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NEW BRUNSWICK.

SUPREME COURT.

REX v. SPERDAKES.

CHAMBERS.

McKEOWN, J. APRIL 10TH, 1911.

Habeas Corpus—N. B. Con. Stat. 1903, Ch. 133, Sec. 4—Stat. of Canada, 1909, Ch. 9, Sec. 325 (as amended)—Attorney-General not Compelled to Exercise Option—Meaning of the Word "May."

The prisoner was tried by FORBES, Co C.J., under the Speedy Trials Act, and convicted on a charge of stealing electricity from the St. John Street Railway. The learned Judge sentenced the prisoner to a term of two years in Dorchester penitentiary, and to pay a fine of $1,000, one-half of which is to be paid to the St. John Street Railway, or to a further term of two years in the penitentiary.

The prisoner was remanded to gaol

This is an application for the release of the prisoner on the ground that the conviction is bad for reasons set out in argument of counsel.

Counsel for Sperdakes obtained from Mr. Justice McKeown, an order instead of a writ of habeas corpus cum causa, under ch. 133, sec. 4, N. B. Con. Stat. 1903, directing the keeper of the common gaol to return to him whether or no such person is detained in prison, together with the day and cause of his having been taken and detained

The return of gaoler Clifford disclosed that Sperdakes was confined in the common gaol under an order of the learned Judge of the St. John County Court until arrangements were completed to transfer him to Dorchester penitentiary.

Dr. W. B. Wallace, K.C., and MacRae, Sinclair & McRae, appeared for the prisoner.

H. A. Powell, K.C., and Clarence H. Ferguson, for the Attorney-General.

Wallace, K.C., moved for the discharge of the prisoner.

Reads: Sec. 825, Criminal Code as amended by ch. 9 of Statutes of Canada, 1909:—

"Where an offence charged is punishable with imprisonment for a period exceeding five years, the Attorney-General may require that the charge be tried by a jury, and may so require, notwithstanding that the person charged has consented to be tried by the Judge under this part, and thereupon the Judge shall have no jurisdiction to try or sentence the accused under this part."

The Attorney-General has not exercised this option and he must do so.

Enabling words are always compulsory where they are words to effectuate a legal right.

See Reg. v. Tithe Commissioners, 14 Q. B. 459

The word "may" involves a duty. In cases such as this you must construe the word "may" from a standpoint of public interest and not in the broad sense of implying permission only.

It was the duty of the learned County Court Judge to call upon the Attorney-General to exercise this option.

Words implying permission have a compulsory force in cases of this nature.

Cites: The King v. Barlow, at pages 302 and 303 of Hardcastle on Statute Law.

Powell, K.C, I thoroughly agree with the view of my learned friend, that words which ordinarily imply permission, are, from a standpoint of public policy, to be construed as imperative.

Under sec. 825 as amended by ch. 9, Statutes of Canada, 1909, the Attorney-General may, if he sees fit, intervene to order the accused to be tried by a jury. There is nothing

in the Act to compel him to do so. The process known as speedy trials has been law for some time. The statute comes in with a condition subsequent allowing the Attorney-General to intervene in certain cases. It is not a condition precedent. The Attorney-General not having intervened the jurisdiction of the learned County Court Judge is intact and not destroyed.

Wallace, K.C., in reply.

McKeown, J. (oral). My view of the section is that it simply permits the Attorney-General to intervene in cases of this nature. The jurisdiction of the Court does not depend upon the intervention of the Attorney-General. The conviction is good and the application must be dismissed.

Application dismissed.

DOMINION OF CANADA.

EXCHEQUER COURT.

January 25th, 1911.

HAMILTON v. THE KING.

Government Railway — Injury to Passenger—Negligence—Liability of Crown — Professional Nurse — Measure of Damages.

This was a case referred, by consent of parties, to the Registrar (L. A. Audette, K.C.), as Referee, for enquiry and report.

A. Lemieux, K.C., for the suppliant.

A. LeBlanc, for the respondent.

The following is the report of the

Referee:—The suppliant brought her petition of right to recover the sum of $10,000 damages for the loss of her two legs resulting from an accident while travelling on the Intercolonial Railway, a public work of the Dominion of Canada.

The Crown, by its plea, denies any liability and says that the accident occurred through her "own negligence in trying to jump from a car before the train came to a full stop at the station platform."

At about 7.40, on the morning of the 1st of August, 1904, the suppliant, a couple of months after having obtained her diploma as a trained nurse, started on the Intercolonial Railway from Montreal for Ste. Flavie, for the purpose of taking a holiday and seeing her father, who resides at St. Gabriel.

Sometime about 9 o'clock in the evening, about an hour late under the time-table then in force, Ste. Flavie station was duly called three times by one of the brakemen. The suppliant says she waited until the train was well stopped to get up from her seat, and at the same time the other travellers were also getting up. She is very sure the train was stopped when she got up (pp. 6, 23).

On the arrival of the train at Ste. Flavie, she was sitting on the first seat or bench near the western door of the down train, on the side next the station, and after waiting as aforesaid, till the train was well stopped, she said she started to get out of the train, directing her steps towards the rear platform between the first-class car and the pullman car. She was carrying in her hand a small satchel and lunch box and was holding on to the railing with the right hand. She was coming out by the rear steps of the first-class car, and as she was placing her foot on the second degree of the steps she says the train gave a jerk, which made her fall. She contends (p. 8) the jerk was a violent one, because she says she endeavoured to hold on (garantier) to prevent herself from falling, but the jerk or shock carried her away notwithstanding. She slipped between the train and the platform of the station, and the front truck of the pullman car passed over her two legs, which were amputated a couple of hours afterwards, the amputation having been decided necessary to save her life.

She remained thirty-eight days at Ste. Flavie, when she returned to Les Soeurs de la Misericorde, at Montreal, at whose hospital she had studied to become a trained nurse, and there she has since lived and been kept by charity, making herself useful by helping with the little binding the hospital does. She has ever since been kept by the nuns, fed and dressed, and true to their noble undertaking, the nuns,

with their usual spirit of charity, say they are willing to keep her for nothing; but this has nothing to do with the merits of the case.

The suppliant had been ten months without walking, when one of the doctors of the hospital gave her two artificial legs. The cost of such legs would run, according to the evidence, from $300 to $500 and would have to be renewed from time to time. She says she is now and then obliged to use crutches, and further that she daily suffers from pains caused by the artificial legs.

The learned counsel for the suppliant contends that the accident resulted from the following acts of negligence of the officers of the railway while acting within the scope of their duties and employment, under sub-sec. (c) of sec. 20 of the Exchequer Court Act:—

1. The bringing of the train to a stop and starting it again with a jerk a few moments after without the order or signal of the conductor and before starting on its regular run.

2. The want of light at the place where the accident happened.

3. The defective construction of the station platform, it being too low and too distant from a train on the track.

4. The negligent omission of the employees of the train, or any of them, from being near the steps of the car from which suppliant was alighting, with the object of helping and giving light with their lantern, as required from instructions from their superior officers.

Let us consider the first count or allegation of negligence. Twelve witnesses swear that after the train had arrived and stopped at Ste. Flavie, it moved again a few moments after for a distance of 25 to 30 feet, more or less, before starting on its regular run. Four witnesses swear the train stopped once for all and did not start again until it went on its regular run. Let us weigh the evidence pro and con.

The suppliant herself swears emphatically she was quite certain the train was stopped when she got up from her seat and walked to the back of the car to get out, and that it must have remained stopped certainly during several seconds (p. 14); but that it started with a jerk when she was on the step in the act of alighting.

Alfred Gagnon, the next witness, who was on the station platform at the arrival of the train, testifies that a few moments after the train had arrived and stopped, while he was standing opposite the first-class car, the train gave a jerk and advanced for 15 or 20 feet (p. 50). He adds further that he is positive the train stopped a first time, and that it started again as above mentioned—he noticed it. He further adds that he saw passengers getting off the train before the suppliant did, from the first-class car on the eastern side, and not at the pullman end. It is perhaps worth noticing here that this is contrary to what brakeman Boucher swears.

Etienne Beaupre, the yard master of the I. C. R., at Ste. Flavie, on duty 1st August, 1904, from 6 p.m. to 7 a.m. next day, is rather an intelligent and bright witness, who gave a well reasoned testimony. He says when the train arrived he was on the platform of the station, and was on his way to meet the conductor of the pullman, as his duty called for, to ascertain whether there were passengers for Metis, and if there were none he was to detach the pullman. He says the train came in, stopped, stuck there, was stopped (p. 112). Passengers alighted at once and the train remained stopped perhaps half a minute. He, in the meantime, saw two or three passengers getting off from the same step by which the suppliant was coming out. When the train stopped the first time the front step of the first-class car had gone by him 10 or 12 feet (p. 109), and when he saw the train was stopping, he walked in the western direction towards the pullman . . . and the train started headways. He says he found that rather peculiar, looked around, and was exactly opposite the rear step of the car when the suppliant fell, the train having advanced 30 to 35 feet, more or less. He then signalled the engine driver with his lantern to stop the train. He saw the suppliant fall—she first slipped under the train and the truck of the pullman car passed over her two legs.

Cyprien Thibault was on the train in question on the 1st August, 1904, on board the second-class car, coming back to Ste. Flavie from Fall River, after five years absence, accompanied by his wife and two children. He says that after Ste. Flavie had been announced the train stopped, and he got off with his two satchels which he brought out and left on the platform of the station, and states that the

train was then well stopped. He had walked out from the front step of the second-class car and noticed no brakeman there at the time. After having safely deposited his satchels on the platform he went back on board the train to get his wife, who had remained on the train with her two children. Two or three passengers had alighted from the car ahead of him; he was following them (p. 132). When he went back on board the train, it moved with a jerk (p. 133), and his wife nearly fell, but held on to a bench. When he went off the train the second time he was not opposite his luggage, and he perceived the train had moved, and he found his satchels at about the middle of the car, adding that he presumes that would mean the train had advanced by about half a length of a car.

Leon Roy, a merchant of Ste. Flavie, was on the platform of the station on the evening of the accident, and saw the train arriving, then stop, and after having been stopped for hardly half a minute started headway again with a jerk, and moved on for 25 to 30 feet—half the length of a car. It was at the time the train started again he saw both the suppliant and Dr. Lavoie fall. Two or three persons had come out of the train ahead of the suppliant (p. 141). He says he would have come out in the same manner as the suppliant did, because there was no reason to believe that the train would thus start anew. He saw the train start, he was near the cars.

Joseph Roy, merchant, ex-mayor of Ste. Flavie, testifies that he remembers the accident and was at the time on the sidewalk, at about 70 or 75 feet from the train, and ascertained that the train had arrived, stopped some time, and that it started again a few moments after.

Joseph Arsenault, farmer, of St. Damase, was on board the second-class car of the train in question on the day of the accident, with his wife, two children and his mother-in-law. He testifies the train arrived quietly at Ste. Flavie, it stopped, but after a minute to one minute and a half, it started again with a terrible shock, and the train then advanced about thirty feet.

Eusebe Bourgoin, of Ste. Flavie, brakeman, in the employ of the I. C. R. for seven years, who, however, did not belong to the crew of the train in question, was at the station on the evening of the accident, and says the train arrived at the usual speed, stopped for about a minute, and

then moved on for about half the length of a car, about 35 feet. The train did not start very suddenly, but enough to make a person who does not expect it lose her balance.

Miss Aglae Bourgoin, who resides at Ste. Flavie, was at the station on the evening of the accident, saw the train arriving, then stop for a minute—a few moments, and start again. She was on the platform of the station opposite the first-class car at about ten feet from the car, and the suppliant, when the train stopped, was on about the second step, when the train started with a shock which threw her (the suppliant) down, as well as Dr. Lavoie. She had also noticed two or three passengers getting off the first-class car during the first stop.

Dr. Lavoie, of Ste. Flavie, was on board the train in question, and says that after the station had been called, the train stopped. When the train had thus stopped he got up from his seat with his three-year-old child in his arms. Just as soon as the train had stopped he took his child and started towards the western door of the car (p. 234). The train was stopped when he arrived on the platform of the car, in the vestibule (p. 235). The suppliant was then going down; she was on the last step and in the act of placing her foot endeavouring to reach the side of the platform of the station, and he saw her disappearing under the car, without exactly realizing what was the matter, when the train was starting anew. He came down believing the train was stopped, and took care in placing his foot; he came straight down with the child in his arms, and in placing his foot on the platform of the station, turned upon himself, made a few steps backwards and fell on his back. Then getting up he ascertained the train was moving. If there had been no movement the suppliant would not have fallen. The train stopped as it came in, moved anew to stop again.

Joseph Gagne, of Ste. Flavie, an employee of the I. C. R., was on the platform of the station on the arrival of the train on the evening of the 1st August, 1904, and remembers the accident. The train arrived and stopped from one to two minutes (p. 263), and started again for 20 to 25 feet. It did not take a minute before the train started again (p. 270). He was about six feet from the suppliant when she fell and saw her fall when the train started anew to cover the distance of 20 to 25 feet. She fell as she was to place her foot on the platform of the station. She tried to put her

foot on the platform and she put it in the open space. The space is too large between the platform and the train.

This concluded the suppliant's evidence on this important point as to whether or not the train started anew after its arrival, for a distance of 20 to 25 feet, more or less. Let us now review the evidence of the defence on this point. Four witnesses testified upon the question.

Louis Levesque, of Ste. Flavie, carter and mail-carrier, 63 years old, who was on the platform of the station opposite the second-class car, on the evening of the accident, gave very loose and intangible evidence. His testimony seems to have been given on the assumption that everything occured as usual on the arrival of the train. His memory was somewhat at fault. He first states he heard of the accident after having received the mail bag (p. 348). Then he says he cannot swear whether there was any mail bag that evening (p. 351). Further on, at p. 352, he says there was no mail bag on that train. The baggage man, however, swears he delivered two mail bags from that train (p. 360). This witness swears the train stopped once for all.

Leandre Chenard, the baggage man on board the train and belonging to the crew at the time of the accident, says that before arriving in front of the baggage room, the train slackened, then it came very near stopping, but it did not stop altogether according to his idea (p. 360). It jerked, simply a jerk ahead, a little.

Eugene St. Pierre, the engine-driver of the train in question and who was in charge of the engine which is said to have caused the accident, testifies that on the evening in question he made only one stop, and that when he again moved it was to go on his regular course. Asked if what he has said—the accident having taken place six years ago—he has so said from personal recollection, or is it because he is in the habit of arriving in that manner, he answers: "It is because I am in the habit of always doing the same work, but I am certain that I did not start anew."

"Q. You do not remember specially that day?

"A. Not all (pas tout à la lettre) all exactly, you understand." (p. 438).

Napoleon Boucher, of St. David, one of the brakemen on board the train in question and the one who took out Dr. Lavoie's satchels by the front steps of the first-class car, says he had been 32 years brakeman at that date, and 28

years now. He testifies he got off the train only when it was stopped. His idea is that the train stopped but once (pp. 450, 460). He further says after having come out of the train, he waited on the station platform for passengers, but not one passenger got off on his side that night (p. 455), although witness Gagnon swears he saw some passengers getting off from that place (p. 48), so he went westwards to deliver his satchel to Dr. Lavoie, and it was then he heard of the accident, and after delivering his satchels he went to the station to notify the conductor, Huppé. The conductor had just registered and was coming out of the station when he met him (p. 453.) Huppé says, however, that Boucher notified him before he registered and in the station (p. 306). Would not the attention of this witness appear to have been, on the arrival of the train, much involved with the delivery of Dr. Lavoie's baggage?

From the evidence above referred to, it appears that twelve witnesses heard on behalf of the suppliant, swear that the train moved a second time for a distance of 25 to 30 feet, more or less, after having stopped on its arrival and before starting for good, and that it is in the course of this short move that the suppliant met with the accident while in the act of getting off the train. Four witnesses on behalf of the Crown swear to the contrary, and say the train stopped but once. The first witness is an old man 63 years old, a carter and mail-carrier, who contradicts himself with respect to the mail bags on the evening in question as already mentioned above and is also contradicted by Chenard. His memory seems at fault, and he says by way of excuse that the accident has happened quite a while ago, and that since then he has been sick in the hospital for a month. On perusal of his evidence it will be found that his testimony is rather loose and unreliable. Then we have the three men of the crew, who swear the train stopped but once, yet their evidence on that point is not as positive and satisfactory as it might be.

In estimating the value of the evidence one must not lose sight of the rule of presumption that ordinarily a witnesses who testifies to an affirmative is to be credited in preference to one who testifies to a negative, magis creditur duobus testibus affirmantibus quam mille negantibus; because he who testifies to a negative may have forgotten a thing that did happen, but it is not possible to remember a thing that

never existed (Lefeunteum v. Beaudoin, 28 S. C. R. 89). Then, the evidence of the crew, without casting any discredit upon them, whose interest is not only closely identified with that of the Crown, but is even larger because they may think their employment is perhaps at stake, ought not to prevail against the testimony of strangers who are disinterested witnesses and even against other employees of the I. C. R., who were in a better position to verify the stop, because they were on the platform of the station. The crew's evidence is certainly that of interested persons, because upon them is thrown the blame for the accident. It will, moreover, obviously appear that it is easier for one standing on the platform of the station, which is stationary, to ascertain whether a train moves or is at a standstill, than for one on board of the train. Then one of the witnesses substantiates his evidence by a very important fact. He gets off the train at the first stop with his baggage, leaves this baggage on the platform of the station and starts back to the train to help his family out. While on board of the train at that time he says it started with a jerk, and when he comes out of the train he finds his baggage about the middle of the car, while it had been left opposite the steps. Can anything be more conclusive?

Then Beaupre, the yard-master, of the I. C. R., ascertained the train had stopped, and is astonished to see it start again, and signals with his lantern to stop.

Moreover, if conductor Huppé came out of the train the first time it stopped, as he says he did, and that the accident happened, as he says, while he was in the station, then one must necessarily presume that the train moved after he had left it since the suppliant fell while the train was moving. Another reason also why the facts should be as related is that the conductor did not hear the cries of the suppliant when he passed at the distance of one car from the place of the accident when he went into the station, and that her cries were loud enough to be heard by Mrs. Roy, on the landing of her house, at a certain distance from the station.

In face of the overwhelming weight of the evidence the undersigned must find, and he so finds that the suppliant met with her accident while the train was in motion for the 25 to 30 feet, more or less, mentioned above, and that the train after its arrival stopped, moved again without orders

for this short distance, and stopped again before its final departure from Ste. Flavie, and that the engine driver in moving his train in that manner transgressed the regulations and did so in contravention of the same, and was guilty of negligence from which the accident resulted, and for which the Crown is liable under sec. 20 of the Exchequer Court Act.

With respect to the second, third and fourth points raised by the suppliant's learned counsel, namely, the want of light, the defective construction of the station platform, and thirdly the negligent omission of the employees of the train to be near the step, with their lantern, when the passengers were coming out of the train, the undersigned may say that it is unnecessary to pass upon these points in view of his finding on the more important point of the moving of the train in contravention of the following regulations of the railway, viz.:—

"178. He must not start his train until the bell be rung, and he must receive the signal from the Conductor; he must invariably start carefully, without jerking, and see that he has the whole of his train; he must run the train as nearly to time as possible, arriving at the station neither too late nor too soon. He must not shut off steam suddenly, so as to cause concussion of the cars, unless in case of danger."

"190. In bringing up his train the Driver must pay particular attention to the state of the weather, and the condition of the rails, as well as to the length of the train, and these circumstances must have due weight in determining him when to shut off steam. Stations must not be entered so rapidly as to require a violent application of the brakes, or to render necessary the sounding of the signal whistle. He must report every instance of overshooting a station to the Superintendent."

In view of the following decision and opinion expressed in the case of Harris v. The King (9 Ex. C. R. 208), viz :—

"And first it is said that the accident would not have happened had there been gates or a watchman at the Green street crossing referred to, and that His Majesty's officers and servants in charge of the Intercolonial Railway were guilty of negligence in not maintaining either a watchman or gates at that crossing. That view I am not able to adopt. There can be no doubt that the crossing was a dangerous one; and that it would have been prudent to keep, as at

times had been done, a watchman at this place to warn persons using the crossing, or to have set up gates there to prevent them from using it while engines or trains were passing over it. But that, I think, was a matter for the decision of the Minister of Railways and of the officers to whom he entrusted the duty and responsibility of exercising in that respect the powers vested in him. There is always some danger at every crossing; but it is not possible in the conditions existing in this country to have a watchman or gates at every crossing of the Intercolonial Railway. The duty then of deciding as to whether any special means, and, if any, what means shall be taken to protect any particular crossing of the railway must rest with the Minister of Railways, or the officer upon whom in the administration of the affairs of the Department, that duty falls. If it is decided that certain special means shall be taken to protect the public at any particular crossing, and some officer or employee is charged with the duty of carrying out the decision, and negligently fails to do so, and in consequence an accident happens, then, I think, we would have a case in which the Crown would be liable. But where the Minister, or the Crown's officer under him whose duty it is to decide as to the matter, comes in his discretion to the conclusion not to employ a watchman or to set up gates at any crossing, it is not, I think, for the Court to say that the Minister or the officer was guilty of negligence because the facts shew that the crossing was a very dangerous one; and that it would have been an act of ordinary prudence to provide, for the public using the crossing, some such protection. At the same time, if, as was the case here, the crossing is one where those who use it are exposed to great and more than ordinary danger, then, in the absence of the special means of protection referred to, greater and more than ordinary care should be taken by those responsible for the running of trains and engines over such crossing."

It would appear to the Referee that the want of additional lights and the defective construction of the platform of the station are matters which are left to the Minister of Railways and the Crown's officers, whose duty it is to decide as to the same, and that it is not for the Court to say that the Minister or the officers were guilty of negligence because the facts shew that there was actual want of light, accentuated on the occasion in question by the crowd

standing between the lights and the train, and that under the evidence the station platform might be held to be somewhat defective. (See sec. 39 of The Government Railways Act). On the evening in question a concurrence of events which would go to shew that there was something wrong or defective—too much distance between the train and platform in both height and space between the edge of the station platform and the car steps—three persons fell, the suppliant, Dr. Lavoie, and Arsenault's mother-in-law. This is what Arsenault says in this respect (p. 177):—

"Q. Il n'est pas arrivé d'accident a votre belle-mère? R. En debarquant des chars la plate-forme est assez loin du step, si ce n'avait pas ete que moi elle aurait enfilé si le train avait fait seulement deux pas, j'ai mis mon enfant à terre, j'ai pris ma belle-mère par le bras.

"Par M. Le Registraire.

"Q. Elle a tombé? R. Elle a tombé entre la plate-forme et le step due char. Quand on prend quinze a seize pouces partant du step á la plate-forme, une veille personne et surtout quand il fait bien moir, qu'il fait noir comme chez le loup, qu'on ne voit seulement pas un pas devant nous autres, une distance de même une vielle personne enfile, et moi j'étais bien plus jeune et j'ai été bien près d'enfiler, j'ai été obligé avec mon pied de tâter, pour voir la plate-forme.

"Q. Vous ne pouviez pas la voir? R. Non, il fesait trop noir, on ne voyait pas un pied en evant de nous autres. Il n'y avait pas une lumière du tout où on a débarqué."

The second and third points upon which the learned counsel relied are thus disposed of. Coming to the fourth count, viz.:—4. The negligent omission by the employees of the train, or of any of them. from being near the steps of the car from which the suppliant came out, with the object of helping and giving light with the lantern as required from instructions by their superior officers—suffice it to say that in that respect that while a better distribution of the crew could have been made with the view of helping and lighting the passengers alighting from the train, the want of doing better could not amount to an act of negligence by itself whereby the Crown could be held liable, while it perhaps might be taken into consideration in a concurrence of acts of minor negligence which could be held to be the decisive cause of the accident.

Quantum.

Coming now to the question of the quantum, the evidence establishes that while the suppliant had been the recipient of a diploma as a trained nurse a couple of months before the accident, she had never earned anything in that capacity. Trained nurses' fees range from $1.50, $2.00, $2.50 to $3.00 per day. It further results from the evidence, that since the accident the suppliant has attempted, during the epidemic of typhoid fever in Montreal, to help in the hospital, but was obliged to discontinue. Ever since the accident the suppliant has been looked after by the religious community called "Les Sœurs de la Miséricorde" at Montreal, entirely by charity. She has, however, made herself useful in working at the binding the community does for itself, but it is not such binding as could be considered of any commercial nature, being confined to the binding for the establishment only.

The suppliant's life is practically wrecked, her prospects blighted; she is deprived of her livelihood. She cannot, as stated by Dr. Fiset, practice as nurse—a walk of life quite remunerative in our days. Dr. Fiset thought she could easily have earned yearly an income ranging from $500 to $900, and when pressed with questions as to her present state he admits she might make herself partially useful in a hospital, but adds that an accident of this kind is one of a nature which would tend to shorten one's life.

The suppliant claims $10,000. She owes $83 to Dr. Fiset for having performed the operation and paid her transportation back to Montreal. She owes the further sum of $80 to Dr. Lavoie who assisted Dr. Fiset in the operation. The medical charges, it may be said, en passant, are very moderate.

Now, in estimating the compensation to which the suppliant is entitled under all the circumstances, bearing in mind all the legal elements under which she is entitled to recover, some consideration should be given to the fact that while she may not be entirely prevented from earning, her chances of employment in competition with others are very much lessened, and her earning powers consequently almost rendered nil.

In assessing damages in a case of this kind, while it is impossible to arrive at any sum with mathematical accuracy,

several elements must be taken into consideration, and one must strive to compensate the suppliant for her loss generally, to make good to her the pecuniary benefits she might reasonably have expected had she not met with the accident. In doing so one must take into account the age of the suppliant, who at the time of the accident was 26 years old, her state of health, her expectation of life, her employment, the income she was earning or had reason to expect to earn, and her prospects, not overlooking, on the other hand the several contingencies to which every person in her walk of life is necessarily subjected, such as the being out of employment to which in common with other persons she was exposed, and her being also subject to illness. All these surrounding circumstances must be taken into account.

In the present case the suppliant was in her prime, in good health, with bright prospects ahead of her, in possession of a good diploma, covering even cases of obstetrics, thus commanding perhaps higher remuneration and enlarging thus the scope of her employment.

Under all the circumstances of this case, the Referee is of opinion to allow the sum of five thousand dollars ($5,000) together with the amount of the two doctors' bills, viz.: Dr. Fiset's for $83 and Dr. Lavoie's for $80, making in all the sum of $5,163.

The suppliant is entitled to recover from His Majesty the King the sum of $5,163, and costs.

On motion of counsel for suppliant, counsel for respondent not opposing, this report was confirmed, and judgment entered accordingly.

NEW BRUNSWICK.

SUPREME COURT.

BARKER, C.J. APRIL 18TH, 1911.

McGAFFIGAN v. WILLETT FRUIT COMPANY.

Party Wall—Right to Support—Lost Grant—Injunction—Costs—Easement—Prescription.

M. G. Teed, K.C., for the plaintiff.

A. A. Wilson, K.C., and J. King Kelley, for the defendants.

BARKER, C.J.:—The dispute involved in this action arises out of the use of what the defendants allege to be a party wall, between their building and the building adjoining it on the south owned by the plaintiff. These buildings are situated on the western side of Dock street in the city of St. John. The plaintiff's lot—or the Parks lot as it is called by the witnesses—has a frontage of 25 feet on the western side of the street, and it is joined on the north by the defendant's lot, or the Butt lot as some of the witnesses call it. The buildings on both lots occupy their entire frontage on Dock street, so that the wall in question is the northerly wall of the plaintiff's building and the southerly one of the defendants. The owners of these lots derive their title through the same origin. They formed a part of a lot described in the earlier conveyances as No. 3, which was conveyed in 1832 to one Ratchford by the devisees of one John Black. In August, 1833, Ratchford conveyed that part of this lot No. 3 which the plaintiff now owns to the late Thomas Parks, who continued to own it up to the time of his death in October, 1875. He died intestate leaving him surviving a widow and five daughters, who continued the ownership down to May 1st, 1896, when all except Mrs. Hall joined in a conveyance to her. She and her husband conveyed to E. F. Jones by deed dated January 19th, 1899. Jones had really purchased for the plaintiff and he conveyed the lot to him by deed dated January 24th, 1899, and registered on the 28th of that month. That part of the lot No. 3 which is now the defendants' lot was conveyed by Ratchford to one Vaughan in September, 1833, and eventually the defendants acquired it under a conveyance from one Annie McLean dated September 2nd, 1909, and registered December 24th, 1909. One W. F. Butt owned this lot at the time of the fire in St. John in June, 1877, when all the buildings on these lots were destroyed. He remained owner until after the new buildings had been erected. In the conveyance of the plaintiff's lot from Ratchford to Parks it is described as follows: "A certain piece or parcel of the said lot No. 3 and which said piece or parcel is abutted and bounded as follows — commencing at the north-west angle of the lot known on the plan aforesaid as No. 2, thence north-westerly and westerly along the line of Dock street 25 feet; thence southerly and westerly in a line parallel to the north-westerly line of lot No. 2, 41 feet 6 inches—thence southerly 24 feet, more or less, till it strikes

the N. W. line of lot No. 2 at the distance of 14 feet 6 inches from the angle formed in the lots by the house now standing on lot No. 2—thence northerly along the N. W. line of lot No. 2, 56 feet more or less to the place of beginning." This description has been continued in the conveyance to the plaintiff. The defendant's lot is, in its description in the conveyance to Vaughan in September, 1833, as well as that in the subsequent conveyance in terms bounded by the Parks land as conveyed to him in August, 1833. Beyond the fact that there were buildings in these lots at the time of the fire in June, 1877, there is nothing whatever in the evidence either as to their user or manner of construction to assist in the determination of the question now in dispute. The Park building had two underground storeys —a basement and sub-basement—in one of which were wine vaults. These vaults were not destroyed by the fire, and the foundation of this wall in question remained comparatively uninjured, so that it was in fact used as the foundation for the new wall. In July, 1877, a few weeks after the fire, building operations were commenced by the then owner of these lots and by the owners of other lots in Dock street. That this wall in question was built on the old foundation is, I think beyond doubt. Mr. Pugsley, who married one of Mr. Park's daughters, and seems to have had some supervision of the building operations, says that the new wall was built on the old foundation. This fact, from what the witnesses who examined the premises say, is capable of determination by an inspection of the wall itself.

The first and most important question is, on whose ground does this wall stand, and who is the owner of it? This question must, I think, be answered in favour of the plaintiff. Mr. Murdock, the city engineer, says that in July, 1877, about three weeks after the fire, he was employed by Mr. Pugsley, acting on behalf of the Parks' heirs, to make a survey of their lot. The ground was then being cleaned up and prepared for rebuilding. Mr. Murdoch had the Ratchford conveyance and some other deeds with him—he made the necessary measurements and a plan of the lot which he produced. This was July, 15th, 1877. He says the foundation of this wall was not destroyed. Referring to the plan he was asked—

"Q. What does the red line through the centre or apparently the centre of the south line of the Parks lot indicate? A. The line of division between the properties.

Q. And you found from your survey the line of division between the Parks lot, now the McGaffigan property, to the south-east was in the centre wall? A. Yes, about the centre wall.

Q. Then how did you find to the northward? A. I found the line on the north face of the wall there.

Q. In other words you found the whole wall on the Parks lot, the north wall? (By the Court). All this northerly wall you found was on the Parks property? A. Yes.

Q. And a half on the other side? A. Yes."

The witness went on to say that the distance from the southern line of the Parks lot which he found to be in the middle or about the middle of the wall between that lot and the contiguous lot on the south, to the northern side of the wall in question was just 25 feet or the exact frontage on the street which the conveyance gives.

The evidence of Mr. Mott, an architect of considerable experience, leads to the same conclusion. Before purchasing the lot the plaintiff employed Mott to inspect the building and examine the premises in order to furnish him with an opinion as to their value. Mr. Mott took the measurement of the building and from the details in its finish and manner of construction, which he described at some length, he concluded that the wall was built not as a party wall but as a distinct part of the building, and he seems to have valued it for the plaintiff as a part of the property he was then about purchasing.

From this evidence, which is not disputed, there is no difficulty in finding as a fact that the wall in question stands altogether on the plaintiff's lot and is his exclusive property.

In Watson v. Gray, 14 Ch. D. 192, Fry, J., classifies party walls under four heads. The first and most common class is where the two adjoining owners are tenants in common. "In the next place," he says, "the term may be used to signify a wall divided longitudinally into two strips, one belonging to each of the neighbouring owners. Then thirdly the term may mean a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements. Lastly the term may designate a wall divided longitudinally into two moieties, each a moiety

being subject to a cross-easement in favour of the owner of the other moiety."

The defendants in their answer claim the wall to be a party-wall. The evidence does not sustain that contention. It is certainly not a party wall within the definition given by Fry, J., in the case I have just mentioned. That, however, does not determine the point at issue. It is possible—and this, I think, is the defendants' true claim—that by the uninterrupted use of this wall for so long a period, they the defendants have acquired an easement for the use of the wall for the support of their building as begun in 1877, though they acquired no right of property either in the wall itself or in the land in which it stands. That remained in the Parks heirs and is now in the plaintiff. This easement is limited in its nature and extent by the nature and extent of the user out of which the easement arises. The distinction between a party wall in which the contiguous owners have rights of property and a wall owned by one and built altogether by himself in his own land, but subject to an easement in favour of the adjoining owner for the support of his building, is illustrated and pointed out in Waddington v. Naylor, 60 L. T. 480, and James et al. v. Clement, 13 Ont R. 115.

There is no doubt from the evidence, that when these buildings were erected in 1877, the joists of the defendants' buildings were let into this brick wall and that from that time down to the present, the building has derived its support in that way. There was no secrecy about this. It was open and notorious it was patent to any one who chose to use his eyes, whether from mere curiosity or from interest. Those who were interested in the Parks property knew where the northern boundary of their lot was. They had had it measured and ascertained by Murdock and they built the new wall on the foundation of the old one.

So far, therefore, as the case rests upon their knowledge of matters as they stood at that time, and as they remained up to the time they parted with the property they must have had, or at all events they must be taken to have had full notice of the use to which this wall was subjected by the owner of the adjoining lot—commenced by Butt in 1877 and continued from that time down without interruption or objection until the plaintiff's letter to Brown in November, 1908— a period of over thirty years. More than

twenty years had elapsed when the plaintiff purchased in January, 1899. He must have known at that time where the northerly line of his lot was. Mott, his architect and valuer, who examined the building for him previous to his purchase, ascertained very easily that there was no wall on the defendants' lot and there was nothing therefore to support their building unless the wall in dispute was used for that purpose.

I do not know that it is necessary at all for the determination of this suit to determine whether the present plaintiff, when he purchased, had notice of the actual condition of things, but if it were I should hold that he had constructive notice at least. He knew where his northerly line was. He knew what he is now contending for that this wall was all in his lot, and it was plain according to the evidence that there was no wall beyond that line and that this could be seen from the street without entering the defendants' building at all. There was a visible state of circumstances which was altogether unlikely, and in this case, I should say impossible—to exist without a burden. In that respect it is a much stronger case than Allen v. Seckham, 11 Ch. D. 790, or Hervey v. Smith, 22 Bea. 299.

This case is not governed by the Prescription Act. The rights were all acquired, and this action commenced before January 1st, 1910, when that part of the Prescription Act relating to easements of this kind came into force. The evidence, therefore, having established an open and uninterrupted use for over twenty years, before the present plaintiff purchased and over thirty before he made any complaint, I am, I think, bound as a matter of law to presume a lost grant, to which this user would be referred. In the latest edition of Gale on Easements (1908), the author sums up the case of Dalton v. Angus, 6 A. C. 740, thus: "the effect of this decision is effectually to establish the rule that an easement of support for new buildings may be acquired by twenty years open and uninterrupted user; and although the Lords do not expressly discuss the general question as to what evidence is admissible to rebut the presumption of loss grant, the effect of this judgment is to affirm the opinion of Thesiger and Cotton, L.JJ. It follows that the presumption cannot be displaced by merely shewing that no grant was in fact made; the long enjoyment either estops the servient owner from relying on such evidence or overrides

it when given." (P. 197.) It is, I think, clear from modern authorities that although this presumption may be rebutted, a grant will be presumed in all cases where it is reasonably possible, for instance in Goodman v. The Mayor of Saltash, 7 A. C. 633, a question arises as to a right to an oyster-fishing in a tidal river which has been exercised from time immemorial by a borough corporation. The House of Lords held that the lawful origin for the usage ought to be presumed if reasonably possible, and that the presumption which ought to be drawn as reasonable in law and probable in fact, was that the original grant to the corporation was subject to a trust or condition in favour of the inhabitants in accordance with the usage. Kay, J., in speaking of this case says "the Court felt themselves bound to refer that usage to some legal origin and invented a most ingenious legal origin by supposing a grant to the corporation in trust for certain persons, the free inhabitants of ancient tenements within the borough:" Tilbury v. Silva, 45 Ch. D. 98. In the same case at page 118, Bowen, L.J., says: "There is no doubt that it is the principle of the English law to suppose a legal origin for long established user—to assume that there is some justification to be found for acts of open enjoyment which have continued as long as the memory of living people extends:" In the Attorney-General v. Simpson (1901), 2 Ch. D. 671, at page 698, Farwell, J., says: "The principle is, that, when the Court finds an open and uninterrupted enjoyment of property for a long period unexplained the Court will, if reasonably possible, find a lawful origin for the right in question."

In East Stonehouse Urban Council v. Willoughby Bros. (1902), 2 K. B. 318, at page 332, Channell, J., speaks of this presumption as "the rule which says that on long continued user or possession being proved anything requisite to give that user and possession a legal origin ought to be presumed by the Court." He adds, "This doctrine has long been known to our law, but in recent times it has been applied more widely and to a greater variety of cases than formerly."

In the absence of any evidence as to the nature of the occupation of the building on these lots previous to the fire in 1877, I think we must presume a grant made then or since. No doubt such a presumption may be rebutted by shewing that any such grant was impossible. For instance, in the case of Mill v. The Commissioners of the New Forest,

2 Jur. N. S. 520, the presumed grant was from the Crown at a time when by statute the Crown was prohibited from making it. At page 521 Jervis, C.J., says: "Suppose that a claim to the right of the use of water in respect of a particular house is established by proof of enjoyment for twenty years and that it is then shewn that the house had been built only twenty-one years, non constat, but the right might have been granted the day before the twenty years commenced. But here it is shewn that the enjoyment commencing when it did the Crown could not have granted the right."

In Phillips v. Halliday (1891), A. C. 228, the dispute arose over the possession of a pew in a parish church, annexed to a dwelling house. It appeared that the lessee of the house had obtained possession of this pew two centuries ago, from the church-wardens who had no power or authority to make any grant of it. The Court held that the grant of a faculty which would be valid, ought to be presumed. Lord Herschell says: "Now I apprehend that where there has been long continued possession in assertion of a right, it is a well settled principle of English law that the right should be presumed to have had a legal origin if such a legal origin was possible, and that the Courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title." (p. 231). At page 235 Lord Herschell continues: "The argument on behalf of the appellants in this: Here, they say, we seek the origin of this alleged right—it arose out of the erroneous supposition of the vicar and church-wardens, or the church-wardens, that they could sell to a parishioner a portion of the site of the church, and that having done so, and he having erected a pew upon it, a good title to it vested in him which he could assert and maintain at law. My Lords, they are, of course, perfectly justified in saying that a transaction of that sort is one which could have no validity. Their position, then, is this—we shew that in its origin this alleged right was acquired in a manner not legal, and that being so, you have no right to presume (as you would have but for the existence of that entry and the information which it gives) that the right has been acquired in a legal manner, and therefore to presume if necessary, a faculty for the purpose of so establishing it. I am unable to accede to that proposition. It cannot be disputed, whatever may be said of the earlier period, that at any time from and after

the year 1687—that is within seven years of this original arrangement, a faculty (supposing that I am right in the propositions of law which I have already put before your Lordships) could have been granted which would have given a complete legal title. Why should the House or the Court refuse to presume, or abstain from presuming, a legal title to this alleged right which they would otherwise have presumed, because in its inception it may be shewn to have rested upon a foundation which would not support it? Why does not the doctrine which I have referred to, the maxim which has been so often acted upon, apply just as well to the acts necessary to confirm a title originally invalid as to the acts necessary to create a valid title in the first instance? It seems to me that the argument of the learned counsel for the appellants must go to this length, that for however many centuries it may be proved that an alleged right has been asserted and enjoyed, if it can be shewn in its inception to have rested upon a foundation invalid in point of law, then, although the title might have been perfectly well validated by some act which you would otherwise have presumed, you are never justified in presuming that act to have been done. My Lords, I am perfectly unable to see upon what basis such a principle can rest. It seems to me that the very reason which has been held not only to justify, but almost to compel, the Court to make presumptions of this description, applies just as much in the latter case as in the former."

Several grounds are taken in answer to the case set up by the defendants. In the first place it is said that the premises have for all these years been in the possession of tenants, and that the owner had therefore no means of interrupting the user. The evidence as to this point is of the most general character and at most would go to shew the ordinary yearly tenancies.

Besides this the easement involved in the case differs materially from an easement of air or light such as was discussed in Ring v. Pugsley, 2 P. & B. 303. You cannot by action compel an owner of a building to close his windows for fear he may by uninterrupted user acquire a right in reference to your property. You must erect the incumbrance on your own land in the exercise of your right as owner, and if you cannot for that purpose enter on the premises of your lessee the time does not run against you. That is however different from this case. This action could

as well have been brought twenty years ago as now. In the next place it is contended that any presumption of grant is rebutted because the only persons who in 1877 could have made a grant were the five daughters of Mr. Parks in whom the title was, and they were under the disability of infancy for a part of the time, and of coverture for a part of the time which rendered it impossible for them to make a valid grant. The evidence shews that these daughters were born as follows: the eldest (afterwards married to Dr. Daniel Pugsley) October 16th, 1855, the second, on March 10th, 1857, the third, May 29th, 1858, the fourth August 12th, 1862, and the youngest on March 23rd, 1866. The eldest daughter was therefore of age in October, 1876, over six months before the fire, and the youngest became of age on the 23rd of March, 1887. All of them were of age when they were married except Mrs. William Pugsley, who became of age in March, 1878, having been married on the 6th of January, 1876. I am not able at present to accede to the objection that infancy of itself rebuts this presumpion of law. The conveyance of an infant is as effectual for passing the title as that of a person of full age, subject to this, that he has the privilege, if he chooses to avail himself of it, of avoiding the conveyance within a reasonable time after he became of age. Edwards v. Carter, A. C. (1893), 360; McDonald v. Restigouch Salmon Club, 33 N. B. 472. The conveyance of an infant is perfectly valid and does not require any confirmation by the grantor after attaining full age to make it so. It is, however, not necessary for the purposes of this case to determine that question, because ample time elapsed after all these daughters had attained full age to make a grant. Between March 25th, 1887, when the youngest child became of age until December, 1909, when this action was commenced is a period of over twenty-two years. What was there to prevent a grant being made during the first two years of the twenty-two? Nothing, so far as I can discern, except coverture. But how is that any obstacle? The property was owned as the separate property of the wives though it could not be conveyed without the husbands joining in the conveyance. But when you are at liberty if not bound to presume a grant there seems to me no more difficulty in presuming one made by the husband and wife if that was necessary than by the wife only for the fact whether it was made or not by the wife alone or jointly with her husband, is not

a factor in the discussion. I therefore see no difficulty in making the presumption and I see nothing to rebut it.

It was further contended that when these children came of age the use was not open and therefore time did not run against them. What I have said on this point in reference to the plaintiff applies more strongly to those daughters. Not one of whom has gone on the stand to deny actual knowledge of the origin of this right which has been exercised for so long a period without objection. Assuming that until they became of age time would not run against them they had then as full knowledge and notice of the use and of its nature and extent as they had years before.

It appears that there are two flues in the wall with openings on its north side into the defendants' premises. Farrell was the first tenant of the premises after the fire. He occupied them for some twenty years from the fall of 1877 immediately after the new building was finished. These openings were no doubt left by the Parks builder in the wall when it was built and they have been there ever since and used by the occupants when necessary. During some part of the time the plaintiff was a tenant of some part of these premises. Farrell seems to have used one of these flues, and although the plaintiff does not seem to have actually used the other, there can be no doubt that he knew it was there. The evidence is not clear as to its actual use, but the inference is, I think, irresistible that the Parks heirs or those who acted for them left these openings for the accommodation of the adjoining premises. Under what circumstances I cannot say for there is no evidence. If the right is continued to them it does not seem to me that the present plaintiff has any cause for complaint.

There will be a declaration that the wall in question is not a party wall—that it stands altogether on the plaintiff's land and is owned exclusively by him.

2. That the defendants have no right of property in the said wall or title to the land on which it stands, but they are entitled to the use of the said wall for the support of their said buildings by keeping and maintaining the joists of the same in the northern side of the wall as placed in 1877 and used since. They are also entitled to the continued use of the two openings into the flues.

3. The defendants must within four months from service of decree remove all joists or beams let into the said

wall or fastened thereto as part of the elevator recently put in to the said building or in any way connected therewith.

4. As to the costs I think each party must pay his own.

The plaintiff has succeeded in part and the defendants in part.

NOVA SCOTIA.

SUPREME COURT.

FULL COURT. APRIL 29TH, 1911.

REX (ON THE INFORMATION OF GILES) v. ELDERMAN.

Municipal By-law for the Suppression of Insulting and Provoking Language — Breach — Conviction of Defendant — Conviction Quashed by County Court Judge — Appeal — Labour Strike — Meaning of Word "Scab" Considered—Point Taken on Appeal not Raised Below—Refusal to Consider Same.

Appeal from the judgment of PATTERSON, CO.C.J., quashing a conviction made by a stipendiary magistrate for insulting and provoking language used by the defendant.

H. Mellish, K.C., and J. L. Ralston, in support of appeal.

W. B. A. Ritchie, K.C., contra.

The judgment of the Court was delivered by

GRAHAM, E.J.:—The charge in this case before the stipendiary magistrate was that the defendant "being an a public street in the town of Springhill, on the 10th of September, 1910, did use insulting and provoking language to him, the said William Giles, a person thereon, to wit, by calling him a scab, a damn scab and a born scab, and by saying that he, the said William Giles, had a scab face and had the look of a scab, and by using other insulting and provoking epithets contrary to the provisions of section 10 of chapter 13 of the by-laws and ordinances of the said town of Springhill."

The defendant was convicted before the magistrate, but on appeal to the County Court Judge the conviction was quashed on the ground that the expressions used were not within the by-law. There is a statute in force to the same effect as this by-law—an old statute—and its object, I think,

was to prevent provocation which might lead to breaches of the peace on the public streets.

It is satisfactorily proved that the words were used. The defendant's own witnesses admit that he used words of that character. His own version of it admits it. There may be some variations as to the words which were coupled with the appellation, but it is admitted by the defendant's witnesses that he applied to the prosecutor the term "scab" and "natural born scab."

The circumstances under which the words were spoken are not in dispute. There has been a labourers' strike in existence for some time at Springhill. The troops had to be called to Springhill in aid of the civil power, and anything tending to provoke breaches of the peace should be prevented.

There is picketing used in regard to the men who remain at work and try to earn their livelihood, and in going to and returning from their work they are assailed with such appellations as are complained of. The defendant is not a miner or a striker, but he is in sympathy with the men on strike, and it is to his advantage to sympathise with them. He is an interpreter, and he can reach foreigners when the English-speaking strikers cannot do so. He says:

"At that time in sympathy with strikers and doing what I could for them. Endeavoured to get men to leave town (witness claims privilege), when I had a chance. Did so until I left Springhill. I was paid $35 union, between $35 and $50 for interpreting. Called the Germans scabs. Talking and laughing about company taking from home at small wages and still being a scab. I called some Austrians scabs in the same way. They were telling me their story. I remember two other fellows, but I don't know their names Went to junction for union, to meet men. Sometimes paid by man who generally goes to meet train."

If the strikers can prevent these men from working they will gain an advantage over the employers. They may succeed even in seriously injuring them if the work cannot be kept going. They cannot use physical violence to these labourers—not while troops are available. They may even be restrained by injunction and by proceedings for contempt, but apparently they think they can accomplish their purpose by causing the workmen to suffer in another way, namely, through their feelings, and thus drive them away

from their work. And they would not employ this means unless they knew it was often successful, and hence the danger of provoking breaches of the peace. As to what the defendant meant and what the prosecutor and bystanders would understand him to mean by the use of such appellations and their effect and the effect they were calculated to produce are very fully dealt with in the evidence. I quote at length because the evidence speaks louder than any mere judgments. The prosecutor, Giles, says:

"I am a union man, but not a U. M. W., I am a P. W. A. man. Since I have been in Springhill the word "scab" has been used by strikers to company's employees, going to and from work. In bodies of 100 or less. Between Herrett Row and works. Every time as I go to work. More than 100 times. Every time I go into town. On the street as I'm passing. It's a name called at me even through windows. We always take it as an insult. Have had to stop men with me from doing something when called. They speak in a daring way to insult us. I'm called a scab every day of my life. Every day I go to town. Didn't lay an information against anyone until present. Didn't know their names. Am working for coal company. Never heard company's employees use word. Didn't say to Edgar Schurman that I was a scab. Said I was called a scab. Don't remember saying to Schurman that I was scabbing or that I was a scab. I am not a scab. It is used to me as an insult. The people working for company are called scabs. I've been called scab. The people not working for company call us scabs. Never heard the people not working for company called scabs."

Frederick White, who was one of the bystanders says:

"He said to Giles, 'I see you haven't left town yet.' Giles said 'No.' Ling and I meantime walked down to where they were. The defendant said 'I believe you're a scab, you're a damned scab, a natural born scab, and you've got a scabby look, and you're not a loyal citizen of your country.' Giles said 'Can you prove it?' Defendant said 'Yes.' Giles said 'I'll have you prove it Monday or Tuesday' Giles appeared all right outwardly. I was in company's employ at time. From what defendant said I took him to be a union man. Strike on then. Giles, Ling and I were strike breakers. I was on strike in Glace Bay. Union men never use 'scab' as a friendly term. They use

it as a word of offence. While I have been in Springhill 'scab' has always been used by strikers and strike sympathizers. Use it in every place they happen to meet you. Hear it before you start for work between house and our work as we are passing through them. They'll say 'You're a scabby son of a bitch,' or 'Here's a nice pair of scabs.' Always 'Scab.' Every day since I have been there they say it to you on the street. Said not in a low tone Heard it when I've been with Giles. They walk between us and our work using this word."

Thomas Ling, another bystander, says:

"Been in Springhill about two months. Heard word 'scab' used when going to work and coming from work. Called by strikers to me and to anyone working for company. Occurred every day. No one but those working for company called 'scab,' and no one called scab and no one called it but those on strike. Heard it on street. Took it as an insult. Often called a 'God damn scab.' Called in an insulting way. By men on picket duty. Quite a crowd."

Cross-examined by Mr. Smith:

"Hard of hearing. Sometimes jollied among ourselves about being scabs. Often heard one of us say men outside call us scabs or that we were scabbing. Working last in Stellarton. I was aggrieved when I was called a scab. Never laid information against anyone. Sometimes I treated it as a joke; others not. Punched a fellow once for calling me a scab. I had a few drinks that day. Knew there was a strike on when I came to work."

Re-examined by Mr. Ralston:—

"Wasn't drunk day I punched fellow. Remember all the circumstances."

Roderick G. W. McDonald says:—

"Constable in employ of Cumberland Railway and Coal Co. Was so on September 10th last. Have been such since April 26th last. Strike on all that time. Seen strikers on street and observed them and hear what they say. Part of my duty. During whole of strike word scab has been used by strikers to company's employees to insult or provoke. Have heard word used over all parts of the town towards myself and other employees. I am on duty every day. Heard it used a number of times, mostly every day towards company's employees. On duty in mornings between 5 and 7. Company's employees going to work. Never heard it used in any other way."

Cross-examined by Mr. Smith:—

"I am a provincial constable. In employ of company since April 26th last. My duty is to see company's workmen on street to work. If any language considered insulting is used I report it. I listen to what they say. Very seldom report use of scab. If I'm called a scab myself I report. That's the only case I report. My explanation of use of word scab is based on what I think of it myself; how I feel about it myself."

Re-examined by Mr. Ralston:—

"I feel it an insult to me. That's my only explanation. That and—it has been reported to me by company's employees."

Re-examined by Mr. Smith:—

"When I say word used to insult or provoke I can only speak for myself."

William T. Baker said:—

"Employee of Cumberland Railway and Coal Co. last four or five months. Heard word scab used by striker to company's employees—frequently. Every morning anyway as employees go to work. Men out on strike to men that are working. Heard it from time to time in the town, but can't say who uses it. To company's employees. During whole of strike word has been used by party out of work to those at work to insult them in some way. Never heard it used in any other way by striker to strike-breaker."

Cross-examined by Mr. Smith:—

"Lived in Glace Bay during strike. Heard word scab used there frequently. People not working called strikers; those working called scabs. Scab means a person working in the mine. Scab is a general term used by men not working to those working. Men working often refer to themselves as scabs, or say "we're scabbing' or 'we're getting scab money.' Words insulting only on certain occasions. There are two distinct classes, strikers and scabs. Generally known as such. When I say word insulting it is my personal impression."

Re-examined by Mr. Ralston:— ?

Generally known by strikers as scabs. Never heard a merchant call a strike-breaker a scab, nor a strike-breaker. I am speaking of how two bodies use it Used in Glace Bay same way. Heard men say they were scabbing. Never saw two parties meet there. My personal opinion based on my experience in Springhill."

Coming to the defendant's witnesses the evidence is even stronger. Edgar Schurman, a bystander, on cross-examination, says:—

"I mean by 'scab' a man who is taking my work while I am out on strike. I heard a labour leader say a scab and a detective were so low they would require a ladder to climb into hell. (Objected to.)"

William Stevenson, another bystander, on cross-examination, says:—

"I never used it to a company's employee. Have never heard a striker say to a company's employee to his face a scab. Have heard them say it when employee could hear. Not often. Won't say I heard it ten days. If it was said so scab could hear, it always shewed up in Court. Can't remember of ever hearing one striker use it to another so that scab could hear it. I thought Giles was in earnest when he said he would make him prove it. A scab is a man who takes your work. Not thought much of in Springhill. Hard feeling against men coming in to take work. I wouldn't care about associating with them. Have heard the definition that scab so low that he had to climb up a ladder to get into hell. Thought that was going too far. A scab is considered a pretty mean man. Have heard strikers and outsiders use scab among themselves, but not to scabs."

Samuel Legere, another bystander, on cross-examination, says:—

"A scab is not thought well of in Springhill. When we call him a scab we mean to shew we don't think much of them. Don't associate much with them. Have been out on picket duty. Don't remember hearing strikers call strike-breakers scabs."

Nelson Ruston, another bystander, on cross-examination, says:—

"Not thought much of by men. I think a scab a pretty low sort of a man. It implies that he is a man that takes your work and isn't thought much of. I wouldn't take it as an insult if I were doing it. Nor that a union man was trying to insult me. I consider a scab may be just as good a man as I am. Not in Springhill at present time. Don't think a scab in Springhill at present time much better than a dog. General run don't feel much better to them than I do. Scab in Springhill means a man who is taking my

work of whom men think that way. (Witness claims privilege.) I have often called men scabs. Not when on picket. On other places have. Have said 'Good day, scab' to let you know I was a striker and to let them know I thought they were a scab. I don't use it very often. Perhaps 50 times. Have heard fellows in line call it so it could be heard. Have seen Legere on picket. Pretty often. Have seen Schurman pretty often. Calling of scab pretty general on line. Also among men going to work. To one another we call them scabs. I did say in magistrate's Court that there might be a word or two left out."

Daniel C. Matheson, says:—

"Have been on picket duty often. Have heard few use it. Not a great many times. Have used it myself. Perhaps half would use it. I expect it is used every day. They called it wherever they saw them. Men on picket ask them, 'Don't you know you're scabbing?' Have heard men call out 'scab, scab' using it then as a term of distinction. I am a town councillor. Some of them didn't know they were scabbing. Some of them consider they're not scabs. They think they have a right to work. Maybe they have never thought what scab meant. I can't see how a man at work wouldn't know he was a scab when other men on strike. Only reason called scabs to distinguish them. Doesn't mean that men calling it are better than others. When I say it is of men opposed to me. Don't think he is as good a man as I am in one particular; not as good a union man. Don't think much of them. Very little of them. Calling scab is intended to convey my meaning. I couldn't stop him being a scab by calling him scab. Don't go out with that hope. A man once scabbing is branded till he dies. That's my opinion. Don't know opinion Springhill about this. Member of U. M. W. in good standing. Chairman police committee. Don't think any but U. M. W. appointed special police. Very few but U. M. W. to appoint. Haven't looked for them. These are men out on duty when picket out."

Henry Perrin says:—

"Have heard word on pickets. (Claims privilege.) Not every day. Used quite frequently. Occasionally called out by men on picket to company's men passing. Might be repeated, 'scab, scab.' It is. On great majority times I was out. I would call men working when I'm on strike a scab. My opinion of them not very high. Nor general opinion of

strikers. I don't use it. I never called a man a scab. If speaking to another I would say so and so's a scab, but I wouldn't call it to himself. I wouldn't like to be called a scab because I wouldn't want to be taking a man's place. General opinion of union men of scabs may be better than mine. Don't think they would think them as good as themselves. It wouldn't be throwing me down to call me a scab, because I wouldn't like to be taking another man's place."

Edgar Harrison says:—

"Never heard anyone outside strikers call out scab. Nor using it to man himself. Talking to me I have heard them mention it. A scab not considered high up in social scale. To call him that expresses our opinion of them. Have been on picket duty. Never used word myself. Heard it quite frequently. Not every day. When company's men going to work. Intended to express idea strikers have of them—the low idea."

I have no hesitation in saying that I think the language used is within the terms of the by-law abusive, insulting and provoking.

The learned Judge has found as a fact that the strikers "regard the non-striker as a very mean low man." They "despise the man."

Three of the defendant's own witnesses at least testify that they apply the appellation "scab" to express their opinion of him.

One can hardly escape from drawing the inference that when they do use an expression like "scab" they do intend to express that opinion, viz., that he is a very mean, low man or a person to be despised. Why do they not use the pleasant alleged equivalent "non-striker" when they assail him day by day on his way to work, and through windows if those expressions mean the same thing? Do they consider it as effective in injuring his feelings, and driving him away from his means of livelihood and provoking him to violence? What do they mean when they say that one "looks like a scab" or is "a natural born scab?" And why do they call his place of residence "scab row?" Is it not evident that the meaning of "scab" is something more unpleasant than non-striker?" It is not original with these people of course. But organised strikes are quite recent in origin. What did the word mean before there were strikes? Did not the strikers lay hold of what the word

then meant and use it with that meaning and so it has been handed down to other strikers? I do not think that the medical term "scale an incrustation over a sore, &c.," has become obsolete among either medical men or people who have not many words in their vocabulary to enable them to avoid its use. Look at the combination "scab-faced" in the evidence. Take the word "scabbed" abounding with scabs, hence mean "paltry, vile, worthless." One would think that all the equivalents for this word given in the dictionaries were now inapplicable and its use by writers like Shakespeare and Swift had become obsolete since strikes came in; that the word had become deodorized; that the only meaning now was a pleasant equivalent for a non-striker "a non-union man."

It is true modern writers avoid some of the words which were used by such men as Burns and Shakespeare; they do not wish to leave an unpleasant association in the mind of the reader. But I think some of them are still current on the back streets. The word "scab" has not, I think, improved. In modern times as well as formerly there have been those who, at least, when they were in the majority, have used an appellation expressive of derision or hatred to express their opinion of another race or class or sect in order to make them feel uncomfortable. Sometimes it has been one word; sometimes another. The effect has been to cause quarrels and avoidance, going around some other way and even going to another country to live. Whatever that word may have been in the mouth of the mob which applied it, the word "scab" in the mouth of the strikers, addressed to the non-strikers is not far behind any of them. I wish that the non-strikers were philosophers and would regard it as a pleasant term that is unavoidable if you wish to distinguish between two classes. Perhaps one ought not to reverse a judgment which decides that. If it would only bind the parties carrying on or opposing a strike it would be useful. But I think I have to identify myself with the New York Court which thought the word was opprobrious, and when written was libellous per se. However dictionaries and decided cases are poor when compared with this evidence which I have quoted.

It appears that Giles, on the witness stand, in cross-examination, said that he expected to be called a scab, that he was what was known as a scab, and that is made use of.

Of course he was a non-striker and I don't wonder that he said he expected to be called a scab when he had been called a scab every time he went to work, and even through open windows. What he evidently meant was that he expected it from the strikers and persons like this defendant; not by anyone else or elsewhere; or that it was true that he was a mean, low, fellow. Is the argument that because of this admission he admitted it was true that he was a mean, low man, or that it was just? And even if it was true, I think that persons who are actually bastards or prostitutes and have those appellations applied to them in the public streets are entitled to the protection of such a law.

Further, I do not think that calling a man a "natural born scab" or saying he has a "scab face" is usually termed discussion or argument. Moreover, I think it was not necessary for the defendant to call the plaintiff anything, good or bad.

A point was taken before us that was not taken before the magistrate or at the hearing in the County Court. I say that because the learned Judge in his judgment quotes the by-law as if it read "abusive, insulting or provoking language," whereas the by-law uses "and," not "or," and the point is made that the information therefore is not sufficient because the word "abusive" is not included. I think that point cannot be taken now because of the statute. Moreover I think that the information is sufficient under the Summary Convictions Act without that word and would be so without the words "insulting and provoking." It sets out the words which were actually used and it continues "contrary to the by-law," pointing it out: In Re William Perham, 5 H. & N. 30.

Then it was contended that the by-law should have been set out in the conviction. This is not necessary. Sec. 68 of the Summary Convictions Act requires judicial notice to be taken of such a by-law.

In my opinion the appeal should be allowed and the order of the County Court Judge of the 13th December, 1910, should be set aside, and it should be ordered that the conviction should be affirmed and that the said defendant should pay the penalty and costs adjudged by the said conviction and be dealt with according to its terms; the plaintiff to have the costs of appeal to this Court and to the County Court.