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MACMAHON, J. DECEMBER 30TH, 1908.

TRIAL.

MAMMELITO v. PAGE-HERSEY CO.

Master and Servant—Injury to Servant—Dangerous Machinery—Warning—Fault of Servant—Nonsuit.

Action for damages for injuries sustained by plaintiff owing to the negligence of defendants while plaintiff was engaged as a workman in their factory, tried without a jury at Guelph.

W. H. Price, for plaintiff.

C. L. Dunbar, Guelph, for defendants.

MACMAHON, J.:—The defendants have a large factory in Guelph, where they manufacture iron pipes, and employ about 250 workmen.

The plaintiff, when 15 years old, was engaged by the defendants at $1 a day, and continued in their employment for 8 months prior to his being injured, with the exception of one occasion when he was relieved from duty for 10 days for disobeying the orders of Mr. James McVicar, who was night superintendent of the work in which the plaintiff was engaged.

Both McVicar and Max Bahm say that they had forbidden the plaintiff on several occasions leaving the side of the works on which he was employed. His duty was to work at the lever from which the pipes first emerge from the carriers. He worked on the lever at a distance of about 60 or 70 feet from the point at which he was injured. He was supposed to be on the side of the building on which the

lever was, on a shift working 20 minutes and then idle for 10 minutes, and during the period in which he was idle he could rest near the boiler on the side of the building where the lever was, and where the workmen had placed boards as seats for the purpose of resting on during the period they were not employed. McVicar says he had difficulty with the plaintiff because of his going around the machines, and told him he would discharge him if he ever caught him going to the other part of the building where the machines were, and on one occasion he took him by the arm and set him down at the place which he ought to have occupied while he was off duty, and which was at the side of the mill where the lever was, and told him that if he ever caught him going to the other side he would discharge him. And he says that he caught him trying to cut off and on the coupler-facerbelt, and he said he took him by the arm and told him to go to the office and get his cheque, and he discharged him for, as I have already stated, 10 days.

That should have been a sufficient warning to him not to go near the machines.

Then Mr. Max Bahm, who was also a foreman at the defendants' mill during the day, said the plaintiff had no business in any other part of the works than where he was employed, to pull the lever, and he told him more than once that if he caught him interfering with the men or going near the machines on the other side, he would discharge him from the works altogether.

Although Max Bahm did not use the word, the inference to be drawn from what he said was that the plaintiff was incorrigible as regards disobeying orders; that, although he had been warned not to interfere with the machinery, he caught him one day putting his hand between the belt and the pulley of one of the machines and bringing his hand around and so continuing it, as if it was a source of amusement to him. He drove him from the belt, gave him extra warning, and said, "I drove him from the belt and told him if he did not stop his fooling he would get hurt."

The excuse offered by the plaintiff for going near this machine, at which Winters was at work, is that Winters motioned to him to come up to where he was at work. If he went there at Winters's instructions, it must have been conveyed by a motion, because, having regard to the great noise existing there (I speak from having visited the locus), it would be impossible for any man who was working on

that machine to have called him and that the plaintiff should have heard the call.

Angelo Rao said that he saw the plaintiff at the machine on the day he was injured. Rao said the plaintiff said he could go where he liked, and that he was 4 or 5 paces distant from the machine. Where Rao stood and demonstrated to us (on the occasion of the view) where the plaintiff was, from the machine, he must have been 10 or 12 paces away. He said he saw the plaintiff pass around Winters's shoulder to the other side, that he heard a cry coming from the place where the plaintiff had been working that "time was up," and that the plaintiff tried to get around the machine, and was injured; he put up his hand in order to save himself and got caught.

Winters, whose statement I believe, said that, instead of wanting the plaintiff to come where he was working, the plaintiff had prior to that day been annoying him and putting out a light and taking other liberties there, and he warned him away; that on this day he came up and put out the light which was hanging in front of the machine, and close to where he was working, and without which the work could not be carried on, and that after he put it out the plaintiff started to run around the machine; and it is likely that, not knowing there was a step near the machine, he stumbled and was falling forward, and in order to save himself reached out his left hand, which was farther from the cog-wheels than his right hand, and got caught in them, and part of his thumb and one of his fingers were taken off.

The evidence satisfies me that the plaintiff was at this machine after repeated warnings from McVicar and Bahm, and after repeatedly being told by Winters that he must not come around the machine at which Winters was at work. I think he was there violating the orders of his superior officers, breaking their instructions to him, and the injury was caused by his own act of negligence.

No doubt, this was a dangerous machine. It is admitted that it was unguarded. I find that it might have been guarded if it had been thought necessary; but no one of these boys from the other side of the shop had a right to go there. The plaintiff went there notwithstanding the repeated warnings, and he brought the injury on himself.

Since making the findings, I have come across the case of Lowe v. Pearson, [1899] 1 Q. B. 261, which is directly

in point. The head-note is: "A boy was employed in a pottery; his duty was to make balls and hand them to women working at a machine, and he was forbidden to interfere in any way with the machinery. He sustained an injury through attempting to clean the machinery, while the woman was temporarily absent. It was held that the accident did not arise out of or in the course of his employment, and therefore he was not entitled to compensation under the Workmen's Compensation Act, 1897." See also Beard v. London General Omnibus Co., [1900] 2 Q. B. 530.

The action will be dismissed. The plaintiff must pay the costs, if exacted.

DECEMBER 31ST, 1908.

C.A.

BAINARD v. MICHIGAN CENTRAL R. R. CO.

Master and Servant — Injury to Servant — Negligence—Dangerous Work—Want of Proper Appliances—Findings of Jury—Evidence—Fault of Servant.

Appeal by defendants from judgment of MAGEE, J., upon the findings of a jury, in favour of plaintiff for the recovery of $2,065.80 in an action for damages for personal injuries sustained by plaintiff owing to the alleged negligence of defendants, his employers. Plaintiff was a mechanic, engaged in putting together the different parts of a locomotive tender. While he was coupling two parts of the tank by a steel pin, the frame dropped down and crushed his arm and broke it. The plaintiff alleged that the proper appliances, i.e., blocks, were not furnished by defendants.

E. C. Cattanach, for defendants.

C. St. Clair Leitch, St. Thomas, and J. R. Green, St. Thomas, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.), was delivered by

MEREDITH, J.A.:—The judgment appealed against is supported by the finding of negligence in not using blocks in the doing of the work in which the plaintiff was engaged when injured, and by that finding only.

What was meant by not using blocks was, that the defendants had not adopted that mode of having the work done. There seem to have been blocks in the work shop, but they had never been used by the workmen in this work. "Horses" were provided and used, which, it is admitted, afforded sufficient protection to workmen whilst work was being done upon the tank; and "jacks" were used to raise it up so that the horses might be placed under it, and for removing the horses and lowering it upon the trucks again when the work upon it was done.

The accident happened after the horses had been removed, and while the jacks were in place in the work of replacing the tank upon the trucks.

There was no reasonable evidence of any negligence, in any one, in not blocking up the tank at that stage of the work. The blocks, obviously, could not be employed while the work of lowering the tank was going on; but the extraordinary proposition is made, and supported by the finding of the jury, that they should have been used for the few seconds whilst the king-pin was being inserted, and again immediately removed so that the lowering of the tank upon the truck could be continued: and this in the face of the evidence that the method in question was that generally, if not invariably, used by all railway companies, and one in which the plaintiff has been employed for 6 years—and yet one in regard to which no one seems to have been able to give evidence of a single instance of accident or of any inconvenience.

In these circumstances, it seems to me that it would be very like a farce if the defendants had required their servants to build up a support of blocks, only to take it down again almost immediately, and a farce in which the plaintiff and the other servants of the defendants would have declined to take part, or else soon have allowed to drop into disuse.

The accident was very plainly caused by the misplacing of one of the jacks. The plaintiff and his helper, a new hand, were the only persons engaged in the work. The plaintiff was a workman of long experience in the work, and enjoying extra pay because of his long service and skill. If he had taken the pains to see that the jacks were in proper position, the accident would have been avoided.

The appeal must, I think, be allowed, and the action dismissed: a conclusion which seems to be quite agreeable with the view of the learned trial Judge, though he allowed the case to go to the jury, and gave effect to their findings.

Appeal allowed with costs—if exacted.

DECEMBER 31ST, 1908.

C.A.

BRILL v. TORONTO R. W. CO.

Street Railways—Injury to Person Crossing Track—Negligence—Excessive Speed—Findings of Jury—No Reasonable Evidence to Support—Dismissal of Action—Person Injured at Fault.

Appeal by defendants from the judgment of CLUTE, J., upon the findings of a jury, in favour of the plaintiff Sarah Brill for the recovery of $1,150 damages and in favour of the plaintiff Isaac Brill for the recovery of $100 damages for an injury sustained by the former by the alleged negligent operation of an electric car of defendants upon Yonge street in the city of Toronto, and for loss sustained by the latter owing to such injury.

D. L. McCarthy, K.C., for defendants.

G. R. Geary, K.C., for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.), was delivered by

GARROW, J.A.:—In the morning of 11th March, 1908, the plaintiff Sarah Brill was crossing Yonge street from east to west, a short distance to the south of the intersection of Queen street. She had to pass around the rear of a street car proceeding north, and had reached the westerly line of track, when she was struck by a car going south upon that track, and very severely injured.

The acts of negligence complained of in the statement of claim were: running the car at too high a rate of speed; not giving warning of its approach; not taking proper precautions; and not having proper appliances to give notice of danger and to avert such danger.

The jury, under a charge not objected to, found, in answer to questions: (1) that the defendants were guilty of negligence; (2) that such negligence consisted in, "taking into consideration the College car" (the one proceeding south which struck the plaintiff) "with a trailer attached, and the slippery condition of the rails on the morning in question, the car was run at too great a speed to be under proper control at this busy point;" (3) no contributory negligence; (4) "the motorman did all he possibly could to avoid the accident in the time he had after seeing the plaintiff;" (5) damages (as above stated.)

The evidence given on behalf of the plaintiffs as to speed was that of the plaintiff Sarah Brill herself, and of a nephew, William Ecker, whose relationship, however, did not appear until the cross-examination, who happened to be standing on the west side of Yonge street in front of the Simpson block. The plaintiff Sarah Brill said that before attempting to cross she saw a car, which she apparently assumed was the car which afterwards struck her, standing above Queen street. And, seeing it standing, she passed around behind the north-bound car, and attempted to cross the westerly track. She was asked: "Q. How about its progress after it left there till it got down? A. I hadn't seen it till it struck me. Q. Did you hear anything at all about the car. A. All I heard or saw was just when it struck me . . . Q. Do you know the distance that the car travelled from the time it started until it struck you? A. I hurried, and it looked like the car was going very fast at the moment. I was very careful. Q. Looking out? A. Looking out."

In cross-examination she said: "Q. How far was the car that was coming down from you when you started to cross the street? A. The time I looked, the car was standing. Q. How far was it from you? A. The car, when I looked at it, was standing at the corner of Queen and Yonge, on the far side. . . . Q. And, seeing it stop there, did you ever look again until the car was on top of you? A. I did not give a look—I was across already only a hair-breadth . . . Q. When you got there (the devil strip), did you look up to see whether the car was coming down? A. I did not look, because I was running across as quickly as I could when I got that far. If the car would have rung—I am not deaf—I could have heard, and would have stopped on the devil strip. Q. But you never looked? A. I looked when I started, but did not look after. Q. But you did not look when

you got to the devil strip? A. No. Q. And you knew that the car you saw up there had to come down? A. Certainly. I expected I had plenty of time."

The nephew, William Ecker, said he was standing after selling his papers (he was then a newsboy) on the west side of Yonge street, opposite the Wanless store, in the Simpson block, and while there he saw a lady, whom he at that time did not know, crossing towards him from the Tremont hotel. The lady was in about the middle of the track, "and the car was running fast, and she hadn't time to go back, and the fender hit her, and she fell down." In cross-examination he was asked: "Q. When did you first see the car that struck her? A. I did not see the car until it knocked her down. I saw the car coming fast down the street and knock her down. Q. Where did you first see the car? A. The car came from Queen street—the other side. Q. But when did you first see it, and where did you first see it? A. On Simpson's side, the side I was standing on. . . . Q. Had it crossed Queen street when you first saw it? A. Yes, it was across Queen street. Q. Had it got down as far as Simpson's when you first saw it? A. Yes. . . . Q. Which did you see first, the car or the lady? A. I saw both. Q. Which did you see first? A. The lady. Q. And then you saw the car afterwards? A. When I saw the car, the accident was happening—just at the same time. Q. So the car was quite close to you when you first saw it? A. Yes. . . . Q. Did you see the fender drop? A. Yes. Q. Did it drop quickly? A. Yes, but the car was running quick. Q. And she got underneath the fender? A. Yes. . . . Q. The car stopped before the front wheel went over her? A. Yes."

This comprises essentially the whole evidence produced by plaintiffs in support of the alleged excessive speed. There was evidence that the gong was not rung, so there could not have been a nonsuit on the whole case.

Then the defendants called witnesses, and, among others, one Muir, a porter at Simpson's, an eye-witness to the whole occurrence from one side of the street, and Williams, a driver for Simpson, also an eye-witness from the opposite side of the street, both of whom said that the car was not going fast, and that its speed, in their opinion, was about 4 or 5 miles an hour. Firth, another eye-witness, who was in the south-bound car, said the car was stopped in about 3 yards from the time the plaintiff Sarah Brill fell; while still another eye-witness, also on the car, said that at the time of the

collision the car was going "very slow." Wainwright, the conductor on the north-bound car, said the south-bound car, when passing his car, was only going at a walking pace. Blainey, the conductor on the south-bound car, did not see the accident, because he was at the rear end, attending to the trolley, but the speed at that time did not, he said, exceed 5 miles an hour. Reynolds, the motorman, said he had turned off the power at Queen street, and was "rolling down" the slight incline towards the next compulsory stop at Richmond street; the speed at the time of the collision was between 4 and 5 miles an hour, and he stopped the car in about 10 feet. No evidence was called in reply.

The question upon this appeal is, therefore: was there, either at the close of the plaintiff's case or of the whole case, any evidence from which the jury, acting reasonably, could find that the speed of the car on the occasion in question was excessive. And, however much I may sympathize with the unfortunate woman, I feel it to be my duty to answer the question in the negative. And my impression is that, even at the close of the plaintiff's case, the proper ruling would have been that the plaintiff's case, so far as it was based on excessive speed, had not been proved by any evidence on which a jury could properly act. But the uncontradicted evidence of every witness upon the subject called by the defence, leaves the matter quite beyond reasonable doubt.

There is abundant authority that a mere scintilla of evidence is not sufficient. There must be enough to justify reasonable men to reach the desired conclusion. Otherwise, the burden resting upon the plaintiff has not been discharged, and the action fails.

Ecker and the plaintiff Sarah Brill swore, it is true, that the car was going "fast," "very fast," and "quick," although they both shew that it was stopped within about 10 feet, but neither was asked to supply for the information of the jury a definite statement of what, in their opinion, the actual speed was, or what would have been a reasonable speed. They were, in fact, simply allowed to sit in judgment, and to pronounce that the speed was "too fast," I suppose because the car struck the plaintiff—a judgment which the jury was, as usual, only too ready, in face of all the other evidence, to echo.

If I had not been able to reach this conclusion, I would still have had some difficulty in supporting a judgment in favour of the plaintiffs, for, in my opinion, the proper con-

clusion upon the evidence is that the accident was caused by the plaintiff Sarah Brill's own imprudence in passing from behind the north-bound car and going upon the westerly track without looking to see where the car was which she had seen standing above Queen street. No excuse is offered for this very apparent act of negligence on her part, which, if it was not the sole cause, at least contributed to cause the injury, and against which, as the jury found, the motorman was powerless to protect her after he saw her.

The appeal should be allowed and the action dismissed with costs, if the defendants ask them.

DECEMBER 31ST, 1908.

C.A.

LAPPAGE v. CANADIAN PACIFIC R. W. CO.

Master and Servant — Injury to Servant and Consequent Death—Negligence—Findings of Jury — Fault of Foreman of Works—Workmen's Compensation Act — Defective System — Common Law Liability — Railway — Damages — Reduction — Apportionment—Costs.

Appeal by defendants from judgment of CLUTE, J., upon the findings of a jury, in favour of plaintiffs.

The action was brought under the Fatal Injuries Act, R. S. O. 1897 ch. 166, by the widow and infant child respectively of one William George Lappage, a workman in the defendants' employment, who it was alleged was killed while engaged in his employment owing to the negligence of defendants.

I. F. Hellmuth, K.C., and G. A. Walker, for defendants.

E. E. A. Du Vernet, K.C., A. H. F. Lefroy, K.C., and G. W. P. Hood, for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A.), was delivered by

GARROW, J.A.:—Deceased's occupation was that of pipefitter, and at the time of his death he was engaged in repairing the pipes under a car in the defendants' yard at Toronto Junction, and, while he was under the car, it fell on him and killed him.

The negligence complained of was in not properly supporting the car while the work underneath was in progress. The action was based both upon the common law, and the Workmen's Compensation for Injuries Act.

The questions submitted to the jury, and their answers were:—

1. Were the defendants guilty of negligence that caused the accident? A. Yes.

2. If so, what was the negligence? A. By the foreman not using proper precaution by not placing 3-inch by 12-inch and 3 feet long planks as a foundation for the trestles.

3. Was the death of William George Lappage caused through the negligence of the defendants by reason of defects in the condition and arrangement of the works and plant used in the business of the defendants? A. Yes.

4. If so, what was the defect? A. Improper foundation by using a narrow board in place of a heavy plank.

5. Was the system of trestles used by the defendants to support the car defective? A. Yes.

6. If so, in what respect? A. Not sufficient supports used to properly carry such a heavy weight, we considering that, if it is absolutely necessary to lift car at both ends at once, that jacks and trestles both should be used at the same time in case of re-action of the jacks.

7. Under whose instruction did deceased act on the occasion in question? A. Kelly and Warren.

8. Whose duty was it to see that the car was sufficiently supported? A. The foreman, Mr. Warren.

9. At what sum do you assess the damages (1) at common law? A. $4,000. (2) Under the Workmen's Act? A. $2,000. We would advise that $2,000 be given to the widow and $2,000 to the child, making a total of $4,000."

His Lordship: "You mean whether $4,000 or $3,000, it will be divided between the mother and the child?"

The Foreman: "Yes, sir."

There was, it was not disputed before us, evidence of negligence proper for the jury, the question really being, should the recovery be as at common law or under the statute? And that, upon the evidence and the findings, it should be under the latter is, in my opinion, clearly the correct view.

The claim to recover as at common law is, of course, based upon the 5th and 6th questions and answers. But the deceased did not lose his life because of the use of a defective system of trestles, or of using or not using a combination of trestles and jack, but because of the sinking of the leg of a particular trestle owing to its insufficient foundation.

That is the negligence found by the jury in the first 4 questions and answers before set out, and is the conclusion warranted by the evidence. There was uncontradicted evidence that plenty of proper material to make a sufficient foundation was supplied by the defendants, and the jury found that it was the duty of the foreman, Mr. Warren, to see that the car was sufficiently supported. This makes a complete cause of action under the Act, without dragging in the rather vague question of "system," which, in my opinion, had really nothing to do with the case.

Upon the question of the amount of the damages under the Act, there was, I think, evidence from which the jury might properly find as they did. The limit is not 3 years' wages according to the rate which the workman was himself receiving, but the estimated earnings of a person in the same grade employed in the like employment: see R. S. O. 1897 ch. 160, sec. 7. The wage paid to the workman himself is of course evidence of the fact to be proved, but so would be evidence of what is paid to other workmen in the same grade employed in the like employment. The deceased was apparently the only workman employed in this particular work at Toronto Junction. But Mr. Vose, also a pipe fitter in the employment of another railway company at the Union Station in Toronto, was called by the plaintiffs, and his evidence, apparently accepted as trustworthy by the jury, would have justified an even larger sum than that found by them.

The judgment should in my opinion be reduced to one for $2,000, to be divided equally between the two plaintiffs, the infant's share to remain in Court until further order, and the appeal should be otherwise dismissed. And there should, I think, under the circumstances, be no costs of the appeal.

DECEMBER 31ST, 1908.

C.A.

RE CITY OF HAMILTON AND HAMILTON CATARACT POWER CO.

Contract—Municipal Corporation—Supply of Electric Light for Streets—Construction of Contract—"Discoveries on Advances in the Electric Act"—Reduction in Price—Arbitration and Award—Scope of Submission—Powers of Arbitrator—Refund of Money Paid—Delay—Profits—Reference back—Costs.

Appeal by the Hamilton Cataract Power Company from the award of the Judge of the County Court of Wentworth, made pursuant to the terms of an agreement between that company and the corporation of the city of Hamilton, respecting street lighting, and cross-appeal by the city corporation from the award.

G. Lynch-Staunton, K.C., and W. W. Osborne, Hamilton, for the company.

H. E. Rose, K.C., and F. R. Waddell, Hamilton, for the city corporation.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.), was delivered by

GARROW, J.A.:—The agreement is dated 30th June, 1899, and was to continue in force for a period of 10 years from 1st July, 1899.

The agreement contains a number of provisions, not all of which need be here recited. The material provisions seem to be as follows. The company was to use for the purposes of the contract the poles and wires of the Hamilton Electric Light and Power Company, and to assume the control with the city of that company for a similar service. The lights were to be furnished by means of electric arc lights of 2,000 nominal candle power, to be paid for at a fixed rate each per annum, subject to deductions for any period exceeding 5 minutes during the night in which the light was out; payment to be made monthly. And then follows clause 10, from which arises the chief conflict between the parties, which is as follows:—

"10. It is also mutually agreed that if, in the opinion of the city council, the cost to the company of supplying

such light has been or can be materially reduced, owing to new discoveries or advances in the electric art, the city corporation may, upon or after the 1st day of July, 1904, give notice in writing to the company asking for a reduction, at the end of 6 months from the giving of such notice, in the price to be charged by them for street lighting, and specifying the amount of such reduction desired by the city, and, if the company do not, within 3 months after receiving such notice, enter into an agreement with the city corporation granting such reduction, the corporation may have the questions of the granting of a reduction, and of the amount of such reduction, referred to an arbitrator or arbitrators, to be agreed upon by the parties or to be appointed in the manner provided for by the Arbitration Act, and such arbitrator or arbitrators, or the majority of such arbitrators, shall have power to award and determine, on the basis of such reduction in cost to the company of supplying the said arc lights, whether any reduction in price should be granted to the city, and the amount thereof, if granted, and the contract shall, in case of a reduction, continue at the reduced price till the end of the said term of 10 years, or, if no reduction be granted or awarded, then at the original contract price. If there shall be any arbitration with respect to a reduction in price for such electric lighting, both parties shall respectively bear and pay their own costs and expenses of such arbitration, including the fees and expenses of the arbitrators appointed by them respectively, but the fees and expenses of the third arbitrator, if any, or of the single arbitrator, if only one be appointed, shall be borne and paid by both parties equally."

On 21st December, 1904, the city clerk wrote to the company, in terms of clause 10, that the city council was of opinion that the cost had been or could be materially reduced, owing to new discoveries or advances in the electric art, and asked for a reduction at the end of 6 months from the giving of such notice in the price to be charged for street lighting, of $25 per annum upon each light.

After considerable delay, during which negotiations, which failed, were in progress, the matter thus in dispute was referred to the County Court Judge, who made his award dated 12th March, 1908; and in the award found and adjudged that the arc lamp now in use . . . is not a new discovery since 1899, and no reduction should be made on that account; that improvements in insulation, generators,

transformers, transmission line switches, lightning arresters, circuit breakers, and other minor improvements, had been made since 1899 and before 21st June, 1905 (not including non-aging iron), whereby a material saving in the loss of power, avoiding expensive breaks and interruptions in service, increasing the carrying capacity of the line, and reducing the operating charges, could be effected, whereby the cost to the company of supplying such lights had been, or could have been, materially reduced since 30th June, 1899; that these "improvements" are "advances in the electric art," within the meaning of clause 10; and awarded a reduction of $15.50 upon each lamp; and that for the period between 21st June, 1905, and 31st October, 1907, the city was entitled to be repaid on this account the sum of $16,169.29, the city having, during such period, paid at the contract rate.

And from this award the present appeal and cross-appeal were made, the company contending that the arbitrator had exceeded his authority in awarding the before mentioned repayment, and in holding that the several matters mentioned in the award were discoveries or advances in the electric art, within the meaning of the agreement; and the city contending that they were entitled to an allowance in respect of the enclosed arc lamp, which, although literally discovered before the date of the agreement, had not been brought into use in Canada.

Effect must, I think, be given to the objection of the company that the arbitrator exceeded his powers in directing a refund of the $16,169.29. Under clause 10 of the agreement, which was not in any way enlarged by the reference, the powers of the arbitrator are to ascertain and state whether any reduction in price should be made, and the amount of such reduction, i.e., in price, which again must mean the price per lamp, since that is the prescribed mode for ascertaining what is to be paid for the service. This, in my opinion, gave the learned arbitrator no power to award concerning the past, but simply, if he reached the conclusion upon the evidence that the price should be reduced, power to fix the reduced price per lamp, at which reduced price the agreement was by its terms to thereafter continue to the end of the term. The long delay between the giving of the notice and the making of the award cannot alter the otherwise proper construction of the agreement, which must be the same in 1908 as it would have been in 1905.

We were invited upon the argument to determine several questions of construction arising upon the agreement, among others the meaning of the term "new discoveries or advances in the electric art." The words, in the abstract, especially as to what is a "new discovery," seem to be self-explanatory, so far as mere words are concerned. The difficulty, if any, arises when we pass from the abstract to the concrete, and then it must become very largely a question of expert knowledge, or, in other words, of evidence. But a general remark or two may perhaps be useful. The parties were contracting with reference to a known plant, from which it was intended to supply other customers as well as the city. And the agreement must be construed in the light of the surrounding circumstances, of which that was one, and must, of course, receive a reasonable construction, that is, reasonable for both sides, so as to carry into effect as nearly as possible what presumably the parties intended by what they said in the agreement. The "discovery" or "advance," to be within the agreement, must be one which it would be reasonable to apply to the existing plant, having regard to all the circumstances, and which, if so applied, would have the effect of materially reducing the cost of producing the stipulated light for the use of the city. By way of illustration, it would be unreasonable, I think, to insist that the company should replace their plant in whole or in part by some newly discovered machinery until it had been seen whether, in fact, the discovery or advance was useful as well as new. They could not, I think, be called upon to experiment at their own expense for the sake of a possible gain to the city. But, if the experimental stage had passed, and the new thing was shewn to be such as a prudent business man would adopt in place of the old, then the city might insist that the company should either adopt it or make such an allowance on the contract price as would be equivalent to the city's gain if it had been adopted.

The city is not entitled to share in increased profits accruing to the company merely because the other business of the company had increased. No partnership was created or intended by the agreement. And this would be the case even if the old plant had, in consequence of increased business, or from any other cause, to be enlarged or removed, unless it can fairly be said that the company either did in such enlargement or renewal adopt or reasonably should have adopted some new device or "advance" in the electrical art,

and thereby had effected or might have effected a saving, in which case the city might be entitled to a reduction.

As to the question whether "advances in electric art" would include the improvements enumerated by the learned County Court Judge, and upon which he based the reduction in price, I cannot say much. These "advances" are contra-distinguished from "discoveries," and must therefore mean improvements upon known methods in producing, storing, transmitting, or applying the current. And I can see no reason for saying that the term may not include the various matters such as insulation, generators, transformers, &c., as held by the learned arbitrator. The question is, I think, entirely one of fact, to be determined in each case upon the evidence, with which at present I do not feel called upon to deal.

It is unfortunate, I think, that no inspection of the company's plant was allowed, or, at all events, made by the experts on behalf of the city; and that no attempt was apparently made by the aid of the company's books of account to shew the difference, if any, in the cost of production, at and subsequent to the date of the agreement. The city is, I think, entitled to a full and fair disclosure as to these very necessary adjuncts to a proper investigation, and to proceed without them, as was done, was, it seems to me, a serious mistake.

Upon the whole, in my opinion, the proper order to make is to refer to the matter back to the learned arbitrator for re-consideration. The evidence already given may stand, with leave to both parties to supplement it by other evidence as desired—the company, if the arbitrator directs, to permit an inspection of their plant by the experts of the city, and, if directed, to produce for inspection their books of account shewing the cost of production for the period covered by the agreement.

The question raised by the cross-appeal as to the enclosed arc lamps will, of course, be open for further evidence and for reconsideration with the other questions, by the learned arbitrator. And this disposition of the matter renders it unnecessary to deal specifically with Mr. Lynch-Staunton's motion for leave to give further evidence.

Under all the circumstances, and considering the nature of the reference, there should, I think, be no costs of this appeal.

DECEMBER 31ST, 1908.

C.A.

SUTTON v. TOWN OF DUNDAS.

Contribution—Joint Tort-feasors—Negligence—Joint Negligence—Contract — Municipal By-law—Electric Wires—Indemnity.

Appeal by defendants the municipal corporation of the town of Dundas from judgment of TEETZEL, J., 11 O. W. R. 501, 504, dismissing the claim of the appellants for contribution against their co-defendants the Dundas Electric Co.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

S. F. Washington, K.C., and H. C. Gwyn, K.C., for the appellants.

J. M. Telford, Hamilton, for defendants the Dundas Electric Co.

MOSS, C.J.O.:—Appeal by the defendants the municipal corporation of the town of Dundas against the judgment of Teetzel, J., before whom the trial took place, in so far as he decided that the appellants were not entitled to indemnity over against their co-defendants the Dundas Electric Company, Limited, for the amount of their judgment recovered by the plaintiff against the appellants and the Dundas Electric Company jointly.

The action was dismissed as against the defendants the Hamilton Cataract Power, Light, and Traction Company, Limited, and they and the plaintiff are not before the Court on this appeal.

The learned trial Judge held that Samuel Sutton's death was due to separate acts of negligence on the part of the appellants and the Dundas Electric Company, the combined effect of which was to bring about the fatal result. He further held that the appellants and the Dundas Electric Company were joint tort-feasors, and that neither could maintain a claim against the other for indemnity or contribution.

The appellants contend that the circumstances were not such as to make them, as between themselves and the Dun-

das Electric Company, joint tort-feasors so as to exclude their claim to be indemnified, and further that, upon the terms of the by-law under which the Dundas Electric Company were permitted by the appellants to erect poles and string wires for conducting electricity or electric current along the appellants' streets and highways, the Dundas Electric Company were bound by agreement to indemnify the appellants.

The facts are stated in the judgment of the learned trial Judge, and it is only necessary to briefly refer to them. The appellants carried their fire alarm wires upon the poles of the Bell Telephone Company. The Dundas Electric Company carried their electric current by means of wires strung upon poles erected by them, but at a lower level than the fire alarm wires. Through a defective fastening, due to the negligent failure on the part of the appellants to provide, in the first instance, a firmly secured knob or other device for holding the wire at the point where it was made to deflect, thereby forming an angle, or through failure to properly inspect and observe that the fastening of the knob had given way, the fire alarm wire was allowed to fall and remain upon or cross the wires of the Dundas Electric Company, passing beneath.

There were no guards between the two sets of wires, and the Dundas Electric Company's wires were either improperly insulated in the first instance, or had become worn, and were negligently left in that condition.

The result was, as the learned Judge found, that the fire alarm wire rested upon the live electric wire, the consequence being that both were melted at the point of contact, and the severed live wire fell to the sidewalk and came in contact with the deceased.

The question is whether, in these circumstances, the appellants are entitled to indemnity from their co-defendants the Dundas Electric Company on either of the grounds above mentioned. In Merryweather v. Nixan, 8 T. R. 186, 16 R. R. 810, the doctrine was laid down that as between joint wrongdoers themselves, one who has been sued alone and compelled to pay the whole damages has no right to indemnity or contribution from the other.

But it has been said that the doctrine was too widely laid down. It was criticised by some of the law Lords who took part in the decision in the case of Palmer v. Wick and Pulteney Town Steam Shipping Co., [1894] A. C. 318, in which it was held that no such rule exists in Scotland. Lord Halsbury, however, said (p. 333) that Merryweather v. Nixan had

been so long and universally acknowledged as part of the English law that, even if one's own judgment did not concur with its principle, it would be now too late to question its applicability to all cases in England governed by the principle therein enunciated.

In the same case Lord Herschell, L.C., said (p. 324): "It is now too late to question that decision in this country." But he added: "There has certainly been a tendency to limit its application even in England." And he referred to Adamson v. Jarvis, 4 Bing. 66, as an instance in which a qualification of the doctrine was introduced. Other instances are afforded by Betts v. Gibbons, 2 A. & E. 57, and Burrows v. Rhodes, [1899] 1 Q. B. 816. In the case of The Englishman and The Australia, [1895] P. 212, Bruce, J., said (p. 217): "It was never decided in Merryweather v. Nixan that one wrong-doer could not sue another for contribution, but that an implied promise to indemnify did not arise from the mere fact of the payment of the whole of the joint liabilities by one of several wrong-doers."

But the rule has not been qualified to the extent of entitling one who is himself a wilful or negligent wrong-doer to indemnity from another involved with him in causing the injury or wrong in respect of which judgment has gone against them. Where the parties are equally culpable, there seems to be no good reason for not leaving the doctrine of Merryweather v. Nixan to its full operation. That at all events appears to be the view taken by Bruce, J., in The Englishman and The Australia (supra).

In this case the evidence shews that the negligence of the appellants was an effective cause of the accident. Had their wire been properly secured, the actual occurrence could not have taken place, for, even assuming negligence on the part of the Dundas Electric Company in failing to properly insulate their live wire, it was only rendered dangerous in the particular instance by the falling upon it of the fire alarm wire. And there was actual joint negligence in the failure of both parties to discover and remedy the condition of the wires in time to avert any serious consequences.

For the same reasons the provisions of the by-law do not apply to the circumstances of the case. The undertaking is to indemnify and hold the appellants harmless against all damages, actions, &c., by reason of any danger or injury from the company's electrical system during the construction there-

of, and thereafter during the existence of the franchise, if incurred by or consequent on the negligence of the company.

Plainly that is only intended to apply to cases where the company alone does the negligent act, and the town corporation, though not joining therein or contributing thereto, are nevertheless thereby expossed to liability. The negligence spoken of is manifestly the sole negligence of the company. The indemnity was never intended to apply to a case where the town corporation were themselves negligent, and by their negligence brought about the state of things which caused the damage or injury and gave rise to the cause of action.

The appeal should therefore be dismissed.

OSLER and MEREDITH, JJ.A., each gave reasons in writing for the same conclusion, citing Missouri R. W. Co. v. Vance, 41 S. W. Repr. 167, 171; 9 Cyc. 805; Pollock on Torts, 8th ed., pp. 199, 201; Burrows v. March, L. R. 5 Ex. 67, L. R. 7 Ex. 96.

GARROW and MACLAREN, JJ.A., also concurred.

DECEMBER 31ST, 1908.

C.A.

McGRAW v. TORONTO R. W. CO.

Street Railways—Injury to Person Attempting to Enter Car —Order of Ontario Railway and Municipal Board—Entrance not Permitted by Front Door of Car—Failure to Post Notice on Door—Evidence of Negligence — Other Grounds of Negligence not Passed on by Jury—Judge's Charge—New Trial—Dismissal of Action.

Appeal by defendants from order of Divisional Court, 12 O. W. R. 587, setting aside the verdict and judgment at the trial in favour of the plaintiff, but directing a new trial, instead of dismissing the action.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

H. H. Dewart, K.C., for defendants.

J. M. Godfrey, for plaintiff.

GARROW, J.A.:—The action was brought to recover damages sustained by the plaintiff in being thrown from a street car operated by the defendants, owing, as was alleged, to the negligence of the defendants.

On 1st December, 1907, the plaintiff, desiring to enter as a passenger the car in question, attempted to enter by the front door, which was closed, and could not be opened from the outside, instead of by the rear door, which was open and was at the time the proper door by which to enter, and while standing on the step the car started, and she was thrown or fell to the ground and was injured. The door by which the plaintiff attempted to enter was kept closed under an order of the Ontario Railway and Municipal Board, dated 17th May, 1907, requiring the front doors of all cars to be so closed during the winter months for the protection of the motorman; the order to come into effect on 1st November, 1907.

There was no door knob on the outside, and it could only be opened from the inside, the intention being that it should only be opened to permit passengers to leave the car but not to enter.

The allegations of negligence in the statement of claim were: (1) no notice had been put up that the door was closed; (2) the motorman knew the plaintiff was on the step, and yet started the car.

The jury found: (1) the injuries to plaintiff were caused by the defendants' negligence; (2) such negligence consisted in "no admittance notice on outside of door;" (3) no contributory negligence; and (4) damages, $750.

In the charge to the jury Falconbridge, C.J., said that there were 3 grounds of negligence relied on, any one of which or all of which they might find, namely: "first, in that there was no notice on the door that the door was closed for entrance; second, in starting the car, if you find it to be the case, when she was already on the step; and thirdly, in not opening the door to let her in."

The absence of the notice was not disputed. There was a direct conflict upon the question whether or not the motorman saw the plaintiff on the step, the plaintiff alleging that he did, and the motorman denying the fact.

And this conflict, the only one in the case, comprised the chief feature of the very full and careful charge, early in which the learned Chief Justice said: "The evidence in the case, as in the one tried yesterday, is pretty short and

pointed, and it comes down to the broad proposition of which witnesses you choose to believe."

The Divisional Court held that the failure to put up a notice of non-admittance was not, under the circumstances, negligence, but granted a new trial, upon the ground that the jury might have been misled by the charge into believing that it was only necessary to pass upon one of the 3 grounds of negligence relied on. And reference was made to Andreas v. Canadian Pacific R. W. Co., 37 S. C. R. 1, which was distinguished, and to Cobban v. Canadian Pacific R. W. Co., 26 A. R. 115; Hanly v. Michigan Central R. R. Co., 13 O. L. R. 560, 9 O. W. R. 229; Hinsley v. London Street R. W. Co., 16 O. L. R. 350, 11 O. W. R. 743; and Russell v. Bell Telephone Co., 11 O. W. R. 808.

I agree with the Divisional Court that it was not, under the circumstances, negligence nor evidence of negligence not to post up a notice of non-admittance. The closed door and the absence of a knob or other outside means of opening it ought to have been sufficient, especially to one accustomed, as the plaintiff was, to the daily use of the street cars, and who admits that she knew of such doors having been put up, to repel any question of invitation. And upon this ground the action should have been dismissed at the trial. And I am, with deference, of the opinion that no sufficient ground is shewn for granting a new trial.

It is the rule, and a wise and sensible one, that when a jury is told that they may find any one or more of several heads of negligence upon the evidence, and they find only one, the others are by necessary implication to be taken as found in favour of the other side, or negatived. To this rule, as to other rules, there are, doubtless, exceptions, but the rule itself is clear, and was not laid down for the first time by any means in Andreas v. Canadian Pacific R. W. Co., 37 S. C. R. 1. See, in addition to the other cases before referred to, Lloyd v. Woodlands, 19 Times L. R. 32 (C. A.)

Nothing was withdrawn or withheld from the jury, as was the case in Russell v. Bell Telephone Co. and Hinsley v. London Street R. W. Co. The jury were plainly invited to find all or any of the several grounds on which the plaintiff relied. No one suggests that all the evidence which could be given was not given; no objection to the charge was made on either side; and none could, I think, properly have been made. The conflict of testimony between the

plaintiff and the motorman was very clearly and very fully pointed out, and the jury told that, in so far as that conflict was concerned, it was purely a question of credibility, and no reason appears to justify the assumption that this, the main burden of the whole charge, was wholly ignored by the jury in favour of the other and simpler finding, of a fact which was never for a moment in dispute.

Why should it not be assumed, knowing as we all do the proneness of juries to favour the plaintiff in such an action, that the failure to answer the second and third questions in favour of this plaintiff was not because of any oversight on their part, or because they were in any way misled by the charge, but because of the weakness of the plaintiff's case, which rested wholly on her own testimony. In such cases it is, of course, quite permissible to examine the whole evidence for the purpose of seeing if injustice would be done by applying the rule. This was done in Cobban v. Canadian Pacific R. W. Co. and in some of the other cases before referred to, and if in such examination it appears that there is strong evidence of negligence upon the heads of negligence not passed upon by the jury, a new trial might well be granted as a matter of discretion. But that is not this case. Here, as in the case of Hanly v. Michigan Central R. R. Co., the evidence is not merely conflicting, but very weak, for how can any one be certain that at 7 o'clock of a December night, another person, with practically only a moment's opportunity, saw him or her through a glass door, as the plaintiff was, and it all depends upon that. A new trial was refused in that case, as I think it should have been in this and for similar reasons.

I would allow the appeal and dismiss the action, with costs throughout to the defendants, if they ask for them.

OSLER, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., MACLAREN and MEREDITH, JJ.A., concurred.

DECEMBER 31ST, 1908.

C.A.

CANADIAN FAIRBANKS CO. v. LONDON MACHINE TOOL CO.

Damages—Special Machine Manufactured by Defendants for Plaintiffs—Contract — Warranty — Breach—Defects—Moneys Paid to Put Machine in Working Order—Evidence—Findings of Trial Judge—Appeal.

Appeal by plaintiffs and cross-appeal by defendants from judgment of BOYD, C., in an action tried by him without a jury, in which he awarded the plaintiffs only $400 without costs on a claim for $2,024.52 for damages for breach of a warranty or guarantee given by defendants with a hammer which they manufactured for plaintiffs.

W. N. Tilley and R. H. Parmenter, for plaintiffs.

G. T. Blackstock, K.C., and T. Hobson, Hamilton, for defendants.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.), was delivered by

MACLAREN, J.A.:—The plaintiffs entered into a contract with the defendants, a company then of London, now of Hamilton, whereby the latter agreed to construct for them a special hammer, weighing 60,000 lbs., equipped with a Lane pneumatic clamping device, and of capacity sufficient to form wheel-barrow bowls, drag-scraper bowls, and wheel-scraper bowls, of specified dimensions, for $5,750. The machine was intended for the Meaford Wheelbarrow Co., with whom the plaintiffs entered into a contract with similar specifications to those contained in their contract with the defendants. A guarantee as to sufficiency was given, and the machine was to be inspected before shipment, in the presence of and subject to the approval of representatives of the plaintiffs and the Meaford company, which inspection took place, and was satisfactory, as was found by the Chancellor.

The difficulty arose after the installation and attempt to operate at Meaford. This was delayed for a considerable time on account of the factory building not being ready for

its reception as soon as anticipated. Difficulties were experienced which were, no doubt, caused in large part by the fact that the hammer in question was something new in this country, and neither the defendants, who constructed it, nor the Meaford company, who undertook to operate it, had had experience in constructing or operating a similar machine. The difficulties were increased by the triangular nature of the transaction, and the circumlocution consequently necessary, and it is not to be wondered at that the parties were, not infrequently, at cross-purposes.

The evidence is very voluminous, and, as is usual in such a case, very conflicting. The testimony covers more than 200 printed pages of the appeal book, and the correspondence put in nearly another 100 pages. The plaintiffs gave in considerable detail the items of which their claim of $2,024.52 was made up. The largest of these was $1,000 paid by them to Mr. Lane, of Cleveland, the inventor or designer of the Lane clamping device, which was to be part of the equipment of the hammer in question. The defendants, before proceeding with the construction of the machine, had employed and paid Mr. Lane for making the necessary drawings and plans, and he was under agreement with them to come to Canada without further charge beyond his expenses if his presence or assistance should be found necessary. When the difficulties of installing and operating the machine arose, and the defendants had not remedied these to the satisfaction of the other parties, the plaintiffs and the Meaford company arranged with Lane that he should come to Meaford and do what was necessary to overcome them. He came with an assistant, and remained for nearly 2 weeks. It was asserted by the plaintiffs that the defendants had been advised of and had concurred in this arrangement. The correspondence, however, shews that the defendants were not at all fully advised in the matter, and were, moreover, on the advice of Lane, entirely excluded from taking part in, or even knowing, what was going on, and were actually excluded from the premises. The Chancellor is very severe upon Lane for his conduct in this regard, prompted, no doubt, in large part by the fact that by keeping the parties apart he was able to get $1,000 practically for doing what he had agreed to do without further compensation. The Chancellor, who saw and heard the witnesses, came to the conclusion that Mr. Lane had greatly exaggerated what required to be done to the machine, and

that an allowance of $100 for this claim of $1,000 was sufficient, and all that the defendants should be held liable for, in the circumstances. It is a pure question of fact, and the printed evidence, both documentary and oral, appears amply to sustain his finding. Indeed, he might even have gone farther, and held that, as the plaintiffs had incurred this expense without more fully advising the defendants or getting their concurrence, and as such fuller communication would have disclosed the fact that such expense was unnecessary, and that they were being imposed upon by Lane, the plaintiffs might properly be left to bear this expense alone, as having been unnecessarily and improperly incurred, unless the plaintiffs chose to do it in their own interest and to keep themselves right with their customers, the Meaford company. However, the Chancellor saw fit to allow them $100, and his decision ought not to be disturbed.

As to the remaining items which go to make up the plaintiffs' claim, the questions which arise are also questions of fact, upon which there is a like conflict of testimony, aggravated by the circuitous method of undertaking to deal with and rectify them. The learned Chancellor appears to have gone very fully and patiently into these also, and there is ample evidence to sustain his findings.

On the whole, I am of opinion that the decision appealed from should be affirmed, and the appeal and cross-appeal dismissed with costs.

DECEMBER 31ST, 1908.

C.A.

COBURN v. CLARKSON.

Contract—Subscription for Shares—Agreement of Defendant to Take Shares off Subscriber's Hands—Consideration—Reasonable Time within which to Make Demand——Rejection of Evidence—Result not Affected—No Substantial Miscarriage.

Appeal by defendant from order of a Divisional Court dismissing an appeal from the judgment at the trial in favour of plaintiff for the recovery of $5,000 in an action to compel the defendant to take $5,000 worth of the capital stock of the Canadian Oil Co. off the plaintiff's hands, pur-

suant to an alleged promise of the defendant so to do, which promise was denied by the defendant, who further pleaded that, if any promise was made, it was without consideration, and that the benefit thereof was not claimed by the plaintiff within a reasonable time.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

W. E. Middleton, K.C., for defendant.

E. D. Armour, K.C., and J. H. Denton, for plaintiff.

OSLER, J.A.:—I think that the judgment of the Divisional Court, affirming the judgment at the trial, should stand. The terms of the agreement are plain, the consideration, as stated and proved, undoubted. The only question is, whether the plaintiff had allowed more than a reasonable time to elapse before calling upon the defendant to perform it by taking the stock he (plaintiff) had subscribed for off his (plaintiff's) hands, as he (defendant) had agreed to do. The only doubt I had during the argument was whether this should not have been demanded before the plaintiff paid for the stock. But this was not stipulated for, and the defendant's own letters, written not long before action brought, may properly be regarded as strong evidence that the plaintiff was still in time in demanding to be relieved of the stock, and that he had no real defence on the ground of lapse of time. There is no evidence that he was prejudiced by the delay, and, as regards the evidence not admitted by the learned trial Judge, I think that the answer to the objection raised on that score is that, if it had been admitted, its effect, as stated, would make no difference in the result, so that no substantial miscarriage has been caused by its rejection.

The appeal should, therefore, be dismissed.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

DECEMBER 31ST, 1908.

C.A.

RE CORNWALL FURNITURE CO.

Company—Winding-up—Reference to Master—Jurisdiction of Master—Dominion Winding-up Act, sec. 110—Power to Inquire into Liability of Holders of Certificates for Fully Paid-up Shares to be Placed on List of Contributories.

Appeal by the liquidator of the company from an order of LATCHFORD, J., dismissing an appeal by the liquidator from a ruling of the local Master at Cornwall upon a reference for the winding-up of the company under the Dominion statute.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

C. H. Cline, Cornwall, for the appellant.

G. A. Stiles, Cornwall, for the respondents.

MOSS, C.J.O.:—This appeal raises a somewhat important question as to the extent and scope of the jurisdiction that may be exercised by an officer of the Supreme Court of Judicature in a proceeding under R. S. C. 1906 ch. 144, the Dominion Winding-up Act.

The company is in process of being wound up under the provisions of that Act. By an order pronounced by Anglin, J., it has been referred to the local Master of the Supreme Court of Judicature at Cornwall to (amongst other things) take all necessary proceedings for and in connection with the winding-up of the company. The order further provides that, in pursuance and by virtue of the statute in that behalf, all such powers as are conferred upon this Court by the Winding-up Act and amending Acts as may be necessary for the said winding-up of the said company be and the same are delegated to the said local Master.

In a proceeding before the local Master, upon the application of the liquidator of the company to place certain persons on the list of contributories as the holders of unpaid shares, it was objected that, in the circumstances ap-

pearing in the case, he had no jurisdiction to deal with the matter. He considered himself bound, in deference to some decisions, to give effect to the objection, though his own opinion was opposed to it.

On appeal Latchford, J., affirmed the order without expressing any opinion of his own.

The persons who are sought to be placed on the list of contributories held certificates to the effect that the shares are fully paid up, but the contention of the liquidator is that the certificates were issued without any payment or consideration to the company, and that in truth the shares in question are wholly unpaid.

The question is thus raised as to the extent and scope of the jurisdiction of the local Master to proceed with the inquiry before him as to the liability of these persons to be placed on the list of contributories in respect of those shares.

It must, of course, be conceded that the local Master, in proceeding in this matter, has jurisdiction to settle a list of contributories, and, as incidental thereto, to inquire whether a person appearing to be a holder of shares does or does not owe anything in respect of them. The jurisdiction of the Court to do this is, of course, unquestionable.

Then sec. 110 of the Act authorizes and empowers the Court to "refer and delegate, according to the practice and procedure of the Court, to any officer of the Court, any of the powers conferred upon the Court by this Act."

It is to be observed that the powers to be delegated are confined to those conferred by the Act. The officer is not made the recipient of any of the original jurisdiction possessed by the Court.

The order made in this matter is in conformity to the Act, and delegates to the local Master all such powers as are conferred by the Act upon the Court which are necessary for the winding-up of the company. It goes almost without saying that the ascertainment of the persons, if any, who are holders of unpaid shares, and the amount, if any, which they are liable to pay in respect of them, is essential to the due winding-up of the company's affairs. It must be assumed that in proceeding with such an inquiry the Court, and by consequence the officer to whom its powers have been delegated, will be governed by the provisions of the Act, and will prosecute the inquiry in the form and manner best adapted to secure justice to all concerned.

In the simple and ordinary case of a subscriber for shares who appears not to have paid the amount payable in respect of them, no difficulty is likely to arise. And, doubtless, a great many of the cases which come up are of that nature.

But cases may arise in which there is some complication, in which the rights of other parties are involved, or in which the circumstances are of such a special nature as to make it more proper or more convenient or more consistent with the attainment of complete justice to invoke the ordinary jurisdiction of the Court for the enforcement of the asserted claims, the powers conferred by the Act being additional and not restrictive: sec. 130.

If such a case presented itself, the delegated officer would necessarily stay his hand, for he can only exercise the powers conferred by the Act, leaving it to the Court to deal with it in the manner deemed most expedient.

Ordinarily, the answer of a person whom it is sought to place on a list of contributories will be found ranged under one or more of the following: either that he is not a shareholder at all, or that he has paid in full the amount payable in respect of his shares, or that he is entitled to be relieved from liability in respect of them by reason of some special circumstances. In whatever way it may be put, his defence is substantially a denial of liability. In none of these cases is it at all likely that there will arise any special question involving inquiries into the settling of rights of third parties or the adjusting of conflicting claims between parties not before the Court, so as to prevent the Court from dealing with the cases in the manner prescribed or indicated by the statute. In nearly every case the simple question is, is the person appearing to be the holder of shares liable to payments in respect of them? And that question, there can be no reason to doubt, the delegated officer may properly entertain and deal with.

His jurisdiction is not limited to cases where no defence is made to the claim and all that he has to do is to ascertain and state the amount payable. The obvious intention of the Act is to provide means for settling and adjusting all questions arising in the ordinary course of the liquidation in the simplest and shortest manner, so that, in the words of Giffard, L.J., in Stringer's Case, L. R. 4 Ch. 475, 493, "without any double process or double set of proceedings,

complete justice might be done between the parties, and a complete winding-up effected."

The local Master was of the opinion that he had jurisdiction to proceed, and he would have exercised it but for the supposed effect of the decision in the case Re Harris Campbell and Boyden Furniture Co. of Ottawa, 5 O. W. R. 649, which appears to have been based on some remarks of Sir Henry Strong, C.J., in the case of Re Hess Manufacturing Co., 23 S. C. R. 644, at p. 653.

But these observations must be read in the light of the facts and circumstances of the case with which the learned Chief Justice was dealing. In that case it was proved that the alleged contributory had given value in kind for the shares in respect of which it was sought to hold him liable, and the learned Chief Justice was combatting the argument that in a proceeding to place the alleged contributory on the list it was competent either for the Master or the Court to inquire into the sufficiency of the value given. This seems clear from the citations he makes from the text-books to which he referred. The learned authors were not dealing with the question of jurisdiction, but with the principle of law to be found in the passages which he quoted, viz., that, in the absence of fraud, the Court (not the delegated officer merely) will not inquire into the value of that which is taken by the company in payment instead of money. The learned Chief Justice shews that this was what was in his mind, for he says (p. 654): "If any consideration was given, it was beyond the Master's competency to inquire into the adequacy of it"—which would certainly be so if, as stated by the learned authors, the Court would not do so.

The case cannot be considered as laying down as an absolute proposition that the Master has no jurisdiction to inquire and determine whether anything has been paid or the company has received any value for the shares.

Whether, in the present case, the holders of certificates for what have been termed "bonus shares" may relieve themselves from liability, on the ground that they never subscribed for the shares, and accepted them on the basis that they were only to become holders of them as fully paid up shares, or on the ground that the proceeding should be under sec. 123, or on the ground of estoppel, or on any other ground, are matters not now before us for consideration. They are to be dealt with by the local Master if and

when put forward. They do not at present affect the question of jurisdiction.

In the circumstances so far as they now appear, the conclusion is that the local Master has jurisdiction to proceed with the inquiry against the persons brought before him, and it should go back to him to continue it.

The appeal will, therefore, be allowed. The liquidator's costs will be paid out of the estate, and there will be no costs to any of the other parties.

MEREDITH, J.A., gave reasons in writing for the same conclusion, in the course of which he referred to In re Pakenham Pork Packing Co., 6 O. L. R. 582, 2 O. W. R. 951, 983; S. C., 12 O. L. R. 100, 7 O. W. R. 658.

OSLER, GARROW, and MACLAREN, JJ.A., also concurred.

DECEMBER 31ST, 1908.

C.A.

CRAY v. WABASH R. R. CO. AND GRAND TRUNK R. W. CO.

Railway—Injury to and Consequent Death of Servant—Collision of Trains—Negligence—Action against two Railway Companies—Dismissal as against one at Conclusion of Plaintiff's Case—Verdict against the Other—Trial—Prejudice — Jury — Judge's Charge — Evidence as to Criminal Charge against Conductor—Admissibility—Excessive Damages—New Trial—Reduction by Consent.

Appeal by defendants the Wabash R. R. Co. from the judgment of ANGLIN, J., in favour of the plaintiff for the recovery of $3,500 damages against the appellants, while dismissing the action against the other defendants. The action was brought to recover damages for the death of John H. Cray, a brakesman in the employment of the defendants the Grand Trunk R. W. Co., by reason of the negligence of one or both of the defendants.

The appeal was heard by Moss, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

H. E. Rose, K.C., for the appellants.

J. H. Rodd, Windsor, for plaintiff.

M. K. Cowan, K.C., for defendants the Grand Trunk R. W. Co.

OSLER, J.A.:—This case took a somewhat unusual course at the trial. The action is brought by the administrator of the deceased Cray, under the Fatal Accidents Act, to recover damages for his death, caused, as alleged, by the negligence of the servants of one or both of the defendant railway companies. He was a servant of the Grand Trunk Railway Company, and if the plaintiff succeeded against that company, the damages would be restricted to the amount recoverable under the Workmen's Compensation Act. At the conclusion of the plaintiff's case the action was dismissed against that company, upon the terms that if there was any evidence upon which the appellate Court might think the case against them ought to have been submitted to the jury, judgment should be entered for such a sum as the evidence would justify. As the case then stood, I would agree with the view of the learned trial Judge that it failed against the Grand Trunk R. W. Co.

It then proceeded against the other company, who, in order to prove that the collision between the trains of the two companies in which Cray was killed was not caused by the negligence of their servants, but by that of the servants of their co-defendants, the Grand Trunk R. W. Co., called one Lawton, the conductor in charge of their own train, whose evidence, if believed, would tend to shew that the negligence which caused the accident was that of the conductor of the Grand Trunk R. W. Co.'s train. This course, the Wabash R. R. Co. in defending themselves had a right to take, though, if the evidence of Lawton had been given on the plaintiff's call, the case would have gone to the jury against both defendants. The plaintiff does not now complain, and, I suppose, could not complain, of what was done, and is content to hold his judgment, if he can, against the Wabash R. R. Co. These defendants, however, urge that the effect of withdrawing from the jury the question whether their co-defendants were guilty of negligence was to convince the jury that it was not open to them to find negligence against any of the servants of that company. This

objection is not well founded, as a reading of the learned Judge's charge shews that, notwithstanding the fact that the case was no longer being proceeded with against the Grand Trunk R. W. Co., it was left open to the jury to find that the negligence which brought about the collision was that of the servants of those defendants, and the question was expressly put whether it was caused by the negligence of the Grand Trunk Railway engine-driver, the only servant of that company who, in my opinion, was affected by the evidence, and the jury answered that it was not. The several acts and omissions relied upon as shewing negligence on his part are referred to in the charge, and I can see no ground for thinking that the case was not amply explained to the jury, or that they did not understand and appreciate the whole situation. That the real cause of the collision was the negligence of the conductor of the Wabash train, the evidence, to my mind, leaves no doubt, and the jury have so found, and there is no reason to disturb their finding on that point.

Then it is said that evidence was improperly admitted of the fact that criminal proceedings had been instituted against the conductor of the Wabash train, and that the minds of the jury must have been thereby improperly affected and prejudiced against the evidence of the conductor for that reason. Such as it was, the evidence said to have been wrongly admitted was a question, not in proper form, no doubt, put to the witness himself in cross-examination, whether he had not been arrested for criminal negligence in connection with the collision. He would seem to have been prevented from answering, or an objection was interposed by Judge and counsel before he could do so, and the question was not followed up; but, in my opinion, counsel was quite within his right in making the inquiry, for whatever it was worth, in order to test the credibility of the witness and to lay before the jury everything which might tend to shew that he was colouring his story or that he had any reason for throwing the blame upon the servants of the other company.

As regards the damages, these are excessive beyond any reasonable amount which the evidence can justify, and there must on this ground be a new trial, confined to the question of damages alone. The costs of the new trial and of the appeal to be costs in the action. But, in order to avoid, if possible, further costs and delay, we have no objection to

suggest that, as the case strikes us, the sum of $2,500 would be a reasonable amount at which to fix the damages, and if the parties assent to pay and accept that sum, or any other amount, the judgment will be reduced accordingly, and the appeal dismissed with costs.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., also concurred.

DECEMBER 31ST, 1908.

C.A.

REX v. WHITE.

Criminal Law—Evidence—Admissions of Prisoner—Confession to Police Officer Induced by Misstatement, Trick, or Deception—Admissibility—Absence of Threat or Inducement.

Crown case stated by BOYD, C., as to the admissibility of certain evidence upon the indictment and trial of the prisoner for attempting to murder or to do bodily harm to one Joshua Pierce.

The case was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

J. R. Cartwright, K.C., for the Crown.

The prisoner was not represented.

OSLER, J.A.:—The prisoner and one Matilda Pierce were jointly indicted and tried at Sandwich before the Chancellor, the prisoner for attempting to murder or to do bodily harm to one Joshua Pierce, and Matilda Pierce, Pierce's wife, for aiding and abetting White in the attempt.

As to the wife the case was withdrawn from the jury. White was found guilty, and sentenced to 10 years' imprisonment, subject to the opinion of the Court of Appeal upon a case reserved by the trial Judge as to the admissibility of certain evidence. The evidence was returned with and made part of the case, in which the substance of it was also briefly stated, with the questions desired to be answered.

Whether the statement made by the prisoner White to the chief of police, Wills, was rejected because it was assumed to have been made in consequence of the untrue statement made to the prisoner by the police officer Jackson that his fellow prisoner, the woman Pierce, had "done some talking" in connection with the matter, or for that reason as well as because the chief of police had not cautioned the prisoner before questioning him or allowing him to make his statement, does not very clearly appear, nor is it material to the consideration of the questions submitted.

All the confessions or admissions of the prisoner, the evidence of which is now objected to, were made at different times, some on the day, some the day after, the conversation with the police officer Jackson, and the contention is that they should all have been regarded as influenced by the false statement of that officer, and should, for that reason, have been rejected as not having been freely and voluntarily made, the inference suggested being that the prisoner, having been led to assume that the wife had implicated him in some way, would naturally retaliate upon her or attempt to minimize his own share in the transaction, and would thus be induced to talk about it, when he would otherwise have been silent.

Jackson, it may be observed, did not question the prisoner; his false statement was made in answer to a direct inquiry by the latter, and there is no evidence that any of the conversations, the evidence of which was admitted, took place in consequence of any inducement or promise or threat held out or made by Jackson or any one else.

I am of opinion that the evidence in question was properly admitted, even though it be assumed that the prisoner's confessions or admissions may have been in some degree influenced by the officer's misstatement. The weight to be attached to them was a matter for the consideration of the jury under all the circumstances. They were rightly held to have been freely and voluntarily made, uninfluenced by inducement or threat of any kind.

Generally speaking, it may be said that it is no objection to the admissibility of a prisoner's confession that it was obtained by means of a trick or artifice practised upon him by the officer or other person to whom it was made.

"A confession is admissible, although it is elicited in answer to a question which assumes the prisoner's guilt or is obtained by artifice or deception:" Joy on Confessions

(1842), p. 42; Archbold's Criminal Pleading and Evidence, 22nd ed. (1900), p. 306; Roscoe, 13th ed., p. 44.

"If no inducement has been held out relating to the charge, it matters not in what way the confession has been obtained, for, whether it was induced by a solemn promise of secrecy, even confirmed by an oath, or by reason of the prisoner having been drunken, or even by deception practised upon him or false representations made to him for such purpose, it will be equally admissible. . . . What the accused has been overheard muttering to himself or saying to his wife or to any other person in confidence is also receivable in evidence:" Taylor on Evidence, 9th ed. (1897), sec. 881; and see The King v. Ryan, 9 Can. Crim. Cas. 347 (Ont.); Phillips on Evidence, p. 427; Phipson on the Law of Evidence (1902), p. 230.

The authorities are cited in the text-books referred to. The latter writer adds: "Recent decisions, however, shew an increasing tendency to exclude evidence obtained by the police by unfair or irregular means;" and I have no doubt that in some circumstances it may appear that a confession so obtained ought to be regarded as not having been freely and voluntarily made, and as open, on principle, to the objection on which the rejection of evidence of that class is founded. The case of Regina v. Histed (1898), 19 Cox C. C. 16, is an illustration of what I refer to. Nothing in the present case, however, invites its application.

The statement made to the officer Jackson, after the interview with the chief of police, as to where the key of Pierce's house would be found, confirmed as it was by the finding of the key in the place described, was plainly admissible, for, even if accompanying language amounting to a confession was inadmissible as possibly untrue, this fact at least was not: Archbold Pleading and Evidence, p. 308; Phipson, p. 232.

The other statements made in conversation with the prisoner's father and the prosecutor's wife and officer Reid, were admissible, for the reasons already given. Each of the questions, therefore, should be answered in the affirmative, and the conviction affirmed.

I will add, speaking for myself, that the practice of police officers of any grade examining prisoners is to be disapproved of, and that the obtaining confessions or statements from them by trick or deception is to be strongly reprobated; the latter in particular tends only to obstruct

the course of justice by discrediting an officer whose testimony might otherwise be useful.

MEREDITH, J.A., stated reasons in writing for the same conclusion.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

DECEMBER 31ST, 1908.

C.A.

DICKSON v. LEROY.

Fraud and Misrepresentation — Action for Deceit—Sale of Interest in Business—Misrepresentation as to Assets and Liabilities—Contract—Damages—Measure of.

Appeal by defendant from the order of a Divisional Court increasing the damages awarded to the plaintiff by the trial Judge from $1,087.12 to $2,000.

Defendant was a general merchant at Camden East, and in September, 1905, plaintiff's son was admitted as a partner in the business, acquiring a one-third interest. On 23rd February, 1907, stock was taken and shewed that the goods on hand amounted to a little over $7,000. Not long after Dickson junior and the defendant discussed a purchase and sale of the two-thirds interest of the latter, but this fell through, as the former had no means of his own to pay the purchase money, and his father was unwilling to indorse his notes therefor.

About the beginning of July a new proposition was discussed, viz., that the plaintiff should buy out the defendant's interest. Without any formal stock-taking, the goods were looked over by the defendant, by the plaintiff's son, and by an employee of the firm, and they came to the conclusion that the amount of stock was substantially the same as on 23rd February.

Plaintiff produced at the trial two memoranda, one composed of a large number of small items aggregating $2,309.89, said to be the accounts due to the firm, and the other aggregating $1,884.69, said to be the accounts due by them to the wholesalers.

The defendant alleged that these statements were made out by Dickson junior in the spring, when he thought of buying; the Dicksons said that they were made in July for the purpose of the sale to plaintiff, and the trial Judge made a special finding in favour of the latter date, which was not now challenged.

The evidence shewed that while the defendant maintained that the stock was worth $7,000, he expressed his willingness to value it at $6,000, which would make his two-thirds interest $4,000, and that it was estimated that the debts due to the firm would equal the amounts due by them. On this basis the plaintiff agreed to give the defendant $4,000 for his interest in the business, and to assume the liabilities.

An agreement under seal, dated 10th July, 1907, was executed, whereby the defendant sold to the plaintiff and his son all his interest in the stock and assets of the partnership for $4,000, they agreeing to pay the debts.

After going into possession, the plaintiff gradually became aware that the debts due to the firm were much less than represented, and the debts due by them much greater, and brought this action to recover damages for deceit and false representations.

The action was tried by CLUTE, J., without a jury, and he found that the debts due to the firm on 10th July, instead of being $2,309.89, were only $1,681.50, or a difference of $628.38; while the debts then due by the firm, instead of being only $1,884.69, really amounted to $4,540.68, or a difference of $2,655.99, the total difference being $3,884.37. As the purchase was only of a two-thirds interest, the total amount of the damage would be two-thirds of $3,884.37, or $2,156.25. The trial Judge held, further, that, inasmuch as the agreement of sale of 10th July was to the plaintiff and his son, although the father was supplying all the purchase money, and was acquiring the whole of the defendant's interest, he was entitled to recover only one-half this sum of $2,156.25, and accordingly gave him judgment for $1,078.12.

Both parties appealed to a Divisional Court, which dismissed the defendant's appeal, and increased the plaintiff's judgment to $2,000.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

W. M. Douglas, K.C., and J. MacGregor, for defendant.

J. L. Whiting, K.C., for plaintiff.

MACLAREN, J.A.:—The evidence shews clearly that the purchase of the two-thirds interest was by the plaintiff alone; that he paid part of the price, and gave his notes for the balance; and that, as between him and his son, he acquired and was intended to acquire the whole of this two-thirds share. It was argued for the plaintiff that, as he was not suing upon the deed, it was not necessary to have it reformed, and that the parol evidence was quite competent. The defendant has taken the opposite ground in his reasons of appeal, but this point was not very strenuously urged.

The chief ground relied upon by the defence before us was that the transaction was really a sale of the defendant's interest in the business, based upon the stocktaking of February; that, while a number of the debts due by customers in February had been paid in the interim, and new liabilities incurred to wholesalers for goods, the goods had correspondingly increased, and that the plaintiff was well aware of a debt of $800 due to the bank, which went to make up the liabilities in July, but which was not included in the $1,884.69 of February. It was very strongly urged that it was not sufficient to shew errors in the statements of debts due to and by the firm; that against these should be set over what was claimed to be a corresponding increase in the stock-in-trade.

Against this is to be placed the finding of the trial Judge that the statements of debts due to the firm and of its liabilities were made out in July for the purposes of the sale which was actually made, and that the defendant vouched for their correctness—findings for which there appears to be ample evidence. He also finds that the sale was made on the basis of the stock being substantially the same in July as in February, and this is in accordance with the evidence of the defendant, as well as of the plaintiff. There is no evidence, and there appears to be no substantial ground, for the claim of the defendant that the stock had been increased, and there are his own admissions and representations to the contrary.

I am further of opinion that the Divisional Court was correct in its position that the agreement of sale of 10th July did not prevent the plaintiff from shewing, as he has conclusively shewn, that the purchase of the two-thirds interest was by him and for himself alone, and that, consequently, he was entitled to two-thirds of the total damage

sustained in consequence of the false statements of the defendant.

To my mind, this is the ordinary case of false representations made by a vendor of facts within his knowledge, and which were not within the knowledge of the purchaser, but upon which he relied and acted, and, as they have been proved to be false, the purchaser is now entitled to recover the amount of damage he has sustained by these representations not turning out to be true.

The appeal should, therefore, be dismissed, and the judgment of the Divisional Court in favour of the plaintiff for $2,000 affirmed.

OSLER and MEREDITH, JJ.A., each gave reasons in writing for the same conclusion.

MOSS, C.J.O., and GARROW, J.A., concurred.

DECEMBER 31ST, 1908

C.A.

DAGG v. McLAUGHLIN.

Master and Servant — Injury to Servant — Negligence— Dangerous Work — Defective System — Knowledge of Danger—Voluntary Exposure—Discovery of Fresh Evidence—Corroborative Evidence—Refusal to Order New Trial.

Appeal by defendant from the order of a Divisional Court, 12 O. W. R. 407, affirming the judgment of MACMAHON, J., at the trial, 11 O. W. R. 1080.

E. F. B. Johnston, K.C., and H. Fisher, Ottawa, for defendant.

A. E. Fripp, K.C., for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.), was delivered by

OSLER, J.A.:—The plaintiff was a workman in the employment of the defendant, who was the contractor for the construction of a subway under the tracks of the Grand

Trunk Railway at the Bank street crossing in the city of Ottawa. He was run over and injured by a loaded dump car, of which he was in charge, owing, as it was alleged, to the negligent system which the defendant had adopted for the haulage of the cars, and to the absence of necessary precautions for the protection of workmen engaged in what was said to be, in the absence of such precaution, a dangerous work.

It appeared that for the purpose of the work a double track of tramway was laid down in the line of the excavation, connected, at the north by a switch, with a single track for a short distance, into the place where the cut was going on, and at the south by another switch, with a single track leading to the dump where the material taken out was deposited.

Three loaded cars at a time were hauled up by a steam hoist and cable just past the switch at the north end. From there they were taken along the east or No. 1 track to the south switch, where they entered the single track to the dump. The returning empties passed through that switch into the west or No. 2 track, along which they were taken back to the hoist, and from there let down by the cable to the excavator. As the tracks approached the south switch, they left Bank street and converged in a curve towards the dump, and at and near the switch and at other points along the line the space between the tracks was too narrow for any one to pass safely between the going and returning cars. From the hoist or a short distance south of it was a slight down grade, increasing as the tracks passed out of Bank street towards the dump, so that the loaded cars, on being set in motion after leaving the hoist, were easily drawn and would finally pass into and through the switch and run down to the dump by their own momentum. On being brought up to the hoist, a horse was attached to the nearest loaded car by a chain with a hook passed into a staple in the truck or platform of the car, the horse being led or followed by his driver, in this instance the plaintiff, walking alongside the cars in the space between the tracks. It was the duty of the driver before arriving at the south switch, and on passing the returning empties, to detach the chain from the loaded cars and attach it to the nearest of the string of empties, which were then hauled back to the hoist. From the dump the latter were drawn by a team, which was detached from them before arriving at the south

switch, through which they were sent by what the witnesses spoke of rather inaccurately as a "flying shunt" or "kick," the impetus which they had acquired from the speed at which they were pulled along by the team being usually sufficient to carry them well past the switch, and up to the place where they would be taken charge of by the man who had come down with the loaded cars. Sometimes the impetus was not sufficient, and then the man with the team would follow and draw the cars up further. The place where the cars would meet was, therefore, quite uncertain, though they usually did so about Patterson avenue. The driver of the cars proceeding to the dump usually went on until he met with the empties after they had passed the switch, but no means were provided for stopping the former after they had entered upon the steeper down grade, or when moving along by their own weight. On the occasion in question the plaintiff expected to meet the empties at a safe distance from the switch, and would have done so had they received a flying shunt of sufficient force. He had approached to within 25 or 30 feet of the switch before he observed them, and then saw that a collision was inevitable if he remained between the tracks. He could not stop his cars, and the safest course which appeared open to him was to turn his horse and to go himself in front of his cars, a course which, though not unattended with danger, was feasible enough, as the cars were not going very fast. In doing so in some way he tripped and fell, and was partly run over, and badly hurt.

A rope was attached to the rear car and left trailing behind it, intended to operate, or to be used as, a brake, but it was impossible for the plaintiff to use it and also to look after his horse. It could have been done had there been a man at the end of the car to attend to it, and the cars could then have been promptly stopped by means of it, and at a safe distance from the other cars. There was evidence that the system adopted in this respect was a dangerous one, and that a brake of some kind was a usual and necessary precaution.

It appears to me that, in these circumstances, the defendant cannot be acquitted of having conducted his business in a negligent manner in omitting to take a precaution for the safety of his workmen which the situation obviously required, and which was a simple and usual one, and would probably have been effective. I am unable to see how the

finding of the learned trial Judge in this respect can be interfered with, as it is supported by evidence which puts the facts as I have stated them.

It was urged that the plaintiff had deliberately gone into this dangerous place, and I was at first inclined to think this a difficulty. But, on further consideration, I am of a different opinion. The plaintiff was expected to meet the other cars. He was not expected to take off his horse and to wait for them, as they might have rolled back if he was not ready at the spot where they stopped, to take them in charge. He would, therefore, naturally go on expecting to meet them at a place where he could still safely take them, and no means were provided for stopping the loaded cars in the dangerous contingency of their going too far.

The trial Judge has absolved the plaintiff from negligence causing the accident and from contributory negligence, and, whatever view I might have taken of the case as a whole had I been trying it, I cannot say that he came to a wrong conclusion upon the evidence, and the Divisional Court having taken the same view of the facts, the judgment is not lightly to be interfered with.

The defendant also moved for a new trial upon affidavits stating the discovery after the trial of further evidence, such evidence in effect being that the accident did not take place at the spot where the plaintiff and his witnesses had sworn that it happened, or in a manner stated by them; that the plaintiff was walking between the rails in front of his car not for the purpose of avoiding the danger of collision with the empty cars, but at a place where there was no danger of that kind, and that he fell when he was trying to get up on his own car for the purpose of riding on it. The plaintiff was asked at the trial in reference to that, and denied it, and the facts deposed to by the other affiants are merely corroborative of evidence given at the trial and contradicting that given there by the plaintiff's witnesses. The Divisional Court refused to interfere, and I agree that a sufficient case has not been made out for doing so and sending the case down for another trial.

On the whole I would dismiss the appeal.

NOVEMBER 30TH, 1908.

C.A.

REX v. LAMOTHE.

Criminal Law—Frequenting House of Ill Fame—Plea of Guilty—Qualified Plea—Evidence — Conviction—Criminal Code, secs. 238, 239—Omission of Allegation that Accused "did not Give a Satisfactory Account of himself"—Code, sec. 773 (f)—Declaration or Creation of Offence—Omission of "Habitual" before "Frequenter"—Code, secs. 852, 1124, 1130.

Appeal by defendant from order of ANGLIN, J., 12 O. W. R. 772, upon the return of a habeas corpus, refusing to discharge the defendant from custody under a conviction by the police magistrate for the town of North Bay for frequenting a house of ill-fame.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

H. L. Dunn, for defendant.

J. R. Cartwright, K.C., for the Crown.

GARROW, J.A.:—It is a pity the magistrate did not allow the prisoner to withdraw his plea of guilty, and try the case on the evidence. That, I think, would have been the proper course, even on the facts as stated by the magistrate.

As to the questions of law argued before us, it is conceded that if the conviction was made under secs. 238, 239, of the Criminal Code, it cannot be supported. Under these sections "every one is a loose, idle, or disorderly person or vagrant, who . . . (k) is in the habit of frequenting such houses (i.e., a disorderly house, bawdy house, or house of ill-fame, or house for the resort of prostitutes), and does not give a satisfactory account of himself or herself," and is liable on summary conviction to a fine not exceeding $50, or to imprisonment with or without hard labour for any term not exceeding 6 months, or to both.

The charge in the information is that the prisoner was, at the date mentioned, "a frequenter of a house of ill-fame," and the conviction finds and states "that he, the

said Fred Lamothe, was a frequenter of a house of ill-fame, and I, the said Sylvanus Weegar, adjudge the said Fred Lamothe for the said offence to be imprisoned in the central prison and there kept at hard labour for the space of 6 months, less one day"—nothing appearing in the conviction to shew that he was asked to give or that he failed to give a satisfactory account of himself: see Regina v. Levecque, 30 U. C. R. 509.

But it is contended by the Crown that the conviction can be supported under sec. 773 of the Code. That section forms part of Part XVI., under the head of "Summary Trial of Indictable Offences," and the sub-head "Jurisdiction," and says that "whenever any person is charged before a magistrate . . . (f) with keeping or being an inmate or *habitual* frequenter of any disorderly house, house of ill-fame, or bawdy house . . . the magistrate may, subject to the subsequent provisions of this Part, hear and determine the charge in a summary way." Section 774 declares that in such cases the jurisdiction of the magistrate shall be absolute, and shall not depend on the consent of the accused, and that "this Part" shall not affect the absolute summary jurisdiction given to any justice or justices in any case by any other Part of the Act. Section 781 provides that in any case summarily tried under paragraphs . . . (f) . . . the magistrate may impose imprisonment, with or without hard labour, for any term not exceeding 6 months, or may impose a fine not exceeding with the costs $100, or both. And the case of Regina v. Clark, 2 O. R. 523, was relied on as authority for the proposition that sec. 773 creates a substantive offence, namely, that of being "an habitual frequenter of a house of ill-fame." The authority of that case was probably binding upon Anglin, J., although he declined to follow it upon the other branch, that the omission of the word "habitual" was fatal, preferring to follow, as he said, the more recent decision in England of a Divisional Court in Clark v. The Queen, 14 Q. B. D. 92. But, on looking at that case, I am unable to see anything in it to justify the conclusion that it is in any conflict with what was said in Regina v. Clark in the Ontario Court. In the English case the Court was dealing with the word "frequents," and, very properly I think, concluded that a man could not be said to "frequent" a street, when the evidence only proved that he had been seen there once. The question there was one of evidence,

which was held to be insufficient; here it is one of pleading. And, in my opinion, the decision in Regina v. Clark upon the question of pleading was correct.

But I am also of the opinion that the conviction in question should be ascribed to secs. 238, 239, rather than to sec. 773.

The origin of secs. 238, 239, is the statute 32 & 33 Vict. ch. 28, "An Act respecting Vagrants," and the origin of sec. 773 is 32 & 33 Vict. ch. 32, "An Act respecting the Prompt and Summary Administration of Criminal Justice in certain Cases." Both statutes were assented to on the same day. There is to me no perceptible difference between the expression used in the first, as applied to an offender, of being "in the habit of frequenting," and in the second of being "an habitual frequenter." And there is not the slightest apparent reason why the first should be let off with an imprisonment of 2 months (since increased to 6 months), the maximum under the first statute, while the second, who, on the Crown's present theory, need not even be asked to give an account of himself, should be subject to 6 months' imprisonment, or why under the one statute the fine may be $50, and under the other $100. It is the one circumstance that the punishment may be greater under the second than under the first which, for a moment, lends colour to the Crown's contention. That there is confusion calling for legislative correction may be admitted. The confusion arises, in my opinion, from the circumstance that most of the offences mentioned in sec. 773 are also indictable offences calling for more severe punishment than those prescribed in the Act respecting vagrants. But, reading the whole section, together with its history, I am of the opinion that there was no intention to create under it any new offence whatever, but merely to recapitulate a series of offences already existing, and to provide for their speedy trial. And in this recapitulation the minor offence of the habitual frequenter, and possibly also of the inmate of such a house, whose cases were already provided for under the vagrancy sections (the keepers being liable not only under those sections but also under one of the "Nuisance" sections, namely, sec. 228), were, by oversight, included.

This construction may not be in harmony with one or more decisions, for instance Regina v. Conlin, 29 O. R. 28, but it is the only one which, under all the circumstances and after much consideration, commends itself to me. But the

conviction is, as I have pointed out, bad in either view, and the prisoner must be discharged.

OSLER and MEREDITH, J.J.A., each gave reasons in writing for the same conclusion.

MOSS, C.J.O., and MACLAREN, J.A., concurred.

[The appeal was allowed at the conclusion of the hearing on 30th November, 1908, and the result is noted in 12 O. W. R. at p. 1160. The written opinions were afterwards prepared, and given to the Registrar on the 31st December, 1908.]

DECEMBER 31ST, 1908.

C.A.

RE TOWN OF BERLIN AND BERLIN AND WATERLOO STREET R. W. CO.

Street Railways — Municipality Assuming Ownership — Award—"Value" of Railway — Franchises and Privileges—Principle of Valuation—R. S. O. 1897 ch. 208, sec. 41 (1)—7 Edw. VII. ch. 56, sec. 6—Net Permanent Revenue Capitalized—Remission to Arbitrators.

Appeal by the street railway company from order of BRITTON, J., 9 O. W. R. 412, dismissing the appellants' motion to set aside an award of a board of arbitrators appointed by the parties to value the appellants' electric railway, upon its assumption by the respondents, the municipal corporation of the town of Berlin.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A.

J. Bicknell, K.C., for the appellants.

H. L. Drayton, K.C., and J. A. Scellen, Berlin, for the respondents.

GARROW, J.A.:—Several matters were argued before us by the learned counsel for the appellants, but, as the reference and the award were both confirmed by statute (see 7

Edw. VII. ch. 58), it is quite beyond question, I think, that the only matter open is the one reserved by the last section (6) of that statute, namely, the amount, which it is there said may be varied on appeal. And the contest is not so much as to the allowance or disallowance of particular items, except in one or two instances, as to the principle upon which the arbitrators proceeded.

The language of the statute, R. S. O. 1897 ch. 208, sec. 41 (1), is as follows: ". . . The municipal corporation may, after giving 6 months' notice prior to the expiration of the period limited, assume the ownership of the railway and all real and personal property connected with the working thereof, on payment of the value thereof, to be determined by arbitration." The arbitrators determined that the sum of $75,200 "is the actual present value," and in the award they say that they declined to accede to the contention of the company that the proper mode to proceed was to ascertain the present net earnings and to capitalize that amount. They also say that, in arriving at that value, they valued the railway as "a railway in use and capable of being used and operated as a street railway," but did not allow anything for the value of any privilege or franchise whatsoever, either in the town of Berlin or in the town of Waterloo.

These abstracts from the award sufficiently indicate the appellants' contentions upon the question of value, the same arguments having apparently been addressed to the arbitrators as were afterwards addressed to us.

Britton, J., agreed with the arbitrators and dismissed the appeal, largely upon the authority of the case in the House of Lords of Stockton, etc., Water Board v. Kirkleatham Local Board, [1893] A. C. 444, which, in his opinion, could not be distinguished. There a water board was constituted by a special Act, with the right of supplying water within the boundaries of two boroughs and certain districts beyond these boroughs, "provided that, when so required by the sanitary authority of any such outlying district, the board shall sell to such sanitary board the mains, pipes, and fittings belonging to the board, within that district, at a price to be fixed, in default of agreement, by an arbitrator, and after such sale the board should cease to supply water within such district." And it was held that the word "price" did not mean "compensation," and that in fixing the price the basis of calculation should be merely the value

of the mains, pipes, and fittings, regarded as plant in situ, capable of earning a profit, and that the arbitrators could not, in addition, allow compensation for the loss of the right to supply water within the outlying district. There the arbitrator stated that his mode of procedure was to take the cost of the mains, pipes, and fittings, of laying them down, and making good the ground, and to deduct a sum for depreciation. And while in that case this was held to have been proper, Lord Herschell, L.C., at p. 449, says that it might not be proper in all cases, and instances a case, not unlike the present, where there had been from time to time an expenditure in perfecting the system and bringing in no immediate return. And as applicable to such a condition he says: "It is obvious that any one who found that whole system complete and ready for working would be prepared to give more for it than the aggregate sums which had been spent in constructing it, inasmuch as he would have it then ready, and, as soon as he paid his money for it, he would be in a position almost immediately to begin earning a profit, at all events much more quickly than if he had occupied a good deal of time in its construction."

In addition to these qualifying remarks, there are also other material differences. What is taken in the present case is the whole system or railway all ready to use, and capable at once of earning, and earning a profit; there only the "mains, pipes, and fittings" in the outlying district were to be acquired, and these only could be made available by being afterwards connected with some other system of supply. There what was to be paid was the "price" of these definite articles, neither more nor less; here the corporation could only assume the ownership of the railway on paying the "value" thereof. "Value" and "price" may occasionally mean the same thing, but not necessarily so. These considerations lead me, with deference, to the conclusion that, whatever may be the proper result of this appeal, the authority upon which Britton, J., so much relied is not in the way of reconsidering the award.

In the English Tramways Act, 1870, the corresponding provision is expressed as "the then value (exclusive of any allowance for past and future profits of the undertaking or any compensation for compulsory sale or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters, suitable to and used by them for the purposes of their undertaking within such

district." And a similar provision is contained in the London Street Tramways Act, passed at the same session.

Under these Acts there have been two decisions in the House of Lords, namely, Edinburgh Street Tramway Co. v. Lord Provost of Edinburgh, [1894] A. C. 456, and London Street Tramway Co. v. London County Council, ib. 489, which, while the language of the statutes there in question is still not identical with that of our statute, seem to me to be more in point than the case relied on by Britton, J. The "then value" is not different, I think, from the "value," which must refer to the period at which the railway is assumed by the municipality. And the term "tramway" may well be regarded as the equivalent of "railway" in our Act. The main difference is in the use of the words contained in the parenthesis. The decision was, Lord Ashbourne dissenting, that the word "tramway" meant the structure laid down, and nothing more, and did not include the statutory powers conferred on the company; that the arbitrator was right in rejecting all evidence of past and future profits, and in awarding that the "then value" of the tramway and all lands, buildings, works, etc., must be measured by what it would cost to establish a tramway, if it did not exist, subject to a proper deduction in respect of depreciation.

But it is impossible to read the judgments without seeing that much stress was laid upon the words in parenthesis, and that, if they had not been there, the judgment of the Divisional Court setting aside the award and remitting the matter to the arbitrator might not have been disturbed. The opinion of the Divisional Court, in very carefully considered and to my mind well-reasoned judgments, was that, notwithstanding the parenthetical words, the "value" was to be ascertained upon a profit-producing basis, and not merely upon the actual value of the material in situ. No two statutes, much less conditions of fact, are usually identical, and all the circumstances must in each case be considered in order to arrive at what the legislature intended.

Not much value is contained in the bald word "value" used in the section which I have set out, and yet there is always this, that justice, not confiscation, is to be presumed in such a case. Under the provisions of secs. 42, 43, 44, 45, the municipality may operate the railway or may transfer it to a new or other company. And, of course, the municipality might have granted the franchise for a second

term of 20 years to the present company, upon terms to be agreed upon.

The statute plainly contemplates the continuous operation of the railway by one mode or the other, with periodical renewals of the franchise, when new terms may be agreed upon, or the railway may be taken over by the municipality. What, then, is the "value" intended by the statute? The question is certainly not without its difficulties. The English decisions, depending on statutory provisions not identical, while they help, do not determine the question. There are, it appears to me, but the two courses: one, to value the material of the railway, including, of course, its lands; the other, to take its net permanent revenue and capitalize that—the result representing its real value. If a railway was being operated at a loss, or without profit, the first would be apparently the proper course, because it would have no value beyond the value of its parts, but, if it does produce, as this railway does, a very considerable profit, and if it appears that such profit has the quality of permanency, then the other method appears to me to be the only one which could do justice to both parties. The company gets the fruit of its enterprise and its long years of waiting, and the municipality gets the railway, and at once receives the profits; in other words, it gets value as well as gives. It was not, I am sure, intended that the municipality should gain at the end of the 20 years at the expense of the company. The municipality parted with the franchise for nothing for the first period of 20 years, and, taking one year with another, it was really worth nothing during that period. Now it has become valuable because of the enterprise and success of the company. But each has had or is entitled to have simply what was bargained for. So that no question of franchise, either in Berlin or in Waterloo, during that period, has, in my opinion, anything to do with the valuation, either by way of increase or deduction. If a new bargain was being made, as might but for the action of the municipality have been the case, a price could have been put upon the franchise for the next period, but, on the other hand, if agreed to, the company would in that case receive the benefit of all future increases in profits, and the one would probably balance the other.

The net annual sum which is to be capitalized should, of course, be arrived at with care. It is not necessarily the net income of the last year, although the "value" is to be

that at the end of the 20 years. Everything abnormal should be eliminated. With this view, the previous years, as many of them as may be necessary, should be carefully examined to see that any gain is likely to be permanent. It should, of course, also be ascertained that the plant is in such condition that, by a normal expenditure upon repairs and replacements, the net annual profit for the year selected for capitalization may reasonably be expected to be capable of being maintained, and due allowance made if the reverse is found to be the fact.

All these elements at least, and perhaps others, enter into the question of what is the real net annual value of the railway, but, when that is ascertained, the rest seems to be mere matter of calculation.

I think the award should be set aside, and the matter remitted to the arbitrators for reconsideration, and that the costs of the appeal should be paid by the respondents.

OSLER and MACLAREN, JJ.A., concurred.

MOSS, C.J.O., dissented, for reasons stated in writing.

DECEMBER 31ST, 1908.

C.A.

POW v. TOWNSHIP OF WEST OXFORD.

Highway — Obstruction — Injury to Traveller — Deviation from Travelled Way — Nuisance — Misfeasance — Responsibility of Township Corporation — Toll Road — Removal of Tolls — County By-law — Validating Statute — Toll Roads Act — Electric Railway Tracks Laid on Portion of Highway — Track Raised above Level — Contributory Negligence — Primary Responsibility of Municipality for Fault of Electric Railway Company — Statutes.

Appeal by defendants from order of a Divisional Court, 11 O. W. R. 115, reversing the judgment at the trial, and directing judgment to be entered for plaintiff for $1,800 and costs in an action by the administratrix of the estate of Archibald Pow to recover damages for his death, caused

by being thrown out of a carriage while travelling on a highway in the defendants' township, owing, as alleged, to such highway being out of repair.

The appeal was heard by Moss, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.,

E. F. B. Johnston, K.C., and G. F. Mahon, Woodstock, for defendants.

W. M. Douglas, K.C., and W. T. McMullen, Woodstock, for plaintiff.

Moss, C.J.O.:—I am of opinion that the judgment of the Divisional Court should be affirmed and this appeal dismissed. Without adopting all the reasons assigned by the learned Chancellor, I entirely agree with his conclusion.

The only question presenting any difficulty is, whether the defendants or the municipality are properly responsible to the plaintiff.. I think the learned Chancellor has demonstrated that, at the time of the happening of the accident on account of which this action was brought, the highway in question was under the jurisdiction of the defendants, and that it was their duty to maintain it and keep it in repair.

The legislation, parliamentary and municipal, bearing upon the question, is not very clearly expressed, but no one can read it without receiving the impression that until the passing of by-law No. 558 of the county of Oxford, which was validated by the legislature on 20th April, 1907, the intention was that the duty of maintaining and keeping in repair and of exercising municipal jurisdiction over this highway was vested in the township of West Oxford. Prima facie it was not of the character of highway over which a county council would have exclusive jurisdiction, unless assumed by by-law, with the assent of the township, under sec. 613 of the Municipal Act, R. S. O. 1897 ch. 223, now sec. 613 of 3 Edw. VII. ch. 19.

The other mode by which it might be made a county road, under the Act for the Improvement of Public Highways, was not adopted. Instead, there was a special arrangement embodied in by-law No. 519 of the county of Oxford, validated by the Act 4 Edw. VII. ch. 60, the manifest object of which was to prevent the operation of the Act for the Improvement of Public Highways, so far as jurisdiction and duty to maintain and repair the highway in question was concerned. The state of things provided for by the by-

law continued until after the happening of the accident, and until the coming into effect of by-law No. 588, by which it is provided that the highway in question, with others, is assumed and is to be thereafter maintained and kept in repair by the county. It is said that this by-law has only been declared by the legislature to be binding upon the corporation of the county. The legislation goes further, and declares that the by-law is legal and valid. Without the assistance of the legislature the by-law would not effect a valid assumption of the highway as a county road. It would not so operate under the Municipal Act for want of the assent of the township, nor would it under the Acts for the Improvement of Public Highways, for lack of compliance with their provisions.

I think the defendants fail to shew that the responsibility under the Municipal Act for the damages allowed to the plaintiff does not rest on them.

GARROW, J.A., gave reasons in writing for the same conclusion.

OSLER and MACLAREN, JJ.A., also concurred.

MEREDITH, J.A., dissented, being of opinion, for reasons stated in writing, that the defendants were not under any legal obligation to keep the highway in repair.

DECEMBER 31ST, 1908.

C.A.

BAGNALL v. DURHAM RUBBER CO.

Master and Servant — Injury to Servant — Negligence — Findings of Jury — Workmen's Compensation Act — Damages.

Appeal by defendants from judgment of MACMAHON, J., upon the findings of a jury, in favour of plaintiff for the recovery of $4,500 in an action for damages for personal injuries sustained by plaintiff while working in defendants' factory, owing to the negligence of defendants, as alleged.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

G. T. Blackstock, K.C., and D. B. Simpson, K.C., for defendants.

W. N. Tilley and R. H. Parmenter, for plaintiff.

MOSS, C.J.O.:—The defendants appeal against the finding of negligence and the judgment affirming their liability therefor to the plaintiff, as well as upon the ground that, in any event, damages could only be awarded under the Workmen's Compensation for Injuries Act. The plaintiff's statement of claim seems to point to the conclusion that he was proceeding under the Act rather than with a view to establishing a liability at common law. But, whether or not, the true conclusion from the evidence and the jury's findings is, that the accident was due to defects in the iron bar not remedied as they should have been, owing to the negligence of the person intrusted with the duty. And this conclusion leads to the further conclusion that the damages must be reduced to $1,500.

It was conceded on the argument that the plaintiff's case could be put no higher as regards damages, even though the defendants were found guilty of a breach of the provisions of the Factories Act.

The judgment must be varied to the extent of reducing the damages to $1,500, and with this variation the appeal is dismissed. There will be no costs of the appeal.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

DECEMBER 31ST, 1908.

C.A.

COLLINS v. TORONTO, HAMILTON, AND BUFFALO R. W. CO.

PERKINS v. TORONTO, HAMILTON, AND BUFFALO R. W. CO.

Negligence — Explosion of Natural Gas — Injury to Servants of Railway Company in Workshop—Liability of Railway Company—Master and Servant — Workmen's Compensation Act — Findings of Jury — Use of Proper Precautions — Inspection of Appliances—Liability of Gas Company — Defective System—Damages.

Appeals by defendants from judgments of FALCONBRIDGE, C.J., upon the findings of a jury, in favour of the

respective plaintiffs. The first action was brought by James Collins to recover $15,000 damages for injuries received owing to an explosion of natural gas alleged to have taken place on 1st November, 1906, in the repair shops of the defendants the railway company at Hamilton, the gas plant having been installed by defendants the Dominion Natural Gas Company. The plaintiff Collins claimed at common law and also under the Workmen's Compensation Act and the Factories Act, and alleged negligence of both defendants in the installation and defective condition of the plant and appliances. The jury found in favour of plaintiff Collins, and assessed his damages at $7,000, for which judgment was ordered to be entered against both defendants with costs. The second action was brought by Florence Mary Perkins, widow, and Elizabeth Perkins and Irene Perkins, infant children, of George Perkins, who was killed in the same explosion which injured Collins, against the same two defendants, to recover damages for his death. A verdict and judgmetn were given for the plaintiffs, $2,000 damages for the widow and $500 each for the children.

The appeals were heard by MOSS, C.J.O., OSLER, MACLAREN, MEREDITH, JJ.A.

G. Lynch-Staunton, K.C., and G. M. Clark, for defendants the Dominion Natural Gas Co., appellants.

C. J. Holman, K.C., and J. A. Soule, Hamilton, for defendants the railway company, appellants.

J. G. Farmer, Hamilton, for plaintiff Collins, respondent.

D'Arcy R. C. Martin, K.C., for plaintiffs Perkins, respondents.

OSLER, J.A.:—The plaintiff Collins was a workman in the employment of the defendant railway company in their repair shops in the city of Hamilton, and was injured by an explosion of gas which occurred there on 1st November, 1906. The gas was introduced into the repair shops by means of plant, machinery, and appliances installed there by the defendants the gas company, under a contract with the railway company. The negligence alleged and mainly relied upon as against the gas company was the omission to attach to the safety-valve a pipe carried through the roof of the building, by which gas, which might escape in case of the valve for any reason failing to act properly, would be led harmlessly into the outside air, instead of being discharged within the

building. As to the railway company, the plaintiff sued as well at common law as under the Workmen's Compensation and the Factories Acts, and charged the defendants with negligence in allowing the plant to be placed and to remain inside the shops in its defective and dangerous condition, and in not inspecting it or having it inspected by the gas company from time to time. Negligence on the part of the servants of the railway company in connection with the works was also alleged.

At the trial it was proved that the gas plant had been installed by the gas company in the machine or repair shops of the railway company under a contract by which the latter granted to the former a license to lay a pipe line for the conduct of natural gas to the town of Dundas in and along the lands of the railway company and under its railway embankment. In part consideration for the license, the gas company agreed to furnish the railway company, at the points and buildings specified, such supply of gas as might be required by them; and at the rates specified. They agreed to lay, at their own expense, a connecting 2-inch iron or steel screw pipe to the machine shops of the railway company (the place in question), to furnish meters and regulators thereto, and pay for all requisite testing and inspection thereof; the pipes supplying the gas to be run to the meters, which were to be placed inside the building where desired by the railway company; all pipes to be tight and kept so by the gas company; all such work to be done under the supervision of the railway company's employees and to the satisfaction of their chief engineer, and to be maintained at the sole expense of the gas company. Clause (g) of sec. 2 provides that, subject to clause (c)—which relates to accidental breaks in the pipe line and any failure or interruption in the supply of gas caused thereby and the exhaustion of gas in the gas fields—the gas company is at all times to indemnify the railway company and its employees and property against accidents, and is to do anything that is requisite or necessary or that may be desired by the company to safeguard life and property. There are other provisions of a similar nature, which appear to refer to the main pipe line only.

The gas company was familiar with the proper methods of installing appliances of the kind in question. The railway company was not. There was much evidence that it was dangerous and improper to have the meter and regulator under the building, and that, if the regulator and safety-

valve or relief-valve were inside, there should be a pipe attached to or in some way connected with the latter, passing through the roof or to the outside air so as to prevent the escape and accumulation of gas within the building.

It is unnecessary to refer at length to the evidence of the facts immediately preceding the explosion, or of the conduct of the plaintiff Collins and his fellow workman Perkins at that time. These were gone into in minute detail, chiefly with the object of shewing that there had been negligence or contributory negligence on their part, which caused it. They have been exonerated by the findings of the jury.

Suffice it to say that, while they were engaged in their work, in the early morning of 1st November, 1906, a violent explosion of gas, which had escaped in considerable quantity into the machine shop, took place, which injured the plaintiff Collins severely and killed his fellow workman.

The efforts of each of the defendants seem to have been chiefly directed to throwing the blame for the escape of the gas upon the other. In particular the gas company contended that dirt had been allowed to accumulate in the regulator, thereby preventing the seat of the valve from fitting closely, and so permitting the gas to escape, and that one Stenison, a man in the employment of the railway company as steam-fitter, had inserted a small Westinghouse cut-off or check-valve in the pipe on the high pressure side of the regulator, that is to say, before the pipe entered the meter, and that the gas had escaped through this valve in consequence of its having been left open, and not through the safety-valve. Much evidence was given on both of these points, that of the railway company being directed to shewing that the check-valve was kept locked when not in use for the special purpose for which it had been inserted, and that a day or two before the explosion the superintendent of the gas company (who was not called as a witness) had inspected the regulator and meter and reported the former right and working properly.

The case went to the jury with a very full and careful charge, which was not objected to, their attention being specially called to the question, from which valve had the gas escaped? Questions were submitted, which with the answers of the jury are as follows:—

1. Was the the injury to the plaintiff Collins and to Perkins caused by any negligence of the defendants the railway company? A. Yes.

2. If so, wherein did such negligence consist? A. By the company allowing their men to tamper with the gas plant.

3. Was the injury to the plaintiff Collins and to Perkins caused by any negligence of the defendants the gas company? A. Yes.

4. If so, wherein did such negligence consist? A. By not running a pipe up through the roof.

5. If you find the accident was caused by the escape of gas, from which valve do you find the gas escaped? A. Safety-valve.

6. If you find that there was any defect in connection with the system of this gas service, did plaintiff Collins or Perkins, or both of them, know of such defect, and did they, or either of them, fail to notify defendant of such defect? A. They did not. They did fail.

7. Was the injury to the plaintiff Collins caused by any negligence on his own part? A. No.

8. Could the plaintiff Collins, by the exercise of reasonable care, have avoided the accident? A. No.

9. Was the injury to Perkins caused by any negligence on his own part? A. No.

10. Could Perkins, by the exercise of reasonable care, have avoided the accident? A. No.

11. At what sum do you assess the damages for Collins? At what sum do you assess the damages for Perkins's death, apportioning the amount, if you think proper, among the widow and the two children? A. Collins, $7,000; Perkins's widow, $2,000; each child, $500.

In answer to the learned Judge, the jury further explained that their answer to question 5, as to which valve the gas escaped from, meant that it was not the one put in by Stenison, but the "big valve," which was the safety-valve.

Judgment was directed for the plaintiff against both defendants for the full amount found by the jury.

As regards the railway company: these defendants are, in my opinion, entitled to judgment. They employed or authorized people against whose competency for the purpose nothing can be said or was said, to install the plant and machinery, and they had it inspected just before the accident, and were assured that the regulator was in proper order. The finding of the jury must be taken to absolve them from all negligence in either of these respects or in installing and using a defective system or plant, as the only negligence found against these defendants is that they "allowed" their

men to tamper with the plant. This is, by itself, a finding of somewhat uncertain meaning, but the expression "tamper" was used several times in the course of the case in reference to what was done and complained of, as negligence, so that we may understand it as counsel for the plaintiff understood it at the trial and on the argument before us, as referring to Stenison's action in inserting the Westinghouse valve, or cut-off, and to anything else which he or any of the other servants of the company did in connection with the machinery. There is no evidence, however, that anything was "allowed" or authorized by the company in any other sense than that it was done by one or more of the plaintiff's fellow-servants in the course of their common employment with him, in the defendants' service, and therefore the case, as one of negligence and liability at common law, entirely fails. It fails also under the Workmen's Compensation Act, there being no evidence to shew that the insertion of the Westinghouse cut-off or check valve, from which, by the finding of the jury, the gas did not escape, could have caused or increased its escape from the safety-valve. The same observation applies to all the other acts, whether of Stenison or of workmen in no position of authority, such as Perkins and Finch; and, even if anything which they did was detrimental, the other findings necessary to establish liability are wanting.

I must add that if a case under the Act had been thought capable of being established, a new trial would probably have been necessary, the damages having been assessed against the defendants jointly and as at common law.

As regards the gas company, I think the judgment should stand. They were installing in the railway company's shops a plant by which the natural gas to be supplied by them was to be introduced and used there in a room where the company's servants were constantly employed. Natural gas, when escaping free into a room, is a substance of a highly explosive and dangerous character, even more so than ordinary illuminating gas, and, its odour being very slight, its presence and accumulation in dangerous quantities is not readily perceptible. In such circumstances, the defendants owed a duty to those who would be exposed to danger in using it to use such ordinary precautions as would obviate the danger, and as, indeed, their contract with their co-defendants called upon them to do.

The jury have found that they were negligent in this respect, and their finding is well supported by the evidence. The case of Parry v. Smith, 4 C. P. D. 325, is much in point. There (to quote from the head-note) the defendant, a gas fitter, was employed by the plaintiff's master to repair a gas meter upon his premises, and for the purpose of doing so took away the meter, and, in lieu of it, made a temporary connection by means of a flexible tube between the inlet pipe and the pipe communicating with the house. The plaintiff having gone, in the ordinary performance of his duty, with a light, into the cellar where the meter had been, gas, which had escaped by reason of the insufficiency of the connecting tube, exploded and injured him. The jury found that the work had been negligently done, and it was held that the defendant was liable. Lopes, J., said: "The plaintiff's right of action is founded on a duty which I believe attaches in every case where a person is using or is dealing with a highly dangerous thing, which, unless managed with the greatest care, is calculated to cause injury to bystanders. To support such a right of action there need be no privity between the party injured and him by whose breach of duty the injury is caused, nor any fraud, misrepresentation, or concealment, nor need what is done by the defendant amount to a public nuisance. It is a misfeasance independent of contract." See also Rapson v. Corbett, 10 M. & W. 710; Pollock on Torts, 8th ed. (1908), pp. 503, 504; and Beven on Negligence, 3rd ed., pp. 63, 64, 501.

On these grounds the case is distinguishable from Winterbottom v. Wright, 10 M. & W. 109, Caledonian R. W. Co. v. Mulholland, [1898] A. C. 216, Earl v. Lubbock, [1905] 1 K. B. 253, and cases of that class.

In the result, therefore, the appeal of the railway company is allowed, and the action as against them dismissed with such costs as were properly incurred by them in the action and appeal. In taxing these costs, the taxing officer must have regard to the order of the 19th November, 1907, directing that one appeal book should be printed for both cases.

The appeal of the gas company is dismissed with such costs as are properly taxable against them.

In the Perkins case, the appeal of the railway company is allowed, and the action dismissed as to them, and the appeal of the other defendants is dismissed. . . . The costs are disposed of in the same way.

MOSS, C.J.O., concurred, for reasons stated in writing.

MACLAREN, J.A., also concurred.

MEREDITH, J.A., was of opinion, for reasons stated in writing, that the appeals of both defendants in the two actions should be dismissed with costs.

DECEMBER 31ST, 1908.

C.A.

RUDD v. TOWN OF ARNPRIOR.

Municipal Corporation—Drainage—Overflow of Water—Injury to Building—Liability of Municipality—Evidence—Findings of Fact—Damages—Mode of Estimating—Reference—Fixing by Court on Appeal.

Appeal by plaintiff and cross-appeal by defendants from the order and decision of a Divisional Court, 11 O. W. R. 886, affirming (with a slight variation) the judgment of ANGLIN, J., at the trial.

G. F. Henderson, K.C., for plaintiff.

Glyn Osler and J. E. Thompson, Arnprior, for defendants.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.), was delivered by

GARROW, J.A.:—The action was brought by the plaintiff to recover damages caused to his property by the negligent construction by the defendants of certain highways and drains in the town of Arnprior, which caused an increased flow of surface water to reach his premises, with the final result that after a heavy thunder storm on 20th July, 1907, his building collapsed, the walls having been previously weakened, as was said, by the action of such additional surface water.

Anglin, J., held that the plaintiff had established a right to recover some damages, but not to the main damages claimed by him, and referred the matter to the Master at Ottawa to ascertain such damages, and also granted relief

by way of injunction after the expiry of 9 months allowed to the defendants to make proper provision to prevent the continuance of the nuisance complained of. The inquiry as to damages was limited to the period prior to 20th July, 1907, but this the Divisional Court varied so as to extend the period down to the inquiry, and otherwise dismissed the appeal.

The facts are very fully set forth in the judgment of Anglin, J. The issues were issues of fact, some of them depending upon the credibility of the witnesses. And, in my opinion, no good ground has been shewn for disagreeing with the conclusions of that learned Judge, confirmed as they have now been by the unanimous opinion of the Divisional Court. I therefore think that the plaintiff's appeal should be dismissed with costs.

I confess to having had greater difficulty with the defendants' cross-appeal to be entirely relieved from the acts of negligence complained of.

The plaintiff's building was constructed on a hillside, and over a gully down which the surface water from the upper lands must, in the natural condition, have flowed in considerable quantity. He was asked by his own counsel: "Q. And your factory is built on the side slope, and what was formerly a gully, would you call it, leading into the river? A. Yes." In front ran Madawaska street, leading in one direction down hill to the river, and in the other intersected by John street at or near the brow of the hill. Madawaska street in front of the plaintiff's premises had long ago been filled in to a considerable depth with slabs, which did not extend quite to the plaintiff's walls, but left a space forming part of the plaintiff's land, of about 18 inches along the front of the building under the sidewalk, which was left open, and which space was, in places, it is said, 10 feet deep, down which water must always have flowed in some quantity, apparently without doing any appreciable injury. But, when the street improvements were in progress in the years 1905 and 1906, this space was filled in by the defendants with clay. And this, it must now be assumed, was done at the plaintiff's express request, notwithstanding his denial, the evidence to the contrary being very clear and strong and the fact distinctly found against him by the learned Judge. There is some evidence, more or less vague, of excessive dampness in the basement prior to the year 1905, but a careful perusal of all that

bears upon that subject leads me to the conclusion that there was no actionable damage prior to that year. I have not overlooked the fact that the plaintiff wrote complaining of the increased quantity of water in October, 1903, but that water was evidently being disposed of by falling into the trench then open, and could have caused little or no damage. And the plaintiff himself must have thought better of it, for he did not apparently persevere with his complaint. It is apparent that, until the trench was filled up, the water flowing in the bottom must have risen very considerably before it could reach the brick wall, which rested upon a stone foundation, and there is no sufficient evidence that this had ever happened before the filling in of the trench. But the filling-in enabled the water for the first time to reach and to affect the brick wall, and then began the complaints of water coming through the brick wall. Eadie, a workman in the plaintiff's employment, was asked if he ever saw any more than the ordinary dampness usual in a basement, and he answered, no, not until the last couple of years, since when he had seen water coming through the brick wall. He had never noticed it coming through the stone wall below, as it probably never did. The water came in, not at one place, but all along the brick wall—"You could not see it running, but you could see there was water coming through." And this rendered the basement so damp that the plaintiff had to move out the machinery. He had seen no dampness to speak of before the filling in. McCormack and Allen, two other workmen, gave testimony practically to the same effect. Stiles, another workman, spoke of dampness before the street alterations, but in a very indefinable way. And the occasion on which he finally complained that he could no longer work in the basement, on account of the dampness, was certainly after the filling-in. The weight of evidence, therefore, is, in my opinion, decidedly in favour of the view that until the trench was filled and the street surface thus brought into contact with the brick wall, there was no substantial injury of which the plaintiff could complain. And, after the filling in of the trench, the only actionable injury would be that caused by the excess of water brought to his premises by reason of the street improvements of which he complains, and for the carrying away of which no adequate provision was made. And to separate this, and estimate its injurious consequences apart from that resulting from the ordinary flow of water, for the consequences of which he cannot com-

plain, is the difficult, if not impossible, task which has been set by the reference for the Master.

I cannot say, upon the whole evidence, that there is no actionable injury. The contrary has been found by the learned Judge. The defendants should make provision by proper drains or sewers for the safe carrying away of the increased water now sent towards the plaintiff's premises, largely, apparently, by reason of the elevation of the John street crossing. And it is quite right that the plaintiff should be protected by the injunction which has been awarded against a continuance of the nuisance. But it seems to me that, under all the circumstances, the damages in the past might well be regarded as practically nominal, and that it would, I think, be a kindness to the parties, as well as in the furtherance of substantial justice, to spare them a long, expensive, and exceedingly difficult reference, by fixing the damages at, say, $100. It is quite true that early in the trial, and apparently accepted by both sides, a reference was suggested—a perfectly proper proceeding if the plaintiff had succeeded in the main purpose of his action, but, having failed in that, he is not, I think, entitled, under all the circumstances of the case, to insist upon the reference. The nature and extent of the injury upon which he succeeds is apparent. Water came in through the brick wall, some of it by reason of the wrongful act of the defendants, and some of it due to the situation of the premises and to the filling in of the trench, the combined result being that the plaintiff was compelled to move the machinery to another floor, and lost the full and previous use of the floor called the basement. How much of all this was due to the one cause and how much to the other, no one can tell, although, doubtless, there will be plenty of witnesses, expert and otherwise, ready to do the guessing usual in such cases. A further guess would have to be made by the Master, followed, no doubt, by a later series, by way of appeal, with at each guess an expense probably exceeding the whole amount of the actual damage. From all that the parties may well be spared, I think, by fixing the amount, even if the sum I name is a little too high or a little too low.

With this variation, I would dismiss the plaintiff's appeal and the defendants' cross-appeal, both with costs.

LATCHFORD, J. JANUARY 2ND, 1909.

WEEKLY COURT.

RE FOSTER AND KNAPTON.

Dower—Limitation of Actions—R. S. O. 1897 ch. 133, sec. 25—Absence of Claimant from Province—Sale of Land Free from Dower—Vendor and Purchaser.

Application by William Foster, the vendor of the south half of lot 12 in the 5th concession of the township of Middlesex, for an order, under sec. 4 of R. S. O. 1897 ch. 134, declaring that the requisition of title served by the purchaser, Thomas Knapton, had been satisfied.

R. G. Fisher, London, for the vendor.

W. R. Meredith jun., London, for the purchaser.

F. P. Betts, London, for Mary Wagner.

LATCHFORD, J.:—The facts in this case are not in dispute. Thomas Foster, the owner at the time of the lands in question, died intestate on 30th November, 1884, leaving a widow, who died in 1896, and 9 children, one of whom is the vendor. One of the children, Joseph, died in 1888, leaving a widow and one child. Another, Charles, died in November, 1885, leaving a widow and two children. The children of Thomas Foster and the children of his deceased children, Joseph and Charles, have granted and released all their interest in the lands of the vendor. The widow of Charles Foster, who remarried, and is now Mary Wagner, claims dower in the interest which her first husband had in the lands, and the only question for the opinion of the Court is whether the vendor has the right to convey free from her claim.

Her right to dower arose upon the death of her husband in 1885: Laidlaw v. Jackes, 25 Gr. 293. She is said to have been then of full age. Soon after her husband's death she went to the United States, and has been absent from Ontario for about 20 years.

Section 25 of R. S. O. 1897 ch. 133 provides that no action of dower shall be brought but within 10 years from the death of the husband of the dowress, notwithstanding any disability of the dowress or any person claiming under her.

Her absence from the province did not prevent the statute from running: Begly v. St. Patrick's Literary Assn., 23 U. C. R. 395.

Had Mary Wagner been in actual possession of the lands, either alone or with heirs of her husband, the period within which her action could be brought would be computed from the time when her possession ceased: sec. 26 of R. O. 1897 ch. 133. But there is no pretence that her possession, if it ever existed, did not cease when she went to the United States. She cannot now maintain an action for dower, and the vendor is, in my opinion, entitled to convey the lands in question free from the claim asserted by the widow of Charles Foster.

The vendor should pay the costs other than those of Mary Wagner, who is not entitled to any costs.

JANUARY 2ND, 1909.

DIVISIONAL COURT.

RE WESTERN AND NORTHERN LAND CORPORATION AND GOODWIN.

Mines and Minerals—Mines Act, sec. 109—Land Reserved or Set apart as a Town Site—Land Subdivided by Private Owner and Plan Registered under Surveys Act—Mining Claim—Compensation—Mines Act, sec. 119.

Appeal by the corporation from an award of the Mining Commissioner, dated 3rd June, 1908, made upon an application to him by Goodwin, the holder of a mining claim upon the lands in question, fixing the compensation to be paid by Goodwin to the appellants, the owners of the surface rights, under the provisions of sec. 119 of the Mines Act, 1906, the payment or securing of which is, by sec. 122, a condition precedent to the right of the respondent, Goodwin, to a certificate of record of the staking out of the claim.

R. McKay, for the appellants.

H. L. Drayton, K.C., for the respondent.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), was delivered by

MEREDITH, C.J.:—The appellants object to the question of compensation being dealt with by the Mining Commissioner, and contend that, by reason of the provisions of sec. 109, the land in question was not open for staking out or recording as a mining claim without the order of the Minister of Lands, Forests, and Mines, and that no such order was made.

The land on which the mining claim was staked out consists of a farm lot in the township of Bucke, in the district of Nipissing (lot 12 in the 2nd concession.) This lot the appellants procured to be subdivided into a very large number of small lots, with streets and avenues, and a plan of the subdivision, which is designated on itself "plan of subdivision of lot 12, concession 2, township of Bucke, Nipissing," to be made. This plan they registered in the proper land titles office, and lots according to the subdivision have been sold by them. All this was done before the staking out of the mining claim.

The subdivision is sometimes called North Cobalt, and houses have been built on some of the lots.

It is contended by the appellants that, in these circumstances, the land on which the mining claim was staked out was at the time of the staking out "land included in or reserved or set apart as a town site," within the meaning of sec. 109 of the Act.

The section reads as follows: "109. No mining claim shall be staked out or recorded on any land included in or reserved or set apart as a town site, whether the same shall have been subdivided into town lots or not, or upon any station grounds, switching grounds, yard, or right of way of any railway, or upon any colonization or other road or road allowance, except by order of the Minister. Provided that all mines and minerals of every nature and kind in any lands which have been or may hereafter be transferred by any order in council under authority of chapter 7 of the Acts of the legislature passed in the 4th year of the reign of His Majesty shall, unless expressly reserved therein, be deemed to have been, and in the case of an order in council hereafter, unless therein otherwise expressly stated, shall be deemed to be, included as part of the said lands, and the said mines and minerals and the said lands are hereby declared to be exempt from the provisions of this section."

The Mining Commissioner refused to give effect to the contention of the appellants, and proceeded to determine the compensation to be paid, which he fixed at $1,500.

We are of opinion that the view of the Mining Commissioner as to the proper construction of the section was right.

In addition to the reasons given by the Commissioner for reaching his conclusion, which are set out in the award, it is to be remembered that the Act deals primarily and mainly with ungranted lands of the Crown, though it does also deal with mines which have been reserved by the Crown in lands granted by the Crown.

As the Commissioner points out, the expression "town site" is used only in two enactments of the provincial legislature, the first of these being an Act relating to the Temiskaming and Northern Ontario Railway, 4 Edw. VII. ch. 7, by the third section of which the Lieutenant-Governor in council was authorized to transfer to the Railway Commission for town sites certain ungranted lands along the line of the railway, and to take compulsorily from the owners for the same purposes other land so situate.

This Act and the Mines Act were passed in the same session, and it seems not unreasonable to infer that the town sites mentioned in sec. 109 were the town sites with which the legislature was dealing in the other Act. The proviso to sec. 109 does not, as it appears to me, displace this inference; it was added, no doubt, ex majori cautela, and to give legislative sanction to the transfer which before then had been authorized by order in council only.

The words "reserved or set apart" are more applicable to action taken by the Crown than to that of private persons.

It is also to be borne in mind that it was the practice in earlier times—whether that practice is still followed I do not know—in the original surveys of Crown lands to lay out what were called "town plots," and to reserve lands for town plots. Though the draftsman of the Mines Act does not use that term, he appears to have had in mind the same thing, to which he gave the name of "town sites."

Nowhere in the Surveys Act, R. S. O. 1897 ch. 181, under the authority of the 39th section of which the appellants' subdivision was made, is a town site spoken of, and in the Registry Act, R. S. O. 1897 ch. 136, sec. 100, which deals with plans of subdivided lands, the provision is, that "where any land is surveyed and subdivided for the purpose of

being sold or conveyed by reference to a plan . . . the person making the subdivision . . ."

To give to sec. 109 the meaning ascribed to it by the appellants would enable the mining districts to be covered with paper towns, the existence of which, though on paper only, would prove a handicap to prospecting and exploring the areas which they embrace, for they could be opened for that purpose only by the order of the Minister, the obtaining of which would involve delay and loss of time—important considerations for the prospector and miner.

That I am not putting it too strongly when I speak of covering the mining districts with paper towns, is shewn by the language of the section which exempts the land, whether divided into town lots or not, and there is, besides, no provision that a plan shall have been registered or even made, and none that lots shall have been sold according to a plan.

I am unable to attribute any such intention to the legislature, as it would mean that the owner might exclude the prospector or miner, while holding in his own hands the power at will to wipe out his subdivision, for that he might do though a plan had been registered as to the whole subdivision, if no lots had been sold according to the plan, and as to practically all except the lots which had been sold, had lots been sold.

In my opinion, the appeal fails and should be dismissed with costs.

TEETZEL, J. JANUARY 4TH, 1909.

TRIAL.

SERSON v. WILLSON.

Cemetery—6 Edw. VII. ch. 33 (O.)—Construction of secs. 1, 7—Trustees—Election—Right to Possession—Deed—Application of Statute to Unsold Lots—Sinking Fund—Account—Notice—Reference—Costs—Municipal Corporation—Payment into Court.

Action by plot owners and trustees for plot owners in Greenwood cemetery, Ridgetown, on behalf of themselves and all other plot owners, for a declaration of their rights under 6 Edw. VII. ch. 33, as trustees of the cemetery, and

for possession, and for payment by defendant Willson to defendants the corporation of the town of Ridgetown of all moneys received by him on account of the sinking fund of the cemetery, and of other moneys received, and for the appointment of the plaintiffs as trustees of the sinking fund in place of the corporation.

A. H. Clarke, K.C., and O. K. Watson, Ridgetown, for plaintiffs.

W. Mills, K.C., for defendant Willson.

M. Wilson, K.C., for the defendant corporation.

TEETZEL, J.:—The plaintiffs are plot owners and trustees for plot owners in Greenwood cemetery, and sue as such trustees and as plot owners on behalf of themselves and all other plot owners.

By deed of 29th September, 1885, one John Willson conveyed in fee simple to Charles Shaw and James W. Brown, in consideration of $2,000, 12½ acres, part of township lot 13 south of the middle road in the township of Howard, "for the express purpose of a public cemetery for the interment of the dead," and subject to the rules, regulations, and by-laws and conditions imposed by the parties of the second part, with power, however, for the said parties of the second part to mortgage the said land and premises, should they see fit.

Subsequently Brown and Shaw had a subdivision plan of the property made and recorded, and proceeded to sell lots for burial purposes in accordance therewith, upon the terms and conditions set forth in a pamphlet over their names, which was delivered to purchasers and circulated widely in the surrounding country.

One of the terms set forth in the pamphlet was that the land should be sold by the superficial square foot, the price to vary from 4 to 8 cents per square foot, according to location, and "two cents per square foot will be charged above the regular price for the sinking fund."

The pamphlet makes the following further provisions in regard to the sinking fund: "To ensure the keeping of ground in proper condition, a rate of two per cent. per square foot will be charged to form a sinking fund, the interest thereof to keep the ground in good order for all time, the corporation of Ridgetown to be the custodians . . . all moneys paid to the above fund shall be placed to a separate

account to form a sinking fund for the purpose of keeping lots and graves in order for all time. This plan has been adopted by the owners in the interest of the lot holders and for the better ordering and appearance of the cemetery. No further payment will be required or allowed to be made. Such care includes only grass cutting and cleaning paths and roads and keeping the cemetery in order."

In further pursuance of the above terms, the corporation of the town of Ridgetown passed a by-law on 5th January, 1886, wherein it is provided that it should be lawful for the treasurer of the corporation to receive from time to time such sum or sums of money as may be paid to him by any person or persons as purchase money of the burial plots in the said cemetery, and that the treasurer should keep an account of all such moneys, the same to be deposited or invested from time to time as may be directed by by-law or resolution of the council, and the dividends arising from the investment of the moneys shall be expended in such manner as may from time to time be directed by the trustees of the said cemetery, in accordance with the rules and regulations set forth in the above mentioned pamphlet, a copy of which is annexed to the by-law.

The plaintiffs and many other persons bought burial lots and interred their dead therein, paying the full price of 10 cents per square foot, but only a portion of the sinking fund of two cents per square foot has been paid in by the successive owners of the cemetery, and no part of it has been paid or applied in keeping the premises in good order.

In 1901 Charles Shaw and one Charles A. Shaw, then owners of the undisposed of portions of the cemetery, brought an action against the corporation of Ridgetown to recover the amount of the sinking fund then held by the corporation; and, objection having been taken by the defendants at the trial that the lot owners were not represented, the late Mr. Justice Street postponed the trial to allow the plaintiffs to add as third parties lot holders of the cemetery within two months; and directed that the action should be dismissed with costs if lot holders were not added within that time; and, the plaintiffs in that action not having complied with the terms of postponement, the action was dismissed with costs.

The corporation not having been able to collect the costs from the plaintiffs, the sum of $315 of the sinking fund was, by resolution of the council, appropriated for that purpose,

and I understand the plaintiffs in this action are not disputing the propriety of that act.

The defendants the corporation in their statement of defence admit holding a balance of the sinking fund, amounting to $277.38, which is on deposit in a chartered bank, and make no claim thereto, and consent to any disposition thereof which the Court may see fit to make, and express a desire to be relieved of any further responsibility in connection with the fund.

The last payment made to the sinking fund was by the former owner, Shaw, on 19th December, 1897.

By deed of 5th August, 1904, from Charles A. Shaw and others, the defendant Willson became the owner of the aforesaid 12½ acres, saving and excepting thereout all lots which had been sold for burial purposes, including lots 1, 2, 3, and 4, ward A., known as the Shaw plan, and by the same deed the grantors granted, relinquished, and quitted claim to Willson all their right, title, and interest into or out of the sinking fund, or any part thereof, or interest accumulated thereon.

Since the defendant Willson became owner, he has made sales of burial lots, but has not paid anything into the sinking fund.

I find upon the facts that when the defendant Willson purchased the property he was affected with notice of the rules, regulations, and terms contained in the pamphlet above referred to, and that he knew that a large number of lots had been purchased in pursuance of them.

The plaintiffs were duly elected trustees of the Greenwood cemetery burial ground by the plot owners therein, under the provisions of ch. 33 of 6 Edw. VII., and the certificate of their election was registered as required by sec. 6 of that Act.

The rights of the plaintiffs largely depend upon the construction to be placed upon that Act. Section 1 provides: "1. Where lands have been heretofore set apart or sold for burial purposes, and no provision has been made in the deed or other instrument setting apart such lands or in the conveyance thereof, or otherwise, for the appointment of trustees of such lands, the owners of plots in such burying ground may elect trustees in the manner hereinafter provided." And sec. 7 provides: "7. Upon the registration of such certificate, the said burying ground shall be vested in the trustees so appointed, subject to the provisions of the

deed or other instrument setting apart such burying ground or conveying the same or any lot therein for burial purposes, and subject to the rights of any persons who may have theretofore purchased plots in such burying ground, and subject to the provisions of any general law of the province applicable thereto, and the trustees elected under this Act shall have all the powers and perform all the duties with respect to such burying ground provided by the Act respecting conveyances to trustees of burying grounds, and all the provisions of the said Act shall apply to trustees elected under this Act, in the same manner and to the same extent as to trustees appointed under conveyances of lands for burying ground purposes therein."

The plaintiffs claim that not only the burial lots but the whole balance of the 12½ acres are vested in them as trustees under sec. 7, subject to the qualifications therein contained, and that they are entitled to possession as such trustees, and they ask for a declaration of their rights and for an account.

Now in this case the effect of the deed from Willson to Brown and Shaw is that the "lands were sold for burial purposes only," within the language of sec. 1, and the deed also contains no provision for the appointment of trustees. So far, therefore, the case seems literally to fit the description of property contemplated by sec. 1.

The provision of that section, however, "for owners of plots" electing trustees, would suggest that the owner, as in this case, of a large undisposed of portion of the original property, was not contemplated, and the argument of the defendant Willson is that sec. 1 only applies to those portions of the property actually disposed of for burial plots, and that sec. 7 is ineffective as against his title to the unsold portions.

For what seems to me the proper disposition of this case, it is only necessary to determine the right of the plaintiffs in reference to plots which have been sold and which may be sold, and I need only say that I entertain grave doubts as to the applicability of the Act as to the balance of the property.

As between the several owners of the burial plots, and as between themselves and their vendors and the public, I think th Act is clearly applicable. Then, if the Act has this limited application, what are the rights of the plaintiffs, as trustees, to the sinking fund?

In the first place, it is to be noted tnat the original founders of the cemetery in their pamphlet or prospectus, as quoted above, declared that the purpose of the sinking fund was "to keep the lots and graves in order for all time," and that that plan had been adopted by the owners in the interests of lot holders, &c.

It follows from these provisions that every purchaser of a plot was intended to have a common interest in the maintenance and application of the sinking fund.

As before stated, I find that the defendant Willson was affected with notice of all the terms and conditions upon which his predecessors held and sold the burial plots, and, in my opinion, his rights are no greater than were the rights of Brown and Shaw.

Under the Act the plots had become vested in the plaintiffs as trustees for all plot owners, with all the rights and powers conferred by the Act, and I think that whatever interest the plot owners have in the sinking fund must pass to the trustees as an incident to the property declared to be vested in them.

As against Willson, therefore, I think the plaintiffs are entitled to a declaration that he is liable to them for two cents per square foot on all plots sold or to be sold by him, with a reference to the Master at Chatham to take the necessary accounts. Costs and further directions reserved until after the report.

As against the corporation of Ridgetown, the plaintiffs as trustees are entitled to be paid the $277.38 and subsequent interest realized by the corporation.

The corporation under their appointment were trustees merely to hold and invest and to apply the funds as might be directed by the trustees of the cemetery according to the rules and regulations set forth in the pamphlet; and the plaintiffs are the only trustees that have been appointed.

I think the proper course for the corporation to have pursued was the one advised by their solicitor in his letter of 13th July, 1899, namely, to pay the money into Court under sec. 4 of the Trustee Relief Act. If this had been done, they need not have been made parties to this litigation, and much costs would have been saved. It is to be noted that this advice was given prior to the action by Shaw in connection with which the corporation were allowed $315 for costs. Not having adopted what was, I think, manifestly the

proper course, the corporation will only be allowed such costs out of the money in hand as would have been taxed on an application to pay into Court.

FALCONBRIDGE, C.J. JANUARY 4TH, 1909.

TRIAL.

McKINNON v. SPENCE.

Will—Devise—Recovery of Possession—Statutes of Limitation—Maintenance—Entry on Land—Legacies.

Action for a declaration as to the true construction of the will of Archibald Spence, late of the township of Mariposa, deceased, and for a declaration that the plaintiffs are entitled under the will to possession of certain land now occupied by defendant, and to other rights under the will.

F. A. McDiarmid, Lindsay, for plaintiffs.

E. D. Armour, K.C., and A. J. Reid, Cannington, for defendant.

FALCONBRIDGE, C.J.:—I am of the opinion that the Statutes of Limitation furnish a defence to all plaintiffs' claims.

Defendant has been in possession for 30 years, not accounting for rents and profits. The widow and Martha were not on the land as claiming ownership, but only as being supported under the will: Hartley v. Maycock, 28 O. R. 508.

Defendant is entitled to have the action dismissed with costs. At the trial defendant by counsel expressed his willingness, notwithstanding the lapse of time, to pay the plaintiffs Christina McKinnon and Martha Spence their legacies of $100 each, and this offer I direct him to carry out.

TEETZEL, J. JANUARY 5TH, 1909.

TRIAL.

MONAGHAN v. ONTARIO VETERANS LAND CO.

Vendor and Purchaser—Contract for Sale of Land—Failure of Vendor to Convey—Crown Lands—Appropriation for Town Site—Notice—Damages—Improvements Made by Purchaser.

Action for damages for breach of an agreement for the purchase and sale of lands.

G. H. Kilmer, K.C., for plaintiff.

J. K. Kerr, K.C., for defendants.

TEETZEL, J.:—The first question to determine is, whether the defendants were mere agents of the plaintiff to take and forward to the government an application under the Public Lands Act, or vendors of the lands to him.

Under an agreement of 12th December, 1904, between the government of Ontario, of the first part, and the defendants, of the second part, it was agreed that the township of Bowman and 4 other townships, for the purposes of the agreement, should be withdrawn from general settlement for 6 years, and should be set apart for settlement under terms set forth in the agreement.

The defendants had acquired the rights of nearly 300 persons who had proved claims and were entitled to be located under the Act to Provide for the Appropriation of certain Lands for Volunteers and Veterans, 1 Edw. VII. ch. 6, and 3 Edw. VII. ch. 3; agreed to cause settlers to be located upon the lands comprised in the 5 townships, in accordance with the agreement; and also agreed to pay the government 50 cents per acre for all the lands upon which settlers are caused to be located, and the defendants were authorized to charge the settlers not more than $1 per acre, including the 50 cents per acre to be paid to the government by the defendants. It was also provided that all persons taking up land should make application, in the usual way and on the usual forms, to the Crown lands agent, and that all applications should be approved of by the Department of Crown Lands, and that in all respects, save as to price, the

land should be administered by the Department as to location, cancellation, re-location, performance of settlement duties, granting of patents, and otherwise in the same manner as the ordinary lands of the Crown in the same district; provided that only those persons should be located upon the said lands who were nominated or recommended in writing therefor by the company or their proper officer. The patent for any lands sold not to issue until the purchase price had been paid in full to the Crown and the company.

The agreement was also subject to the express condition and reservation that the government may, at any time within a period of 3 years from the date of the agreement, reserve to itself, take, and set aside any portions of the lands comprised in said townships that the government may deem necessary and designate for the purpose of a town site or town sites, and for right of way of any railway, without any compensation or payment of damages to the defendants or their assigns or to any settler or to any person claiming through the defendants or their assigns, whether the land or lands so taken by the government are settled or located or not; and it is provided that nothing therein contained should affect the right of the defendants' assigns, or such settlers or person as the case may be, to compensation from the company.

The plaintiff signed the usual application prescribed under the Public Lands Act, R. S. O. 1897 ch. 28, to purchase the north half of lot 5 in the 6th concession of the township of Bowman, on 7th November, 1906, and gave it to the defendants' agent to forward to the Department, and on the same day he signed an agreement between himself and the defendants, whereby, after reciting that he desired to be located and become a settler upon said lot, he covenanted and agreed: (1) to pay the defendants therefor the sum of $160; (2) "to settle upon the said lands forthwith upon the execution of this agreement, to comply with the provisions of the law and the departmental regulations with respect to, and to do and make, the settlement duties upon said lands;" (3) "and that in case of default in the performance of the covenants aforesaid, or any of them, all the rights and claims of the settler shall become and be absolutely forfeited, and the company may, by its officers or servants, without any notice or demand, enter upon the said lands and dispossess the settler, without recourse to law or legal proceedings, and may locate thereon another settler, in the settler's place and

stead, as if this agreement had not been made and the settler had not been located upon the said lands and had not acquired any right, nor ever had any right, to enter thereon or to settle the same or any part thereof; and in case of any such default in whole or in part the settler will, at the request of the company, execute a full and free release to the company of any property, right or rights, in, to, or in respect of the said lands and everything erected, made, or done upon the said lands."

On 18th December, 1906, the defendants sent the following letter to the plaintiff: "Dear Sir: We beg to advise you that your application for the purchase of the north half of lot 5 in the 6th concession of the township of Bowman was duly received and approved of by the company, and that the same has been filed in the Crown Lands Department. Under the agreement executed by you with this company, on making your application there is payable by you, as purchase money, the sum of $160, payable as follows, $65 on the 1st day of January, 1907, and $28⅓ on the 1st day of January in each following year, with interest at 6 per cent. per annum upon so much as may remain unpaid from time to time. Your attention to the foregoing is requested."

I think it quite clear that the effect of these documents is to constitute the transaction an agreement to purchase and sell, and not a mere agency.

The plaintiff made the payment to the defendants in accordance with the agreement, and entered upon the land, and cleared or partly cleared between 5 and 6 acres.

In pursuance of the right reserved under the agreement between the government and the defendants, the lot in question was by the government set apart as a town site on 28th December, 1906, and on 31st December, 1906, the Deputy Minister wrote the defendants as follows: "With reference to your letter enclosing application of Water Monaghan for north half of lot 5 in the 6th concession, Bowman, I have to say this land is not open for sale, being reserved for town site."

The defendants omitted to notify the plaintiff of the fact that the lot had been so set apart, and he was not notified of this fact until 7th June, 1907, and then not by the defendants, but by one Burke, a divisional engineer of the Temiskaming and Northern Ontario Railway.

It is to be noted that as early as 15th June, 1906, the secretary of the Temiskaming and Northern Ontario Rail-

way Commission wrote to the Deputy Minister of Lands, Forests, and Mines that the Commission desired the lot in question, with others, for the purpose of a town site, and, if the defendants had been reasonably alert, they could have ascertained, long before accepting the plaintiff's agreement, that their right to sell this lot would probably be cancelled.

The only other question is, whether the plaintiff, before he purchased or made his improvements, had from other sources such notice that this lot would probably be set apart for a town site as to place the risk on him. The evidence on this question is somewhat conflicting, but I am of opinion that the plaintiff had not such notice. He denies it, and I think the circumstances and probabilities support his position.

I think the plaintiff is entitled to recover damages for the work and improvements put on the land before he received the notice, which I fix at $300. The other damages claimed are, I think, too remote.

There will, therefore, be judgment for plaintiff for $300 and costs, less $25 payable to defendants for costs of the day on 28th December.

BRITTON, J. JANUARY 5TH, 1909.

TRIAL.

PIGEON RIVER LUMBER CO. v. MOORING.

Timber—Raft of Ties Floated down Streams and Towed on Lake—Timber Slide Companies Act, R. S. O. 1897 ch. 194—Tolls for Use of Slide Company's River Improvements—Estimate of Number of Ties—Right to Tolls—Non-compliance with secs. 40 and 43 of Statute—Agreement as to Tolls—"Just Toll"—"Lawful Toll"—Lien for Driving and Improvements—Loss by Allowing Ties to Pass into Lake—Towage of Ties—Claim for—Evidence—Contract—Quantum Meruit—Rate of Payment—Delay—Lien for Towage—Carrier's Lien—Loss by Delivery of Ties—Maritime Lien—"Raft" not a "Ship" or "Vessel"—Waiver.

Action by 3 companies for work done for and services rendered and materials supplied to the defendants in respect of certain ties owned by defendants.

F. H. Keefer, K.C., for plaintiffs.

H. Cassels, K.C., and A. J. McComber, Port Arthur, for defendant.

BRITTON, J.:—The claim of the plaintiffs the Pigeon River Lumber Co. was a trifling one for some wood alleged to have been furnished to defendant.

The claim of the Arrow River and Tributaries Slide and Boom Co. is for driving and running certain ties of defendant over the improvements of these plaintiffs on the Arrow river and Pigeon river, and for dues which these plaintiffs claim for the use by the defendant of these improvements.

The claim of the Lake Superior Tug Co. is for towing these same ties from the mouth of the Pigeon river to Port Arthur.

All the claims are in respect of the same ties, all owned by defendant, and which were being brought by defendant from where they were cut above the improvements in the rivers mentioned, to Port Arthur.

The defendant moved in Chambers to compel the plaintiffs to elect which case would be proceeded with, contending that there was an improper joinder of plaintiffs. The Master referred the motion to the trial Judge, and an order was made striking out the Pigeon River Lumber Co. as plaintiffs, and as to the other plaintiffs the motion was dismissed.

I shall deal first with the Arrow River and Tributaries Slide and Boom Co., and shall speak of it as "the company." It was incorporated by the Lieutenant-Governor of the province of Ontario by letters patent dated 11th October, 1899, and its corporate powers were made specially subject to the Timber Slide Companies Act, R. S. O. 1897 ch. 194. The company's claim against the defendant is $2,289.66 for tolls or dues for the use of the company's river improvements in floating ties down to Lake Superior, the destination of these ties being Port Arthur, via the Arrow river, the Pigeon river, and the lake. The claim as made up is for 114,483 ties at 2 cents each.

There was no accurate count of these ties while in the river, but there was evidence of careful estimate that there were at least 114,483 ties. Joseph Labby estimated the number at 116,000, but, as the defendant denies, and says the number sold by him to the Canadian Pacific R. W. Co. was 109,000, that must be taken as the number for which the company is entitled to receive tolls, if entitled at all.

The defence is that the defendant made no use of the improvements, and, even if he did, the company cannot re-

cover because of non-compliance with the requirements of R. S. O. 1897 ch. 194.

I find upon the evidence that the defendant did make use of the company's improvements, and is liable for the use of the same, and that the 2 cents for each tie is less than the amount of toll the company was entitled to charge, based upon the computation, and fixing the amount as provided by the statute, and I find that the amount charged was reasonable.

Of ch. 194, secs. 2 to 17 inclusive, 20 to 35 inclusive, and 60, 62, and 63, were repealed in 1907 by 7 Edw. VII. ch. 134, sec. 211.

Of what remains of the Act now in force, sec. 40 provides that all tolls, after the first year, shall be calculated upon the cost of the works and the quantity of different kinds of timber expected to pass down, and definite directions are given and limitations imposed which the owner of the improvements must obey.

Section 41 gives to the Commissioner of Crown Lands power to refer the taking of accounts or the consideration of any matter he may deem necessary for the adjustment of tolls to an expert.

Section 42 fixes the proportions that the tolls on different kinds of timber shall bear to each other.

Section 43 provides that the annual account required to be rendered by every company shall contain a schedule of the tolls, calculated as in the Act provided, which it is proposed to collect in the following year, and, further, that this schedule shall be published in some paper published in the county or district in which, or nearest to which, the works are situate, and, if the tolls are not disallowed by the Commissioner of Crown Lands before 15th April, such tolls shall be the lawful tolls for that year.

Section 44: The owner of timber intended to be passed over improvements must, upon demand of the owner of the improvements, furnish a written statement of the different kinds of timber.

Section 45: Every company may demand and receive the lawful tolls upon all timber which has come through or over any of the works, etc.

Section 46: If the just tolls are not paid on demand, the company may sue for the same.

Section 47: If the owner of the timber objects to the amount of the demand, and tenders a sum which he claims

to be the true and just amount of the tolls, the company suing shall pay the costs, unless it recovers a greater amount than the amount tendered.

With the sections mentioned standing, this company was brought under the operation of the Companies Act, 7 Edw. VII. ch. 34. Section 131 of the last-mentioned Act requires returns by the company. That is directory, and there is a penalty for non-compliance.

Section 164 is an enabling section, authorizing the company to pass by-laws regarding many things for its successful working, and including the collection of tolls. It was not in evidence that any by-laws had been passed. The company did make a return on 25th January, 1908, for the year 1907. This return was upon a blank furnished for the purpose by the Provincial Secretary's Department, and no objection has been made to this return.

The objection by defendant to the collection of tolls is that the company has not for the year 1908 complied with secs. 40 and 43 of the Timber Slide Companies Act, and that the strict compliance with these sections is a condition precedent to the collection of tolls.

The case, as it presents itself to me, is a very different one from Beck v. Ontario Lumber Co., 10 O. L. R. 192, 6 O. W. R. 54, 12 O. L. R. 163, 8 O. W. R. 35, 16 O. L. R. 21, 9 O. W. R. 99, 193, 10 O. W. R. 711.

Here there was originally a schedule of tolls established. The charter was based upon an application which was accompanied by the report then required by sec. 8 of the Act. That report contained "a schedule of tolls proposed to be collected." Such tolls were legally authorized. Each year after the first year the tolls "were calculated upon the cost of the works and the quantity of different kinds of timber expected to pass down the stream," etc., as provided by sec. 40. That being so, and in view of the circumstances of this case, I am of opinion that the non-compliance with sec. 43 for the year 1908 does not prevent plaintiffs' recovery.

After tolls have been legally established, and with the provision made to protect owners of timber from unjust demands made by owners of improvements, I think the case distinguishable from one arising under R. S. O. 1897 ch. 142. Section 13 of the last-mentioned Act provides that the owner is at liberty to collect tolls fixed by the County Court Judge or stipendiary magistrate.

The company, being the owner of improvements and entitled to tolls, chose to bargain with the defendant for a sum as tolls, less, as the company says and as the fact is, than they would be entitled to upon the computation mentioned in the statute.

An agreement in writing was made with the defendant for the year 1906, at 2 cents for each tie; another agreement in writing was made with the defendant for the year 1907, at the same rate. Then for 1908 there was negotiation, and the company supposed that an agreement would be made on the same terms. The defendant raised no objection to the company's right to the improvements, or to the collection of tolls for their use, until long after the ties were sent down the rivers. Then the account was rendered by the company. Apparently the 3 companies originally named as plaintiffs are under the same management, and the accounts were put together. I accept the evidence of Chamberlain that defendant did not object to the account for tolls—he did object to amount for towage of logs and for time occupied in towing them from the mouth of Pigeon river to Port Arthur.

The owner of timber is protected by sec. 47 if more than the "true and just amount of tolls" is demanded. While sec. 45 mentions "lawful toll" which may be taken as the toll fixed by schedule, sec. 46 gives the remedy for the "just toll." "Just toll" is the "lawful toll," and "lawful toll" is "just toll," and I do not attempt to draw any distinction between these words further than this, that their use indicates that the toll, just toll, and therefore lawful toll, might be calculated, although sec. 43 not complied with.

For these reasons the company is entitled to recover $2,180.

The company is not entitled to any lien on these ties for driving or for use of the improvements. The right of lien or to seize the ties for tolls was limited to the assertion of it while the ties were in the rivers or streams before they reached Lake Superior. See sec. 49.

The defendant by counterclaim charges the company and the Pigeon River Lumber Company with putting into the river a large quantity of logs for the purpose of floating the same down the river, and that they put and kept the logs in the river in such a way as to hinder, and with the intention of hindering, the defendant, and of preventing him from driving his ties down the river. There is no reasonable

evidence upon which I can find the defendant guilty as alleged, so the counterclaim must be dismissed with costs.

The Lake Superior Tug Company Limited sues for towing the ties above mentioned from the mouth of the Pigeon river to Port Arthur. The evidence seems clear as to this. The ties were 44 miles from Port Arthur; they were under contract of sale to the Canadian Pacific Railway Company. The Molsons Bank had made advances to the defendant, and had a claim on the ties, and Mr. Little, the manager of the branch of this bank at Port Arthur, was anxious that they should be brought to Port Arthur, and money realized from their sale.

Mr. Little, acting for the defendant and with defendant's authority, saw Mr. Scott, the president of the tug company, about the towing. The president did not care about the work, and at all events did not care about doing work for the defendant, and told Mr. Little so, but said he would do it at his price, and would look to Mr. Little for pay. The sum named was 2 cents a tie, or $8 an hour for running time of tug—made up at $6 an hour for tug itself, and $2 an hour for use of towing booms, and half price for time when not running. This conversation was reported to defendant. Defendant says he did not agree to it, or authorize Mr. Little to do so. I think he is mistaken. He did assent to it; if not in words, he did by his conduct. Mr. Scott told Mr. Little, and Little told the defendant, that by the hour was the cheaper, as in fact it was. Mr. Scott got instructions to tow the ties, and they were towed to Port Arthur in two trips, with the defendant's knowledge and without any objection. A detailed account for this was rendered, amounting to $1,539, including $3 for extra meals. The objection raised at the trial was that the charge per hour was too high, and that there was undue delay. I find that the price per hour was agreed upon, and the evidence does not warrant the conclusion that there was any loss of time or unnecessary delay. The towing ties collected and boomed as a raft on Lake Superior is dangerous business, and requires skill, great watchfulness, and good judgment. It was not suggested that there was any want of good faith, or that there was any scheming or wilful neglect on the part of the captain or officers of the tug. These officers of the boat and the president of the company gave their evidence in a very straightforward manner. The president was clear that there was a distinct bargain, and the depositions of the

defendant, put in at the trial, do not displace, but rather corroborate, the president's evidence.

Even if there was not a bargain fixing amount of remuneration, there is, upon quantum meruit, evidence to establish the charge made, as reasonable under the circumstances. The defendant seems not to have made any objection to the account—anything that any of the plaintiffs understood as an objection—until about 15th August. Mr. Chamberlain, acting for all, made out the account as sued, viz., Pigeon River Co., $5, Arrow River Co., $2,289.66 for tolls, tug company, $1,539 for towage and meals: total, $3,833.66. This account was presented, and the defendant was asked for a cheque. Defendant said he had no money then, and wanted to wait for returns. During the conversation defendant said the towing bill was not right—price was right, but time too long, and the ties delivered had not been checked. Mr. Chamberlain wanted defendant—failing to get a cheque from him—to accept a draft, and Chamberlain understood that, subject to the one objection named, the defendant would accept the draft for $3,833.66, and such a draft was made and put into plaintiffs' bank, but, as it turned out, was not accepted; but, from all that, beyond a doubt, took place, it is difficult to understand the defendant's accepting plaintiffs' services and raising the defences as he has done in this action.

There should be judgment for the Lake Superior Tug Company Limited for $1,539 with costs.

As to lien, the tug company had a lien upon these ties for towing them from the mouth of Pigeon river to Port Arthur. The ties were brought down in two trips and delivered to defendant as they were gathered or stored in his booms at Port Arthur—the first raft delivered 6th July, the second 29th July. Upon the arrival of the first raft at Port Arthur, and when plaintiffs were ready to deliver, they could have asserted their lien, and, failing to get pay or security, possession of the logs could have been retained. Upon being ready to deliver the second raft, the lien could have been asserted, and possession retained until transportation paid or matter arranged. The plaintiffs apparently, so far as appears, did not at either time assert any lien, but made an unconditional delivery.

"The carrier's lien is dependent upon possession, and is lost by delivery of the goods to the consignee or owner:" Cyc., vol. 6, p. 503.

I treat these ties towed the same as freight: see Jones on Liens, 2nd ed. secs. 319, 320; Macnamara on Carriers, pp. 98, 99.

No assertion of lien was made until long after delivery. I do not know why. The bank could not have resisted it, for the manager made the agreement with the tug company, and told Scott, the president, that he, the manager, would see that the transportation of the ties was paid for. The writ of summons herein was issued on 21st September, and until then or just before the plaintiffs did nothing, and in the action neither the bank nor Mr. Little is made a party.

As to the lien the plaintiffs had for the services rendered in towing, it was waived by giving credit to the defendant. The account was rendered to defendant on 31st July. Subsequent to that the interview between Chamberlain and the defendant took place—when, as Chamberlain understood, the defendant agreed to accept a draft for the whole amount, subject to the objection that delay in towing was to be considered. The draft was made, and, although defendant did not accept, the plaintiffs actually waited until after the maturity of the draft drawn on 15th August, and which fell due on 8th September.

The plaintiffs urge a "maritime line" attaching, in their favour, upon the ties, and which now may be enforced. A maritime lien exists in certain well defined cases in regard to a ship or vessel, and, where it exists, attaches to the vessel, independent of ownership or agency, and possession in the first instance is not necessary for its enforcement. This is not a lien against a vessel or anything connected with it, but it is asserted as a lien upon ties for their towage. Maritime lien may exist in favour of persons doing repairs, furnishing supplies, seamen's wages, cases of collision, and in other cases. It is not necessary to go into further particulars as to when and how maritime lien attaches. The ties were towed as a raft. A raft is not a ship or vessel, against which, for the purpose of enforcing a lien in favour of a person not in possession, any proceedings can be taken in the Admiralty Court.

In The "Nithsdale," 15 C. L. T. Occ. N. 268, it was held that a dredge requiring to be towed from place to place for its work was not "a vessel." The general definition of a ship or vessel subject to admiralty jurisdiction is that it shall include every description of vessel used in navigation, not propelled by oars. This raft was not moved or pro-

pelled by any power on it, but was hauled by a vessel, and the ties, being so hauled, were as to the vessel the same as if on board and carried as freight.

Even for the towage of a vessel, if towing was pursuant to contract, and if the possession of the vessel towed was not retained, there would be no way of enforcing the lien against the ship towed. See Jones on Liens, 2nd ed., secs. 1717, 1788, and Westrup v. Great Yarmouth Steam Carrying Co., 43 Ch. D. 241. It has been held that the assertion of a lien in an ordinary suit like the present, and not doing so in Admiralty in the first instance, prevents later recourse to Admiralty jurisdiction. If the claim, in reference to which the lien is asserted, is put into judgment in an ordinary action, and where the proceeding is not in rem, there would be waiver of the lien.

There will be judgment for the plaintiffs the Arrow River and Tributaries Slide and Boom Co. against the defendant for $2,180, with costs, and the counterclaim of the defendant will be dismissed with costs.

There will be judgment for the plaintiffs the Lake Superior Tug Co. against the defendant for $1,539, with costs. No costs of motion for interim injunction, and no costs to defendant of payment of money into Court, that having been done by arrangement outside of defendant.

Declaration that, at the time of the commencement of the action, the plaintiffs were not, nor was either of them, entitled to a lien upon the ties in question.

LATCHFORD, J. JANUARY 6TH, 1909.

WEEKLY COURT.

BEARDMORE v. CITY OF TORONTO.

Pleading — Statement of Claim—Motion to Strike out—Rule 261—Reasonable Cause of Action—Action not Frivolous or Vexatious—Dismissal of Action or Stay of Proceedings—Municipal Corporation—Contract with Hydro-Electric Power Commission—Action to Declare Invalid—Statutes—Parties—Fiat of Attorney-General—Fraud and Misrepresentation—Amendment—Ultra Vires.

Motion by defendants, under Con. Rule 261, for an order striking out the statement of claim, on the ground that it disclosed no reasonable cause of action, and that the action

was frivolous and vexatious, and for an order staying all proceedings until the Hydro-Electric Power Commission of Ontario should be added as a party defendant.

J. S. Fullerton, K.C., for defendants.

E. F. B. Johnston, K.C., and Henry O'Brien, K.C., for plaintiff.

LATCHFORD, J.:—The action is brought by Walter D. Beardmore, a freeholder and ratepayer of the city of Toronto, suing on behalf of himself and all other ratepayers of the city of Toronto, against the corporation of the city of Toronto, for a declaration that a certain contract made between the defendants and the Hydro-Electric Power Commission of Ontario is void, and for an injunction restraining the defendants from acting upon said contract.

The Hydro-Electric Power Commission was appointed by the Lieutenant-Governor in council under the provisions of 6 Edw. VII. ch. 15. Two of the 3 members may be members, and one must be a member, of the Executive Council of Ontario. By the statute mentioned and 7 Edw. VII. ch. 19, large powers, contractual and otherwise, may be exercised by the Commission upon the authorization of the Lieutenant-Governor in council.

Section 21 of the Act of 1906 provides that no action shall be brought against the Commission . . . without the consent of the Attorney-General for Ontario. The Act of 1908—8 Edw. VII. ch. 19, sec. 23—contains the same provision in a slightly different form.

After setting forth the status of the parties—the plaintiff being a freeholder and ratepayer of the city of Toronto, and the defendants a municipal corporation acting through the municipal council thereof—the statement of claim alleges that, by virtue of ch. 15 of 6 Edw. VII., the Hydro-Electric Power Commission of Ontario was brought into existence; that the defendants, in pursuance of said Act, submitted a certain by-law to the people, and, after the vote thereon, finally passed such by-law, as No. 4834, on 28th January, 1907. Paragraph 6 of the statement of claim is as follows:—

"The said by-law No. 4834 enacted, among other things, that it shall be lawful for the said municipal corporation to enter into a contract with the Hydro-Electric Power Commission of Ontario for the supply to the said corporation, for 30 years, of 15,000 continuous horse power or more of

electrical power or energy for the uses of the municipal corporation and the inhabitants thereof, for lighting, heating, and power purposes, at from $14 to $18.10 per horse power per annum for the continuous power, ready to be distributed by the said municipal corporation, such price to include all charges for interest, sinking fund, for cost to construct, and the cost to operate, maintain, repair, renew, and insure the plant, machinery, and appliances to be used by said Commission."

The statement of claim further alleges that, purporting to act in pursuance of the said by-law, the defendants authorized their mayor and clerk, by by-law No. 5138, to execute a contract, and such officers did execute a contract with the Hydro-Electric Power Commission, for 10,000 horse power at Niagara Falls, at a price dependent on voltage, and, if voltage over 60,000, the price to be fixed by arbitration.

This contract the plaintiff states was not authorized by by-law No. 4834, in that there is nothing in the contract limiting the liability of the defendants to a sum not exceeding $18.10 per horse power, for continuous power ready for distribution, and the defendants might be bound to take power at a price considerably in excess of the maximum price, $18.10, fixed by the by-law. The plaintiff also asserted that the contract he impeached was not only unauthorized by the ratepayers of Toronto, but was induced by representations of the Chairman of the Commission, and those acting under him, which were untrue in substance and in fact. A charge of misrepresentation and fraud on the part of the Commission was also made.

After the motion had been partly argued, I directed that it should be enlarged until an application for the Attorney-General's consent had been granted or refused. The plaintiff applied to the acting Attorney-General, Sir James P. Whitney. The application is stated by Mr. Johnston, who represented plaintiff, to have been opposed by counsel for the defendants and counsel for the Hydro-Electric Power Commission. The plaintiff in a similar action—Smith v. City of London—made application for a fiat at the same time. After consideration the following decision was rendered:—

"Smith v. London.

"Beardmore v. Toronto.

"In re application for fiats in the above cases.

"These applications were fully argued before me by counsel representing the different interests on 1st December.

"I am expected, apparently on the mere statement of a plaintiff that the members of the Hydro-Electric Power Commission were guilty of fraud and deception, as set out in the statements of claim, to assume the truth of the statement, and, therefore, grant a fiat. Under this doctrine it would be simply necessary for a plaintiff to interject into his pleading any allegation calculated, if true, to justify the issue of a fiat, and a fiat would follow as a matter of course. As I cannot agree with this, and as, under such circumstances, fiats have been many times refused, I do not see my way clear to grant these applications.

"Apart from the question of fraud, the plaintiffs' contention in each case rests upon the view that the municipal councils had not the power under the statute to finally enter into contracts with the Hydro-Electric Power Commission without submitting the terms of them to the ratepayers. I have personal knowledge that this was not the intention of the legislature, and I cannot divest myself of that knowledge. It may be that at its next session, which cannot now be long delayed, the legislature may make a declaration on the subject.

"In refusing the applications now, I reserve leave to the applicants to renew them after the opening of the session.

"J. P. Whitney,

"Acting Attorney-General."

Upon the renewal of the motion after the consent had been refused, leave was asked to amend the statement of claim by withdrawing the paragraphs alleging misrepresentation and fraud, and substituting therefor the following paragraphs:—

"9. The ratepayers of the said city of Toronto having passed the said by-law for the supply of electric power at a maximum price of $18.10 per horse power per annum ready for distribution, it became the duty of the members of the municipal council of the corporation of the city of Toronto to see that no other or different contract was signed under the authority of the said by-law.

"10. The plaintiff further says that the defendants are not authorized and have no power to enter into the said contract.

"11. The defendants allege that the Crown is concerned in the matters above referred to, and that the Crown is a necessary party to these proceedings, but the plaintiff submits that the said by-laws and any contract made or pretended to be made thereunder are not matters of Crown prerogative, and that the Crown is not therefore a necessary or proper party to this action.

"12. The plaintiff further says that the defendants claim that no action can be brought against the Hydro-Electric Commission of Ontario in respect of matters in which the Commission is concerned without the fiat of the Attorney-General for the province of Ontario, by reason of the statutory provision in that behalf, being 7 Edw. VII. ch. 19, sec. 23, but the plaintiff submits that the said provision is ultra vires of the legislature of the province of Ontario."

The plaintiff concludes by asking a declaration that 7 Edw. VII. ch. 19, sec. 23, is ultra vires of the legislature of Ontario, and that the contract is illegal and void, and for an injunction restraining the defendants from acting upon the contract, levying taxes, or paying moneys in pursuance of the contract, and from delivering the contract to the Hydro-Electric Commission.

On behalf of the defendants it is contended that, even as amended, the statement of claim should be struck out.

Under Con. Rule 261, a Judge of the High Court may order any pleading to be struck out on the ground that it discloses no reasonable cause of action, or ground of defence, and in any such case, or in case of the action or defence being shewn by the pleadings to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.

The Rule applies only where the entire pleading discloses no reasonable cause of action or ground of defence: Smith v. Traders Bank of Canada, 11 O. L. R. 24, at p. 29, 6 O. W. R. 748.

The two parts of the Rule are distinct: Shafto v. Bolckow, 34 Ch. D. 725. The summary proceeding under the first part can only be adopted when it can be clearly seen that the claim or answer is on the face of it "obviously unsustainable:" Attorney-General v. London and North Western R. W. Co., [1892] 3 Ch. 274 (C. A.); or in cases which are plain

and obvious: Hubbuck v. Wilkinson, [1899] 1 Q. B. 86. Before a claim or answer is struck out under this Rule, it must be seen that it is not only demurrable but something worse: Roberts v. Charing Cross R. W. Co., 87 L. T. R. The pleading will not be looked at with the eyes of an old special pleader: Kellaway v. Bury, 66 L. T. R. 599 (C. A.) The question is not whether it discloses a good cause of action, but whether it discloses a reasonable one: Dadswell v. Jacobs, 34 Ch. D. at p. 281 (C. A.)

The cases cited shew that the Rule does not apply where there is a question of difficulty or important points of law to be determined, or where the transaction is a complicated one, giving rise to questions which ought to be tried.

The power to stay or dismiss an action under the second branch of the Rule is also used only in exceptional cases where the proceedings are clearly wanting in bona fides, and are vexatious or oppressive. "That is a very strong power, and should only be exercised in cases which are clear and beyond all doubt:" Lindley, L.J., in Kellaway v. Bury, 66 L. T. R. 599, at p. 602. The pleading must not only be demurrable, but the Court must see that the plaintiff has no cause of action at all. In Stephenson v. Gadnett, [1898] 1 Q. B. 677, in which a stay was granted, Chitty, L.J., declares that the jurisdiction of the Court to stay an action as frivolous and vexatious ought to be exercised with very great caution. The ground of the decision in that case is that it would be an abuse of the process of the Court to allow a suitor to litigate over again the same question which has already been decided against him: p. 680.

In Reichel v. Nagrath, 14 App. Cas. 665, the defendant sought to retry the same issues that had been conclusively decided. Lord Herschell said of the defendant, "He has not a shadow of defence:" p. 669. In Macdougall v. Knight, 25 Q. B. D. 1, the question raised was identical with that previously decided by a Court of competent jurisdiction. The Rule was applied by our own Courts in Lawrie v. Tuckett, 2 O. L. R. 162, but in that case the judgment of the Court of Appeal in Lellis v. Lambert, 24 A. R. 263, left nothing to be said in favour of the plaintiff's right to maintain the action. In Kellaway v. Bury, 66 L. T. R. at p. 602, Kay, L.J., says: "Before a Court will summarily dismiss an action either under the Rule applicable to such a case, as being frivolous or vexatious, or under the inherent jurisdiction which the Court has to prevent its process being

abused, it will very cautiously and carefully consider the facts."

In the present case a ratepayer, whose rights are unquestionably materially affected by the contract entered into between the defendants and the Hydro-Electric Power Commission, invokes the Courts to declare whether that contract is or is not valid and binding upon himself and the other ratepayers of the city of Toronto; and, if the contract should be found invalid, to prohibit the defendants from incurring any liability under it which would affect him as a ratepayer. The contract on the important point of the cost of power is alleged by the statement of claim to differ from the price stated in the by-law approved by the ratepayers. I adopt, as applicable to this case, the language of Mr. Justice Anglin in a case arising out of a by-law of the town of Galt, reported as Re Scott and Patterson, 12 O. W. R. 637, at p. 642: "If the consent of the ratepayers to the contract (that must assuredly mean to the material terms of the contract, and what term is more material in the present case than the price of the power delivered in the municipality?) is, by the statute (6 Edw. VII. ch. 15, sec. 7), made a pre-requisite to the right of the municipality to enter into such contract, when that assent has not been obtained, the council has not the right to pass a by-law requiring the execution of such contract."

It was also held in the Galt case that a by-law mentioned (as is the said by-law 4834) in sec. 1 of 8 Edw. VII. ch. 22, was not validated by that statute, and that a contract similar to that sought to be impeached by Mr. Beardmore might be regarded as illegal and contrary to 6 Edw. VII. ch. 15, and 7 Edw. VII. ch. 19.

The importance of the matter to be determined is manifest. It was said at the hearing of the motion, and not disputed, that the contract involved the expenditure by the defendants of probably $3,000,000. To meet this sum the plaintiff and other ratepayers will be assessed by the defendants, and taxes will be imposed and collected. He has, I consider, a status to maintain this action.

Although the issue presented is new and has never been determined, the validity of a similar contract has been questioned in the carefully considered judgment of Mr. Justice Anglin. It cannot be said that the plaintiff's action is "obviously unsustainable" except upon the ground that one of the parties to the contract attacked is not a party to the

suit, and cannot be made a party to it by anything the plaintiff can do. Upon the authority of Atlantic and Pacific Telegraph Co. v. Dominion Telegraph Co., 27 Gr. 592, I am asked to hold that the plaintiff cannot maintain his action until the Hydro-Electric Commission has been made a party. That decision arose upon a demurrer. The plaintiffs sought to restrain the defendants from carrying out an agreement for the transfer of messages to the American Union Telegraph Company without making the latter company a party to the suit. Chancellor Spragge allowed the demurrer. In his judgment (p. 595) he says: "It does appear to me manifestly unjust, as well as contrary to the rule of procedure in this Court, as I understand it, to hear a cause and make a decree (if the decree be made as prayed for) which would disable these defendants from performing their agreement, which the plaintiffs themselves say the defendants have made with another company, and, for all that appears in the bill, made innocently and in perfect good faith on the part of that other company, without giving that other company an opportunity of shewing why this should not be done."

There is no rule of procedure now in force to the effect stated by the learned Chancellor, and a pleading will not now be looked at with the same strictness as it would have been under the old demurrer: Dadswell v. Jacobs, 34 Ch. D. at p. 281. Rule 202, on the other hand, expressly enables the Court to adjudicate on matters arising "between parties who are some only of those interested in the property in question . . . without making the other persons interested in the property . . . parties." If the Court can now adjudicate regarding property in the absence of a party interested, why cannot the Court do so in regard to a contract, especially when the plaintiff has exhausted all means of bringing in the party of whose absence the defendants complain? The general principle is undoubtedly that all parties interested in the subject matter of the suit should be before the Court. So far as this action concerns the contract itself, as distinguished from the right of the defendants to assess and tax the plaintiff and other ratepayers to meet the obligation of the defendants under the contract, there would be a lack of finality in a decision in favour of the plaintiff. The Hydro-Electric Commission would not be bound by the decision in a suit to which it was not a party.

But it is not, I think, open to the Commission to complain when the plaintiff has done all that is within his power to make the Commission a party, and the Commission has resisted his efforts. Nor should the plaintiff be expected to wait until after the opening of the session for the consent of the Attorney-General. The decision of the acting Attorney-General refusing his consent is no more open to question by me here than the provision of the statute making such consent necessary before a body, empowered to enter into contractual obligations throughout Ontario, can be proceeded against in the Courts of this province, even in respect to breaches of such obligations.

It is argued that the enactment investing the Commission with immunity, except with the consent of a member of the same executive as one or possibly two members of the Commission, is beyond the powers of the legislature of Ontario. I do not feel called upon to attempt to determine upon a motion of this kind whether such legislation—however extraordinary it may appear from a juristic point of view—is ultra vires or not. But I am asked to close the doors of the Court against a litigant who questions the power of the legislature to free the Commission from the liability which would otherwise be cast upon it by the law. The ground of the decision in Atlantic and Pacific Telegraph Co. v. Dominion Telegraph Co., apart from the rule mentioned, is the injustice of proceeding in the absence of one of the parties to the contract without giving that party an opportunity to be heard. The Hydro-Electric Commission has been given an opportunity to be heard in this action. It has objected to being made a party, and that objection has, after consideration, been sustained. The Commission cannot reasonably object if in its absence an opportunity is given to the plaintiff to have its rights determined, at least as between himself and the defendants, and possibly to the extent of declaring the contract with the Commission to be invalid. I regard the case of Atlantic and Pacific Telegraph Co. v. Dominion Telegraph Co. and the cases therein cited as inapplicable to the present case, and see in them no reason why the plaintiff should not be permittel to proceed with his action. He seeks a decision on difficult, important, and complicated questions, which, in my opinion, ought to be tried. If he should succeed, he may possibly not succeed to the same extent as if the Hydro-Electric Commission was a party, but for this he is in no

way to blame; and, as far as the Courts can give him relief, if at all, he should not be denied the right of appeal to them. Should the Commission fear that it may be prejudiced by any conclusion reached in this action, it may, of course, apply to be joined as a party.

The motion should be dismissed, with leave to plaintiff to file statement of claim as amended; costs to be costs in the cause to the successful party.

LATCHFORD, J. JANUARY 6TH, 1909.

WEEKLY COURT.

SMITH v. CITY OF LONDON.

Pleading—Statement of Claim—Motion to Strike out—Rule 261—Reasonable Cause of Action—Action not Frivolous or Vexatious—Dismissal of Action or Stay of Proceedings—Municipal Corporation — Contract with Hydro-Electric Power Commission—Action to Declare Invalid—Statutes—Parties—Fiat of Attorney-General—Ultra Vires.

Motion by the defendants to strike out the statement of claim, on the same grounds as in Beardmore v. City of Toronto, ante.

E. E. A. DuVernet, K.C., and A. H. F. Lefroy, K.C., for the defendants.

J. M. McEvoy, London, for the plaintiff.

LATCHFORD, J.:—Paragraphs 8, 13, 14, 16, 19, 20, 21, and 22 of the statement of claim have been considered by the Master in Chambers upon an application to have them struck out (12 O. W. R. 668). On an appeal from his decision, Meredith, C.J., struck out paragraph 14, but otherwise affirmed the order of the Master (12 O. W. R. 675).

While the issues in this action are similar to those in Beardmore v. City of Toronto, the pleading in this action, with paragraph 14 struck out, does not raise the question of fraud or misrepresentation on the part of the Hydro-Electric Power Commission.

It is substantially in the form of the amended statement of claim in the Beardmore case; and, for the reasons given in my judgment in that case, the application of the defendants should be dismissed; costs should be in the cause to the plaintiff in any event of the action.

MEREDITH, C.J. JANUARY 7TH, 1909.

CHAMBERS.

RE ROBERTSON.

Infant—Legacy—Direction for Payment at Age of 18—Payment into Court—Power of Court to Order—Payment before Majority—Discharge—Order for Payment out—Terms—Official Guardian.

Application by the executors of the will of William Thomas Robertson, deceased, for leave to pay into Court, under the Trustee Relief Act, $200 in their hands, representing a legacy of that amount bequeathed by the testator to his daughter Ivy Hazel Robertson, an infant of the age of 11 years.

F. W. Harcourt, K.C., for the executors.

MEREDITH, C.J.:—By the terms of the will, the legacy with accumulated interest is to be paid to the legatee when she shall have attained the age of 18 years.

The only question is as to whether the order should provide for payment out to the legatee on her attaining the age of 18 years.

No doubt, the law is that, notwithstanding such a direction as that contained in this will, in the absence of a provision that the infant's discharge shall be sufficient, an executor is not bound to pay the legacy to an infant on the infant attaining the prescribed age, but the reason for this rule is that upon payment of the legacy the executor is entitled to a discharge from the legatee, which an infant is not competent to give.

There is no reason for applying this rule where the legacy is in the hands of the Court, as no discharge is in that case required, and it is in the power of the Court to permit moneys in the hands of the Court to which an infant is entitled, to be paid out to or applied for the benefit of the infant, if, in the opinion of the Court, it is proper that that should be done.

The order may therefore provide for payment out to the infant on her attaining the age of 18 years, but that the cheque is not to be issued except with the privity of the official guardian.

I make this latter direction in order that if any circumstances should arise which render it inexpedient that the infant should then receive the money, the official guardian may intervene and apply to have the payment out stayed until the infant shall have attained her majority.

MACLAREN, J.A. JANUARY 7TH, 1909.

C.A.—CHAMBERS.

BANK OF NOVA SCOTIA v. BOOTH.

Appeal to Court of Appeal—Leave to Appeal from Order of Divisional Court—Judicature Act, sec. 76 (g)—Special Reasons for Treating Case as Exceptional — Matter of Practice in High Court—Discretion—Application to Rescind Order for Attachment of Debts—Order for Cross-examination on Affidavits.

Motion by the Dominion Fish Co., garnishees, for leave to appeal to the Court of Appeal as a special and exceptional case under sec. 76 (g) of the Judicature Act, from a unanimous judgment of a Divisional Court.

F. Arnoldi, K.C., for the garnishees.

C. A. Masten, K.C., for the plaintiffs, judgment creditors.

MACLAREN, J.A.:—An application was made by the garnishees to the Master in Chambers to set aside the attaching order, and in support thereof there were filed the affidavits of two persons residing in Winnipeg. The judgment creditors asked leave to cross-examine upon these affidavits. The garnishees contended that upon the cross-examination of Waters, upon whose affidavit the attaching order had issued, he had displaced the foundation for the order, and consequently the cross-examination should not be allowed.

The Master, without passing upon the attaching order, made an order for the cross-examination of the affiants in Winnipeg. From this latter order an appeal was taken to a Judge in Chambers. It was heard by the Chief Justice of the Common Pleas, who affirmed the order of the Master. In giving his decision he discussed to some extent the position of the attaching order and the affidavit upon which it

issued. The garnishees further appealed from his judgment to a Divisional Court, and this appeal was unanimously dismissed.

I do not think the present is a proper case for the application of the rule in sec. 76 (g). It is a pure question of practice in the High Court, and when the Master, and a Judge in Chambers, and a Divisional Court of the High Court, have passed upon the question and are all unanimous, I do not think their decision should be interfered with except for very grave reasons. The Master, in the exercise of his discretion as to the best mode of dealing with a case in his own tribunal, saw fit to grant leave to cross-examine upon these two affidavits, which the garnishees had filed and declined to withdraw, and it is his discretion and not mine that should govern in such a case. It may be that he will be with the garnishees upon the merits of the attaching order, and all these appeals will have been unnecessary. At all events, I do not think I should be justified in adding another to the long list of appeals, and, as I consider it simply as an appeal from the order allowing the cross-examination in Winnipeg, a mere interlocutory proceeding, by which the garnishees may eventually be in no wise hurt, the present application is dismissed.

DECEMBER 31ST. 1908.

C.A.

WRIGHT v. PORT HOPE ELECTRIC CO.

Negligence—Injury to Linesman Working on Telegraph Pole —Injury by Live Wire—Master and Servant—Findings of Jury—Evidence—Liability—Contributory Negligence—Electric Company—Telegraph Company — Indemnity—Joint Tort-feasors—Relief over—Third Party Proceedings.

Appeals by both defendants, the Port Hope Electric Co. and the Canadian Pacific R. W. Co., from the judgment of BRITTON, J., 11 O. W. R. 318, in favour of the plaintiff upon the findings of a jury, as against both defendants; and appeal by the defendants the Canadian Pacific R. W. Co. from a later judgment of BRITTON, J., 11 O. W. R. 688, dismissing the claim of the railway company for indemnity or relief over against their co-defendants.

The appeals were heard by Moss, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

G. F. Shepley, K.C., for defendants the Port Hope Electric Co.

I. F. Hellmuth, K.C., and Angus MacMurchy, K.C., for defendants the Canadian Pacific R. W. Co.

J. E. Jones, for plaintiff.

MOSS, C.J.O.:—This is an action brought against the two defendants by the mother of one Harry B. Wright, who, while working as a telegraph linesman in the employ of the defendants the Canadian Pacific R. W. Co., was killed, owing, as the plaintiff alleged, to the negligence of the defendants or one of them. The trial was had before Britton, J., and a jury.

In the way in which the action came down for trial, two leading but in some respects wholly separate questions were in issue.

The first, and that with which the plaintiff was chiefly concerned, was whether the death of her son was due to negligence on the part of the defendants or one of them for which they or one of them were liable in damages to her, and was in the main for the jury.

The second, in which the plaintiff was not so directly interested, was whether, in the event of the defendants the railway company being found liable in damages to the plaintiff, they were entitled to be indemnified by their co-defendants. This was dealt with by the trial Judge.

Upon the answers of the jury to questions submitted to them, the trial Judge entered judgment against both defendants with $2,500 damages.

And upon the second question the trial Judge held that, as between themselves, the defendants were joint tort-feasors, and that the claim for indemnity could not be supported.

Both defendants appealed against the judgment in favour of the plaintiff, and the railway company also appealed in respect of the claim for indemnity.

Before the jury there was much contention as to the cause of the deceased linesman's death. The jury found the cause to be a circuit formed between the south primary wire and the south transformer hanger. The wire and hanger had been placed by the defendants the electric company on a telegraph pole, the property of the defendants the rail-

way company, and the deceased had ascended it in the performance of work he was doing as an employee of the railway company.

On the argument of the appeals, counsel for the electric company said that he did not now dispute this finding.

It is scarcely open to question that this finding involves the defendants the electric company in the happening of the accident. The wire and hanger with which the deceased came into contact, thereby forming the circuit, being the property of the defendants the electric company, and having been placed there by them, the death was, to that extent at least, due to their action.

The jury further found the reason of the circuit. After finding that the death was caused by the negligence of both defendants, they, in response to the question, "If so, what negligence do you find—state fully and state all the negligence which, in your opinion, caused the death?" answered: "(a) Wires not properly insulated; (b) space between primary wires insufficient." These findings were applicable only to work done by the defendants the electric company, and if the pole had been their property, and the deceased was lawfully upon it, would have rendered them solely responsible for his death, in the absence of contributory negligence, against which the jury have found. There is evidence amply sufficient to justify these findings. Upon what grounds, then, can these defendants expect to be freed from liability to the representative of the deceased? There is no other finding of the jury which affords them any assistance. The findings that the defendants the railway company were negligent in allowing the electric company to string high voltage wires on the pole, and that the electric company's use of the pole was with the knowledge and consent of the railway company, cannot affect the position of the plaintiff. The deceased had not, and neither has the plaintiff, anything to do with the nature of the arrangement, if any, between the co-defendants, and the jury have negatived the claim that the system of placing their wires and hangers adopted by the defendants the electric company was the most proper or best system for securing against danger to persons working among them.

The facts being that the spacing between the primary wires was insufficient to enable a man to pass through them in safety in case of the insulation being defective, and of their carrying such a high voltage as the wire in question

was intended to carry and was carrying—that the insulation was in fact defective —that the deceased was lawfully on the pole—and that his death was owing to these causes—these defendants were rightly adjudged liable to the plaintiff.

Their appeal should, therefore, be dismissed.

As to the appeal of the defendants the railway company, the evidence and the findings of the jury give rise to other considerations.

The jury, having been specially asked to state all the negligence which, in their opinion, caused the death, answered, as regards the defendants the railway company, that they were negligent in allowing the electric company to string high voltage wires on their poles. It is not pretended that liberty was given to string wires not properly insulated, or that there was any knowledge on the part of the railway company that the electric company's wires were or had become defective.

It is true that the jury answer in the affirmative the question, "Was the use of the pole by the Port Hope Electric Co., as it was used when the death of Wright occurred, with the knowledge and consent of the Canadian Pacific R. W. Co.?" But this question was intended for the purpose of settling the question as to the existence of an arrangement enabling the defendants the electric company to use the railway company's posts for their equipment, and was not intended for the purpose of obtaining a finding as to the railway company's knowledge of the condition the wires and equipment were actually in at the time of the accident. This appears manifest from the trial Judge's charge. He told the jury that it was a mere formal question, because the evidence seemed to be all one way, evidently referring to the testimony of the president of the electric company as to what had taken place between the officers of the two companies with regard to the use of their respective poles. If it had involved the question of knowledge of the actual condition at the time of the accident, it would not have been correct to call it a formal question, or to say that the evidence was all one way. There is no evidence that the defendants the railway company had any knowledge of the want of proper insulation, which was the primary cause of the accident, and without which it could not have happened as it did. The wires had been kept and maintained by the defendants

the electric company for a period of about 15 years, during which all appeared to be right and proper, and the jury expressly exonerated the foreman Hillis, who was in charge of the work at which the deceased was engaged when he met his death, from any negligence which caused the death.

This absolves the company from any charge of knowledge of the insulation having become defective.

The case, therefore, appears to resolve itself into one in which there was nothing more in the first instance on the part of the defendants the railway company than the giving permission to string properly insulated high voltage wires on their poles.

There is an absence of any further finding against these defendants, bringing home to them negligence which led to the death.

On the ground that actionable negligence has not been made out against these defendants, their appeal should be allowed.

This conclusion renders unnecessary any discussion of the claim for indemnity, but I do not, as at present advised, dissent from the view taken by my brother Garrow on this branch of the case. The case in this respect appears to be different from that of Sutton v. Town of Dundas, in which judgment was given to-day (ante 126.)

The result is that the appeal of the defendants the railway company is allowed, and the action dismissed as against them, with the costs properly taxable against the plaintiff; and that the appeal of the defendants the electric company is dismissed with costs. There will be no costs of the third party proceedings, or of the appeal in respect thereof, to or against any of the parties.

MEREDITH, J.A., gave reasons in writing for the same conclusions.

OSLER and MACLAREN, JJ.A., also concurred.

GARROW, J.A., was of opinion, for reasons stated in writing, that the plaintiff was entitled to retain her judgment against both defendants, but that the railway company were entitled to a remedy over against their co-defendants.

ANGLIN, J. JANUARY 8TH, 1909.

TRIAL.

TORONTO, HAMILTON, AND BUFFALO R. W. CO. v. SIMPSON BRICK CO.

Railway — Private Crossing Used for Purposes of Business of Brick-yard—Agreement of Railway Company to Provide "Farm Crossing" — Means of Egress to Public Highway—Easement — Prescription — Estoppel—Railway Act, 1888, sec. 191—Covenant to Maintain Crossing —Equivalent of Reservation—Construction of Statutes—Headings and Side-notes—Operation of Railway—Severance of Land—Evidence—Inconvenience—Injunction.

Action for an injunction restraining the defendants from trespassing upon the plaintiffs' right of way and railway tracks.

J. W. Nesbitt, K.C., for plaintiffs.

A. M. Lewis, Hamilton, for defendants.

ANGLIN, J.:—The defendants, as lessees of Mr. J. J. Scott, occupy and operate a brick yard situate within the city of Hamilton, on the north side of the plaintiffs' line of railway between Hamilton and Brantford. In connection with their business the defendants use a private lane or right of way, 30 feet in width, over the property of one Maguire, lying to the south of the plaintiffs' railway. This land leads to Aberdeen avenue, and is the only means of access from the defendants' brick yard to a public highway. To reach this lane the defendants use a crossing over the plaintiffs' railway, and this constitutes the trespass of which the plaintiffs complain.

When the plaintiffs' railway was built, both the lands now leased by the defendants and those now owned by Maguire were the property of Noah S. Briggs and Charles S. Briggs, as tenants in common. In December, 1894, they conveyed to the plaintiffs their right of way through their property, and they obtained simultaneously with their conveyance an agreement by which the plaintiffs covenanted to provide and maintain "a farm crossing" at the point now in question. The land now leased by the defendants had been in use as a brick-yard for some 25 years prior to 1893. From 1893 to 1903 it lay practically idle. The Messrs. Briggs

conveyed both properties to Maguire in December, 1901. In March, 1903, one Fanning acquired from Maguire the premises now leased by the defendants. In his conveyance Maguire granted to Fanning a right of way, from Aberdeen avenue to the lands conveyed to him, over a strip of land 30 feet wide and abutting at its northern end, opposite the crossing provided and maintained by the plaintiffs under the agreement of 1894. Fanning subsequently agreed to sell to Mr. J. J. Scott; and Mr. Scott has leased the premises to the defendants, with an option to the defendants to acquire Mr. Scott's rights under his agreement with Fanning. The right of way is not specifically referred to in the two latter documents. It was evidently regarded as something which would pass with the land as appurtenant to it.

Though Fanning bought the property for the purpose of re-establishing a brick-making industry upon it, he did not make use of it. Before Mr. Scott bought, he negotiated with the plaintiffs, through their superintendent, Mr. Fisher, for a siding. In these negotiations the crossing was not expressly referred to. Mr. Scott established an extensive brick-making industry on the property. The plaintiffs built the siding arranged for, and also reconstructed the crossing, which they have since maintained in repair. For a year and a half no objection was taken to the use made of the crossing by Mr. Scott, which was similar in character and extent to the use which the defendants have made of it since they acquired the business. But early in 1906 the plaintiffs began to complain of the crossing being used for the purposes of a manufacturing business, asserting that it had been intended only for farm purposes. This action was begun in July, 1907.

While I do not deem it material, in case it should hereafter prove to be so, I find that the plaintiffs were aware that Mr. Scott intended to use the premises which he bought from Fanning as a brick-yard, and that he intended to invest a large sum of money in the business. I find that the plaintiffs, through Mr. Fisher, were fully aware that Mr. Scott bought with the idea of using the crossing in question and the lane to the south as the means of conveying from his yard brick intended for local trade, and which he should not ship out by the plaintiffs' railway. I find that it was because of this knowledge that they reconstructed and subsequently repaired the crossing in question.

This crossing and lane afforded, when this action was begun, the only means of egress from the Scott property to

a public highway. Pending this litigation, and with a view to facilitating a suggested settlement, a strip of land leading from the defendants' premises along the plaintiffs' railway to Aberdeen avenue has been secured. But this would afford a very poor and inconvenient mode of egress to the defendants, owing to a depression, some 60 feet deep, occurring upon it between the defendants' premises and Aberdeen avenue. Moreover, having regard to the circumstances under which this strip of land was acquired, a settlement not having been effected, I think the defendants are entitled to have this action disposed of as if they did not control this strip, although, in the view which I take, their control of it does not affect the right which they assert and defend.

In the present case it may be unnecessary to inquire what would be the purely statutory rights of the defendants or obligations of the plaintiffs, in the absence of any agreement respecting the right of crossing at the point in question. I assume—as the authorities seem to establish—that no prescriptive right of crossing, and no such right by estoppel, can arise after the railway company have acquired their right of way, because it is apparently ultra vires of a railway company by express grant to confer such an easement: Canada Southern R. W. Co. v. Town of Niagara Falls, 22 O. R. 41. Apart from agreement and excluding highway crossings and crossings which the Railway Commission may now order, the only rights of crossing to which the right of way of a railway constructed under the Railway Act of 1888 (51 Vict. ch. 29) is subject, are those provided for by sec. 191 of that statute. But I know of nothing to prevent a railway company, when acquiring their right of way, taking the land required from their grantor, subject to reservations in his favour of such rights of crossing or other easements as may be agreed upon, and which are not inconsistent with the use of the right of way for railway purposes: McKenzie v. Grand Trunk R. W. Co., 14 O. L. R. 671, 9 O. W. R. 778. An agreement for a crossing contemporaneous with the deed of the right of way to the railway company, is, I think, equivalent to a reservation in the deed itself. Here the vendors made such an agreement, and the character and extent of their right of crossing the plaintiffs' railway must be determined by the terms of that agreement, which is in the form of a covenant by the railway company to provide and keep in repair "a farm crossing," &c., at a specified point. The crossing claimed by the defendants is at this point.

Subject to the question of severance dealt with below, the covenant of the railway company with "the vendors, their heirs, executors and administrators," enures to the benefit of assigns or grantees of the vendors, including lessees of such grantees. The first question for determination, therefore, is, whether the use which the defendants are making of this crossing is within the rights conferred upon Noah S. Briggs and Charles H. Briggs by the agreement of the plaintiffs.

This agreement recites the conveyance by deed of even date of part of the Briggs property to the railway company for the purposes of their railway, and an agreement by the railway company that, "in consideration of the conveyance," they "should provide a crossing over and across the said lands so granted and conveyed." It proceeds: "Now this indenture witnesseth that the company hereby covenants and agrees with the said vendors to provide and thereafter keep in repair a proper and convenient farm crossing, of a width of 14 feet, with two gates 12 feet in width, one on the northerly and the other on the southerly boundary of the said railway lands, the said crossing to be placed at or near station number 496 in the company's line of railway."

It is notable that, while "farm crossing" is found in the operative clause, "crossing" alone is used in the recital. The terms "crossing" and "farm crossing" appear to be used indifferently and as interchangeable terms. Having regard to the facts that for 25 years before the railway was built the property to the north had been used almost constantly as a brickyard, and was unsuited for other purposes, and that the crossing was designed to furnish a means of egress from this land to Aberdeen avenue, it would seem that it was intended by this agreement to provide for a crossing for such purposes as the owners of this property might require, and not merely for a crossing restricted in its use to "farm purposes," in the ordinary sense of that phrase. Indeed, I think that the word "farm" may well be disregarded in construing the agreement, and that it may be read as conferring a right of crossing for all purposes for which the land cut off by the railway may profitably and conveniently be used. It would, in my opinion, defeat the intent of the parties to the agreement to hold that the use of the crossing must be confined strictly to farm purposes.

But if the word "farm" may not be rejected or ignored, then I would find that the term "farm crossing" was used by the parties as a convenient description of the right of crossing created by sec. 191 of the Railway Act of 1888.

In the Railway Act of 1888 two kinds of crossings and only two are provided for, viz., "highway crossings" and what are in the heading and side-note to sec. 191, though not in the section itself, termed "farm crossings." "Farm crossings" appears to be a term used in the statute in contradistinction to "highway crossings," and intended to cover all private rights of crossing to be enjoyed by "persons across whose lands the railway is carried," whatever may be the character of such lands or the use to which they are put. Having regard to all the circumstances in which the agreement here in question was made, as shewn by the evidence, it was intended, in my opinion, to confer upon the grantors to the railway company a right of crossing, in its nature and extent at least as great as that described under the caption "farm crossings" in sec. 191 of the Railway Act, the width of the crossing itself, and of the gates and its precise location, being defined by the agreement. The phrase "a farm crossing," if not used as the equivalent of "a private crossing," as I think it was, was employed as a convenient and well-understood phrase to describe the rights created by sec. 191 of the Railway Act, and these rights, at least, the agreement, upon its proper construction, in my opinion conferred on Noah and Charles Briggs.

For the plaintiffs it is contended that the right of crossing conferred by sec. 191 is restricted to such uses as are incident to the usual and ordinary requirements of a farmer. This question was mooted but not determined in Plester v. Grand Trunk R. W. Co., 32 O. R. 55, where it was held by a Divisional Court that the hauling of gravel from a farm to a highway was "a farm purpose," and the Court suggested that the hauling of timber cut from the land might be within "farm purposes." Possibly conveying from the land brick made from clay found in it might also, upon a construction, liberal but not unreasonably so, of "farm purposes," be deemed to be covered by that phrase.

As already pointed out, sec. 191 made the only provision under the Act of 1888 for crossings over railways other than highway crossings. Railways are necessarily carried across many properties which are not farms in any sense of the word. The language of sec. 191 is that "every company shall make crossings for persons across whose lands the railway is carried, convenient and proper for the crossing of the railways by farmers' implements, carts and other vehicles." Unless these latter words are to be read as re-

stricting the preceding general language of the section, and confining the use of every crossing provided under this section to farmers' implements, farmers' carts and farmers' other vehicles, there is in the section itself nothing to warrant the view that it was intended to provide only for crossings for "farm purposes." On the contrary, the section extends to all lands across which the railway is carried. The word "farmers'" applies necessarily only to the word "implements." It does not necessarily qualify the words "carts and other vehicles." But, if it does, the phrase "convenient and proper for the crossing of the railway by farmers' implements, carts and other vehicles," describes, not the uses to which the crossing may be put, but the kind of construction which the railway company were required to provide, that is, a crossing so built and arranged that it should afford a suitable passage for farmers' implements, for carts and for other vehicles. Whatever the purpose for which the lands crossed by the railway are used, the owner shall not be entitled to require the company to provide or maintain any higher grade or better class of crossing than that so described. But it by no means follows that the use of the crossing is to be restricted to farm purposes.

Should the generality of the section as to the lands to which it applies be restricted by the caption and side-note "farm-crossings?" In my opinion, it should not. The fact that, if such a construction were to prevail, many properties not farms would be left unprovided for and much valuable land cut off from access to street or highway, affords a cogent argument against it. That marginal notes are no part of the statute is well established. The function of the caption or heading appears to be similar to that of a preamble, viz., to aid in explaining obscure, doubtful, or ambiguous language in the section or sections found under it: Donly v. Holmwood, 4 A. R. 555, 560; but not to extend or restrict the scope of terms plain and unequivocal. The heading must often be regarded as "inserted for the purpose of convenience of reference and not intended to control the interpretation of the clauses which follow:" Union Steamship Co. of New Zealand v. Melbourne Harbour Trust Commissioners, 9 App. Cas. 365, 369.

"In this Act . . . unless the context otherwise requires . . . the expression 'lands' . . . includes real property, messuages, lands, tenements, and hereditaments of any tenure." The onus is certainly upon those

who contend that "lands" in sec. 191 means "farm lands" only, to shew that it is inconsistent with the context to give to the word "lands" the wider meaning given it in the interpretation section: ib.

The distinction between cases such as Eastern Counties and London and Blackwell R. W. Co. v. Marriage, 9 H. L. C. 32, in which the heading dealt with read, "And with respect to small portions of intersected land be it enacted as follaws," and Hammersmith, &c., R. W. Co. v. Brand, L. R. 4 H. L. 171, where the heading was, "And with respect to the construction of the railways and the works connected therewith, be it enacted as follows" (pp. 203 and 208), on the one hand, and, on the other, cases like that now under consideration, where the headings are not "so drawn as to be applicable grammatically to the sections which follow them," is pointed out in Union Steamship Co. of New Zealand v. Melbourne Harbour Commissioners, supra. In the former class of cases the heading is certainly intended to control the application of the sections under it, while in the latter class the heading rather appears to be inserted for convenience of reference, and its further office to be that it "may properly be . . . used for the purpose of construing any doubtful matter in the sections under that very heading:" per Brett, L.J., in The Queen v. Local Government Board, 10 Q. B. D. 319, 321.

But the heading "farm crossings" is given full effect if it is taken to be descriptive of the grade or class of crossing which the railway shall be obliged to provide. If there is anything obscure or ambiguous in sec. 191, it is found in the concluding words, "farmers' implements, carts and other vehicles." If the heading is looked at for the purpose of clearing up any doubt as to whether the qualifying word "farmers'" applies to "carts and other vehicles," as well as to "implements," it then fulfils its legitimate office. This may lead to the application of the qualifying word "farmers'" to all three subjects. But the whole phrase in which these words occur—"convenient and proper for the crossing of the railway by farmers' implements, carts and other vehicles—" is, as already pointed out, restrictive neither of the kinds of properties for which crossings must be provided nor of the uses to which such properties or crossings may be put, but descriptive of the sort and quality of crossing which the railway must make. The heading "farm crossings" is given all the effect and influence to which it is

entitled in the construction of the section, if it, too, is taken as descriptive of the character of the construction of the crossing, and not restrictive of the purposes for which it may be used, or of the uses to which the lands crossed by the railway may be put. I see nothing to require construction of the words "for persons across whose lands the railway is carried," in a sense different from their plain and ordinary meaning.

No doubt, the vast majority of crossings which it was expected that railways would be required to make under this provision were crossings which may properly and with strict accuracy be called "farm crossings." This fact may account for the use of this term in the statute to designate the private crossings, of whatever nature, for which it was intended to provide by sec. 191, in contradistinction to the public crossings designated "highway crossings," and provided for by secs. 183 to 190 inclusive. But I incline rather to the view that this heading was inserted as descriptive of the class and grade of crossings which the railway companies should be obliged to construct.

The corresponding section of the English Act, the Railway Clauses Consolidation Act (1845), numbered 68, is so different in its terms that cases decided under it afford little assistance in construing sec. 191. It requires the company to make and maintain "for the accommodation of the owners and occupants of lands adjoining the railway, such and so many convenient gates, bridges, arches, culverts, and passages as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made." If the plaintiffs' railway were constructed under such a statutory provision as this, I should entertain no doubt that, subject to the question whether the extent and mode of his user prevents or obstructs the working of the railway—Great Northern R. W. Co. v. McAllister, [1897] 1 I. R. 587—the defendants would, apart from agreement, be entitled to the right of crossing which they claim. Upon the construction of sec. 191 of our own Railway Act of 1888, I have been referred to no authority except the case of Plester v. Grand Trunk R. W. Co., supra, and I have myself found no such authority. I have no hesitation in concluding that sec. 191 is not restricted in its application to crossings for farm purposes merely.

The evidence has not at all convinced me that the use by the defendants of this crossing is inconsistent with the safe

operation of the plaintiffs' railway, or that it unduly increases the burden of the easement created by the agreement of 1894.

The plaintiffs sought to show that the traffic over this portion of their line was very heavy, their train master being called to state that 70 trains a day passed the crossing. But of these so called trains only 14 to 16 are passenger or freight trains, the rest being light engines and principally yard engines. Many of these trains run at night, when, of course, the crossing is not in use by the defendants. The crossing is within the city of Hamilton. The evidence is that about 10 waggons per day—one-half loaded, one-half empty—are driven over it. Except in a couple of instances in 1904, there is no evidence of any obstruction or delay of the plaintiff's trains by the use made of the crossing. Since that time there has been no report of trouble. There apparently has been none since the defendants became lessees of the premises. There is not in this case evidence such as was before the Court in Great Northern R. W. Co. v. McAllister, [1897] 1 I. R. 58; that a use is being made of the crossing for which it is unsuitable in construction, or that it is being used in any extraordinary manner, or for cumbrous vehicles, such, for instance, as a traction engine. The plaintiffs have not shewn that the use made by the defendants of the crossing has seriously incommoded or inconvenienced them, if indeed mere inconvenience, short of obstruction to traffic creating a condition of danger inconsistent with the use of the railway, would suffice: they certainly have not established that it prevents or unduly interferes with or obstructs the working of the railway.

The premises now leased by the defendants had been in use as a brick yard for 25 years before the railway was built. The land is unsuited for agricultural purposes, and it must have been in the contemplation of the plaintiffs that its use as a brick-yard might and probably would be resumed. As stated in the McAllister case, "Every physical circumstance may be taken into consideration in determining now what was in the minds of the parties as to the future use of the crossing." The defendants are merely carrying on, perhaps on a somewhat more extensive scale, a business for which the premises were used before the railway was constructed. They have not, as was the case in Great Northern R. W. Co. v. Talbot, [1902] 2 Ch. 759, sought to use the crossing for conveying goods and traffic not originating

upon the premises to which the easement is appurtenant. They have not unduly increased the burden of the easement by altering its character, nature, or extent. I do not know that they can be required to limit their use of the crossing to purposes for which the land was used before the railway was built: United Land Co. v. Great Eastern R. W. Co., L. R. 17 Eq. 158; but they are in fact exercising the right of crossing in a manner in which, upon the evidence before me, I think it was contemplated it should be exercised when the agreement of December, 1894, was made.

For the plaintiffs it is further urged that when the right of crossing was created the lands on either side belonged to the same owners, Noah and Charles Briggs; that they are now held by different owners—the plaintiffs' lessor Scott or his vendor Fanning on the north and Maguire on the south—and that, therefore, the right of crossing has ceased to exist; and counsel cited Midland R. W. Co. v. Gribble, [1895] 2 Ch. 827. There a severance, without reservation, in favour of the land for which the easement was subsequently claimed, of the easement itself, or of any right of way over the other portion of the land to the enjoyment of which the right of crossing would be necessary, was held to involve an abandonment of the right of crossing. The Court of Appeal, affirming the decision of Wright, J., rests its judgment distinctly upon the abandonment and release implied by the owner's severance "in such a way as to shew conclusively that this occupation way over the railway was no longer of any use to him, and to shew conclusively that he never intended to use it thereafter . . . When he severed the land without any reservation of any right of way, there was an end of the right of way over the railway—he abandoned his easement:" per Lindley, L.J., at p. 831. Here there was the grant by Maguire to Fanning, as appurtenant to the land to the north which Fanning bought, of the right of way over the strip 30 ft. wide leading from the railway crossing over Maguire's unsold land to Aberdeen avenue. Midland R. W. Co. v. Gribble is, therefore, as Mr. Lewis said, an authority supporting rather the contention of the defendants than that of the plaintiffs. There has not been in this case any such severance as would involve the cesser of the right of crossing.

The plaintiffs have entirely failed, in my opinion, to establish their right to the relief which they claim, and their action should, therefore, be dismissed with costs.