THE

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SEPTEMBER 30TH, 1907.

DIVISIONAL COURT.

## TORONTO CREAM AND BUTTER CO. v. CROWN BANK OF CANADA.

*Security for Costs—Action Brought by Liquidator in Name of Company in Liquidation—Liability for Costs—Assets of Company—Undertaking of Liquidator.*

Appeal by plaintiffs from order of MABEE, J., 9 O. W. R. 718, reversing order of Master in Chambers, 9 O. W. R. 543, and requiring plaintiffs to give security for costs, by means of an undertaking of their liquidator.

M. C. Cameron, for plaintiffs.

F. Arnoldi, K.C., for defendants.

THE COURT (MULOCK, C.J., ANGLIN, J., CLUTE, J.), dismissed the appeal with costs.

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SEPTEMBER 30TH, 1907.

DIVISIONAL COURT.

## RE BOYD v. SERGEANT.

*Division Courts——Jurisdiction—Division Courts Act, sec. 190—Action Brought in Wrong Court as against Garnishees—Abandonment at Trial of Claim against Garnishees—Objection to Jurisdiction by Primary Debtor—Saw Logs Driving Act, sec. 16—Common Law Cause of Action — Decision of Division Court Judge — Right to Review.*

Appeal by defendant from order of RIDDELL, J., ante 377, dismissing a motion for prohibition to the 1st Division Court in the district of Algoma.

J. A. Paterson, K.C., for defendant.

W. E. Middleton, for plaintiff.

THE COURT (MULOCK, C.J., ANGLIN, J., CLUTE, J.), dismissed the appeal with costs.

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CARTWRIGHT, MASTER. OCTOBER 1ST, 1907.

CHAMBERS.

## COATES v. THE KING.

*Pleading — Amendment — Petition of Right—Consent of Crown—Rules of Court.*

Motion by the suppliants for leave to amend the petition of right so as to read in the 14th paragraph that the suppliants "at the request of the said Government purchased" the second issue of treasury bills. The facts are stated in a former report, ante 462.

Featherston Aylesworth, for the suppliants.

N. Ferrars Davidson, for the Crown.

THE MASTER:—The motion was supported by Rule 929, which, it was argued, empowered the Court to deal with a petition of right in regard to the proposed amendment as if it was an ordinary action.

Rule 929 is substantially the same as sec. 7 of the Imperial Act 23 & 24 Vict. ch. 34. In Clode on Petition of Right, p. 176, this section is discussed, and it is shewn that "the Crown has always had a certain prerogative in matters of pleading and procedure which has not been taken away by this statute."

The cases of Thomas v. The Queen, L. R. 10 Q. B. 44, and Tomline v. The Queen, 1 Ex. D. 252, shew that as respects discovery the rights of a suppliant are not co-extensive with those of the Crown.

In the latter case Bramwell, L.J., points out that this is also the case as to security for costs.

No case was cited on the point of amendment, nor have I found any, except that of Smylie v. The Queen, 27 A. R. 172, where an amendment was granted by the Court of Appeal quantum valeat. No mention of this is made in the judgment of the trial Judge in 31 O. R. 202, and I have not been able to see a copy of the appeal book. But counsel for the Crown in that case may not have objected to the amendment, which only asked alternative relief by way of damages in case the suppliants were held to be entitled to the relief prayed for, and the Crown was unwilling to renew the licenses in the old form. It was not sought in that case to vary the statement of what is prima facie a material fact, as is asked here. The present motion is opposed except on terms which the suppliants decline to accept. I am, therefore, of opinion that it cannot be granted for two reasons.

(1) A petition of right has to be verified by affidavit. It would therefore seem to follow that as a condition precedent to entertaining the motion the proposed amendment should be verified in the same way, and the mistake satisfactorily accounted for.

(2) But, however that may be, it seems to be a more serious and indeed a fatal objection that any such amendment should be first submitted to the Lieutenant-Governor and approved of by him. The granting of the necessary fiat is an act of grace (Clode, p. 165, and cases cited.) Without this no further proceedings can be taken. If, therefore, a different case is sought to be set up, it is surely necessary that the permission of the Crown to proceed thereon should be granted.

This would sufficiently appear from the consent of the counsel for the Crown, which in such a case should be recited in the order.

For these reasons I am of opinion that the Rules as to amendments are not applicable to the present motion, as the Court has no power to amend a petition of right without the consent of the Crown.

The question is one of some novelty and importance, and the costs may be in the cause. . . .

CARTWRIGHT, MASTER. OCTOBER 1ST, 1907.

CHAMBERS.

## WELBURN v. SIMS.

*Security for Costs—Slander—Chastity of Plaintiff—R. S. O. 1897 ch. 68, sec. 5, sub-sec. 3—Defence—Admission.*

Motion by defendant for security for costs in an action brought under R. S. O. 1897 ch. 68, sec. 5, the motion being made under sub-sec. 3 of sec. 5.

W. D. McPherson, for defendant.

W. N. Ferguson, for plaintiff.

THE MASTER:—Paragraph 4 of the statement of claim charges defendant with having made defamatory statements impugning the plaintiff's chastity to certain persons, and proceeds as follows: "And to the plaintiff's husband the defendant said 'If you knew what I know, you would not live with that woman (meaning the plaintiff) for three minutes,'" and adding particulars.

The defendant's affidavit in support of the motion denies the previous alleged slanders and continues: "I did upon one occasion, in response to a question from Mr. Welburn, the husband of the plaintiff, tell him 'If you knew what I know you would not live with that woman for three days,'" but denying any other statement to Mr. Welburn, or any one else affecting the plaintiff.

It is objected that no defence is shewn to what is the most serious of the alleged slanders. There is confession, but not avoidance.

I agree with this view: and, following Paladino v. Gustin, 17 P. R. 553, I think the motion must be dismissed with costs to plaintiff in any event. This renders it unnecessary to consider whether the plaintiff is responsible for costs. At the close of the argument I was under the impression that this had not been successfully attacked, within the principle laid down by the Chancellor in Bready v. Robertson, 14 P. R. 7.

The defendant should plead in 10 days.

MABEE, J. OCTOBER 1ST, 1907.

TRIAL.

## LAWSON v. PACKARD ELECTRIC CO.

*Master and Servant—Injury to Servant—Infant Employed in Factory — Negligence of Foreman — Dangerous Machines—Neglect to Caution Infant—Liability of Employers—Superintendence — Workmen's Compensation Act—Factories Act.*

Action for damages for injuries sustained by plaintiff while in the employment of defendants, by reason of the negligence of defendants, as alleged.

H. H. Collier, K.C., for plaintiff.

E. D. Armour, K.C., and G. B. Burson, St. Catharines, for defendants.

MABEE, J.:—The plaintiff entered the defendants' employ in May last, and on 19th June met with an accident while attempting to take a tin plate out of a stamping machine. He lost the ends of three fingers. He was between 14 and 15 years of age, and had no knowledge of machinery of any kind, and was engaged by Mr. Pope, the defendants' foreman upon the floor in question, to help any one there who needed help, except one Gallagher, who was doing piece work. He was given no instruction how to operate any of the machines; the foreman said it was not intended that he was to operate any, nor was he given any warning as to any of them being dangerous. In other words, he was just turned loose upon this floor with general instructions to help any one and every one (except Gallagher), with no word of caution or warning of any description. On 19th June he was helping George Hill to put the plates through the stamping machine in question; they were carried to the machine by the plaintiff and Hill; the latter was to operate the press; then, after they were stamped, the plaintiff was to carry them way. Hill had left the machine for a few minutes, and Pope called out and asked in effect if the two were going to be all day in getting the plates through, whereupon the plaintiff, in the absence of Hill, took hold of the press and endeavoured to get a plate out, when the die came down upon his hand. It is tripped

by a foot press, and this the plaintiff must have inadvertently touched, as it appears it had never been known to fall without pressure upon that part. Hill had been accustomed to use a stick to take the plates out, but this had been misplaced.

The accident plainly occurred by reason of the plaintiff's endeavour to get the plates put through without delay, and his attempting to remove one from a machine about which he had never been instructed nor warned as to its danger.

Pope had authority to employ the plaintiff, and was acting under such authority. Was he negligent in not cautioning the plaintiff as to the danger of the machines? It is admitted that the machine in question is dangerous, and the foreman said there was no way to guard it. Was it not the duty of the foreman to point out to the plaintiff the dangerous machines, and caution him, or give some instructions as to how he should approach them, and, if it was intended that he should not attempt to operate any of them, forbid him from so doing?

I have no hesitation in holding his omission to take this reasonable and sensible course to be the grossest kind of negligence. The dangers surrounding the work the boy was put at were apparent to the foreman. They were by no means appreciated by this inexperienced boy, and I am of opinion that the plain duty of any foreman, under the like circumstances, is to point out, to caution, and to warn, and omission to do so is negligence.

The evidence does not disclose that the foreman made any examination of the boy's capacity for appreciating danger, and so he was allowed to commence without any care being taken to ascertain his ability to perform the work he was being set at. It is clear that the instructions given him to help those requiring his assistance, would sooner or later take him to assist some one in working a dangerous machine, just as in the result he was called upon to help Hill; he is then directed to perform what may be hazardous work, and of which he had had no experience; and, as I understand the liability and duty of masters under such circumstances, it is that they are bound to point out the dangers connected with that work, thus enabling the infant employee to comprehend and avoid them; and omission so to do is carelessness that makes the employer liable for the consequences that follow.

. . .

Mr. Armour contended that the defendants were not liable even if the foreman had been guilty of negligence in omitting to caution, and relied upon the recent case of Cribb v. Kynoch (Ltd.), [1907] 2 K. B. 548, where it was held that the doctrine of common employment applied, and that, although there was a duty on an employer to give instructions to a young and inexperienced person employed by him in dangerous work, that duty was one that could be delegated to a foreman, and that the negligence of the foreman was a risk which a fellow-servant, even though an infant, takes upon himself. The report of this case states that the action was based solely upon the common law liability, and so I presume there was some reason why the plaintiff was not able to invoke the assistance of the Employers' Liability Act.

The plaintiff here is entitled to rely upon the provisions of R. S. O. 1897 ch. 160, sec. 3, which provides for personal injuries caused by the negligence of any person in the service of the employer "who has any superintendence" intrusted to him, whilst exercising such superintendence, and in such cases the statute has swept away the defence of common employment. So here the foreman Pope was in the service of the defendants, and was intrusted with the superintendence of hiring men to work on this floor, and while he was so exercising such superintendence he was guilty of an omission of duty towards the plaintiff, which I think was plainly negligence. I do not read the Cribb case as in any way cutting down or limiting the provisions of the Employers' Liability Act, and, therefore, I do not regard it as assisting in the solution of any case here based upon the provisions of our Workmen's Compensation for Injuries Act.

I think the plaintiff's case can also be based upon sub-sec. 3 of sec. 3 of the Act, and, if desired, the pleadings may be so amended. The plaintiff was bound to conform to the directions of Pope, and at the time of the injury he was so conforming, namely, helping Hill, and the injury resulted from his having so conformed. I think it was negligence in the foreman in so directing the plaintiff to assist at the working of a dangerous machine, without himself giving some instructions, or warning, or seeing that the operator of the machine did.

I do not think that the plaintiff has any redress under the provisions of the Factories Act, as it does not appear that

the machine in itself could have been rendered less dangerous by any sort of guard or protection.

I think the plaintiff is entitled to recover, and I assess the damages at $600.

Judgment for plaintiff for $600 damages and costs.

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MABEE, J. OCTOBER 1ST, 1907.

TRIAL.

## SERVOS v. STEWART.

*Water and Watercourses — Lands Bordering on Navigable Lake—Rights of Riparian Owner—Removal of Sand or Gravel from Shore—Trespass—Injunction—Damages.*

Action for trespass to land.

J. H. Ingersoll, St. Catharines, for plaintiffs.

G. F. Peterson, St. Catharines, for defendant.

MABEE, J.:—Plaintiffs own lot 5 in the 1st concession and broken front of the township of Grantham. The description in the Crown grant, which issued on 8th July, 1799, covering lot 5, runs as follows: "Beginning on the shore of Lake Ontario where a post has been planted at the south-east angle of lot No. 5, marked $\frac{R}{5}$., thence south . . . to the place of beginning." A plan made by Mr. George Gibson in 1871, from a survey made by him, shews that at that time the water line had receded between 7 and 8 chains, and he stated at the trial that since 1871 between 3 and 4 chains more have washed away. Plaintiffs' farm is cultivated down to the edge of the bank; this is a clay loam ranging from 10 to 15 feet in height, at the foot of which lies the shore composed of sand and gravel of varying width, in some places 20 feet, and in others the margin of shore or beach is very small. I find upon the evidence of plaintiff Alexander Servos, and of George Coppen, that this shore or beach forms a protection to the bank, and at the points where the shore is widest and highest, the bank is less liable to wash or cave down during high water and storms than where the shore is low or narrow.

Even with this protection, over 40 acres of the land covered by the Crown grant have washed away during the past century, and doubtless without the shore or beach, and with the direct action of the waves upon the clay banks, a great deal more land would have been lost during that time. A narrow highway runs down to the beach, and in December last, and again in May of this year, defendant drove down the highway and removed gravel from the shore opposite the lands of plaintiffs. Objection was taken to this by one of the plaintiffs, and he ordered defendant off. Again on 29th May defendant returned, with a number of his neighbours, and drew away 17 or 18 loads of gravel from a point some distance from where the road touches the beach, and opposite plaintiffs' lands. Plaintiffs then had defendant notified in writing to desist; he drew two loads after receiving the written notice, and in his examination for discovery says he intends to draw more as soon as his farm work will permit him. So defendant claims the right to remove this gravel from opposite the lands of plaintiffs, and the point for determination is whether plaintiffs can prevent him.

Plaintiffs contended that the point of commencement in the description in the Crown grant being now some 10 or 11 chains out in the lake, they are the owners of the land out that far covered by the lake waters, but I do not think that to be the case. The grant relates to land on the shore of Lake Ontario, and as the lake widens the boundary of plaintiffs' lands recedes. But, to entitle plaintiffs to maintain this action, it is not necessary for them to make title to any of the lands covered by water. They are riparian proprietors, and have the right to have the beach or shore maintained in such manner as will best protect their lands. Carrying away this gravel gives the water easier access to plaintiffs' cultivated lands, and renders them liable, during storms, to encroachment they would not otherwise be liable to. It is, as it were, a natural wall between the waters of the lake and plaintiffs' banks, and defendant, proposing to tear that wall down, may be restrained: Attorney-General v. Tomline, 14 Ch. D. 58.

In Stover v. Lavoia, 8 O. W. R. 398, 9 O. W. R. 117, it is held that the shore of a navigable inland lake is now well understood to mean the edge of the water at its lowest mark, and that a grant to the lake shore "carries to the edge of the water in its natural condition at low water mark." If this

be so, then the lands of the plaintiffs extend to the line of the water at low water mark, and so include the spot where defendant removed the gravel. My own view would be that a boundary at the shore of a lake would be that point where the ordinary wash ceased, and that all the sand or beach between ordinary low water and the nominal high water wash would form the shore. Again applying Stover v. Lavoia, it is said that a littoral or lacustrine proprietor has the right to protect his riparian privilege against any injury likely to arise from the wash of the waves and against the removal of sand or gravel which forms a natural barrier against the encroachment of the lake.

I find the fact to be that the act of defendant rendered the encroachment of the lake more likely, and the continued removal of the sand or gravel would work injury to plaintiffs' lands.

It was contended that the sand or gravel might shift or wash away by storms, and so the waters reach plaintiffs' banks. Of course, that might happen, and that is one of the risks incidental to plaintiffs' riparian position, but it in no way forms any excuse for defendant removing what the storms have not as yet washed away.

It was also argued that, as plaintiffs had at times sold gravel to defendant and others, they were in some way precluded from now complaining. I do not think so. Plaintiff Alexander Servos admitted that he had done so, but in ignorance of its injurious effects, and that he, now knowing the injury it had been to his land, was determined to stop further removal if he could.

Coppen, an owner some 5 or 6 lots away, said he had refused $200 for leave to remove gravel from in front of his land, as such removal would be very injurious to the banks.

I think plaintiffs are entitled to an injunction restraining defendant, his servants or agents, from digging up or removing any sand or gravel lying between the banks of plaintiffs' lands and the waters of Lake Ontario.

I fix the damages for the trespasses already committed at $20, and order defendant to pay plaintiffs' costs upon the High Court scale.

OCTOBER 1ST, 1907.

DIVISIONAL COURT.

## PORT HOPE BREWING AND MALTING CO. v. CAVANAGH.

*Company—Shares—Subscription—Increase of Capital Stock —Agreement to Take Shares before Issue of Supplementary Letters Patent—Amendment — Rights of Defendant under Contract.*

Appeal by plaintiffs from judgment of MACMAHON, J., 8 O. W. R. 985.

H. A. Ward, Port Hope, and C. A. Moss, for plaintiffs.

W. E. Middleton, for defendant.

THE COURT (MULOCK, C.J., ANGLIN, J., CLUTE, J.), gave leave to plaintiffs to amend their statement of claim by setting up the contract made between plaintiffs and defendant, and directed that upon the amendment being made the plaintiffs should have judgment upon the contract for the amount of their claim, reserving, however, the rights of defendant under the contract. No costs of appeal or of action subsequent to issue of writ.

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RIDDELL, J. OCTOBER 2ND, 1907.

TRIAL.

## FOSTER v. ANDERSON.

*Vendor and Purchaser — Contract for Sale of Land—Construction—Time of Essence—Delay of Purchaser in Tender of Purchase Money and Deeds — Refusal to Award Specific Performance—Costs.*

Action for specific performance of a contract for the sale by defendant to plaintiff of land.

W. J. Clark, for plaintiff.

G. H. Watson, K.C., for defendant.

RIDDELL, J.:— . . . An offer to purchase, dated 18th September, 1906, signed by plaintiff, was by a real estate agent, who had by defendant been authorized to receive offers to purchase, transmitted to her. She on 20th September, 1906, accepted this offer to purchase, and transmitted the offer so accepted to the real estate agent, and it was by him handed to plaintiff. Shortly thereafter defendant became dissatisfied with the bargain, and so notified her solicitor. This solicitor, in conversation with the solicitor for plaintiff, made it clear that his client was dissatisfied; and there was nothing in the conduct of defendant or her solicitor which should or did lead plaintiff or his solicitor to believe that the terms of the contract would not be rigidly insisted upon. I accept the evidence of defendant's solicitor in all respects, except that I think the story told by the real estate agent of the interview between him and defendant's solicitor is substantially true. I have been unable to find any fraud on the part of the real estate agent, even if that would, on the facts of this case, have made any difference.

The terms of the contract material to be considered are as follow:—

To Mrs. R. W. Anderson: I, G. B. Foster, . . . hereby agree to and with Mrs. R. W. Anderson . . . to purchase all and singular . . . at the price or sum of $9,500 . . . $100 in cash . . . on this date as a deposit, and covenant, promise, and agree to pay $1,400 on closing of purchase and to execute a second mortgage for $4,000, bearing interest at 5 per cent., payable . . . and assume the mortgage incumbrance now thereon . . . provided the title is good. . . . The purchaser is to be allowed 10 days from acceptance to investigate title at his own expense. This offer is to be accepted by 25th September, 1906, otherwise void; and sale to be completed on or before 10th October, 1906, on which date possession of the said premises is to be given me, or I am to accept the present tenancies and be entitled to the recipt of the rents and profits thereafter . . . Time shall be the essence of this offer. Dated 18th September, 1906. G. B. Foster.

"I hereby accept the above offer and its terms, and covenant, promise, and agree with the said G. B. Foster to duly carry out the same in the terms and conditions above mentioned. . . Dated 20th September, 1906. Rosina W. Anderson."

I think that the provision that time should be "the essence" applies not only to the time at which the offer was to be accepted, but also to the time at which the offer so accepted was to be carried out.

Had plaintiff been ready to carry out the purchase on 10th October, and had tendered a conveyance for execution, accompanying this with the $1,400 and the second mortgage called for by the contract, I have no doubt that the transaction would have been closed, and that, though defendant's solicitor had no express instructions to receive money on behalf of his client, such a tender to him would have resulted in the completion of the purchase.

It is quite clear that the purchaser did not intend that the purchase should be completed on 10th October; he upon that day sent a draft conveyance to the solicitor for defendant to be executed by defendant, and said in the letter: "Immediately you notify me that the same is executed, I am prepared to pay over the purchase money at once. I understand that Mrs. Anderson at present resides in Austin, Texas, and I tender this to you as her solicitor and agent in this province." It was apparently intended by plaintiff that the deed should be sent for execution to Texas, and upon the notification to him that the deed had been executed he would then pay over the purchase money. This could not be until 2 or 3 days at least after 10th October.

Not to labour the point that no second mortgage had been furnished, it seems to me that the delay of plaintiff is sufficient to enable defendant to succeed.

However a court of equity would have looked upon a stipulation that time should be of the essence of the contract in the time of Lord Thurlow (Gregson v. Riddle, cited by Romilly in 7 Ves. 268), it is clear that such a clause is now as binding in equity as in law: Fry on Specific Performance, 3rd ed., sec. 1076.

Cases as to the necessity of a tender have little bearing upon the matter here under discussion. No doubt it has been held that if a tender would have been a mere formality, and would have been refused, it may well be dispensed with. Such are the cases of Cudney v. Gives, 20 O. R. 500, and the like. Here it was not merely an omission to tender, but there was the intention not to complete, and I have found the fact to be that a tender made upon 10th October would have been effective.

Nor do the cases in which a defendant was not permitted to set up this defence when the omission to complete was due to his own default or misconduct, assist. There was nothing of the kind. In this view the action should be dismissed.

As between a plaintiff who desires to force the sale to him of property at an undervalue, and a defendant who refuses to complete a contract entered into with her eyes open because it will result in pecuniary loss, and defends on such narrow grounds as I have held to be successful in this case, there is not much to choose. In the exercise of my discretion, I do not award costs to either party.

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OCTOBER 2ND, 1907.

DIVISIONAL COURT.

## ARMSTRONG v. CRAWFORD.

*Pleading—Counterclaim—Motion to Strike out—Irregularity—Co-defendants — Defence—Amendment—Convenience—Trial—Relief Asked—Setting aside Judgments—Declarations of Ownership—Mining Leases—Agreements.*

Appeal by defendants Donald Crawford, Murdock McLeod, and John McMartin, from order of RIDDELL, J., ante 381, reversing order of Master in Chambers whereby the counterclaim of defendants Thomas Crawford and S. R. Clarke against the appellants was struck out.

G. H. Watson, K.C., and J. B. Holden, for appellants.

S. R. Clarke, for defendant Thomas Crawford and in person.

D. Urquhart, for plaintiff.

THE COURT (MULOCK, C.J., ANGLIN, J., CLUTE, J.), held that the matters set up by defendants Thomas Crawford and S. R. Clarke were matters of defence as against plaintiff, and should be so pleaded, and not merely by way of counterclaim as against him. As against their co-defendants, such matters were properly pleadable only because pleadable in connection with plaintiff's claim, and then the proper way for

their seeking relief as against their co-defendants was by way of counterclaim. If these two defendants desired any relief as against plaintiff, they might specially ask for such relief by their prayer. If they desired relief, as well, against their co-defendants, then such relief must be asked by way of counterclaim as consequent on the matters pleaded in connection with plaintiff's claim.

Leave given defendants to amend in accordance with the foregoing views within one week, in which event this appeal to be dismissed. Costs of appeal to be costs in the cause. If defendants should not so amend, then this appeal to be allowed with costs. If amendments made, plaintiff and co-defendants to have 3 weeks to reply.

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OCTOBER 2ND, 1907.

DIVISIONAL COURT.

## DEWEY v. HAMILTON AND DUNDAS STREET R. W. CO.

*Damages—Fatal Accidents Act—Action by Married Woman for Death of Aged Father—Reasonable Expectation of Pecuniary Benefit from Continuance of Life—Reduction of Verdict—New Trial.*

Appeal by plaintiff from judgment of RIDDELL, J., 9 O. W. R. 511, dismissing action, upon motion for nonsuit, after findings of jury in favour of plaintiff with damages assessed at $2,000.

A. M. Lewis, Hamilton, for plaintiff.

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

THE COURT (MULOCK, C.J., ANGLIN, J., CLUTE, J.), ordered that if the parties should agree to a reduction of the damages to $500, there should be judgment for plaintiff for that amount with costs. If the parties should not agree, new trial ordered, and costs of former trial and of this appeal to be costs in the cause.

CARTWRIGHT, MASTER. OCTOBER 3RD, 1907.

CHAMBERS.

## PETTYPIECE v. TOWN OF SAULT STE. MARIE.

*Venue—Motion to Change—Convenience—Witnesses—View—Costs—Postponement of Trial.*

Motion by defendants to change venue from Sandwich to Sault Ste. Marie.

Grayson Smith, for defendants.

H. E. Rose, for plaintiff.

THE MASTER:—The action is in respect of certain granolithic pavements laid by plaintiff at Sault Ste. Marie, under a contract with the defendants, whose engineer was to supervise the work. This work was admittedly not completed. The statement of claim says this was owing to the incompetence and improper interference of defendants' engineer, who has also not given any certificates on account of the work, as he says, but plaintiff alleges the contrary. In any case plaintiff says that he is entitled to further certificates. The engineer has been made a defendant for this purpose, and plaintiff asks for a mandamus requiring him to issue such certificates as plaintiff is entitled to.

The notice of motion was served on 4th June, but, as both parties wished to cross-examine on the affidavits filed, it did not come on for argument until 1st October instant.

The defendants lay stress on the fact that the work was done at Sault Ste. Marie; and that, as their defence is that it was so negligently and unskilfully done that it will cost $6,000 to replace, it will be advisable that the Judge should have a view; the mayor and the engineer swear to 20 or 21 witnesses, several of them being the officers of the defendants, and rely on McDonald v. Park, 2 O. W. R. 812, 972.

The plaintiff swears to 12 witnesses, and invokes such cases as Halliday v. Armstrong, 3 O. W. R. 410, and McDonald v. Dawson, 8 O. L. R. 72, 3 O. W. R. 773.

The cross-examinations of the mayor and the engineer seem to shew conclusively that at least 5 of the 20 witnesses set out in their affidavit will not be required, i.e., the 3 members of the board of works and the town clerk and treasurer.

On the other hand, the cross-examination of the plaintiff has not in any way shewn that he will not require the witnesses he has deposed to as necessary, or that it would be more convenient to have the trial at Sault Ste. Marie than at Sandwich.

I therefore think that the motion cannot succeed, and that if the defendants are really being injured, they must be left to apply to the trial Judge for such direction as to costs of the witnesses as he thinks proper after hearing the evidence.

I was asked to postpone the trial until the non-jury sittings, on the ground of delay in bringing on the motion. This, however, was in the hands of the defendants, and they might have guarded themselves on this point if they so desired. It will be far more convenient and less expensive to go from Sault Ste. Marie to Sandwich on the 14th instant than on 17th December, at the non-jury sittings. In any case the defendants must be left to make a substantive motion if they so desire. The plaintiff is not in any default so as to make it right to postpone the trial against his will. Perhaps on application he will consent.

The case set up by the plaintiff does not require any view of the work on the ground. The defence, on the other hand, might wish that the Judge should have the opportunity, if he thought it useful, of inspecting the pavements, assuming that they are not covered deep with snow in the middle of December, the assizes at Sault Ste. Marie being fixed for the 10th of that month.

The motion must be dismissed with costs in the cause.

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OCTOBER 4TH, 1907.

DIVISIONAL COURT.

## MAXON v. IRWIN.

*Appeal to Divisional Court—Appeal from Judgment of Division Court — Time — Division Courts Act, sec. 158—Time when Decision Notified to Parties — Promissory Note — Alteration — Word "Renewal" in Margin Erased — Material Alteration — Bills of Exchange Act, sec. 145 — Alteration not Apparent — Holders in Due Course — Payment According to Original Tenor.*

Appeal by plaintiffs from judgment of junior Judge of County Court of Essex in favour of defendant in an action

in the 5th Division Court in the county of Essex, to recover $102.47 on a promissory note, which had been altered by erasing the word "renewal" in the margin.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

J. H. Rodd, Windsor, for plaintiffs.

A. H. Clarke, K.C., for defendant, objected that the appeal was not in time, and opposed it on the merits.

RIDDELL, J.:—An objection was taken that the appeal was not in time, the judgment being dated 5th August, and the papers filed and appeal set down 22nd August. It appears, however, that, while the written reasons for judgment are dated 5th August, the parties were not notified of it until some time thereafter, and until within two weeks of 22nd August, the first notice reaching plaintiffs' solicitor on 12th August. I think that the provisions of sec. 158 of the Division Courts Act, R. S. O. 1897 ch. 69, have been complied with. That section reads: "The appellant shall, within two weeks after the date of the decision complained of, or within such other time as the Judge may by order in that behalf provide, file the said certified copy with the proper officer of the High Court, and shall thereupon forthwith set the cause down for argument at the first sittings of the High Court which commences after the expiration of one month from the decision complained of," etc.

Not dissimilar language in the County Courts Act, R. S. O. 1897 ch. 55, has already been interpreted by this Division. Section 57 of that Act provides: "The appeal shall be set down for argument at the first sittings of a Divisional Court of the High Court of Justice which commences after the expiration of one month from the judgment, order, or decision complained of," etc.

It was held in Fawkes v. Swayzie, 31 O. R. 256, that if such opinion or decision is not pronounced in open court, it cannot be said to be pronounced or delivered until the parties are notified of it. While that decision is not binding upon us, it recommends itself to reason, and should be followed.

But it is argued that in the section under consideration in this case the terminology is different from that in the County Courts Act. Here, it is said, the date of the judg-

ment is specifically referred to, while in the other Act the language is not "the date of the judgment," etc., but "the judgment." Even if this were all, the difference is trifling and immaterial. And law is not a system of dialectics in which subtle and fine-drawn-distinctions might be received with favour, but it is or should be a system of common-sense rules for the guidance of the man of ordinary intelligence. But it will be seen that in the section it is provided that the cause is to be set down for argument for the "first sittings of a Divisional Court which commences after the expiration of one month from the decision complained of." It is obvious, I think, that the legislature used this expression as synonymous with one month after the date of the decision.

The objection has no substance, and should be overruled.

. . . .

The learned Judge first gave judgment in favour of plaintiffs, but upon motion he changed his opinion and gave judgment for defendant. Plaintiffs now appeal.

It is argued for the appellants: (1) that the alteration is not material; and (2) that, if it be material, the provisions of sec. 145 of the Bills of Exchange Act, R. S. C. 1906 ch. 119, apply, and the note is valid.

In considering the question of materiality, it is important to remember that this is a question of law and to be determined as a matter of law, not a question of fact to be determined upon consideration of the surrounding circumstances. . . .

[Reference to Vance v. Lowther, 1 Ex. D. 176, 178; Re Commercial Bank, 10 Man. L. R. 171.]

Many cases in which an alteration has been held not to be material will be found cited in Mr. Falconbridge's very valuable work on Banking and Bills of Exchange, pp. 586, 587, while on pp. 585 and 586 are cited cases in which an alteration has been held to be material.

I think the present case is much more like Garrard v. Lewis, 10 Q. B. D. 30, than Suffell v. Bank of England, 9 Q. B. D. 555, decided as the latter was upon a note of the Bank of England, the distinction between which and an ordinary promissory note is discussed by Sir George Jessel, M.R. In the case of an ordinary promissory note, the opinion of Lord Coleridge, C.J., would probably be held to be satisfactory: S. C., 7 Q. B. D. 270.

But, in the view I take, it is not necessary to decide whether the alteration is material. I think the express proviso contained in the statute saves this note.

Section 145: " . . . Provided that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor."

I conceive the "tenor" of a note to be the contract into which the maker intended to enter, as shewn by the language employed.

The note sued upon would import a statement by the maker: "I agree to pay, one month after date, to the order of Norman & Dawson, $101; but I shall not pay the note of which the present is a renewal."

I am unable to see how this is not a promise to pay the amount of the renewal note. No doubt, if the word "renewal" had not been erased, there would or might have been difficulty in discounting it; and had plaintiffs taken the note with the word "renewal" staring them in the face, they might have had difficulty in recovering—but that is not the test. The note is in their hands without notice that it is a renewal—they are innocent holders for value—and the statute entitles them to enforce the promise contained in the note in their hands without regard to the added implied reference to a pre-existing note whose place this note was to take.

I think the appeal should be allowed with costs and the original judgment of the County Court Judge reinstated.

FALCONBRIDGE, C.J., agreed that the objection to the appeal should be overruled, for the reasons given by Riddell, J.

He was of opinion, for reasons stated in writing, that the alteration in the note was material; referring to Pigot's Case, 11 Co. 27a; Master v. Miller, 4 T. R. 320; Davidson v. Cooper, 13 M. & W. 343; Suffell v. Bank of England, 9 Q. B. D. 555; Knill v. Williams, 10 East 431; Garrard v. Lewis, 10 Q. B. D. 30.

He was, however, of opinion that the alteration was not "apparent;" referring to Leeds Bank v. Walker, 11 Q. B. D. 84; Schofield v. Earl of Londesborough, [1896] A. C. 514; Cunnington v. Peterson, 29 O. R. 346; and that plain-

tiffs were holders in due course, and entitled to recover upon the note according to its original tenor.

He therefore agreed in allowing the appeal with costs and restoring the original judgment.

BRITTON, J., agreed in the result.

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OCTOBER 4TH, 1907.

DIVISIONAL COURT.

## RE VILLAGE OF NEWBURGH AND COUNTY OF LENNOX AND ADDINGTON.

*Municipal Corporations—Liability of County for Maintenance of Bridge Crossing River—Width of River—Municipal Act, secs. 613, 616.*

Appeal by the county corporation from judgment of Judge of County Court of Lennox and Addington finding that the county corporation are required wholly to build and maintain certain bridges crossing the Napanee river, in the village of Newburgh, and that the duty or liability of so building and maintaining the bridges belongs and rests upon the county corporation.

J. McIntyre, K.C., for appellants.

J. L. Whiting, K.C., for the village corporation.

The judgment of the Court (MULOCK, C.J., ANGLIN, J., CLUTE, J.), was delivered by

CLUTE, J.:—The question turns upon s. 613 of the Consolidated Municipal Act, 1903, which provides (sub-sec. 3) that "every county council shall have exclusive jurisdiction over all bridges crossing streams or rivers over 100 feet in width, within the limits of any incorporated village in the county, and conecting any main highway leading through the county;" and sec. 616, sub-sec. 2, which imposes upon the county council the obligation to maintain such bridges. . . . . .

The river in question, where it passes through the village of Newburgh, divides into two channels, which re-unite, enclosing an island. These two channels at that point constitute the river. The river is more than 100 feet in width above and below the island. The road, which it is admitted is a highway leading through the county, passes over these channels by bridges. The channel crossed by one bridge is 38 feet in width, and the channel crossed by the other bridge is 80 feet in width. The island contains 5 or 6 acres.

The question is, whether, under the Act, the county council has exclusive jurisdiction over these bridges. The statute declares that the county council shall have exclusive jurisdiction over all bridges crossing streams or rivers over 100 feet in width.

The statute, in our view, has reference to the width of the river, and not to the length of the bridge. The two channels of the river being together admittedly over 100 feet in width at the place where it is crossed by the bridges in question, the matter is concluded. The case is one clearly within the purview of the statute. See Regina v. County of Carleton, 1 O. R. 277.

Appeal dismissed with costs.

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OCTOBER 4TH, 1907.

C.A.

## RE GIBSON.

*Lunatic—Detention of Alleged Lunatic in Asylum for Insane —Authority — Medical Certificates — Informalities — Habeas Corpus—Motion for Discharge—Refusal—Appeal —Direction for Trial of Issue as to Sanity—Retention of Appeal pending Trial.*

Appeal by D. H. Gibson, an alleged lunatic, from an order made by TEETZEL, J., on the return of a writ of habeas corpus, remanding the appellant to the custody of the superintendent of the Mimico asylum for the insane.

The appeal was heard by Moss, C.J.O., Osler, Garrow, Maclaren, Meredith, JJ.A.

J. W. McCullough and L. C. Smith, for the appellant.

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

Moss, C.J.O.:—The return to the writ shews that the appellant is detained at the Mimico asylum for the insane by virtue of certificates purporting to be given by two medical practitioners, as provided by R. S. O. ch. 317, secs. 8 and 9. It is alleged by the appellant that there are informalities in the certificates sufficiently grave and important to invalidate them as authority for the detention. But it also appears from affidavits made by the superintendent and others, under whose observation and charge the appellant has been during his confinement, that his state of mind is such as to render it utterly unsafe to trust him outside of the asylum, even in the care of the best qualified and most experienced nurses. The statements and opinions of these gentlemen are questioned on behalf of the appellant, but enough appears to make it quite apparent upon the present material that it would not be proper, in the public interest, to restore him to liberty, even though the objections to the certificates should prevail: Re Shuttleworth, 9 Q. B. 651; Regina v. Pinder, Re Greenwood, 24 L. J. Q. B. 148. In the latter case Coleridge, J., who was one of the Judges who took part in the judgment in Re Shuttleworth, said (p. 152): " . . I was reminded of what had fallen from the Court on several occasions when defects of a formal nature in orders or certificates have been urged as the ground for discharging lunatics; and I still feel that, in such cases, when in the affidavits it appears clear that the party confined is in such a state of mind that to set him at large would be dangerous, either to the public or himself, it becomes a duty and comes within the common law jurisdiction of the Court, or a member of it, to restrain him from his liberty until the regular and ordinary means can be resorted to of placing him under permanent legal restraint."

In the present state of the evidence, the proper course seems to be to put the matter in train for a full investigation of the question as to the sanity of the appellant, and as to the danger of permitting him to be at large.

For the determination of questions of this nature in ordinary actions the Court may, in the exercise of its powers,

direct the trial of an issue, withholding in the meantime its decision on the appeal: Rule 817. And in more than one instance a similar practice has been adopted on the hearing of an application upon the return to a writ of habeas corpus: In re Andrews, L. R. 8 Q. B. 153; In re Guerin, 58 L. J. M. C. 45 n.; and in our own Courts the well known case of Re Smart.

None of these cases was that of an alleged lunatic, but there appears to be no good reason why the rule should not be applied in such a case as well as in others.

The order now made is that the parties do proceed to the trial of an issue in which the question shall be whether the appellant is at the time of the inquiry of unsound mind and incapable of managing himself or his affairs, and whether, if being found insane, he is dangerous to be at large.

The form of the issue is to be settled between the parties, or, in case of disagreement, by a Judge of this Court in Chambers.

The proceedings in the appeal are to stand over pending the trial of the issue or until other order of the Court.

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

GARROW and MACLAREN, JJ.A., concurred.

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OCTOBER 4TH, 1907.

C. A.

## REX v. ING KON.

*Liquor License Act—Order of Magistrate Directing Destruction of Liquors—Order of High Court Quashing—Right of Informant to Appeal to Court of Appeal under sec. 121 —Order Quashing Right on Merits — Refusal of High Court to Protect Informant from Action—Discretion—Appeal.*

Appeal by the Attorney-General and the informant from an order of a Divisional Court (MULOCK, C.J., ANGLIN,

J., CLUTE, J.), quashing an order made by one of the police magistrates for the city of Toronto for the forfeiture and destruction of certain liquors seized by the police in the possession of defendant, a Chinese grocer and medicine dealer in the city of Toronto. The liquors were alleged to be medicines, and to be worth several hundreds of dollars. The defendant was also convicted for an offence against the Liquor License Act. The Divisional Court refused to quash the conviction, but quashed the order for destruction without costs, holding that it was unauthorized, and refused to protect any one but the magistrate.

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

J. R. Cartwright, K.C., for the Attorney-General.

F. R. MacKelcan, for the informant.

W. E. Raney and A. Mills, for defendant.

OSLER, J.A.:—Ing Kon was on 9th July, 1906, convicted by a police magistrate for the city of Toronto of the offence of keeping liquor for sale without license, and fined $20. In the formal conviction, as returned, appears a declaration by the magistrate that the liquor and vessels containing the same are forfeited to His Majesty, and an order or direction that the informant, Archibald, do forthwith destroy the same. The conviction was not drawn up until some considerable time after it had been made, and probably not until it became necessary to do so for the purpose of making a return to a writ of certiorari, which was afterwards obtained by the respondent for the purpose of an application to quash the conviction and order. The informant had notice of the intention of the respondent to make such application, but, being of opinion, as it would seem, that he could not do so successfully, destroyed the liquor.

A motion to quash the conviction and set aside the order was afterwards discharged so far as the conviction was concerned, but the Court, being of opinion that there was no evidence on which the magistrate was justified in forfeiting and directing the destruction of the major part of the goods of the respondent, which had been seized by the informant, quashed and set aside that order, and directed that no action should be brought against the magistrate. A motion which was afterwards made to the Divisional Court, on behalf of

the informant, to vary the order by extending the protection to him and others concerned in the destruction of the goods, was afterwards dismissed, and the present appeal is brought by him from the orders of the Divisional Court: from the first, in so far as it sets aside the order for the forfeiture and destruction of the respondent's property; and from the second, in so far as it refuses relief to the informant by protecting him from an action.

I am not satisfied that sec. 121 of the Liquor License Act gives an appeal to the informant from the order of the Divisional Court setting aside the declaration of forfeiture and order for the destruction of the respondent's property. The appeal thereby given is from any judgment or decision of the High Court, or Judge thereof, upon any application to quash a conviction made under the Act, or to discharge a prisoner who is held in custody under any such conviction, whether such conviction is quashed or the prisoner discharged or the application is refused. The order and direction in question is not necessarily part of the conviction, which consists of the finding of guilt and the imposition of the penalty. The order and direction may be in the conviction, or may be by a subsequent or separate order: sec. 131 (2); and where that is the case, no appeal is given. Why should there be any difference in that respect, where the order is set forth in the conviction? Moreover, the appeal given by sec. 121 is only "whether such conviction is quashed, or the prisoner discharged, or the application is refused;" and the informant cannot complain of the judgment of the Divisional Court in any of these respects, as the conviction was affirmed.

It is, however, unnecessary to decide in this case whether an appeal lies from the principal order complained of under the Liquor License Act, or the Judicature Act, because upon the merits, which were heard subject to the objection to the jurisdiction, it is clear that the order of the magistrate cannot be supported, and that the order of the Divisional Court, setting it aside, should be affirmed. There was really no evidence before the magistrate that the liquors the destruction of which is complained of were liquors which the respondent might not lawfully sell, and which were not protected by the provisions of the Act and its amendment. The contrary, indeed, was abundantly proved. The liquors were shewn to be medicines or com-

pounds prepared, sold, and used as such, and were within sec. 3 of the Act 61 Vict. ch. 30, and, as such, expressly exempted from the operation of the Liquor License Act, sec. 2 (1), as amended by 6 Edw. VII. ch. 47 (O.), sec. 1 (2) (a).

The second order of the Divisional Court, refusing to extend to the informant the protection which it was thought right to give to the magistrate, was made in the discretion of the Court, a discretion which, if I may say so, was, under the circumstances, rightly exercised, and may serve the purpose of teaching police officers to temper zeal with discretion in carrying out prosecutions under the Act.

I think the appeal should be dismissed with costs.

Moss, C.J.O., and Meredith, J.A., gave reasons in writing for the same conclusion.

Garrow and Maclaren, JJ.A., concurred.

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October 4th, 1907.

C. A.

BRENNER v. TORONTO R. W. CO.

*New Trial — Misdirection — Reversing Order of Divisional Court Directing New Trial—Objection not Taken at Trial —Negligence—Street Railways—Injury to Person Crossing Track—Contributory Negligence — Ultimate Negligence—Rules of Street Railway Company — Substantial Wrong or Miscarriage.*

Appeal by defendants from order of a Divisional Court setting aside a judgment for defendants upon the findings of a jury, and directing a new trial, upon the ground of misdirection, in an action to recover damages for injuries sustained by Eva Brenner, one of the plaintiffs, by being struck by a car of defendants when attempting to cross Queen street west, in the city of Toronto, opposite University avenue.

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

D. L. McCarthy, for defendants.

W. R. Smyth and S. King, for plaintiffs.

MEREDITH, J.A.:—The one substantial question is whether plaintiffs are entitled to a new trial on the ground of misdirection. Upon that ground alone the Divisional Court granted a new trial, and this appeal is from the judgment of that Court.

If there were such misdirection, plaintiffs are entitled to a new trial generally; it affected the whole question of negligence, and would plainly affect all the findings of the jury upon that question, so that nothing is gained by discussing any question of negligence at the last moment, or negligence at any earlier stage; a question which does not now arise, and one which may never arise in this case, so far as any court of appeal is concerned.

In order to entitle a party to a new trial on the ground of misdirection, three things must exist: (1) it must be a material misdirection; (2) it must have been distinctly objected to at the trial; and (3) some substantial wrong or miscarriage must have been occasioned by it.

Each one of these essentials is wanting in this case: the first two being, the second must necessarily be, absent.

The contention to which the Divisional Court gave effect was, and is, that the trial Judge withdrew from the consideration of the jury the working rules of the defendants, made for the guidance of their servants, proved at the trial; that he told the jury that defendants' rules had nothing to do with the case.

But he told them nothing of the sort. There is no ground for contending that he did. The only excuse for it is to be found in the remark to that effect which appears in the shorthand report of the trial. But that remark, if really ever made, was not made in the presence of the jury, and obviously could not have had any sort of effect upon them. I would have supposed it to have been erroneously reported, but, if not, it must have been but an innocuous slip of the tongue, not to be wondered at, perhaps, after the exceeding patient and accommodating manner in which the Judge dealt with very many and very long requests to charge the jury, upon many subjects, in the way plaintiffs desired that they

should be charged, the result of which was that their counsel had, for all practical purposes, another opportunity of presenting his arguments to the jury, and so the last word with them.

That there is no sort of ground for this contention is apparent on all hands. It would be a stultification of the act of the Court in permitting evidence to be given of such rules, evidence which took up considerable time, and which no one objected to in any manner, but which was given and received as if it were just as material as any other part of plaintiffs' case.

In one part of the charge the very opposite of what is contended for was clearly and distinctly put in these words: "Therefore is was his duty to sound his gong at University street. It is recognized by the rules of the company as being the proper thing for the motorman to do. It is, therefore, not too much to say that that course, being recognized as reasonable by the company, should be recognized as reasonable by the public, and that they should expect it to be followed." What possible ground of objection, by the plaintiffs, can there be to such a statement as to the materiality and effect of the defendants' rules? Surely, if there be any objection to it, it is not on the part of the plaintiffs. But it is said that the Judge was then discussing the question of the sounding of the gong. But what possible difference can that make? For he was dealing with one of the rules of defendants, all of which are in this respect upon the same footing, and were proved in the same manner and at the same time.

During the very long discussion carried on by plaintiffs' counsel with the Judge, immediately after he had finished his charge, the following observation was made by him: "It is not a question, gentlemen of the jury, as to the motorman's duty under the rule, it is a question of what is reasonable for him to do." Again, what objection can justly be made to this? Should the Judge have said: "It is not a question whether the motorman acted reasonably, the question is, did he obey the rule?" Supposing the rules had been in defendants' favour, and they were endeavouring to avoid liability for negligence because the motorman had done all that the rule required of him, would plaintiffs think the charge that obedience to or disobedience of the rules was not the question which the jury had to try, but that that question was whether reasonable care was taken, was very erroneous?

There is nothing whatever that took place in the presence of the jury, from first to last, throughout the trial, that detracts in any manner from these observations as to the effect of the rules, nor anything in any manner withdrawing them as evidence—the same as all the rest of the evidence adduced—from the consideration of the jury.

There was, therefore, no misdirection such as plaintiffs contend for.

In these circumstances, it is not to be wondered at that there was no sort of objection to the Judge's charge in this respect; it would indeed be rather surprising if there had been, on the plaintiffs' part. Search as one may throughout the very many requests, objections, and observations of plaintiffs' counsel, nothing of the sort can be found, though it was clearly not a case of omitting anything which might have been said, or of saying too little.

In regard to the charge generally, it may, I think, be safely said that if all charges afforded as much evidence of painstaking and accuracy, there would be very little to be reasonably found fault with; though it is certainly a mistake to allow another speech to be made in the presence of the jury in the guise of objections to the charge.

And, as I have said before, there being no misdirection, nor any objection to the charge on the ground of misdirection, respecting the rules of the defendants, it is obvious that there was no substantial wrong or miscarriage occasioned by any such misdirection.

It would be a thing very much to be regretted if any of the Courts should drop into a loose practice of granting new trials. One trial should, generally speaking, be quite enough; and no encouragement should be given to any sort of loose manner of conducting a trial, by any of the parties to it, upon the notion that anyway, if they are only careless enough, they can get another trial. The cost of a wasted trial is a serious matter; the injustice of giving a party a second chance, except for very substantial reasons, is manifest. Besides, it must always be remembered that the jury have certain absolute rights, powers, and duties, which the Court has no more right to invade or disregard than the jury have to invade the province of the Courts, or to disregard their proper instructions; and that to grant a new trial because the Court may not like the verdict, or upon any but substantial and established grounds, is really a disregard of the sole functions of the jury, and an invasion of their province.

But if the evidence were to be weighed and the case re-tried here, and notwithstanding the sympathy which one may, and indeed must, have for plaintiffs in their great misfortune, can it be said that the findings of the jury were not, even at the least, well warranted by the evidence? Can it be said that the real cause of the accident was not the imprudent manner in which the female plaintiff attempted to cross the railway tracks? And, if the position of the parties were reversed, and defendants were here seeking a new trial under quite similar circumstances and on the like grounds, can it be doubted that the application would be immediately dismissed? Such a test is not always out of place.

I am quite unable to perceive how any sort of injustice, from a legal point of view, was done to plaintiffs at the trial, nor find any good excuse for interfering with the verdict of the jury there rendered, or with the judgment directed by the trial Judge to be entered thereupon, and would, therefore, allow this appeal.

Moss, C.J.O., gave reasons in writing for the same conclusion.

Osler, J.A., agreed in the result, being of opinion that there was no misdirection; and added that, in his opinion, there was no hard and fast rule which absolutely prohibited the Court from entertaining an objection on the ground of misdirection when the party has omitted to take it at the trial.

Garrow and Maclaren, JJ.A., agreed in the result.

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October 4th, 1907

C. A.

## Re DUNCAN AND TOWN OF MIDLAND.

*Appeal to Court of Appeal—Leave to Appeal from Order of a Divisional Court — Local Option By-law — Motion to Quash—Special Grounds for Permitting Second Appeal.*

Motion by Duncan for leave to appeal from the order of a Divisional Court, 10 O. W. R. 345, reversing order of

MULOCK, C.J., 9 O. W. R. 826, and dismissing (on all grounds) a motion to quash a local option by-law of the town of Midland. The principal ground upon which it was sought to quash the by-law was that the council gave the by-law its third reading before the expiration of two weeks from the voting upon it, so that electors had not their full statutory time for seeking a scrutiny or recount of the votes cast.

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

J. B. Mackenzie, for the applicant.

F. E. Hodgins, K.C., for the town corporation.

THE COURT (MEREDITH, J.A., dissenting), made an order giving leave to appeal, confined to the one question mentioned.

MEREDITH, J.A.:—The applicant is seeking something like a double indulgence; the double exercise of the judicial discretion of the Court in his favour.

In the first place he seeks the special leave of the Court to appeal in a case which was never appealable without such leave; and he seeks that leave from this Court at this somewhat late day, although he might have applied to a Divisional Court or a Judge of the High Court, or to a Judge of this Court, when the Court was not sitting, at any time since the pronouncement of the judgment of the Divisional Court on 2nd July, 1907.

In the second place he seeks the interference of the Court with the by-law in question, in the special and extraordinary manner provided by statute for the summary quashing of by-laws; instead of having its validity questioned only when that question properly arose in some matter affecting his rights in civil or criminal proceedings.

In these circumstances, it is specially important to look into the substance of the appeal, its purpose, and the effect of its success.

The by-law is objected to on the highly technical ground that it was passed a few days sooner than it should have been. The other objections to it are unsubstantial, and have not met with any encouragement anywhere. Assuming, then, that it is invalid because prematurely passed, what possible

substantial gain can it be to the applicant to have it set aside? It is not suggested that any one has been hurt in any manner, by reason of the premature action of the council: and it is quite obvious that if it be set aside on that ground, it will be regularly passed there: and surely, nothing is to be gained in either substance or manner by the see-saw process of setting it aside only to have it enacted again. . .

I am unable to bring myself to the point of taking part in the granting of leave to appeal in such a case; to see how there can be special reasons for treating the case as exceptional, and for allowing a further appeal: understand why leave to appeal should be granted where the inevitable result should be its dismissal, without considering the legal point raised in it; or if for purely academic purpose it be considered and adjudged in the appellant's favour, nothing has been gained of any sort of substantial benefit to any of the parties concerned, because what the Court does in setting the by-law aside one day, will be undone by the council the next, in duly passing it. Leaving the parties to their strict legal rights in all respects under the by-law as it is, and under any other by-law which the council may pass if they choose to repass that in question or pass any other, in my opinion, is the only way in which they should in the first place have been, and should now be, left.

I would refuse the application for leave to appeal.

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RIDDELL, J. OCTOBER 5TH, 1907.

CHAMBERS.

## RE BARTELS.

*Habeas Corpus—Escape of Prisoner in Custody of Sheriff pending Argument of Motion for Discharge—Waiver of Rights of Prisoner under Writ — Voluntary Return of Prisoner to Custody of Sheriff—Quashing Writ—Application for New Writ—Time—Extradition Act, sec. 23—Dispensing with Presence of Prisoner.*

Motion by Herman Bartels senior for his discharge from custody, renewed, in the circumstances explained in the

judgment, after the proceedings set out ante 379, or in the alternative for a new writ of habeas corpus.

H. H. Dewart, K.C., and N. Sommerville, for the prisoner.

T. D. Cowper, Welland, for the State of New York.

RIDDELL, J.:— . . . After his escape Bartels eluded the vigilance of the authorities for some time, but was ultimately arrested and arraigned before a police magistrate for the city of Toronto, and, pleading guilty to the charge of escape, he was sentenced to 3 months' imprisonment. His term was shortened by a few days through the clemency of the executive, upon condition that he surrender himself to the custody of the sheriff of Welland. This has been done.

Upon application to me under the leave reserved, I suggested to the solicitor for the applicant that there might be difficulty in the way of considering the merits of the motion; and I granted leave to serve a notice in the alternative for judgment upon the motion already made, or for an order for a new writ of habeas corpus. This was done, and the matter argued before me at Osgoode Hall.

In my former memorandum I did not consider my power to deal with the application: see ante p. 380 ad fin. The doubt I then entertained has been strengthened by further consideration, and an examination of the few authorities on the point.

Production of the prisoner having been waived, it was not brought to the attention of the Court that the sheriff had brought him to Toronto, and I had no thought that he was anywhere else than in the common gaol at Welland— until I was informed by an officer of the Court that he had escaped. I then inquired of counsel for the prisoner where his client was, and was informed that he had been in Court during the morning, but that he was not in Court at that time. The argument proceeded, and at the conclusion . . . . judgment was reserved.

In law, it appears that upon the return of the writ, pending the hearing, the prisoner is detained under the writ and not under the authority of the original warrant: Rex v. Bethel, 5 Mod. 19. Whether this would be the case in the present instance, there having been no deliverance by the

sheriff to the Court, or any officer thereof, I do not stop to investigate. The prisoner was at the time of his escape either in the custody of the sheriff of Welland as sheriff of that county under the original warrant, or in the custody of that gentleman as an officer of the Court under a writ of habeas corpus.

What, then, is the effect of an escape after the issue of a writ of habeas corpus, and pending the argument?

I have searched in vain for any case in any county under the British flag at all on all fours with the present. I confess I had not expected to find any instance in which, like the present, the prisoner was practically invited to escape, or in which the guarding of the prisoner was so utterly negligent—if one can dignify by the word "guarding" the act of leaving a prisoner alone in the corridor of a public building.

But no case has been cited to me, and I can find none in our Courts, or in the Courts of the mother land, or of her other colonies, in which there was an escape at all, after the writ had been issued. It will be necessary then to decide the case upon principle.

The purpose of the writ of habeas corpus is to enable the applicant to have the legality of the imprisonment inquired into, and, if that be illegal, to procure his discharge from custody: Ex p. Cobbett, 15 Q. B. 988. The writ is granted upon the application of the prisoner himself or of some one acting for him.

"The remedy of habeas corpus is . . . intended to facilitate the release of persons actually detained in unlawful custody . . .; it is the fact of detention and nothing else which gives the Court its jurisdiction:" per Lord Watson in Barnardo v. Ford, [1892] A. C. 326, at pp. 334, 335.

"The very basis of the writ is the allegation, and the prima facie evidence in support of it, that the person to whom the writ is directed is unlawfully detaining another in custody:" per Lord Herschell at p. 339.

See Re Hottentot Venus, 13 East 195.

In my view, if the prisoner, before judgment is given upon his motion, himself puts an end to the detention, he

thereby waives all right which he might have had under the writ. I am unable to distinguish such a case from a case in which the detention had ceased before the issue of the writ—there it is clear the writ should not issue: Barnardo v. Ford, [1892] A. C. 326.

Some assistance may perhaps be derived from cases nearer in their circumstances to the present. . . . . .

[Reference to Regina v. Eavin, 15 Jur. 329 (a); Barnardo v. Ford, [1892] A. C. at p. 535, per Lord Watson.]

In view of these cases and upon principle, I am of opinion that at the time of the conclusion of the argument, the prisoner having by his own act discharged himself from custody, he thereby waived all rights he may have had under the writ, and that, had I given judgment at that time, I should have declined to make an order for his release.

There are cases in some of the Courts of the American Union which may be referred to. Reference to these cases is made in Church on Habeas Corpus, 2nd ed., s. 191. . . . Ex p. Walker, 53 Miss. 366; Harmdon v. Flowers, 57 Miss. 14; Re Watts, 3 O. L. R. 279, 1 O. W. R. 129, 133; Hurd on Habeas Corpus, 2nd ed., p. 249, and Impey's Sheriff, there cited; Ex p. Robinson, 6 McLean, 355, 360. . . .

Does the fact that since that time the applicant has again come into the custody of the same sheriff make any difference? I think not—the judgment should be given now that should have been given at the close of the argument, and that is, that the writ should be quashed.

The next question to consider is whether a new writ should issue.

In . . . Rex v. Robinson, 10 O. W .R. 338, 14 O. L. R. 519, I held that after a writ of habeas corpus had been obtained, and the prisoner remanded to custody upon the return, the Court was not necessarily precluded from granting another writ of habeas corpus, notwithstanding Taylor v. Scott, 30 O. R. 475. That decision has not been appealed against. I see no reason to depart from it, and I now follow it. And I am of opinion that there may be circumstances under which a second writ may issue other than those suggested in the

Robinson case—and that where there has not been an adjudication upon the merits, though the applicant seeks for such adjudication.

It is objected, however, that the application for a second writ is too late, and sec. 23 of ch. 155, R. S. C. 1906, is referred to. That section provides: "A fugitive shall not be surrendered until after the expiration of 15 days from the date of his committal for surrender; or, if a writ of habeas corpus is issued, until after the decision of the Court remanding him."

No trace of any such provision is to be found in the early legislation of Upper Canada. The first Act is (1833) 3 Wm. IV. ch. 7, which, upon being carried into the Revised Statutes of Upper Canada in 1843, becomes 3 Wm. IV. ch. 6 (see p. 592 of that revision), and is consolidated in 1859 in C. S. U. C. as ch. 96.

Nor do the statutes of the province of Canada contain such a clause: (1849) 12 Vict. ch. 19, consolidated in 1859 in C. S. C. as ch. 89. Nor the Imperial legislation, 6 & 7 Vict. ch. 76, which may be read in extenso in Egan's Law of Extradition (1846), pp. 36 et seq.

The first provision of this character is to be found in the Dominion Act of 1868, 31 & 32 Vict. ch. 94, sec. 3, which provides that "it shall be lawful for the Governor, at any time not less than 7 days after the commitment of an accused person . . . to order the person . . . to be delivered to . . . the United States." This chapter will be found printed amongst the reserved Acts. The legislation of 1870, 33 Vict. ch. 25, did not affect this. The Act of 1873, 36 Vict. ch. 127, though formally repealed by the Act of 1877, 40 Vict. ch. 25, was never printed. The Act of 1877 provides, sec. 17, for a period of 15 days in lieu of 7, as previously provided, and this was continued in sec. 16 of the R. S. C. 1886 ch. 142, now appearing in sec. 23 of the R. S. C. 1906 ch. 155.

This provision is well known to have been introduced by reason of the case of Ex p. Ernest Sureaú Lamirande, 10 L. C. Jur. 280. . . . . Lamirande had been charged with making false entries in the books of the Bank of France at Poictiers, thereby defrauding the bank of 700,000 francs.

He was arrested in Montreal, and on 22nd August, 1866, late in the evening, fully committed for extradition. On the 23rd notice was served, on his behalf, upon the attorney representing the Crown, of the presentation of a petition on the 24th at 1 p.m. for a writ of habeas corpus. At that hour the petition was presented by counsel in presence of counsel for the Crown and for the French government. Upon the argument it was pressed that attempts had been made to bribe his captors to bring him into the United States; and that he had been threatened from the beginning that, law or no law, he would be brought back to France. Counsel for the Crown protested against insinuations tending to disparage the institutions of the country, when, as he said, the prisoner was fully protected by the fact that he could not be extradited except on the warrant of the Governor-General. As counsel for the Bank of France desired to be heard, the case was adjourned till the following morning, and on that morning a writ of habeas corpus was ordered. The learned Judge (Drummond, J.) says: "I would have issued the writ before adjourning, had the counsel for the prisoner insisted upon it. But that gentleman was, no doubt, lulled into a sense of false security by the indignation displayed by counsel for the Crown, when counsel for the prisoner signified to me his apprehension that a coup de main was in contemplation to carry off the petitioner before his case had been heard. Upon the return to the writ it appeared that on the night of the 24th, at midnight, the prisoner had been delivered over to an officer from Paris by virtue of an order signed by the Governor-General, ostensibly signed by him in Ottawa on the 23rd, he being at that time in Quebec; it was really registered at Ottawa before its signature by the Governor-General. So that, when the case came to be argued, "the petitioner" was "on the high seas, swept away by one of the most audacious and hitherto successful attempts to frustrate the ends of justice which had yet been heard of in Canada." The Court, therefore, made no order as to the prisoner.

It was due to the scandal created by the outrageous proceedings in this case, and to prevent the repetition of such a transaction, that the section referred to of the Act of 1868 was passed. This legislation was not intended to and does not diminish the rights of the prisoner—it was intended to and does extend them.

It may be mentioned that the omission of the Court to make any order as to the prisoner supports the conclusion I have arrived at on the first point for decision.

I see nothing, therefore, in the Act preventing the issue of a new writ of habeas corpus, and I accordingly order it. A new return will be made, but, by consent, the presence of the prisoner will be dispensed with. This is the practice that is almost invariably followed in our Courts. I remember only one case in my experience in which the prisoner was actually produced in Court; and this seems to be a practice approved of by the Supreme Court of the United States: Re Medley, 134 U. S. 160, 162.

The matter may be brought before the Judge of the week, or, if the parties desire, the matter having been partly heard by me, I shall fix a day for the argument before myself. . . .

It will be seen that this judgment proceeds upon the theory that, so far as the former writ is concerned, the prisoner has destroyed its efficiency by his own act—but, in respect of the application for a new writ, while the prisoner has sinned against the laws of our land, he has been punished for, and has thereby expiated his offence, and is entitled to the same consideration as though he had not offended.

It is not, in my view, necessary, on my dismissing the motion for judgment, to do so without prejudice to the application for a second writ, or in granting the application for a second writ to reserve leave to raise upon the argument all objections against the issue of the same—to avoid question, I do both.

And I do not consider whether it would not be a perfect answer to an application for discharge under the second writ to shew that the prisoner is not in involuntary but in voluntary confinement—the sheriff came in possession of him only with his own consent, as it was his acceptance of the condition in the pardon of His Excellency which alone permitted or would justify his being in custody at this time of the sheriff of Welland. It may be considered by the Court hearing the application that the act of the prisoner in voluntarily placing himself in the custody of the sheriff should be considered a waiver of any right he otherwise

would have to be free from such custody—at least until the expiration of the term of imprisonment in the Toronto gaol.

Such questions as these may be better dealt with by the Judge hearing the application and after argument.

NOTE:—Upon the reading of this judgment, counsel for the prisoner stated that he abandoned the application for a new writ—as, if a new writ were to be issued, the delay would prevent his client being tried at the sittings of the New York Court then imminent.

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