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BRITTON, J. NOVEMBER 21ST, 1903.

WEEKLY COURT.

RE WALTON AND NICHOLS.

Will—Construction—Devise—Intention—Supplying Words to Carry out—Estate—Fee Simple or Estate Tail.

Petition by Charles E. Walton under the Vendors and Purchasers Act upon a question of the title of the petitioner to certain land under the will of Charles Walton. The testator by his will divided his farm into two parcels: (1) the south 15 acres with all the buildings; (2) the residue of the farm. The first part he devised to his wife for life or during widowhood, and then to his adopted son, the petitioner. No question arose as to this part. The residue of his farm he gave to his wife until the adopted son should arrive at the age of 21, unless the wife should marry before that date. Then, in the 5th paragraph of the will, the testator provided for the event of the death of the petitioner before attaining the age of 21, and without leaving issue of his body, or after arriving at the age of 21 without leaving issue of his body, in which event there was a gift to Charles Ewings and Wellington Ewings. In the 6th paragraph the testator created a charge in favour of his wife, from the time of the adopted son attaining the age of 21, or from the time the adopted son, had he lived, would have attained that age, of a rent of £15 a year.

H. J. Scott, K.C., for petitioner.

W. E. Middleton, for the purchaser.

BRITTON, J., held that the will must be read as if it contained the words "or dying after arriving at such age and during the lifetime of my wife." The testator did not intend that Charles Ewings and Wellington Ewings should get the

property unless the petitioner died before the widow and without lawful issue. The testator intended that the petitioner should, if living, take an estate either in fee simple under a devise to him and his heirs or an estate in tail under a devise to him and the heirs of his body. In either case the petitioner can make a good title. May v. Logie, 23 A. R. 785, followed.

Order declaring accordingly. No costs.

NOVEMBER 21ST, 1903.

DIVISIONAL COURT.

DUNN v. MALONE.

Interest—Rate of—Chattel Mortgage—Interest Act, R. S. C. ch. 8—Express Waiver of Provisions of, not Binding on Mortgagor.

Appeal by defendant from judgment of Judge of County Court of Wentworth in favour of plaintiffs in an action for redemption of a chattel mortgage. On the 6th April, 1901, plaintiffs made a chattel mortgage on their household furniture to one Samuel Bell, of the city of Hamilton, to secure payment of $125 advanced to them. The interest was to be $5 a month, and the mortgagors waived the benefit of R. S. C. ch. 8, the Interest Act, and the amending Act of 1900, and declared that the statement in the mortgage of the rate of interest was a compliance with the Acts. The plaintiffs made 12 monthly payments of $5 each and two payments of $10 each, in all $80, on account of interest, between 6th April, 1901, when the advance was made, and 6th August, 1902, when the last of these payments was made, and 9 monthly payments of $5 each on account of principal. On 29th December, 1901, they tendered the mortgagee $30 as being enough to satisfy the balance. This was refused, the mortgagee claiming $80 for principal and $20 for interest. The mortgage was assigned to defendant in December, 1902. On 10th January, 1903, plaintiffs brought this action and offered to pay the $30 which they had tendered. The Judge found that no more than the $30 was due and ordered defendant to pay plaintiffs' costs, the $30 to be set off against them.

W. S. McBrayne, Hamilton, and M. Malone, Hamilton, for appellant.

K. Martin, Hamilton, for plaintiffs.

THE COURT (STREET, J., BRITTON, J.) held that the Interest Act was passed in the public interest for the protec-

tion of persons borrowing money upon personal security. The policy of the law is to allow the borrower and the lender to agree upon any rate of interest, and the borrower having agreed to it must pay it, provided the rate per annum is stated in the contract. This proviso is his only protection, and it is introduced to prevent his being kept in the dark by the lender as to the real rate of interest per annum which he is agreeing to pay. To allow a borrower when making his contract, to agree that the Act should not apply, would be to allow two private individuals to set at naught an Act passed in the public interest. If these clauses of waiver were held to be valid, they would become a common form, and the Act would speedily become a dead letter. There is a singular lack of authority in English and Canadian reports. Mabee v. Crozier, 22 Hun (N.Y.) 264, Bosler v. Rheem, 72 Pa. St. 54 Am. & Eng. Encyc. of Law, 1st ed., vol. 28, pp. 533-4, and Graham v. Ingleby, 1 Ex. 651, referred to.

Appeal dismissed with costs.

NOVEMBER 21ST, 1903.

DIVISIONAL COURT.

TRAVISS v. HALES.

Husband and Wife—Liability of Husband for Torts of Wife —Marriage before 1884.

Appeal by defendant Richard Hales from judgment of STREET, J., ante 309, in favour of plaintiff for $1 and costs against both defendants in an action against husband and wife to recover damages for a slander uttered by the wife in April, 1901. The defendants were married in 1875. Street, J., held upon conflicting authorities that the marriage being before the Act of 1884, the husband was liable for the torts of his wife.

F. A. McDiarmid, Lindsay, for appellant.

J. W. McCullough, for plaintiff.

THE COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) referred to Amer v. Rogers, 31 C. P. 95, an article by Mr. T. Cyprian Williams in 16 Law Quarterly Review, p. 191, Lush on Husband and Wife, 1st ed., p. 256, 2nd ed., pp. 290, 291, upon the one hand; and to Lee v. Hopkins, 20 O. R. 566, Seroka v. Kattenburg, 17 Q. B. D. 177, and Earl v. Kingscote, [1900] 2 Ch. 585, on the other; and decided to follow the decision of the Court of Appeal in

the last case, not being able to discover any such difference between the English statutes and our own as to justify the opposite conclusion. The ground upon which the English cases proceeded was that the right conferred of suing the wife alone in respect of torts committed by her during coverture was an additional right given to the person wronged, and that there was nothing in their Acts to take away from him his common law right of suing the husband and wife jointly, and there is nothing in our Acts before 47 Vict. ch. 19 to enable the Court to say that the common law right is taken away, if upon the provisions of the English Acts it was not.

Appeal dismissed with costs.

BRITTON, J. NOVEMBER 23RD, 1903.

WEEKLY COURT.

GURNEY FOUNDRY CO. v. EMMETT.

Evidence—Cross-Examination of Deponent on Affidavit—Motion for Injunction — Production of Documents on Examination—Undertaking to Produce—Answers to Questions—Relevancy of Questions — Sufficiency of Answers—Trade Union—Details as to Employer's Business.

Motion by defendants for an order to commit W. C. Gurney to gaol for contempt in not producing on his examination on his affidavit certain books, letters, and documents, and for refusal to answer certain questions, or for an order for production and attendance at his own expense for further examination, etc.

J. G. O'Donoghue, for defendants.

E. E. A. DuVernet, for plaintiffs.

BRITTON, J.—On 28th August, 1903, W. C. Gurney, who is the second vice-president of the plaintiff company, made an affidavit which was for the purpose of, and was part of the material used on, an application for an injunction herein.

On the 20th October Gurney was examined at great length upon this affidavit, and it is in reference to the refusal to produce papers, and to answer questions on that examination, that this application is made. . . .

On the 9th November the Chancellor made an order (ante 959) restraining the defendants from issuing and publishing the placards, posters, and printed matter complained of, or any like productions till the trial or further order.

To that extent the proceeding for which the affidavit was filed, has been disposed of, and so to the extent to which the restraining order has been made the right of cross-examination is gone: see Holmested and Langton, 672; Rule 490.

As to production, the defendants did not follow the course suggested in Lavery v. Wolfe, 10 P. R. 488, and on that ground I should be warranted in dismissing the motion, so far at least as it relates to non-production.

I propose, however, to consider the matter on its merits.

The motion is to commit for contempt:—

(1) In not producing before the special examiner the books, etc., referred to at questions 255, 256, 261, 334, 335, 336, and 337, and also other books, documents, etc., referred to in the said examination;

(2) For refusal to answer questions Nos. 198 to 201, 452 to 456, 510 to 513, 585, 620, 654, 657, 699 to 707, and 716 to 719, all inclusive; and

(3) For refusal to attend for the conclusion of his examination.

Or in the alternative for an order to Gurney to produce and to attend at his own expense and answer the questions above referred to and be further questioned.

It is very material in considering this matter to note that the examination is not for discovery. The cross-examination on an affidavit ought to be confined within reasonable limits. The defendants will no doubt avail themselves of their right to an order for production and of examination of an officer of the company for discovery. The production asked for as indicated by these questions, is of the following:

(*a*) A copy of the indenture between the plaintiff company and apprentices. The subject of indenture was introduced by question 217:—

"Do you have indentures for your apprentices?" Answer: "Yes."

From questions 217 to 261, the answers to all are full and frank, with nothing that would suggest any attempt or desire, on Gurney's part, to evade the question or frame an answer so as to avoid giving all the information in his power.

Q. 252.—"Do you state that the indenture makes provision for letting the apprentice off if he is guilty of any of these things." A.—"Yes, I think so, if I am not mistaken."

Q. 253.—"Have you a copy of that indenture?" A.—"Not with me."

Q. 254.—"Can you get me a copy of that indenture?" A.—"Yes."

Q. 255.—"And will you?"

That question was not answered, but Mr. DuVernet said, "I will supply you with a copy of that indenture."

Mr. O'Donoghue did not reply to Mr. DuVernet, but continued:

Q. 256.—"Now, are you quite positive there is that provision in the indenture" A.—"I remember it so. I would not exactly swear to the fact that it is there."

Mr. O'Donoghue to Mr. DuVernet:—"Will you consent to one of these going in as an exhibit?"

Mr. DuVernet: "Certainly."

Mr. O'Donoghue proceeds.

Q. 257.—"How do your apprentices work—on piece work—or how?" A.—"They start on day work—they could not make a living at piece work."

Q. 258.—"But you can switch them from day work to piece work and back again if you see fit?" A.—"Yes."

Q. 259.—"And if they make too much at piece work you can put them on day work?" A.—"We desire them to make as much as they can; it is for the good of the company."

Q. 260.—"How much per cent. do you keep off them when they work piece work?" A.—"It will be stated in the indenture. I forget. It varies for different work."

Q. 261.—"The indenture is in blank?" A.—"I will get one that is filled in properly."

There is no allegation that either Mr. Gurney or Mr. DuVernet refused to produce this indenture or an indenture filled up, or that the defendants, or any of them, in any way are or can be prejudiced by its non-production, and further, what appears to be a printed form of such indenture is in a copy of a paper called "The Toiler," produced by Mr. Gurney as exhibit H, referred to in his affidavit. It may fairly be assumed that this is a true copy of the printed form of indenture used by plaintiff company.

The next thing that defendants desire to have produced is a letter within to Mr. Gompers, president of the American Federation of Labour, Washington, D.C., dated 22nd March, 1902.

Mr. O'Donoghue apparently had such a letter, or what purported to be a copy of such a letter, and he read it to Gurney and asked:

Q. 325.—"Now, did you write a letter on 22nd March, 1902, to Mr. Samuel Gompers to this effect?" (reads the letter). A.—"I did not send that letter."

Q. 326.—"Do you know anything about the letter?" A.—"I know there was some correspondence with Gompers."

Q. 327.—"From whom in your establishment?" A.—"I could not say; one of the officers. I know it was not me."

Q. 328.—"Mr. Carrick?" A.—"Possibly."

Q. 329.—"Would it be Mr. Edward Gurney?" A.—"Possibly."

Q. 330.—"Is that statement that they were discharged correct or incorrect" A.—"It is not correct according to my information."

Q. 331.—"Whoever wrote that would know, I suppose?" A.—"He would believe he was writing what was correct, no doubt."

Q. 332.—"The chances are you would be wrong?" A.—"No, the chances are I am right, I think."

Q. 333.—"Although you do not know anything about the dispute further than was reported to you?" A.—"That is right."

Q. 334—"Do you doubt that that letter was sent?" A.—I know that there was some correspondence with Gompers."

Q. 335.—"Would the letters from Gompers and copies of your letters in reply be in possession of the company?" A.—"I think so."

Q. 336.—"Could you get them?" A.—"I could."

Q. 337.—"I would like to have these letters—will you produce them?"

Mr. DuVernet said: "I will produce them if they are in existence." The matter then dropped.

With that undertaking on the part of the solicitor, and with all the information in possession of defendants' examining counsel, and considering that this is, as before stated an examination upon an affidavit and not for discovery, and assuming for the sake of argument that defendants at the trial may be entitled to those letters, and that they are relevant to the issues therein, it is going altogether afield to talk of "contempt" on the part of the witness, or to ask for any order for production for further examination on this affidavit.

As to refusal to answer. Speaking generally, the defendants have not adopted the method prescribed by Rule 455. In a cast of this kind, where a witness is not contumacious, and where the objection is taken to the question by counsel,

or by the witness at the instance of or upon the advice of counsel, it is not a case of contempt or of committing for refusal. The validity of the objection should be determined by the Court or a Judge, and Rule 492 makes the cross-examination upon an affidavit subject to the same rules as apply to the examination of a party for discovery—so Rule 455 applies.

The notice of motion is as to Gurney's refusal to answer questions numbers 198 to 201. The questioning had been in regard to apprentices and journeymen in other shops, and then

Q. 196.—"The other establishments, in business, manage to get along with that?" A.—"No, they are always very short of help."

Q. 197.—"Have they ever complained to you?" A.—"Bitterly."

Q. 198.—"Who have?"

Mr. DuVernet objected.

Mr. Gurney: "I do not wish to bring my friends under the ban of the union."

Mr. DuVernet: "That has nothing to do with it. I would like the examination confined to some reasonable limits."

Mr. O'Donoghue: "The witness has sworn here that they require a large number of apprentices."

Mr. DuVernet: "I decline to allow the examination to proceed on that line, on the ground that it does not come under the affidavit and is not relevant."

Ruling of special examiner:

"I admit the question subject to the objection. I think the question is within the affidavit, arising as it does out of previous answers of the witness."

Q. 198.—"You refuse, then, to say who it was made the bitter complaints to you?" A.—"Yes."

Q. 199.—"You recollect who made the complaints?" A.—"Perfectly."

Q.—"Recently?" A.—"Recently."

Q. 201.—"Since this suit was started?"

Mr. DuVernet: "I object to the question."

I am of opinion that the objections to these questions were quite proper. It seems to me entirely immaterial that other establishments were short of help, and that persons in other establishments complained to witness; and the witness was quite right in refusing to give the names of persons so complaining.

Questions 452 to 456, 510 to 513, 585. 620. 654. 673. 699 to 707. 724 to 729. inclusive.

In regard to these, the defendants are not entitled to succeed on their motion.

In some cases the refusal to answer was because the names wanted were of persons who may be witnesses called by plaintiffs if this case goes to trial. It may be that a party to a suit is entitled to names and addresses of persons in certain cases, notwithstanding the fact that they may be called on behalf of the opposite party—but in this case the persons who may be witnesses do not form any substantial part of the material facts—and their names need not be disclosed. This is in line with the decisions of Marriott v. Chamberlain, 12 Q. B. D. 154, and Humphries v. Taylor. 39 Ch. D. 693.

Some of these questions are entirely irrelevant.

And as to some, the witness had, by his answers to other questions, given all the information in his power. There is, in point of fact, no such refusal to answer, as would in any way prejudice the defendants.

After a cross-examination of the witness in which 737 questions were put by the examining counsel, covering, as I think, the whole ground, and getting all information of value, it would, in my opinion, be improper to order a further attendance for further examination on this affidavit.

Motion dismissed with costs.

BRITTON, J. NOVEMBER 24TH, 1903.

TRIAL.

BONTER v. NESBITT.

Settlement of Action — Dispute as to—Trial of Question — Finding of True Settlement — Costs—Solicitor's Lien — Acquiescence.

Action for malicious prosecution and arrest, and counterclaim for amount of several judgments against plaintiff. The action was entered for trial at the spring jury sittings, 1903, at Cobourg. The parties met during the sittings, and, in the absence of counsel or solicitors, arrived at a settlement. Upon an appeal by plaintiff and his solicitor from an order of a local Judge dismissing appellants' motion for an order upon defendant to pay the costs incurred by plaintiff in the action, MACMAHON, J., ordered (ante 610) that plaintiff should be at liberty to continue the action for the recovery of costs, and the action went to trial again under this order. The defendant pleaded the settlement and release, and plaintiff replied setting up as the true settlement

that defendant agreed to pay plaintiff $405 in cash and all claims against plaintiff, and pay plaintiff's costs, and further that the settlement was fraudulent and conclusive, and void as against plaintiff and as against the lien of the solicitor for his costs.

R. C. Clute, K.C., and J. W. Gordon, Brighton, for plaintiff.

E. C. S. Huycke, K.C., for defendant.

BRITTON, J., held the defendant's statement of what the settlement really was, namely, that defendant was to pay $400 to plaintiff, to release all claims he had against plaintiff, and plaintiff was to release all claims he had against defendant, and the action and counterclaim were both to be dismissed without costs, should be accepted; the solicitor had lost his lien by acquiescence; and that there was no collusion.

Action dismissed without costs and counterclaim dismissed without costs.

MACMAHON, J. NOVEMBER 25TH, 1903.

TRIAL.

CHANDLER AND MASSEY CO. v. GRAND TRUNK R. W. CO.

Railway—Carriage of Goods—Arrival at Destination — Destruction by Fire in Railway Company's Warehouse—Liability—Conditions of Shipping Bill.

Action to recover the value of a static machine, an X-ray apparatus, and a water motor shipped by the plaintiffs to one Kerr, at Dunnville, on the 7th November, 1902, and destroyed by fire while in defendants' freight shed at Dunnville.

E. B. Ryckman, for plaintiffs.

H. S. Osler, K.C., for defendants.

MACMAHON, J., held that it was impossible, on the evidence, to say that the defendants were guilty of any negligence in connexion with the burning of the freight shed; that the goods, when destroyed, were in possession of defendants as warehousemen; and that, by virtue of the 10th condition indorsed on the shipping bill, after the goods were placed in the warehouse, the defendants' liability was at an end. Richardson v. Canadian Pacific R. W. Co., 19 O. R.

369, and Lake Erie and Detroit River R. W. Co. v. Sales, 26 S. C. R. 665, referred to.

Action dismissed.

MACMAHON, J. NOVEMBER 25TH, 1903.

TRIAL.

YELLAND v. IRWIN.

Contract—Action to Set aside—Misrepresentations—Purchase of Interest in Timber Limits—Costs—Parties.

Action by Eliza Yelland, widow of the late Dr. Yelland, of Peterborough, and W. G. Yelland, brother of the deceased, the executors of his will, to set aside an option given by plaintiffs to defendants Stratton and Hall for the purchase by the latter of the plaintiff's interest as executors in certain timber limits, and for payment by defendant William Irwin to plaintiffs of $2,211 now in his hands, being the share of plaintiffs as executors in the proceeds of the sale of the limits. The defendants Stratton and Hall by their defence claimed specific performance of the option. The executors' interest was one-twentieth, and the price agreed upon was $1,275.

D. W. Dumble, K.C., for plaintiffs.

W. R. Riddell, K.C., and W. F. Johnston, Peterborough, for defendants Stratton and Hall.

L. M. Hayes, Peterborough, for defendant Irwin.

H. W. Hall, Peterborough, for infant defendant.

MACMAHON, J., without imputing to defendant Hall any desire to misstate what took place between himself and plaintiff Eliza Yelland, concluded that the former had forgotten some of the statements he made, and accepted the account given by the latter of the interview between them, and held that, by reason of the statements made, the option or agreement could not stand. Walters v. Morgan, 3 De G. F. and J. at p. 723, Waters v. Donnelly, 9 O. R. at p. 401, and Margraf v. Muir, 57 N. Y. 155, referred to.

Judgment for plaintiffs declaring that the agreement or option is null and void and should be delivered up to be cancelled, and directing defendant Irwin to pay to plaintiffs $2,211 in his hands, being one-twentieth of the amount for which the limits were sold. Defendants Stratton and Hall

to pay plaintiffs' costs and costs of defendant Irwin. Plaintiffs to pay the costs of the infant defendant, who was not a proper party.

CARTWRIGHT, MASTER. NOVEMBER 26TH, 1903.

NOXON CO. v. COX.

Venue—Motion to Change—County Court Action—Contract —Clause Governing Venue—Construction—Enforcement.

Motion by defendant to change venue from Woodstock to Goderich and to transfer the action from the County Court of Oxford to the County Court of Huron.

W. Proudfoot, K.C., for defendant.

C. A. Moss, for plaintiffs.

THE MASTER.—The action is on an agreement to pay a note of $125 and give an old machine as the price of a new one. The contract states that on default in payment "suit therefor may be entered, tried, and finally disposed of in the Court where the head office of the Noxon Company (Limited) is located." (That is, in Ingersoll, County of Oxford.) . . . It was argued that the words quoted are only applicable to a Division Court . . . . I do not think they are to be so restricted. It seems to me more reasonable to hold that the word "Court" is to be understood as meaning "the Court having jurisdiction" (see 3 Edw. VII. ch. 13, sec. 1 (O.)), and to be construed in reference to the contract in which they occur. . . . . The parties agree that in case of litigation it shall be carried on in the Court (whatever it is, whether High Court, County Court, or Division Court) having jurisdiction over the subject matter of the action in the locality where the head office of the company is situated.

I refuse the motion on this ground, and give no opinion on the merits.

The plaintiffs are willing to let any extra expense of trial at Woodstock be to defendant in any event. This term will be embodied in the order.

Costs in the cause.

CARTWRIGHT, MASTER. NOVEMBER 26TH, 1903.

CHAMBERS.

FITZGERALD v. WALLACE.

Security for Costs—Appeal to Court of Appeal—Application for Increased Security—Forum.

Motion by adult defendants for increased security for costs.

D. W. Saunders, for applicants.

F. W. Harcourt, for infant defendants.

H. E. Rose, for plaintiff.

THE MASTER.—The action was dismissed without costs. The plaintiff has appealed to the Court of Appeal. The case has been set down, and $200 paid into Court as security.

Mr. Rose objected that the motion could only be made to the Court of Appeal or a Judge thereof. I think this objection is entitled to prevail. Rule 830 (8) was relied on for the motion. But it seems clear that all the provisions of that Rule are to be governed by the first line, which says "where security is required under Rule 826 or 827." Now, both of those Rules confer jurisdiction only on the Judges of the Court of Appeal.

No such application, so far as I am aware, has ever been made, otherwise than as was done in Centaur Cycle Co. v. Hill, 4 O. L. R. 493, 1 O. W. R. 639. . . .

Motion dismissed with costs to plaintiff in any event.

This will not prejudice the renewal of the application, as was done in Centaur Cycle Co. v. Hill.

CARTWRIGHT, MASTER. NOVEMBER 26TH, 1903.

CHAMBERS.

FLYNN v. TORONTO INDUSTRIAL EXHIBITION ASSOCIATION.

Pleading—Action for Personal Injuries—Negligence—Defective Construction of Machine—Defence that Defendants Insured against Accident—Irrelevancy—Striking out.

The statement of claim alleged that the infant plaintiff was injured at the Dominion exhibition in September, 1903, while riding "in a machine known as a Razzle-Dazzle." The injury was alleged to have been the result of improper and defective construction of the machine. The 8th paragraph

alleged that defendants knew that the machine was dangerous.

The defendants moved to strike out the 9th paragraph, which repeated that allegation of the 8th, and concluded with an allegation that the defendants, to protect themselves against liability, insured themselves against the risk they so took in the Ontario Accident Insurance Company, which company were defending this action in the name of the defendants.

G. L. Smith, for defendants.

W. N. Ferguson, for plaintiff.

THE MASTER.—The motion must prevail, and the objectionable paragraph be stricken out. The only object it can have is to prejudice the jury on the trial of the case. Whether the defendants have so protected themselves from possible liability or not, is not in any way relevant to the issue. The fact cannot assist the plaintiff. It certainly should not be allowed to embarrass the defendants. The fact of such insurance could not, in my opinion, be given in evidence. But if the statement were allowed to remain on the record, it might be recited to the jury, and a discussion would ensue in which the fact of such insurance would be made known, to the manifest prejudice of the defendants. . .

I base my decision on the ground that the fact, if true, is not "one of the material facts upon which the party pleading relies:" see Rule 268. At most, if admissible at all, it would only be evidence to support the allegation of knowledge of the defective condition of the machine by the defendants. But I do not think it is admissible, much less proper to be pleaded.

Order made striking out paragraph 9, with costs to defendants in any event.

BRITTON, J. NOVEMBER 26TH, 1903.

TRIAL.

McCONACHIE v. GALBRAITH.

Water and Watercourses—Surface Water—Diversion to Neighbouring Land—Trespass — Specific Act — Damages—Injunction—Costs.

Action for damages for injury to land from surface water and noxious weeds, alleged to have been carried from defendant's to plaintiff's land.

Trial without a jury at Cobourg.

D. B. Simpson, K.C., for plaintiff.

G. H. Watson, K.C., and H. F. Hunter, Bowmanville, for defendant.

BRITTON, J.—Plaintiff and defendant are the owners of adjoining farms. Plaintiff says that the surface water flowing over defendant's land, if left to itself, would flow southerly over defendant's own land to a natural watercourse and on to Lake Ontario, and complains that defendant has obstructed the water in its natural course and so diverted it that it flows upon plaintiff's land to her damage.

This is a case in reference to surface water. No watercourse has been established within the decision in Beer v. Stroud, 19 O. R. 10. The water does not flow in such a channel as to create riparian rights, within the ordinary acceptation of these words.

The evidence does not shew any collection of water by defendant at the point marked A. on plaintiff's plan. The natural flow of the surface water from points north and north-westerly of point A. is south and south-easterly to point A., and then on to B. and C., then crossing to plaintiff's land. . . . This is established by the weight of evidence of persons knowing the locality and by the measurements made on the ground. . . . It is established that for years prior to 1898 the bulk of the water left defendant's land at point C. and followed the course indicated by the dotted line to the east and south. This was surface water, and, according to Ostrom v. Sills, 24 A. R. 526, plaintiff had a right to keep it off her land. She did not build any dam or erect any barriers against this water, but her fence was there, and at the bottom of the fence and against it dirt collected, silt accumulated, and grass grew, forming an obstruction, so that year after year, less water proportionately flowed upon her land. That, however, continued to be the course of the larger part of the surface water in spring freshets until 1898. In 1897 defendant had his land to the south of point C. "seeded down," and in the spring of 1898, owing to a bank of snow and ice against the line fence from B. to C., the water forced its way south on defendant's land, making a small channel for itself through defendant's seeded field. In 1899 the water again went that way, making this channel deeper, or making what defendant calls a "big ditch." Some water went that way in the spring of 1900. In the autumn of 1900 defendant ploughed his south field, and so obliterated the "big ditch." In the spring of 1901 defendant drew a load of manure and put it upon the land just below point C. to prevent the water going south, and he put

some earth upon the manure, making what plaintiff calls a dam. He also ploughed a furrow running westerly from point C. This was the beginning of the trouble. . . . In the autumn of 1902 defendant did further work on the ground. . . He put straw to fill up what he calls "the hollow," and he filled up a couple of furrows. He made a ditch from a point on his own land to the line fence, between his land and plaintiff's. He cut a rail out of the line fence, dug the ditch under the fence, and took out the bottom rail. . . . He cut through a grass covered bank at the bottom of the fence. . . making a ditch, as he admits, of 6 inches deep, and he then went upon plaintiff's land and continued the ditch upon her land to a furrow, a distance of about 3½ feet.

Defendant had no right to dig through this bank and go upon plaintiff's land. Plaintiff was and is entitled to the natural protection which is furnished as against surface water by the deposit upon her own land of silt and earth carried down by spring and autumn freshets.

No actual damage has been done to plaintiff's land by the water alone. All the damage proved is that from bringing down seeds of wild mustard, etc.

I think the $25 paid into Court by defendant is sufficient to cover all damages.

Plaintiff is wrong in her contention that the surface water did not naturally flow upon her land. . . The defendant had a right to do what he did as to ploughing and digging on his own land. It was only good husbandry. . . Upon the evidence I conclude that no more water was by defendant caused to flow upon plaintiff's land than did flow in the years prior to 1898, except to the small extent of the digging done and trespass committed in the autumn of 1902.

As it is a case in which plaintiff is entitled to recover only as to a specific act, and as no further trespass is threatened, it is not a case for injunction.

Under the circumstances, I think the judgment should be without costs. . . .

The $25 to be paid out to plaintiff in full of damages.

BRITTON, J. NOVEMBER 26TH, 1903.

TRIAL.

GORDANIER v. JOHN DICK CO.

Master and Servant—Injury to Servant—Negligence—Defect in Machinery—Knowledge of Master—Knowledge of Servant—Contributory Negligence—Jury—Nonsuit.

Action for damages for loss of plaintiff's right hand by its being caught in the fans of a "dryer" in the bag factory of defendants, where plaintiff was employed.

In the dryer were two fans which, when in motion, revolved with great velocity. The dryer was a room about 16 feet long by 10 feet wide. The air in it was heated by steam in pipes within the room. The cloth to be dried was hung upon bars in the room and the room was closed up, not with doors on hinges, but with panels or boards fastened together like doors and placed in position to box in the material to bt dried. On one side, in a recess or opening, were the two fans, set some inches back of the frame in which was the gear by which the fans were driven, and back of an oil cup which received the oil for lubricating the gear. The fans were put in motion by putting a belt upon the tight pulley or driving pulley of the shaft connected with the fans. When the fans were not in motion this belt ran upon a loose pulley. The plaintiff alleged that the arrangement for running the fans was defective, to the knowledge of defendants; that the belt was a little wider than the loose pulley, and was liable to extend to the tight pulley and start the fans, without anyone using the shifter, and that the shifter itself would not effectively do the work intended.

The plaintiff left work on Saturday 23rd May at noon. He said that in closing up he noticed the tendency of the belt to go upon the tight pulley, and he had to hold the belt upon the loose pulley until the machinery stopped.

On the morning of Tuesday 26th May, before 6.30, the plaintiff went to the factory to commence work. On arriving, he said, he looked and saw that the belt was properly upon the loose pulley, and then started for the dryer to oil up. When he started none of the machinery was in motion. He took off one door or panel of the drying room. He said he was ordered to do this, and told that it was not necessary to open another. He first went into the north part and filled the oil cup for the north fan. He then began to make his way through or between the folds of cloth with which the place was filled, and in going through heard the machin-

ery start. He held the oil can in his left hand, put his right hand up to feel for the oil cup, but, instead of reaching it, his hand went against the fan, which was then in motion, having been started, after the driving machinery was started, by the slipping of the belt from the loose pulley to the tight pulley.

The jurors visited the factory and had a view of the premises, and found, in answer to questions, that the injury was caused by negligence in having the arrangement of shifting lever and pulley so defective as to permit the belt to slip upon the tight pulley and start the fans when they ought not to be set in motion, and that plaintiff could not, by the exercise of reasonable care, have avoided the injury; and assessed his damages at $1,250.

E. C. S. Huycke, K.C., for plaintiff.

R. C. Clute, K.C., for defendants, contended that upon plaintiff's own evidence he was guilty of such contributory negligence as to disentitle him to recover; that he went to the drying room in the dark, and felt for the oil cup, instead of taking off a door before going in, and in that way getting sufficient light to enable him to see the oil cup.

BRITTON, J.—. . . . In my opinion, it was for the jury to say, considering all the circumstances—what plaintiff was told by the foreman as to the necessity for taking off more than one door, plaintiff's own knowledge of the place, he having for a long time been engaged at that work, his familiarity with the location of the oil, his not knowing that the fans were in motion—whether plaintiff was guilty of such negligence as to be himself to blame for this accident. The most I can do is to say that "facts have been established by evidence from which negligence may be reasonably inferred—the jurors have to say whether, from the facts submitted to them, negligence ought to be inferred." I do not say that it ought to be inferred in this case.

It was argued that plaintiff, knowing that in starting the machinery the belt was likely to slip from the loose pulley to the tight one, should have remembered this when entering the drying room, and have assumed that the fans were in motion, and so have been careful not to place his hand even near the oil cup. It is easy to be wise after the event. Knowledge of defect or danger is not necessarily contributory negligence. A person may know, and under certain circumstances may be excused for forgetting at the particular moment. . . . I am of opinion that I could not pro-

perly have withdrawn the case from the jury: see Scriver v. Lowe, 32 O. R. 290, and cases there cited.

Judgment for plaintiff for $1,250 and costs.

NOVEMBER 26TH, 1903.

DIVISIONAL COURT.

McCORMACK v. GRAND TRUNK R. W. CO.

Railway—Carriage of Goods—Escape of Dog in Transit—Liability of Railway Company—Common Carriers.

Appeal by defendants from judgment of senior Judge of County Court of Wentworth in favour of plaintiff for $100 damages in an action for the loss of a field spaniel delivered to defendants by plaintiff to be carried from Hamilton to South River, in the district of Parry Sound, which, while in care of defendants' servants, escaped and was never recovered.

Plaintiff shipped a deer hound and the dog in question on the 1st November, 1902, for the carriage of which he paid 80 cents each, receiving from defendants a check for each dog. The dogs were put into the baggage car at Hamilton by the baggageman who had charge of them. Each had a collar. A chain was fastened to the collar of the hound by a snap, and the other end of the same chain was fastened to the spaniel's collar by a cross-bar to a ring on the collar. There was a ring in the middle of the chain for the use of the person leading or holding the dog. When the train reached Toronto, the baggageman removed the dogs from the car, and, taking the cross-bar from the ring of the spaniel's collar, put the chain through under the collar, bringing the heads of the two dogs together, and used the end of the chain to tie the dogs to a post at the overhead stairway in the Union Station, until the train for Parry Sound should be ready to leave. The baggageman was leading the dogs to the Parry Sound train, when the spaniel backed up and pulled his head through the collar and escaped and was not recovered.

The Judge found that the collar on the spaniel was sufficiently strong, and that the defendants, having for their convenience altered the way in which the dog was fastened, could not complain.

J. W. Nesbitt, K.C., for defendants, contended that they were not common carriers of dogs, and therefore not liable for the loss, citing Dickson v. Great Northern R. W. Co., 18 Q. B. D. 176.

S. F. Washington, K.C., for plaintiff.

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

MACMAHON, J. (after setting out the facts at length):—By the English Railway and Canal Traffic Act, 17 & 18 Vict. ch. 31, sec. 1, the expression "traffic" includes "animals," and it is the same in our Railway Act, 51 Vict. ch. 29, sec. 2 (v).

Section 2 of the English Act provides that the company shall afford all reasonable facilities for the receiving and forwarding and delivery of traffic. . . .

[Quotation from the judgment of Lord Esher, M.R., in Dickson v. Great Northern R. W. Co., 18 Q. B. D. at p. 190.]

The Master of the Rolls points out that the condition sought to be imposed on the railway company for carrying the dog the loss of which occasioned the action, was unjust and unreasonable, and therefore void.

[Reference to sec. 246 of the Dominion Railway Act.]

As pointed out . . in Cobban v. Canadian Pacific R. W. Co., 23 A. R. at p. 119, the language of sec. 7 of the Imperial Act enables a company to make a special contract with just and reasonable conditions, while ours contains an absolute denial of power to escape from liability for negligence. . .

[Reference to Robertson v. Grand Trunk R. W. Co., 21 A. R. at p. 215.]

The defendants being by the Railway Act the common carriers of animals of all kinds, this dog was received by them as common carriers, and, as it was not delivered to plaintiff in accordance with the contract, the defendants are liable for the loss. . .

In The Queen v. Slade, 21 Q. B. D. 433, it was held that a dog is "goods" within the meaning of 2 & 3 Vict. ch. 71, sec. 40. . . .

Appeal dismissed with costs.