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APPELLATE DIVISION.

SEPTEMBER 21ST, 1914.

*MURPHY v. LAMPHIER.

Will—Action to Establish—Evidence — Onus — Testamentary Capacity — Failing Memory and Senile Decay — Procurement of Will by Others—Stealth, Haste, and Contrivance—Duty of Solicitor Called in to Prepare Will—Revocation of Former Wills—Executors Propounding Will—Costs—Discretion—Appeal.

Appeal by the plaintiffs from the judgment of BOYD, C., 31 O.L.R. 287, 6 O.W.N. 238.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

J. G. O'Donoghue, for the appellants.

J. W. Bain, K.C., and A. Ogden, for the defendants, the respondents.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—. . . . Agreeing, as we do, with the reasoning of the Chancellor and his conclusion that the appellants failed to satisfy the anus which rested upon them of establishing the testamentary capacity of the deceased, it would serve no good purpose to review the evidence or to discuss the grounds of the decision.

The learned counsel for the appellants pointed out one or two errors in the Chancellor's statement of the facts, but they are unimportant and in no way affect the soundness of his conclusions upon the facts.

*To be reported in the Ontario Law Reports.

The appellants complain of the disposition which was made of the costs by the learned Chancellor; but, as the costs are left to the discretion of the trial Judge, this Court, according to the practice, has no power to interfere with the exercise of that discretion, as the appeal in other respects fails, and no leave was given by the learned Chancellor to appeal as to the costs.

During the argument, counsel for the respondents expressed his willingness to pay $500 towards the costs of the appellants; and, if an arrangement is made that that shall be done, the Court will approve of it; and, if there is power to make such a direction, the order dismissing the appeal may provide for payment of the agreed amount out of the estate of the deceased.

SEPTEMBER 21ST, 1914.

*BANNISTER v. THOMPSON.

Husband and Wife—Enticement of Wife—Alienation of Affections—Deprivation of Consortium—Findings of Jury—Absence of Adultery—Right of Action — Damages — Separate Counts—Overlapping—Reduction of Damages.

Appeal by the defendant from the judgment of MIDDLETON, J., 29 O.L.R. 562, 5 O.W.N. 358.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

C. W. Bell, for the appellant.

R. McKay, K.C., and C. V. Langs, for the plaintiff, the respondent.

The judgment of the Court was delivered by MACLAREN, J.A.:—This action was brought to recover damages for (1) enticing away and (2) alienating the affections of the plaintiff's wife by the defendant.

These claims were set out in two paragraphs, and separate questions were submitted to the jury embodying them. They found in favour of the plaintiff on each, and assessed the damages at $500 and $1,000 respectively. The trial Judge entered judgment in favour of the plaintiff for $1,500.

*To be reported in the Ontario Law Reports.

The defendant has appealed to this Court firstly on the ground that no action lies on such a charge where, as here, the wife is still living with her husband, or where the jury have not found that adultery has been committed.

The first reported case on which the trial Judge relied for the sufficiency of the ground of action is Winsmore v. Greenbank (1745), Willes 577. It is cited as still being law in the leading text-books on the subject. See Addison on Torts, 8th ed., p. 858; Clerk & Lindsell on Torts, 3rd ed., p. 5; Pollock on Torts, 9th ed., p. 235; Eversley on Domestic Relations, 3rd ed., p. 175. It is also cited with approval by Armour, C.J.O., in Bailey v. King (1900), 27 A.R. 703, at p. 713.

This ground of objection, in my opinion, is not well founded.

The appellant also urges that the two paragraphs above referred to overlap. The first alleges that the defendant enticed away from the plaintiff his wife and procured her to absent herself unlawfully for long intervals from his house and society. The second, that the defendant by his wrongful acts alienated from the plaintiff the affections of his wife and deprived him of her love, services, and society.

For the wrongful acts of the defendant whereby he alienated from the plaintiff the affections of his wife and deprived him of her love, services, and society, the jury have awarded the plaintiff $1,000. What damage has the plaintiff suffered beyond the loss of his wife's affections, love, services, and society? Nothing more is suggested in the evidence, and it is difficult to imagine any further loss or damage. The first paragraph refers rather to the means used, the second to the damages resulting therefrom. This is dealt with in the case of Winsmore v. Greenbank, *supra*, at p. 582. . . .

See also the case of Metcalf v. Roberts (1895), 23 O.R. 130, where the cases on the subject are fully discussed.

I am consequently of opinion that the whole damages which the plaintiff can recover are included in the third question, based upon the second paragraph, and that the judgment should be reduced to $1,000, and that there should be no costs of the appeal.

SEPTEMBER 21ST, 1914.

MUSUMICCI v. NORTH DOME MINING CO.

Master and Servant—Death of Servant—Workman Employed in Mine—Explosion—Negligence—Failure to Inspect — Findings of Jury—Evidence—Mines Act, R.S.O. 1914 *ch.* 32, *sec.* 164, *Rule* 10.

Appeal by the defendant company from the judgment of LENNOX, J., at the trial, upon the findings of a jury, in favour of the plaintiff.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

M. K. Cowan, K.C., and J. W. Pickup, for the appellant company.

F. Denton, K.C., for the plaintiff, the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The action is brought under the Fatal Accidents Act, on behalf of the widow and children of Salvatore Musumicci, deceased, who was killed by an explosion which occurred in the mine of the appellant, in which the deceased was working on the 21st March, 1913.

The deceased was a helper to Marco Dementitch, another employee of the respondent, who had charge of the drilling-machine in number 5 drift in the mine, and operated it.

Thirteen holes had been drilled in this drift by Dementitch, and the charges in them had been exploded on the morning of Thursday the 20th March. According to the testimony of Dementitch, after the holes had been charged and the fuse lighted, he and the deceased ascended to the surface and listened for the reports of the explosion, and heard "all the shots go off"—i.e., satisfied himself that an explosion had taken place in each of the holes. Some of the timbers in the mine were displaced by the explosion, and, on the afternoon of Thursday, Dementitch was instructed by Grierson, the captain of the mine, to "fix" them. He and two other employees, Cassidy and Orek, were engaged on that work until nearly midnight, when it was completed.

While this work was going on, the deceased was engaged in "levelling down the drift to put down the air-pipe," and mucking back.

After the repairing of the timbers was completed, the men ascended for their supper, and returned to the mine about one o'clock on Friday morning for the purpose of proceeding with the work of drilling. Dementitch then began drilling, and had been engaged in that work for about two hours and a half, when an explosion occurred which killed the deceased and seriously injured Dementitch himself. After he had drilled two holes to the full depth, and while he was engaged in drilling the third and had got in to the depth of 13 inches, the explosion took place. This third hole was being drilled at the distance of about 6 inches from one of the holes that had been previouly shot, and there was evidence from which the jury might reasonably infer—as they did—that the explosion was caused by the drill coming into contact with some of the powder which had been used in charging the neighbouring hole and had not exploded when it was shot.

According to the testimony of Dementitch, when he went down to repair the timbers he looked at the holes that had been "shot," and found that some of them had not broken "very good," and these had broken off except 8 inches or a foot left in the "end of them," which I understand to mean the bottom of them.

How the drill came into contact with the unexploded powder in the neighbouring hole, Dementitch was unable to say; but it is, I think, a reasonable inference that one of these holes was not drilled straight—and indeed that would seem to be the only way in which the drill could have come into contact with the powder.

There was no shift boss employed in the mine, and no inspection of the drift had been made since the previous Wednesday by the mine-captain, and nothing was done by him to ascertain the condition of the drift or of the holes that had been shot before the work of again drilling on the Friday morning was begun. The powder used in charging the holes was forcite, and that kind of powder had not been used before in the mine.

Although there was no evidence that any express order was given to Dementitch to go on with the drilling after the repair of the timbers was completed, it is manifest that that is what he was expected and it was his duty to do. He was on the "night shift," and the only work he had to do after the timbers were repaired was to go on with the drilling, and it was for that purpose that he went down into the mine at one o'clock of the morning on which the explosion took place.

At the close of the case for the plaintiff, counsel for the appellant argued that negligence had not been proved and that

there was nothing to submit to the jury, but the learned trial Judge refused to give effect to this contention, and left the case to the jury.

The jury found, in answers to questions put to them, that the death of the deceased was caused by the negligence of the appellant, and that that negligence consisted in the appellant "not having proper supervision of the men; for not making an inspection of the last blast, especially after using a new kind of powder contrary to the mining law of Ontario."

The learned trial Judge left it to the jury to say whether the explosion was caused by the negligence of Dementitch, and their answers shew that they did not think so. While this removes one of the grounds upon which the respondent relied for fixing the appellant with liability, it also operates in her favour, because it eliminates Dementitch's negligence as a factor in causing the death of the deceased.

Notwithstanding the able argument of counsel for the appellant to the contrary, I am of opinion that there was evidence to go to the jury, and that their findings are supported by the evidence.

As I have said, the work in which Dementitch was engaged when the explosion occurred it was his duty to do, and the appellant is, I think, in no better position than if Dementitch had been expressly instructed to go on with the drilling; and the jury were, I think, warranted in coming to the conclusion that the appellant was negligent in impliedly directing or sanctioning Dementitch's proceeding with the drilling without an inspection having been made of the condition of the drift and the holes after the blasting on Thursday, especially as a new kind of powder had been used on that occasion.

Rule 10, sec. 164 of the Mines Act, R.S.O. 1914 ch. 32, provides that "the manager, captain or other officer in charge of a mine shall make a thorough daily inspection of the condition of the explosives in or about the same, . . ." This rule was invoked by the respondent, and it may be that it is wide enough to embrace the duty of inspecting the holes which had been blasted; but I prefer not to rest my judgment on that ground, for, apart altogether from the rule, it was the duty of the appellant to take all reasonable precautions to prevent its employees from being exposed to unnecessary danger in the performance of their work; and the question is, whether there was evidence that that duty was not performed, and that the death of the deceased was due to the failure to perform it; and, in my opinion, there was.

An inspection of the holes would have shewn that some of them had broken badly and ought to have resulted in their being carefully examined by some person more competent than Dementitch to judge as to their condition constituting a source of danger when new holes were being drilled in close proximity to them, and in that source of danger being removed; and, if I am right in that view, the death of the deceased was caused by the failure of the appellant to make the inspection.

Upon the whole, I am of opinion that there was evidence to support the findings of the jury, and that the appeal should be dismissed with costs.

SEPTEMBER 21ST, 1914.

BECKERTON v. CANADIAN PACIFIC R.W. CO.

Master and Servant—Death of Servant—Action under Fatal Accidents Act—Failure to Establish Relationship of Master and Servant—Absence of Contract—Findings of Jury—Negligence—Dangerous Place—Invitee—Duty of Owner—Patent Danger—Knowledge of Invitee—Cause of Death.

Appeal by the plaintiff from the judgment of MIDDLETON, J., 6 O.W.N. 158.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

J. H. Rodd, for the appellant.

Angus McMurchy, K.C., for the defendant company, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The action is brought on behalf of the widow and the infant children of William Beckerton, deceased, to recover damages, under the Fatal Accidents Act, for the loss sustained by them by the death of the deceased, which, it is alleged, was caused by the negligence of the respondent.

The deceased was a labourer who was employed by the respondent when there was work for him to do in unloading vessels at the respondent's dock in Windsor and reloading the cargoes into railway carriages; and he was employed and paid by the hour. He met with his death by drowning on the morning of the 16th August, 1913, at about half-past seven. He had

been employed with a number of other men on the dock on the previous day, and had taken part in unloading a cargo of flour and reloading it into the cars. When work was stopped for the day, the whole of the cargo had been unloaded, but there remained enough to fill three or four cars yet to be loaded on the cars—a work of about two or three hours.

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The hour for commencing work in the morning was seven o'clock. Between 7.15 and 7.30 in the morning, the deceased left his house, which was very near the dock, and proceeded to the dock. On his way to it, he was overtaken by Robert Hunter, the timekeeper who was employed in the work; and, in reply to the deceased's inquiry if there was "anything doing" that morning, Hunter said that there was not, and that all the men that were needed to complete the loading of the flour had been employed. After receiving this information, the deceased continued on his way to the dock, and, according to the testimony of the only eye-witness of what happened—Louis Hill—walked along the dock, keeping about four feet away from the edge on the water side, and had almost reached the third of the gangways to which I shall afterwards refer when he staggered backward and then went forward and "slipped right down" on to the gangway and rolled down its incline into the water, and was not seen again until his body was found some time after by dragging for it in the river.

The deceased was subject to fainting or epileptic fits, and when under their influence would become unconscious and fall down, and the only reasonable inference is, that what caused him to stagger and fall on the occasion referred to was the occurrence of one of these fits.

The ground of negligence charged is, that the gangways, which were constructed at intervals along the dock and sloped towards the water, were a source of danger to persons having occasion to cross or to walk upon them, especially when, as was said to have been the case on the morning on which the deceased met his death, they were rendered slippery by flour having fallen upon them, and it was contended that when not in use, as they were not that morning, a guard should have been placed across the mouth of them to prevent a person who might fall on them from rolling or slipping into the river, as apparently the deceased did.

After falling or rolling into the river, the deceased did not rise again to the surface, but his hat and pipe did, which would seem to indicate that he was smoking.

There was no evidence that the deceased, after meeting the timekeeper, went towards the office on the dock, where, if he desired to be put to work, it was his duty to report, and the fair inference from all the testimony is, that, if the deceased when he left his house intended to go to work on the dock, he abandoned that intention when informed by the timekeeper that there was no work for him to do, and that he was strolling along the dock enjoying his morning smoke.

At the close of the case for the appellant at the trial, a motion was made by counsel for the respondent to dismiss the action, but the learned trial Judge decided to submit the case to the jury, reserving the motion to be afterwards dealt with by him.

The jury, in answer to questions put to them, found: (1) that the witness Hill fairly described the accident as it actually happened; (2) that the respondent was at fault by not having proper protection at the mouth of the slips; (3) that the deceased was in the employ of the respondent at the time of the accident; and they assessed the damages at $1,600.

The learned Judge eventually gave effect to the respondent's motion and dismissed the action, being of opinion that there was no evidence that the deceased was, at the time of the accident, in the employment of the respondent.

With that opinion we agree. It is unnecessary to say what would have been the result if it had appeared that the deceased when he met his death was on his way to his work, though I think that even in that case, bearing in mind that he was employed and paid by the hour while actually at work, it could not be said that when he met his death he was in the employment of the respondent. However that may be, as I have said, the proper conclusion upon the evidence is, that the deceased was not on his way to work, but that, after having been told by the timekeeper that there was no work for him to do, he abandoned his intention, if he had any, of going to work.

The case is not presented on the pleadings and was not presented at the trial as one in which the deceased was on the respondent's premises by its implied invitation, as he would have been if he had gone there to inquire if there was work for him to do; but, if the respondent was sought to be made liable on the assumption that the deceased was on the dock for that purpose, the action must have failed, because, if the condition of the gangway was dangerous, the danger was obvious to the deceased, and there was no duty to protect him against it.

The duty in the case of an invitee is thus stated in Halsbury's Laws of England, vol. 21, pp. 388-9, para. 656: "The duty of the occupier of premises on which the invitee comes is to take reasonable care to prevent injury to the latter from unusual dangers which are more or less hidden of whose existence the occupier is aware or ought to be aware;" and is thus put by Bramwell, L.J., in Lax v. Corporation of Darlington (1879), 5 Ex. D. 28, 34: "If the place was not safe, if there was a danger that was not obvious to any person coming there, that person ought to have been warned against it, and it should have been said, 'If you come, you must come and take the place as you find it, for the situation of things is such that there is danger there.' The defendants did not warn the plaintiff, and the jury have found that the place was dangerous; and, therefore there is, in my opinion, a prima facie case against them, not upon any ground of negligence or misfeasance, but simply upon the ground that they have not done their duty to their customer in apprising him that there was danger in his accepting their invitation and allowing him to come to their ground for a profit to themselves."

In the case at bar, upon the hypothesis that the condition of the gangways was a source of danger to persons walking along the dock, that danger was obvious and was well-known to the deceased, and therefore no warning such as mentioned by the Lord Justice was necessary for him. There was nothing in the nature of a trap and nothing concealed, and, if danger there was, it was patent to the deceased.

The action was, we think, properly dismissed, so far as the liability of the respondent was based upon the duty owed by it to the deceased as a person in the respondent's employment, and no good purpose would be served by sending the case back for a new trial on the other ground I have mentioned. We have before us all the materials necessary for finally determining the matters in controversy, and there is no case made for holding the respondent liable upon the ground on which the defendants in Lax v. Corporation of Darlington were held to be liable.

The answer of the jury to the third question should be set aside and judgment pronounced dismissing the action.

I cannot part with the case without expressing the opinion that the effective cause of the unfortunate death of the deceased was the fit which he evidently had at the moment when he staggered and fell, and that the respondent is not answerable for the consequences which followed. The respondent was not

bound to foresee that such an event might happen or to guard against the consequences of it, if it did happen, and the case might be disposed of adversely to the appellant, I think, on that ground also.

The appeal is dismissed with costs.

SEPTEMBER 21ST, 1914.

DOMINION TRANSPORT CO. v. GENERAL SUPPLY CO.

Carrier—Transportation Company—Cartage of Machinery from Railway Station to Works of Vendee—Liability of Vendor and Consignee for Charges—Contract—Ratification — Estoppel—Evidence.

Appeal by the defendant company from the judgment of the Senior Judge of the County Court of the County of Carleton in favour of the plaintiff company in an action in that Court, tried without a jury.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

G. G. S. Lindsey, K.C., for the appellant company.

Shirley Denison, K.C., for the respondent company.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The action is brought to recover the respondent's charges for transporting machinery from the Ottawa station of the Canadian Pacific Railway to the West End Construction Company, which I shall afterwards refer to as the construction company, in that city.

The machinery had been purchased by the construction company from the appellant, and was shipped from Prescott to Ottawa by the Canadian Pacific Railway, consigned to the appellant. By the terms of the contract of purchase, the property in the machinery remained in the appellant until the price of it was paid, and the purchaser was entitled to possession of it until default in payment.

On the arrival of the machinery at Ottawa, the advice-note was handed to the respondent, a cartage company which delivers goods which arrive at Ottawa by the Canadian Pacific Railway

to the persons to whom they are consigned, and a duplicate copy of the advice-note was sent to the appellant.

Upon the advice-note the words "no cartage" were stamped, which means, as the evidence establishes, that the shippers do not undertake responsibility for the cartage charges.

The construction company was desirous of obtaining quick delivery of the machinery, and its representatives, Claffy and Grey, saw the agent of the respondent, Mr. Manners, and told him of this. Mr. Manners at once communicated with the appellant asking for its consent to the respondent's letting the construction company have or delivering to that company the machinery, and the appellant's consent was given to that being done. Arrangements were then made between the representatives of the construction company and Manners for the cartage of the machinery to the works of that company at or near Fairmount avenue. A discussion took place as to the charges, and it was finally arranged that the work should be charged for by the day. According to the testimony of Manners, Grey said that the charges would be paid by the appellant, but this was denied by Grey. Assuming that Manners' evidence on this point is accepted, there is nothing to indicate that Grey acted or assumed to act, in the transaction or in making that statement, for the appellant; but it is clear that he was acting, as all the parties knew, for his own company.

The machinery was delivered in pursuance of this arrangement, and its delivery occupied several days.

On the 3rd July, 1911, the respondent sent to the appellant a bill of its charges, and on the 19th of the same month the following letter was written by the sales-manager of the appellant:—

"Ottawa, Can., July 19/11.

"The Dominion Transportation Co., Ottawa, Ont.

"Gentlemen:— *Attention of Mr. D. H. Manners.*

"We are in receipt of your statement dated July 3rd for cartage on car of machinery to Fairmount ave. We note that you charge us at the rate of $7.50 per day for five teams, which we think is a trifle stiff, in view of the fact that these teams were practically on the same waggon.

"We would thank you to look into this matter, and we think that you will agree with us that this charge is a little steep.

"Yours truly,

"The General Supply Co. of Canada Ltd.

"G. B. Harlock,

"Sales M'g'r. Mchy. Dept."

On the following day, Manners replied to this letter, explaining the reason for the charges, and concluded his letter by saying that he "would be pleased to see you personally and talk the matter over."

According to the testimony of Greene, an officer of the appellant company, Manners, in accordance with the suggestion in his letter of the 20th July, had an interview with Greene at which he repudiated all liability of the appellant for the respondent's charges. Manners does not in terms deny this, but says that, according to his recollection, there were no repudiations of liability by the appellant until the following October.

On the 25th July, 1911, the following letter was written by the appellant to the construction company:—

"Ottawa, Can., July 25/11.

"The West End Construction Co., Ottawa, Ont.

"Gentlemen:—Beg to enclose herewith bill from the Dominion Transport Co. for the moving of large crusher, which they have charged to us, also the correspondence we have had with them in reference to this bill. We think that this price is pretty stiff, and, as you are acquainted with the facts, and as this should really have been charged to you direct, we think you had better take this matter up with them, as we think there is no need for us entering this in our books.

"In the meantime we will also voice our complaint to Mr. Manners.

"Yours truly,

"The General Supply Co. of Canada Ltd.,

"G. B. Harlock,

"Sales M'g'r. Mchy. Dept."

In my opinion, the appellant is not liable for the respondent's charges. There was, as between the appellant and the construction company, admittedly no liability on the part of the appellant to deliver the machinery at the construction company's works; the appellant's duty was at an end when the machinery reached the Ottawa station of the Canadian Pacific Railway Company. The contract for the transport of it to the construction company's works was made between that company and the respondent, and Claffy and Grey did not act or assume to act for the appellant in making the contract. If either of these gentlemen had assumed to act for the appellant, it may be that the subsequent correspondence would amount to a ratification of their acts; but, as they did not assume to act

for anybody but the construction company, there was nothing to ratify.

The letters of the 19th and 25th July seem to indicate that the appellant, or the writer of the letters, was under the impression that the appellant was liable for the respondent's charges, but that is clearly not enough to render the appellant liable.

It was argued for the respondent that the conduct of the appellant after the receipt of the respondent's bill of charges, and especially the letters of the 19th and 25th July, estop the appellant from denying its liability, but I am not of that opinion. At most they shew that the appellant entertained the belief that it was liable to pay the respondent's charges, but there is nothing to indicate that the respondent changed its position to its prejudice relying upon the appellant's conduct and letters; and, in the absence of evidence of that having taken place, no estoppel arose.

There is, besides, the evidence of Greene to which I have referred that, at the interview between him and Manners, he (Greene) repudiated liability on the part of his company.

The appeal should be allowed with costs and the judgment be reversed, and judgment entered dismissing the action with costs.

SEPTEMBER 21ST, 1914.

CITY OF TORONTO v. CONSUMERS GAS CO.

Municipal Corporation—Construction of Sewer—Necessary Lowering of Gas Company's Main—Expense of—Liability for —Municipal Act, R.S.O. 1914 *ch.* 192, *secs.* 325, 398 (7)—*Injurious Affection of Land of Company in which Main Laid*—11 *Vict. ch.* 14.

Appeal by the defendant company from the judgment of the Senior Judge of the County Court of the County of York, after trial of an action in that Court without a jury, in favour of the Corporation of the City of Toronto, the plaintiff (respondent).

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

I. F. Hellmuth, K.C., and W. B. Milliken, for the appellant company.

G. R. Geary, K.C., for the respondent corporation.

The judgment of the Court was delivered by MEREDITH, C.J. O.:—The action is brought to recover the expense incurred by the respondent in lowering a 20-inch gas main belonging to the appellant, laid on Eastern avenue, one of the public highways of the city of Toronto, at or near the intersection of that street with Carlaw avenue, another of the public highways of the city, which was necessitated by the construction by the respondent, in the public interest, of a sewer on Carlaw avenue.

It is conceded by the appellant that the lowering of the gas main was necessary to enable the sewer to be constructed, and that, if the appellant is liable to pay the expense incurred in lowering the gas main, the respondent is entitled to recover the amount sued for; and the action is really brought for the purpose of obtaining a judicial determination as to whether the cost of such a work is to be borne by the appellant or by the respondent.

When the appeal was opened and the fact that the case is a test one was mentioned, it was suggested that it was undesirable that the parties should be concluded by a judgment of this Court from which there is no appeal, and it was agreed by counsel that the case should be treated as if the action had been removed into the Supreme Court.

If it were not for the decision of the Supreme Court of Canada in Consumers Gas Co. v. City of Toronto, 27 S.C.R. 453, and the provisions of sec. 325 of the Municipal Act, R.S.O. 1914 ch. 192, I should be inclined to agree with the conclusion of the learned Judge of the County Court. It was, however, held in that case that the soil occupied by the pipes of the appellant is land taken and held by the appellant under the provisions of its Act of incorporation (11 Vict. ch. 14); and by sec. 325 it is provided that "where land is expropriated for the purposes of a corporation or is injuriously affected by the exercise of any of the powers of a corporation or of the council thereof, under the authority of this Act or under the authority of any general or special Act, unless it is otherwise expressly provided by such general or special Act, the corporation shall make due compensation to the owner for the land expropriated, or where it is injuriously affected by the exercise of such powers for the damages necessarily resulting therefrom. . . ."

The sewer in the laying down of which it became necessary to remove the pipes of the appellant was constructed under the authority of cl. 7 of sec. 398 of the Municipal Act, which empowers the councils of all municipalities to pass by-laws "for

constructing, maintaining, improving, repairing, widening, altering, diverting, and stopping up drains, sewers, or watercourses; providing an outlet for a sewer or establishing works or basins for the interception or purification of sewage; making all necessary connections therewith, and acquiring land in or adjacent to the municipality for any such purposes."

The land of the appellant, i.e., the soil in which its pipes were laid, was injuriously affected by the exercise of the power of the respondent or its council in the construction of the sewer, the laying of which necessitated the removal of the pipes, and the appellant was entitled to compensation for the damage necessarily resulting from the exercise of that power, and it follows that the appellant cannot be required to repay to the respondent the expense incurred in taking up and relaying the pipes.

The appeal should be allowed with costs and the judgment appealed from reversed; and, in lieu of it, judgment should be entered dismissing the action with costs.

SEPTEMBER 21ST, 1914.

*ROBINSON v. VILLAGE OF HAVELOCK.

Negligence—Children Killed in Sand-pit Owned by Municipal Corporation—Nuisance—Cause of Death—Duty of Corporation—Absence of Knowledge of Children's Resort to Sand-pit—Liability—Findings of Jury—Evidence—Appeal.

Appeal by the Corporation of the Village of Havelock, the defendant, from the judgment of KELLY, J., 6 O.W.N. 90, in favour of the plaintiff, upon the findings of a jury, in an action, under the Fatal Accidents Act, to recover damages for the death of the plaintiff's three children, caused by falling sand and earth in a sand-pit on the defendant corporation's property, where the children were playing.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

F. D. Kerr, for the appellant corporation.

D. O'Connell, for the plaintiff, the respondent.

*To be reported in the Ontario Law Reports.

The judgment of the Court was delivered by MEREDITH, C.J. O. (after stating the facts and the findings of the jury) :—There is no doubt that the excavation made by the appellant constituted a nuisance, but no case is made on the pleadings and there is no finding of the jury that the nuisance was the cause of the accident, and there is no evidence that would warrant such a finding.

The right of the respondent to recover must, therefore, depend on his having established that in the circumstances the appellant owed a duty to the children which it failed to perform, and that their death was occasioned by that failure.

The respondent's counsel relied on Cooke v. Midland Great Western Railway of Ireland, [1909] A.C. 229; but, assuming that the finding of the jury that the appellant invited the children to use the gravel-pit is warranted by the evidence—and I think it is not—the answer to the second question is fatal to the respondent's case. In the Cooke case, the plaintiff would have failed but for the conclusion that was reached that the defendant knew that it was placing or leaving in the way of boys and children, a temptation alluring to them and dangerous in its nature, and with which it was not improbable that they would come in contact. It was upon this knowledge that, in the opinion of Lord Atkinson, "the liability of the owner is at bottom based" (pp. 238-9.)

The Cooke case has been considered by the Court of Appeal in Latham v. R. Johnson & Nephew Limited, [1913] 1 K.B. 398, and the Court there came to the conclusion that no new law was laid down or intended to be laid down in the earlier case, and pointed out that all that was decided in that case was that the defendant had put in a place open to their licensees a thing dangerous *in itself*, and that there was, therefore, cast upon the defendant a duty to take precautions for the protection of others who will certainly come into its proximity: per Farwell, L.J., at p. 408. Hamilton, L.J. (p. 416), says: "A child will be a trespasser still, if he goes on private ground without leave or right, however natural it may have been for him to do so. On the other hand, the allurement may arise after he has entered with leave or as of right. Then the presence in a frequented place of some object of attraction, tempting him to meddle where he ought to abstain, may well constitute a trap, and in the case of a child too young to be capable of contributory negligence it may impose full liability on the owner or occupier, *if he ought, as a reasonable man, to have anticipated*

the presence of the child and the attractiveness and peril of the object." Again, at p. 417, the same Lord Justice says that there was no evidence "that the defendants knew that there was anything dangerous about any stones in general or these stones recently shot there in particular," referring to the heap of stones which had or was supposed to have caused the injury to the child.

Besides the answer of the jury to the second question, there was, as I have said, no evidence of knowledge by the appellant that children were in the habit of resorting to the gravel-pit to play there; Leeson's knowledge of the fact was not notice to the appellant. He was not an officer or servant of the appellant, but, as has been said, a teamster employed to haul sand or gravel from the pit whenever occasion required that it should be hauled for the purposes of the appellant, and he had neither oversight nor care of the pit intrusted to him.

These difficulties in the way of the respondent's success are, in my opinion, insuperable; and there are, I think, other formidable difficulties in the way of it, to which it is not necessary to refer.

Even if knowledge by the appellant that children were accustomed to resort to the gravel-pit to play had been proved, we could not uphold the judgment without running counter to Pedlar v. Toronto Power Co. (1913), 29 O.L.R. 527, affirmed by a Divisional Court (1914), 30 O.L.R. 561.

The appeal must be allowed and the judgment of the trial Judge reversed; and, in lieu of it, judgment be entered dismissing the action—the whole with costs, if costs are asked by the appellant.

HIGH COURT DIVISION.

MIDDLETON, J. SEPTEMBER 18TH, 1914.

McKEY v. CONWAY.

Mortgage—Priority—Covenant—Construction — Claim for Reformation—Principal and Interest—Redemption—Foreclosure—Sale.

Action by a second mortgagee for a declaration that his mortgage has, by virtue of a certain covenant, priority over the first mortgage, and for foreclosure.

A. E. H. Creswicke, K.C., and W. A. J. Bell, K.C., for the plaintiff.

B. H. Ardagh, for the defendant John Gibbs.

MIDDLETON, J.:—Cassidy, the owner of the land in question, mortgaged the same to the defendant John Gibbs to secure an advance of $1,500; the principal falling due on the 21st December, 1911. The mortgage contained a proviso for the acceleration of the payment of the principal upon default of payment of interest, also a proviso enabling the mortgagor to pay off the whole or any part of the principal sum on any interest day without notice or bonus.

Cassidy conveyed this property to the defendant Conway, but on the 22nd June, 1910, executed a mortgage in favour of the plaintiff to secure the sum of $500 in ten equal monthly instalments of $50, the first instalment to become due on the 22nd September, 1910; so that the last instalment payable under this mortgage would mature before the principal would fall due under the earlier mortgage, by effluxion of time.

The occasion of making the second advance was the partial destruction of the building on the property by fire. The building had been used as an hotel, and the License Commissioners required its restoration and improvement before the license would be renewed. The money advanced was spent towards this restoration, but the building never was completed, and the license never was renewed. Conway has made default in payment of the mortgage, and it may be taken that both he and Cassidy are financially worthless.

At the time of the making of McKey's advance, some arrangement was made between him and Gibbs looking to the protection of McKey with respect to the loan to be made. This arrangement was embodied in a covenant found in McKey's mortgage; and I find nothing upon the evidence which would justify the reformation of that covenant. I think it must be taken to express the real bargain between the parties, and their rights must be worked out upon the documents as they stand.

This covenant, omitting immaterial words, is a covenant on the part of Gibbs that he "will not collect or receive payment of or seek to collect any of the principal money secured by" his mortgage, "but will allow said principal to remain unpaid and will collect the interest thereon only until and while and so long as the moneys hereby secured shall remain unpaid."

So far as the mortgagor and his assignee are concerned, it

may be taken that these moneys will remain forever unpaid; and it is plain from the evidence given that the property in its present condition will not realise enough to satisfy the first mortgage.

The second mortgagee now seeks in this action a declaration that the effect of this covenant is to give to his mortgage priority over the first mortgage, and in default of redemption he asks foreclosure as against the prior mortgagee. To this Gibbs answers by alleging that the true intention of his covenant was merely to postpone the demand of the principal upon his mortgage during the period of the currency of the plaintiff's mortgage according to its terms, and in the alternative he takes the position that, even if the covenant has any wider effect, he is nevertheless entitled to priority and to enforce payment in respect of his interest for all time, and that all he is prohibited from doing by the covenant is calling for or enforcing payment of his principal, which nevertheless remains and is a first charge upon the property.

There is much force in the contention made by Mr. Ardagh that this covenant, read in the light of St. John v. Rykert, 10 S.C.R. 278, contemplates payment by the mortgagor in accordance with his covenant, and that the words "so long as the money hereby secured shall remain unpaid" really mean "until the time herein stipulated for payment;" but I think that this will be carrying the St. John case beyond its true effect; and, bearing in mind the fact that no default would in ordinary course take place under the Gibbs mortgage so that the principal would become payable, until all payments under the plaintiff's mortgage were past due, it seems to me that the parties contemplated the postponement of the calling in of Gibbs' principal so long as the moneys secured by the plaintiff's mortgage were in fact unpaid.

I am unable to yield to Mr. Creswicke's contention that the effect of this covenant is to postpone the Gibbs mortgage. A postponement was not asked, nor was it contemplated by the parties; and the right of Gibbs to receive his interest is expressly stipulated for. This, I think, distinguishes the case from Burrowes v. Molloy, 2 Jo. & Lat. 521. There the mortgagee had covenanted that he would not call in the principal money during the lifetime of the mortgagor. Default was made in payment of interest. It was held that the interest was so accessory to the principal that he could not maintain foreclosure for the non-payment of interest while the principal was not yet due. This case might make it very difficult for Gibbs to maintain fore-

closure; but he is not seeking to foreclose; he is content to allow the principal to remain a charge upon the property; but he does desire to receive his interest in the meantime, because that is expressly stipulated for by his covenant. As under the covenant he will be entitled to interest upon his principal so long as it remains unpaid, this charge for which priority is reserved is really equivalent to the principal itself.

In no aspect of the case can I find anything to justify the declaration sought.

A judgment has been signed against the defendant mortgagor for foreclosure. Both parties agree that it is in the interest of all that the property be sold. I think the judgment should be changed from foreclosure to sale, and that a sale should be had at as early a date as possible. This probably cannot be done without some notice being given to the Conways. I permit notice asking for this relief to be given to them by registered letter, and in the meantime do not formally pronounce judgment. I think each party should be at liberty to add his costs of the action to his mortgage security.

If I am correct in thinking that the plaintiff has no priority, he might well release his claim upon the property, leaving Gibbs to work out his own salvation; for it is plain that the property will not bring the amount due upon the mortgage.

LATCHFORD, J. SEPTEMBER 19TH, 1914.

PARKERS DYE WORKS LIMITED v. SMITH.

Covenant—Restraint of Trade—Undertaking not to Enter into Competition with Established Business—Reasonableness—Extent of Territory—Breach—Managing Rival Business—"Agent or otherwise"—Injunction.

Motion by the plaintiffs for an interim injunction.

W. R. Cavell, for the plaintiffs.
E. B. Ryckman, K.C., for the defendant.

LATCHFORD, J.:—The plaintiffs Parkers Dye Works Limited have for many years carried on business as dyers and cleaners in Toronto and the other principal cities of Ontario, and have in all about 400 agencies in the Dominion of Canada. In 1912, they

purchased a similar business, theretofore for many years conducted by the defendant under the name of "Smith's Toronto Dye Works." They incorporated the latter business as "Smith's Toronto Dye Works Limited," and retained the defendant in the position of manager.

In June, 1914, an agreement dated the 23rd April, 1914, was made between the plaintiff companies and the defendant whereby Mrs. Smith (the defendant), in consideration of $1,000, assigned to the Parker company her claims against the Smith company, acknowledged that she had no further claim against either company, and covenanted that she would not, "as agent or otherwise, for any person . . . directly or indirectly enter into competition with or opposition to the business" of either company within Ontario for a period of three years from the date of the agreement.

In a Toronto newspaper of the 23rd July, the following advertisement appeared:—

"Smith
"French Cleaning and Dyeing
"85 Bloor St. West,
"Under the management of
"Mrs. E. T. Smith."

A circular issued about the same time sets forth that "O. E. Smith" has opened a dyeing and cleaning business, at the address mentioned, "under the management of Mrs. E. T. Smith, formerly of Smith's Toronto Dye Works, with many years of experience in high class trade."

The plaintiffs (the two companies) now seek an injunction restraining Mrs. Smith from managing the rival business of O. E. Smith, on the ground that her management of the business at 85 Bloor street west constitutes a breach of her covenant.

The defendant was examined under oath for the purposes of the motion. Her evidence—to say the least—is not remarkable for its candour. With much reluctance, Mrs. Smith admitted that "O. E. Smith" is her daughter Olive. There was even greater difficulty in obtaining from the defendant an admission that she was acting as manager of the O. E. Smith business. She was asked—Q. 147—"Are you managing the business?" and answered "I am working for her." While denying that she knew anything of the advertisement, she acknowledged that the daughter had shewn her the circular. The examination referring to this circular proceeded:—

"148. Q. You told me just now the circular was correct, you

know, and that circular says 'under the management of Mrs. E. T. Smith'? A. I said I was doing anything I was told to. She may call me a manager; I don't know what she calls me."

There is little difficulty about the reasonableness of the restriction by which the defendant agreed to be bound. As the business of the Parker company extends throughout the whole of Ontario, the restriction does not, in my judgment, afford the company more than fair protection, and the interests of the public are not interfered with. See Allen Manufacturing Co. v. Murphy, 22 O.L.R. 539, 23 O.L.R. 467.

The business carried on at 85 Bloor street west is undoubtedly in competition with or opposition to the business of the plaintiffs. I assume for the purposes of this motion that that business is not a mere cover for a business which is in fact the defendant's.

Yet the management of that business by the defendant is, in my opinion, in breach of her covenant that she would not for the term mentioned, as agent or otherwise for any other person, directly or indirectly enter into competition with or opposition to the business of the plaintiffs.

The covenant in Gophir Diamond Co. v. Wood, [1902] 1 Ch. 950, so much relied on by the defendant, turns on the use of the word "interested" in any connection which meant that the defendant was to have a proprietary or pecuniary interest in the success or failure of the business. No such connection exists in the present case. "Manager" seems to me to fall within the general words "or otherwise" following the word "agent," if, indeed, it is not within the word "agent" itself.

The defendant will, therefore, be enjoined as asked until the trial. Costs in the cause to the plaintiffs, unless the trial Judge shall otherwise order.

BERLET V. BERLET—LENNOX, J.—SEPT. 18.

Husband and Wife — Alimony — Desertion — Lump Sum Fixed for Alimony—Money Lent—Interest—Costs.]—An action for alimony and money lent, tried at Berlin. The parties had lived together as man and wife for about 40 years, when the defendant deserted the plaintiff. The learned Judge finds that there was no excuse for the desertion; that upon two occasions the defendant assaulted and injured the plaintiff; and that the plaintiff is entitled to alimony. As the defendant's property is in-

cumbered, a lump sum will be better for the plaintiff than periodical payments, and the sum of $2,500 offered by the defendant is not an unreasonable one. The learned Judge also finds that the plaintiff lent the defendant $201.14, which she is entitled to recover. Judgment for the plaintiff for $2,701.14, with interest on $201.14 from the 24th December, 1913, and with costs upon the County Court scale, without set-off. A. L. Bitzer, for the plaintiff. E. P. Clement, K.C., for the defendant.

LONGFORD QUARRY CO. v. SIMCOE CONSTRUCTION CO.—MIDDLETON, J.—SEPT. 18.

Contract—Supply of Building Material—Contract-price—Ascertainment—Correspondence—Deductions—Costs.]—Action to recover $1,188.11, being the balance alleged to be due to the plaintiffs for stone supplied to the defendants for use in the construction of a post-office building at Midland. The amount claimed was calculated upon the theory that the plaintiffs were entitled to charge over and beyond the contract-price for all stone supplied in excess of the amounts named in a letter written by the plaintiffs on the 4th April. The defendants contended that the contract was one to supply all the stone required for the building, and that they were entitled to receive the necessary stone for the stipulated price, even if the quantity exceeded the amounts stated by the plaintiffs as the basis of the price given. Upon the correspondence and evidence, the learned Judge finds in favour of the defendants' contention.—At the time of bringing the action, the defendants had not paid for all the stone received, even on their own contention. They sought to balance the account by claiming an abatement with respect to stone that was not supplied for the erection of the steps of the building, $157.28, and by bringing into Court $400.72. The stone for the steps amounted to 125 feet. For this the defendants paid $125 and freight $32.25 in excess of the freight from Longford; but the stone purchased was sawn stone and not stone in the rough, and this saved the stone-cutting, which was to be done by the defendants. Taking the same price for the rough stone, the learned Judge said, the amount which should be deducted was $31.50, and that added to the $32.25 made a total of $66.75. The plaintiffs were, therefore, at the time of bringing the action, entitled

to recover $558, the balance upon the contract, less $66.75, that is, $491.25.—Judgment for the plaintiffs for $491.25, with interest from the date of the writ of summons and costs upon the County Court scale, subject to a set-off of the excess of the defendants' Supreme Court costs. The money paid into Court is to be paid out on account of the ultimate balance due to the plaintiffs; if there is any excess, that may be returned to the defendants. A. E. H. Creswicke, K.C., and W. A. J. Bell, K.C., for the plaintiffs. F. W. Grant, for the defendants.