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COURT OF APPEAL.

SEPTEMBER 20TH, 1911.

*ROGERS v. NATIONAL DRUG AND CHEMICAL CO.

Landlord and Tenant—Agreement for Lease—Absence of Seal—Possession—"Option" for Further Term—Assignment by Lessee of Interest under Agreement—Right of Assignee to Renewal of Lease—Equitable Jurisdiction of Court.

Appeal by the plaintiff from the judgment of RIDDELL, J., 23 O.L.R. 234, 2 O.W.N. 763, dismissing the plaintiff's action to recover possession of demised premises, and allowing the defendants' counterclaim for a declaration of the defendants' right to a renewal of a lease.

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

J. Bicknell, K.C., and M. Lockhart Gordon, for the plaintiff.

E. D. Armour, K.C., for the defendants.

The judgment of the Court was delivered by GARROW, J.A.:—

. . . It is not disputed by Mr. Bicknell, counsel for the plaintiff, that in a lease under seal a covenant to renew would have run with the land. His . . . major contention is, that, the present demise not being under seal, the agreement to renew did not run with the land, and hence is not binding upon the lessor's assignee. This view is, however, in my opinion, quite too narrow, in that it takes no account of the equitable rule to which effect has been, properly in my opinion, given by Riddell, J.

A minor contention was, that the option created only a personal obligation; and, therefore, did not affect the land. I am unable to see the force of this contention. It seems to me to be really included in what I have called the major contention.

*To be reported in the Ontario Law Reports.

The plaintiff purchased the demised premises with notice of the agreement, or so-called parol demise, which had been registered; and he, therefore, stands in the shoes of his assignor as to any rights or equities which could have been specifically enforced against the land itself while in the hands of his assignor. . . . The Court would, or at least might, have adjudged specific performance of the agreement, and compelled the granting of a proper lease with a proper covenant of renewal which would have run with the land. And the land in the plaintiff's hands cannot, under these circumstances, and the law, as I understand it, escape from this obligation simply because, when he purchased, the agreement lacked a seal—which, after all, is the whole argument.

The appeal should be dismissed with costs.

SEPTEMBER 20TH, 1911.

*STECHER LITHOGRAPHIC CO. v. ONTARIO SEED CO.

Assignments and Preferences—Chattel Mortgage—Assignment of Book-debts—Money Advanced to Insolvent Company to Pay one Creditor—Preference—Intent to Hinder and Delay—13 Eliz. ch. 5—Assignments and Preferences Act, sec. 2, sub-sec. 1.

Appeal by the defendant Adam Uffelman from the order of a Divisional Court, 22 O.L.R. 577, 2 O.W.N. 503, varying the judgment of TEETZEL, J.

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

Sir George C. Gibbons, K.C., and H. J. Sims, for the appellant.

M. A. Secord, K.C., for the plaintiffs.

The judgment of the Court was delivered by MEREDITH, J.A.: —No reasonable fault can be found with the findings of the trial Judge, upon the evidence adduced by the parties at the trial before him. The effect of such findings is, as I understand them, that the transaction in question was really that of Jacob Uffel-

*To be reported in the Ontario Law Reports.

man, though the mortgage was taken in the name of the defendant, his brother, Adam Uffelman; and that the purpose of the transaction, and the effect of the mortgage, was to delay all other creditors of the company and to give to Jacob Uffelman, who was a creditor of the company, an unjust preference over all other its creditors. The findings are not inconsistent; the scheme was intended to stave off all other creditors in the hope that the company might recover itself, but, if not, that the defendant would have his preferential security; and, therefore, was, in my opinion, a transaction in violation of both the Statute of Elizabeth and the provincial enactment against unjust preferences.

The only substantial question in the case, as it seems to me, is as to character and extent of the relief which should be given to the plaintiffs. When the mortgage was given, Jacob Uffelman was a guarantor of the Merchants Bank of Canada, who were creditors of the company, and who had security to a certain extent for their claims against the company, to the benefit of which Jacob Uffelman, as such surety, was entitled; by the transaction in question the claims of the bank were all paid off, and so Jacob Uffelman was released from his liability as surety. In these, and the other, circumstances of the case, the plaintiffs are entitled to have the transaction in question wholly set aside; but, in my opinion, it does not follow from that that Jacob Uffelman is also to lose the rights which he had against the company at the time of the carrying into effect of the impeached transaction. Why should he? What right have the plaintiffs at common law, under the Statute of Elizabeth, or under the provincial enactment, beyond the removal of the fraudulent security out of their way? The only penalty which the Courts can impose is that provided for in the Statute of Elizabeth; and that is not sought in this action. The parties should, in my opinion, be put in the same position as if the impeached transaction had never taken place; and that, as I understand him, was the position finally taken by Mr. Secord, in his argument of this appeal.

I may add that the fact of the giving of value for an impeached security, whilst entitled to great weight on the question of fact whether the intention was to defeat, delay, or hinder creditors, cannot, under the provincial enactment, save the transaction, if in truth made with such intention.

I would allow the appeal to the extent of restoring the judgment directed to be entered at the trial, and would dismiss it in other respects: the defendant should have the general costs

of the appeal, but should pay the costs of that branch of it upon which he has failed, if there be any separable from the general costs.

SEPTEMBER 20TH, 1911.

McPHERSON v. TEMISKAMING LUMBER CO.

Timber—Crown Timber Act, R.S.O. 1897 *ch.* 32—*License to Cut —Judgment against Licensee—Execution—Assignment of Timber License to Bank—Injunction—Notice—Seizure of Cut Timber—Bank Act, secs.* 80, 84—*Validity of Assignment—Lien—Transfer of License to Purchasers—Interpleader.*

Appeal by the defendants and cross-appeal by the plaintiffs from the judgment of TEETZEL, J., 2 O.W.N. 553.

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

G. H. Kilmer, K.C., for the defendants.

W. Laidlaw, K.C., for the plaintiffs.

GARROW, J.A.—The plaintiffs were execution creditors of A. McGuire & Co., Annie McGuire, and Andrew Devine, which, in the case of the plaintiff Booth, also included Cornelius McGuire, under which the Sheriff of Nipissing seized certain sawlogs alleged to be the property of the execution debtors, or of some of them. An interpleader issue was directed, the logs having been claimed by the defendants the Temiskaming Lumber Company Limited, and was determined by Teetzel, J., in favour of the defendants as to all the executions, except that of the plaintiff McPherson of the 30th November, 1909, as to which the learned trial Judge found in favour of the plaintiff McPherson.

The defendants now appeal, and the plaintiffs cross-appeal.

The facts are fully stated by Teetzel, J., in his judgment, and need not be here repeated at any length.

It is, I think, obvious that his judgment in the plaintiff's favour mainly rests upon the effect which he gave to the interim injunction. But for that I infer that his finding would have been otherwise. It is not necessary to pronounce an opinion

upon the question whether the injunction should in the first instance have been granted. That question is really not before us, except perhaps incidentallly. Nor need we consider the liability, if any, of the officers of the defendant company for contempt in aiding the defendants in the original action in committing a breach of the injunction. The sole question here is one of title. And I am, with deference, quite unable to see how that question is affected by the circumstance of the existence of an injunction. An injunction acts only in personam: see Attorney-General v. Birmingham, etc., Drainage Board, 17 Ch. D. 685, at p, 692. At the utmost, notice of the injunction might be equivalent to notice of the execution, which may indeed have been Mr. Justice Teetzel's real meaning when he speaks of notice of the injunction, for he follows up the reference to notice of the injunction with a remark as to it being also notice of the execution. What then is the legal effect, if it be assumed that the defendants had, when they acquired the timber limits from McGuire & Co., as they undoubtedly did, notice of the plaintiffs' executions? Simply none, in my opinion, for the reason that the interest of a licensee under the Crown in a timber limit is not subject to seizure or sale under execution: see Canadian Pacific R.W. Co. v. Rat Portage Lumber Co., 10 O.L.R. 273. Section 9 of the Execution Act, to which reference is made in the judgment, can have no application where the goods in question are not exigible under the execution. And, if the debtors' interest is to be regarded as an interest in land, the same result would follow.

Then it is suggested, but not I think distinctly proved, that the purchase by the defendants was made in fraud of creditors of McGuire & Co.; but there can be no fraud upon creditors in dealing with property which, under the law, the creditors cannot reach. The purchase seems to have been a real transaction, in which the property passed, and was intended to pass, and was made for a valuable consideration, which, upon the evidence, was paid. Under these circumstances, I am quite unable to see any evidence of fraud, although, if the property had been exigible, the purchaser would, no doubt, have taken subject to the incumbrances by way of execution of which he had notice.

For these reasons, I would allow the appeal and dismiss the cross-appeal, both with costs.

MEREDITH, J.A.:—I am still unfortunate enough to be unable to understand why the interest in land of a licensee under a Crown lands timber license is not an interest in land liable to

seizure and sale under a writ of execution, as well as liable to assessment for the purposes of taxation: but this Court has decided otherwise; see Canadian Pacific R.W. Co. v. Rat Portage Lumber Co., 10 O.L.R. 273, and Re J. D. Shier Lumber Co. and Township of Lawrence, 14 O.L.R. 210; and this case must be ruled by such decisions, decisions which conclude this case against the respondents.

The rights under the timber license not being exigible, the enactments against fraudulent conveyances are not applicable to them; no transfer of such rights could be fraudulent and void as against creditors: the transfer of the license in question was, therefore, as against creditors, a valid one; they had no legal right or power to intervene between transferor and transferee.

The transfer was a real one; the transferees cut the timber, and were, when it was cut, alone entitled to all the beneficial interest in it.

The mere fact that they knew that an injunction, in an action to which they were in no way parties, had gone against the transfer of the license, could not prevent a legal transfer of it. According to the decisions I have referred to, the injunction was wrongly granted. It would be a strange thing if by such a method a lawful right to transfer properly could be frustrated by one having no manner of legal right to it; there are sufficient means of enforcing obedience to, and of punishing disobedience of, the injunctions of the Courts, without giving them the effect of a clog upon titles of the character imposed in the judgment in appeal.

The result, as it seems to me, is, therefore, that, as, under the cases binding upon this Court in this case, execution creditors had no rights of any kind in regard to the timber license, and as the timber was cut by the transferees in their own right and for their own benefit under a sufficient transfer to them, the judgment in appeal was wrong and should be reversed as to McPherson's first execution; and was right, in the result, and should be affirmed as to the other executions.

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

SEPTEMBER 20TH, 1911.

D'EYE v. TORONTO R.W. CO.

Street Railways—Injury to Person Attempting to Get on Car—Findings of Jury—Negligence—Evidence.

An appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., upon the findings of a jury, in favour of the

plaintiff, for the recovery of $2,500 damages for personal injury sustained by the plaintiff by reason of the negligence of the defendants, as she alleged, in starting a car while she was in the act of getting into it.

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

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

B. H. Ardagh, for the plaintiff.

The judgment of the Court was delivered by MEREDITH, J.A.:—There was evidence upon which reasonable men could have found for the plaintiff in this action.

According to the plaintiff's testimony, the car was not moving when she attempted to board it; a signal was given, and the car put in motion, when she had her hand on the handrail and one foot on the step, in a position of evident danger if the car were then put in motion: her evidence fails to bring home to any one, having any control of the car, knowledge of her predicament; but that want of evidence is supplied by the conductor, who admits having seen her, though he exculpates himself in a clear manner so that the defendants must have failed if the jury believed that part of his testimony; but they did not. Coupling part of the plaintiff's testimony with part of the conductor's, a case is made out; for, though the plaintiff may have had no right to attempt to board the car where she did, yet, having done so and being in a dangerous position, it was an act of actionable negligence on the conductor's part to put the car in motion while, to his knowledge, the woman was in a position, safe while the car was not moving, obviously very dangerous if the car were then put in motion.

The jury might, as no doubt they did, have given credit in part only to the evidence of the conductor, and add that to so much of the plaintiff's testimony as made out a case against the defendants.

The appeal should be dismissed.

SEPTEMBER 20TH, 1911.

WILLIAMS v. TORONTO R.W. CO.

Street—Collision of Car with Cart—Negligence—Findings of Jury—Evidence.

Appeal by the defendants from the judgment of LATCHFORD, J., in favour of the plaintiff, upon the findings of a jury, for the recovery of $1,500 damages.

The plaintiff's cart came in contact with a car of the defendants upon College street, in the city of Toronto, and he alleged negligence of the defendants, and claimed damages for injury to himself and property.

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

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

John MacGregor, for the plaintiff.

The judgment of the Court was delivered by MEREDITH, J.A.: —The learned trial Judge seems to have intimated to the jury that, if the collision was caused by the plaintiff turning his horse towards the kerb so that the wheel, and not the hub of the wheel, was struck, the defendants would not be liable—an intimation which appears to me to have been quite too strong in the defendants' favour. I would rather have thought it an act of caution which 99 out of 100 ordinary persons would have taken. Why not? The waggon in his way caused him to turn towards the railway track in passing; when he had paused, why should he not turn out of a place of danger and attempt to reach a place of complete safety? It is said that he ought to have known that there was room enough for the car to pass without striking his cart if he kept straight on, and that, if he turned, the nearer wheel of his cart would be brought within striking distance, if the car happened, at the very moment, to be alongside the cart; but surely that is an unreasonable contention. The man was leading his horse, and endeavouring to reach a place of safety; how was it likely, or indeed possible, that he could know that, at any time, there was room for the car to pass, and that it would come so near to him that the turning of the wheel would throw the fellow of the wheel within striking distance? A state of facts which, having regard to the charge, the jury seem to have negatived.

But, as I have intimated, the jury seem to have reached the conclusion that the accident was not caused in that way; that, in fact, the hub of the wheel was first struck, as one of the witnesses testified. It is said that that cannot be, because a mark of the contact was found upon the step—the running board of an open car—which was quite too low down to strike the hub; but this is again a very lame contention, because, among other things, another part of the car may have first struck the hub—as one of the witnesses testified it did—and the impact have thrown the cart around so that the fellow struck the step.

Whatever may have been the real conclusion of the jury, there is no manner of doubt in my mind that there was abundant evidence upon which a reasonable jury might find for the plaintiff.

According to the motorman's evidence, he had only about three inches to go upon—there was only that space between the cart and the car; why should he assume that that state of affairs would continue until his car had passed; that the plaintiff, after passing the waggon, would not turn away from the tracks so as to be quite out of danger? It meant only a few moments' time to enable the man, horse, and cart to reach a place of safety, evident to every one.

The appeal seems to me to be a hopeless one; not only was there reasonable evidence to go to the jury, but the jury reached a right conclusion on the question of liability.

I would dismiss the appeal.

SEPTEMBER 20TH, 1911.

*ADAMS v. CRAIG AND ONTARIO BANK.

Banks and Banking—Cheque Drawn by Customer—Promise of Bank Manager to Pay—Consideration for—Acceptance by Drawee—Statute of Frauds—Exception as to "Property Cases."

Appeal by the defendants the Ontario Bank from the order of TEETZEL, J., 2 O.W.N. 857, dismissing an appeal from the report of George Kappele, an Official Referee, and directing judgment to be entered for the plaintiff, pursuant to the report, for $2,223.43, the amount of a cheque drawn by the defendant Craig upon the Ontario Bank to the plaintiff's order, upon an alleged promise by the bank to pay the amount of the cheque.

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

J. Bicknell, K.C., and F. R. MacKelcan, for the appellants.

I. F. Hellmuth, K.C., and H. S. White, for the plaintiff.

MOSS, C.J.O.:—The question upon this appeal is as to the liability of the defendants upon a promise made on their behalf

*To be reported in the Ontario Law Reports.

to the plaintiff to pay a sum of money representing the value of certain goods purchased from him by the defendant Craig, amounting to $2,223.45.

It is not disputed that the promise was made, but the main contention of the defendants the bank is, that, in essence and effect, it was a promise to answer for the debt or default of the defendant Craig, and came therefore within the provisions of the 4th section of the Statute of Frauds, and, not being in writing, was not enforceable.

The plaintiff had received from the defendant Craig a cheque upon the defendants the bank, of which the latter was a customer, for the sum of $2,223.45, representing the value as settled between them of certain hides, furs, and skins which had been forwarded by the plaintiff to the defendant Craig. And, if the facts proved justified the conclusion that the promise made by the manager of the defendants the bank was no more than an agreement that, if the defendant Craig failed to pay the plaintiff the amount represented by the cheque, the defendants the bank would make it good, the defendants the bank would be entitled to judgment. But that is not the true conclusion from the evidence and findings of the learned Referee. . . .

On the 10th September, 1906, when the manager of the bank gave the assurance referred to, to the plaintiff, the defendant Craig owed the bank by way of overdraft $34,009.71. The sale that was then pending, and which contained a large portion of the plaintiff's goods, was completed on the 5th October, 1906, and on that date the account of the defendant Craig was credited with $10,448.08, the proceeds of the draft resulting from the completion of this sale. This reduced the defendant Craig's liability to the bank to $24,484.16. . . .

The defendants the bank were fully aware that included in the goods of which a sale had been arranged by the defendant Craig, and the proceeds of which were to be placed to his credit in the bank, were the whole or the greater part of the hides, furs, and skins belonging to the plaintiff, and that, without the plaintiff's agreement to and acquiescence in such disposition of them, the sale as made could not be carried through.

In consequence, and in order to induce the plaintiff to forbear action which would prevent the consummation of the sale, the promise was given that upon the sale being completed and the purchase-money placed to the credit of the defendant Craig, the bank would pay the amount of the cheque.

The case, therefore, falls within that class of exceptions to the statute which is designated by the learned Judges of the Court

of Appeal in Harburg India Rubber Comb Co. v. Martin, [1902] 1 K.B. 778, as "the property cases." These are shortly defined by Vaughan Williams, L.J. (p. 784), as cases in which either the person who made the promise had property which he wished to relieve from liability, or there was property which he wished to acquire. But reference to other portions of his judgment and of that of the other Lords Justices shews that they understood the rule to extend to cases in which the person making the promise had an interest merely, as well as to cases in which he had an absolute property in goods of which the release was sought. This is shewn by the passage following that to which reference has been made, in which the learned Lord Justice says: "The defendant's promise was not, as it seems to me, . . . a new contract for the release of any property which either was his or in which he had an interest." Later on (p. 788) he quotes the following from the judgment of Cockburn, C.J., in Fitzgerald v. Dressler, 7 C.B.N.S. 374: "I quite concur in that view of the doctrine, provided the proposition is considered as embracing the qualification at the conclusion of the passage; for, though I agree that the consideration alone is not the test, but that the party taking upon himself the obligation upon which the action is brought, makes himself responsible for the debt or default of another, still it must be taken with the qualification stated in the note above cited, viz., an absence of prior liability on the part of the defendant or his property, it being, as I think, truly stated there, as the result of the authorities, that, if there be something more than a mere undertaking to pay the debt of another, as where the property in consideration of the giving of which the party enters into the undertaking is in point of fact his own or is property in which he has some interest, the case is not within the provision of the statute which was intended to apply to a case of an undertaking to answer for the debt, default, or miscarriage of another, where the person making the promise has himself no interest in the property which is the subject of the undertaking."

In the present case there exists that "something more" of which Cockburn, C.J., speaks, viz., the interest of the defendants the bank in the goods and the desire to procure their freedom from any restriction placed by the plaintiff upon the carrying out of the sale from which the defendants the bank expected to receive and in the end did receive the purchase-price.

In that view the learned Referee correctly found and determined, as he stated in his written opinion, that, "within the meaning of the cases, there was a new and distinct consideration

(namely, the forbearance to exercise legal rights on the part of the plaintiff and the direct interest of and benefit to the bank in the property passing to their customer), as the foundation of the promise made by the bank's manager."

The promise was not the personal or individual promise of Denny, the manager, made on his own account. If that were so, the action should have been against him. But the promise was made on behalf and for the benefit of the defendants the bank, and the benefit that was derived from the transaction, which was carried out on the faith of the promise, accrued to the defendants the bank. The avails of the sale were received and dealt with by them, and they cannot seriously allege that it was not their transaction.

The appeal should be dismissed with costs.

GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., concurred.

MEREDITH, J.A., to give reasons later.

HIGH COURT OF JUSTICE.

MIDDLETON, J., IN CHAMBERS. SEPTEMBER 15TH, 1911.

YONHOCUS v. CANADA FOUNDRY CO.

Discovery — Examination of Officer of Company-defendant —Production of Report of Accident—Privilege—Examination before Order for Production.

Appeal by the plaintiff from an order of the Senior Registrar of the High Court, sitting as Master in Chambers, dismissing an application by the plaintiff to compel production by the defendants upon the examination of one Ashworth, an officer of the defendants (an incorporated company), of a report of an accident, made immediately after its occurrence.

J. F. Boland, for the plaintiff.
R. J. McGowan, for the defendants.

MIDDLETON, J.:—Privilege is sufficiently claimed upon the examination; and there is nothing in the cross-examination of

Mr. Ashworth to lead me to discredit his statement that the report was with the view of having an accurate contemporaneous report in the event of the accident giving rise to litigation. Betts v. Grand Trunk R.W. Co., 12 P.R. 86 and 634, where the report was held not to be privileged, well illustrates the distinction.

In this case the examination was had before production. I do not think that the question as to the right of the plaintiff to inspection of this document should be raised in this way. Upon an order to produce being served, the defendants would, no doubt, claim privilege by their affidavit, and this affidavit would be conclusive, and there is no right to cross-examine upon it. The plaintiff cannot in this way do indirectly what he is not permitted to do directly.

So in both aspects the appeal fails and must be dismissed with costs to the defendants in any event.

BOYD, C. SEPTEMBER 19TH, 1911.

*PATTISON v. CANADIAN PACIFIC R.W. CO.

Railway—Crossing of one Railway by another—Interlocking Plant—Signal-man—Negligence—Injury to and Death of Servant of one Railway Company—Joint Servant—Liability for Injury.

Action by Margaret Pattison, widow of Samuel Pattison, a locomotive fireman employed by the defendants the Canadian Pacific Railway Company, to recover damages for his death, alleged to have been caused by negligence of a servant of those defendants or of the defendants the Canadian Northern Railway Company, at a place where the two railways crossed, in failing to give the proper signal.

F. H. Keefer, K.C., for the plaintiff.

W. H. Curle, for the defendants the Canadian Pacific Railway Company.

O. H. Clark, K.C., for the defendants the Canadian Northern Railway Company.

BOYD, C.:—There is no dispute about the facts. The acci-

*To be reported in the Ontario Law Reports.

dent happened in September, 1910, where the track of the Canadian Northern Railway was crossed by the track of the Canadian Pacific Railway at a place known as Wood Crossing; the signal-man in charge was guilty of gross negligence—blundered in his signals so that the train of the Canadian Pacific Railway was derailed and its fireman killed. It is not disputed that the widow should recover as damages $4,250 if either defendant is liable: the dispute is as to such liability inter sec.

The Canadian Northern was the senior road in possession of the track, and the Canadian Pacific Railway Company made application to the Railway Board for leave to cross that track, which was granted in April, 1908, by order of the Board, upon the usual terms, that the applicant should insert a diamond in the track, with interlocking plant, at its own expense; that the Canadian Northern Railway Company should appoint a competent man to be in charge of the crossing; and that the applicant should bear and pay the whole cost of providing, maintaining, and operating the said interlocking plant, including the cost of keeping a man in charge of the crossing. A competent man was appointed, to the satisfaction of both defendants; and no complaint arose till the night in question, when the man in charge became intoxicated, and so occasioned the disaster. The service at the place and time in question was being performed solely for the benefit of the Canadian Pacific Railway Company. . . .

The question of liability, in these circumstances, was brought before the Railway Board . . . irrespective of the accident, and a ruling was given by the Chief Commissioner which is pertinent to the present litigation. . . .

[Quotation from the 4th report of the Board of Railway Commissioners for Canada for the year ending the 21st March, 1909, p. 305, part of which is: "I think . . . this signal-man should be regarded as a joint employee of each . . . and that each company shall be liable for all the loss or damage suffered or sustained on its own lines by its patrons or employees or to its property caused by the negligence of the joint signal-man; and, in no event, shall the companies, as between themselves, be liable for any loss or damage . . . happening upon the line or lines of the other and caused by or arising from the negligence of such signal-man."]

This ruling was in March, 1909, and does not authoritatively control the relative liability of these defendants for what oc-

curred in September, 1910, under the permission to cross granted in April, 1908; but it is a valuable expression of the mind of the Railway Board as to the existing legal liability. . . .

This man, appointed by the one company and paid by the other, would be a person in charge of the signals at the crossing and interlocking switches, within the meaning of the Workmen's Compensation for Injuries Act, sec. 3, sub-sec. 5: Gibbs v. Great Western R.W. Co., 12 Q.B.D. 208. . . .

In the evolution of the law, the old test, as to who hired and paid, is being modified, if not superseded, by the more modern method indicated in the judgment of Garrow, J.A., in Hansford v. Grand Trunk R.W. Co., 13 O.W.R. 1184, at p. 1187: i.e., the whole circumstances of the employment must be looked at; and the real effect of the actual relation existing must not be lost sight of in deference to a formula about hiring or paying. . . .

The common signal-man is to be regarded as the person employed by the company for which he is adjusting the points and giving the signals.

If the order of the Board . . . be regarded as a quasi-contract or in the nature of a contract between the companies, the rules of common law would place liability on the company which was making use, on its own line, of the common servant for the sole prosecution of its own work at the crossing of the other road. . . . Hall v. Lees, [1909] 2 K.B. 602.

Or, if the theory of joint service be rejected, and the signal-man, so appointed and so paid, be regarded as a servant or agent sui generis of both companies, then fairness and good sense would support the proposition that the company for which the signal-man was alone acting on the particular occasion, was the principal against which relief should be sought, if the then agent of that road was guilty of misconduct by which an employee of the road was injured.

The proper conclusion in this case is, that the damages agreed upon be paid by the defendant the Canadian Pacific Railway Company, with costs of action. As to the other defendant, the action is dismissed, without costs, as the precise question involved now arises for the first time in the Courts.

PARSONS v. CITY OF LONDON—MASTER IN CHAMBERS—SEPT. 18.

Parties—Attorney-General—Addition of as Plaintiff—Con. Rule 185—*Delay of Trial—Injunction—Cause of Action—Sale of Municipal Property—Right of Way.*]—Motion by the plaintiff for an order adding the Attorney-General for Ontario as a co-plaintiff, in consequence of the question raised in the judgment of TEETZEL, J., 2 O.W.N. 1483, as to the right of the plaintiff to maintain the action, except so far as he sought to restrain the defendants the Corporation of the City of London from selling municipal property to the defendants the Royal Bank of Canada. The Attorney-General was willing to be added if, in the opinion of the Court, it was desirable in the interests of justice. Counsel for the defendants raised three objections to the motion. The first was on the ground of delay. As to this, the Master said that the action could be tried at the London sittings beginning on the 2nd October next, if expedition were used. The second objection was, that the plaintiff, so far as he sought to restrain a sale of the whole block, 110 feet square, and to sell the land in any case free from the right of the public to a passage-way over it from Richmond street to the market, set up a distinct cause of action from that on which the injunction had been granted. It was said in reply that Con. Rule 185 is sufficiently wide in its present form to allow this to be done. It was argued that Ellis v. Duke of Bedford, [1899] 1 Ch. 494, in appeal, [1901] A.C. 1, shewed that this was permissible. The Master said that the doubt expressed in that case as to the necessity for joining the Attorney-General would not seem to apply in the facts of the present case. To this second objection, therefore, he did not give effect, in view of the above case. The third objection was, that the action was premature, as no interference had as yet taken place with the alleged right of way—or was even threatened or intended, so far as was shewn. The Master said that the claim was to have a binding decision on the important questions raised by the plaintiff. These, in his view, should be decided now, in the interests of all parties, so that the city corporation might know exactly what they were able to convey, and the present or any future purchaser might know what he was getting. If there was no intention of interfering with the passage-way, now or at any future time, this could be so stated in the pleadings, and a judgment given to that effect. These serious questions having been brought before the Court, in an action in which all necessary persons were parties (or would be if the present motion were

granted), it would be contrary to the spirit of the Judicature Act and its present administration to put the matter off and wait to see what might be done at a later stage, when this or some other sale was carried out, pursuant to the leave given by the statute 1 Geo. V. ch. 95, sec. 10. The motion was, therefore, granted, with costs to the defendants in any event. Casey Wood, for the plaintiff. E. Bayly, K.C., for the Attorney-General. C. A. Moss, for the defendants the Royal Bank of Canada. E. C. Cattanach, for the defendants the Corporation of the City of London.

TOWN OF STURGEON FALLS v. IMPERIAL LAND CO.—MASTER IN CHAMBERS—SEPT. 20.

Particulars—Statement of Claim—Lien for Taxes—Sale of Lands — Description.]—After the judgment in this case, 2 O.W.N. 1433, further particulars were delivered on the 15th August. With these the defendants were not satisfied, and moved for further particulars. The plaintiffs by the statement of claim asked: (1) a declaration that taxes due on the lands of the defendant land company, as set out therein, were a special lien thereon in priority to the claims of the defendants the Trusts and Guarantee Company, who were mortgagees of the lands to secure bonds issued by the land company; (2) for payment and other necessary consequential relief. These taxes were for the years 1906 and four following, and, as claimed, amounted to nearly $10,000, charged on nearly 200 different parcels. It was contended by counsel for the defendants that they were entitled to have as clear and precise a description of each parcel as would be necessary to insert in a deed. On the other side, it was pointed out that this motion was made before delivery of statement of defence, and that it was quite clear that the first question and the only one that would be decided at the trial was, whether the plaintiffs were entitled to the priority they claimed, or whether it had been in any way lost or taken away, as, e.g., by the fact that the land company were now in liquidation. It was conceded that, if the plaintiffs succeeded at the trial or at the final stage in establishing their right to priority, the matter would be referred to ascertain what was due on each separate parcel, and that then the exact parcels must be accurately defined. The Master said that, as the case now stood, the defendants could safely plead, and should do so in ten days. They

needed only to set out the ground on which they claimed priority over the plaintiffs. Motion dismisssed; costs in the cause. H. W. Mickle, for the defendants the Trusts and Guarantee Company. S. H. Bradford, K.C., for the defendants the Imperial Land Company. G. H. Kilmer, K.C., for the plaintiffs.