THE

ONTARIO WEEKLY REPORTER

(TO AND INCLUDING APRIL 15TH, 1905.)

VOL. V. TORONTO, APRIL 20, 1905. NO. 15

APRIL 5TH, 1905.

DIVISIONAL COURT.

HENDERSON v. STATE LIFE INS. CO. OF INDIANAPOLIS.

Life Insurance — Withdrawal of Application before Acceptance—Return of Premium—Contract—Interim Receipt.

Appeal by defendants from judgment of County Court of Wentworth in favour of plaintiff in an action for the return of a life insurance premium paid by plaintiff to defendants.

W. H. Hunter, for defendants.

G. H. Levy, Hamilton, for plaintiff.

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

MEREDITH, C.J.:—On 19th May, 1904, plaintiff signed a written application to defendants for an insurance on his life of $10,000, and on the same day paid to the local agent of defendants $51.90 and gave him his (plaintiff's) promissory note for $300, the two sums making up the amount of the first annual premium, for which he received the company's receipt in full, stating: " . . . The insurance will be in force from the date of approval of the application by the medical director. In case the policy should not be issued, the money paid will be refunded: provided, a completed application for such insurance is made and submitted to the com-

pany, at its home office, and that the applicant, if he shall not receive his policy within 30 days from date hereof, shall notify the company. . . ."

The promissory note was discounted . . . by the agent, and was paid at maturity by plaintiff.

On 1st June, 1904, and before any acceptance by defendants of the offer of plaintiff which was contained in the application, plaintiff gave notice to defendants of the withdrawal of his application, and requested the return of the money he had paid and the promissory note he had given. . . .

The written application is in form 1, for a policy of $10,000 insurance on the life of plaintiff upon the 20 payment plan, and, among others, the following statements are contained in it:

"I have paid $351.90 to the subscribing soliciting agent, and have been furnished with his receipt for the same to make the insurance herein applied for binding from the date of approval by the company's medical director. . . . It is hereby agreed that all the foregoing statements and answers, and also those I make to the company's medical examiner, which are hereby made a part of this application, are warranted to be full, complete, and true, and are offered to the company as a consideration for the contract, which shall not take effect until this application, which I agree to complete by submitting to a medical examination, has been accepted by the company at the home office in Indianapolis, Indiana, and the first premium shall have been paid and accepted by the company or an authorized agent during the life and good health of the person herein proposed for insurance."

The written application and the medical examiner's report were transmitted by the local agent to the head office of the company, and reached that office on 31st May, 1904; the acceptance of the application by the medical director took place on 6th June, 1904; and the acceptance of the risk by the head office of the company on the next day, when, according to the memorandum stamped on the application, the policy was sent out. . . .

I am unable to see anything in the facts and circumstances of the case that precluded plaintiff, at any time before the acceptance by defendants of the risk which he had offered

them, from withdrawing his application, and thereupon being entitled to be repaid what he had paid in money, and to have the promissory note which he had given returned to him.

It was contended by Mr. Hunter that a contract, not, as he admitted, a contract to insure, had been come to as the result of the application by plaintiff, the payment of the $351.90, and the receipt which was given, which prevented the application from being treated as a mere offer which might at any time before acceptance be withdrawn by the person making it. . . . He put it that the company had agreed, in consideration of the payment made, that, if the medical director should approve of the application, and it should be accepted by the company at the home office in Indianapolis, Indiana, the company would insure plaintiff and issue to him their policy in the terms of the application.

I am unable to agree with this contention. I see nothing in the receipt which binds defendants to do anything; it is simply an acknowledgment of the payment of the money and a statement that the insurance will be in force from the date of the approval of the application by the medical director, which I take to mean, that, if the application is accepted by the company at the home office, the policy will conform to the application by making the insurance binding from the date of approval by the company's medical director.

It is also to be observed that it is expressly stated in the printed part of the application that the contract shall not take effect until the application has been accepted by the company at the home office in Indianapolis, Indiana.

It appears to me, therefore, that what took place between the parties amounted merely to an offer by plaintiff to defendants of the risk on his life, on the terms mentioned in the application, and the payment by plaintiff of the sum required to pay the first premium to be applied for that purpose if and when the offer of plaintiff should be accepted, and that defendants before the application was withdrawn had neither accepted the risk nor bound themselves to do anything in consideration of what plaintiff had done; and in this view of the case it is clear that the judgment of the Court below is right. . . .

[Reference to Johnson v. Flewelling Manufacturing Co., 36 New Brunswick 397.]

Appeal dismissed with costs.

MEREDITH, J. APRIL 3RD, 1905.

TRIAL.

FLEMING v. CANADIAN PACIFIC R. W. CO.

Trial—Jury—Failure to Set down in Time—Power to Give Leave to Set down—Jurors Act, sec. 97—Amending Act, 2 Edw. VII. ch. 14, sec. 3.

By 2 Edw. VII. ch. 14, sec. 3 (O.), sec. 97 of the Jurors Act, R. S. O. 1897 ch. 61, is amended by adding thereto certain sub-sections:—"(2) In case it appears that there is no business requiring the attendance of a jury at any sittings of the High Court, or of any County Court, for the trial of actions with a jury, the . . . clerk . . . at least 5 clear days before the day appointed for the sitting shall give notice in writing . . . to the sheriff that there is no such business. . . . (3) Notwithstanding anything contained in any statute or rule of Court, actions to be tried by a jury, whether in the High Court or County Court, shall be entered for trial not later than 6 clear days before the first day of the sittings."

By sec. 4, the amending Act is not to apply to any county in which is situate a city. But by sec. 19 of 4 Edw. VII. ch. 10 (O.), the words "having a population of 20,000 or over" were added to the above sec. 4, thus making the statute of 2 Edw. VII. applicable to a county containing a city the population of which is less than 20,000, such as Wellington and Guelph.

In this case notice of trial was given by plaintiff for the Wellington jury sittings of the High Court at Guelph beginning 3rd April, 1905, but the case was not set down, owing to the illness of plaintiff and some negotiations between the solicitors for an adjournment.

At the opening of the sittings, J. E. Day, for plaintiff, moved for leave to set the case down, it not being the only jury case, and jurors being in attendance.

Angus MacMurchy, for defendants, supported the motion.

MEREDITH, J., held that, notwithstanding the language of sub-sec. (3) added by the amendment, he had power to grant the application on consent, and perhaps even without consent in a proper case. The object of the Act was to save the expense of summoning a jury where no cases are set down for trial by jury.

MEREDITH, J. APRIL 5TH, 1905.

TRIAL.

FLEMING v. CANADIAN PACIFIC R. W. CO.

Evidence—Action under Fatal Injuries Act—Depositions of Witness before Coroner's Inquest—Admissibility—Absence of Witness—Diligent Inquiry.

Action under the Fatal Injuries Act brought by the widow and administratrix of the estate of a man who was killed upon defendants' railway, to recover damages for his death.

Plaintiff tendered in evidence the depositions of one Burns taken at the coroner's inquest, at which the railway company and the family of deceased were represented by counsel, who examined or cross-examined the witnesses.

J. E. Day, for plaintiff.

Angus MacMurchy, for defendants.

MEREDITH, J., on the authority of Sills v. Brown, 9 C. & P. 601, held the depositions admissible, provided satisfactory proof were given of the absence of witness from the country, or the impossibility of finding him after due inquiry.

Plaintiff being nonsuited on other grounds, the question whether a sufficient case of diligent inquiry had been made was not decided; the Judge inclining to the opinion that a case was not made out.

CARTWRIGHT, MASTER. APRIL 10TH, 1905.

CHAMBERS.

FULMER v. CITY OF WINDSOR.

BANGHAM v. CITY OF WINDSOR.

Consolidation of Actions—Different Plaintiffs—Same Defendant—Common Subject—Inconsistent Claims—Stay of Action—Setting down for Trial.

Motion by defendants to consolidate these actions or stay one of them.

J. P. Mabee, K.C., for defendants.

W. M. Douglas, K.C., for plaintiff Fulmer.

A. R. Clute, for plaintiff Bangham.

THE MASTER:—By 63 Vict. ch. 108 (O.) a by-law of defendants providing for the permanent improvement of the principal streets in Windsor, according to a scheme set out in schedule A. to the Act . . . was validated. The general scheme was to use macadam, and the whole plan proceeds on that basis. But by sec. ix. it was provided that if the majority of the owners on any street desired asphalt or brick or other durable material rather than macadam, and signed and presented a petition to that effect 6 months before the date when, according to schedule B., such street was to be paved, and gave certain security for the difference in cost, then it should be the duty of the council to comply with such prayer.

Pursuant to clause ix., on 15th August, 1904, a petition was presented to the city council by certain persons, asserting themselves to be the majority in number and value of the owners on Pitt street, requiring asphalt instead of macadam. This petition was referred by the city to their assessor and solicitors, who reported that the same was sufficiently signed and in proper form. . . . On 27th February, 1905, the council passed a resolution to purchase from the Ontario Asphalt Block Co. the necessary material. On 11th March plaintiff Fulmer commenced his action to restrain defendants from paving Pitt street with asphalt. And, certain persons who had signed the petition having notified the council that they withdrew their names so far as they were able, the council on 13th March passed a resolution requiring those who were in favour of asphalt "to take action towards that end within 7 days," and determining that otherwise macadam would be laid and not asphalt.

The petitioners took no steps, and on 27th March the council repealed their resolution of 27th February, and passed a resolution declaring their intention to lay macadam pavement upon Pitt street.

On the following day plaintiff Bangham commenced his action to restrain the use of macadam. In order to facilitate this action, defendants appeared on the same day, and statement of claim was served and statement of defence delivered in both actions on 31st March, and on the same day defendants moved in both actions to have them consolidated, or that the action of Bangham be stayed until that of Fulmer is decided, defendants submitting to be bound by such judgment, or that one of the plaintiffs should be made plaintiff and the other a defendant to decide their rights in the above action. . .

A somewhat similar motion was made in Lake Superior Co. v. Hussey, 2 O. W. R. 506. For the reasons given there, I think a similar order (if any) is all that can be made here.

Had the council adhered to their determination to lay Pitt street with asphalt blocks, the present difficulty would not have arisen. They seem to have become alarmed by the commencement of Fulmer's action on 11th March. This led them into the doubtful step of assuming to rescind their resolution of 27th February by the resolution of 27th March. On this being done it is not surprising that the Baugham action was commenced. The council by their resolutions of 13th and 27th March would almost seem to have invited it. . . . When the first action was commenced, making a claim for an injunction to restrain the use of asphalt, the council might well have waited. They could not have been compelled to do anything while that action was pending. The decision there would necessarily have settled the question as to the sufficiency of the petition of 15th August, 1904, and the completion of all necessary formalities so as to make it the duty of the council to use asphalt instead of macadam.

It is their own doing that they now have two actions on hand instead of only one. They cannot ask to have either stayed under the provisions of R. S. O. 1897 ch. 51, sec. 57 (9). No other remedy suggests itself as being possible. The actions should properly be set down together at the June non-jury sitting, if both are then at issue.

At present the motion must be dismissed with costs to plaintiffs in any event.

(This order was reversed by FALCONBRIDGE, C.J., on 14th April, 1905, and an order made adding Bangham as a party defendant in Fulmer's action, and staying Bangham's action. Costs to defendants here and below in any event.)

MACMAHON, J. APRIL 11TH, 1905.

CHAMBERS.

RE BENSON AND IMPERIAL STARCH CO.

Company—Transfer of Shares—Refusal to Register—By-law—Ultra Vires—Ontario Joint Stock Companies Act—Mandamus.

Motion by George F. Benson for a mandamus to compel the Trusts and Guarantee Company, Limited, as transfer

agents and registrars of the Imperial Starch Company, Limited, to rectify the register of the Imperial Starch Company, Limited, and to enter and record the transfer of 2 shares of the preference stock of the Imperial Starch Company, Limited, from William M. Leacy to the applicant.

W. H. Blake, K.C., for applicant.

W. J. Boland, for the companies.

MacMahon, J.:—The Imperial Starch Company on 1st November, 1901, issued to William M. Leacy a certificate for 5 fully paid up shares of the preference stock of that company, of the par value of $100 each, which, as appears by the certificate, "are transferable only on the books of the company by the owner thereof in person or by attorney, on the surrender of this certificate." On the face of the certificate the Trusts and Guarantee Company are named as the transfer agents and registrars of the company.

Leacy, on 16th January, 1905, assigned, by indorsement on the back of the certificate, 2 of the shares to J. F. Junkin, of Toronto, which were transferred to him by the Trusts and Guarantee Company, the transfer agents of the Imperial Starch Company, on the books of that company, on 28th January, 1905. Mr. Junkin then desired to transfer one of the shares to George F. Benson and the other to Mr. Strachan, of Montreal. Upon the manager of the trusts company being informed that Mr. Benson was the managing director of the Edwardsburg Starch Company, Mr. Junkin was told that the trusts company as transfer agents could only transfer stock of the Imperial Starch Company upon the authority of that company being given. Shortly after this, Mr. Hugh Blain, president of the Imperial Starch Company, telephoned the trusts company that the transfers of the shares to Mr. Benson and Mr. Strachan were not to be put through. Mr. Junkin attended again on 24th January, and requested that the transfers be made to Mr. Benson and Mr. Strachan, but the trusts company refused his request.

On 8th or 9th February Mr. Junkin requested the trusts company to have the transfer of the shares to himself cancelled, as he wished to return the certificate to Mr. Leacy, and the cancellation was made on the books of the Imperial Starch Company, and the transfer to Mr. Junkin on the back of the certificate was stamped "cancelled," and the certificate returned by Junkin to Leacy.

Leacy, by indorsement on the share certificate, dated 27th February, assigned 2 of the shares to George F. Benson, and Leacy appointed Mr. W. H. Blake his attorney to transfer the shares on the books of the Imperial Starch Company to Mr. Benson. Mr. Blake was also appointed attorney by Mr. Benson to accept for him the said 2 shares of stock. Mr. Blake, on 2nd March, exhibited the share certificate, the transfer, and the powers of attorney to the manager of the Trusts and Guarantee Company, and applied to have the stock transferred, but the manager refused to make the transfer.

On 26th January, 1905, at a meeting of the directors of the Imperial Starch Company, the following by-law was passed: "Whereas it is desirable and in the best interests of the company that the shares of the company shall be transferable on the books of the company only in such manner and subject to such conditions and restrictions as are hereinafter mentioned: now therefore be it enacted and it is hereby enacted, that no transfer of any stock or shares of the company shall be valid until approved of by the directors and registered on the books of the company. All transfers of stock or shares shall be at the discretion of the directors."

Before this by-law could become effective, it required ratification by the shareholders, and at a meeting of the stockholders held on 7th February, representing 1,700 out of a total of 2,000 shares, the by-law was unanimously ratified.

The Imperial Starch Company were incorporated under the Joint Stock Companies Act, R. S. O. 1897 ch. 191, and by sec. 27 it is provided: "The shares of stock of the company shall be deemed personal estate, and shall be transferable on the books of the company in such manner only, and subject to all such conditions and restrictions, as by this Act, or by the special Act, or by letters patent or by-laws of the company, may be prescribed."

"28. The directors may refuse to allow the entry, in any such book, of any transfer of shares of stock whereof the whole amount has not been paid in."

"30. No share shall be transferable until all previous calls thereon have been fully paid in, or until declared forfeited for non-payment of calls thereon."

And by sec. 47: "The directors may from time to time make by-laws not contrary to law, or to the letters patent of the company, or to this Act, to regulate:

"(a) The allotment of stock; the making of calls thereon; the payment thereof; the issue and registration of certificates of stock; . . . the transfer of stock."

One need not stop to consider such cases as Bradford Building Co. v. Briggs, 12 App. Cas. 29; Bank of Africa v. Salisbury Gold Mining Co., 41 W. R. 47; and In re McKain and Canadian Birkbeck Co., 7 O. L. R. 241, 3 O. W. R. 156, 335, . . .

The point raised here is concluded by the decision in Re Panton and Cramp Steel Co., 4 O. W. R. 109. Mr. Justice Osler in delivering the judgment said: "The transfer being in order and the stock paid in full, the company had no discretion to exercise in the matter, or option but to comply with the demand of the transferee to record the transfer."

The statute gives the company power to pass by-laws "regulating the transfer" of stock, that is, how and in what manner and with what formalities it is to be transferred. But the Imperial Starch Company have passed a by-law virtually empowering the directors to prohibit the transfer of stock; that is, unless the directors approve of the transfer, it cannot be made in the books of the company. This, in effect, would prevent a holder of fully paid shares in the company from selling and realizing on his stock, because no purchaser could be found, if registration as owner could be prevented at the caprice of the directorate.

Under sec. 28 of the Act the directors may refuse to allow the entry to be made of any transfer of shares of stock in any such book, whereof the whole amount has not been paid in, but their power does not extend beyond refusing to transfer stock which has not been fully paid in.

The order must go for the transfer of the 2 shares to the applicant Benson on the books of the Imperial Starch Co. That company must pay the costs of the applicant and of the Trusts and Guarantee Co.

MACMAHON, J. APRIL 11TH, 1905.

WEEKLY COURT.

RE MARSHALL.

Insurance—Life—Benefit Certificate — Apportionment among Children—Will.

Motion by the executor of the will of John A. Marshall, deceased, for an order under Rule 938 determining the persons entitled to a sum of $2,890 paid into Court by the In-

dependent Order of Foresters, being the amount due under a benefit certificate issued by the Order on 5th April, 1892, to John A. Marshall, to whom on the face of the certificate the amount was payable.

By an indorsement on the certificate dated 12th May, 1892, the insured designated his wife, Anna V. Marshall, and his 3 children, Lena, Ella, and Eva, as the beneficiaries, each being entitled to receive $750 of the insurance moneys.

On 30th January, 1899, the wife and 3 daughters signed a document requesting that the beneficiaries be changed from themselves to the executors and administrators of the insured, and the latter made an application to the Order for a change, stating: "I designate as my beneficiaries in the new policy the following, viz., to my executors and administrators for my wife and children in such proportion as set forth in my will."

Section 251 of the laws of the Order provided that on receipt of an application for change of beneficiary, together with the benefit certificate, if approved by the Supreme Chief Ranger or by the executive council, the Supreme Chief Secretary shall incorporate in the benefit certificate the changes desired.

The application and certificate and the fee of 50 cents required for change of policy were received by the local court of the Order of which the insured was a member, for transmission to the Supreme Court at Toronto.

The designation on the back of the original certificate had written across it, apparently by some officer of the local court, "This designation is revoked March 21, 1899." But the direction in the application for change to the new beneficiaries mentioned therein did not appear to have been acted upon by the Supreme Court.

The application for change of beneficiaries was signed by the insured, and the policy was identified by inserting therein its number.

The insured died on 31st May, 1904, leaving a will, which is set out in the judgment of STREET, J., ante 404, upon an application with respect to another insurance upon the life of the same person.

W. S. Morden, Belleville, for executor.

W. B. Northrup, K.C., for widow and three children.

E. D. Armour, K.C., for Herbert E. Marshall.

F. W. Harcourt, for infants.

MACMAHON, J.:—. . . The only distinction between the case decided by my brother Street and this case is, that in the certificate issued by the Ancient Order of United Workmen it was declared, on the face, that John A. Marshall . . . had designated 3 of his children (naming them) as the beneficiaries, and afterwards, in 1899, he revoked this designation by indorsement on the certificate, and directed payment to be made to his executors named in his will and in such shares as set forth in the will; whereas, in the case now being dealt with, the insured in his application for a change of beneficiary revoked the designation indorsed on the certificate and directed payment to be made to his executors and administrators for his wife and children, in such proportions as set forth in his will.

This is a distinction without a difference, and the decision of my brother Street in 5 O. W. R. 404 governs the present application.

The insured has not by his will dealt with the moneys payable under the certificate, and as to them there is an intestacy. The amount of the insurance is for his wife and children in such proportions as set out in his will, and, as he died without fixing the proportions, the fund will be divided among the widow and children in equal shares: R. S. O. 1897 ch. 203, sec. 159 (7).

Costs of all parties out of the fund, the costs of the executor between solicitor and client.

MACMAHON, J. APRIL 11TH, 1905.

TRIAL.

LAZIER v. ARMSTRONG.

Landlord and Tenant—Lease of Shop — Covenants — Insolvency of Tenant—Assignment for Creditors—Election of Assignee to Retain Premises—Rent—Use and Occupation.

Action to recover possession of demised premises and for use and occupation.

E. G. Porter, Belleville, for plaintiffs.

W. S. Morden, Belleville, for defendants.

MACMAHON, J.:—On 29th April, 1902, plaintiffs leased to John C. Woods certain premises . . . to be used as a

store for . . . ten years from 1st June, 1892, at . . . $620 a year, payable monthly.

The lease contained the following covenants: "And the said lessee, his heirs, executors, administrators, and assigns, doth hereby covenant, promise, and agree to and with the said lessors, their executors, administrators, and assigns, that he, the said lessee, his executors, administrators, and assigns, shall and will well and truly pay or cause to be paid to the said lessors, their executors, administrators, or assigns, the said yearly rent hereby reserved, at the times and in the manner hereinbefore appointed for the payment thereof. Provided always, and these presents are upon this express condition, that if the said yearly rent hereby reserved, or any part thereof, shall at any time remain behind or unpaid for the space of 21 days next over or after any of the days on which the same shall become due and payable, or if a breach or default shall be made in any of the covenants hereinafter contained by the said lessee, his executors, administrators, or assigns, then and in every such case it shall be lawful for the said lessors, their executors, administrators, or assigns, into and upon the said premises, or any part thereof in the name of the whole, to re-enter and the same to have again, repossess, and enjoy, as if these presents had never been executed or the said term expired by effluxion of time."

In 1903 an action was brought by plaintiffs against John C. Woods, and the settlement of that litigation is embodied in an agreement under seal dated 21st November, 1903, by which plaintiffs acknowledged receipt of the rent up to 1st January, 1904, and for the remainder of the term—8½ years—the lessors agreed to accept and the lessee agreed to pay $500 a year in monthly instalments. In all other respects the lease was confirmed.

In 1904 John C. Wood made an assignment under R. S. O. 1897 ch. 147, for the general benefit of his creditors, to defendant Armstrong; and on 5th May, 1904, Armstrong gave plaintiffs notice of the assignment, and also . . . . that he elected to retain the premises occupied by the lessee . . . for the unexpired term . . . under sub-sec. 2 of sec. 34 of R. S. O. 1897 ch. 170.

Defendant Armstrong sold the stock belonging to the insolvent estate to defendant H. C. Woods, the insolvent's brother.

The rent was paid up to the 1st June, 1904, after which plaintiffs refused to receive any rent accruing due subsequent to the assignment.

This action was commenced on 10th October, 1904 . . . and on 31st January, 1905, the premises were vacated and the keys tendered to plaintiff S. S. Lazier, who refused to receive them; they were, however, left in his office. . . .

It follows, I think, from the express wording of sub-sec. 2 of sec. 34 of ch. 170, that when the assignee elects to retain the premises, the effect of the section is to prevent a forfeiture, and, as said in Kennedy v. Macdonell, 1 O. L. R. at p. 254, "places the assignee in the same position as respects the lease as the assignor would have been in had the assignment not been made, the landlord being entitled to the full amount of the rent reserved by the lease."

The assignment to defendant Armstrong and his election to retain the premises . . . make him liable on all the covenants in the lease; and, while the statute gives him the right of election . . . it confers no power on him to assign the lease without the consent of the lessors. He may, therefore, be liable to plaintiffs for the rent of the premises for the remainder of the term, unless such consent is obtained.

Armstrong becoming, as it were, statutory assignee of the leased premises for the 8½ years, under the terms of the lease, plaintiffs are entitled to recover the rent only under and by virtue of the covenants in the lease, and the amendments thereto, under the agreement of 21st November, 1902, and they cannot recover for use and occupation.

As, after the assignment, defendant Armstrong went into possession under the terms of the lease, it follows that defendant H. C. Woods cannot be made liable for use and occupation, and the action must be dismissed as against him.

As all the evidence has been given, I will allow plaintiffs to amend their statement of claim as against defendant Armstrong as they may be advised: defendant Armstrong to plead to the amended statement of claim; and, after the amendments are made, I will hear counsel.

Costs reserved.

STREET, J. APRIL 12TH, 1905.

TRIAL.

CASSERLEY v. HUGHES.

Bankruptcy and Insolvency—Conveyance by Insolvent to Creditor — Action by Assignee for Creditors to Set aside—Grantee's Ignorance of Insolvency—Security for Debt—Wages—Interest—Redemption—Costs.

Action by the assignee for creditors of George P. Hughes to set aside a conveyance of land by the latter to his daughter, defendant Georgiana K. Hughes, as fraudulent and preferential.

C. E. Hewson, K.C., and A. E. H. Creswicke, Barrie, for plaintiff.

H. Lennox, Barrie, for defendant.

STREET, J.:—I . . find that George P. Hughes was insolvent on 9th April, 1896, when the conveyance to his daughter . . . was made, and that he knew he was insolvent, and made the conveyance . . . in order to withdraw the property . . . from the reach of his creditors. It is true that the fact of his insolvency cannot be actually demonstrated by an examination of his books, because the books are so kept as to render it impossible to ascertain his true financial position at that time. But when he stopped payment in November, 1903, he was insolvent in a very large amount, and has failed satisfactorily to shew how he can have lost so much money in the interval. I think, however, that there is nothing to shew that defendant Georgiana K. Hughes was at any time aware of his insolvency; she worked diligently for him for many years; her wages were regularly credited to her; and she was clearly a creditor of his and entitled to be paid what was due her. She did not ask for security for her debt, but she was aware that it was given to her, and she accepted it and continued afterwards for more than 7 years to work for her father at stipulated wages, which were credited to her. I think I must hold that the conveyance to her was intended merely as a security, and not as an absolute conveyance, for she allowed her father to receive and retain the rents as they came due.

Plaintiff, as assignee, is entitled to represent the creditors, including the one whose debt, existing when the conveyance in question was made, has never been paid.

Defendant has claimed to hold the property absolutely; in my opinion, she is entitled to hold it as security only; . . there should be no costs to either party.

Judgment declaring defendant entitled to hold the property as security for her wages, and interest thereon, not exceeding the amount of wages and interest entered in her pass-book; interest to be limited to 6 per cent.; against the wages and interest are to be set off the credits entered in the pass-book and any other sums in cash which may be shewn to have been paid to defendant on account of her wages; but she is not to be charged with any sums for board or clothing beyond the credits in the pass-book. If the parties are unable to agree upon the amount due to defendant, there will be a reference to the local Master at Barrie to ascertain it, and in that case further directions and the costs subsequent to the hearing will be reserved. Three months to be given to plaintiff to redeem, and the right to redeem to be foreclosed unless exercised within that time.

APRIL 12TH, 1905.

C.A.

TORONTO GENERAL TRUSTS CORPORATION v. CENTRAL ONTARIO R. W. CO.

Pledge—Railway Bonds—Sale by Pledgees—Compliance with Terms of Hypothecation—"By Giving"—Notice—Abortive Sale—Subsequent Private Sale.

Appeal by S. J. Ritchie from order of STREET, J., 3 O. W. R. 520, 7 O. L. R. 660, allowing appeal by Thomas G. Blackstock and Robert Weddell from certificate of local Master at Belleville of his finding that the sale to Blackstock and Weddell by the Bank of Ottawa of certain bonds of defendant railway company, was invalid.

The appeal was heard by OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.

A. B. Aylesworth, K.C., and J. H. Moss, for appellant.

G. T. Blackstock, K.C., and T. P. Galt, for respondents.

MACLENNAN, J.A.:—The question in this appeal arose in the Master's office in Belleville, and is, which of the parties is entitled to prove in respect of 300 bonds issued by the railway company for the sum of $1,000 each, with interest coupons attached, which had been pledged by Ritchie to the Bank of Ottawa, as security for a promissory note of $50,000 made by him, bearing date 30th November, 1900, and payable 15 days after date, with interest at 6 per cent. per annum from 31st May preceding.

Blackstock and Weddell claim as purchasers of the bonds from the bank, after default in payment of the note, at the rate of 22½ cents on the dollar of the principal money of the bonds, and to have paid the purchase money therefor, amounting to $67,500. Ritchie, on the other hand, contends that the bank having held the bonds in pledge by way of security, the sale made by them was irregular and void, and that the purchasers, having bought with notice of the character in which the bank held the bonds, are affected by the invalidity of the sale.

The Master found for the appellant Ritchie, and his judgment was reversed on appeal by Mr. Justice Street, from whose judgment the present appeal is brought.

Having read carefully the whole of the lengthy evidence and documents, I think the Master came to the proper conclusion on the question of notice, that is, that the respondents had notice before completion that the bank held the bonds as pledgees and not as owners, and the only doubtful question is as to the regularity and validity of the sale.

That question depends on the proper construction of the contract of pledge, which is set out in the Master's judgment.

The contract authorizes the bank, in default of payment of the note at maturity, "from time to time" to sell the said securities or any part thereof . . . by giving 15 days' notice in one daily paper published in the city of Ottawa, as to the said bank shall seem proper, with power to the bank to buy in and resell without being liable for loss occasioned thereby."

The bank published a notice of a sale of the bonds by auction on 11th March, 1902, and it was published in the Ottawa "Evening Journal" daily for 15 days before the day of sale. There was no sale at the time appointed, and it

was postponed for one week, the advertisement, with a notice of the postponement, having been continued. Neither on this occasion was there any sale made of the bonds, and it was further postponed for another week, but without any further publication of the notice of sale, and no sale was effected.

There was no further publication of any intention to sell the bonds, and on 19th August an offer was received by the bank from Mr. Blackstock, one of the respondents, of 22½ cents in the dollar on the par value of the principal money of the bonds, and, after much correspondence, a sale of the whole of the bonds, with unpaid coupons attached, was made to Mr. Blackstock, on behalf of himself and the other respondent, and completed on or about 30th September.

At the time of the sale the par value of the bonds, with interest coupons in arrear, was, as found by the Master, about $66,000; the debt due to the bank was $56,872.78, and the purchase money received was $67,500, or $10,627.22 more than was due. So that the bank sold nearly five bonds, with attached coupons, the par value of which was $11,000, more than was necessary to pay their debt, no effort having been made to restrict the sale to so many as was necessary for that purpose.

On receiving Blackstock's offer of 19th August, the bank telegraphed to Ritchie at Akron, Ohio, where he lived, that they had an offer for the bonds, not stating what it was, and that they would sell unless payment was made by 12 o'clock on the 21st. To this they received an answer on the same day that arrangements were being made to pay the debt, and protesting against the sale. No further communication was made to Ritchie, and the fact of the sale was apparently not made known to him until 21st October afterwards.

The Master was of opinion that the sale to the respondents by private contract, without any further notice, as required by the instrument of pledge, was unauthorized and void, but in this he was reversed by the judgment of Mr. Justice Street, from which Mr. Ritchie has brought this appeal.

The bonds in question are part of a series of 2,200 for $1,000 each, with interest at 6 per cent., payable half yearly, secured by a mortgage of the railway made by trustees. The bonds were payable at the end of 20 years, and became due

on 2nd April, 1902. Both bonds and interest coupons are expressly made payable to bearer, and it is declared that each bond and all rights and benefits arising therefrom shall pass by delivery. In these circumstances, I think the bonds and coupons are negotiable securities, and that, in the absence of notice that the bank held them as security, or that Ritchie had some title or interest therein, the respondents' title would be good: Young v. McNider, 25 S. C. R. 272, and the cases there referred to by Strong, C.J.; and the question is whether the sale is binding on Ritchie, and I think it is not.

The bank were pledgees for a debt, payable at a fixed time, which had elapsed. Therefore no demand of payment was necessary, and the bank had a power to sell as provided in the instrument of pledge. The pledge was of the bonds and all coupons attached thereto. The notice of sale seems to be as meagre and slipshod a compliance with the contract as could well be imagined. It describes the bonds as bearing 5 per cent. interest, instead of 6 per cent. per annum, and states that to each bond all "maturing" coupons are attached. The bonds were dated 1st April, 1882, and became due on 2nd April, 1902, and so, on the day named for the sale, there was only one coupon "maturing" on each bond. There were nearly 40 overdue coupons on each bond, representing a debt exceeding the whole amount of the principal money, which were not advertised to be sold at all. The bonds were part of a series of 2,200 for $1,000 each, the whole with interest secured pari passu by mortgage of the railway and all its works, and the advertisement is silent as to there being any security. It is not said how the bonds would be offered, whether en bloc or in parcels, nor does the evidence disclose how they were offered. All that is said is, by Mr. Burn, that there were no bids, and by Mr. Langdon, that on the last adjournment on 25th March the sale was closed, there being no bidders thereat, and the sale proved abortive. After the failure to sell on 18th March, the bank informed Mr. Ritchie by letter and telegram of the further postponement of the sale to the 25th; that there had been considerable inquiry for the bonds; and that it was probable there would be no lack of purchasers when they were finally exposed for sale; but, as already observed, there was no further advertisement of this final postponement, or, so far as appears, any other effort to reach those inquirers or expected purchasers, or any notice except to Ritchie.

I am unable to construe the power of sale in the same manner as Mr. Justice Street. He thinks a sale "by" giving 15 days' notice must be taken to mean to sell "after giving" or "first giving," or simply "giving," the required length of notice. He says the giving of the notice was a condition to be performed, in the absence of which no authority to sell arose; that the stipulation did not require a sale by auction, and therefore the bank were entitled under it to sell either by private sale or by public auction. I cannot adopt that view of the power, because it eliminates from the contract the word "by," which we are not at liberty to do. The 15 days' published notice was the means agreed upon for effecting the sale. The notice was published, but it effected nothing. The bonds were still unsold, and it is not pretended that the sale to the respondents was effected by the notice. The notice was of a sale by auction, and I think that is what the contract intended. That is apparent from the power given to the bank to buy in and resell, and I think the bank had no power to sell otherwise than by auction. The sale in question was made by private contract, and I think the bank had no power to do that. But, even if, after the sale by auction in pursuance of the published notice had failed, it could be held that then the bank had power to sell without a further advertisement, I think this sale cannot and ought not to be upheld as a valid sale of these pledged bonds. In Story on Bailments, 9th ed., sec. 310, a work which ever since its first publication in 1839, has been cited in England as an authority, it is said: "The common law of England existing at the time of Glanville seems to have required a judicial process to justify a sale, or at least to destroy the right of redemption. But the law as at present established leaves an election to the pawnee. He may file a bill in equity for foreclosure and sale, or he may proceed ex mero motu, upon giving due notice of his intention to the pledgor. In the latter case, if the sale is bona fide and reasonably made, it will be equally obligatory as in the first case. But a judicial sale is most advisable in cases of pledges of large value, as the Courts watch any other sale with uncommon jealousy and vigilance; and any irregularity may bring its validity in question."

There is very little authority that I have found in the English books as to whether, or when, a sale of a pledge by private contract may be made, but in the United States the

authorities are numerous and uniform that it should be public, so as to ensure the best price being obtained: Schouler on Bailments, 3rd ed., secs. 227, 228, 229; Lawson on Bailments (1895), sec. 62; and see Am. & Eng. Encyc. of Law, 2nd ed., pp. 882-891.

I think this sale was not made with reasonable care or with proper or any regard to the rights and interests of Ritchie. No attempt had been made to reach the inquirers referred to in Mr. Burn's letter of 18th March, and who were expected at that time to become purchasers, and when the offer of 19th August came, its terms were not communicated to Ritchie, but he was called upon to redeem within 48 hours, or in default it would be accepted. That offer was about 10½ cents in the dollar of the bonds and arrears of interest which were sold. The very first offer was accepted, because it was sufficient to pay the bank's debt, although they knew there were other inquirers for the bonds, who, as they had reason to believe and expect, might become purchasers. They also carelessly sold more than were necessary to pay their debt, without any effort to restrict the sale to what was sufficient for the purpose, and, although the offer was at so much in the dollar, and not a fixed sum for the whole, I think such a sale, even if the bank had power to sell by private contract, which I think they had not, cannot be supported as between the bank and Ritchie, and by reason of notice to respondents cannot be maintained by them any more than it could be by the bank.

I therefore think the appeal should be allowed, and that the decision of the Master should be restored.

GARROW and MACLAREN, JJ.A., concurred.

OSLER, J.A., dissented, for reasons given in writing.

APRIL 12TH, 1905.

C.A.

ONTARIO LADIES COLLEGE v. KENDRY.

Company—Subscription for Shares—Conditional Subscription—Condition not Fulfilled — Representation of Agent of Company—Materiality—Untruth—Invalidity of Subscription.

Appeal by plaintiffs from judgment of BOYD, C., dismissing without costs an action brought by an incorporated body

to recover $500, the amount of 5 shares of plaintiffs' capital stock for which defendant subscribed on 20th April, 1892, with interest from the dates on which the calls became payable.

Defendant set up that he was induced to become a subscriber for shares by the representations of plaintiffs' agent by whom he was solicited, to the effect that Mr. G. A. Cox and Mr. H. A. Massey had each subscribed or promised to subscribe for $10,000 of stock, upon the condition that subscriptions for $50,000 were obtained on or before 1st January, 1893; that defendant's subscription was required in order to assist in making up what was still required of the $50,000; and that his subscription would not be binding unless the $50,000, including the subscriptions of Messrs. Cox and Massey, were fully subscribed on or before 1st January, 1893.

It was proved that neither Mr. Cox nor Mr. Massey had subscribed or promised to subscribe for $10,000 each, either conditionally or unconditionally, nor did they do so at any time after defendant's subscription, nor was $50,000 subscribed on or before 1st January, 1893.

BOYD, C., held that the representations were proved to have been made; that, by reason of them, defendant was induced to subscribe for the stock "as a sort of escrow; it was not to be effective or operative unless the $50,000 was obtained within the limited period of time."

G. H. Watson, K.C., and J. B. Dow, Whitby, for plainitffs.

E. G. Porter, Belleville, and S. T. Medd, Peterborough, for defendant.

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

MOSS, C.J.O.:—For plaintiffs it was contended that defendant failed to prove the representations. They were distinctly sworn to by defendant, and were not contradicted. It appears that the agent by whom they were made died some years before the commencement of the action, but, as the Chancellor pointed out, if plaintiffs were prejudiced for want of his evidence, it was due to their delay in bringing the action. The Chancellor gave credit to defendant's testimony, and there is no law applicable to this case which disables a

party from succeeding upon his own uncontradicted testimony. . . . [Reference to In re Hodgson, Beckett v. Ramsdale, 31 Ch. D. 177, 183, and Rawlinson v. Scholes, 79 L. T. 350.]

The law of this province is only different in the cases, such as in actions by or against the representatives of deceased persons, where there is a statutory provision requiring corroboration as to matters which occurred in the lifetime of the deceased.

In the present case there are circumstances tending to corroborate and support defendant's statements, but at all events there are no facts or circumstances of such countervailing weight as to render it proper not to give effect to the Chancellor's conviction.

It was also urged that plaintiffs were not bound by the representations of their agent. He was undoubtedly their agent to solicit subscriptions for shares, and plaintiffs are now seeking to take the benefit of what he did in the matter of procuring defendant's subscription. It is clear law that if an agent, at the time a contract is entered into, makes any representation or declaration touching the subject matter, it is the representation or declaration of his principal, and it is now settled that a principal cannot enforce a contract induced by the material representations of the agent who negotiates it, whether such representations are fraudulent or not: Kerr on Frauds, 3rd ed., p. 83 and cases. Here the representations were material, and whether made in good faith and with a belief in their certain fulfilment or not, they cannot be ignored or repudiated by plaintiffs.

It was also argued that defendant's case upon the pleadings, as well as upon the evidence, is, that the contract was a conditional contract or agreement, and that the contract upon which plaintiffs are suing being in writing, and on its face unconditional, evidence to vary it was inadmissible as against the provisions of the Statute of Frauds. If the case is to be viewed as a case of a contract induced by material representations which were untrue, the argument would be inapplicable. But, regarding the case from the other standpoint, the answer to the argument seems to be, that where contemporaneously with a written agreement there is an oral agreement that the written agreement is not to take effect until some other event happens, oral evidence is admissible to prove the contemporaneous agreement. . .

[Reference to Wallis v. Littell, 11 C. B. N. S. 369; Davis v. Jones, 17 C. B. 625; Pym v. Campbell, 6 E. & B. 370; Abrey v. Crux, L. R. 5 C. P. 42.]

The circumstances of this case seem to bring it within the rule laid down in Wallis v. Littell. The contract, it is true, appears on its face to be a completed contract, but it was to have no beginning whatever except upon the happening of a stipulated contingency, which did not occur.

Whichever view is taken of the evidence, plaintiffs' case fails.

Appeal dismissed.

APRIL 12TH, 1905.

C.A.

MICHIGAN CENTRAL R. R. CO. v. LAKE ERIE AND DETROIT RIVER R. W. CO.

Railway—Contract—Breach—Controllable Freight—Supply of Cars.

Appeal by defendants from judgment of BOYD, C., at the trial, in favour of plaintiffs, in action to recover damages for the alleged breach of an agreement by which defendants agreed to ship by plaintiffs' railway all their "controllable" freight for points reached by the lines of plaintiffs, up to $35,000 per annum. The breach alleged was that defendants did not ship their controllable freight as agreed.

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

W. Cassels, K.C., for defendants.

I. F. Hellmuth, K.C., and W. P. Torrance, for plaintiffs.

GARROW, J.A.:—It was admitted at the trial that defendants had not shipped freight over plaintiffs' lines to the amount of $35,000 per annum; that, had plaintiffs furnished cars as requested (the real dispute between the parties), more freight would have been sent; and it was agreed that if plaintiffs should be found entitled to recover any damages, such damages should be ascertained by a reference.

Defendants' line is what is known as a local road. It has connections however with four trunk or through lines, viz., plaintiffs', the Grand Trunk, the Canadian Pacific, and the Wabash, and all four lines were when the agreement was made, and are still, competing for the through freight origin-

ating on defendants' line. And at that time and prior thereto, the usual custom was for plaintiffs to supply the necessary cars to carry the goods from shipping points to destination, a custom then common to all four trunk lines, and which the other three still continue.

After the agreement was made, plaintiffs continued the custom for about 9 months, and then refused any longer to do so, and for the first time asserted that under the agreement it was the duty of defendants to supply such cars.

The Chancellor adopted plaintiffs' contention. In his judgment he uses the following language: "Upon the proper meaning of the agreement, I think plaintiffs are right, and that its terms cannot be modified by a reference to a previous practice, in different circumstances. A new relation was established by the terms of the written and sealed contract, and under it the obligation undertaken by defendants was to ship all controllable freight via plaintiffs' lines, for all points reached by plaintiffs lines and connections. Had the intention been to give plaintiffs only a preferential option over other competing trunk lines to obtain its foreign freight, upon sending cars to receive it, different language would have been employed to manifest this intent." And the formal judgment accordingly declares the true meaning and intent of the agreement to be "that the defendants should ship by the plaintiffs' lines and their connections all freight which could be shipped by such route as the defendants might be free to select as between the shipper and the defendants." And a reference was ordered to ascertain the damages, but limited to the period subsequent to that during which plaintiffs had been supplying cars.

With deference, it appears to me that the real question in dispute has not been, at least expressly, determined by the judgment now under review. Defendants did not, as I understand them, dispute that they were bound to send all "controllable freight" by plaintiffs' lines. They can, and no doubt do, subscribe to every word which I have quoted from the formal judgment; but then, after all, what is "controllable freight?" That is the real question. The phrase is not at all self-explanatory, and is therefore properly the subject of explanatory evidence by business experts familiar with the class of business in question, several of whom were examined. From this evidence it clearly appears that it is the shipper who alone controls the route, where he has a choice of

two or more. And it also clearly appears that a determining circumstance with the shipper always is the advantage of a through or continuous carriage without transhipment or breaking bulk; that, in fact, speaking, generally, of two routes, otherwise equal, the one offering through cars, while the other does not, making transhipment necessary, the shipper would always select the former. And if he did, the local railway would be bound to follow his directions. These circumstances, which are, I think, abundantly proved, make it clear that "controllable freight," that is, freight which defendants could or can control, is limited to such freight as is placed in cars at the point of shipment to be thence carried in the same cars without transhipment to the place of destination.

The agreement in fact made and could make no difference. The same competition continued, and what was "controllable" before remained so afterwards, and by exactly the same methods, for the simple reason that the real control rests in the hands of the shipper, and not of the railway company.

Then, what did the parties intend by the use of the term "controllable freight" in the light of the surrounding circumstances?

Transhipment being out of the question, owing to the objection of the shipper, there were only two modes left by which the agreement could be reasonably performed—one that plaintiffs should as theretofore continue to supply the cars, as the other competing lines were doing, the other that the defendants should themselves do so. There is nothing in the agreement itself one way or the other on the subject. The Chancellor's opinion evidently was that the parties intended by the agreement to effect a change in this respect, but, if so, would it not be reasonable to expect to find an express stipulation in it of such intention? And finding none, is it not reasonable to infer that the parties did not intend such an important change, but rather to continue as before, the conditions of the competition remaining the same? That at all events is my interpretation of the agreement. And it is, I think, strongly confirmatory that such was also the interpretation of the parties themselves for several months after the agreement was made.

The other mode, that the defendants should supply the cars, thus necessitating a large increase in their car equipment, especially in the light of the fact that the other through lines were and are ready and willing to supply them, seems

to me on every ground unreasonable and wholly foreign to what in my opinion the parties could have intended.

The appeal should be allowed with costs and the action dismissed with costs.

OSLER and MACLAREN, JJ.A., concurred, giving reasons in writing.

MOSS, C.J.O., also concurred.

MACLENNAN, J.A., dissented, giving reasons in writing.

APRIL 12TH, 1905.

C.A.

JONES v. GRAND TRUNK R. W. CO.

Railway—Expulsion of Passenger—Indian—Passenger Rates—Special Contract—Custom—Withdrawal of Privilege—Absence of Notice—Accommodation—Jury—Damages.

Appeal by defendants from judgment of BRITTON, J., 3 O. W. R. 705, in favour of plaintiff for $10 damages (assessed by jury) and costs on the High Court scale, in an action for damages for expulsion from a train of defendants.

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

W. R. Riddell, K.C., for defendants.

A. G. Chisholm, London, for plaintiff.

MOSS, C.J.O.:—. . . Plaintiff had frequently travelled upon defendants' train between Hagersville and Hamilton, and vice versa, as the holder of an Indian ticket, occupying a seat in the first class carriage, even when the train was composed, as it was on the occasion in question, of two carriages, one a first class carriage, and the other the carriage in respect of which the dispute has now arisen. Until the occasion in question she had always occupied a seat in the first class carriage, and had never been denied the accommodation. Upon the weight of evidence, the other carriage was, to all outward appearance, nothing more than a smoking car. There was nothing to indicate that it was a car for the accommodation of second class passengers. The conductor testified that the words "second class" were painted on the outside, but in this he is contradicted by the brakesman and plaintiff's husband, who made a careful examination of the carriage.

Inside, the word "smoking" is painted on one end, if not both ends; but there is a small square of paper pasted over the door of the smaller compartment with the words "no smoking" printed with a pen and ink. The testimony shews that every part of the carriage was on occasions occupied and used by smokers of tobacco. The conductor says he only checked smoking in the smaller compartment when women were there, and admits that at times it was an offensive carriage by reason of tobacco smoke. Plaintiff says that on the occasion in question, when she alighted on the platform at Rymal, she saw a number of persons at the windows smoking with their pipes in their mouths.

The jury found that the carriage was in a fact a smoking car, and it was open to them to so find upon the evidence.

Upon the findings and the evidence, it should, I think, be taken to be established: (1) that the carriage into which the conductor told plaintiff to go bore, to all outward appearance, the semblance of a smoking car, and nothing else; (2) that plaintiff believed, in good faith, that it was a smoking car, and nothing else; (3) that there was no other carriage provided as part of the train for the accommodation of second class passengers; (4) that plaintiff was told by the conductor that she must pay the full first class passenger fare or go into "the next car," meaning the carriage in question, or get off; (5) that the conductor was aware that plaintiff believed the carriage to be a smoking car, and nothing else, but he did not inform her to the contrary, or gilve her any reason to think otherwise; (6) that a smoking car used as such is not sufficient accommodation for the transportation of second class passengers.

Upon these conclusions it follows that upon the occasion in question defendants did not furnish sufficient accommodation for plaintiff as a second class passenger. I see nothing improper, or fraught with the dire consequences suggested by counsel for defendants, in the finding of the jury that as a smoking car the carriage in question was not sufficient accommodation for second class passengers.

The opinion of Parliament as to the character to be ascribed to smoking tobacco is found in sec. 214, sub-sec. (e), of the Railway Act, which authorizes railway companies to make by-laws, rules, or regulations for "prohibiting the smoking of tobacco and the commission of any other nuisance in or upon such carriages." Even in the absence of rules or

regulations, no person travelling in a first class carriage would be permitted to smoke in the midst of the other passengers. He would be obliged to conform to the ordinary usages and decencies. And surely there can be no license to such a person to enter a car filled perhaps with women and children, and because they are travelling on second class instead of first class tickets, and in a second class carriage, subject them to the nuisance caused by tobacco smoke, which would not be tolerated in the car he came from. There is no evidence in this case that it is the usage to allow smoking among the passengers in a second class carriage.

If, as defendants contend, there was a small compartment of the carriage in question not devoted to smoking, plaintiff was not aware of it. As before mentioned, there was nothing on the outside to indicate that it was a second class passenger carriage, and all the indications plaintiff observed pointed to its being a smoking car. I think it was the conductor's duty, seeing, as he must have seen, that plaintiff was under that impression, to have told her of the compartment. The duty is to "furnish" sufficient accommodation, and I cannot think that duty was performed in this instance. To furnish must include to make known or bring to the notice of those for whom the accommodation is provided, some intelligible direction to where it is. Plaintiff was allowed to continue under the belief that the only accommodation offered her was a seat in a smoking car, and, in the view I take of the facts and findings, this was not furnishing her with sufficient accommodation.

Appeal dismissed with costs.

MACLENNAN and MACLAREN, JJ.A., concurred.

GARROW, J.A., dissented, giving reasons in writing, in which OSLER, J.A., concurred.

APRIL 12TH, 1905.

C.A.

GRAHAM v. INTERNATIONAL HARVESTER CO.

Master and Servant—Injury to Servant—Negligence of Master —Common Law Liability — Defective System — Findings of Jury—Workmen's Compensation Act.

Appeal by defendants from judgment of MEREDITH, C.J., in favour of plaintiff, upon the findings of a jury.

Plaintiff, the widow of one Joseph Graham, sued on behalf of herself and her children, under the Fatal Injuries Act, to recover damages for his death, which was caused, as alleged, by the negligence of defendants.

Defendants carried on business as manufacturers of agricultural implements. The deceased was a workman in their employment, and on 19th August, 1903, was engaged with two other men in working at a drop-hammer in the machine shop. The end of a steel bar, placed upon the anvil, to be struck by the hammer, flew up and struck deceased a severe blow in the abdomen, in consequence of which he died.

The jury found: (1) that the system in use by defendants for doing this work was defective in that "it" lacked support for the end of the piece of steel; (2) that "it" arose or had not been discovered owing to defendants' negligence or that of some one intrusted by them with the duty of seeing that the condition or arrangement of the works was proper; (3) that the injury was caused by the lack of support to the bar; (4) that Robinson (the blacksmith) was a person whose orders deceased was bound to obey; (5) that deceased said to Robinson "go ahead;" (6) that there was no evidence that Robinson gave any order; (7) that Robinson should have seen that the steel was flat on the anvil; and (8) that the deceased was not negligent.

The appeal was heard by OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.

A. B. Aylesworth, K.C., for defendants.

G. Lynch-Staunton, K.C., for plaintiff.

OSLER, J.A., gave reasons in writing, in which GARROW, J.A., concurred, for holding that defendants were not liable at common law or under the Workmen's Compensation Act, and therefore that the appeal should be allowed and the action dismissed.

MACLENNAN, J.A., gave reasons in writing, in which MACLAREN, J.A., concurred, for holding that defendants were liable at common law upon the findings of the jury on account of the defective system, and therefore that the appeal should be dismissed.

THE COURT being thus divided, the appeal was dismissed with costs.

C. A.

APRIL 12TH, 1905.

TOWNSHIP OF FITZROY v. COUNTY OF CARLETON.

Way—Substitute for Boundary Line between Counties—Deviations—Declaration—Mandamus.

Appeals by defendants the corporations of the counties of Renfrew and Lanark against the judgment of FALCONBRIDGE, C.J., 3 O. W. R. 280, in favour of plaintiffs, declaring certain highways to be deviation highways, and directing the appointment of arbitrators to ascertain and decide the amount of the liability of defendants for the proper care and maintenance of a bridge over a stream called the Wawa, which crossed the deviation road in the township of Fitzroy. The corporation of the county of Carleton were also defendants, but did not contest plaintiffs' claim.

The appeal was heard by OSLER, MACLENNAN, GARROW, MACLAREN, JJ. A.

A. B. Aylesworth, K.C., for defendants the county of Renfrew.

J. A. Allan, Perth, for defendants the county of Lanark.

D. H. Maclean, Ottawa, for defendants the county of Carleton.

G. F. Shepley, K.C., and R. V. Sinclair, Ottawa, for plaintiffs.

GARROW, J.A.:—The physical facts are somewhat peculiar. No less than three township and the same number of county boundaries are involved, in consequence of the difficulties in road construction caused by a sharp bend in the river Madawaska where these several boundaries meet. The township of Fitzroy is in the county of Carleton, the township of McNabb in the county of Renfrew, and the township of Pakenham in the county of Lanark. The boundary line between Fitzroy and Pakenham runs northerly to the southerly limit of McNabb, which forms the northerly boundary to both Fitzroy and Pakenham at the place in question.

The river in its course towards the Ottawa river flows easterly in the township of McNabb until about a mile westward from the junction of the boundary line between Pakenham and Fitzroy with that between these townships and

McNabb, when it sharply crosses the boundary between Pakenham and McNabb, then proceeding easterly crosses the boundary between Pakenham and Fitzroy, and again sharply turns northerly and easterly and regains its original course through the county of Renfrew by crossing the boundary line between Fitzroy and Pakenham.

It is therefore obvious that if the original boundary lines are to be opened, no less than three expensive bridges in close proximity would be necessary, namely, one between the townships of Pakenham and Fitzroy, one between the townships of Pakenham and McNabb, and one between the townships of Fitzroy and McNabb. None of the boundary lines in question has ever been opened throughout across this loop, and none of these bridges has ever been built, although the neighbourhood has been settled for many years.

The present situation upon the ground is, that the obstruction caused by the loop in the river is overcome by a highway built and maintained around the southerly side of the loop, commencing at the east in the boundary line between the townships of McNabb and Fitzroy, and ending in the west in the boundary line between the townships of McNabb and Pakenham, this having been apparently the order of its construction, that is, from east to west. The boundary line road between the townships of Pakenham and Fitzroy was opened up at a later date, and apparently ends when it joins the other first mentioned road.

The exact origin of the east and west road around the loop is not at all clear. There was in the early days a mill at or near the bridge in question over the Wawa stream in the township of Fitzroy, and at least a portion of the road now in question, possibly all of it in the township of Fitzroy, owes its origin to the efforts of private individuals to reach this mill. And the other portion, namely, that through the township of Pakenham around the bend, had apparently a somewhat similar origin, in that it too was originally a mere trespass road. Then the council of the township of Fitzroy passed a by-law to establish a road to the Pakenham boundary line, in the line if not upon the exact site of the old trespass road, and also of the present travelled road, on 12th December, 1853. And the council of the township of Pakenham passed a similar by-law to establish a road from that boundary line to the boundary line between Pakenham and McNabb, also upon or near the site of the older trespass road, on 1st

November, 1854, thus completing the loop around the bend and giving a continuous highway from east to west. Before the latter by-law was passed, namely, on 22nd September, 1854, the township of Fitzroy had apparently passed or attempted to pass a by-law to repeal the former by-law before mentioned. No reason appears for so doing, nor does it appear that any notices were given or other steps taken to make the repeal effective, and it is the fact that the road remained open and was continuously used by the public as a highway after the alleged repeal, just as before; so that the alleged repeal or attempted repeal may, I think, be disregarded.

Such then appears to be the history of the highway in question, first, mere trespass roads, followed by municipal recognition, and by user by the public for a period approaching 50 years, while the original allowances for roads during all these years remained and still remain unopened and incapable of use as thoroughfares by reason of the absence of the bridges required to cross the river.

Upon this road around the bend, since the passing of the by-law before mentioned, the townships of Pakenham and Fitzroy have from time to time expended public money in repairs and improvements, and the statute labour has been expended upon this as upon the other highways in the vicinity.

About five years before the trial the two townships united in joint action at or near the boundary line to alter and somewhat shorten the road so as to avoid a gully and improve the road. And this is apparently the only joint action in evidence by any of the several municipalities interested from the beginning.

The Chief Justice found that the road around the loop or elbow before described is a deviation for the purpose of getting a good line of road; and that the departures to the north-west and north-east of the road forming the boundary between the townships of Fitzroy and Pakenham are also deviations for the same purpose; and that both deviations were made as substitutes for the possible roads on the respective boundary lines, and were made for the purpose of obtaining a good line of road in view of the obstructing course of the Madawaska river and of the comparatively enormous expense in the matter of bridge construction and otherwise;

and adjuged the relief asked for by plaintiffs against all the defendants.

I am, with deference, unable to agree with the finding against defendants the county of Lanark, which of course entirely depends upon whether, in the circumstances, the highway where crossed by the Wawa in the township of Fitzroy forms in law part of the boundary line road between that township and Pakenham. The evidence is undisputed that when the boundary line road between these townships was opened, it was so opened only along the true boundary line, until it reached the already existing travelled road around the bend, where it stopped, as I think it might properly have done, without the consequences following which are contended for by plaintiffs.

With reference to the other branch of the case, I agree with the conclusion reached by the Chief Justice. The merits lie entirely in that direction, and the law is not, I think, subjected to any undue strain in so holding. Sec. 617, sub-sec. 1, of the Municipal Act, 1903, prescribes the alleged duty, and sub-sec. 2 declares that "a road which lies wholly or partly between two municipalities shall be regarded as a boundary line within the meaning of this section, although such road may deviate so that it is in some place or places wholly within one of the municipalities, provided that such deviation is only for the purpose of getting a good line of road, and a bridge built over a river, stream, pond, or lake, crossing such road where it deviates as aforesaid, shall be held to be a bridge over a river, stream, pond, or lake, crossing a boundary line, within the meaning of this section."

The present amendment, 3 Edw. VII. ch. 8, sec. 131, has apparently only declared in statutory form that which had been long ago held by the Courts to be the proper construction of the statute: In re County of Brant and County of Waterloo, 19 U. C. R. 450; County of Victoria v. County of Peterborough, 15 A. R. 617; and does not, in my opinion, affect the questions involved in this action. The appellants' main contentions, as I understand them, are: (1) that to constitute a deviation road there must be joint action by the local municipalities charged with the duty of opening up and maintaining the original allowance of road, in originating the deviation; and (2) that a road which has its origin in some other motive than to obtain a good line of road cannot legally

be or become a deviation road as that term is used in the Municipal Act.

When the road in question was first opened, township boundary lines forming also county boundary lines were under the exclusive jurisdiction of county councils: sec. 12, Vict. ch. 81, secs. 39 and 41, sub-sec. 11; and C. S. U. C. ch. 54, sec. 339. And undoubtedly, if no road at all had been opened, joint action would have been necessary in the manner pointed out in the Municipal Act, which has, I think, from the beginning always contained the requisite machinery in case of disagreement to compel joint action where there was a joint duty. But this is the case of a highway already opened and in long and well established use, and the real question, in my opinion, is not so much its actual origin as its use by the public. Not is it denied that in fact the road serves the purpose of connecting, and is in fact the only means on the ground of connecting, the highways which have been opened to the east and to the west of it upon the true boundary line. And it is equally beyond question that the river is a very serious obstacle to opening up the true boundary line, quite sufficient to justify a deviation. Sec. 617, sub-sec. 2, mentions expressly a "road," not a road allowance, and this would, I think, include a road the public title to which had been acquired by dedication, or even whose legal origin was unknown, or if known was proved to have been for some temporary or merely local purpose, providing it had finally become a public highway and had in fact been adopted and accepted by the municipalities interested, and been used and was being used as a deviation of the original road allowance for the purpose of acquiring a good line of road: see In re McBride and Township of York, 31 U. C. R. 355; O'Connor v. Townships of Otonabee and Douro, 35 U. C. R. 73, at p. 85, where the same very learned Judge who decided the case of In re McBride and Township of York (the late Sir Adam Wilson) used this language: "A county council may accept a road as dedicated by a private person, although there was no by-law signifying such acceptance;" he having previously said in the McBride case, which was a case of dedication of a deviation road between two townships: "It is not necessary that the road between townships should consist of original road allowance only. Such roads may be acquired or may be added to by purchase or by dedication as in other cases, and when once established by any lawful means it is a road for all

purposes and subject to the common incidents and law applicable to highways in the particular locality in which they are situated."

The question is really one of fact. The municipal corporations are charged with the duty to open up and maintain highways for the convenience of the public. The duty in the present case was jointly vested in the counties of Carleton and Renfrew, and neither of them as corporations apparently did anything, but they both knew, that is the inhabitants knew, from the beginning, that this road was being opened, and that it was gradually as the years passed assuming its final character of an apparent deviation road to avoid the river. They could have intercepted this by opening up the true boundary line or some other road in lieu of it, but they preferred, wisely I think, to do nothing, because the road now in question satisfactorily served the public purpose and so absolved them from their duty in the premises.

Must there not come a time when it is no longer a question of origin in such a case ? I certainly think there must, and that that time is long past in the case of the present highway, which was, in my opinion, long ago accepted and adopted by the municipalities interested as in fact a boundary line road, although not upon the true boundary line, and a boundary line road so accepted and adopted by them for the purpose only of obtaining a better line of road than upon the true boundary line.

With deference, I think there was no good reason shewn for ordering the county of Renfrew to pay the costs of the county of Carleton. The judgment against the latter county should, in the circumstances, be without costs, and they should pay their own costs of the appeal, their appearance having been unnecessary, as they do not contest plaintiffs' claim.

The appeal of the county of Lanark should be allowed with costs and the action as against them dismissed with costs. And the appeal of defendants the county of Renfrew should be dismissed with costs, and the judgment appealed from should be varied accordingly.

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

MACLAREN, J.A., also concurred.

OSLER, J.A., dissented, for reasons which he gave in writing, being of opinion that the case was one not provided for

by the Act, and therefore that the appeals, both of Lanark and Renfrew, should be allowed and the action dismissed.

APRIL 12TH, 1905.

C. A.

REX v. TORONTO R. W. CO.

Criminal Law—Indictment of Street Railway Company for Nuisance—Negligent Operation of Cars—Want of Proper Appliances—Fenders—Cars Running Reversely.

Case reserved by the Chairman of the General Sessions of the Peace for the county of York, upon an indictment and conviction of defendants for a nuisance, consisting in the negligent operation of their cars, without proper appliances, etc., so as to endanger the lives and safety of His Majesty's subjects, etc.

J. Bicknell, K.C., and J. W. Bain, for defendants.

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

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

OSLER, J.A.:—The indictment on which these defendants were convicted seems to have been framed upon the precedent of one in a former case against them, . . . which was then held to be sufficient as an indictment for a common nuisance under secs. 191, 213, of the Criminal Code. The charge there was that the company operated cars constructed in such a manner as to be likely to endanger the lives and safety of persons using the highway in common with the railway, that is to say, without proper fenders: The Queen v. Toronto Railway Co. (June, 1900), 4 Can. Cr. Cas. 4. The form is needlessly prolix, but I am of opinion that the 1st and 4th counts, at all events, of the indictment now in question sufficiently charge a common nuisance either at common law or under sec. 191 and the first part of sec. 192 of the Code. These counts, in substance, allege that defendants were authorized to operate a street railway on certain streets in the city of Toronto, and in doing so were under a legal duty to take reasonable care and precautions to avoid endangering the lives and safety of the public, but without reasonable excuse neglected to take such precautions and did thereby endanger the lives and safety of the public and thereby committed a common nuisance. The causing of the death of Elizabeth

Ward is stated merely as an illustration of the way in which the nuisance alleged affected the individual mentioned as one of the public, the consequence, in short, of the offence.

The nuisance the commission of which defendants are charged with is the omission to discharge a legal duty, which omission endangered the life, health, or safety of the public, a sufficient statement of what constitutes a common or public nuisance either at common law or under the Code, sec. 191. The duty alleged is that which existed as well at common law as under sec. 213 of the Code; every one who has in his possession or under his control anything whatever, animate or inanimate, or who maintains anything whatever which in the absence of precaution or care may endanger human life, is under a legal duty to take reasonable precaution against and to use reasonable care to avoid such danger, and is criminally responsible for the consequences of omitting without lawful excuse to perform such duty. And sec. 192 of the Code (1st branch) enacts that everyone is guilty of an indictable offence and liable to one year's imprisonment or a fine (as to corporations see sec. 639) who commits any common nuisance which endangers the lives, safety, or health of the public. . . .

[Union Colliery Co. v. The Queen, 31 S. C. R. 81, 4 Can. Cr. Cas. 400; Regina v. Great Northern R. W. Co., 9 Q. B. 315, and Pharmaceutical Society v. London, etc., 5 App. Cas. 857, referred to.]

I agree with what the learned County Judge is reported to have said in the case above cited that "the public can only look for protection to the general law applicable to those using the highway; such law would apply to a street railway company operating cars constructed in such manner as to be likely to endanger the lives and safety of persons using the highway in common with the railway. The defendants have acquired no rights for their cars on the highway in common with the railway." And again: "I am of opinion that the defendants are under a legal duty to operate their cars upon the highway so as to avoid endangering the lives of the public using the highway in common with themselves. What form these precautions ought to take must be largely a matter of evidence."

In the case at bar the evidence was that on lines of defendants on streets running north and south, as Avenue road, with double tracks thereon, the cars going north ran on the

eastern track and those going south on the western track; that this was the general practice and one to which the public were used and accustomed; that on arriving at Dupont street, a street running westerly from Avenue road, and in order to turn the car for the purpose of its return trip south, it would cross into that street for a short distance and then go backwards into Avenue road, the tracks over which it thus passes on re-entering that road forming what is called a Y. Instead, however, of passing over to the track on the east side of Avenue road and continuing its northerly journey thereon to the end of the line, and then switching over to the west side on arriving there to begin its southward journey, it proceeds backwards for rather more than a quarter of a mile to the end of the line on the western track, which having reached it starts again in the opposite direction. The car is thus, while going northward from Dupont street, not only reversed but is going northward on a track on which the cars usually go when travelling southward, and there is neither fender nor headlight on what has thus temporarily become the front end of the car, and the motorman and gong are not at that end, nor is it usual to sound the gong while going the short distance from Dupont street to the end of the line. There was evidence that all this was likely to be very confusing to persons crossing the street, and that at night it was not easy, in the absence of headlight or gong, to say whether a car proceeding reversely was coming towards one, or going in the opposite direction, and that the system on which defendants managed their cars at this place—for it was not a matter of occasional breach of duty or negligence on the part of the servants of the company in charge of the car—was a source of danger to the public, and was probably the cause of the death of the person mentioned in the indictment. There was, no doubt, evidence both ways, but there was evidence on which the jury were justified in finding against defendants.

Mr. Bicknell urged that the absence of the fender at the rear end of the car could not be considered as evidence of neglect or want of care in the management of the car, or as an element of the criminal negligence defendants are charged with, because the statute only requires them to have a fender on the front end of the car, that their cars were so furnished, and that in any case the statute affixes a penalty to default which exonerates them from further responsibility.

The answer, however, to this objection is that the statute is not dealing with the question of criminal negligence; that

it indicates what it is reasonable defendants should do for the safety of the public in this respect; that the per diem payments which defendants are charged with for neglect are not imposed qua penalty, but are merely constituted a debt to the local municipality; and that if defendants had complied, as they say, with the statute by placing fenders on the front ends of the cars, they were a fortiori operating them in a negligent and dangerous manner by doing so in a way which made the fenders ludicrously useless.

I do not think there is any substantial objection to the Judge's charge, or that evidence was improperly admitted.

The question submitted must therefore be answered in favour of the Crown.

CARTWRIGHT, MASTER. APRIL 13TH, 1905.

CHAMBERS.

SPARROW v. RICE.

Security for Costs—Motion by Person not a Party to Action—Residence Abroad—Actor—Costs of Motion.

Motion by C. B. Baker, who was not a party to the action, and who resided out of the jurisdiction, for an order setting aside the service upon him of the writ of summons, as having been made by mistake; and cross-motion by plaintiffs for an order staying Baker's motion until he gives security for costs.

R. W. Eyre, for Baker.

C. A. Moss, for plaintiffs.

THE MASTER:—The point seems determined by Re Pinkney, 1 O. W. R. 715, and Canadian International Mercantile Agency v. International Mercantile Agency, 4 O. W. R. 338.

It was contended that Baker was not an actor. This is not tenable. He is clearly moving for benefit of defendant Burton, and not in his own interest. He could safely leave the matter alone, but he chooses to move, and so is an actor: see Johnson v. Smallwood, 2 Dowl. 588.

The cases . . . Bilbrow v. Bilbrow, 3 C. B. 730, and Stevenson v. Thorne, 13 M. &. W. 149, are not decisions on the point in question.

There must be security as in Re Pinkney before the main motion can proceed. Unless this is given within 2 weeks, or such further term as is agreed on, the main motion will be dismissed with costs.