THE

ONTARIO WEEKLY REPORTER

(TO AND INCLUDING SEPTEMBER 1ST, 1906).

VOL. VIII. TORONTO, SEPTEMBER 6, 1906. No. 6

MABEE, J. JUNE 11TH, 1906.

TRIAL.

LUDGATE v. CITY OF OTTAWA.

Highway—Non-repair—Injury to Pedestrian—Snow and Ice —Notice to Municipal Corporation — Gross Negligence — Damages.

Action by Hannah Ludgate to recover $2,000 damages for personal injuries.

The plaintiff alleged that in the afternoon of the 19th March, 1906, she was walking westward on the south side of Albert street, between O'Connor and Bank streets, in the city of Ottawa, when, owing to the want of repair, slippery, uneven, and dangerous condition of the sidewalk, she fell, broke her arm, and sustained other serious injuries; that the injuries were caused by the gross negligence of the defendants, their servants and agents, in wilfully allowing that portion of the street in question to become and remain out of repair and in a dangerous condition for pedestrians.

The defendants denied the allegations of the plaintiff and charged that the plaintiff's injury, if any, was due to her own negligence and want of care, and that by the exercise of ordinary care and caution she might have avoided the injury.

The action was tried before MABEE, J., without a jury, at Ottawa.

D'Arcy Scott, Ottawa, for plaintiff.

Taylor McVeity, Ottawa, for defendants.

MABEE, J.:—I think in this case the plaintiff has established liability against the defendants.

The facts are not seriously in dispute. The statement of them given by the witnesses called on behalf of the defendants does not materially differ from the statements given by these ladies who have testified, along with the plaintiff, upon her behalf.

It seems that last winter was an extremely mild one, and very little snow fell. That is, of course, material, because what might be negligence under one set of weather conditions, at a certain season of the year, might be no evidence whatever of negligence under another set of weather conditions, at some other season of the year.

It is in evidence that for some 10 or 12 days previous to the occurrences that led to this litigation, there had been no snow fall at all, and apparently no drip from adjacent eaves that reasonably could have been said to have been the cause of this elevation that existed upon this walk. The witnesses have agreed in the main as to the location of it and the extent that it covered the surface of the pavement. The plaintiff was under the impression that it was some 6 inches higher on the inside; Mrs. Starrs says about the same height, some 6 inches; "there was a slope from 6 inches down to almost nothing."

Mrs. Mills says she thinks it was 6 or 7. Mrs. Agar agrees with Mrs. Mills in saying some 6 or 7 inches high.

Mrs. Hutchison does not speak of the height, but she mentions the slant, the extent of time it had been there, and Frederick Mills speaks in the same way.

It is shewn by these witnesses, or some of them, that during the course of 3 or 4 weeks before this accident some three or four others had fallen at the point in question or in the immediate vicinity.

Then on behalf of defendants, the street foreman had made no particular examination of this walk; he was not sure whether he had passed over it on foot; he had driven along the street, and driving past he noticed there was ice upon the pavement. He was under the impression it was only 2 or 3 inches in thickness.

Mr. Finlay, the ward foreman, was aware the walk was in the condition described by the witnesses for plaintiff, and Mr. Finlay's evidence in the main does not disagree with that of plaintiff and those called by her.

He says that about a foot on the outside of the walk was bare. That agrees with the statements made by one of the ladies that she had been accustomed to walk along on the outside edge, because that was the only place she could proceed with any reasonable degree of safety. Then Mr. Finlay thinks that the ice was some 2 or 3 inches thick on the inside of the walk, and it sloped down towards the middle. He says there might have been places where it was thicker than 3 inches. That is not at all contradictory of the statements made upon plaintiff's side of the case, that it ran up to 6 and possibly 7 inches in height.

We have it shewn that this condition existed for 3 or 4 weeks previous to the accident, without any reason being given why this ice could not have been removed.

The case does not strike me as being at all similar in its facts with Mahoney v. City of Ottawa, decided by my learned brother Teetzel, and reported in 3 O. W. R. 695. That case is, I think, distinguishable upon its facts, and the only assistance one derives from the cases in matters of this sort is where the facts can be said to be largely identical. I think that the existence of this elevation for the length of time shewn here, during a mild winter, with the appliances used by the city for the removal of just such dangers as this, may be said to be gross negligence. No reason is shewn for the non-removal, nothing appears in evidence that would lead one to think it would have been unreasonable to expect the city to remove it; it is in a populous section of the city, much travelled, within half a dozen doors of one of the most travelled streets of the city; it remained there for the length of time I have mentioned. As to the knowledge of its existence (although that is not even necessary in this case), its presence appears to have been known by those whose duty it would seem to me to be, under the law, to have seen that it was removed. On all these facts I think the conclusion is irresistible that plaintiff has brought defendants within the section which makes them liable in actions of this sort.

I am dealing only with the point at which the accident occurred. I have no concern about the block from one end to the other, or any other block or blocks in the city. I am dealing distinctly with this particular location, 204-206 on the south side of Albert street.

Then as to the question of damages, the plaintiff's injury, fortunately, was not very serious. She is a lady in humble

station, earning only some $11 a month. She says that she lost $16.50 by reason of her being laid up with the accident, and she paid $21.50 for board; the doctor's bill $45; $5 for a nurse, and $1.80 for medicine: making a total out of pocket expenditure of $89.80.

Then, one of the bones of her wrist was broken; she apparently has had a good recovery. There is, doubtless, some permanent stiffness, but to all intents and purposes Dr. Dowling says it is practically, for working, as good as ever, although doubtless she does, as she says, suffer some inconvenience. The doctor said that the break would cause considerable pain, and doubtless she did suffer, as we know all people do who receive injuries of that character. But fortunately there is no permanent injury other than possibly some little inconvenience. I think, under the circumstances, the assessment for pain and suffering and other loss of a sufficient sum to make the whole compensation $250 would not be unfair to both parties to the litigation.

There will therefore be judgment in favour of plaintiff for $250, together with the costs of the action.

HODGINS, MASTER IN ORDINARY. JUNE 12TH, 1906.

MASTER'S OFFICE.

RE CEMENT STONE AND BUILDING CO.

EGAN'S CASE.

Company—Winding-up—Contributory—Director—Entries in Register—Resolution of Directors—Attempt to Get Rid of Liability.

Upon a reference for the winding up of the company it was sought to make Samuel Egan liable as a contributory in respect of 10 shares of the capital stock of the company.

THE MASTER:—In this case the director-contributory Egan originally signed in April, 1904, for 5 shares in the capital stock of this company. He subsequently applied for 10 additional shares under the following circumstances:

"Q. Did you subscribe the stock list such as you have described for 10 shares more? A. I don't remember it being a list at all that I gave my name for the 10 shares. Q. How did you apply? A. The president wanted, or the manager wanted, my name to assist him in selling stock, and it was in that way I gave him my name. Q. How did you give him your name? A. I just signed my name on a paper, but I don't remember any list at all, the second time that I signed. Q. On a paper for how many shares? A. For 10 shares."

And further on he stated in answer to my questions: "Q. You say you signed your name for 10 shares more? A. The manager wanted my name in order to assist him to sell stock,—it was not for the sale of the shares to me." After some irrelevant answers he was asked again: "Q. I ask you what was the fact. You say you were asked to subscribe for a purpose, was not that what you have stated? A. Well, the manager represented to me that he was wanting my name to assist him in selling stock. Of course I did not talk much more about it until I saw my name in the book for— Q. And while you gave your name you did not intend that that contract should be binding on you? A. No, your honour, I didn't."

The books of this company shew that certain original entries have been scratched out with a pen knife. But in the journal of 1905, exhibit No. 3, on p. 4, a list of the shareholders appears, among which is the following entry: "Mar. 31, Saml. Egan 420—$1,500." And in the ledger of 1905 (exhibit No. 5), on p. 420, is the following entry: "1905, Mar. 1, J. 4 $1,500—the figure 1 in the $1,500 being crossed out by a pen mark, but the reference is to the journal, p. 4. In the other books the figure before 500 is scratched out with a pen knife.

These entries explain what the original and erased entries stated, namely, that this director-contributory had been entered in the books of this company as a shareholder for 15 shares of the value of $100 each, in all $1,500, on which he has paid $500, leaving $1,000 still unpaid.

On 11th March, 1905, this director-contributory was elected a director of the company; and he then complained that the entry of $1,500 was wrong, and finally at a meeting of the board of directors held on 8th June, 1905, the following entry of a resolution is recorded and was passed at his

instigation or request: "Moved that the application for 10 shares of company stock by Mr. S. Egan be not accepted. Seconded Mr. E. Willfong."

This resolution conflicts with the entries in the financial books of the company, which shew that on 1st March, 1905, this director-contributory had been entered by the company as a shareholder for $1,500. And the question at once arises: Could this company, after enrolling and entering this director--contributory as a shareholder, deny to him (if the company had been prosperous) his rights as a shareholder to the shares so acknowledged?

The answer will be found in the observations of Sir W. M. James, L.J., in Weikersheim's Case, L. R. 8 Ch. at p. 837, where, after finding that the names of the contributories had been entered in what he called the "second volume of the register of members," he said: "The company after that could not have disputed the right of any person entered therein, on the ground of his not being registered as a member; and I am of opinion that the member could not dispute the fact that he was entered in that book as a member registered, and having the rights and liabilities of a member of the company." See also Compbell's Case, L. R. 9 Ch. at p. 15, and as to the power of directors to remit shares, see Re London and Provincial Consolidated Coal Co., 5 Ch. D. 525.

Then in the statutory summary or return required by R. S. O. 1897 ch. 191, s. 79, to be transmitted to the Provincial Secretary, the name of this contributory appears as a shareholder as follows: "Egan, S., 143 Spadina Ave., Com. Merchant. Amount of stock held, $1,500. Amount unpaid and still due thereon, $1,000." This summary is an official or public document in the custody of the Provincial Secretary, and a certified copy is receivable as evidence under R. S. O. 1897 ch. 73.

Prior to the meeting of 8th June, 1905, at which the resolution above cited was passed, the following letter dated 6th June, 1905, and signed by the assistant secretary-treasurer, was stated to have been received by this director-contributory: "Samuel Egan, Esq., Spadina Avenue, Toronto. Dear Sir,—We are in receipt of your application for 10 shares of common stock of the Cement Stone and Building Company, Limited, Toronto, Ontario. We regret that we are unable to allot you this stock, as we have closed our

stock book for the present year. We trust, however, that if at some future time you are still desirous of investing in our company, we shall be able to accommodate you in the matter of allotting you the stock as requested."

When examined by me respecting these proceedings, the contributory stated: "Q. You complained to the board that you ought not to have been made liable for this stock? A. Yes, your honour, I did. Q. Is that the reason that induced the board to carry the motion that has been recorded? A. I would naturally think it was. Q. Then the statement in this letter is the statement of another reason; and which would you say now was the true reason; that which you made before the board, or this which is in the letter? A. That which I made before the board. And that this is untrue? A. O, yes, I would think so. Q. And the rest of the letter I suppose may be answered in the same way: 'We trust, however, that if at some future time you are still desirous of investing in our company, we shall be able to accommodate you in the matter of allotting you the stock as requested.' The expression read in the letter that you were anxious to get the stock and they were refusing it, was also untrue? A. Yes."

The irregular proceedings in thus, by an untrue resolution, seeking to relieve this director-contributory of his liability in respect of the 10 shares entered in his name in the books and in the official summary to the Government, bring this case within the observations of Lord Romilly, M.R., in Ex p. Munster, 14 L. T. N. S. 723, where he said: "Where a person who is himself a director of a company seeks to get rid—I don't say, of course, improperly—of his liabilities to the concern of which he is a director, this Court will naturally watch his conduct in the matter, and will hold him strictly to his engagements." See, further, Brown's Case, 19 Beav. 97; Henderson's Case, 19 Beav. 107; Straffon's Executors' Case, 1 DeG. M. & G. 576; and Bridger's Case, L. R. 5 Ch. 305.

I must, therefore, hold this director-contributory liable in respect of the 10 shares in question. Costs to follow the event.

HODGINS, MASTER IN ORDINARY. JUNE 20TH, 1906.

MASTER'S OFFICE.

RE CEMENT STONE AND BUILDING CO.

McBEAN'S CASE.

Company—Winding-up—Contributory—Petitioner for Incorporation—Subscription for Shares—Memorandum of Association—Director and President of Company.

Upon a reference for the winding-up of the company, it was sought to place William McBean's name on the list of contributories.

THE MASTER:—In this case McBean was one of the petitioners for the charter of incorporation, in which it was alleged "that by subscribing therefor in a memorandum of agreement and stock book duly executed in duplicate, with a view to the incorporation of the company, your petitioners have taken the following amounts of stock set opposite their names." And under this, among the names, appears the following:

"Petitioners:	"Amount of Stock Subscribed for:
"William McBean.	"$2,200."

Section 10, sub-sec. (4), of the Ontario Companies Act, R. S. O. 1897 ch. 191, enacts that "each petitioner shall be the bona fide holder in his own right of the share or shares for which he has subscribed in the memorandum of agreement." The 23rd section of the Imperial Companies Act, 1862, though not worded according to the same form, has been interpreted as having much the same effect.

The charter of the company was issued on the 8th February, 1904, and on the 10th February the first meeting of the provisional directors was held, at which McBean was appointed chairman, and certain by-laws and resolutions were carried. A subsequent meeting of the shareholders for organization was held on the same day, at which McBean was appointed chairman, and, after the by-laws and resolutions of the provisional directors had been adopted, McBean was elected one of the directors, and at a subsequent meeting of the directors was elected president of the company.

The minutes of all these meetings have been put in, and the two first are signed by McBean as "chairman;" the latter is signed by him as "president."

The facts in this case appear to be similar to those in Evans's Case, L. R. 2 Ch. 427, the head-note of which states: "E. signed a memorandum of association of a company as the holder of 10 shares, and acted for a short time as a director of the company. Other directors were then appointed, and E. never afterwards had anything to do with the company. No shares were ever allotted to him, and his name was never on the register. All the shares in the company were allotted to other persons, but the allotment was not final [not having been regularly confirmed by the directors], and they were not taken up:—Held, that E.'s name ought to have been on the register, and that he was a contributory in respect of the shares."

This case has been followed in Migotti's Case, L. R. 4 Eq. 236; Sidney's Case, L. R. 13 Eq. 228; Levick's Case, 23 L. T. N. S. 838; and other cases.

I must, therefore, hold that McBean is a contributory in respect of his subscription for $2,200 worth of shares in this company. Costs will be added.

HODGINS, MASTER IN ORDINARY. JULY 9TH, 1906.

MASTER'S OFFICE.

JORDAN v. FROGLEY.

Husband and Wife—Marriage before 1859—Right of Wife to Dispose by Will of Property Acquired after Marriage.

A question of title arising upon a reference.

THE MASTER:—Since the judgment in this case reported in 5 O. W. R. 704, one of the defendants, William Jordan, has died; and the question is raised that, as he and Sarah Sharp, daughter of the testator, were married in 1854, and therefore before the Act 22 Vict. ch. 34 (C. S. U. C. ch. 73), that statute did not protect the title which she acquired under her father's will made in 1882, but that it vested in her husband; and the case of Reid v. Reid, 31 Ch. D. 402, is cited

in support of such contention, being a decision under the English Married Woman's Property Act, 1882.

There is, I think, a clear distinction in the wording of the respective Acts, which indicates that decisions under the English Act are not applicable to cases under the Canadian Act.

Section 2 of C. S. U. C. ch. 73, provides that every married woman who, on or before 4th May, 1859, married without a marriage contract or settlement, shall and may after that date have, hold, and enjoy all her real estate and personal property not then reduced into the possession of her husband, "whether belonging to her before marriage, or in any way acquired by her after marriage, free from his debts and obligations contracted after the said 4th May, 1859, and from his control and disposition without her consent, in as full and ample a manner as if she were sole and unmarried."

The English Act, sec. 5, provides that "every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid, as her separate property, all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act."

There is, therefore, a clear distinction in the Acts respecting the acquisition of the right of married women to deal with their property. The right depends upon the time when the "title" to the property vested in the married woman. Our Act operates on prior and future acquired property by virtue of the words "belonging to her before marriage or in any way acquired by her after marriage." The English Act operates on future acquired property, by virtue of the words "her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act."

But sec. 16 of the Act placed a restriction on the previous grant of "full and ample" power to a married woman to have, hold, and enjoy all her real estate not reduced into the possession of her husband, by limiting her power to devise or bequeath the same to any person other than "her child or children issue of any marriage, and failing there being any issue then to her husband." And in Mitchell v. Weir, 19 Gr. 568, Strong, V.-C., held that under this section a bequest by

a married woman in favour of her husband was void, and that as to such bequest there was an intestacy.

This section was repealed in 1873 by sec. 46 of the Wills Act, 36 Vict. ch. 20; but such repeal was not to "prevent the application of any . . . provision of laws formerly in force to any transaction, matter, or thing anterior to the said repeal to which they would otherwise apply." The original section with the restriction on a married woman's power to devise or bequeath her property, which existed between 4th May, 1859, and 1st January, 1874, has been consolidated from R. S. O. 1877 ch. 106, sec. 6, down to R. S. O. 1897 ch. 128, sec. 6.

These statutes were considered by the Court of Appeal in Lawson v. Laidlaw, 3 A. R. 77, where it was held that the real or personal property enjoyed by a married woman under the statutes of 1859 and 1872 is her separate property at law to the same extent, and with the same incidents, as property settled to her separate use was and is in equity.

Sarah Jordan, one of the daughters of the testator William Sharp, died on 7th June, 1884, having previously made her will dated 21st April, 1884, in which she bequeathed to certain of her children her interest in the estate of her late father.

Under the authority cited I must hold that Mrs. Jordan, notwithstanding her marriage before the Act of 1859, acquired the interest in her father's estate referred to in my former judgment in this case, 5 O. W. R. 704, and had power to dispose of it by the will produced in these proceedings.

MABEE, J. JULY 13TH, 1906.

WEEKLY COURT.

NORTHERN CONSTRUCTION CO. v. SWANSON.

Interim Injunction—Breach of Contract—Ability of Defendant to Respond in Damages—Affidavit Sworn before Issue of Writ of Summons—Dissolution of Injunction.

Motion by plaintiffs to continue injunction granted by a local Judge restraining defendant from taking or removing

from plaintiffs' right of way any part of the plant, materials, equipment, horses, etc., used in and upon plaintiffs' works, in alleged breach of a contract between plaintiffs and defendant.

W. N. Ferguson, for plaintiffs.

W. E. Middleton, for defendant.

MABEE, J.:—The interim injunction was granted upon the affidavit of plaintiffs' assistant secretary shewing . . . facts that were probably sufficient to satisfy the Court that plaintiffs would, or might, suffer damages, if defendant were permitted to continue the breaches of his contract, which defendant would not be able to pay. The affidavit of defendant shews that he has ample means at his command to satisfy any loss plaintiffs may sustain from any breach of the contract in question, and at the same time defendant's counsel urges that no breach has been committed.

I should refrain so far as possible upon this motion from dealing with questions affecting the ultimate rights of the parties. The construction of the contract is one of such questions, and as to the rights of the parties under its wide provisions I say nothing, except that to my mind it is not at all clear that defendant has made any breach. But, treating the motion as if defendant had no right to take his horses off the work, the case remains as one of simple breach of contract, plaintiffs having as yet sustained no damage, and defendant being able to compensate plaintiffs if they do sustain such damage. Under these circumstances plaintiffs are not entitled to an injunction.

I am not at all impressed with the case advanced by the affidavit of plaintiffs' assistant secretary. The facts are not given with sufficient detail to enable the Court to judge if reasonable grounds exist for his fear of loss arising to plaintiffs. These facts are more within the knowledge of the engineer named in the contract, but no affidavit is made by him. The affidavit in reply does not advance matters. The affidavit upon which the interim injunction was obtained was sworn at Sudbury on 29th June, and the writ of summons was issued at North Bay on 30th June. So in fact there never was any affidavit upon which plaintiffs had any right to obtain an interim injunction. I feel compelled to dissolve this injunction with costs to defendant in any event. Plaintiffs

may have leave to renew their motion if upon a full development of all the facts they may be advised that they can present a proper case for the interference of the Court.

JULY 24TH, 1906.

DIVISIONAL COURT.

ALLAN v. SAWYER-MASSEY CO.

Master and Servant — Injury to Servant — Negligence of Master—Dangerous Work—Neglect to Provide Safeguards —Evidence for Jury—Excessive Damages.

Motion by defendants to set aside judgment for plaintiff for $2,000 damages in an action for the loss of an eye, tried before MABEE, J., and a jury at Hamilton.

Plaintiff was a mechanic in the employment of defendants, and, while engaged at his usual occupation, was hit in the eye by a piece of steel from a cylinder which was being chipped by a fellow-workman, a short distance away, and his left eye permanently destroyed.

G. Lynch-Staunton, K.C., for defendants, contended that there was no evidence of negligence to submit to the jury, and that the trial Judge should have nonsuited plaintiff, and that the damages were excessive.

J. L. Counsell, Hamilton, for plaintiff.

The judgment of the Court (MULOCK, C.J., TEETZEL, J., MAGEE, J.), was delivered by

TEETZEL, J.:—. . . As to the first branch of the motion, I have come to the conclusion that there was sufficient evidence of negligence to warrant the case being submitted to the jury. . . . It was clearly established that the work of chipping the large castings was not only attended with danger to the operator, but to any one in close proximity. The iron chips fly with a good deal of velocity, and, while not likely to do harm to any other part of the body, would, if the eye were hit, probably cause very serious injury. Under the system adopted by defendants the chipping is done in a room 40 x 56 feet, in which some 15 men are employed at that

work, and no provision whatever is made to protect them from the flying chips. According to the usual practice in defendants' shop, one of their workmen was employed in chipping a large cylinder within a few feet to the rear of plaintiff, and in such a manner that the chips would tend to fly towards where plaintiff was working, and so close were they together that should plaintiff have occasion to turn his head to the right, he was in danger of being struck on the eye by one of the flying chips from the cylinder.

Plaintiff alleges that he was injured in this way, and there was evidence from which the jury might so find. There was also evidence that this danger could be removed, or at least greatly reduced, either by a screen or by placing the cylinder on a pivot so that it could be turned and the chips always sent in an opposite direction from where plaintiff was working, or by having the large castings chipped in an open yard at such a distance from other employees as to remove all danger to them.

The jury were not asked specific questions, but the whole case was submitted to them upon a full and fair charge, against which no objection was made, and, while . . . the evidence might have warranted a verdict in defendants' favour, there was evidence upon all the issues sufficient to warrant a finding for plaintiff.

Assuming that the employment was dangerous—and the evidence establishes that it was—then it was clearly the duty of defendants to use all reasonable precautions for the protection of their servants. . . .

[Reference to Smith v. Baker, [1891] A. C. at p. 362; Williams v. Birmingham, [1899] 2 Q. B. 338.]

In the light of the Judge's charge to the jury, I think the result of their finding is, that, as regards plaintiff, defendants omitted to take reasonable precautions for his protection, and that they did not, therefore, carry on their operations so as not to subject him to unnecessary risk, and were in consequence guilty of negligence which caused plaintiff's injury.

On motion for a new trial on the ground of excessive damages, the rule as laid down in Praed v. Graham, 24 Q. B. D. 53, and enlarged in Johnson v. Great Western R. W. Co., [1904] 2 K. B. 250, is, that a new trial will not be granted on the ground of excessive damages, unless, having regard to

all the circumstances of the case, the Court is of opinion that the amount is so large that no 12 men could reasonably have given it, or unless the Court, without imputing perversity to the jury, comes to the conclusion, from the amount of damages and the other circumstances, that the jury must have taken into consideration matters which they ought not to have considered, or applied a wrong measure of damages.

While in this case the amount may be larger than is sometimes awarded for the loss of an eye, I cannot find, either from the amount or from anything else on record in the case, any reason which would, having regard to the rule, justify our interfering with the verdict.

Appeal dismissed with costs.

FALCONBRIDGE, C.J. JULY 26TH, 1906.

TRIAL.

PAGE.

VAN TUYL v. FAIRBANK.

Contract — Action to Set aside, for Improvidence — Delay in Bringing Action—Interest in Partnership—Inadequacy of Price—Fraud — Bad Debts — Goodwill—Counterclaim—Costs.

Action by the widow of Benjamin Stoddart Van Tuyl, late of the town of Petrolia, hardware merchant, to set aside an agreement entered into between plaintiff and defendant, dated 7th May, 1902; for an accounting of the partnership business of Van Tuyl & Fairbank; for payment to plaintiff of $1,468.19 paid into Court and any further sum which might be found due to plaintiff for her interest in the partnership business.

A. H. Clarke, K.C., and N. A. Bartlett, Windsor, for plaintiff, contended that the agreement should be set aside; because (1) plaintiff improvidently and without knowledge of the actual facts entered into it; (2) defendant misled plaintiff in his statements to her concerning the business; (3) it was the duty of the defendant, being the surviving partner of the firm of Van Tuyl & Fairbank, to acquaint plaintiff with all the facts in connection with the business, and that he did not do; (4) plaintiff relied upon defendant's statements wholly, as he, being a partner in the business for up-

wards of 30 years, was the only person who knew what the business was worth.

J. H. Rodd, Windsor, and I. Grenizen, Petrolia, for defendant.

FALCONBRIDGE, C.J.:—This action is brought after the lapse of nearly 4 years, and the delay in attacking the settlement is not satisfactorily accounted for.

Very shortly after the execution of the agreement of 7th May, 1902, the two sons of the deceased threatened proceedings against defendant, and eventually a settlement with them was made upon the basis of $90,000 as the value of the business, instead of $75,000, which was the basis of the agreement between plaintiff and defendant. Defendant submitted to this rather than have the business wound up, a proceeding which would be necessarily disastrous to all parties; but this concession of defendant is not an admission (and I do not find it to be the fact) that the larger sum was the true basis.

There was, therefore, no gross inadequacy in price, and it does not appear to me that the agreement can be set aside on the ground of improvidence. Plaintiff employed a manager of a financial institution to go over the statements and the books, etc., for the purpose of ascertaining whether or not the offer made by defendant was a fair one, and she also consulted a solicitor before she came to a conclusion as to the settlement.

Plaintiff has also failed to prove that any fraud was practised upon her. The deduction of 20 per cent. from the invoice price of the goods cannot be said to be unreasonable. On this basis of percentage plaintiff's husband was originally taken into the business, and about 1899, when Van Tuyl was seeking to purchase it from defendant, he put the stock at 80 per cent. in the offer which he made.

Nor does it appear that the allowance for bad debts was excessive, as the result has shewn. Whatever may be its supposed value in England, I regard goodwill as being in 99 cases out of 100 in this province a negligible quantity.

On the whole, I cannot find any legal or moral ground for a judgment in plaintiff's favour, and I dismiss the action with costs and declare defendant entitled to the money in Court.

Nothing was said in the written agreement about the counterclaim, which was probably put forward as a shield and not as a weapon, and, defendant having succeeded on the main issue, the counterclaim may be dismissed without costs.

FALCONBRIDGE, C.J. AUGUST 1ST, 1906.

TRIAL.

LONDON AND WESTERN TRUSTS CO v. CANADIAN FIRE INS. CO.

Fire Insurance—Subletting of Premises—Change in Nature of Risk—Notice to or Knowledge of Assured—Notice to Insurance Company — Knowledge of Agent — Absence of Notice in Writing—Statutory Conditions.

Action by the liquidators of an insolvent company which owned certain buildings in the town of Sudbury insured by defendants for 3 years from 4th October, 1904, and destroyed by fire on 30th November, 1905, to recover the amount of the insurance.

The substantial defence was that the insolvent company leased to one Ferres, a Syrian merchant, a portion of the insured buildings, and that Ferres took possession thereof and put and kept therein for sale a stock of merchandise to the value of some thousands of dollars, and therein and thereon carried on the business of a merchant, which change of occupation was material to the risk, which thereby became a mercantile one, and more hazardous than that described in the application for insurance.

G. C. Gibbons, K.C., and G. Gibbons, London, for plaintiffs.

N. W. Rowell, K.C., for defendants.

FALCONBRIDGE, C.J.:—It was admitted that the change of occupation was material to the risk, and it was proved that defendants could not or would not make a contract for insurance on mercantile risks for a term exceeding one year.

There was no proof of actual notice to the insolvent company of the change of occupation, although it would not be very difficult to come to the conclusion that the agent of the insolvent company who signed the application for the insurance had knowledge of it. But I think that the question of notice or knowledge is not material. . . .

[Reference to Bunyon's Law of Fire Insurance, 5th ed., p. 166; Kuntz v. Niagara District Fire Ins. Co., 16 C. P. 578.]

One Fournier, an insurance agent residing in Salisbury, who writes risks for about 16 companies, and who is named on the back of the present policy as the agent of defendants, undoubtedly had notice and knowledge of the condition of affairs. On 8th April, 1905, he took the application for insurance on the stock for a Montreal company, and he knew all about Ferres keeping goods there. But I am of opinion that Fournier's knowledge does not affect defendants, as there was no notice in writing to the company or their local agent under statutory conditions No. 3 and No. 20: Morrow v. Lancashire Ins. Co., 29 O. R. 377, 26 A. R. 173; Guerin v. Manchester Assce. Co., 29 S. C. R. 139. . . .

Action dismissed with costs.

MacMahon, J. August 8th, 1906.

WEEKLY COURT.

Re TALBOT AND CITY OF PETERBOROUGH.

Municipal Corporations—By-law Regulating Sale of Cigarettes—Excessive License Fee—Prohibitive By-law—Quashing.

Motion by William Ernest Talbot and Thomas William McDonough for an order that by-law No. 1218 passed by the municipal council of the city of Peterborough on 8th May, 1906, intituled "A by-law to license and regulate the sale of cigarettes," be quashed, on the ground (among many others) that the fee of $200 for a license, without the payment of which no owner or keeper of a store or shop (other than

taverns and shops holding licenses under the Liquor License Act) could sell cigarettes, was an excessive fee and was in effect prohibitive.

D. O'Connell, Peterborough, for the applicants.

E. H. D. Hall, Peterborough, for the city corporation.

MACMAHON, J.:—The by-law came into force on 1st July last.

The applicant Thomas William McDonough in his affidavit states that he is a ratepayer of the city of Peterborough, where he has carried on business as a tobacconist for some years; that the average profit per box of 10 cigarettes is 1½ cents, and he sells on an average of between 30 and 40 packages per day, and the average profit per day would not be higher than 60 cents, and the profit on such sales for a year would not exceed $183, and that the license fee of $200 would be more than the profits from the annual sales; that the number of shops in Peterborough where cigarettes are sold, other than grocery stores and hotels, is 8; that he considers the license fee as practically prohibitory, as no dealer in cigarettes could derive a profit from their sale, and in consequence thereof he did not obtain a license. That at a meeting of the municipal council held on 18th July, at which a petition signed by the tobacconists of the city was presented, asking for a repeal of the by-law, and during the discussion of the petition, McDonough says he heard Alderman Elliott state, "that the idea of the whole council was that the by-law should be prohibitive," and that Alderman Mason said he advocated the by-law because he thought it would be prohibitive.

The affidavit of the other applicant, William Ernest Talbot, is to the like effect.

William George Rundle, a tobacconist, who has been in business in Peterborough for some years, says that since the coming into effect of the by-law he has not sold cigarettes to any purchaser, as he had not obtained a license because the fee for a license he considered prohibitive, as the profits from the sale of cigarettes for a year would not equal the amount of the license fee.

To the like effect are the several affidavits of William John O'Brien, William John Morgan, Arthur Mitchell, tobaccon-

ists, and of Arthur Ray, a clerk in the tobacco store of Daniel Ray, all of whom carry on business in Peterborough.

There are 8 tobacconists in Peterborough; the only one who procured a license is Mehail Poppakeriazes, who states in an affidavit filed that his only reason for obtaining a license was that he is the owner of a tobacco shop and pool room, and unless the patrons of the pool room could obtain cigarettes at his tobacco shop adjacent to the pool room, they would not patronize his pool room, and he would lose the revenue from that source, and to retain that revenue he procured the license, although the profits from the sale of cigarettes in his store did not at any time amount to $200.

Under sec. 583, sub-sec. 28, of the Consolidated Municipal Act, 3 Edw. VII. ch. 19, the councils of cities having less than 100,000 inhabitants may pass by-laws for licensing and regulating the owners and keepers of stores and shops (other than taverns and shops holding licenses under the Liquor License Act), where cigars and cigarettes are sold by retail, and for revoking any license so granted, etc. And sub-sec. 29 gives authority to the council to fix the sums to be paid for licenses required under by-laws passed under the preceding sub-sec. 28. . . .

[Reference to In re Neilly and Town of Owen Sound, 37 U. C. R. 389.]

Tobacco, it is said, is used by 80 per cent. of the male population over 16 years old. Some smoke it in a pipe, others smoke cigars, while another class of smokers prefer cigarettes. Some use tobacco to stimulate the nerves, while others say they use it because it is soothing to the nerves. It is common knowledge that many people smoke as regularly as they take their meals, so that the use of tobacco in one form or another is a daily, and in many cases an hourly, necessity to a large number of people.

Having regard to the nature of the business and to the necessity of supplying a great number of the male population with cigarettes, and having regard to the fact that the yearly profits derived from their sale is insufficient to pay the license fee, no other conclusion can be reached than that an unreasonable and prohibitive fee was attempted to be exacted; and that, according to the statements of two of the aldermen at the meeting of the council already referred to, it was intended that the by-law should be prohibitive.

Mr. Hall urged that the license fee could not be regarded as prohibitive because one of the tobacconists of Peterborough — Mehail Pappakeriazes — had obtained a license. The latter states in his affidavit that the reason for procuring the license was to prevent the income derived from his billiard room from being diminished. And the result is that having obtained a license he now enjoys a monopoly of the cigarette trade in the city of Peterborough.

As I have reached the conclusion that the by-law is ultra vires, for the reasons above stated, I have not considered it necessary to deal with the other grounds mentioned in the notice of motion.

The order will go quashing the by-law with costs.

MACMAHON, J. AUGUST 10TH, 1906.

CHAMBERS.

RE WILLIAMS AND GRAND TRUNK R. W. CO.

Railway—Expropriation of Land — Immediate Possession—Necessity for—Station Site—Plans not Prepared.

Motion by the Grand Trunk Railway Company for an order for immediate possession of part of water lot No. 49, according to plan 5a, and land adjoining the same to the north, in the city of Toronto, set out by metes and bounds in the notice of motion.

M. K. Cowan, K.C., for the railway company.

W. E. Middleton, for the A. R. Williams Co.

MACMAHON, J.:—On 23rd February, 1905, in pursuance of an application made by the Grand Trunk Railway Company to the Board of Railway Commissioners, an order was made authorizing the railway company to take for the purposes of a station, etc., the said lands, the property of the A. R. Williams Company.

Arbitrators were, during the month of July last, appointed to decide as to the value or compensation payable to the owners, but as yet no award has been made in the premises.

By sec. 170 of the Railway Act, 3 Edw. VII. ch. 58, where an award has not been made, a warrant for possession shall be granted by a Judge on affidavit to his satisfaction that the immediate possession of the lands is necessary to carry on the railway, with which the company are ready forthwith to proceed.

The affidavits on which the motion was launched were made by Edward Donald of Montreal, barrister, who is the tax and land agent of the Grand Trunk Railway Company, who states that he is familiar with the values of property in the vicinity of the property in question, and he considers the sum of $112,500 a fair value and a liberal compensation for the right, title, and interest of A. R. Williams in the lands in question.

Another affidavit made by Walter G. Brownlee, a superintendent of the railway, states (paragraph 8) that immediate possession of the said lands by the railway company is necessary in order to enable them to remove the building and prepare the ground for the station, all as set out in the order of the Board of Railway Commissioners, and with which said work the Grand Trunk Railway Company are ready forthwith to proceed.

When cross-examined on his affidavit, Mr. Brownlee said that the plans for the station had not as yet been completed; that the size of the building was not yet known; and that so far as he knew no contracts had been let for the erection of the building; and the only preparations made for the erection of the building were the instructions given to him to clear up the débris remaining on the lands intended for the station since the great fire in 1904.

Mr. Hays, the general manager of the Grand Trunk, made an affidavit after the motion had been set down, and that I allow to be read, in which he says that architects are preparing the plans for the station, and, when the plans have been decided upon, the contract will be let and work commenced on the station during the coming autumn, and will be continuously and vigorously carried on until completed.

The affidavits wholly fail to shew that the company are ready forthwith to proceed with the erection of the station, as the contract, according to the affidavit of Mr. Hays, is not to be let until the coming autumn, and it may be very late in the autumn before it is let.

The motion will be dismissed with costs, but without prejudice to the right of the railway company to renew the motion when the conditions have changed.

MACMAHON, J. AUGUST 18TH, 1906.

WEEKLY COURT.

SOVEREEN MITT, GLOVE, AND ROBE CO. v. WHITESIDE.

Company—Directors—Filling Vacancies in Board—Quorum —Special Meeting of Shareholders—Injunction.

The plaintiffs were incorporated under the Ontario Companies Act. After the charter was obtained by-laws were passed, which were sanctioned by the shareholders in January, 1904, clause 11 providing that "the affairs of the company shall be managed by a board of 7 directors," and clause 13 that "4 directors present at any meeting of the directors shall constitute a quorum for the transaction of business." Seven directors were duly elected to the board in accordance with the terms of the by-law.

During May, 1906, 3 of the directors—Jacob Sovereen, E. S. Sovereen, and R. F. Bell—sold their shares to the defendant Wilbur H. Whiteside, and J. H. Cole, another director, sold his shares to the defendant Ezra Crysler.

The transfers of these shares were made to the respective purchasers thereof on or before 13th June, 1906, and the respective transferors of the shares then ceased to be directors of the company.

After the 4 above named ceased to be directors of the company, the remaining three directors — R. Dalton, D. Dalton, and J. B. Moore—assuming to be a quorum for that purpose, elected Ezra Crysler, James A. Lawson, R. A. Dalton, and George Lawson directors to fill the vacancies that had been created in the board.

The above named defendants then obtained from the local Judge at Hamilton an order, dated 3rd July, restraining R. A. Dalton and George Lawson, two of the plaintiffs, from acting as directors of the plaintiff company, unless duly elected at a

properly called meeting of the shareholders of the company, and Dent Dalton, J. B. Moore, and Rufus Dalton were also thereby restrained from appointing any person or persons on the board of directors of the company and from issuing any of the unissued shares of stock of the company, or from selling, issuing, or dealing with the same.

This injunction was on 12th July continued until the trial.

The defendants W. H. Whiteside, James A. Lawson, and Ezra Crysler (representing not less than one-tenth of the subscribed capital of the company) had on 15th June served a requisition on the company requiring that a special general meeting of the stockholders be called within 21 days for the purpose of electing 4 directors to fill the vacancies in the board of directors, and also for considering, and, if thought fit, passing the following resolution, "That the shares of the company, other than those already issued and allotted to subscribers therefor, shall be issued only when and as directed by a majority of the shareholders at a meeting called for that purpose, or at an annual meeting of the shareholders of the company."

As no action was taken on this requisition, the same defendants, Whiteside, Lawson, and Crysler, who are the holders of more than one-fourth part in value of the subscribed stock of the company, sent to each of the stockholders a notice calling a special general meeting of the stockholders to be held at Delhi on 4th August, 1906; the purpose of the meeting being as stated in the requisition above referred to.

After the service of this notice, and on 3rd September, the plaintiffs obtained from the local Judge at Woodstock an injunction restraining the defendants from electing, at the meeting of the shareholders, called for 4th August, directors of the company to fill the alleged vacancies, and from passing at that meeting a resolution limiting the power of the directors to issue and allot stock in the company of the character described in the notice.

Plaintiffs moved to continue this injunction.

W. A. Dowler, K.C., and G. Kappele, for plaintiffs.

G. H. Kilmer and L. F. Stephens, Hamilton, for defendants.

MACMAHON, J.:—What was urged by counsel for plaintiffs was that, as sec. 40 of the Act provides that the affairs of the company shall be managed by a board of not less than 3 directors, and as that number of qualified directors remained, they were competent and had authority to fill the four vacancies existing in the board after the 4 who sold their stock ceased to be directors.

What is meant by sec. 40 is, that there is the minimum number of directors who can, by a charter granted under the Act, administer the affairs of a company. It in no way limits the right of the company under sec. 45 to pass by-laws to increase the number of directors; and under sec. 47 to provide what number of directors shall form a quorum. And without the quorum being present provided by the by-law, the board is incompetent to transact the business of the company.

In New Haven Local Board v. New Haven School Board, 30 Ch. D. 350, the Court of Appeal held that the filling up of vacancies in the local board was business within the meaning of 38 & 39 Vict. ch. 55, sec. 155, and where the board of directors had been reduced by resignations from 9 to 2, the filling by the latter of vacancies was invalid; and in Re Cambria Peat Co., 31 L. T. N. S. 773, it was held that when the quorum specified by the statute, charter, or by-laws is not present, transactions or resolutions of any kind are entirely invalid. So it was held in Toronto Brewing and Malting Co. v. Blake, 2 O. R. 175, that where one of 3 directors disposed of his stock he thereupon ceased to be a director, and the directorate then became incompetent to manage the affairs of the company. See also Bottomley's case, 16 Ch. D. 681; Buckley's Companies Acts, 7th ed., p. 542.

As the 3 remaining directors could not legally fill the vacancies in the board, the only manner in which the 4 directors could be elected for that purpose, was by calling a special general meeting of the stockholders as provided by sec. 52 of the Act.

This was the course sought to be adopted by the defendants W. H. Whiteside, James Lawson, and Ezra Crysler, when they made the requisition which was served on 15th June.

I take it that was the view entertained by Mr. Justice Mabee as to the manner in which the stockholders should

proceed to fill the vacancies, for the injunction which he continued to the trial enjoined two of the defendants, R. A. Dalton and George Lawson, from acting as directors, "unless duly elected at a properly called meeting of the shareholders of the said company."

The notice given by the defendants W. T. Whiteside, James A. Lawson, and Ezra Crysler, calling a meeting of the shareholders to elect 4 directors to fill the vacancies on the board, was properly given.

The other subject mentioned in the notice as to the unissued stock of the company, even if a resolution were passed, could only be regarded as a recommendation to the directors, and therefore innocuous.

The injunction will be dissolved; costs in the cause to defendants.

FALCONBRIDGE, C.J. AUGUST 23RD, 1906.

TRIAL.

PHILLIPS v. PARRY SOUND LUMBER CO.

Trespass to Land—Cutting Timber—Joint Tort-feasors—Independent Contractor—Damages—Gross Negligence.

Action for trespass to land.

W. L. Haight, Parry Sound, for plaintiff.

Wallace Nesbitt, K.C., and F. R. Powell, for defendants the Parry Sound Lumber Company.

F. E. Hodgins, K.C., and H. E. Stone, Parry Sound, for defendant Hailstone.

FALCONBRIDGE, C.J.:—. . . It was admitted by the defendants that there had been a trespass upon the lands of the plaintiff, and that trees belonging to him had been cut and carried away, but it was contended that the trespass was an innocent one, and the two defendants sought each to cast the responsibility and the burden of the same upon the shoulders of the other.

I do not find that the defendant company succeeded in proving that Hailstone was an independent contractor and not a servant. The alleged contract (exhibit 9), bearing date 30th September, 1903, was never signed by the parties, and is only faintly and vaguely identified by Hailstone. The only

reference to tamarac poles in it is in a postscript or memorandum in the writing of an officer of the company, and it has relation only to the price to be paid for the same. I do not find that the company and Hailstone were working strictly in accordance with this memorandum. The company kept such control of the work and of the mode of carrying it on, that I find Hailstone not to be a contractor, but servant. There is also some evidence of ratification on the part of officers of the company after it was discovered that a trespass had been committed. I do not find that the position of trees cut on the Killbear block differs from that of those on lot 61. The company were responsible for what their co-defendant did and for what was done by people intrusted with the execution of the work by him. These defendants being then co-trespassers and tort-feasors, have not, in my opinion, succeeded in their internecine struggle to cast the burden the one upon the other, and they are both severally liable to the plaintiff.

I come now to consider the question of damages. I refuse utterly to treat this trespass as so innocent a one as to entitle the defendants to say that they are to pay simply the board measure value of the wood which they have undertaken to cut and haul off the plaintiff's property. I find that there was gross negligence on the part of the defendants in not ascertaining and keeping within the true boundaries of the lots over which they had the right to cut. The key-note of the situation is, no doubt, to be found in the expression repeated over and over in the evidence, that private owners or locatees or grantees were to protect their own lots. For example, see p. 168 of the evidence of defendant Hailstone, line 5: "Q. So that your instructions from the company were to cut everything you dare and let the other people protect their own lots? A. I was to use judgment and care and caution, I admit that, in cutting up to the line, but if there was any doubt I was to let them protect their own lots,"—phrase pregnant with sinister meaning !

There is very little question about the number of the pieces. I exclude the road allowances, as the defendants apparently had the right to cut there. I find there were 180 tamarac trees removed from lot 61, from which I deduct 83 as cut by the plaintiff himself, leaving 97. I find there were 91 cut on Killbear; total 188. I deduct 54 cut on defendant company's lot by leave of Carson, leaving 134 to be

accounted for. If the jury had been retained, there would have been evidence to go to them on which they could have found for the full value named by plaintiff. The circumstances were very exceptional. Pieces of tamarac of unusual length were required for the particular purposes of the contract then in hand. There is no room for the application of the rule in Hadley v. Baxendale. A man is not bound to put up a signboard warning trespassers that the timber which they may unlawfully carry off has a special value to the owner. I prefer the measurements of plaintiff's witnesses and their estimate of the size of the timber and the lengths to which it could have been cut. This case was not withdrawn from the jury by any act of mine. It was an assessment of damages which was peculiarly for a jury, and it was at the instance of the parties themselves that I consented to try the case without a jury. I therefore, acting as a jury, proceed to give what I consider a fair, though perhaps by no means an adequate, estimate of the loss. I shall allow the plaintiff the sum of $5 each for the 134 trees, $670. I am including in this finding the allowance which would have to be made for the 25 per cent. of the logs which admittedly would not reach the standard required for the long spiles. I also allow for the culls in the woods (which culls the plaintiff did not wish cut at the present time), and for general damage to the lots the additional sum of $50. I therefore direct judgment to be entered for the plaintiff for $720 against both defendants with full costs, including costs of examinations for discovery. I make no order as between the two defendants as to costs or otherwise. Thirty days' stay.

MACMAHON, J. AUGUST 24TH, 1906.

WEEKLY COURT.

RE TOWN OF BERLIN AND BERLIN AND WATERLOO STREET R. W. CO.

Statutes—Construction—Repeal of Statute—Exception as to Action or Proceeding Pending—Municipal Corporation—Notice of Intention to Take over Street Railway.

The following case was stated for the opinion of the Court in respect of a certain notice dated 12th January, 1906, given by the town corporation to the railway company:—

The undersigned appointed by the municipal council and the company as hereinafter set forth, hereby submit to this Court a stated case for the opinion of the Court, the questions of law hereinafter referred to arising out of the said notice and proceedings subsequent thereto.

1. The notice marked exhibit A was served upon the president and general manager of the said company on behalf of the said municipal corporation on 18th January, 1906.

2. On 14th May, 1906, the Lieutenant-Governor gave the royal assent to two certain Acts enacted by the Legislative Assembly of the province of Ontario, known respectively as chs. 30 and 31 of 6 Edw. VII. (O.), and which are cited as "The Ontario Railway Act, 1906," and "The Ontario Railway and Municipal Board Act, 1906," respectively.

3. By sec. 259 of ch. 30 of 6 Edw. VII., ch. 208 of R. S. O. 1897, referred to in the notice, was repealed.

4. On 21st June, 1906, an agreement now produced and marked exhibit B was executed by the mayor and clerk of the municipal corporation, and by the president and secretary of the railway company, without either party being aware that ch. 208 of R. S. O. 1897 had been repealed.

5. Three meetings of the undersigned have been held at the town of Berlin on the following dates, viz., 7th July, 8th August, and 16th August, 1906.

6. It was not drawn to the attention of the undersigned till the meeting held on 16th August that R. S. O. 1897 ch. 208 had been repealed as aforesaid, and the undersigned at the meeting of 7th July, directed that a statement of the claims in respect of which the railway company seek compensation be delivered to the solicitors for the municipal corporation on or before 20th July, and also that the municipal corporation should be entitled to enter upon the real property of the railway company and to inspect the same, and to make a survey of the undertaking of the railway company, and at the meeting of the undersigned on 8th August certain discussions took place and certain directions were given by the undersigned as particularly set forth in the stenographer's notes taken at that meeting, now produced and marked exhibit C hereto.

7. At the meeting of the undersigned held on 16th August it was brought to our attention by counsel for the railway company that ch. 208 of R. S. O. 1897 had been repealed by the statute 6 Edw. VII. ch. 30, and the question

of the effect of the repeal was raised upon the proceedings hereinbefore referred to, and as a consequence this case was stated for the opinion of the Court.

8. The undersigned respectfully request the opinion of this Court upon the questions of law as follows:—

(1) Has sec. 65 of 6 Edw. VII. ch. 31 the effect in law of preventing the repeal of R. S. O. 1897 ch. 208 as to said reference, under the circumstances above detailed, and is the said R. S. O. ch. 208 thereby continued in force and effect for the purpose of said reference and notice (exhibit A) hereinbefore referred to.

(2) Is the reference above referred to "an action or other proceeding" within the meaning of sec. 65 of 6 Edw. VII. ch. 31?

(3) If so, was the said reference pending within the meaning of the phrase "any action, or other proceeding 'pending' at the time of coming into force of this Act"?

(4) If 6 Edw. VII. ch. 31, sec. 65, has not the effect in law of continuing R. S. O. 1897 ch. 208 in force and effect as above stated, then were the said municipal corporation and the said railway company entitled to enter into, and are they bound by the terms of, the said agreement of 21st June, 1906, such agreement having been acted upon by the proceedings taken on 7th July and 8th August, above referred to, by the undersigned, without objection on the part of the parties to said agreement or either of them.

(5) If R. S. O. 1897 ch. 208 is repealed by 6 Edw. VII. ch. 30, then, in the absence of any forum expressly created by the last named statute to fix compensation in reference to their existing franchises, does not the fact that the notice of taking over was given in pursuance of the last named statutes (sic) before being repealed, leave the parties at large to continue their proceedings under the old Act or create their own forum.

Dated at Berlin, August 16th, 1906.

(sgd.) Joseph Jamieson,
" E. Morgan,
" J. M. Scully,
Arbitrators.

Exhibit A referred to in the stated case was as follows:

"To the Berlin and Waterloo Street Railway Company. You are hereby notified, pursuant to sec. 41 of the Street Railway Act, being ch. 208 of the Revised Statutes of Ontario, 1897, that at the expiration of twenty years from the

time of passing by-law No. 355 of the corporation of the town of Berlin, that is to say, to wit, the 6th day of September, 1906, the said corporation of the town of Berlin intend to assume the ownership of your railway, and all real and personal property in connection with the working thereof, on payment of the value thereof to be determined by arbitration, and generally to exercise in relation thereto, all the powers conferred upon the said corporation by sec. 41, and any other sections of the said Act which may be applicable.

"That the arbitration may be proceeded with, and the value of the said railway and property determined, as provided by the said section, you are hereby notified to submit to the mayor of the said corporation the name of a person whom you desire to be appointed sole arbitrator to determine such value, in order that the said corporation may consider such nomination, and either accept the same or submit another name or other names.

"Dated this 12th day of January, 1906.

"The Corporation of the Town of Berlin.

"A. Brecker, Mayor.

"A. Alleter, Clerk."

W. B. Raymond and J. A. Scellen, Berlin, for the town corporation.

W. D. McPherson, for the railway company.

MacMahon, J.:—On 15th June the municipal corporation notified the railway company that an application would be made to a Judge in Chambers on the 19th for an order appointing an arbitrator or arbitrators to determine the value of all the real and personal property of the railway company pursuant to sec. 41 of the Street Railway Act, R. S. O. 1897 ch. 208, and, in pursuance of the notice served upon the railway company on behalf of the applicants dated 12th January, 1906.

Nothing appears to have been done under the notice, as on 21st June an agreement under seal was entered into between the town of Berlin and the railway company, which recites that the 20 years during which the company was authorized to operate the railway would expire on 6th September, 1906, and that the municipal corporation intended to assume the ownership, etc.; and that the railway company and the corporation had been unable to agree upon a single arbitrator, and had agreed there should be three arbitrators, and that the town had appointed John M. Scully as arbitrator, and

the railway company had appointed Edward Morgan, junior Judge of the County of York, as arbitrator, who, under the authority conferred by the agreement, had appointed Joseph Jamieson of Guelph, County Court Judge, as third arbitrator.

Although ch. 208 of R. S. O. 1897 has been repealed by 6 Edw. VII. 30, it is provided by sec. 65 of 6 Edw. VII. ch. 31, that such repeal "shall not affect any action or other proceeding pending at the time of the coming into force of this Act."

By sec. 41 of R. S. O. 1897 ch. 208, it is provided that "A municipal corporation may, after giving six months' notice prior to the expiration of the period limited, assume the ownership of the railway and all real and personal property in connection with the working thereof on payment of the value thereof to be determined by arbitration."

As the giving of the notice six months prior to the expiration of the period limited for operating the railway is a condition precedent to the right of the municipal corporation to institute arbitration proceedings to determine the value of the undertaking, it follows that the notice itself was "a proceeding pending" in connection with the arbitration at the time of the coming into force of the 6 Edw. VII. ch. 31, on 1st June, 1906.

I therefore in answer to the first question say that sec. 65 of 6 Edw. VII. ch. 31 prevents the repeal of R. S. O. 1897 ch. 208, in so far as the reference in question is concerned.

As to the second question, I answer that the notice was "a proceeding pending" within the meaning of sec. 65 of 6 Edw. VII. ch. 31.

3. The answer to question 3 is included in the above answer to question 2.

4. It follows from the answers to the preceding questions that the municipal corporation and the railway company are bound by the agreement of 21st June, 1906.

5. Having regard to the preceding answers, it becomes unnecessary to answer question 5.

The attention of the legislature should be drawn to sec. 202 of 6 Edw. VII. ch. 30, as it does not appear to me to apply to any railway except those to which municipal corporations have granted privileges since the Act came into force.

The railway company must pay the costs of the town of Berlin.