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HODGINS, MASTER IN ORDINARY. MAY 4TH, 1906.

MASTER'S OFFICE.

CAMERON v. PETERS.

Partnership—Dissolution—Reference to Take Accounts—Partnership Articles—Covenant for Payment of Specified Sum—Lien for—Report of Master—Special Circumstance.

Reference to the Master in Ordinary in a partnership action.

S. Alfred Jones, for plaintiff.

W. B. Laidlaw, for defendant.

THE MASTER:—By partnership articles dated 17th February, 1904, plaintiff and defendant entered into a co-partnership in the trade or business of manufacturers of shoe and leather dressing and other specialties, under the name, style, and firm of "The Maple Leaf Brand Shoe and Leather Dressing Company," for the term of 3 years from the said date, at No. 617 Queen street west, in the city of Toronto.

By a notice in writing dated 1st February, 1906, defendant served notice on plaintiff that the partnership should cease at the expiration of 15 days from that date. And by judgment dated 12th February of the same year the partnership was declared to be dissolved, and Mr. E. R. C. Clarkson was appointed receiver, and the usual partnership accounts were directed to be taken.

Clause 2 of the partnership articles was as follows: "2. That the said co-partners shall each contribute towards the capital stock of the co-partnership, as follows: the said

Michael Peters shall furnish all necessary capital for the carrying on of the said business until the same becomes a paying concern, and shall pay to the said Donald Cameron $900 in cash on the execution of this indenture; and the said Donald Cameron, in consideration thereof, shall teach and instruct the said Michael Peters, to the best of his ability and at all times during working hours, in the manufacture of the said shoe and leather dressing, and generally in the said trade and business."

This provision brings this co-partnership under the class of partnerships where one partner contributes all the capital necessary for the business, and the other contributes his labour and skill. And on a dissolution of such a partnership the partner who has contributed the money or property which has formed the capital of the firm, is entitled, after payment of the debts of the co-partnership, and an adjustment of the accounts of the partners inter se, to be repaid the amount of money or value of the property he has contributed to such capital. And he is entitled to this re-payment before any division of profits. The partner who has contributed his labour or skill can only claim as his compensation a share in the profits which the co-partnership has earned during the term of the partnership.

Another clause in the said co-partnership articles is as follows: "3. That all losses and expenses of the said co-partnership shall be borne and paid equally by the said co-partners."

This clause must be construed as subject to the terms of the preceding clause, which provides that the defendant is to "furnish all necessary capital for the carrying on of the said business until the same becomes a paying concern." But until the liabilities —"losses and expenses"—of the said co-partnership are ascertained, and the assets are realized, it may not be necessary to construe or apply this clause further. But in order that the co-partnership assets shall be properly administered a notice to creditors must issue in the ordinary form.

But on the covenant by the defendant that he "shall pay to the said Donald Cameron $900 in cash on the execution of this indenture, and the said Donald Cameron in consideration thereof shall teach and instruct the said Michael Peters, to the best of his ability and at all times during working hours, in the manufacture of the shoe and leather

dressing, and generally in the said trade and business," I find on the evidence that Donald Cameron did teach and instruct Michael Peters as required by the clause, and that Donald Cameron is therefore entitled to be paid by Michael Peters $900, with interest at 5 per cent. from 17th February, 1904.

And as by Con. Rule 667 the Master is authorized under any judgment "in taking accounts, to inquire, adjudge, and report as to all matters relating thereto as fully as if the same had been specially referred," and as by sub-sec. 12 of sec. 57 of the Judicature Act it is required that in every cause or matter pending before the Court the Court shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies whatsoever as any of the parties may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward in such cause or matter, so that as far as possible all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any such matters avoided, it will be proper to report, as a special circumstance, that the plaintiff being entitled to recover the said sum of $900 from defendant under the covenant in the said partnership articles, should be declared to have a charge or lien on any moneys to which defendant may be entitled on the adjustment of the accounts of this partnership.

See Elgie v. Webster, 5 M. & W. 518, and Lindley on Partnership, pp. 595-6.

SCOTT, LOCAL MASTER.

APRIL 9TH AND OCTOBER 8TH, 1906.

MASTER'S OFFICE.

E. B. EDDY CO. v. RIDEAU LUMBER CO.

Contract—Lumbering Operations—Cleaning out Stream—Allowance for—Proportion of Cost—Driving Timber—Breach of Contract—Construction of Contract — Impossibility of Performance—Failure to Get Logs out—Measure of Damages—Destruction of Logs by Fire—Negligence—Nominal Damages—Interest—Costs—Claim and Counterclaim.

This is an action referred to the local Master at Ottawa for trial, involving disputes arising out of lumbering opera-

tions carried on by the parties on some of the streams tributary to Lake Temiskaming. The matters at issue fell under three heads: one forming the subject of the disputed portion of the claim, and the other two of the counterclaim. A portion of the claim was not disputed.

J. F. Orde, Ottawa, and M. G. Powell, Ottawa, for plaintiffs.

G. F. Henderson, Ottawa, for defendants.

THE LOCAL MASTER:—In the autumn of 1903 a verbal agreement was entered into between the local agents of plaintiffs and defendants, and of Mr. J. R. Booth, whereby plaintiffs and Booth were to clean out one-half each of a stream known as the Jean Baptiste creek, charging up a proportionate part of the cost to defendants. The Jean Baptiste creek was entirely in a state of nature, no lumbering operations having theretofore been carried on upon it. The evidence is that in such a case a great deal of preliminary work in the way of cleaning out brush and fallen trees, cutting away over-hanging limbs, etc., is necessary before driving operations can be successfully carried on. It was this class of work that the agreement contemplated. A portion of it was done in the autumn, and as to the charge for that no dispute arises. The cold weather, however, came on before the work was completed, and the remainder of it was done in the spring. For the cost of this latter portion defendants dispute their liability. I find on the evidence that, while doubtless all parties assumed that the work would all be done in the autumn, the agreement was in no way contingent on that. I find further that a large part of the work done by plaintiffs in the spring was primary cleaning out, such as defendants had agreed to share the cost of. This must be evident from the undisputed fact that over a considerable portion of the creek no work whatever was done in the autumn. The evidence is that even in the case of streams that have previously been driven, a certain amount of cleaning out is necessary each spring, and for this class of work defendants are not, of course, liable. The evidence is, however, that allowance, and I think I must find sufficient allowance, has been made for this by plaintiffs in arriving at the amount claimed. I therefore allow plaintiffs' claim at $706.04, the full amount claimed.

Under another verbal agreement defendants drove certain timber of the plaintiffs' down a stream know as Hudson creek. Both the measure of the remuneration payable and the quantity of the timber driven were disputed, but, in view of the opinion I expressed on the argument, counsel consented to my fixing the amount due defendants under this head at $214.20.

The most serious dispute of all, and one without which the other two would probably never have gone to suit, arises under a contract in writing, dated 18th March, 1904. Under the terms of this defendants undertook to "drive, sweep, and boom out at the mouth of the Wabis creek" certain timber of plaintiffs on that creek, plaintiffs, in consideration thereof, undertaking "to drive and sweep all the logs and timber, the property of the said Rideau Lumber Company Limited, placed in or on the banks of the Jean Baptiste river and Blanche river, from its junction therewith to the mouth of the said Blanche or White river, and there deliver the same to the Upper Ottawa Improvement Company, Limited."

The two following clauses occur in the agreement:—

"3. It is further agreed by and between the said companies that all timber or logs on the banks of the said rivers or creeks, to be driven as aforesaid, and which is not dumped into the waters of said rivers and creeks, when required so to be for that purpose, shall be dumped by that company hereby required to drive same, and a proper statement, shewing what logs and timber, if any, were so dumped, furnished forthwith to the company owning same, and such last mentioned company shall be liable for the usual sum paid for dumping logs and timber similarly situated, and pay to the company dumping same said sum or sums, if any, on demand.
. . .

"5. And it is further agreed that each of the said companies, their successors and assigns, shall make every reasonable effort under the circumstances to fulfil their respective parts of this agreement, during the driving season of this year, and if at any time either company fail to do so, the other company may give notice thereof in writing to such company offending, and in case such demand is reasonable and not complied with by a time to be specified for that purpose by the company giving notice, such last mentioned company may perform such services itself, at the expense and cost of the company so in default."

The agents who acted in the matter for the respective parties agree in saying that clause 5 was inserted by the solicitor who prepared the agreement without specific instructions from them, and that, owing to the extreme shortness of the driving season, the portion of it relating to notice of default, etc., was altogether unworkable.

Defendants completed their part of the contract, and as to that nothing arises. Plaintiffs admittedly left a large proportion of defendants' logs on the shores of the Jean Baptiste and the Blanche. It is said that it was not reasonably possible to get these logs down, and that plaintiffs, under clause 5 of the agreement, and even apart from it, are thereby excused. In the view I take, it is unnecessary to consider whether or not the kind of impossibility sought to be set up would excuse plaintiffs. I find on the evidence that plaintiffs' agents did not make proper effort to get the logs out, and it must therefore be presumed that, had they done so, they would have succeeded in bringing down all the logs. The evidence is too voluminous to permit of its being referred to in detail. I may, however, mention two or three points. Notwithstanding clause 3 of the contract, practically no attempt was made by plaintiffs' men to dump or assist in dumping defendants' logs on the banks of the Jean Baptiste. The foreman did not even know that such a duty was cast on him. It is said that what was known as the McNaughton dump was in very bad shape for handling, but plaintiffs' men did not even try. Again, the plaintiffs' agent was not justified in closing operations on the Jean Baptiste on 16th May, and discharging those of his men not required for the sweeping of the Blanche. He should have waited (as defendants' agent did on the Wabis) for the rain that was almost sure to come, and that did in fact come a few days later. Then, as regards the sweep of the Blanche, it was not impossible, but at the most only difficult, to roll the remaining logs into the water after the jam had been cleared away. There was plenty of water in the river all summer, and if the banks were too muddy to work on to advantage immediately after the water fell, the men could have been sent back to do the work later in the season. The plaintiffs are therefore liable for the damages occasioned by the failure to get the remainder of the logs out, and the only remaining question is as to the measure of damages. As regards the timber other than that in the McNaughton and the Stall-

wood & Gunn dumps, this presents no serious difficulty. It was all brought out by defendants in the following season, and the claim made is for the cost of bringing it out, together with interest on the cost of the stuff for the year during which delivery was delayed, and both of these defendants are certainly entitled to recover. As regards the McNaughton and the Stallwood & Gunn timber, however, the matter is further complicated, by the fact that both dumps were, in the interval, destroyed by fire. The Stallwood & Gunn dump was destroyed by a purely accidental forest fire soon after the close of the driving season. Learning of this, defendants' agent, in order to protect the McNaughton dump from a similar mishap, gave instructions to have the brush burnt away from around it, as it is customary for lumbermen to do in the case of their shanties, in order to protect them from forest fires. The pile, however, took fire from the burning brush and was destroyed. It is in evidence that had it not been destroyed in this way it would not have been destroyed at all, as no forest fire occurred in that vicinity during the year. In the view I take, it is unnecessary to consider whether or not the burning of the McNaughton logs was due to the negligence of defendants' employees. It appears to me clear that the accidental destruction of the timber by fire was not a result flowing so naturally from the plaintiffs' breach of covenant as to entitle defendants to the value of the timber by way of damages. There was evidence, it is true, to the effect that forest fires are of common occurrence in that country, and that the danger from them is a constant menace to shanties and to timber left behind in the spring. Still I think that is hardly enough to render plaintiffs liable in the way contended for. In the words of Armour, C.J., in Leggo v. Welland Vale Co., 2 O. L. R. 49, it was not a damage such as might fairly and reasonably be considered as either arising naturally according to the usual course of things from the breach of such a contract, or such as might reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. I quite recognize that the present is a much stronger case for allowing the damages than was Leggo v. Welland Vale Co. Still I think that, even here, the damages are too remote. The most that can be said is that the destruction of the timber by fire was a not unlikely possibility, and that I think is not enough. To what damages

then are defendants entitled? As the McNaughton and Stallwood & Gunn timber was never in fact brought down at all, the same measure obviously cannot be applied as in the case of the other logs. It does not appear to me that defendants are entitled to any more than nominal damages. The loss of the timber by fire is the only damage defendants have suffered. If plaintiffs are not liable to make that good, there cannot be any question of substantial damages at all. This result may appear unfortunate in view of plaintiffs' breach of contract, but it is, I think, inevitable.

As arranged on the argument, I will hear counsel further as to the quantity of timber left behind by plaintiffs and brought down by defendants the following year, and as to the cost to defendants of bringing it down.

Argument was afterwards heard as to the amount of damages and on the question of costs.

THE LOCAL MASTER:—After hearing further argument, I find that 6,500 logs were left behind in 1904 on the Jean Baptiste and the Blanche, by plaintiffs, and brought down the following year by defendants. This is exclusive of the McNaughton and the Stallwood & Gunn dumps destroyed by fire, the quantities in which, as only nominal damages can be recovered in respect of them, it is unnecessary to find. The total number of logs brought down by defendants in 1905, including those in question, was 31,667, and the total cost of bringing them down was $1,000. If defendants are entitled to a proportionate part of this sum as the cost of bringing down the 6,500 logs, the amount will be $291.37. Plaintiffs, however, point out that defendants would have brought down the other logs in any event, and contend that the cost of doing so could not have been materially increased by the addition of 6,500. It is of course, my duty, in assessing the damages, to endeavour to place defendants in the position they would have been in had the contract not been broken, but in no better position; and if it clearly appeared that the logs were brought down without expense, nothing would be allowable under this head. In the absence, however, of clear evidence of this, I cannot aid the wrongdoer by assuming it to have been so. It is definitely proved that defendants brought down 31,667 logs, at a total cost of $1,000. The only course open to me appears to be to attri-

bute to the logs in question a proportionate part of that sum. To fix on any other amount would be a pure assumption.

Defendants are also entitled to interest on the value of the logs for the year during which, owing to plaintiffs' default, they were deprived of the use of them. I think, on the evidence, this must be calculated, not at the legal rate, but at 6 per cent. It was the custom of defendants to carry on operations with money borrowed from the bank at that rate, and to credit receipts from sales on the loan. This was done in the year in question, and the actual loss amounted therefore to 6 per cent. The amount is $225. This leaves a net balance of $24.53 due defendants, made up as follows,—

Amounts recovered by defendants:		
On Hudson Creek contract		$214 20
On Jean Baptiste and Blanche contract:		
Cost of bringing logs down	$291 37	
Interest	225 00	
Burnt logs, nominal damages		516 37
		730 57
Amount recovered by plaintiffs		706 04
Balance due defendants		$ 24 53

It only remains to dispose of the question of costs. Plaintiffs have succeeded to the full extent of their claim, but of the $706.04 recovered, only $292.67 was ever seriously disputed. Defendants have succeeded on every item of the counterclaim, though the amount recovered is, in each case, considerably less than the amount claimed. In the case of the largest item, only nominal damages have been allowed. I think plaintiffs are entitled to the general costs of the action, and defendants to the costs of the counterclaim. It is true that the chief contest was on the counterclaim. Still, plaintiffs were fully entitled to sue for the claim, as it was due and unpaid. Defendants might have paid the amount into Court and brought an independent action on the counterclaim. I think, however, that the justice of the case can be fully met on taxation by duly considering, in fixing counsel fees, etc., the relative importance of the several issues.

TEETZEL, J. OCTOBER 8TH, 1906.

CHAMBERS.

FLEMING v. McCUTCHEON.

Arrest—Intent to Quit Ontario—Intent to Defraud Creditors —Evidence—Discharge from Custody.

Defendant was arrested under an order for arrest made by MACMAHON, J., on material which established a prima facie case that defendant was about to quit Ontario with intent to defraud plaintiff, within the terms of sec. 1 of R. S. O. 1897 ch. 80. Upon his arrest he was released on bail in terms of the order.

He now moved to set aside the order, and in the alternative for his discharge under Rule 1047, upon new material filed by him.

R. McKay, for defendants.

L. F. Heyd, K.C., for plaintiff.

TEETZEL, J.:—Even if I thought the original material insufficient, I could not, as I understand the practice, set aside the order, as that could only be done on appeal to a Divisional Court.

The law now appears to be well settled that to justify defendant's detention in custody, there must be not only the intention to quit Ontario, but also the intention thereby to defraud his creditors in general or plaintiff in particular, and that these are questions of fact in each case to be inferred from the facts and circumstances shewn by the affidavits. See Phair v. Phair, 19 P. R. 67; Beam v. Beatty, 2 O. L. R. 362.

Upon the motion for discharge defendant must shew such facts and circumstances as, in the opinion of the Judge, outweigh the prima facie case made by plaintiff and which negative an intent to defraud.

After a perusal of all the material filed, I am of the opinion that defendant in this case has established that his departure from Ontario was not with the intention of defrauding his creditors in general or plaintiff in particular, but that his purpose was honestly to better his position by establishing himself in the business of a druggist in the province of Saskatchewan.

Some of the facts which I find and which influence my conclusion are: (1) the sale of his business in Ontario was open and well known in his neighbourhood, and it was a profitable sale; (2) long before plaintiff's cause of action arose, defendant had seriously contemplated selling out and moving to Saskatchewan; (3) plaintiff's action is for breach of promise of marriage; her damages, if any, are uncertain, and defendant is, I believe, in good faith defending the action, believing plaintiff has no right to recover; (4) defendant has made provision out of the sale proceeds to pay all his business creditors; (5) he had arranged and intended to return to Ontario about the end of September or beginning of October to settle up a number of business affairs, pack and ship his furniture, and attend the trial of this action.

The order will, therefore, be directing defendant's discharge and a release of his bail. The costs to be costs in the cause unless otherwise ordered by the trial Judge.

ANGLIN, J. OCTOBER 8TH, 1906.

TRIAL.

KEEWATIN POWER CO. v. TOWN OF KENORA.

HUDSON'S BAY CO. v. TOWN OF KENORA.

Water and Watercourses—Expropriation of Lands of Riparian Owners—Development of Water Power by Municipality—Lease from Crown of Bed of Watercourse—Compensation to Owners—Basis of—Value of Lands—Interest of Riparian Owners in Bed of Stream and Water Power—Parties—Attorney-General—Non-navigable Stream Lying between and Connecting Navigable Waters—Impediments to Navigation by Falls—Title to Lands—Crown Patent—Construction—Ownership ad Medium Filum—English Rules as to Non-tidal Waters—Application to Ontario—Injury to Dam—Compensation for—Costs.

Actions to restrain the municipal corporation of the town of Kenora from prosecuting expropriation proceedings instituted for the purpose of acquiring certain lands situate on

both banks of a watercourse adjacent to the town, and generally known as the east branch of the Winnipeg river. The lands on the eastern bank (mainland) were the property of the Hudson's Bay Co., and those on the western bank (Tunnel Island) were owned by the Keewatin Power Co. The plaintiffs also asked declarations of certain rights which they asserted in the bed of the watercourse and in the water power which might be developed from it, and sought to prevent defendants from carrying on works designed for the development of such water power.

W. Nesbitt, K.C., and J. Jennings, for plaintiffs the Keewatin Power Co.

F. H. Phippen, K.C., and C. A. Moss, for plaintiffs the Hudson's Bay Co.

N. W. Rowell, K.C., G. Wilkie, and A. McLennan, Kenora, for defendants.

W. H. Hearst, Sault Ste. Marie, for the Attorney-General for Ontario.

Anglin, J.:—In 1892 the Hudson's Bay Co. leased part of their lands on the eastern bank for a term of 10 years to Messrs. McCrosson and Rideout for the purpose of establishing electric light and power works. The lessees took possession of these lands and constructed works on a small scale, using for their purposes a portion of the waters of the watercourse in question. In 1894 the term of this lease was extended to 20 years, subject to a provision for cancellation upon notice. This lease was at a later date transferred to the Citizens Telephone and Electric Power Co. of Rat Portage, which made a further development of the water power, and supplied the town of Rat Portage and its citizens with electric light, etc. By provincial statute 2 Edw. VII. ch. 62, defendants were authorized to acquire, and they subsequently purchased and took over, the water plant and works of the Citizens Telephone and Electric Co. Plaintiffs the Hudson's Bay Co. had meantime given a notice of cancellation to the Citizens Co., under which they allege that all rights under the lease above mentioned expired on 29th March, 1902. Defendants, however, took possession of the lands covered by the lease, and of the plant and works, under their assignment from the Citizens Co. They then conducted negotiations with the Hudson's Bay Co. for the

purchase from them of the lands theretofore leased to Messrs. McCrosson and Rideout. These negotiations proved unsuccessful, because of the differences between the parties which it is the purpose of these actions to determine, and in 1903 defendants procured from the legislature authority for the expropriation of such lands on both sides of the watercourse as should be required for the power development which they contemplated making. In 1905 defendants obtained from the Crown, as represented by the government of the province of Ontario, what purports to be a lease of the bed of the watercourse in question. They then proceeded with blasting and other works for the development of power in this watercourse, having first given notices of expropriation of the lands upon the banks under their statutory powers. Arbitrators were duly appointed, etc. An order made by the District Court Judge requiring plaintiffs, upon payment into Court of a comparatively trifling sum, to deliver to defendants immediate possession of the lands for the expropriation of which notices had been given, precipitated the present actions.

In the course of the trial before me, by arrangement between the parties, made with my approval, all objections by plaintiffs to the sufficiency and regularity of the expropriation proceedings of defendants were waived; the claim for injunction was withdrawn; the lands described in the expropriation notices given by defendants were conceded to be requisite for their purposes; and it was agreed "that issues should be tried to settle the rights of the parties and obtain directions to arbitrators as to what basis damages by way of compensation are to be assessed on, whether as owners of bed of river in addition to land, or as owners of land only, and in such case to define rights to be taken into consideration by arbitrators." Certain other minor difficulties were also adjusted.

As a result of this very sensible arrangement, the development works of defendants at Kenora are proceeding. The Court is now asked to determine for what plaintiffs are entitled to claim compensation—whether (a) merely for the value of the lands on the respective banks of the watercourse which defendants purpose taking from them; or (b) also for the value of the adjacent bed and the water power which may be developed from the watercourse lying between the lands of the Hudson's Bay Co. and those of the Kee-

watin Power Co.; or (c) for the value of the lands upon the banks, coupled with such rights in the waters flowing past them as plaintiffs are entitled to as riparian owners.

At the opening of the trial counsel for defendants directed attention to the fact that the title of the Crown to the bed of the river, and to the water power in question, asserted by the lease to defendants, is denied by defendants, and asked that the Attorney-General for Ontario be added as a party defendant in each action. Counsel for plaintiffs opposed that motion. Upon being asked if he would assent to this being done, Mr. Hearst, who appeared for the Attorney-General, requested an opportunity to obtain specific instructions. He subsequently stated that the Attorney-General declined to consent to be made a party, and I thereupon refused Mr. Rowell's motion. (See Eddy v. Booth, 7 O. W. R. 75.) Mr. Hearst continued, however, to watch the proceedings on behalf of the Attorney-General.

Much evidence at the trial and not a little strenuous argument was directed to the question whether the water-course with which we are dealing should be deemed part of the Winnipeg river, and should be regarded as part of a stretch of navigable water, or should be held to be a non-navigable stream, connecting two considerable lake-like expanses of navigable water, neither of which forms part of a river. Upon this branch of the case I have had the advantage not merely of the oral testimony adduced, but also of the view which, at the request of all parties, I took of the waters immediately in question and waters adjacent thereto. Upon this inspection of the river my conclusions as to the character of the waters at the point in dispute are largely based.

The town of Kenora is situated at the northern end of the Lake of the Woods. This large and important body of water, studded with countless islands, extends some 80 miles southerly from Kenora to the mouth of the Rainy river, which flows into it, and which forms part of the international boundary betweeen Canada and the United States of America. Its width varies. In some places it is many miles wide, its area being about 2,000 square miles. It is said by some witnesses that formerly there were several natural exits for the waters of this lake. To-day there are but two, known as the east and west branches of the Winnipeg river, and, upon the evidence, I find that there never

was any other natural outlet. These two outlets—the western carrying about 3 or 4 times as much water as the eastern—are three-quarters of a mile apart, being separated by Tunnel Island.

The western branch is several hundred feet wide, and is crossed by a costly and apparently effective regulating power dam constructed by the Keewatin Power Co. The eastern branch, about 60 feet wide, carries a considerable volume of water, which for a short distance rushes down what may be described as almost a gorge, having at one point an abrupt fall of some 15 feet. The length of this "branch" is about 8,000 feet measured from the waggon bridge to the north end of Old Fort Island. The total fall, some 18 feet, occurs in a distance of a few hundred feet. Above and below the falls this branch is itself navigable. Upon the whole evidence I find that the minimum volume of water flowing through this east branch is and always has been capable of producing in the natural condition of the stream, upon development, at least 4,000 horse power. Below the point at which the waters of the eastern and western branches or outlets meet, there is another lake-like expanse of waters, varying in width, containing many islands, and with very little, if any, defined current. Though much smaller than the Lake of the Woods, this body of water is not at all dissimilar in character.

For many years geographers appear to have treated the Winnipeg river as beginning at the head of the two outlets from the Lake of the Woods. All the maps and documents produced, many of them of a public character, refer to the outlets of the lakes as branches of the river. The proper finding upon all the evidence is, in my opinion, that the Winnipeg river commences at the points of outlet from the Lake of the Woods, and that the expanse below the falls of the east and west branches, and those branches themselves as well, form part of that river.

Of the non-navigability of both branches, for a short distance in each, there cannot be any question whatever. The waters below, as well as above, are, however, in my opinion, unquestionably navigable. They afford a route for carriage by water of considerable commercial importance, extending in an otherwise unbroken stretch for some 114 miles. The traffic upon the Lake of the Woods has been for many years past and is still considerable. It is navigable for fairly

large steamboats for a distance of 80 miles south of Kenora. North of Kenora, after the falls and rapids in the east and west branches are passed, the Winnipeg river broadens out and is navigable for at least 34 miles by small steamboats, some 3 or 4 of which ply up and down, carrying freight and a few passengers. At a point 7 miles north of Kenora the first rapids occur. They are not sufficient to interrupt navigation. From a point 34 miles north of Kenora the navigation of the river becomes more difficult, numerous portages being necessary before Lake Winnipeg, 163 miles distant from Kenora, is reached. But in this distance there are several stretches of good water about 20 miles in length, capable of carrying boats drawing 5 or 6 feet. This river for many years served as part of the trade route for the Hudson's Bay carriers from the east to Fort Garry and other points. York boats, with a capacity of 20 tons, were navigated up and down it. The volume of water flowing down the river is at all points such that, if natural obstacles were overcome by canals or other artificial means, a route for navigation from Lake Winnipeg to Fort Francis would be quite feasible. Even in its present condition its value as a trade route is not inconsiderable, though since the advent of railways it is no longer travelled as it was in by-gone days. Yet from Fort Francis 80 miles down the Lake of the Woods to Kenora and from Kenora northwards to the crossing of the transcontinental railway—25 to 30 miles farther—Mr. Henry Ruttan, a witness for plaintiffs, upon whose testimony I feel that I may rely, says the waterway is of very great value, adding that the natural impediment to navigation presented by the falls in the east branch of the river can be easily overcome by means of a canal. . . .

[Quotations shewing what is a navigable river, from Regina v. Meyers, 3 C. P. at pp. 349, 350, 351, 352; Essen v. McMaster, 1 Kerr 501; Rowe v. Titus, 1 Allen 329; McLaren v. Caldwell, 6 A. R. at p. 489; Wadsworth v. Smith, 11 Me. 280; The Montello, 20 Wallace 430; United States v. Rio Grande, 174 U. S. R. 690; Broadnax v. Baker, 94 N. C. 675; Farnham on Waters, pp. 125, 127.]

Applying these definitions of navigability, I have little hesitation in holding that the Winnipeg river, said to carry a volume of water little inferior to that of the Ottawa, formerly a great channel of commerce and still of considerable value as a trade route, must be deemed a navigable river.

There can be no question whatever of the navigation in fact at the present time of the waters of this river for 34 miles below the falls of the east branch at Kenora, and of the waters of the Lake of the Woods for 80 miles above Kenora. This east branch, whether regarded as part of the Winnipeg river, as I think it should be, or as a distinct stream, is unquestionably a link in a great stretch of navigable waters of considerable commercial value and importance, in the course of which occurs, in a distance of 114 miles, but one natural impediment to navigation. Such is the character of the watercourse in which it becomes necessary to determine the extent of the rights of riparian proprietors, which plaintiffs certainly are.

The Keewatin Power Company, Limited, are, by grant from the government of Ontario, dated 30th April, 1894, owners of the whole of Tunnel Island, excepting only the right of way of the Canadian Pacific Railway Company across the island.

The Hudson's Bay Company claim to have had title, under grant and charter of His late Majesty King Charles II., to a vast territory lying north and west of the great lakes, which included the lands in question. By deed of surrender, executed in November, 1869, the Hudson's Bay Company relinquished to the Crown all their rights of government over this great territory and title to all the lands comprised in it, excepting certain reserved strips or blocks occupied by and in proximity to their established trading posts, the lands so retained to be selected and to amount in all to 50,000 acres. Upon the eastern bank of the east branch of the Winnipeg river the company at first stipulated for a reservation of 50 acres. But, the lands selected at their various posts being somewhat less than the 50,000 acres agreed upon, in 1872, under an order in council of the government of the Dominion of Canada, to which the British government had transferred the lands relinquished by the company, the company were allowed to select "additional tracts of land" to complete the area of 50,000 acres for which they had stipulated. They then asked for and obtained the right to retain a block of 690 acres at Rat Portage. These lands were surveyed and laid out by Charles F. Miles, P.L.S., under instructions from the Minister of the Interior. They border on the Lake of the Woods and the east branch of the Winni-

peg river. In 1887 the government of the province of Ontario, at the request of the Dominion authorities, issued a patent to the Hudson's Bay Company for this tract of 690 acres, laid out by Miles. The Hudson's Bay Company assert that this patent was merely confirmatory of a title which they had from the time of the grant of Charles II., and retained by virtue of their reservation of 50,000 acres from the surrender to the Crown in 1869. This defendants do not admit, claiming that the Hudson's Bay Company's title rests solely upon the patent of 1887 from the government of Ontario.

The deed of surrender from the Hudson's Bay Company to the Crown excepts the reserved lands in these terms:—"2. The company to retain all the posts or stations actually possessed and occupied by them or their officers or agents, whether in Rupert's Land or any other part of British North America, and may within 12 months after the acceptance of the said surrender select a block of land, adjoining each of their posts or stations, or within any part of British North America, not comprised in Canada and British Columbia, in conformity, except as regards the Red River Territory, with a list made out by the company, and communicated to the Canadian Ministers, being the list in the annexed schedule. The actual survey is to be proceeded with with all convenient speed."

"4. So far as the configuration of the country admits, the blocks shall front the river or road by which means of access are provided, and shall be approximately in the shape of parallelograms, and of which the frontage shall not be more than half the depth."

At Rat Portage the company's reservation, according to the schedule annexed to the deed of surrender, was restricted to 50 acres. What portion of the 690 acres eventually granted these 50 acres comprise, it is impossible to say. The increase in the area allotted to the company at Rat Portage is explained by a report of the Deputy Minister of the Interior to have been "the result of subsequent arrangement between the company and the government." The order in council of the Ontario government shews that the patent for the 690 acres was issued on the recommendation of the Minister of Crown Lands, stating that "it is proper that the agreement entered into by the government of Canada with the Hudson's Bay Company in the years 1870 and 1872 should be carried out in good faith."

The Ontario patent issued to and accepted by the Hudson's Bay Company grants to them "a parcel or tract of land . . . containing by admeasurement 690 acres, be the same more or less, being composed of a block of land as shewn by a plan of survey by Provincial Land Surveyor Charles F. Miles, dated 7th January, 1875. . . ." This plan shews the plot of 690 acres to extend to the water's edge of the Lake of the Woods and of the east branch of the Winnipeg river.

Applying the ordinary canons of construction, the position of the Hudson's Bay Company should be rather better under the patent from the Ontario government, than under the earlier title which the company asserts, since a reservation in their deed of surrender would be restricted to that which it expresses, rather than extended to include incidental rights not in terms reserved: Bullen v. Dunning, 5 B. & C. 849, 850. These plaintiffs are, of course, entitled to the full benefit of the patent from the government of this province which they have accepted and which they produce in evidence of their title. I find nothing in the terms of the reservation in the deed of surrender that would aid them in maintaining a construction of it which would assist their present claim. I cannot, therefore, see that their claim of title by reservation, if conceded, would at all improve their position or confer rights wider or more extended than those assured to them by their provincial patent.

Mr. Rowell contended that because plaintiffs' grants are from the Crown they must receive a construction which would confine the subject matter of the grants strictly to that which is explicitly described. In Lord v. Commissioners of Sydney, 12 Moo. P. C. 473, it was held that a Crown grant of lands bordering upon a non-navigable creek carried title to the bed ad medium filum. . . . See too Attorney-General v. Scott, 34 S. C. R. 603, 615.

Nor does the fact that the Hudson's Bay Company's lands are described as a parcel shewn upon a plan, which indicates the water's edge as one of the boundaries of the parcel, at all affect the rights of the grantee. These rights are precisely the same as if the lands had been described by metes and bounds, and as extending to any lying along the water's edge; Micklethwaite v. Newberry Bridge Co., 33 Ch. D. 133, 145; Kirchoffer v. Stanbury, 25 Gr. 413, 418; Smith v. Millions, 16 A. R. 140.

In the case of the Hudson's Bay Company, therefore, subject to some reservations in their grant with which I shall deal presently, the question is squarely presented, does a grant from the Crown of lands of defined area, extending to the water's edge of such a stream as the east branch of the Winnipeg river, carry with it title to the river bed ad medium filum, and to the superjacent waters and the rights to any power that may be developed from them?

Subject to the effect of special terms in the grant to the Keewatin Power Company, which must be separately dealt with, the same question arises upon that instrument.

Plaintiffs maintain that the English rule under which a grant of lands upon the banks of non-tidal waters entitles the grantee to claim that his lands extend ad medium filum aquæ, is in full force in this province; they further contend that as riparian owners, though the alveus ad medium should not be held to be included in the grant to them from the Crown, they are entitled to the use—ordinary and extraordinary—of the waters flowing past their lands; they also assert that in any case the titles of riparian owners prima facie extend to mid-stream in such portions of navigable waters as are non-navigable owing to natural impediments. Defendants, while fully admitting the common law doctrine prevalent in England, maintain that a different rule must obtain on this continent; that the rule that the ownership of the alveus remains in the Crown, confined in England to tidal waters, must here be extended to all waters navigable in fact; that where the waters above and below are navigable, a short watercourse connecting such navigable waters, though obstructed by a non-navigable fall or rapid, must be deemed part of a navigable stretch of water; and that the rights of riparian owners along such obstructed watercourse are the same as those of riparian proprietors whose lands border upon the main bodies of water above and below. They further maintain that any extraordinary use of the waters of a stream, such as for purposes of power development, is incident to the ownership of the alveus, and is not the right of a proprietor whose lands extend only to the water's edge.

The doctrine of the common law as administered in England that, whereas in tidal navigable waters the title to the alveus is presumed to remain in the Crown unless expressly granted, in all non-tidal rivers, whether, in fact, navigable

or non-navigable, the title to the alveus is presumed to be in the riparian proprietors, is too long and too clearly established to admit of any controversy. Upon the applicability of the latter portion of this rule to navigable non-tidal rivers in Ontario, and to non-navigable portions of navigable water stretches, the parties are at issue. Counsel for plaintiffs concede, however, that whereas in England, upon waters non-tidal but navigable in fact, the public right of navigation depends upon some Act of Parliament, or upon express dedication or prescription, in Ontario, as in the United States, this right exists jure naturæ and independently of any statute, proven grant, or presumption from user. This conceded modification of the English doctrine is well warranted by authority: Regina v. Meyers, 3 C. P. 305, 346, 351, and many later cases; see too Caldwell v. McLaren, 9 App. Cas. at p. 405.

How far, if at all, the doctrines of the English common law are to be otherwise modified in their application to the rivers and lakes of this province is the principal question for determination in these actions. Upon this subject we have had some valuable expressions of judicial opinion in our own Courts. There has also been much discussion in the Courts of the United States upon the same question, which has frequently arisen in various States of the Union. . . . .

[Quotations from and references to Re Provincial Fisheries, 26 S. C. R. 444, 451, 521; Barthel v. Scotten, 24 S. C. R. 367, 370; The Queen v. Robertson, 6 S. C. R. 52, 129; Ratté v. Booth, 14 A. R. 419, 439; Parker v. Elliott, 1 C. P. 470, 489; Regina v. Meyers, 3 C. P. 305, 350, 351, 357; Gage v. Bates, 7 C. P. 116, 122; Attorney-General v. Perry, 15 C. P. 329, 331; Dickson v. Snetsinger, 23 C. P. 235, 245; Warin v. London and Canadian Loan and Agency Co., 7 O. R. 705, 722, 723; Miller v. Great Western R. W. Co., 13 U. C. R. 582; Regina v. Sharp, 5 P. R. 135; Kairns v. Turville, 32 U. C. R. 17; Re Trent Valley Canal, 12 O. R. 153.]

In none of these cases does the question now presented appear to have been expressly decided. But the expressions of opinion quoted from Judges of eminence are so clear and numerous that they seem entitled to be accorded the weight of binding authorities. What is there to be found against them? . . .

[Quotations from and reference to Massawippi Valley R. W. Co. v. Reed, 33 S. C. R. 457, 468, 469; The Queen v. Robertson, 6 S. C. R. 52; Lord v. Commissioners of Sydney, 12 Moo. P. C. 473; Caldwell v. McLaren, 9 App. Cas. 392, 404; Re McDonough, 30 U. C. R. 288.]

I find no other reported case in this province or in England which throws any light upon the question how far our non-tidal navigable waters should be deemed subject to the ad medium of the English common law. The weight of judicial opinion of authority in this province distinctly supports the view that the soil in our rivers navigable in fact is presumed to remain in the Crown, unless expressly granted.

The American authorities afford little assistance. The Supreme Court of the United States has held in many cases that grants of land bounded by waters, made without reservation, must be construed according to the law of the State in which the lands lie: Hardin v. Jordan, 140 U. S. R. 371; Mitchell v. Smale, ib. 406; Grand Rapids v. Butler, 159 U. S. R. 87; . . . The Genesee Chief v. Fitzhugh, 12 How. (U. S.) 443; . . . Kingman v. Sparrow, 12 Barb. 201; Canal Commissioners v. People, 5 Wend. 446; United States v. Chandler-Dunbar Co., Wanty, J., United States Circuit Court, 20th July, 1905, not reported. . . .

Beyond vague statements that the ad medium rule is unsuited to the conditions of non-tidal navigable waters in Canada, and should therefore be held not to be in force, I find no reason advanced in our cases (excepting Dickson v. Snetsinger, the ratio decidendi of which seems inapplicable to the western portion of this province) to support the view propounded in the comparatively numerous dicta which I have quoted. While it is obvious that the ad medium rule would produce incongruities and almost absurdities, if applied to the great lakes, and must give rise to serious difficulties if held applicable to rivers forming part of the international boundary, I must own that I see no incongruity and no difficulty likely to result from its application to our numerous inland rivers which are navigable in fact.

If the ad medium rule should be discarded merely on the ground of unsuitability, where should the line be drawn? Because unsuitable to some of our non-tidal navigable waters, should it be held inapplicable to all? Uniformity might be so attained, but would not that end be practically

achieved by excepting from the application of the rule only the great lakes and the rivers connecting them and other rivers which form part of the international boundary?

How far does merely partial unsuitability warrant the exclusion from our system of jurisprudence of a portion, not of the English statutory law, but of the common law proper?

The Act of 1792, 32 Geo. III. ch. 1, introduced "the laws of England" in the most comprehensive terms. It contained no restricting words, such as "so far as applicable to conditions prevailing in Upper Canada," "so far as local circumstances permit," "so far as such laws can be applied," or "as near as might be."

Upon such qualifying words the Courts have held that certain English statutes, not suitable to young colonies in new countries, were not brought into force by enactments introducing English law in terms otherwise general: Attorney-General v. Stewart, 2 Mer. 143; Whicker v. Hume, 7 H. L. C. 134; Rex v. McKinney, 14 App. Cas. 77; Yeap Cheah Neo v. Ong Cheng Neo, L. R. 6 P. C. 381; Mayor of Lyons v. East India Co., 1 Moo. P. C. 175. But, although the statute in question in the three cases first cited (the Mortmain Act) has been held to be in force in Ontario—Doe Anderson v. Todd, 2 U. C. R. 82; Whitby v. Liscombe, 23 Gr. 1; Macdonell v. Purcell, 23 S. C. R. 101—opinions have very much differed as to the sufficiency of the general language of 32 Geo. III. ch. 1 to effect its introduction. . . . . But statute law and common law existing independently of statute are widely different subjects: Uniacke v. Dickson, 2 N. S. Rep. (James) 287, 289, 290; and I find no case in which it has been held that a general and unrestricted introduction of English law into ceded territory does not bring into force the entire common law proper, as distinguished from English statutory law. There are, however, several dicta of learned Judges to the effect that the introduction of the common law proper into Upper Canada is subject to the same qualification which has been implied in regard to the statute, namely, that provisions of the English law not applicable to the state and condition of the province were not imported. . . .

[Reference to Doe Anderson v. Todd, 2 U. C. R. at p. 86; Whitby v. Liscombe, 23 Gr. at p. 37; Attorney-General

v. Stewart, 2 Mer. at p. 148; Gage v. Bates, 7 C. P. at p. 129; Dickson v. Snetsinger, 23 C. P. at p. 245; Re Provincial Fisheries, 26 S. C. R. at p. 528.]

Though it be fairly well established that such portions of the English common law proper as were not reasonably applicable to the conditions of this province were not introduced in 1792, yet the application of the criteria of "suitability" and "reasonableness" must, except in the clearest cases, always give rise to difficulty and not infrequently to divergence of opinion: see Doe Anderson v. Todd, 2 U. C. R. at p. 87, per Robinson, C.J. Assuming that doctrines of the English common law wholly unsuited to our conditions should be altogether rejected, and other doctrines of the same law applied only so far as they appear to be reasonably adapted to those conditions, in determining to what non-tidal navigable waters in Ontario the English ad medium rule is not reasonably applicable, our Courts would encounter many difficult problems, for the solution of which it would scarcely seem possible to prescribe any immutable standard.

That the rights of riparian proprietors may be as little uncertain as possible, it will be better, if a logical basis can be found for that conclusion, that it should be held that the ad medium rule does not apply to any waters in this province which are navigable in fact, rather than that the rule applies to such bodies of navigable water as the Courts may from time to time deem fit subjects for its application. I think such a basis exists.

It is conceded that the public right of way upon our non-tidal waters which are navigable in fact has always existed ex jure naturæ. That right in these waters is precisely the same as the like right in tidal navigable waters. If the presumption which ascribes to the Crown the title in the soil under English waters navigable in law rests upon the tidal character of such waters, the fact that the right of navigation upon our waters exists jure naturæ is not of importance; but, if that presumption arises from the existence jure naturæ of the public right of navigation in English tidal waters, then the like right in our non-tidal navigable waters should carry with it the same presumption.

Upon an examination of the English cases, the navigability and not the tidal character of tidal navigable waters appear to be the real foundation of the presumption that the ownership of the soil is vested in the Crown.

Although the flux and reflux of the tide affords prima facie evidence of navigability, its strength depends upon the situation and nature of the channel: Rex v. Montague, 4 B. & C. 598, 602; Miles v. Rose, 5 Taunt. 705; Mayor of Lyons v. Turner, Cooper 86. In these and other cases it has been held that many incidents of tidal navigable waters do not extend to non-navigable waters subject to the influence of the sea tides. . . .

[Reference to Woolrych's Law of Waters, 2nd ed., p. 42; Illinois Central R. R. Co. v. Illinios, 146 U. S. R. 387; Gann v. Free Fishers of Whitedale, 11 H. L. C. 192.]

A consideration of the decisions upholding the title of the Crown to the bed of tidal waters has satisfied me that the necessity of fully protecting the public rights of navigation and fishery in the superjacent waters was the dominant, if not the sole, factor in building up the English common law doctrine that the beds of navigable tidal waters are presumed to be vested in the Crown.

The facts that the presumption of navigability was restricted to tidal waters, and that the importance of the public rights in non-tidal navigable rivers was not recognized when title to the lands upon their banks was acquired, account for acquiescence in the claim to title to the alveus made by riparian owners upon the latter class of rivers. That claim, conceded in early days, precluded the application in England to these waters of the presumption in favour of Crown ownership of the alveus which obtained in regard to tidals waters; because when the public right of navigation in non-tidal rivers was asserted, private rights in the soil of the bed had long since become vested. In this country the public right of navigation in all navigable waters has always existed and been recognized. To give the fullest effect to all the incidents which, in the absence of obstacles, that right should carry with it, interferes here with no vested interests. The title to both bed and banks being in the Crown, its grant of the latter may be construed according to the rules which govern the construction of grants made under similar conditions in England.

Unity of title in the Crown to bank and bed only occurs in England in regard to tidal navigable waters. There the nature of the tenure upon which the Crown holds title to the alveus of rivers navigable in law precludes any presumption

of an intention to part with any portion of it, unless such portion is granted in express terms. Since in all waters of this country, which are navigable in fact, the interest of the Crown in the bed is precisely the same as that which it possesses in the fundus of tidal navigable waters in England, it is a logical deduction that by nothing short of an express grant should the Crown be held to have parted with its title to the alveus of our navigable rivers.

Indeed it may not unfairly be said that even in England the application of the ad medium rule is restricted to rivers in which the alveus had already become the property of private riparian owners before the public right of navigation in such rivers was established. We have no rivers of the latter class in this country.

When the raison d'etre of the English ad medium rule as applied to non-tidal navigable rivers is understood, and the peculiar conditions under which it became established in England are appreciated, English authorities no longer present formidable obstacles to the acceptance of the proposition enunciated in the many strong expressions of opinion by our own Judges which I have quoted. In our rivers which are navigable in fact, because the public rights in them are recognized to have always existed, ex jure naturæ, the title to the alveus must be presumed to remain in the Crown unless expressly granted. It follows that a Crown grant of lands bordering upon such rivers gives title to the grantee only to the water's edge.

But it is argued that in any event the ad medium rule should apply to such parts of navigable rivers as are in their natural state non-navigable owing to impediments such as falls or rapids. Such is not my opinion. Once the navigable character of the river is established, up to the point at which navigability entirely ceases, the stream must be deemed a public highway, though above that point it is private property: The Queen v. Robertson, 6 S. C. R. 52.

The inconvenience which would ensue were the soil of the bed of the same river in alternate stretches vested in the Crown juris publici, and in the riparian owners juris privati, affords strong ground for the belief that the law is not in a condition which would produce such results. Then again, though navigation at the falls in the east branch of the Winnipeg river is presently impossible, the engineers

say that a canal to overcome the natural obstacle which the falls present is quite possible. Is not the stream even at this point navigable in posse? I think it is.

There is judicial authority for the proposition that a natural interruption of navigation in a river, in its general character navigable, does not change its legal characteristics in that respect at the point of interruption, and that riparian owners are not at such point presumed to own the bed ad medium filum: Re State Reservation at Niagara Falls, 16 Abbott's New Cases (N.Y.) 159, 187, 37 Hun 507, 547-8. I do overlook the fact that the river under consideration in this case was international. See too Broadnax v. Baker, 94 N. C. 675, 681; Farnham on Waters, p. 102; Hurdman v. Thompson, Q. R. 4 Q. B. 409, 537, 450.

Gwynne, J., in McLaren v. Caldwell, 8 S. C. R. 435, at pp. 465-6, expressed obiter the contrary view, basing it upon the judgment of Sir James Macaulay in Regina v. Meyers, 3 C. P. 305. But on examination Sir James Macaulay's judgment hardly seems to warrant its citation as authority for the proposition of Mr. Justice Gwynne: see p. 352. The judgment of the Supreme Court in McLaren v. Caldwell was reversed in the Privy Council, 9 App. Cas. 392, but this point is not touched upon in the judgment of the Judicial Committee.

As part of an important stretch of navigable waters the east branch of the Winnipeg river is, in my opinion, at the falls, as well as above and below them, subject to the incidents of navigable waters.

Apart, therefore, from any special terms which they contain, the grants to the plaintiffs do not sustain their claim to the ownership of the bed of the portion of the east branch of the Winnipeg river which flows between their respective properties.

But Mr. Rowell argues that certain reservations in the Hudson's Bay Company's grant and other special provisions in the Keewatin Power Company's grant also require this construction.

The former grant contains these words:—"Saving, excepting, and reserving nevertheless, unto Us, Our Heirs and Successors, the free uses, passage, and enjoyment of, in, over, and upon all navigable waters that shall or may be hereafter found on or under or be flowing through or upon any part of the said parcel or tract of land hereby granted

as aforesaid, reserving also right of access to the shores of all rivers, streams, and lakes for all vessels, boats, and persons, together with the right to use so much of the banks thereof, not exceeding one chain in depth from the water's edge, as may be necessary for fishery purposes."

The reservation of rights of navigation is merely an expression of what would be presumed were there an express grant of the alveus itself. It is quite consistent with the patent conveying to the grantee title to the bed of the river ad medium. The reservation of the right of access to the shores is, in my opinion, merely incidental to the right of navigation, and also consistent with the grant carrying title to the bed ad medium: see Hawkins v. Mahaffy, 29 Gr. 326.

But the reservation of the right to use a strip along the bank one chain in depth from the water's edge for fishery purposes is not so easily disposed of. This also is merely an easement, yet it implies that the right of fishery does not pass to the grantee, as it would if the stream were strictly private, and the grant carried title to the soil ad medium. The right of fishery is a profit à prendre appertaining to the ownership of the alveus: Re Provincial Fisheries, 26 S. C. R. 444; Robertson v. The Queen, 6 S. C. R. 52. If then the grant carried title to the bed of the stream ad medium, the right of fishery passing with it, this reservation would be meaningless. Does its presence indicate that it was intended that title to the soil of the bed should remain in the Crown, or merely that the grantee should not have as a property right, incident to his ownership of the soil, an exclusive right of fishery? In Hindson v. Ashby, [1896] 2 Ch. 1, at p. 10, Lindley, L. J., says: "It must be taken as now settled that, if the right to a several fishery in a public navigable river is proved to exist, the owner of the fishery is to be presumed to be also the owner of the soil over which his fishery extends, unless there is evidence to the contrary:" Holford v. Bailey, 8 Q. B. 1000, 1016, 13 Q. B. 426. The presumption would seem to be a fortiori in a private river. If then the language of the Hudson's Bay Company's patent implies a reservation of a right of fishing to the Crown for the public, the argument that the soil of the bed of the stream was not intended to pass to the grantee seems cogent. But the view I have taken of the main question renders it unnecessary to determine the nature and effect of this reservation.

In the case of the Keewatin Power Company, however, we find reservations of a very different character. That instrument is, the defendants urge, only consistent with the grantees' title terminating at the water's edge. The letters patent granting Tunnel Island also grant to the Keewatin Power Company in express terms two smaller islands lying in the west branch of the Winnipeg river, between Tunnel Island and the mainland, a block of land on the south shore of the west branch of the river, and all the islets or reefs of rocks and the land under the water in the west branch of the Winnipeg river between Tunnel Island and the block of land upon the south shore granted to the company, "together with the water power adjoining thereto on the west branch or outlet of the said Winnipeg river, the whole herein described land containing 386 acres and a half more or less." This grant is "subject to the condition and understanding that nothing herein contained shall be construed as conferring upon the grantees exclusive rights elsewhere upon the said Lake of the Woods or upon any other streams flowing into or out of the said lake, or shall confer upon the said company power or authority to interfere with or in any way restrict any powers or privileges heretofore enjoyed by Us, or which may hereafter be granted or demised to any other person or company in respect of any other water power on the said Lake of the Woods, or any other stream flowing out of or into the said lake. Provided that any such powers or privileges which may hereafter be granted shall not destroy or derogate from the privileges hereby granted."

The grant of the islets and reefs or rocks and land under water, situate between Tunnel Island and the block of land upon the south shore granted to the company, imports that the grant of the two latter parcels did not carry title to the bed of the river, because, if it did, these rocks or islets and the land under water would, by virtue of that title, become the property of the grantees, and this express grant of them was wholly unnecessary. If the title to the bed of the west branch did not pass, except by this express grant, neither did the title to the bed of the east branch ad medium, of which there is no such express grant. The express grant of the water power on the west branch reinforces this argument. The interpretative words "that nothing herein contained shall be construed as conferring upon the grantees exclusive rights elsewhere upon the said Lake of the Woods, or upon

any other streams flowing into or out of the said lake," render it, in my opinion, impossible to successfully contend that this grant was intended to give to the Keewatin Power Company ownership of the western half of the bed of the east branch of the Winnipeg river—another stream flowing out of the Lake of the Woods—which would carry with it the "exclusive rights" which these plaintiffs now assert. Lord v. Commissioners of Sydney, 12 Moo. P.C. 473, 497, 498; Hare v. Horton, 5 B. & Ad. 715; Farnham on Waters, p. 240. The reservation of the right to demise powers and privileges in respect to other water powers and other streams flowing out of the lake, if possible renders this conclusion still more certain. Upon this ground, as well as upon the non-applicability of the ad medium rule to these waters, I am clearly of opinion that the claim of the Keewatin Power Company to the soil of the western half of the bed of the east branch of the Winnipeg river wholly fails.

What then are the rights of the plaintiffs as riparian owners not entitled to the soil of the bed of the stream? There can be no doubt that, subject to any restrictions in the grants under which they take title, riparian owners are entitled to a most extensive usufruct, extraordinary as well as ordinary, of the waters flowing past their lands.

In Miner v. Gilmour, 12 Moo. P. C. 131, Lord Kingsdown, delivering the judgment of the Judicial Committee, says at p. 156: "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him."

In North Shore R. W. Co. v. Pion, 14 App. Cas. 612, Lord Selborne, after quoting the above passage as undoubted law, says at p. 620: "The question whether this general law was, in England, applicable to navigable and tidal rivers arose, and (with the qualification only that the public right of navigation must not be obstructed or interfered with)

was decided in the affirmative by the House of Lords, in Lyon v. Fishmongers' Co., 1 App. Cas. 683. That decision was arrived at, not upon English authorities only, but on grounds of reason and principle, which (if sound, as their Lordships think them) must be applicable to every country in which the same general law of riparian right prevails, unless excluded by some positive rule or binding authority of the lex loci." See too Hamelin v. Bannerman, [1895] A. C. 237, 240.

Where the banks on either side are vested in the same person, only the rights of owners above and below need be considered in using the waters. But where the banks on either side belong to different persons, the soil of the alveus being not the common property of both, but belonging to each in severalty usque ad medium filum, neither proprietor is entitled to use it in such a manner as to interfere with the natural flow of the stream past the property of the other.

In Bickett v. Morris, L. R. 1 Sc. App. 47, these restrictions upon the rights of riparian owners are pointed out, and it is held that "any operation extending into the stream is an interference with the common interests of the opposite riparian proprietor, and, therefore, the act being prima facie an encroachment, the onus seems properly to be cast upon the party doing it to shew that it is not an injurious obstruction:" p. 56; see too pp. 59 and 61; Orr Ewing v. Colquhoun, 2 App. Cas. 845, at p. 861; Kirchhoffer v. Stanbury, 25 Gr. 413, 420.

Where the riparian proprietor is not the owner of the part of the alveus adjacent to his land, he has no right to place any erection upon it or to interfere in any way with the bed of the stream. His right to the usufruct of the water is restricted by the limitations that he may not place any erection in the alveus and may not, except for ordinary purposes, employ the water in any manner which interferes with the rights of adjacent proprietors opposite as well as above and below him on the stream. These riparian rights are of course subject to the public right of navigation and to the right of fishery incident to the ownership of the alveus.

Thus limited, this right of usufruct the Hudson's Bay Company, as riparian proprietors, enjoy in the waters of the east branch of the Winnipeg river. So far as this incidental

right enhances the value of the property which the defendants propose to take from these plaintiffs, the latter are entitled to be allowed compensation for it in the pending arbitration.

Prospective capabilities of the property of the plaintiffs, having regard to the extent of their rights as riparian owners, must be taken into consideration, as they may form an important element in determining the real value of the lands: Lefevre v. The Queen, 1 Ex. C. R. 121.

If both plaintiffs were entitled to these riparian rights, it may be that they would be justified in asking the arbitrators to treat them as a single proprietor and allow to both jointly the amount by which the value of the lands on both sides of the stream would be enhanced by the usufruct of the water, if such lands were held by a single owner, such usufruct being in that case restricted only by inability to utilize or interfere with the alveus and the riparian rights in the waters of proprietors above and below.

But, in my opinion, the riparian rights of the Keewatin Power Company are less extensive than those of the Hudson's Bay Company. The grant to the Keewatin Power Company is subject to the "express condition and understanding" that nothing contained in it shall confer "upon the grantees exclusive rights elsewhere upon the said Lake of the Woods or upon any other streams flowing into or out of said lake or shall confer upon said company power or authority to interfere with or in any way restrict any powers or privileges heretofore enjoyed by Us or which may hereafter be granted or demised to any other person or company in respect to any other stream flowing out of or into the said lake."

The company are by this patent given certain exclusive rights and water power privileges on the west branch of the Winnipeg river. The east branch of the Winnipeg river is another—the only other—stream flowing out of that lake. Upon this stream the Crown reserves the right to grant or demise water power privileges in nowise restricted. It by implication, if not expressly, withholds from the Keewatin Power Company any rights, riparian or other, which would in any manner hamper or interfere with the fullest enjoyment of any rights which it should thereafter grant or demise, and of such rights as it has now in fact demised to defendants in respect to the water power in question. It follows, I think, that the Keewatin Power Company are entitled only to such usufruct of the waters of the east branch flowing past

Tunnel Island as they may have subject to the limitations already indicated in the case of the Hudson's Bay Company, and also to the further restriction that this usufruct shall in nowise diminish or hamper the powers and privileges of the defendants under their Crown lease and statutory franchise. So far as their riparian interest in these waters thus limited may enhance the value, present and prospective, of the lands of which the defendants propose to deprive these plaintiffs, but no farther, it should be taken into account by the arbitrators in determining the compensation to which they may plaintiffs.

I am also asked by Mr. Nesbitt in the case of the Keewatin Power Company to declare this company entitled to claim compensation from the defendants in the pending arbitration for any injury, present or prospective, which the carrying out of the projected works of the defendants in the east branch may work to the dam of these plaintiffs in the west branch, or to their water power rights or privileges in that watercourse. The grant to the Keewatin Power Company contains this further proviso: "Provided that any such powers or privileges which may hereafter be granted shall not destroy or derogate from the privileges hereby granted." It may be that this proviso will enable these plaintiffs to restrain the defendants from so carrying out their projected works as to interfere with the company's rights and privileges in the west branch, or it may entitle the Keewatin Power Company to claim compensation in damages for any injury which they may sustain by such interference. But that is not a proper question, in my opinion, for consideration upon the present arbitration. There is no evidence before me to warrant a belief that the defendants' works, if carried out as projected, will in any way affect the rights and privileges of these plaintiffs in the west branch. That question must be left open, and nothing done or omitted in the present litigation will in any wise prejudice them, if, at any future time, the Keewatin Power Company seek to prevent or to obtain redress for such injuries. I must, however, decline to now pronounce a declaratory judgment upon this phase of the case presented by these plaintiffs.

It was a term of the settlement during the trial of certain questions at issue between the parties that I should dis-

pose of the costs incurred in respect of those matters as well as the general costs of these actions. Having regard to the nature of the issues, and to the disposition made of the entire case, my discretion as to costs will, I think, be most properly exercised by requiring the respective plaintiffs to pay to the defendants three-fourths of their costs of defending these actions, other than costs incurred upon and as incidental to the motion or motions for injunction, as to which there will be no order.

OCTOBER 8TH, 1906.

DIVISIONAL COURT.

EVENDEN v. STANDARD ART MANUFACTURING CO.

Company — Money Advanced to — Authority of President — Negotiations for Formation of New Company—Failure of Consideration—Recovery of Money Advanced.

Appeal by defendants the Standard Art Manufacturing Co. from the judgment of STREET, J., at the trial, in favour of plaintiff as against the appellants, and cross-appeal by plaintiff against the same judgment dismissing the action as against defendant Dickson. Action to recover $1,000 alleged to have been advanced to defendants.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., CLUTE, J.

W. R. Riddell, K.C., and Z. Gallagher, for defendants.

W. Cassels, K.C., and W. H. Lockhart Gordon, for plaintiff.

CLUTE, J.:—. . . Plaintiff brings this action to recover $1,000, the amount of two cheques made by him in favour of the Standard Art Manufacturing Co., one for $250 dated 21st March, 1905, and one for $750 dated 28th March, 1905, and interest.

Defendant Dickson, at the time of the advance, was president and general manager of defendant company. The company was incorporated on 14th September, 1904, and organized principally, as it would appear, by defendant Dickson.

In January following plaintiff took stock in the said company, and became security for the company with a view of raising money to carry on its business to the extent of some $2,500. The company finding it difficult to carry on business for lack of capital, negotiations were opened through Dickson with Lillicrap & Tate, who owned a saw-mill in the vicinity of Lakefield, with a view of uniting the interests and plants of both, and in the expectancy of obtaining a bonus of $15,000 from the village of Lakefield. Negotiations in this direction had proceeded so far that on 9th March an agreement was made between Lillicrap & Tate, of the one part, and Dickson, of the other, with a view of carrying out this proposed arrangement. In that agreement it is recited that Lillicrap & Tate and others are the owners of a saw-mill and about 5 acres of land in the village of Lakefield, together with lumber camps and timber lands containing about 1,000,000 feet of lumber, more or less, with all necessary equipments to carry on their business as lumbermen, and that Dickson owns or controls machinery, plant, stock, etc., for the manufacture of furniture and woodenware, heretofore owned by the Standard Art Manufacturing Co. of Toronto.

It was said that the reason why this agreement was entered into by Dickson instead of the defendant company was because the municipality of Lakefield would have no right to give a bonus to a manufacturing company to induce it to remove from one municipality to another, and that this difficulty was to be avoided by a transfer of the property of defendant company to Dickson, and the arrangement carried out by him. As a matter of fact, at the date of the above agreement Dickson did not own the company's plant. A bill of sale by the company to Dickson of the plant in question is dated 17th April, 1905.

On 15th March, 1905, Dickson and Lillicrap & Tate entered into an agreement with the municipal corporation of the village of Lakefield by which the corporation were to guarantee the payment to the extent of $15,000 of certain bonds to be issued by the proposed company, under certain terms and conditions therein expressed. With a view of carrying out this arrangement, a charter was applied for and obtained for the new company, of which all the parties concerned, that is Lillicrap, Tate, Dickson, Evenden, and James Morrison, were original incorporators. This charter is dated 31st March, 1905.

It will be seen, therefore, that the $1,000 was advanced in the manner aforesaid during these negotiations and before the new charter had been obtained, and before defendant company had executed the bill of sale of its plant to Dickson.

It was not disputed that the cheques for the money so advanced, which were made payable to the order of the company, were duly indorsed by defendant Dickson as president of the company, and that the company received the full benefit of the advance. The money never, in any sense, came into the hands of Dickson, nor was any part of it appropriated or used by him. . . .

It is, I think, quite clear, as held by the trial Judge, that the money having come to the hands of defendant company and being used by the company in the ordinary course of their business, plaintiff is prima facie entitled to recover. The defendant company, however, seek to be relieved of any liability mainly upon the ground—as I understood the argument of Mr. Riddell — that the company never owed the amount; that the cheques, although payable to the order of the company, were really given to the company at the request of Dickson; and that, assuming that Dickson procured the loan, he had no legal right to do so, and there was no power in the president or manager to borrow money in the way that this was obtained.

The trial Judge has dealt pretty fully with this question. He points out the ground upon which the negotiations fell through, namely, that Dickson refused at the organization meeting of the new company to give a statement of what the Standard Art Manufacturing Co. were going to give for the $22,000 of stock which they were to receive. With what the trial Judge has said in respect to this matter, I entirely agree. Lillicrap & Tate, having been refused the statement demanded, withdrew and refused to have anything further to do with the organization of the new company. Plaintiff, after taking advice, also declined to have anything to do with the matter.

On 17th May, 1906, defendant Dickson advertised for sale by publication the furniture conveyed to him by defendant company, and entered into negotiations for organizing a new company at Barrie, in which the plant which was intended to form part of the assets of the Lakefield company was to be used for the same purpose for the proposed Barrie

company. In short, the proposed transaction of the Lakefield company fell through, and there was an end of it. A quorum could not be formed; no business could be transacted for lack of a quorum; one of the parties refused to proceed further; and, so far as these negotiations had anything to do with inducing plaintiff to advance his money, they were now entirely out of the question.

But it is said that because, at the suggestion of Dickson, plaintiff agreed to make this advance upon the understanding that these negotiations were to go through, and that he was to receive some $2,000 stock of the new company in case it did go through, that now he is not entitled to recover his money from anybody, although negotiations have proved abortive. I do not think this view can be maintained. It seems impossible to dissociate Dickson as a private individual from Dickson as president and general manager of the defendant company. The negotiations having fallen through, the facts remain that, at the instance of the president and general manager, plaintiff advanced $1,000 to the company by cheques payable to their order—that the company assented to this advance, received the money, and properly used the same in the payment of their debts.

I think the principle upon which Bridgewater Cheese Factory Co. v. Murphy, 23 A. R. 66, was decided, is applicable to the present case. . . .

I think it must be held that defendant Dickson was acting throughout on behalf of defendant company, of which he was president; that the transaction must be taken as a whole; that he said in effect to plaintiff, "I, as president of this company and general manager, will carry out an arrangement by which the company will transfer their plant to me, with a view of forming the Lakefield company, and you shall have $2,000 of the stock of that company for this advance to the company;" that these negotiations having fallen through, the proposed consideration for this advance entirely failed; that the money so advanced was never intended as a gift to any one; and that the consideration having failed, plaintiff is entitled to recover his money back.

The answer which is sought to be made to this statement —as I understand the argument—is that Dickson was not acting for the company, nor were the company empowered to enter into such an arrangement. I do not think the company can be allowed to take this position as against plaintiff.

who, as far as one can see, acted bona fide throughout; and, if it is put upon the other ground, that the company through Dickson had no authority to enter into any such arrangement, then equally the consideration wholly fails. But having received plaintiff's money and properly used it for their ordinary purposes, it would be a gross fraud upon plaintiff if now they were permitted to retain that money upon the pretence that their general manager had no authority to negotiate for it.

The appeal should be dismissed with costs, and the cross-appeal dismissed without costs.

BRITTON, J., gave reasons in writing for the same conclusion.

FALCONBRIDGE, C.J., also concurred.

CARTWRIGHT, MASTER. OCTOBER 9TH, 1906.

CHAMBERS.

LEE v. ELLIS.

Attachment of Debts — Salary of Police Magistrate — Public Officer—Appointment and Termination on Resolution of County Council—Public Policy.

Motion by plaintiffs, judgment creditors, to make absolute an attaching order and garnishing summons.

T. J. W. O'Connor, for plaintiffs.

A. J. Anderson, Toronto Junction, for defendant, judgment debtor.

THE MASTER:—The defendant is police magistrate for the town of Toronto Junction, and also for the county of York. His last quarter's salary in the latter capacity has been attached, and has not yet been paid over.

The question is, can this be distinguished from the case of Central Bank v. Ellis, 20 A. R. 364, against the same defendant? It was there held that his salary as police magistrate for Toronto Junction was exempt from seizure on grounds of public policy, he being, as police magistrate, the holder of "an office which is a public judicial office:" per Osler, J.A., at p. 369.

Mr. O'Connor sought to distinguish the present case because, by secs. 15 and 16 of R. S. O. 1897 ch. 87, appointments of this class are made only on the resolution of the county council, and can be terminated in the same way.

This however, does not, in my opinion, make any substantial difference. Such an officer is just as much the holder of a judicial office during the term of his commission as if he had been appointed under sec. 2 or 3 of the Act. In all the cases under that statute the appointment is made by the Lieutenant-Governor, and the incumbent holds office during pleasure only (sec 1).

Unless there was clear authority for the view set forth by Mr. O'Connor, I should hesitate to hold that the status and consequent rights of police magistrates appointed under sec. 15 are so widely different from those enjoyed by gentlemen appointed under secs. 2 and 3. Both are equally public officers. The only difference is that in one case the Lieutenant-Governor acts on his own motion, in the other he awaits the expression of a desire of the county council that the appointment should be made. He then acts if he sees fit to do so. But it is not less his appointment than are those made under secs. 2 and 3. Nor is the statute affected by the permission given to the county council by sec. 16 to terminate the appointment. It merely states one ground on which the Governor's discretion will be exercised—but it is not the only one.

The motion fails and must be dismissed.

I do not think it is a case for costs, as the point is new.

BOYD, C. OCTOBER 9TH, 1906.

TRIAL.

FALLS v. GIBB.
FALLS v. YOUNG.

Bankruptcy and Insolvency — Conveyances of Land by Insolvent to Creditors within 60 Days of Assignment for Creditors—Preference—Evidence—Onus—Setting aside — Security Valid in Part—Costs.

Actions by the assignee for the benefit of the creditors of an insolvent to set aside conveyances of land made by the insolvent to defendants as preferential and void

BOYD, C.:—. . . Defendants have not satisfied the onus cast upon them by the statute to shew that they have not obtained an unjust preference. One defendant is son-in-law, the other brother-in-law, of the insolvent. They lent him money at different times, at rates of interest higher than the statutory, without security, and so let the matter run till within 60 days of the assignment. There is no reason given why they became dissatisfied with the notes they had taken for the loans, and were pressing for security. They knew that the insolvent was not able to meet his obligations as they fell due, and that he was increasing the amounts borrowed. He was in the building and contracting business with insufficient capital, and conveyed to these two relatives all his available landed property. Gibb fails more conspicuously than defendant Young, but both have failed . . . to satisfy me that they have overcome the statutory implication which is raised against the transaction: National Bank v. Morris, [1892] A. C. 287; Dana v. McLean, 2 O. L. R. 466; Craig v. McKay, 12 O. L. R. 121, 7 O. W. R. 507.

Young made an advance of $300 which should be protected, but the rest of his security for $2,100 is vacated. He will be relieved as to one-seventh of the costs. The rest he will pay to the assignee. Gibb's security is vacated with costs to plaintiff.

BOYD, C. OCTOBER 9TH, 1906.

TRIAL.

STOVER v. LAVOIA.

Water and Watercourses—Lands Bordering on Navigable Lake—Rights of Riparian Owner—Access over Shoal Water to Deeper Water—Removal of Sand or Gravel from Bed of Lake at Edge of Water—Trespass—Diminution of Soil—Recession of Shore Line — Special Injury—Injunction—Damages.

Action for trespass.

BOYD, C.:—Plaintiff is the owner of land . . . extending to the shore of Lake St. Clair. This land lies between the Great Western Railway and the water, and is in form a low sand bank, sloping to the water's edge. Beyond the water's edge lies a shoal or flat, sloping gradually down to the deep water, which forms the strictly navigable part of the lake. There

is thus, first of all, plaintiff's land going to the shore of the lake, then the shoal belt beyond, ending in the deep navigable water. No doubt, the soil and bed of the lake, shoal and navigable, is vested in the Crown, subject to the rights of the public and of the adjoining riparian proprietors to have access to the navigable waters over the flats and shoals. The point to be first determined is to what limit plaintiff's title extends. I have no doubt that the boundary to the lake shore means and carries to the edge of the water in its natural condition at low-water mark.

Along the shore of a non-tidal river, or of a navigable inland lake, is now well understood to mean along the edge of the water at its lowest mark, both in this country and in the United States. That may be called the American use of the word "shore," which in England is reserved for the ocean, and has there a more limited meaning. Still, since Throop v. Cobourg and Peterborough R. W. Co., 5 C. P. at pp. 531 and 549 (1854), that definition may be considered as not only colloquially but legally accepted. The shore is the space between the bank and the water's edge at still water—the space between high and low water marks. See Porter v. Elliott, 1 C. P. 491 note (1854).

The like conclusion was reached in the United States at an earlier period: Hawkes v. Cutting, 5 Wheat. 384, where Marshall, C.J., said, "The shore's border on the water's edge, i.e., at low water" (1820).

Plaintiff, thus owning lands bordering on the shore of the lake, is a littoral or lacustrine proprietor. But these are merely more exact terms for expressing what is involved in the more usual and more comprehensive term "riparian proprietor." As riparian proprietor plaintiff has certain rights relative to the lake in front of him, which the law recognizes and will enforce as against unauthorized intermeddlement. He has a right of access over the shoal water near the edge to the deeper water, where navigation practically begins, and a right there to provide a landing place or other convenience for the use of the navigable waters. He has also the right to protect his riparian privilege against any injury likely to arise from the wash of the waves, and also as against any interference with the bed of the lake at the edge of the water by unauthorized removal of the sand or gravel, which forms the natural barrier against the encroachment of the lake:

Lyon v. Fishmongers' Co., 1 App. Cas. 674, 676; Attorney-General v. Tomline, 14 Ch. D. 58; and Yates v. Milwaukee, 10 Wall. (U.S.) 497.

In this case . . . defendant has taken or procured to be taken sand from the very land of plaintiff, and also from the edge of the water adjoining plaintiff's land; and also, as I understand his rather evasive answers, he claims the right as one of the public to take the sand from the bed of the lake along the shore. True, he does not trespass upon plaintiff's land, but he goes down to the water's edge by a road, and then drives his team along the shallow water, and to plaintiff's frontage, and then digs or raises the sand from the meeting place of land and water into his waggon, and carts it off to his own premises. There is some appreciable diminution of soil, and consequent recession of shore line, attributable to the insistent action of defendant. The general effect is that the lake is encroaching more on plaintiff's property than would be naturally the case, and I think plaintiff has a right to seek relief by way of damages and injunction. I would fix the amount of damages at $15, and grant a perpetual injunction against the removal of the sand and gravel from plaintiff's land, and from the shoal or flat in front of plaintiff's land ending in the lake.

Though the removal of sand from the bed of the lake is matter of public cognizance by the government, it is yet an actionable wrong by any one peculiarly and specially injured beyond the rest of the public. Such is the injury to plaintiff as owner and riparian proprietor of the locus in quo: Watson v. City of Toronto, 4 U. C. R. 158.

Costs of suit to plaintiff.

OCTOBER 9TH, 1906.

DIVISIONAL COURT.

CROWN BANK v. BRASH.

Promissory Notes—Forgery of Makers' Names—Indorsement in Name of Firm—Liability of Non-authorizing Partner—Discount by Bank—Notice or Knowledge of Manager—Circumstances giving Rise to Suspicion—Findings of Jury—Disregard of one—Rule 615—Judgment of Court.

Appeal by plaintiffs from judgment of TEETZEL, J., in favour of defendant Brash, upon the findings of a jury,

in an action against the surviving partner of the firm of Brash & Campbell, and against the administrator of the estate of Campbell, the deceased partner, to recover upon certain promissory notes indorsed by Campbell in the firm name and discounted by plaintiffs in the ordinary course of business.

The jury found that the makers' names to the notes were forged by Campbell and discounted by plaintiffs without the knowledge of Brash, and (9) that the plaintiffs, through their local manager, acted honestly and in good faith; but they also found (8) that the manager had notice of the fact that Campbell had no authority from his partner Brash. Upon these findings the action was dismissed against Brash, and plaintiffs appealed.

The appeal was heard by Boyd, C., Magee, J., Mabee, J.

F. Arnoldi, K.C., and W. T. McMullen, Woodstock, for plaintiffs.

G. H. Watson, K.C., and J. W. Mahon, Woodstock, for defendant Brash.

Boyd, C.:—The 8th and 9th answers may perhaps be harmonized by reading them as a finding that the local manager was negligent or careless in his dealings and had notice of some irregularities in other matters which, if investigated and followed up, might have led to information that the acting partner was exceeding the limits of his partnership authority, but he failed to do so; yet nevertheless the notes sued on were negotiated and cashed in good faith and with honest action on the part of the bank.

The law is laid down by Lord Blackburn in Jones v. Gordon, 2 App. Cas. 628, substantially thus: "Carelessness, negligence, foolishness in not suspecting something wrong, when there are circumstances leading that way, are not enough to constitute a defence, if they fall short of establishing dishonesty. To raise a defence it must appear that the party giving value for a negotiable instrument should be affected with notice that there was something wrong with it. . . . Evidence of carelessness or blindness may with other evidence be good evidence upon the real question, whether he did know that there was something wrong with it. If he was honestly

blundering and careless, and so cashed the note when he ought not to have taken it, still he would be entitled to recover . . . But if he was not honestly blundering or stupid or careless, but must have had a suspicion that something was wrong, and so refrained from asking questions and probing into it lest his suspicion might become knowledge—then that is dishonesty which precludes his claim to relief in a court of justice."

If the two findings cannot be reconciled, I think the latter is entitled to prevail, and that we should disregard the somewhat vague result conveyed in the 8th question and answer. No time is indicated when the notice of want of authority is to be attributed to the officer of the bank. And upon the evidence I do not think what is reported shews that there was such notice or knowledge of the limited power of the acting partner as makes it inconsistent with fair mercantile dealing that defendant Brash should be called upon to pay. At most there are in the course of business a few unusual items arising which might, if followed up, have disclosed something wrong, and the failure to do so might have weighed with the jury and led them to impute constructive notice; but this is a doctrine not to be imputed into the law of negotiable instruments: Lord Herschell in London Joint Stock Bank v. Simmons, [1892] A. C. at p. 221.

The trouble on both sides in this case appears to arise from over-trustfulness both by the bank and the surviving partner. The bank took for granted that the deceased partner had the right to deal in and to use the name of the firm, and had no reason to suspect or investigate whether or not his authority was limited. Defendant Brash had such confidence in his partner that he allowed him practically to do as he liked in the conduct of the business without taking any trouble to supervise or investigate what was going on. If defendant Brash is to be excused for being over-confident in the integrity of his partner, much more may the bank be so in assuming that honesty characterized all the dealings of their customer.

The finding of the jury distinctly repels the idea of bad faith or dishonesty on the part of the bank or its officer, and to that finding, which is well grounded on all the evidence, I think effect should now be given, even if the 8th answer is to be displaced or modified as I have suggested. All the facts are before us, and it would be unfortunate to pro-

long the litigation, which I do not think we need to do if we make use of the power given by Rule 615: Rogers v. Duncan, Cameron's Supreme Court Cases, p. 363.

MAGEE, J., gave reasons in writing for the same conclusion.

MABEE, J., also concurred.

OCTOBER 10TH, 1906.

DIVISIONAL COURT.

McLEOD v. CLARK.

Attachment of Debts—Division Court—Liability of Garnishees to Primary Debtor—Evidence of.

Appeal by Peter Campbell, one of the garnishees, from the judgment of the 1st Division Court in the county of Middlesex, finding that the appellant was indebted to the primary debtor in the sum of $203.41, and directing that that amount be applied in satisfaction of the primary creditor's judgment against the primary debtor; and cross-appeal by the primary creditor from the judgment of the same Court discharging the other garnishees, the Dominion Bank.

J. C. Judd, London, for Peter Campbell.

R. K. Cowan, London, for the primary creditor.

H. S. Blackburn, London, for the Dominion Bank.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

MABEE, J.:—Unless Clark, the primary debtor, could at the date of the garnishee summons have successfully maintained an action against the bank and Campbell, or either garnishee, for the money in question, it is manifest that the primary creditor must fail in these proceedings. I think Clark could not have maintained such an action against Campbell, upon the facts appearing in evidence, and that Campbell's appeal must be allowed with costs, and the garnishee summons as to him dismissed with costs.

I think it is established that $50, the amount of the promissory note left by Campbell with the bank, and afterwards paid by him, is still in the possession of the bank, and that this money belonged to Clark at the date of the service of the garnishee summons. The cross-appeal of the primary creditor will, therefore, be allowed with costs to the extent of that sum, and judgment will be entered in his favour against the bank for $50 with interest from 1st January, 1905, with costs in the Division Court.

OCTOBER 10TH, 1906.

C.A.

SHEA v. TORONTO R. W. CO.

Street Railways—Injury to Passenger Thrown from Car—Negligence—Contributory Negligence — Evidence for Jury —Operation of Car — Duty to Passenger Standing on Platform.

Appeal by defendants from order of a Divisional Court, 7 O. W. R. 724, dismissing defendants' appeal from judgment of MABEE, J., at the trial, refusing to nonsuit plaintiff after the jury had disagreed.

The action was brought to recover damages for injuries sustained by plaintiff by being thrown from a car of defendants while he was standing on the back platform, smoking, owing to a sudden jerk of the car.

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

D. L. McCarthy, for defendants.

H. D. Gamble, for plaintiff.

MOSS, C.J.O.:—Mr. McCarthy's first contention is that plaintiff having voluntarily elected to stand upon the rear platform of defendants' car upon which he was riding, instead of endeavouring to find sitting or standing room in-

side, thereby disentitled himself to complain of anything that happened to him while there, whether through the negligence of defendants or not.

But plaintiff was not on the platform against the will, or in defiance of the rules, of defendants. Passengers are permitted, and when smoking are required, to stand on the rear platform. The act of plaintiff, therefore, in standing there, could not per se constitute negligence. He was there with the knowledge and sanction of defendants, and their duty not to be negligent extended to him as well as to all other passengers.

The trial Judge rightly refused to withdraw the case from the jury on this point.

The other point argued is whether he ought to have withdrawn it from the jury, on the ground that the evidence shewed that plaintiff was the author of his own injury by the negligent manner in which he stood in—as was argued—a dangerous place on the platform.

Plaintiff states that he was holding the upright bar or standard with his right hand, and with his left he had hold of the north side of the car door, his hand resting on the bundle of boards which he had with him. Apparently the jury were unable to pronounce against him on the question of contributory negligence.

As the case is to be submitted to another jury, it is unnecessary and perhaps inadvisable to discuss the evidence. I will only say that it does not appear to me that plaintiff has admitted that his injury arose from his own negligence or that he has admitted facts from which the only inference that could reasonably be drawn is that his injuries were due to his own negligence. And if that be so the case is one for the jury to deal with.

The appeal should be dismissed.

OSLER and MEREDITH, JJ.A., each gave reasons in writing for dismissing the appeal.

GARROW and MACLAREN, JJ.A., also concurred.

MABEE, J. OCTOBER 11TH, 1906.

CHAMBERS.

LONDON AND WESTERN TRUSTS CO. v. LOSCOMBE.

Third Party Procedure—Action by Liquidators of Insolvent Company against Directors—Illegal Acts Depleting Capital of Company—Relief over against Individual Shareholders in Respect of Payments to them—Rule 209—Scope of—Indemnity, Contribution, or Relief over.

Appeal by third parties and plaintiffs from order of Master in Chambers of 28th September, 1906, giving directions as to trial of third party issues.

C. A. Moss, for third parties.

G. S. Gibbons, London, for plaintiffs.

W. E. Middleton for defendants Wortman and Durand.

MABEE, J.:—Plaintiffs are the liquidators of the Birkbeck Loan Company; defendants were, with several others, directors of that company; the statement of claim sets forth the following alleged causes of action against defendants: (1) that during several years, although the expenses and losses exceeded the profits earned, defendants "declared and paid dividends upon all the various classes of stock" in the Birkbeck Company, and that such payments were illegal and unauthorized; (2) that defendants made several illegal and improper loans, which are fully specified; (3) illegally surrendered certain mortgages; (4) illegally allowed one of the defendants to withdraw from the company $2,348.74; (5) illegally applied and appropriated $350 towards the expense of forming a bank; and it is said these illegal acts have depleted the capital stock of the company to the extent of $70,000.

Defendants Wortman and Durand set up various defences, making general denials, alleging good faith, proper audits, etc., and also alleging that plaintiffs, who represent the shareholders, are not entitled to maintain an action to recover moneys alleged to have been improperly paid to such shareholders; that the shareholders who received the dividends

are practically the same persons who are shareholders at this time; that directions will be asked for on inquiry, and that the moneys, if any, improperly paid be refunded or set off.

The material shews that at the date of the winding-up order there were 126 permanent shareholders and that during the last 6 years the changes in the ownership of permanent shares have numbered 48. I presume this means transfers.

The defendant Wortman, upon an affidavit alleging that he desired to obtain relief over against the shareholders with respect to money paid to them individually, that Moorehouse and Watson are two shareholders, and that he (Wortman) desired to obtain relief over against them to the extent of the moneys paid to them, procured leave to serve a third party notice, and served the same upon Moorehouse and Watson. The affidavit also states that if these third parties appeared he (Wortman) proposed to apply for an order directing them to represent the class of shareholders.

The Master, upon the application of the defendants, made the usual order for trial of the third party issue; and from this both the third parties and the plaintiffs appeal. The Master thought the course pursued might effect a consolidation of 180 possible actions, but, of course, this could not be so unless, as he states, the defendants should succeed in obtaining an order for representation of the other shareholders by the two sought to be brought in. No such order has been applied for, and I do not think any such order could be made. So, as matters stand, if the third party issues are tried as ordered, it will dispose only of the liability of two shareholders, and leave 178 claims to be disposed of in some other way.

It will be observed that the claim for indemnity applies only to one of the 5 separate and distinct causes of action alleged in the statement of claim. I do not think this is the sort of case intended to be covered, . . . by Rule 209. The right of defendants to recover from the various shareholders the dividends paid to them, if any such right exists, does not arise by virtue of a recovery by plaintiffs from defendants of these same moneys—and, unless the right against the shareholders accrues to defendants by reason of a recovery at the instance of plaintiffs, it cannot be an indemnity.

If defendants had any right to recover from the shareholders, they could at any time have taken proceedings against them for the moneys erroneously paid, and if they could not recover upon their own initiative, I do not think their position would be in any way strengthened because plaintiffs recovered from them.

It is not suggested that this is a case of "contribution." It remains then to consider if it falls within the words "any other relief over." I think this also should be limited or confined to the class of cases in which the relief over arises by reason of the defendant being held liable to the plaintiff, and that is not this case. There may be cases where the right is not strictly one of indemnity, but which right has its existence solely because the defendant has been adjudged liable, and the words in question are, I think, intended to apply to such cases only.

It is said that one object of the Rule is to prevent the same question arising between the plaintiff and defendant, and the latter and the third party, being tried in different forums, and the possible scandal of different conclusions being arrived at. The "same question" is not involved in this case. These defendants may be liable to the plaintiffs, and still not be entitled to recover from the shareholders the dividends paid to them. These issues are entirely separate and distinct, and present different considerations, and the evidence will be different.

Other difficulties present themselves by reason of the fact that 3 only out of many directors are sued in this action. The moneys are said to have been paid, or certainly could only have been paid, under a resolution or by-law of the board of directors, and it is by no means clear that these individual defendants could enforce rights over against the shareholders, if any such rights exist, without the presence, as parties to the proceedings, of their fellow directors. Again, if the defendants, or the board as a body, could recover these dividends back from the shareholders, it must be by reason of separate and distinct causes of action against each individual shareholder. I do not think all the shareholders could be joined in one action, and it does not seem proper to permit, by means of this uncertain third party procedure, what could not be effected in an ordinary action, namely, a consolidation of many distinct causes of action against different individuals.

It was stated that there are no creditors of the Birkbeck Company; that the action was brought in the supposed interest of and for the benefit of the shareholders; and that if moneys were recovered from the directors, the only persons entitled would be practically the same body of shareholders to whom the dividends in question had already been paid. The defendants in their defence claim relief as to this feature of the case. Inasmuch as this action is being proceeded with by the liquidators only with the sanction of the Court, there is complete power in the Court to see that no hardship results to the directors in respect to the dividends in dispute; and, if it appears that the only persons who would be entitled to receive them, as part of the depleted capital of the company, if they are recovered from the defendants, are the same persons to whom these moneys have already been paid, the Court may direct that portion of the liquidators' claim in the action to be abandoned; so no real necessity exists for any endeavour to stretch the scope of the third party Rule.

No hardship will result from allowing this appeal, and it is allowed. The order of the Master will be vacated and the service of the third party notice set aside. The defendants must pay the costs of the plaintiffs and the third parties before the Master and of this appeal.

Reference may be had to the following cases: Parent v. Cook, 2 O. L. R. 712, 3 O. L. R. 350; Wynne v. Tempest, [1897] 1 Ch. 110; Moore v. Death, 16 P. R. 296; Catton v. Bennett, 26 Ch. D. 161; Wye v. Hanes, 16 Ch. D. 489; Moxam v. Grant, [1900] 1 Q. B. 88; Davey v. Corry, [1901] A. C. 477; Miller v. Sarnia Gas Co., 2 O. L. R. 546; and H. & L., p. 392, and additional cases there referred to.

CARTWRIGHT, MASTER. OCTOBER 12TH, 1906.

CHAMBERS.

PEPPER v. OTTAWA TYPOGRAPHICAL UNION NO. 102.

Writ of Summons—Service on President of Trade Union—Effect of Registration of Union under Ontario Insurance Act—Body Corporate—Party to Action.

Motion by defendants to set aside service of a copy of the writ of summons on their president for them.

J. G. O'Donoghue, for defendants.

J. R. Code, for plaintiff.

THE MASTER:—For the motion reliance was placed on Metallic Roofing Co. v. Local Union No. 30, 9 O. L. R. 171, 5 O. W. R. 95, and on Sellars v. Village of Dutton, 7 O. L. R. 646, 3 O. W. R. 664. In the latter case it was said by Street, J., that a corporation might be created by an Act of Parliament without a direct enactment, but that the language relied on, if not direct, must at least shew by necessary implication the intention to create the corporation. This, he thought, had not been done in that case. In the other case Osler, J.A., says that it was proved that neither of the defendants was incorporated, "nor does either of them appear to be registered anywhere in the name of their association so as to constitute them a quasi-corporate body such as was sued in the Taff Vale case, [1901] A. C. 426."

Here, however, it is alleged and not denied that defendants have been registered under the Insurance Act, R. S. O. 1897 ch. 203. This having been done, sec. 33, sub-sec. 4, provides that "the persons named in the registrar's certificate" and their associates and successors "shall thenceforward be a body corporate and politic, and shall have the powers, rights, and immunities vested by law in such bodies."

No mention is made of liabilities, but under the decision in the Taff Vale case these would seem to be incident to the powers and rights conferred on the association, even where, as there, it was admitted that the defendants were not a corporation.

Counsel for the motion drew attention to the provisions of R. S. C. 1886 ch. 131. Section 4, sub-sec. 3a, of that Act might be thought to prevent the Court from entertaining the action. However that may be, the question does not arise here, and must be left to be pressed, if relied on, as a matter of defence.

So far as I can see, the service was proper, and the motion should be dismissed with costs to plaintiff in any event. . . .

CARTWRIGHT, MASTER. OCTOBER 12TH, 1906.

CHAMBERS.

MITCHELL v. HAGERSVILLE CONTRACTING CO.

Venue—Change—Preponderance of Convenience—Witnesses—Expense—Other Considerations.

Motion by defendants to change the venue from Welland to Cayuga.

H. L. Drayton, for defendants.

R. McKay, for plaintiff.

The Master:—It is admitted that plaintiff was injured, and that this took place at Hagersville, which is about 11 miles from Cayuga and 40 from Welland. Plaintiff resides at Niagara Falls, which is 50 miles from Cayuga and 20 from Welland. Of the 5 persons who witnessed the accident, 4 reside at Hagersville, and the residence of the other is unknown. Besides these 4 witnesses, defendants say they will require 10 more witnesses to give evidence as to the system in use at their quarry, all of whom reside at Hagersville.

Plaintiff is an Italian, and the affidavit in reply is, therefore, excusably made by his solicitor. It states that he will require as witnesses a number of quarry and dynamite men who reside at Niagara Falls, but he cannot say how many until after he has had discovery from defendants. He says also that "plaintiff is unable financially to take a number of experts to Cayuga," and that these are the only class of witnesses who will be required on the issues as developed in the pleadings.

Assuming that plaintiff is limited under 2 Edw. VII. ch. 15 (O.) to 3 such witnesses, this would made 4 with himself.

Assuming that defendants really require and are allowed as experts and otherwise the full number of 14 witnesses, the case will then stand as follows. They must go with 14 witnesses 30 miles further to Welland than to Cayuga. Allowing return fare at 5 cents a mile this would make only $21. But, if the change was made, plaintiff must go 30 miles or more extra with his 3 experts at an extra expense of $6 or $7 at least.

It seems clear that under McDonald v. Dawson, 8 O. L. R. 72, 3 O. W. R. 773, the motion must be dismissed. That case is a good deal stronger in its facts in favour of a change than the present, as the difference in expense was really considerable. Here it is comparatively trifling.

Something was said on the argument about the inconvenience to witnesses; but the Court will never inquire as to this: per Rose, J., in Standard Drain Pipe Co. v. Town of Fort William, 16 P. R. 404; see to the same effect the judgment of Meredith, J., in Saskatchewan Land and Homestead Co. v. Leadley, 9 O. L. R. at p. 550.

It was also said that it would be inconvenient to get from Hagersville to Welland in time for the opening of the Court on 19th November, being a Monday. Plaintiff's solicitor says this is a mistake, and that in any case he has other actions in which he acts for the plaintiffs therein, and that he will set one or more of these down first, so that defendants can safely arrive at Welland on Monday afternoon or Tuesday morning.

There seems, therefore, to be no reasonable ground for a change of venue. There is no such substantial preponderance of convenience as is necessary to displace "the right of the plaintiff as dominus litis to control the course of litigation:" per Boyd, C., in McDonald v. Dawson, supra. . .

Motion dismissed; costs in the cause.

OCTOBER 13TH, 1906.

DIVISIONAL COURT.

FINCH v. NORTHERN NAVIGATION CO.

Master and Servant—Death of Servant—Destruction of Vessel by Fire—Negligence—Warning—Watchman—Common Employment—Findings of Jury—Absence of Evidence to Sustain—Nonsuit.

Appeal by plaintiff from judgment of ANGLIN, J., dismissing the action, which was brought by the widow of Lyman Finch, a deck hand on defendants' steamer "Collingwood," to recover damages for his death. The steamer was burned on the morning of 19th June, 1905, while moored at the wharf at Collingwood, and Lynch perished in the boat, but precisely how was not shewn.

The action was tried with a jury, who answered certain questions, as set out below, but the Judge, notwithstanding the findings, entered judgment as of nonsuit, from which plaintiff appealed.

A. G. MacKay, K.C., for plaintiff.

Wallace Nesbitt, K.C., and Britton Osler, for defendants.

The judgment of the Court (FALCONBRIDGE, C.J., MAGEE, J., CLUTE, J.), was delivered by

CLUTE, J.:—The following are the questions submitted to the jury and the answers thereto:—

1. Was plaintiff's husband burned to death on the steamer "Collingwood?" A. Yes.

2. Did defendants fail to provide for proper and reasonable watching in the boiler and engine department of the steamer? A. Yes.

3. If so, was such failure the cause of the death of plaintiff's husband? A. Yes.

4. Who was responsible for such failure to provide watching in the boiler and engine department, if you find there was such failure? A. Mr. Gildersleeve.

5. Were all the persons sleeping in the forecastle awakened and warned of the fire in time to have enabled them to escape from the burning steamer? A. No.

6. Could Handy have awakened them in time to escape after he discovered the fire? A. No.

7. At what sum do you assess plaintiff's damages? A. $1,200.

There was, I think, sufficient evidence to support the first finding, that plaintiff's husband was burned to death on the steamer "Collingwood."

As to the second finding, I cannot say that there was no evidence which ought to have been submitted to the jury upon this point. A special watch had been provided for the engineer's department for 11 years. This was discontinued last year owing to the dismissal of a portion of the engineer's staff, and a change by the general manager of the system of watch. It might fairly be inferred, I think, that if for 11 years a special watch were necessary for the engineer's department, the discontinuance of that watch was the neglect of a reasonable precaution of safety.

With reference to the third finding, however, after a careful perusal of the evidence I am unable to find any evidence which can fairly be said to prove that the failure of defendants to provide a watch in the engine department was the cause of the death of plaintiff's husband. The evidence fails to shew that, even had there been an additional watchman, a different result would have followed. It is not shewn that with such watch deceased would have been forewarned in time to escape. It is not disputed that men sleeping in the forecastle did escape after they were warned. It does not appear that the deceased had not time to escape. For all that is known to the contrary, he may have succumbed to the smoke after reaching the deck, or from some other cause. I have searched the evidence in vain to find somewhere some proof that the additional watch suggested would have saved the deceased, and I find no evidence from which one may fairly say that the lack of such watch was the cause of his death.

It does not appear that there was not time to have fully warned the men after the fire was discovered, and if they were not warned this would be owing to the neglect of Handy, the watchman. Now, he was a person in common employment with deceased, and the statute does not avail in this case to enable plaintiff to escape from the defence raised by common employment. This, I think, is clear. The statute does not give a workman remedy against his employer for the negligence of a fellow servant, except in the cases therein specified: Wakeley v. Holloway, 62 L. T. N. S. 639; Wild v. Waygood, [1892] 1 Q. B. 783; McEvoy v. Waterford Steamboat Co., 18 L. R. Ir. 159.

The Employers Liability Act (England), of which our Workmen's Compensation for Injuries Act is a copy, was introduced to bring back the law to what it was supposed to be in England before . . . Priestley v. Fowler, 3 M. & W. 1, and the effect of the statute is stated by Smith, J., in Weblin v. Ballard, 17 Q. B. D. 125; . . . Thomas v. Quartermaine, 18 Q. B. D. 685.

Now, a workman is prima facie entitled to recover where the employer—be he private employer or corporation—has delegated his duty of superintendence to other persons, and such other persons have caused injury to the workman by negligently performing the duties and powers delegated to them, but the doctrine of common employment, so far as it is not abrogated, remains.

There was no evidence that Handy, who had formerly been a fireman, was not a proper person for the watch, or that there was negligence on the part of the superintendent or general manager in appointing him. If it can be said that there was negligence on the part of any one which caused the death of plaintiff's husband, it was that of the watchman, a person in common employment with deceased, and on account of whose negligence plaintiff is not entitled to recover.

I agree with the trial Judge "that there is no evidence upon which a jury of reasonable men could be asked to find that such failure was the cause of the death of plaintiff's husband. Upon the evidence it is purely conjectural what caused his death, and upon the whole case I can find nothing which would warrant a jury in finding that it was caused by the want of an additional watchman or would have been prevented had such watchman been provided."

Appeal dismissed with costs.