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HON. SIR JOHN BOYD, C. NOVEMBER 8TH, 1912.

TRIAL.

WATERLOO v. BERLIN.

4 O. W. N. 256.

Street Railways—Ontario Railway and Municipal Board—Jurisdiction of — Agreement between Municipalities — "Net Annual Profits"—Right to Deduct Taxes—No Jurisdiction in Court—6 Edw. VII., ch. 31, secs. 17, 51, 63, and 64.

Action by town of Waterloo against the city of Berlin to enforce proper accounting under an agreement between the parties dated January 18th, 1910. The agreement was superimposed on the parties by an order of the Ont. Rw. & Mun. Board, and provided that defendants should operate the railway running between the two towns and pay to plaintiffs one-quarter of the annual net profits arising from such operation. In making up a statement of such profits defendants assumed to deduct taxes which plaintiff claimed should not be deducted.

BOYD, C., *held*, that the Court had no jurisdiction to hear the action, all such matters having been left to Ont. Rw. & Mun. Board by 6 Edw. VII., ch. 31.

Action dismissed with costs.

Action by the town of Waterloo against the city of Berlin to enforce proper accounting under clause 20 of an agreement between these parties dated 18th January, 1910. The agreement as a whole makes provision for the operation of the street railway between these municipalities; the railway itself being owned and operated by the defendants.

Clause 20 provides that Berlin shall pay to Waterloo one-quarter of the annual net profits earned by the railway, on the 1st January of each year. Plaintiff's complaint is that Berlin has wrongly assumed to make deductions from the total profits "under the guise of taxes" and has so reduced the amount properly payable to the plaintiffs: and also with like effect the defendant has charged to mainten-

ance account several sums which should have been properly charged to the capital account; and otherwise has failed fully to account for other profits. A general account was asked with special declarations of liability. The defendant pleaded as a matter of law that the Court has no jurisdiction.

A. B. McBride, for the plaintiffs.

A. Millar, K.C., for the defendants.

HON. SIR JOHN BOYD, C.:—It was admitted that the agreement sued on was not of a voluntary character between the signatures but was the outcome and the effective expression of terms and regulations imposed by the Ontario Board of Railway Commissioners by its order duly made on the application of Waterloo. The agreement itself was after execution submitted to and approved of by the same Board as appears by its order dated 2nd September, 1910. The objection having regard to these conditions is well taken. The policy of the Legislature that questions such as these between municipalities and street railways as to their operation and mutual relations, financial or otherwise, should be exclusively dealt with by the Railway Board specially constituted for that purpose. Once having laid hold of a matter within its jurisdiction, that Board is seized of it for all purposes of working out details of any directions given by the Board. It is for the Board to interpret and give effect to its own orders and to deal with differences arising out of these orders, and this the Legislature intends for the very purpose of expeditious and appropriate adjustment without having recourse to the intervention of the Courts. Ample machinery is provided by the Statute for dealing with the adjustment of the accounts and the ascertainment of the net profits on a right footing satisfactory to the Board—which gave the direction. Reference passim to the Statute of 1906, 6 Edw. VII. ch. 31, will shew how abundant are the powers and methods entrusted to the Board for administrative and supervisory purposes. Thus sec. 16 gives power to the Board to dispose of any complaint that there has been a failure to do the thing called for by the agreement in question, viz., to pay a full and proper one-quarter of the net profits. And again more particularly as applicable to the present situation the group

of sections headed "Enforcement of Municipal Agreements," e.g., sec. 63. The Board has power to enforce municipal agreements such as this and the power to construe and determine the proper meaning of the clause in question (sec. 64.) The Board may take such steps as are necessary to enforce payment of the one-quarter net profits and to solve the difficulties raised in the pleadings, sec. 63 (2).

The Board has full jurisdiction to hear and determine all matters of law or fact and have such powers in connection with the exercise of its jurisdiction as are possessed by the High Court, sec. 17 (1). And having become properly seized of a case the Board has exclusive jurisdiction therein (sec. 17(3)).

Appellate jurisdiction is given to the Board in questions of amount, taxation and exemption therefrom (sec. 51), and these are also within the purview of its primary powers in a dispute such as the present. Of cases cited, Re Sandwich, 17 O. W. R. 45, where the questions arose chiefly under a private agreement made between the litigants as to which it was said that the Board was not a Court and had no general power of adjudicating upon questions of construction in the abstract: a proposition not pertinent to the present agreement. On the other hand the large jurisdiction enforced by the Act of 1906 is commented on and recognised in *Re Port Arthur*, 18 O. L. R. 382.

The objection is well taken and the action should stand dismissed with costs: this is of course without prejudice to any further application being made to the Railway Board.

HON. MR. JUSTICE RIDDELL. NOVEMBER 14TH, 1912.

WEEKLY COURT.

NASSAR v. EQUITY INSURANCE CO.

4 O. W. N. 340.

Insurance — Fire — Reference as to Damage — Report of Master — Appeal from—Smallness of Finding—Over Valuation—Allegation of Disregard of Findings at Trial by Master—Costs.

Appeal by plaintiff from and motion for judgment by defendant on a report of the Master-in-Ordinary on a reference by the judgment herein (see 20 O. W. R. 898), as to the amount of damage suffered by plaintiff in an action on an insurance policy. The action was for $3,000, defendants paid into Court $1,250 while denying liability, and the Master found $414.46 due (including interest to the date of the report).

RIDDELL, J., dismissed appeal from the report and gave judgment thereon, costs to plaintiff up to delivery of statement of defence, costs to defendant thereafter, defendants to have a set-off of costs against the judgment, and costs.

Appeal by plaintiff from and motion for judgment by defendant on a report of the Master-in-Ordinary dated June 25th, 1912.

The action was against a fire insurance company for a fire loss at the plaintiff's billiard-room in Toronto. The case came on for trial before HON. SIR WM. MULOCK, C.J. Ex.D., in November, 1911, who passed simply upon the issue as to fraud in the proofs of loss and directed the amount of the loss to be determined by the Master-in-Ordinary.

An appeal from this judgment was (with a trifling variation as to costs) dismissed by the Divisional Court (1912), 20 O. W. R. 898.

The claim was for $3,000: the defendants while disputing that the plaintiff's loss was so much paid the sum of $1,250 into Court as sufficient to pay the plaintiff's claim. The Master-in-Ordinary found the actual loss $400 which with interest $14.46 from October, 1911, to the date of the report, 25th June, 1912, made $414.46 due upon the last mentioned day.

G. W. Mason, for the plaintiff.

W. E. Raney, K.C., and E. F. Raney, contra.

HON. MR. JUSTICE RIDDELL:—The case was presented on both sides most earnestly, exhaustively and ably. I have also the advantage of elaborate and carefully prepared reasons of the Master-in-Ordinary for his judgment: while the Master-in-Ordinary had himself the advantage of a careful personal inspection of the premises and a detailed examination of the goods in the presence and by the consent of counsel for both parties (it is said that this was at the instance of the plaintiff: but that I do not consider of any consequence). The Master had also the inestimable advantage of seeing the witnesses which of course I have not: and I must approach the appeal bearing that handicap in mind—and must remember that according to the well-established practice in Ontario the Master is the final Judge of the credibility of the witnesses he has seen, unless indeed there be some unmistakable document or something of the kind which shews the contrary or which the Master has failed to take into consideration. The findings of a Master are on the same footing as the findings of a trial Judge for which *Beal* v. *Michigan Central Rw. Co.*, 19 O. L. R. 502, may be looked at, also *Booth* v. *Ratti*, 21 S. C. R. 637, at p. 643, and like cases, e.g., *Re Sanderson* v. *Saville* (1912), 26 O. L. R. 616 at p. 623 and cases there cited. I note the complaint of the plaintiff that the Master has in effect at least, reversed the findings at the trial and has in substance found fraud in the proofs of loss. Of course he has not done so in form—no such issue was open before him—and I do not think that a finding of fact as to value upon which an argument could be based tending to shew that the real value of the goods had been misrepresented in the proofs of loss can at all be said to be a reversal of the decision at the trial. The decision was that there was no fraudulent over-valuation at the time in the proofs of loss—not that there was no over-valuation, or that the plaintiff or any of his witnesses would not at some future time lie about the value.

I have read all the material, most of it more than once, and with care, and I am unable to find that the Master-in-Ordinary has made a mistake.

The appeal will be dismissed with costs.

As to the motion for judgment, the costs have been reserved till now except the costs up to trial occasioned by charges of fraud which the defendants have been by the

Divisional Court ordered to pay. Leaving aside these costs —the case stands claim for $3,000: payment into Court of $1,250: judgment for $400 and interest: there is no plea of tender so as to entitle the defendants to all their costs as in some cases: and it seems to me that the costs are in the discretion of the Court.

I think the proper order to make is that the plaintiffs shall have their costs up to the delivery of the statement of defence and the defendants their costs thereafter including the reference, the appeal therefrom and motion for judgment with a set-off of such costs against the amount of damages and costs awarded to the plaintiff. The plaintiff to be declared to be entitled to receive from the defendants the sum of $414.46 and interest thereon at the Court rate from June 25th, 1912, as damages—and the amount paid into Court to be paid out to the parties as their interest appears on the above basis. If the amount of costs payable to the defendants exceed the amount of damages and costs payable to the plaintiff the defendants will have judgment against him for the balance. The report of the Master-in-Ordinary is confirmed.

HON. MR. JUSTICE MIDDLETON. NOVEMBER 15TH, 1912.

CHAMBERS.

RE MONTGOMERY ESTATE.

4 O. W. N. 308.

Lunatics—Not so Found—Statutory Committee—9 Edw. VII., ch. 37—Jurisdiction of Court.

MIDDLETON, J., *held*, that the Court had no jurisdiction over lunatics or their estates or their statutory committee, under 9 Edw. VII., ch. 37, the Inspector of Prisons and Public Charities, until an order declaring insanity had been made.

Application for an order sanctioning a settlement between the Minister of Justice and the Inspector of Prisons and Public Charities, acting as statutory committee of Frances A. Towner, now confined in a public asylum.

F. Aylesworth, for the Inspector of Prisons and Public Charities.

HON. MR. JUSTICE MIDDLETON:—This unfortunate lady has not been declared a lunatic; and I am of opinion that the statute relating to lunatics—9 Edw. VII., ch. 37—does not give the Court any authority over lunatics or their estates unless and until an order has been made by the Court declaring insanity.

By the statute relating to public lunatic asylums, R. S. O. (1897), ch. 317, sec. 53, the Inspector of Prisons and Public Charities is *ex officio* the Committee of every lunatic who has no other committee; but I do not think that this brings him under the jurisdiction of the Court over the committees of lunatics conferred by 9 Edw. VII., ch. 37. The committee there referred to is not the statutory committee, but the committee appointed by the Court.

The Court, therefore, has no jurisdiction in the premises; but I trust it may be found that the very wide powers conferred upon the statutory committee by the Revised Statute may be found wide enough to authorize his approval of what appears to be a very reasonable arrangement.

HON. MR. JUSTICE SUTHERLAND. NOVEMBER 15TH, 1912.

RE STEWART.

4 O. W. N. 293.

Insurance—Life—Designation of Beneficiary—Will—"All my Insurance Policies"—Identification—Change of Beneficiary—2 Geo. V., ch. 33, secs. 247, 170, and 171—R. S. O. (1897), ch. 203, sec. 160—Retroactivity—Date of Statute—Vesting of Interest.

Application by executors for advice as to the disposition of certain moneys received under insurance policies upon the life of the deceased. The policies in question were made payable to his wife, and by his will he devised and bequeathed all his "real and personal estate including my life insurance policies" to his executors, to form a fund to be distributed amongst certain objects named in the will, including his wife. In addition to the policies in question, there were certain other policies payable to his estate. On behalf of those opposed in interest to the widow, it was argued that 2 Geo. V., ch. 33, was applicable, and that by sub-secs. 3 and 5 of sec. 171, of such Act, the law previously in force was altered, and that the will contained such a designation of the beneficiary as to alter the designation contained in the policy.

SUTHERLAND, J., *held*, that as secs. 170 and 171 of the statute 2 Geo. V., ch. 33, did not come into operation until August 1st, 1912, whereas the testator died on May 25th, 1912, they had no retroactive effect, and did not apply.

Craies' Statute Law, pp. 351, 352, 357, and 367, and other authorities, referred to.

That there had not been such a designation in the will as would alter the designation in the insurance policies.

In re Cochrane, 16 O. L. R. 328, followed.

Costs to all parties out of estate.

One John Marks Stewart was in his lifetime insured under certain policies of life insurance in 16 companies, aggregating a face value of $19,306.65. One of them for $1,000 was by its terms made payable to his mother, Agnes Stewart, and two others for $1,000 each to his estate. All the other policies were made payable to his wife, and in case she predeceased him to his executors, administrators and assigns. He made a will dated 19th January, 1909, and died on the 25th May, 1912. Letters probate issued to the executors named in the will on the 20th June, 1912. The testator left him surviving his widow and five sons and daughters, three of whom are infants.

The executors did not include in their inventory of the testator's estate any of the moneys secured by said policies, except the sum of $2,000, representing the amount of the two policies payable to the estate of the deceased; and, in an affidavit filed by one of them, he states that their reason for this was, chiefly, "that the will did not identify the policies," and he thought, "that the will did not make a valid re-appropriation."

The will contains the following clauses: "I give, devise and bequeath all my real and personal estate, including my life insurance policies, of which I may die possessed in the manner following, that is to say:—

"To my executors and trustees hereinafter named and appointed in trust to call in and convert the same into money in trust to stand possessed of the fund thereby created for the following purposes and trusts, that is to say:—

"(1) To pay to my daughter Rena Stewart the sum of one thousand dollars, which bequest is in addition to all other benefits which she is entitled to receive under this my will.

"(2) To pay to my mother Agnes Stewart the proceeds of my life insurance policy in the Independent Order of Foresters.

"(3) To invest the balance in first mortgages of real estate in the names of my trustees or in guaranteed investments of the Trusts and Guarantee Company, Limited, with power to vary such investments from time to time, with power to retain investments made by me in my lifetime as long as they shall think proper.

"(4) To pay to my wife Sarah Stewart the income arising from one-half of the said trust fund during the term of

her natural life for her own personal use absolutely which bequest I declare to be in lieu of all dower in my estate.

"(5) To pay the income arising from the remaining half of the said trust fund to my wife for the purpose of being expended by her in the education and maintenance of my infant children."

Two of the companies whose policies were payable to the widow, as already indicated, paid the amounts thereof to her. The other eleven companies, whose policies aggregate in value $13,288.17, required the executors of the estate to receive the insurance moneys under said policies and to discharge the companies from liability. The executors say that they considered these policies to be payable also to the widow, and it was not until the companies required them to receive the money and discharge the policies that they found themselves "compelled to intermeddle with the funds and become responsible for the administration of the same." The moneys payable under said eleven policies, with the exception of one, were paid to them before the 1st August, 1912, and the amount payable under it on the 6th August, 1912.

The executors asked upon this application for the determination of the following questions:—

"1. Do the following words used by the testator 'I give devise, and bequeath all my real and personal estate including my life insurance policies, of which I may die possessed,' constitute a variation of the policies of insurance of the testator which, by the express terms of the policies, are made payable to Sarah E. Stewart, wife of the assured and now his widow, and in case she should predecease the assured, then to his estate, and are the words used a sufficient identification of same?

"2. Has the testator by his will altered the apportionment of the insurance moneys secured by the various policies, or are the moneys payable only as directed by the policies of insurance, and in accordance with the terms of the said policies, and the various indorsements thereon?

"3. Does the said general clause in the will of the testator or any other clause therein contained except paragraph 2, affect or control the disposition of the insurance moneys of the deceased?

"4. Can the executors pay to Mrs. Sarah E. Stewart the proceeds of policies mentioned in paragraph 9, (d) of the affidavit of Charles Julius Mickle filed on this motion, as

having been paid to the executors of the estate, and the widow, and amounting to $13,288.12?"

R. S. Cassels, for the executors.

C. J. Holman, K.C., for the widow.

J. R. Meredith, for the infants.

HON. MR. JUSTICE SUTHERLAND:—It is admitted that if the law were still as it was before the passage of the Ontario Insurance Act (1912), 2 Geo. V., ch. 33, the widow would be entitled to receive the moneys. In *Re Cochrane*, 16 O. L. R. 328. It is suggested on the authority of *Re Dicks*, 18 O. L. R. 657, that regard should be had to the law as it stood at the date of the will and not at the date of the death of the testator. Section 247 of the said Act is as follows:—

"247. Sections 162 to 201 of this Act shall come into force on the 1st day of August, 1912, and the remaining sections of this Act shall come into force forthwith."

Included, therefore, in the sections which did not come into force until the 1st August, 1912, is a new section, numbered 170, which is as follows:—

"170. Except in so far as the same are inconsistent with the provisions of this Act relating to contracts made or declared to be for the benefit of a preferred beneficiary or preferred beneficiaries, sections 171 to 182, shall apply to all contracts of insurance of the person and declarations whether made before or after the passing of this Act."

Sub-sections 3 and 5 of section 171, of said Act, are as follows:—

"(3) The assured may designate the beneficiary by the contract of insurance or by an instrument in writing attached to or endorsed on it or by an instrument in writing, including a will, otherwise in any identifying the contract, and may by the contract or any such instrument, and whether the insurance money has or has not been already appointed or apportioned, from time to time appoint or apportion the same, or alter or revoke the benefits, or add or substitute new beneficiaries, or divert the insurance money wholly or in part to himself or his estate, but not so as to alter or divert the benefit, or any person who is a beneficiary for value, nor so as to alter or divert the benefit of a person who is of the class of preferred beneficiaries to a person not of that class or to the assured himself, or to his estate."

"5. Where the declaration described the subject of it as the insurance of the policy or policies of insurance or the insurance fund of the assured, or uses language of like import in describing it, the declaration, although there exists a declaration in favour of a member or members of the preferred class of beneficiaries, shall operate upon such policy or policies to the extent to which the assured has the right to alter or revoke such last-mentioned declaration."

It is contended on behalf of those interested in the estate, other than the widow, that the Act of 1912, was in part passed in consequence of the decision in *Re Cochrane*, and the construction placed on sec. 160, of ch. 203, of the Revised Statutes of Ontario, 1897. Sub-section 5 of said sec. 171, and which is a new section, is referred to in this connection. It is argued that the Act is in this respect an enabling one, and it should be given a liberal construction. See Maxwell on the Construction of Statutes, 4th ed., p. 360. If said sub-sec. 5 applies, it would apparently make the declaration in the will effective to alter the previous declaration in the policies. It it also contended on behalf of those other than the widow that though secs. 170 and 171 are sections referred to in sec. 247, as not coming into force until August 1st, 1912, that nevertheless on that date they became operative, and by virtue of sec. 171, are retroactively applicable to the declaration in the will made before the passing of the Act. On behalf of the widow it is, however, contended that on the death of the testator her interest became a vested one. The policies by their terms were payable on the death of the insured and to the widow. At that time the only existing declaration which was intended to or could effect a change was the one in the will. It was, however, under the law as it then stood ineffective for that purpose. I think the contention on behalf of the widow is a sound one and that the Act of 1912, cannot be held to have any application to the policies in question, that the interest of the widow was a vested one and that she is entitled to the moneys in question. Reference to Craies' Statute Law, 351, 352, 357, 367. *"The Langdale,"* 23 T. L. R. 683—*Smithies* v. *National Association of Operative Plasterers,* [1909] 1 K. B. 310, at p. 319; *Commercial Bank of Canada* v. *Harris,* 26 U. C. R. 594.

The first three questions propounded in the notice of motion must, therefore, be answered in the negative, and the fourth in the affirmative.

The two adult children of the testator, viz., Rena Stewart and James Downing Stewart, who were not represented on the motion, have the same interest in the estate as the infants who were represented. The executors on the motion asked that an order should be made appointing someone to represent them for the purpose of the motion. I do not think this is necessary. Under Rules 939 and 940 they are sufficiently represented by the counsel for the infants, whose interests are similar.

It is a proper case, I think in which to make costs of all parties payable out of the fund in question.

HON. MR. JUSTICE LATCHFORD. NOVEMBER 18TH, 1912.

RE GLOY ADHESIVES, LTD.

4 O. W. N. 350.

Company—Winding-up—Report of Master—Appeal and Cross-Appeal —Purchase of Shareholder's Shares — Gross Fraud — Proceeds Partly Paid to Company—Right to Recover—Shareholder not to Benefit by Fraud.

Appeal by one Hughes, and cross-appeal by liquidator, from the report of the Master-in-Ordinary, dismissing Hughes' claim to rank on the assets of a company in liquidation as a creditor to the extent of $1,200, and the liquidator's claim to recover $800 from Hughes. One Vanderburg, the promoter of the company, had induced one Crosby to purchase from Hughes $2,000 worth of stock by fraudulent means, and of this $2,000, $1,200 had been paid to the company and $800 given to Hughes.

LATCHFORD, J., *held*, that Hughes could not profit by the fraud of Vanderburg, and could not recover the $1,200 received by the company, but that the company had no right to recover the $800 from Hughes as it was money that never rightfully belonged to it.

Lloyd v. *Grace* (1912), 28 T. L. R. 547, referred to.

Appeal dismissed with costs, cross-appeal dismissed without costs.

Appeal on behalf of T. B. Hughes from the report of the Master in Ordinary declaring Hughes not to be entitled to $1,200 paid by one Crosby for shares held by Hughes. He claimed to be entitled to rank on the assets of the company to the extent of the $1,200.

On behalf of the liquidator, the report of the Master was sought to be varied in so far as it held that the liquidator is not entitled to recover from Hughes a sum of $800 paid to Hughes by the company.

A. C. MacMaster, for the motion.

W. R. Wadsworth, contra, and for cross-appeal.

HON. MR. JUSTICE LATCHFORD:—That the $1,200 was received by the company for Hughes, is undoubted. It was, with the $800 in question, obtained by H. E. Vanderberg from the boy Crosby, by gross and unconscionable fraud. To hold Hughes entitled to the $1,200 would be equivalent to determining that he could rightly profit by Vanderberg's wrongful—and, as I regard it, criminal—course in plundering young Crosby.

The circumstances under which the $2,000 was obtained by Vanderberg are so extraordinary that I think the evidence taken before the Master should be submitted to the Crown Officers charged with the administration of the criminal law; and I am directing the Registrar accordingly.

The relation of principal and agent did not, as the Master has rightly found, at any time exist between Crosby and Vanderberg, in regard to the purchase of the worthless shares of Hughes. Vanderberg was no doubt instructed by Hughes to sell his stock, and did sell it. Vanderberg was the company, as the Master puts it; meaning, I assume, that he conducted all the affairs of the company; the board of directors, of which Hughes was one, leaving all matters in Vanderberg's hands. Vanderberg induced Crosby to make the cheque for $2,000, which Crosby had obtained from his widowed mother, payable, not to Hughes, but to the company, which was at the time in a moribund condition. The company had the benefit of $1,200 out of the $2,000, only $800 being handed over to Hughes; but the company was not entitled either to the $800 or to the $1,200; it was simply made a conduit for the money between Crosby and Hughes, and part of the money remained with the company; a part only—the $800—passing on to Hughes.

Crosby has chosen to regard the company as his debtor, not only to the extent of the $1,200 of his money, which it obtained, but also as to the $800 which Vanderberg passed on to Hughes in part payment for his shares.

The liquidator has apparently not contested Crosby's claim. The Master in fact has allowed it, and the liquidator has not appealed upon the point. Hughes is not entitled to claim the $1,200, which the company received through his agent's fraud. He is, moreover, in my opinion, liable for Vanderberg's fraud, whether Vanderberg was acting for his own benefit or not. Dicta to the contra were recently expressly dissented from in the House of Lords. *Lloyd* v. *Grace & Co.* (1912), 28 T. L. R. 547, reversing the decision

of the Court of Appeal, [1911] 2 K. B. 489. Hughes is, in my opinion, not entitled to rank on the assets for the $1,200, and his appeal should be dismissed with costs.

The cross-appeal also fails. The $800 which Hughes received was not the money of the company, but the money of Crosby. It reached Hughes in part payment of shares which Vanderberg had sold for Hughes to Crosby. Had Hughes received the whole $2,000, and not merely part of it, the company would, in my opinion, have no right—whatever Crosby's right might be—to recover these moneys from Hughes. The company had parted with nothing in exchange for Crosby's money, and it has not, I think, in any way became subrogated to the rights which Crosby had or might have had if he had not elected the company as his debtor for the $800 as well as for the $1,200. No costs of the cross-appeal.

HON. MR. JUSTICE MIDDLETON. NOVEMBER 18TH, 1912.

TRIAL.

GATTO v. TORONTO.

4 O. W. N. 356.

Municipal Corporations — Negligence — Leak into Baker's Ovens—Inspection by Health Department—Exaggeration of Damages—Statutory Defences.

MIDDLETON, J., dismissed, with costs, plaintiff's action for alleged damages to his baking business by reason of a service pipe leakage into his ovens, and rendering it impossible for him to bake bread through the alleged negligence of defendants, as he considered the negligence had not been proven, and the damage grossly exaggerated.

Action tried at Toronto on the 7th and 8th of November, 1912, to recover damages for injury sustained by water leaking from a broken service pipe, and making an oven, constructed in an area under the sidewalk, wet, so that the plaintiff was unable to bake bread therein for a period of forty-two days.

W. E. Raney, K.C., for the plaintiff.

C. M. Colquhoun, for the defendant.

HON. MR. JUSTICE MIDDLETON:—On reflection I retain the opinion expressed at the trial, that the plaintiff's claim has little merit and is grossly exaggerated.

The injury took place in the spring and early summer of 1911. The writ was issued on the 18th December, 1911; and the action is only now brought to trial. The delay has created a good deal of confusion in the evidence.

During the preceding winter, the plaintiff had purchased the property, which was then in very bad condition, the water-pipes throughout the building having been broken by frost. On his taking possession, the cellar where three ovens were situated, was found to be wet: most of the water coming from the rear, and supposed to flow from the stable yard of an adjoining livery stable. This rendered one oven entirely useless. The plaintiff, a baker in a small way, used the other two ovens, situated under the sidewalk.

The premises were regularly inspected by the Medical Officer of Health, who prohibited any attempt to use the front oven while the water from the stable ran into it.

There seemed to be a good deal of difficulty in locating the actual source of this trouble. When the water began to leak at the front of the building, this was regarded in the first instance as an entirely minor matter; and I think that the plaintiff is now unjustifiably attempting to put forward complaints made with reference to the leakage at the rear as some justification for the present action. He made no complaints in writing, nor did he personally attend at the city offices for the purpose of lodging a conplaint. Most of the communications on his behalf were through the telephone, and were addressed to the Medical Health Office. The plaintiff sought to eke out the meagre evidence he was able to give by calling a number of civic employees, with a view of bringing home notice of the existence of the defect in this way. These witnesses all appeared to me to be most reliable, and I am quite prepared to accept their evidence.

Mr. Hayward is employed in the department of health and is charged with the duty of inspecting bakeshops. This inspection is primarily directed to the maintenance of sanitary conditions; and I think that the plaintiff is attempting to treat some of Hayward's visits as being the visits of waterworks officials in response to his complaint.

On the 6th July, Hayward inspected the place and found that steps were being taken to stop the leakage from the stable. He heard no complaint as to the leakage in front. On the 26th his attention was drawn to the leakage at the front oven. The leakage was located and stopped on the 3rd

of August; so that but little, if any, damage could be attributable to any delay from this on.

A memorandum was found in the handwriting of Mr. Wilson, the chief clerk of the Medical Office of Health, as follows: "Water runs into bakeshop, 27 Arthur street, said to be from stable 29. Inspectors report trouble is not there, but probably from a water pipe. Will you please have this inspected and let me know." It is suggested that this refers to the leaking pipe in front. I do not think so. Mr. Wilson cannot recall the circumstance; but to my mind the memorandum clearly relates to the leak at the rear. I think that it is fair to suppose that it preceded the inspection referred to in Mr. Wilson's letter of July 5th, when he notified the owner of the livery stable that "upon inspection of 29 Arthur street, it is found that your washrack is not tight and that water runs into the adjoining cellar."

In the complaint-book of the Water Works Department, there is an entry under date of 26th June: "27 Arthur street; stopcock N. G.: burst," which the clerk in charge interprets as meaning that a pipe inside the building was burst and required repair and that the stopcock on the street line could not be sufficiently closed to enable the repair to be made.

Men were sent to make this repair. They called at the plaintiff's premises, No. 27, and were told that there was nothing wrong there. They then went to No. 29, and found existing there the precise condition of affairs suggested by the instruction. Plumbers were endeavouring to repair a burst closet pipe, but could not solder, owing to the defective stopcock. The repair gang then dug to the stopcock, removed the defective parts, and in due course made a report, on the following day, June 27th: "Stopcock leaking through 29 Arthur street. Dug out, tunnelled under sidewalk, shut down: used ⅜ stopcock."

Hutchinson, the bookkeeper who received the telephone message, said that when he received it on the 26th, he was told that no harm was being done, so he did not send the "hurry-up wagon," as he would have done in the case of an emergency.

I think that Peter Petrozzi, when he went on the plaintiff's behalf to the health office, directed his complaint to the leaks in the rear; and it may well have been that what he

did originated the memorandum signed by Mr. Wilson, and the subsequent investigation into the leaking washrack.

Even making large allowance to the plaintiff by reason of his inability to speak English, I think he ought to have drawn the attention of the Water Works Department to the leak in some more effective way; and, further, I believe he would have done so, if he was suffering any such inconvenience as he now suggests. I have no doubt that some inconvenience was suffered; and at the trial I stated that in my view $200 would be an outside allowance, if he was entitled to recover and entitled to damages by reason of inability to bake enough bread to answer his requirements. The evidence as to this is most unsatisfactory. Particulars had not been given; special damage had not been pleaded; and there was every indication of a desire to exaggerate. If this element of damages is too remote, I would think that $50 would more than compensate for the inconvenience.

As I am unable to find any negligence on the part of the city, I think the action fails; but if I had thought the plaintiff entitled to recover, I would not have certified to prevent a set off of costs.

In addition to the other grounds, the defendants rely upon statutory defences which were originally given to the water commissioners, and which they claim have passed through them as part of the "privileges" referred to in the legislation. See 35 Vict., ch. 79, secs. 19, 21, 28, and 41 Vict., ch. 41, sec. 1. I do not find it necessary to pass upon this contention.

HON. MR. JUSTICE RIDDELL. NOVEMBER, 20TH, 1912

ST. THOMAS, NON-JURY.

RE WOODS, BROWN v. CARTER.

4 O. W. N. 388.

Executors and Administrators—Claim by Plaintiff to be Next of Kin —Pedigree—Hearsay Evidence—Rule as to, Discussed—Costs.

Action for a declaration that plaintiff was one of the next of kin of Edward Woods, deceased. Defendants alleged that plaintiff's mother, through whom she claimed, was not the child of, but adopted by, her putative parents.

RIDDELL, J., found in favour of defendant's contention and dismissed action. No order as to costs, save that defendants were given their solicitor and client costs out of the estate.

Discussion of the rule that hearsay evidence admissible to prove pedigree.

Action by plaintiff for a declaration that she was one of the next of kin of Edward Woods, deceased, and as such entitled to a share of his estate.

V. A. Sinclair, for the plaintiff.

W. H. Barnum, for the defendant.

HON. MR. JUSTICE RIDDELL:—This case tried before me without a jury at St. Thomas, afforded a spectacle none too common, and, therefore, the more pleasant—parties on either side cordially admitted—or rather asserted—the good faith of their opponent, and also the perfect honesty and good faith of the witnesses on the other side. There was no contradiction in the evidence. I was struck by the candour and transparent honesty of all the witnesses examined and found, and find that they not only tried to tell the exact truth, but also that they succeeded (in all matters within their knowledge) in doing so. I would add that though it was what may without much violence to language be called a "family" dispute, and that it was in substance a dispute about sharing a dead man's estate, still there was no evidence of bitterness or ill-will exhibited by any party—and counsel conducted the case throughout with skill and courtesy.

One Edward Woods died in October last, intestate and without issue, never having married. He had had a brother, but he had predeceased him, and Edward Woods left no brothers or sisters or descendants of either. He was the son of James H. Woods, who was the son of Harvey Woods and Penelope Ovton, his wife. Harvey Woods and Penelope Woods had many years ago came into Upper Canada from the State of New York, with a family in which were James H. Woods, Melinda Woods (afterwards Mrs. Livingston), and Caroline Woods (afterwards Mrs. Cook).

There was also treated as one of the family, a girl, always known as Sarah Woods. She became the wife of Thomas Cascadden, and had issue, Amanda Cascadden, who became Mrs. Amanda Brown. Mrs. Livingston and Mrs. Cook both left issue.

It is apparent then that if Sarah Woods was the sister of James H. Woods, her daughter, Mrs. Amanda Brown is entitled to share in the estate of Edward Woods; as she in that case would be a cousin german, and stand in the same relationship to the decedent as the children of Mrs. Livingston and of Mrs. Cook. This being a matter of pedigree by

one of the well established rules of evidence, hearsay evidence will be admitted. It is not of moment here to consider the reason, historical or logical, of this exception to the general rule—if, indeed, it be not a survival of an older condition of the rules of evidence in this class of cases—having excepted the somewhat artificial restriction which has been imposed on evidence in general. The so-called rule and so-called exception are thoroughly established in any event. The declarations admitted are made: (1) by deceased members of the family; (2) *ante litem motam,* and (3) not obvious for his own interest. *Attorney-General* v. *Kohler,* 9 H. L. C. 654, 670, *Landerdale Peerage Case* (1885), 10 A. C. 692; *Gee* v. *Ward,* 7 E. & B. 509; *Plant* v. *Taylor,* 7 H. & N. 211, 238; *Dysant Peerage Case,* 6 A. C. 489. "The natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position without any temptation to exceed or fall short of its truth" are accepted as evidence, per Lord Eldon, L.C., in *Whitelocke* v. *Baker* (1807), 13 Ves. 514.

Monkton v. *Attorney-General* (1831), 2 R. & M. 160. There may be some doubt as to the degree and view of relationship in the person declaring which will permit the declaration being effective as evidence. There is no doubt an illegitimate member of the family is not within the rule.

Doe d. Bamford v. *Barton,* 2 M. & Rob. 28, but a connection by marriage is said to be sufficient. *Doe d. Nuthey* v. *Harvey,* 1 Ry. & Mad. 297; *Doe d. Fulton* v. *Randall,* 2 Mad. & P. 20. I thought it safer to exclude this latter, but this exclusion did not affect the result.

I find that Penelope, the putative mother, did say that she had taken Sarah to bring her up, etc., that it was well known in the family that she was not one of the family, but an outsider, and in the evidence called for the defence, I must find that she was not the daughter of Penelope Woods, although her position was made as pleasant for her as possible, and her want of kinship to her putative relations was not unnecessarily flaunted.

Mrs. Amanda Brown, her daughter, claims to be a next of kin of Edward Woods; the administrator of Edward Woods estate denies this. I thought it proper to make an order at the trial that the administrator should represent all all persons who have an interest in disputing Mrs. Brown's kinship. And I find in favour of the defendant as to costs,

I do not consider that I should make the real next of kin pay the costs of one who makes the claim to be of them and fails; but I think under all the circumstances I may direct that there shall be no costs except that the defendant shall have his costs between solicitor and client out of the estate.

Once before money come to be divided; it had been part of the estate of a deceased relative in New York State, and while James, Melinda, and Caroline divided this money to the exclusion of Sarah, they contributed from their share to a fund for her. While I have no power to direct those now dividing a dead relative's estate to give any part of their money to their "cousin," I should feel gratified if they would do so—at least sufficient to pay her costs if their generosity did not extend further.

COURT OF APPEAL.

NOVEMBER 19TH, 1912.

DUNN v. GIBSON.

4 O. W. N. 329.

Seduction—Forcible Assault — Corroboration not Necessary in Civil Action—Defendant Mentally Defective — Death of Child—No Ground for New Trial—Excessive Damages—No Standard for—Jury Sole Judges.

Action for damages for forcible seduction of plaintiff by defendant. Defendant was mentally defective and plaintiff was a servant in his mother's house.

SUTHERLAND, J., gave judgment for plaintiff for $5,000 and costs upon the findings of the jury.

DIVISIONAL COURT dismissed appeal from judgment of Sutherland, J., with costs.

COURT OF APPEAL *held*, that the damages could not be said to be excessive in view of the nature of the case, that corroboration was not needed in a civil case, and that the fact that the jury had been told that the child might be a permanent burden on plaintiff, whereas it only lived one day, was no ground for a new trial.

Appeal dismissed with costs.

Action of damages for assaulting and ravishing the plaintiff without her consent tried at Hamilton before Sutherland, J., and a jury, who returned a verdict for $5,000. An appeal to the Divisional Court was dismissed.

Plaintiff, a young woman of 22 years of age, was a servant in the house of defendant's mother, a grand-daughter being the third member of the family. The defendant, who

is about forty years of age and unmarried, lived with a relative near by. He was in the habit of going to his mother's frequently, and bringing in water and doing other chores. From an accident in childhood his mentality was arrested and he could not be taught, but he developed physically. He was examined for discovery and as a witness sometimes he answered intelligently and at other times not, but nearly always in monosyllables. He denied the charge. Plaintiff said the offence was committed in the morning when he and she were alone in the house. She said she screamed but was not heard. She did not tell any person about it until nearly two months after the alleged outrage, when she went to the hospital and her pregnancy was discovered.

The appeal to Court of Appeal was heard by HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH and HON. MR. JUSTICE MAGEE.

E. F. B. Johnston, K.C., for the appellant.

W. A. Logie, for the respondent.

HON. MR. JUSTICE MACLAREN:—Counsel for the appellant argued that the action should fail because her testimony required corroboration and because there was no disclosure of her for nearly two months. This is not a criminal case and the rules of evidence in the Criminal Code on these points do not apply and these were questions for the jury.

It was also claimed for appellant that the trial Judge improperly allowed plaintiff's counsel to urge upon the jury large damages on account of the expense she would be put to for the bringing up of the then unborn infant whereas in the result it lived only one day. Defendant's counsel did not raise any objection at the trial and there is nothing to shew that any improper appeal was made. The possible early death of the child was a contingency that would be present to the minds of the jury, and the actual result could be no ground for a new trial.

A new trial was also claimed on the ground of excessive damages. The damages are much larger than are ordinarily allowed in such cases; but this is a matter peculiarly for the jury. The offence was a very grievous one if the evidence of the plaintiff was true, and the jury believed her.

The Divisional Court were evidently not shocked by the amount and I do not think it is a case in which we can properly interfere.

In my opinion the appeal should be dismissed.

HON. MR. JUSTICE MEREDITH:—This appeal really involves but the two questions; whether there ought to be a new trial on the ground of excessive damages, or upon the ground of the birth and death of a child since the trial.

No objection was made at the trial or here, that the damages were in any respect too much; the charge at the trial was not at all objected to in respect of anything said in it on the question of damages.

And having regard to all the circumstances of the case I am unable to perceive how this Court can interfere on the ground of excessive damages: the case is in no sense one in which, as to the amount of the damages, there is some standard by which the jury ought to have measured them, and which they failed to observe. According to the finding of the jury, the defendant was guilty of an assault, of a very violent, indecent and hurtful character, upon the plaintiff; and so it is a case in which the jury might give exemplary damages, as well as compensatory damages. The amount awarded may seem large, but, whether less or even more, it was right and duty of the jury to assess them; a right and duty which the Courts cannot interfere with unless, generally speaking, it has been misused or exercised under some material mistake.

Nor can I see how this Court can well interfere on the other ground. What has happened is one of the things, the possibility of the happening of which, the jury might, and doubtless did take, into their consideration; and, beside that, the thing which has happened is not one which necessarily would lessen the amount; indeed it may very well be that it would have no such effect.

I would, therefore, dismiss the appeal.

HON. SIR JOHN BOYD, C. NOVEMBER 7TH, 1912.

TRIAL.

WILSON v. TAYLOR.

4 O. W. N. 253.

Mortgage—Sale under Power—Alleged Improvidence—Sale en Bloc Instead of in Parcels—Delegation of Matter to Careful Solicitor by Mortgagee—Local Conditions—Printers' Error in Advertisement—Duties of Mortgagees Discussed—No Evidence of Mala Fides.

Action for damages alleged to have been sustained by a mortgagor by reason of the alleged improvident sale of the mortgaged premises by the mortgagor, under his power of sale. The chief complaint was that the property had been sold *en bloc* instead of in parcels, against the expressed wishes of plaintiff, and the evidence went to shew that in all probability more could have been obtained for a sale in parcels. Defendant had been too old to look after the matter himself, and had put the whole business in the hands of a competent solicitor.

BOYD, C., *held*, that "if a mortgagee exercises his power of sale *bona fide* for that purpose, without corruption or collusion with the purchaser, the Court will not interfere, even though the sale be very disadvantageous unless, indeed, the price is so low as to be in itself evidence of fraud."

Haddington Island Quarry Co. v. *Huson*, [1911] A. C. 729, and other cases as to liabilities of mortgagee selling, reviewed.

Aldrich v. *Can. Perm. Loan Co.*, 24 A. R. 193, distinguished.

Action dismissed without costs.

J. E. Hutcheson, K.C., for the plaintiff.

J. L. Whiting, K.C., for the defendant.

HON. SIR JOHN BOYD, C.:—It has been said that in exercising the power of sale in a mortgage, the mortgagee is acting as a trustee and in explanation of that relation it has been further said that he should act in the same way as a prudent man would act in the disposal of his own land, The highest Courts, however, have held that the mortgagee is not acting as a trustee, but only in pursuance of the powers conferred by the mortgage and that he may first consult his own interest before that of the mortgagor, especially I would think in a case where the security though adequate may be difficult of realization. The effect of this state of the law is to displace the test of the prudent man dealing with his own property in favour of a somewhat lesser degree of responsibility. The point is adverted to by Mr. Justice Duff in *British Columbia Land & Investment Agency* v. *Ishitaka*, 45 S. C. R. at p. 317, and has a bearing on the present case.

A valuable rule as to the obligations of the mortgagee is to be found in an appeal from Victoria to the Privy Council; viz., that a mortgagee may be chargeable with the full value of the mortgaged property sold if from want of due care and diligence it has been sold at an under-value, and the reference in such an event would be to charge the mortgagee with what but for his wilful negligence and default might have been received: *National Bank of Australasia* v. *United Hand in Hand* (1879), 4 App. Cas. at pp. 392, 411. In other words: the inquiry is, has the mortgagee been culpable to the extent of wilful default in exercising his power of sale?

My attention was called to the terms of the power of sale; in this case, the statutory form which was used in the mortgage of 20th November, 1908, made by the plaintiff to the defendant to secure $4,000, R. S. O. ch. 126, covenant 14, p. 1186. Power is given to sell the land or any part or parts thereof by public auction . . . as to him shall seem meet . . . and the mortgagee shall not be responsible for any loss which may arise by reason of any such . . . sale . . . unless the same shall happen by reason of his wilful default or neglect. The responsibility arising from the exercise of the power of sale is thus exactly defined in the terms used by the Privy Council and is to be measured by the usual test applied in cases of wilful blame. In conveying the land to be held as security the mortgagor has given a large discretion to be *bona fide* exercised by the mortgagee. If default is made in payment and due notice given of the intention to sell by proper and adequate advertisements, the manner of selling whether *en bloc* or in parcels is left in the hands of the mortgagee. For a disadvantageous sale or for an inadequate price he is not responsible when he acts *bona fide*, unless the amount is so disproportionate to the value as to induce the conclusion that the property has been recklessly sacrificed. One is wise after the event and after a sale one may be able to say that had the property been put up otherwise a better result would have been obtained. But in considering the method of advertising and the best way of putting up the property for sale it may be a matter of doubt as to what course is most advisable, for example as to selling *en bloc* or in parcels. If in this dilemma the mortgagee prefers one way to the other he cannot be charged on the ground of

wilful default. Acting according to the best light reasonably attainable he may err and yet may be absolved from making good any loss to the mortgagor.

In the latest decision on the point in the Privy Council the language of Kay, J., in *Warner* v. *Jacob*, is approved, who says the power is given to enable the mortgagee the better to realise his mortgage debt. "If he exercises it *bona fide* for that purpose without corruption or collusion with the purchaser the Court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud;" *Haddington Island Quarry Co.* v. *Huson*, [1911] A. C. at p. 729. In *Kennedy* v. *De Trafford*, [1897] A. C., the Law Lords agree in holding that if a mortgagee takes pains to comply with the provisions of the power and act in good faith his conduct as to the sale cannot be impeached.

At the close of the evidence I thought that the mortgagor had been damaged to the extent at least of $1,800 as an effect of the sale conducted as it was; the evidence as applied to the plan of the place indicated that the better way would have been to have sold in parcels and that four parcels could readily be adjusted, (1) of the house and barn, (2) of the brickyard and 7 acres of clay, (3) of three lots to the north of the house, and (4) of the grazing land about 13 acres separated by a stream from the brickyard. There was evidence that the owner himself to the knowledge of the mortgagee had offered the place for public sale about a year before in parcels, and other evidence shewed that persons would have competed for the lots and the grazing land had they been put up in parcels. Some attempt was made to have the land parcelled out before the sale on behalf of the mortgagor, but nothing very definite as to the manner of subdivision was suggested.

I think on the evidence that the land should have been advertised in parcels and that a better attendance would have been the result at the place of auction.

On the other hand local conditions existed—that the property was a difficult one to dispose of in any way and that in Gananoque where it was situate there was little or no market for land or for such a sized house as was on this land. The property was all in one place and fenced around, with some intermediate fencing, and though the mortgagee from age and infirmity was not able to give much assistance,

he referred the applicants and the arrangement of the whole sale to a solicitor of long-standing and experience resident in the place, who weighed the pros and cons of the situation. I might almost say that the mortgagee did not act as if he had been disposing of his own property, yet this would not be a decisive test in view of the later authorities, for he employed a competent person who endeavoured to "take some pains" to carry out rightly the provisions of the mortgage both as to advertising and conducting the sale. The mortgagor had himself made use of all the various parts of the mortgaged property in connection with the brickyard and the solicitor thought that the best way to get the whole sold was to make no separation of the parts. The proposal to separate was not urged in any explicit or defined way: only a claim was expressed by the creditors that it should be sold in parcels and what the mortgagor himself asked was that the brickyard might be sold separately and the rest to the best advantage.

The complaint in the pleadings is that the defendant sold the whole property *en bloc*; that he neglected to divide into separate parcels prior to the sale though requested by the mortgagor, and that he omitted ten lots in the description given in the advertisement. No harm resulted from the omission of the numbers of these lots—it was a printer's error, and as the lots formed part of the brickyard, this enumeration was merely following the minutes of the description in the mortgage. No one clear method of division was suggested by the mortgagor or anybody else. When the mortgagor himself advertised for sale, he made three parcels: (1) the house and barn; (2) the brickyard, and (3) the grazing land, but his sale was abortive and none of the parcels were bid up to the reserved bid.

No doubt it was decided in *Aldrich* v. *Canada Permanent Loan Co.*, 24 A. R. 193 (*dissentiente* Burton, J.A.), that the duty of the mortgagee was to sell in parcels and not *en bloc*. But that duty depends upon a variety of circumstances which do not here exist. In that case the mortgage covered a farm and two shops in a village nearly three-quarters of a mile away and no justification for a joint sale existed. Whatever loss has resulted to the mortgagor from the sale of the property conducted as it was, I do not think judgment should be given in his favour having regard to the trend of judicial opinion.

I dismiss the action without costs.

HON. MR. JUSTICE RIDDELL. NOVEMBER 9TH, 1912.

CHAMBERS.

CAMPBELL v. VERRAL.

GIBSON v. VERRALS.

4 O. W. N. 300.

Action—Motion to Stay—Judgment Outstanding in Former Action—Res Judicata—Parties—Costs.

Motion by defendant to stay actions until a former judgment, recovered by plaintiff upon the same cause of action against Taxicabs Verrals Limited, is got rid of in some way. After recovery of the judgment in the former action it was discovered that defendant company, while incorporated, had no assets, and this action was then launched against George W. Verral, trading as the Taxicabs Verral Company.

RIDDELL, J., dismissed motion, costs to plaintiff in any event of cause.

T. N. Phelan, for the motion.

John McGregor, contra.

HON. MR. JUSTICE RIDDELL:—These are two actions but may, for the purposes of this motion, be treated as one.

The plaintiff sued "Taxicabs Verrals, Limited" by writ tested November 30th, 1910, served upon George W. Verral only—pleadings were delivered and the action tried resulting in a verdict for a considerable amount. The plaintiff then found that the company had been incorporated, indeed; but it had done no business and had no assets.

Then an action was brought against "George W. Verral, trading as the Taxicabs Verral Company"—an appearance having been entered, a motion was made to set it aside which failed, 23 O. W. R. 6.

It is plain that the cause of action in both the former and the present action is the negligence of a taxicab driver resulting in injury to the plaintiff.

The defendant moves to stay the action until the former judgment is got rid of in some way.

I do not think the motion can succeed.

The cause of action against the incorporated company no doubt "*transit in rem judicatam*": but that is all. Any cause of action against Verral is still a "cause of action" only—it had not passed into a judgment.

It was determined in the former action that the negligence of the chaffeur was the negligence of the company—

and that judgment standing it operates as an estoppel as between the parties thereto (and their privies if any) but no further. The plaintiff could not as against the company say that the negligence was the negligence of Verral but there is no reason why she should not as against Verral.

These are commonplaces: and I reserved my decision solely to read the authorities so earnestly pressed by Mr. Phelan to see if there were anything in them laying down or indicating the law at all differently. There is not.

So far as this is an application to the discretion of the Court, there is nothing in the defendant's conduct entitling him to consideration beyond any other litigant; while on the strict law he must fail.

The motion will be dismissed with costs to the plaintiff in any event.

I have not overlooked the fact that the first action seems to have been intended to be brought against Verral and the intention changed, as Verral's name appears first on the writ and is cancelled.

COURT OF APPEAL.

McDOUGALL v. GRAND TRUNK Rw. CO.

4 O. W. N. 363.

Negligence—Railway—Passenger Alighting—Door of Coach Closed—Negligence—Right to Enter Pullman—Trespasser—Contributory Negligence — Train in Motion — Emergency — Reasonable Act —Injuries—Damages.

Action by plaintiff for damages for personal injuries sustained by reason of the alleged negligence of defendants. Plaintiff was a passenger upon a car of defendant's train travelling from Toronto to Weston. As the train approached Weston, near midnight, he made preparations to alight, and when the train stopped, with a companion, went to the rear door of their car and, finding it locked, passed through the car immediately behind, which happened to be a Pullman sleeper, to its rear door, which was open. By this time the train was under way and going some four or five miles an hour. Plaintiff's companion alighted safely, but he fell and was seriously injured, losing an arm. Defendants claimed that plaintiff had no right to be in the Pullman, and he was, therefore, a trespasser, towards whom they owed no duty, and that in addition, he was guilty of contributory negligence in alighting while the train was in motion.

MEREDITH, C.J.C.R., at the trial, by consent of counsel, only submitted two questions to the jury: (1) as to whether the rear door of plaintiff's car was locked, which defendants denied, which the jury answered in the affirmative, and (2) as to the amount of damages, which they fixed at $2,500. Judgment was then entered for plaintiff for $2,500 and costs.

COURT OF APPEAL (MEREDITH, J.A., dissenting), dismissed defendants' appeal with costs.

Keith v. Ottawa & New York Rw. Co., 5 O. L. R. 116, approved.

Appeal by defendants from judgment of MEREDITH, C.J.C.P., awarding plaintiff $2,500 damages upon the findings of a jury in an action for damages for personal injuries sustained through the alleged negligence of defendants.

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

F. E. Hodgins, K.C., and A. C. Heighington, for the plaintiff.

HON. MR. JUSTICE GARROW:—Appeal by the defendants from the judgment at the trial before Meredith, C.J., and a jury in favour of the plaintiff. The action was brought to recover damages caused to the plaintiff while a passenger on the defendants' railway, by reason of insufficient provision to enable him to properly and safely alight from the train upon which he was travelling, upon its arrival at Weston station.

The plaintiff and his friend, John Gibney, had left Toronto together, bound for Weston, a station a few miles to the west of that city, where the train arrived a little before midnight. They were seated in a passenger coach of the ordinary description, so far as appears, conected at its rear end with a Pullman coach, the whole being what is called a vestibuled train. There was a door of exit at each end of the passenger coach. The forward door was open, but there was conflicting evidence whether the rear door also was open.

The plaintiff and his friend tried the rear door near which they had been sitting, and finding it as they say locked, they passed through the Pullman coach, and alighted from the rear platform of that coach after the train had commenced to move; Mr. Gibney, who was first, alighted without difficulty, but the plaintiff in alighting immediately afterwards fell and was severely injured. In passing through the Pullman coach they met the porter who was apparently in charge. He asked if they desired to get Pullman accommodation, and getting a negative reply did not order them out or attempt to turn them back or otherwise prevent them from proceeding to the rear platform as they did.

It is not claimed that the stop at the station was not of sufficient length to have enabled the plaintiff and his friend to alight under ordinary circumstances.

At the close of the evidence for the plaintiff, counsel for the defendants moved for a nonsuit, which was reserved, and renewed at the close of the whole case, when this took place:—

"Mr. Hellmuth: I would submit that on the whole case—

His Lordship: I am entirely against you. I think the defendants are liable. You put them on this train; you invited them to alight; when they went to the proper place to alight they could not get exit from the car. They were not bound to remain on the car. They went to see if they could find some place of exit, and finding none they made their best way out.

Mr. Hellmuth: I think, with great respect, that all the cases proceed on the ground of invitation, and where they find, as they say they did, a closed door and trap-door down, there was no invitation.

His Lordship: I will rule the other way. What question of fact is there in this case to submit to the jury?

Mr. Hellmuth: The time the train stopped.

His Lordship: Is there any other important question than whether Gibney and the plaintiff are right as to the condition of the vestibule between the second day car and the first Pullman? What I propose to do, unless there is some objection that strikes me as formidable to it, is to ask the jury just the one question, whether the vestibule was closed, as the defendants say, or whether it was as the plaintiff and Gibney say—and as to the damages—and any other question I will determine without the aid of the jury.

Mr. Hellmuth: I suppose those are questions of law more than of fact.

His Lordship: Yes, largely. Of course, the evidence as to the time the train stopped there varies very much from a minute and a half to three minutes. I suppose nobody could say—I do not know how that is—nobody could say that these men had not time enough to get off.

Mr. Heighington: No, I do not think we will contend we had not time to alight if the doors were open.

His Lordship: Does not the whole case turn on whether the door was closed, and then the question of law as to whether in the circumstances the men were justified in doing as they did? The only question there that might be asked the jury is whether they did what was right under the circumstances; but I think I will pass upon that. I will just ask the jury to assist me on one question of fact and the damages.

Mr. Hellmuth: I do not know that I can object to that. Of course, my accepting your Lordship's doing that does not mean that I would be bound by the findings as to this.

His Lordship: Certainly not."

Accordingly the only questions submitted to the jury were (1) was the rear door closed, to which they answered "Yes," and (2) the amount of the damages, which they fixed at $2,500, for which amount the plaintiff has judgment.

The case involves one or more rather nice questions, but upon the whole I do not see any good ground upon which we can interfere. The defendant cannot complain of the somewhat unusual course adopted at the trial, because counsel assented. All that now seems open is the question whether there was reasonable evidence to justify the inferences and findings made by the learned Chief Justice, and I find it impossible to say that there was not. The plaintiff had in the absence of timely information to the contrary a right, it seems to me, to expect to find the rear door of the passenger coach open, in which case he could easily have alighted there in the time allowed. He might even have gone after finding the rear door closed, to the front door which was open—and still have alighted in plenty of time. Instead, he proceeded through the Pullman coach into which. it may be conceded, he had no right under his ticket to enter. But that is not the real question. He had a right to alight from the train, and having at last reached an opening from which he could alight, the real question must, I think be, might he then alight, the train having commenced to move—in other words, was what he did under all the circumstances reasonable. In the opinion of the learned Chief Justice it evidently was, and I am not prepared to differ from that conclusion. It is easy to say after the event that the plaintiff would have escaped injury if he had gone to the front door instead of the rear door, or to the front door after finding the rear door fastened, as upon the findings of the jury it must now be assumed it was. But the time allowed for deliberation was at the best, very short, and finding the rear door closed, it was almost as easy to reach the rear of the Pullman coach as to return to the front door of the passenger coach. It is not to be forgotten that it was the act of the defendants' servants in failing to open or to keep open the rear door which put the plaintiff in the difficulty. Nor is it an answer in law to say that the train being again in

motion the invitation to alight was thereby cancelled. Allowance must be made for the very natural desire of a passenger not to be carried beyond his destination, especially at so late an hour. It must, therefore, always in such cases and under such circumstances be a question of the reasonableness of what was done, a question which was rather recently considered in this Court in *Keith* v. *The Ottawa Rw. Co.*, 5 O. L. R. 116.

I, therefore, see no alternative but to dismiss the appeal with costs.

HON. MR. JUSTICE MACLAREN:—This is an appeal by the defendants from the judgment in an action tried by Meredith, C.J., and a jury. Plaintiff was a passenger from Toronto to Weston, a western suburban village, where, on descending from the train, he fell and was run over by the rear car and lost an arm. The jury awarded him $2,500.

The chief dispute was whether the vestibule doors at the rear of the day car, in which the plaintiff and a friend were riding, were open or closed, while the train was standing at the Weston station. It was assumed throughout that if these doors were closed it would be negligence on the part of the company. The conductor and the brakesman of the train swore that they had remained open as usual from Toronto, and were only closed after the train started from Weston. Plaintiff and his companion, Gibney, swore that they were in the rear seat of the rear day car, that when "Weston" was called out, and the train was slowing down they arose and went into the rear vestibule and finding all the doors closed, Gibney tried first to open the doors at the rear of the day car, and finding them "stuck," he next tried those at the front of the first Pullman with a like result. He then rushed into the Pullman car followed by the plaintiff, and passing the porter hurried into the rear vestibule, reaching it just as the train was starting. Gibney opened these vestibule doors and descended safely to the ground east of the station platform. Plaintiff following him closely tried to do the same, but stumbled and fell under the rear car near the eastern end of platform with the result stated.

The learned Chief Justice, with the acquiescence of counsel, submitted only two questions to the jury, reserving to himself the decision of the other points in the case. The two questions and the answers of the jury were: "(1) Were the trap doors down and the vestibule doors closed between

the car upon which the plaintiff was a passenger and the Pullman car in rear of it, when the train came to a stop at Weston? A. Yes. (2) At what sum do you assess the plaintiff's damages? A. $2,500."

His Lordship thereupon held that the plaintiff had acted reasonably in what he did, and that there was nothing in the rate at which the train was proceeding to make it manifestly dangerous for him to attempt to get off the way he did, and entered up judgment for $2,500. The evidence was that the train was going at the rate of three or four miles an hour when the plaintiff fell. The finding of the Chief Justice as to the danger is quite in accord with the principles laid down by this Court in *Keith* v. *Ottawa and N. Y. R. W. Co.*, 5 O. L. R. 116, which in some respects is similar to this case and the correctness of his decision on this point was not challenged by the defendants, either in their reasons of appeal or the oral argument before us.

Counsel for the defendants, however, claimed that on the evidence the jury should not have found that the rear vestibule and trap-doors of the day car in which plainitff was riding were closed during the time the train was standing at Weston station. On the one hand they had the conductor and brakesman (two interested witnesses) swearing they were not; while on the other they had the plaintiff and Gidney (only one of them interested) swearing the opposite, and giving particulars of Gidney having actually tried to open them before the train started. They believed the latter as it was their privilege to do, and no sufficient reason has been given to us to interfere with their verdict on this point.

While the counsel for the defendants as just stated did not criticise the holding of the trial Judge as to the speed of the train, not making it manifestly dangerous or negligent for the plaintiff to attempt to alight, he did urge very strongly that as the plaintiff had only a first-class ticket, he had no right to enter the Pullman at all, that he was a mere trespasser to whom the company owed no duty (probably the first time on record on which such a claim was put forward), and that the vestibule and trap-doors being closed there was not only no invitation to him to alight that way, but an express prohibition to attempt it.

I do not think the fact of the plaintiff being only a first-class passenger has anything to do with the present case.

A first-class or even a second-class passenger may have a right under certain circumstances to pass through a Pullman car in embarking upon or alighting from or in simply passing through a train. The question is: Did he act reasonably? It may be noted here that there is no evidence that the plaintiff knew this car was a Pullman until he had got some distance inside and saw the berths made up, and by that time he was much nearer the exit in the rear and would know that he could reach it much sooner than that in front, if such a thought as turning back had then occurred to him.

Bearing in mind that the only point on which there was a conflict of evidence has been disposed of by the verdict of the jury, what are the proved facts that are material to the case? The plaintiff after the brakesman called out "Weston," as the train was slowing down, went to the proper place for him to alight, no notice having been given to him to go elsewhere. Finding all the doors closed, his companion who was in front tried first to open the vestibule doors of the day car, and finding them "stuck," next tried those of the front of the Pullman, with a like result. Then they started to go through the Pullman car. It was agreed that he could have turned back and gone to the front of the day car. He did not know that that was open to him any more than the place they had just tried. It was perhaps even more natural that they should continue to press on in the direction they had started rather than retrace their steps. But plaintiff from his experience knew that the train stopped only one or two minutes, and he had now only some seconds to make his exit. A man who in such an emergency comes to a decision that may not be the wisest, is not on that account necessarily negligent. It was quite natural that he should follow his friend where the way was apparently clear, and where the friend made his way out in safety. Although the defendants had negligently closed him in, it was his duty to make all reasonable efforts to get off, rather than to remain passive and then seek damages from the company for having carried him beyond his destination. The company having negligently closed his natural means of getting off the train without notice to him were guilty of negligence in starting the train before he had sufficient time to get off by the means he adopted which under the circumstances was not a negligent or unreasonable or improper way or method, and the injury he sustained was the direct result of such negligence. I can

find no sufficient ground for reversing the finding of the trial Judge.

The appeal in my opinion should be dismissed.

HON. MR. JUSTICE MEREDITH (*dissenting*) :—The learned trial Judge, with the expressed assent of the defendants, and the tacit assent as well, no doubt, of the plaintiff, withdrew this case from the jury and determined it altogether himself, with the exception of the single question: "Was the trap-door down and the vestibule door closed between the car upon which the plaintiff was a passenger and the Pullman car in rear of it, when the train came to a stop at Weston?" and the assessment of damages; and so the case stands in a very different position upon this appeal now than it would stand if the case had been tried in the more usual way—if the jury had been required to find, and had found, upon all the material questions of fact involved in the case.

The jury's answer to the one question was "Yes;" and they assessed the damages at $2,500; findings which must stand, because there was evidence adduced at the trial upon which reasonable men might so find; and there is no appeal against a jury's finding.

But in regard to all other material facts, there is an appeal; and this Court is bound now to consider such facts, and if they prove to be, plus the findings of the jury, insufficient to support the judgment directed at the trial, to be entered in the plaintiff's favour, it cannot stand.

There is no finding of negligence on the part of the defendants, by the jury, nor indeed, expressly by the Judge; nor, if such negligence, that it was the proximate cause of the plaintiff's injury. The mere fact of this particular door being closed "when the train came to a stop" might be evidence of care rather than lack of care. It may be that the jury, if asked, would have found that it was not open at all during that stop. But they have not done so. The evidence of the plaintiff and that of his companion at the time, is not very clear in regard to this. They say that they rose from their seats before the train had quite stopped, and went to the platform and found the outer doors closed; that the plaintiff's companion made an effort to open them but could not, and that they then went on through the next car, a Pullman, reaching its rear doors

and opening them and getting off when the train was again in motion: the time during which the train was actually stopped is variously put at from one minute and a half to three minutes, the plaintiff's companion testified to about a minute and a half: and so it seems difficult to account for the plaintiff's movements during that time, unless it was nearly all spent in vain efforts to open the doors, though neither testified to anything pointing to more than a few moments' stay there. If it were proper that a way out through that door should have been provided that duty would have been performed if the doors were opened after the train stopped and kept open long enough to enable passengers having ordinary diligence and care to alight. But it may be that if the jury were right in their finding, then those doors were not open at any time during the stop; and the evidence of the conductor, as well as that of the brakeman, respecting them is untrue, and yet it might have been better if the question had not been limited to the time "when the train came to a stop."

Assuming, however, that the finding ought to be that no reasonable means of alighting from the train was afforded at those doors, during that stop, was there negligence on the part of the defendants in that respect?

Any finding upon the whole evidence upon this question is that there was. The defendants did not at the trial take the position that it was not their duty to passengers to provide a way out by the doors in the rear of the car in which the plaintiff was; the whole of the testimony in their behalf points in the other way; it was to the effect that those doors are always kept open for that purpose until that train leaves the station at which the accident occurred, and that they were to open so that the plaintiff might and should have passed through them in alighting on the occasion in question.

Then was the neglect of the trainmen to open them, or to have them open, the proximate cause of the plaintiff's injury? I am unable to say that it was; feeling constrained to find that the want of ordinary care on the part of his companion and himself, on the contrary, was the cause of this most regrettable accident.

Finding no way out by the rear doors, and that some of those doors were so fastened that they could not be opened, which need have been the work of a few seconds

only, their course seems to me very plainly to have been, to pass through the car they had occupied, and in which they had a right to be, and find a way out at its front door; all of which might have been done more than five times over even at the lowest estimate of the duration of the stop —a minute and a half. That car they had a right to be on and to pass through; the sleeping car they had no right to be on or to pass through under ordinary circumstances. They had not paid for passage in it; those only who had, had a right to be there; and had a further right not to be disturbed by those who had not; and especially not to be disturbed when they had retired or were retiring; only an invitation or an emergency would justify that which the plaintiff and his companion did. What excuse have they for invading that car at that hour of the night? The right to alight might justify it if that were the only reasonable way of alighting; but that is not so; the contrary is the fact; as all who travel upon our railways must know. Sleeping cars are generally if not invariably "vestibuled" as it is called; and the vestibules are more generally closed than in ordinary cars because those travelling short distances are not in the habit of travelling in sleeping cars. The protection of those occupying sleeping cars requires vestibuled car; and the safety which the closed vestibule affords might be converted into a trap if passengers from any part of the train were permitted to open them, at their will or for their convenience, without the knowledge of any of the train's crew.

In addition to all this the plaintiff and his companion saw and passed by the porter of the sleeping car in going through it, but without asking from him to be afforded means of alighting, as I think, even if they had had a right to be there, they should have done. It was within the power of any of the train hands to stop the train and afford a means of alighting and that should and would be done, doubtless, in a proper case; the mere pulling of a signal cord with which all train hands are familiar would have stopped the train.

But having had time enough to go through their own car many times over and so far as the evidence shews not having attempted to go that way at any time, but, instead, having invaded the sleeping car at almost the last moment, and opened its closed doors, and so far as the evidence

shews properly closed doors, and got off when the train was in motion, I am quite unable to see how the plaintiff can justly recover damages from the defendants for injuries sustained through a misstep in attempting so to alight.

To say that the plaintiff was imprisoned is of course drawing the long bow; with one door of a sixty-foot car wide open the imprisonment is imaginary. Nor can it be said that the defendants failed to have their train sufficiently manned; four persons to aid possibly hardly more than 8 or 10 persons to alight ought to be sufficient.

I am unable to see any just ground upon which the judgment in the plaintiff's favour can be supported. Whether it could have been supported if the jury had found sufficient facts to sustain a judgment is a question which it is not necessary to consider.

HON. SIR JOHN BOYD, C. DECEMBER 5TH, 1912.

TRIAL.

TORONTO v. GARFUNKEL.

Municipal Corporations — By-Laws — Building Restrictions—Apartment House—Location—Permit—Estoppel—Injunction—Terms.

Action by plaintiffs to restrain defendants from locating an apartment house upon a street named in by-law No. 6061 of plaintiffs, wherein certain streets are named upon which apartment houses forbidden to be located. Defendants obtained a permit for the erection of an apartment house upon the street in question from the City Architect of plaintiffs on April 13th, 1912, and the by-law was passed on May 13th, 1912. Prior to the latter date, defendants had entered into certain contracts of erection, but had done no actual work upon the lands. On June 7th, the City Architect assumed, by letter to defendants, to revoke the permit, and on June 21st, wrote to defendants as follows: "In consequence of the decision of Mr. Justice Middleton, in the *Wheeler Case*, my letter to you of the 7th inst. is hereby withdrawn." Defendants argued plaintiffs were estopped thereby.

BOYD, C., granted injunction as prayed, on terms that plaintiffs reimburse defendants for all damages or outlay sustained by them by reason of the granting of the permit, the same to be ascertained by a reference to the Master.

No costs to either party.

(EDITOR'S NOTE.—See *Toronto* v. *Wheeler*, 22 O. W. R. 326; 3 O. W. N. 1424, and *Toronto* v. *Williams*, 27 O. L. R. 186.)

Action by plaintiffs, the corporation of the city of Toronto to restrain defendants from erecting or locating an apartment house upon the south-east corner of Keele street and

Grenadier road, Toronto, contrary to the provisions of by-law No. 6061 of the plaintiff corporation.

Tried before the Honourable The Chancellor, at Toronto non-jury sittings, December 4th and 5th, 1912.

Irving S. Fairty, for the plaintiffs.

W. J. McWhinney, K.C., for the defendants.

HON. SIR JOHN BOYD, C.:—I have been considering this case, and I think that an injunction should be granted on the terms that the city undertakes to pay any actual outlay made by the defendants, and for any loss that they may be liable for, because of any breach of any contract entered into by them, with a view to the construction of the apartment house.

There will be no costs up to here. There will be a reference to the Master to ascertain the damages, and the costs of that reference are to be dealt with by him in case there are any extravagant claims.

My reasons in part are these; that the Legislature and the city prohibited the erection of apartment houses within this area, and that being the position the permit would be so much waste paper. I take it there is no power to override that by-law on the part of any city official; it would take some power as high as that which passed the by-law itself, and the tentative letter from the solicitor's office and the instructions from the architect did not carry the matter any further; they did not relieve the situation in point of law. They did operate on the defendant and induced him to make an outlay and do other things in preparation for the erection of this apartment house, and when he made the excavation there in September, I suppose that awakened the city to the gravity of the situation. That is the reason why I do not give costs up to here, and this being a Court of equity, as a matter of equity, I deal with it in that way.

G. S. HOLMESTED, K.C., IN CHRS. NOVEMBER 15TH, 1912.

WOLTZ v. WOLTZ.

4 O. W. N. 354.

Particulars—Alimony Action—Vagueness.

G. S. HOLMESTED, K.C., IN CHAMBERS, ordered plaintiff to give further particulars of allegations in a statement of claim, costs in cause.

Motion by defendant for particulars of the statement of claim in an alimony action.

W. H. Kirkpatrick, for the defendant.

Gray, (Montgomery & Co.), for the plaintiff.

G. S. HOLMESTED, K.C.:—The particulars delivered in answer to the defendant's demand, do not, in my opinion, sufficiently answer the demand so far as it relates to paragraph 15, and to paragraphs 20 and 22.

I, therefore order the plaintiff within a fortnight to deliver better particulars as to the matters referred to in those paragraphs with times, places, and persons specified in reference to the allegations made in those paragraphs. The costs of the motion must be in the cause.

In default of delivery of such particulars those paragraphs will have to be struck out or the plaintiff precluded for giving any evidence thereof at the trial.

I may remark that the plaintiff's fifth answer does not give any specific date nor does it mention the nature of the alleged insults and annoyance, and assault, nor the person guilty thereof—paragraph 6, of her answer is equally vague.

COURT OF APPEAL.

NOVEMBER 19TH, 1912.

REINHARDT BREWERY LIMITED, ET AL. v. NIPISSING COCA COLA BOTTLING WORKS.

4 O. W. N. 366.

Interpleader—Credibility of Witnesses—Onus in Favour of Possessors—Possession of Incorporated Company—Fraud—Holding Out.

An interpleader action wherein plaintiffs, execution creditors of one Abraham David, had seized certain goods alleged to belong to the said David, while in possession of defendants.

RIDDELL, J., *held*, that plaintiffs had not satisfied the onus upon them of shewing that the goods in question were not the property of defendants, and dismissed the action with costs.

DIVISIONAL COURT varied the judgment of RIDDELL, J., above, by declaring that plaintiffs were entitled to a portion of the goods so seized.

COURT OF APPEAL (MEREDITH, J.A., dissenting), dismissed an appeal from judgment of Divisional Court, with costs.

Appeal by the defendants from the judgment of a Divisional Court, reversing in part the judgment at the trial, of Riddell, J., in an interpleader issue between the parties.

The plaintiffs were execution creditors of one, Abraham David, and under their execution had seized the goods in question, while in the possession of the defendants.

C. H. Porter and G. F. McFarland, for the defendants.

W. R. Smyth, K.C., for the plaintiffs.

In giving judgment, RIDDELL, J., said among other things, "remembering that the onus is upon the plaintiffs to prove that the property is not the property of the defendants, I do not think there is sufficient before me to entitle me to find that the onus has been met. . . . The cause is full of suspicion" . . . etc. The learned Judge declined to place reliance upon the evidence of the Davids, of which family three members were called. The other witnesses upon both sides were evidently regarded as equally credible, at least, nothing to the contrary is said.

No notes of the judgment delivered in the Divisional Court appear in the printed appeal book, but it is apparent from the formal judgment that the Court regarded the situation of the goods purchased from Zahalan as different from the other goods seized since, it is only as to the latter that the appeal was allowed. As to the latter the Court must have been satisfied that the plaintiff had satisfied any onus originally resting upon him.

The case is certainly, as was said by Riddell, J., one of great suspicion. Discarding the evidence of the family of David, as I think must be done, there is the evidence of several witnesses, Mr. Heaney, Mr. Bradley, Mr. Comfort, especially the latter, all tending towards the same conclusion that not long before the organization of the joint stock company, the execution debtor was in possession of the goods now in question, apparently as owner, that he was holding himself out as the proprietor of the business and the owner of the goods, and that upon their removal he placed them in charge of the witness Comfort as his agent, that Comfort afterwards left because of interference by Albert David, and that the latter, whom Comfort left in charge, afterwards disclaimed the business, saying it belonged to his brother Abraham, and subsequently on an execution in the Division Court against the latter coming in, abandoned his former disclaimer, and claimed the business as his own.

The bill of sale under which the claimants alone pretend to make title is only from Rashada and Albert. Abraham is no party to it. And it follows that if the goods really belonged to Abraham, and not to Rashada, his wife, or Albert his brother, the claimants never had any title to them.

Under all the circumstances I am wholly unconvinced that the Divisional Court erred in the conclusion arrived at. The case looks to me very much like an attempt by the three Davids to put the goods in such a position that the creditors of Abraham could not reach them. The judgment now appealed against, thwarts that intention, and we are not, I think, called upon under the circumstances to be astute to find reasons for reversing it.

I would dismiss the appeal with costs.

HON. MR. JUSTICE MACLAREN:—I agree.

HON. MR. JUSTICE MEREDITH:—The judgment pronounced at the trial was, in my opinion, quite right; and the reversal of it a mistake caused mainly by overlooking two of the most material facts of the case, facts which are incontrovertable; I mean the fact that the defendants are a legal entity entirely separate and distinct from any of the Davids; and the fact that the defendants had the property in and the possession of the goods in question at the time of the seizure.

The defendants are a duly incorporated company; Abraham David is, as far as the evidence shews, no more than a mere shareholder in the company.

That the goods were in the possession of the defendants at the time of the seizure, was admitted by the plaintiffs at the trial; the statement of their counsel was: "They were seized in the premises of the company at Cochrane;" and the form of the issue, putting the onus of proof upon the plaintiffs, shews it.

That possession was evidence of ownership; but, in addition to that, all of the Davids, are by their acts and their evidence precluded from asserting any other ownship; and it is not suggested that any one else could be the owner of them; and if anyone else were, the plaintiffs must likewise fail upon this issue.

Then the defendants being the owners as against Abraham David, how can the plaintiffs succeed in this issue? In one way only—by proving that the goods were the property of Abraham David, and that they were acquired by the company with intent, on their part, to defeat his creditors; I say on their part, because the acquisition was not a voluntary one; the company's stock was given in consideration for the property it acquired.

Neither of these things—each of which is necessary to the plaintiffs' success—is proved. One may be suspicious as to Abraham David's ownership before the company acquired the goods; but suspicion is not proof; and the onus of proof was on the plaintiffs, an onus which was very far from being fairly and reasonably met by a lot of loose, rambling, and wholly inconclusive, evidence. And as to any fraudulent intent on the part of the company, there is really no evidence. Beside Abraham David, there were at least four shareholders, one of them being the solicitor, Mr. Porter; and there is no evidence of Abraham David being any more than a mere shareholder.

I can find no warrant in the evidence for the assertion that the defendants make no pretence of title except through Albert and Rashada David; they were not called upon to make proof of title; that obligation was on the plaintiffs; the defendants' possession alone was proof of their title at the time of seizure, and could not be disturbed by the plaintiffs except on satisfactory proof that, at that time, Abraham David was really the owner.

Nor can I at all agree to the succeeding assertion that if the goods really belonged to Abraham, and not to Rashada or Albert, the defendants could not have acquired title to them; for surely even acquiescence only by Abraham in a transfer by the others to defendants would carry any right he

might have in the goods to the defendants by way of estoppel; and as I have said all the Davids are, upon the facts of the case and the evidence in it, precluded from ever asserting any title to the goods against the defendants.

I, therefore, quite agree with the trial Judge in his finding that there was not sufficient evidence to satisfy the onus of proof that the goods in question were not Albert's but were Abraham's; and, in addition to that, there can, I think, be no reasonable finding that, even if the goods had been Abraham's, the title and possession of them had not passed from him to the company before the seizure was made.

I would allow the appeal, and restore the judgment at the trial, which ought not in any case to have been lightly disturbed.

COURT OF APPEAL.

NOVEMBER 19TH, 1912.

DART v. TORONTO RW. CO.

4 O. W. N. 315.

Negligence—Street Railway — Excessive Speed — Collision—Lack of Vigilance by Motorman—Findings of Jury—Vagueness—Contributory Negligence—"Lack of Judgment" — Ultimate Negligence—New Trial—Costs.

Action for damages for personal injuries sustained by reason of the alleged negligence of defendants' servants in operating a street car upon the streets of Toronto. The jury found negligence on the part of defendants, but found plaintiff could have avoided the accident, "to a certain extent," by the exercise of reasonable care, and further, that the want of reasonable care consisted in his "lack of judgment." Finally they answered that the motorman, after having become aware of the peril of plaintiffs, could, by taking reasonable precautions, have avoided the accident.

LATCHFORD, J., entered judgment for plaintiffs upon the findings of the jury, with costs.

DIVISIONAL COURT, *held*, that the findings of contributory negligence were too vague to be understood, and should not be guessed at, and there was no sufficient evidence on which to base the jury's finding of ultimate negligence.

Judgment at trial set aside and new trial directed.

COURT OF APPEAL dismissed defendant's appeal from judgment of Divisional Court, with costs.

Rowan v. *Toronto Rw. Co.*, 29 S. C. R. 718, referred to.

Appeal by the defendants from the judgment of a Divisional Court reversing the judgment at the trial, before LATCHFORD, J., and a jury, in favour of the plaintiff, and directing a new trial.

The action was brought to recover damages said to have been caused to the plaintiffs upon a highway in the city of Toronto by the negligent operation of a street car by the servants of the defendants.

The jury answered the questions submitted to them as follows:—

"1. Q. Was the accident to the plaintiffs caused by the negligence of the defendant? A. Yes.

2. Q. If so, in what did such negligence consist? A. Excessive speed, and not proper warning.

3. Q. Was the car properly under control as it approached the crossing? A. No.

4. Q. Was the speed of the car excessive as it approached the crossing? A. Yes.

5. Q. Was proper warning given the plaintiffs by ringing the gong? A. No.

6. Q. Could Dart, by the exercise of reasonable care have avoided the accident? A. Yes, to a certain extent.

7. Q. Could any of the other plaintiffs, Tassie, Blair, or Norvell, have avoided the accident by the exercise of reasonable care? A. No.

8. Q. If Dart could have avoided the accident, in what did his want of reasonable care consist? A. By lack of judgment.

9. Q. What was the want of reasonable care, if any, on the part of the other plaintiffs, or any of them? (No answer).

10. Q. After the motorman ought to have become aware of the peril of the plaintiffs, could he by taking reasonable precautions have avoided the accident? A. Yes.

11. Q. What damages, if any, do you find the plaintiffs entitled to? A. Dart, $800; Tassie, $250; Blair, $25, and Norvell, $15."

And upon these answers, LATCHFORD, J., directed judgment in favour of the plaintiff.

The Divisional Court set aside this judgment and directed a new trial; holding that there was no evidence to support the tenth answer, and that the answers as to contributory negligence (6th and 8th), were not sufficiently explicit.

The appeal to Court of Appeal was heard by HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE LENNOX.

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

D. Inglis Grant, for the plaintiff.

HON. MR. JUSTICE GARROW:—I agree with the Divisional Court in both particulars. And from the course of the argument before us it is apparent that of the two grounds, the second only calls for further observation here.

A perusal of the evidence and of the charge amply shews that the jury were well warranted in finding the defendants guilty of negligence, causing the accident. And the circumstances would also, I think, have warranted a finding of contributory negligence, of which there was certainly some evidence.

Nor can fault be found, I think, with the learned Judge's charge, in which, with reference to what the plaintiff might have done to avoid the accident, he said:—

"Then, if Dart could have so avoided the accident, that is, by exercising reasonable care, in what did his want of reasonable care consist? Should he have looked out? Should he have approached a crossing of that kind slowly, and when he got to a point where he could see up and down the street, should he have halted his horse before he attempted to cross, where there were two lines of cars, one up and one down? He did not look down, there is no suggestion that he looked down. I want you to answer that question; what was his want of reasonable care? Then, what was the want of reasonable care on the part of any of the other plaintiffs?"

Under these circumstances, and with deference to the learned trial Judge, can any one say with certainty that the jury intended to find or not to find contributory negligence on the part of the plaintiff Dart? The sixth answer, "yes, to a certain extent," might have passed muster if the eighth had found the facts upon which the "extent" depended; as, for instance, that Dart did not look in time, or advanced too rapidly, or did not halt when in a place of safety.

But how can such or indeed any safe meaning be reasonably extracted from the words "by lack of judgment;" which, in the circumstances, seem fatally indefinite and inconclusive. The measure of the plaintiff's duty was to exercise the judgment of a reasonable man; and whether he did or did not perform that duty depends upon what he did or failed to do upon that occasion—as to which we are left by the finding quite in the dark—and not upon whether he has good or bad judgment.

The point is one which is of frequent occurrence, but which is usually avoided, wisely, in my opinion, by sending the jury back to further elucidate and make their meaning plain, if possible.

Under the circumstances, where so much depends upon the actual facts, not much assistance can be got, in my opinion, from decided cases—to a number of which we were referred by counsel upon the argument.

Mr. McCarthy admitted that it was necessary for him to maintain that the finding amounted to an absolute finding of contributory negligence. Apart from the cases I could no so construe its language, for the reasons which I have given; but in addition it seems to fall within the rule indicated by Sir Henry Strong, C.J., in *Rowan v. Toronto Street Railway Company,* 29 S. C. R. 718, at p. 719, where that very learned Judge says that to disentitle a plaintiff to recover, upon the ground of contributory negligence, it must be found distinctly that the accident was attributable to his failure in the duty imposed upon him.

There is in my opinion, no such distinct finding in the present case. But as the jury evidently intended to make a finding of some kind, not entirely in exoneration of the plaintiff, upon the subject of contributory negligence, I think the Divisional Court exercised a wise and entirely proper discretion in granting a new trial.

The appeal should be dismissed with costs.

HON. MR. JUSTICE MEREDITH:—I agree with the learned Chief Justice of the Divisional Court in his conclusions that there is nothing in this case sufficient to support a judgment in the plaintiff's favour on the ground of "ultimate negligence;" and that the findings of the jury on the question of contributory negligence are so uncertain that a new trial must be had before justice can be done between the parties.

There is no evidence, nor any finding, of any negligence on the part of the defendants except in the excessive speed of the car, failure to sound the gong so as to give proper warning of its approach, and failure to see the danger and avoid the injury; and there is no ultimate negligence in these things; they are all things which would be offset by contributory negligence of the plaintiff.

There is no evidence, nor any finding, that the motorman did see the danger and might then in the exercise of ordinary care in the circumstances, have avoided the injury; that would be what is commonly called "ultimate negligence;" it would give rise to a later and new duty in the defendants towards the plaintiff—the duty, notwithstanding his negligence, to avoid injuring him, if any reasonable means that could then be done.

But to find that the motorman ought to have seen the man's peril and to have averted it, is to find original negli-

gence only, in not keeping a proper outlook, negligence which would be offset by the plaintiff's negligence is not doing likewise, with indeed much easier means of seeing the danger, and either not running into it or else turning away from it.

So that the plaintiff cannot hold his judgment upon the finding of the jury in answer to the tenth question.

It is much to be regretted that the jury were not required to give more definite and understandable answers to questions six and eight; the failure to do that makes the delay, cost, and worry, of another trial unavoidable.

It is quite clear that the jury did not find the plaintiff altogether not guilty of contributory negligence; that they were not able to say that much in his favour; but just what they meant in this respect, it is impossible, with any degree of certainty, to understand from the words used; and, as the Chief Justice remarked, their meaning ought not to be guessed at.

If the jury meant that by the proper exercise of his judgment the plaintiff might have avoided part of the injury which was caused by the accident, the damages should have been assessed accordingly, but there is nothing to indicate that they were.

As was held in the Divisional Court, the whole thing is quite too uncertain to support any just final adjudication on the plaintiff's claims.

And I am quite unable to agree in, or give effect to, the contention that, because there is a clear finding in the plaintiff's favour on the question of negligence on the part of the defendants, the plaintiff ought to recover unless there is a clear finding of negligence on his part too; it is not a case in which one or other of the parties must succeed finally now; that is the middle course of trying it over again and taking proper care to get conclusive findings; against which course neither of the parties, nor indeed the Court, can very reasonably complain, because it is only because they all failed in their duty to clear up the uncertainty when they should have done so, and when it could easily have been accomplished with delay or cost, that a new trial is necessary.

I would affirm the ruling in the Divisional Court; the respondents should have their costs of this appeal; but we are not now concerned with what the effect of this affirmance may be under the order giving leave to bring this appeal.

HON. MR. JUSTICE MACLAREN:—I agree.