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COURT OF APPEAL.

FEBRUARY 1ST, 1912.

*COUNTY OF HALDIMAND v. BELL TELEPHONE CO.

Municipal Corporations—Telephone Company—Right to Erect Poles on Bridge—Consent not Given by Municipality—43 Vict. ch. 67, sec. 3(D.)—45 Vict. ch. 95 (D.)—Restrictions Imposed by sec. 248 of Railway Act (D.)—Application to Board of Railway Commissioners—Trespass—Injunction—Stay.

Appeal by the plaintiff from the judgment of LATCHFORD, J., 2 O.W.N. 1154.

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

T. G. Meredith, K.C., for the plaintiffs.

G. Lynch-Staunton, K.C., for the defendants.

MACLAREN, J.A.:—The plaintiffs' action was for an order compelling the defendants to remove their poles from the piers of the bridge crossing the Grand river at the village of Cayuga.

In May, 1887, the county council gave permission to the defendants to fasten a small scantling fixture to the rafters of the bridge, projecting about three feet from the side, upon which to put their wires. The wires remained there until 1907, when the defendants removed them to the other side of the bridge, stringing them upon poles inserted in the stone piers of the bridge. There were some negotiations between the parties as to allowing the poles to remain, but no agreement was come to.

By their defence, the defendants, under their charter, 43 Vict. ch. 67(D.), amended by 45 Vict. ch. 95, claimed a right to do what had been done.

The trial Judge held that, under sec. 248 of the Railway Act, R.S.C. 1906 ch. 37, the defendants could not do what had been done without the consent of the municipality, or, fail-

*To be reported in the Ontario Law Reports.

ing such consent, without the leave of the Board of Railway Commissioners. He found that the plaintiffs had suffered no actual damage, and, until they did so, he held their only remedy was to apply to the Railway Commissioners to have the poles removed; and dismissed the action with costs.

On behalf of the company it was argued before us that, as the company was given power, under sec. 3 of 43 Vict. ch. 67, to "construct, erect, and maintain its line or lines of telephone along the sides of and across or under any public highways, streets, bridges, watercourses, or other such public places, or across or under any navigable waters," and, as bridges are not mentioned in sec. 248 of the Railway Act, the company had the same rights with respect to this bridge as it was held by the Privy Council to have with respect to the streets of Toronto, in Toronto Corporation v. Bell Telephone Co., [1905] A.C. 52.

Sub-section 2 of sec. 248 of the Railway Act provides that, except as therein provided, a telephone company shall not "construct, maintain, or operate its lines of telephone upon, along, across, or under any highway, square, or other public place within the limits of any city, town, or village, incorporated or otherwise, without the consent of the municipality." Sub-section 3 provides that, if the company cannot obtain such consent on terms acceptable to it, it may apply to the Board of Railway Commissioners.

The trial Judge was of opinion that the omission of the word "bridge" in sub-sec. 2 had not the effect that the company claimed; and I think he was clearly right. The bridge in question is a part of the highway, and is covered by the language of the sub-section.

The provisions of these two sub-sections do not apply to long distance or trunk lines. The location of these is, by subsecs. 4 and 5, subject to the direction of the municipality, or of its officer, unless they, after a week's notice in writing, shall have omitted to prescribe such location and make such direction.

It is admitted that some of the lines in question are local, and some are long distance or trunk lines. With regard to the former, the company had no right to proceed without the consent of the plaintiffs or of the Board. With regard to the latter, they should have given the week's notice or have received the direction of the municipality or its officer. With respect to both classes of lines, they were mere trespassers; and I can find nothing in the law requiring the plaintiffs to apply to the Board, or ousting the jurisdiction of the Courts.

In my opinion, the appeal should be allowed, and the order asked for by the plaintiffs should be granted, unless the parties can, within a reasonable time, make a satisfactory agreement, or, failing that, the defendants take the steps prescribed by the Railway Act.

MEREDITH, J.A., was of the same opinion, for reasons stated in writing.

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

Appeal allowed with costs, and judgment to be entered for the plaintiffs with costs, with a stay of the injunction for three months.

FEBRUARY 1ST, 1912.

*TORONTO AND NIAGARA POWER CO. v. TOWN OF NORTH TORONTO.

Municipal Corporations—Electric Power Company—Powers under Act of Incorporation, 2 Edw. VII. ch. 107 (D.)—Erection of Poles and Wires in Streets of Town—Permission of Municipality—"Construct, Maintain, and Operate"—Introduction of Provisions of Railway Act—51 Vict. ch. 19, sec. 90—Amendment by 62 & 63 Vict. ch. 37, sec. 1—Direction of Municipality—Effect of Reading secs. 12 and 13 of Act of Incorporation with sec. 90 as Amended.

Appeal by the defendants from the judgment of BOYD, C., 24 O.L.R. 537, ante 77.

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

G. H. Watson, K.C., and T. A. Gibson, for the defendants.

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

MOSS, C.J.O.:—The plaintiff, an incorporated company, with power to produce, sell, and distribute electric and other power and energy, and, for those purposes, to construct, maintain, and operate lines of wire, poles, tunnels, conduits, and other works, and to erect poles, construct trenches and conduits, and do all other things necessary for the transmission of power, heat,

*To be reported in the Ontario Law Reports.

or light, as fully and effectually as the circumstances require, brought this action against the Municipal Corporation of North Toronto for an injunction to restrain that body from interfering with or preventing the plaintiffs in the erection of poles and lines of wire in and along Eglington avenue, a highway within the corporation limits, or, in the alternative—by amendment asked for at the trial—for a declaration that they were entitled to erect their poles and wires for the transmission of electricity upon and along the public streets of the municipality, without the leave or license of the defendants.

The learned Chancellor awarded the plaintiffs the latter relief, subject to certain conditions as to depositing plans and books of reference; and obtaining the approval of the engineer of the Dominion Board of Railway Commissioners thereto.

The plaintiffs were incorporated by 2 Edw. VII. ch. 107 (D.), which was assented to on the 15th May, 1902. Section 21 of the Act declares that sec. 90—together with certain other sections—of the Railway Act, shall apply to the plaintiffs and their undertakings, in so far as the said sections are not inconsistent with the special Act.

The Railway Act in force at that time was 51 Vict. ch. 19, which was assented to on the 22nd May, 1888. But, between that date and the date of the Act incorporating the plaintiffs, a number of amendments to the earlier Act had been made; and, among others, sec. 90 was amended by adding thereto a new sub-section.

This enactment is contained in the first sections of 62 & 63 Vict. ch. 37, which was assented to on the 11th August, 1899. When, therefore, in 1902, sec. 90 of the Railway Act was incorporated into the plaintiffs' incorporating Act, the sub-section added by 62 & 63 Vict. ch. 37 formed part of the enactments which were made to apply to the plaintiffs and their undertakings, in so far as they were not inconsistent with the incorporating Act.

At the trial, the existence of this sub-section appears to have been overlooked, and the learned Chancellor's attention was not directed to it. . . . Its language appears to render it applicable in many respects to the case in hand. To begin with, it specifies and deals with the case of companies empowered by Parliament to construct and maintain lines for the conveyance of light, heat, power, or electricity—that is to say, some of the very objects for which the plaintiffs were incorporated. And, with regard to that subject, it enacts that "when any company has power by any Act of the Parliament of Canada to construct and maintain . . . lines for the conveyance of light, heat,

power, or electricity, such company may, with the consent of the municipal council or other authority having jurisdiction over any highway, square, or other public place, enter thereon for the purpose of exercising the said power, and as often as the company thinks proper, break up and open any highway, square, or other public place, subject, however, to the following provisions.'' One of these provisions (f) is as follows: ''The opening up of any street, square, or other public place for the erection of poles or for the carrying of wires under ground, shall be subject to the direction and approval of such person as the municipal council appoints, and shall be done in such manner as the council directs; the council may also designate the places where such poles shall be erected; and such street, square, or other public place shall, without any unnecessary delay, be restored as far as possible to its former condition by and at the expense of the company.'' These provisions were carried into the Railway Act, 1903, and are now to be found, in a somewhat modified form, in sec. 247 of the Railway Act, R.S.C. 1906 ch. 37.

If these enactments, in so far as they require that a company with the powers possessed by the plaintiffs must proceed with the consent of the municipal council, and subject to the direction and approval of such person as it appoints and under its direction, are not inconsistent with the plaintiffs' incorporating Act, they are applicable to the plaintiffs and their undertaking; and, if so, the plaintiffs are left without support for the present action.

The plaintiffs rest the right asserted in the action upon secs. 12 and 13 of the incorporating Act. Is there anything in them reasonably inconsistent with sec. 90 of the Railway Act, as it stood when it was imported into the plaintiffs' Act? . . .

Sections 12 and 13 confer powers that are requisite and necessary as of course, in order to enable the plaintiffs to prosecute the enterprise for which they were incorporated. They are empowered by sec. 12 to acquire, construct, maintain, and operate works for production, and works for the conduct and supply, of electricity and other power, and by means thereof produce and transmit and furnish it to, or receive it from, others, as well as to perform other acts. And sec. 13 says that they may erect poles, construct trenches or conduits, and do all other things necessary for the transmission of power, heat, or light, as fully and effectually as the circumstances of the case may require, provided the same are so constructed as not to incommode the public use of streets, highways, or public places, or to impede the access to any house or other building erected

in the vicinity thereof, or to interrupt the navigation of any waters; but they shall be responsible for all damages which they cause in carrying out or maintaining any of these works.

These provisions do not expressly negative the property rights of municipalities or individuals; and the stipulation as to payment of damages found in each of these two sections does not necessarily exhaust the conditions to which the plaintiffs could reasonably be required to conform.

The enactments of the sub-section added to sec. 90 of the Railway Act are not in conflict with what is enacted in secs. 12 and 13 of the incorporating Act. They follow naturally as directions incident to the exercise of the powers given to the plaintiffs in order to the carrying out of their enterprise. Even before the date of the plaintiffs' Act, the trend of legislation had set in the direction of municipal control over the exercise of powers upon streets and highways by incorporated companies; and that circumstance may account for the importation of sec. 90 into the incorporating Act. In any case, the question is one of construction of the Act as a whole; and the provisions are to be read together, if they may be so read without leading to an unreasonable or absurd result.

Reading them together, the meaning to be gathered seems to be, that secs. 12 and 13 confer powers to be exercised in conformity with the directions of sec. 90 of the Railway Act, in so far as they relate to the construction and maintenance of lines for the conveyance of light, heat, power, and electricity upon or along highways, squares, or other public places.

That being the case, the plaintiffs' case fails, and the action should have been dismissed.

It follows that the appeal must be allowed and the action dismissed; but, under all the circumstances, there should be no costs to either party.

GARROW, J.A., agreed with the opinion of MOSS, C.J.O.

MACLAREN, MEREDITH, and MAGEE, JJ.A., agreed in the result, for reasons stated by each in writing.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT. JANUARY 26TH, 1912.

*RE STURMER AND TOWN OF BEAVERTON.

Costs—Power of Court to Make Real Litigant Pay Costs—Unsuccessful Application to Quash Municipal By-law—Nominal Applicant—Judicature Act, sec. 119.

Appeal by Hamilton from the order of BOYD, C., ante 333, 25 O.L.R. 190, requiring the appellant to pay certain costs, amounting to $384, to the Corporation of the Town of Beaverton.

The appeal was heard by CLUTE, LATCHFORD, and MIDDLETON, JJ.

G. Lynch-Staunton, K.C., for the appellant.

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

MIDDLETON, J.:—I think the judgment appealed from is clearly right. It is quite true that the jurisdiction of the Common Law Courts to award costs must in general be found in some statute; but it is equally a recognised exception to this general statement that a Common Law Court always had power to award costs against one unsuccessfully invoking the aid of its process, even when the Court had no jurisdiction to entertain the application: Rex v. Bennett, 4 O.L.R. 205; Re Cosmopolitan Life Association, 15 P.R. 185; In re Bombay Civil Fund Act, 40 Ch. D. 288. And the Court always had power to award costs against the real applicant when the motion was made by him in the name of a man of straw for the purpose of avoiding liability. The Courts were never so blind as to be unable to see through this flimsy device nor so impotent as to be unable to act.

The Queen v. Greene (1843), 4 Q.B. 646, has never been doubted. It determines: "Where a rule nisi for a quo warranto information is discharged, and it appears that the party making affidavit as relator is indigent and unable to pay costs, and was procured to make the application by another who is the real prosecutor, the Court will order the costs to be paid by the party so promoting the application." . . . This case also shews that the liability may be enforced in a summary way. Some question having arisen as to the material that should be read upon such an application, a Rule of Court was promulgated in Easter Term, 1843, dealing with this question: "In every case

*To be reported in the Ontario Law Reports.

in which the Court shall grant a rule . . . to compel any person not a party to an original rule to pay the costs of such original rule," etc. Thus in the year 1843 the Common Law Courts, not only by decision, but by general Rule, asserted the jurisdiction in question.

It is said with much force that the cases shew that the jurisdiction to award costs against a landlord who defended an ejectment action was always regarded as an exception to the general rule that the Court had no power save over parties to the record, and that this exception was based upon the peculiar practice in ejectment. Undoubtedly, this is said in so many words in Hayward v. Giffard, 4 M. & W. 194; but I can only regard The Queen v. Greene as a deliberate refusal to recognise this limitation to the general power of the Court. . . .

[Reference to Mobbs v. Vandenbrande, 33 L.J.Q.B. 177; Hutchinson v. Greenwood, 24 L.J.Q.B. 2; Hearsey v. Pechell, 8 L.J.N.S. C.P. 247, 5 Bing. N.C. 466.]

In this case it is not said that Hamilton "merely has an interest in the suit;" it is said and shewn that it his suit, and that he has been guilty of something in the nature of barratry and maintenance, because, desiring to try his own right, he has procured this man of straw to allow the litigation to be brought in his name. This, as the cases shew, is an abuse of the process of the Court, and, I think, a contempt of the most serious character, because the Court which is called into existence to administer justice is being used as a tool and instrument by which an injury is inflicted which, it is said, it can in no way redress.

In Chancery there never was any such limitation suggested as to the power of the Court over costs. The books contain many references as to the mode in which payment of costs may be enforced against persons not parties to the suit (*e.g.*, Sanger v. Gardner, C.P. Coop. 262; Attorney-General v. Skinners' Co., ib. 1); but, singularly, do not contain, so far as I can ascertain, any case in which the foundation of that jurisdiction is discussed or the principles by which the discretion of the Court is governed declared.

Courts of Equity, it is said, have in all cases awarded costs "not from any authority but from conscience and *arbitrio boni viri*:" Corporation of Burford v. Lenthall, 2 Atk. 551. See, also, Andrews v. Barnes, 39 Ch. D. 133.

But, quite apart from any consideration of the law and practice before the Judicature Act, as now amended, I think that that Act makes our jurisdiction clear. In addition to the power originally conferred, which made all costs "in the discretion of

the Court," the Court now has "full power to determine by whom and to what extent such costs are to be paid:" sec. 119 of R.S.O. 1897 ch. 51. These words were added to get rid of the restricted meaning attached to the words of the earlier Act in In re Mills, 34 Ch. D. 24; and the Court has since then declined to apply any narrow construction to the amending Act: In re Fisher, [1894] 1 Ch. 450; In re Schmarr, [1902] 1 Ch. 326; Dartford Brewery Co. v. Moseley, [1906] 1 K.B. 462.

In re Appleton French and Scrafton Limited, [1905] 1 Ch. 749, is an instance in which the Court held that this statute enabled costs to be awarded to one not a party to the record.

The power conferred by this statute is one which must be exercised upon principle and in accordance with those rules that govern the exercise of all judicial discretion, and in no harsh and arbitrary manner; but where, even in the old cases, it is said that justice and equity point to the propriety of an order in such cases as this, and the Court laments the absence of jurisdiction, there can be no reason, now that jurisdiction is conferred by the Act, why the Court should be slow to exercise it in proper cases.

One is inclined to wonder at the timidity of some of the earlier Judges and to admire the robust sense and courage of Lord St. Leonards, who, in a somewhat similar case (Burke v. Lidwell, 1 Jo. & Lat. 703), after commenting upon the highly improper conduct of those who induced the pauper plaintiff "to allow his name to be made use of as the plaintiff in this suit for the fraudulent purpose of avoiding payment of costs," said: "Can there be a fraud which the Court ought to visit more strongly than the conduct furnished in this case, in which, to avoid the payment of costs of a doubtful litigation, to which the plaintiff might be made liable, the real plaintiff procures a pauper to become the nominal plaintiff . . .?" What was there sought was security for costs; and it was argued that there was no power in the Court of Chancery to make such an order, and no precedent for it, though that remdy was well known at law. "Then comes the question, have I the power to act in accordance with my opinion? It would be a reflection upon the administration of justice if I had not such a power. I am clearly of opinion that I have that power, and I am prepared to exercise it, and to make a precedent if none exists." Can it be doubted that Lord St. Leonards would have made the order now asked?

CLUTE, J., gave reasons in writing for the same conclusion. He referred to some of the cases cited by MIDDLETON, J., and

also to the following: Evans v. Rees (1841), 2 Q.B. 334, 11 L.J. N.S.Q.B. 11; Ram Coomar Coondoo v. Chunder Canto Mookerjee, 2 App. Cas. 186; Fraser v. Malloch, 23 Rettie 619.

LATCHFORD, J., concurred.

Appeal dismissed with costs.

DIVISIONAL COURT. JANUARY 26TH, 1912.

CADWELL v. CAMPEAU.

Contribution—Co-sureties—Bond for Fulfilment of Municipal Contract—Advances Made and Work Done by one of three Bondsmen—Assignment of Contract to him—Agreement between Sureties—Construction—Extent of Liability for Contribution.

Appeal by the defendants from the judgment of BOYD, C., in favour of the plaintiff, in an action for contribution, upon a bond given by the plaintiff and defendants to the Municipal Corporation of the Town of Sandwich for $5,000 for the due fulfilment of a contract between John Lorne & Son and the town corporation for the construction of a sewer.

On the 12th May, 1909, John Lorne & Son contracted with the corporation to construct a sewer, upon certain terms and conditions. One clause of the contract provided for weekly payments during the progress of the work, under progress certificates of the engineer "of 80 per cent. on account of work done and materials supplied under this contract and for duly authorised extras, the value of such work to be in proportion to the amount payable for the whole work and authorised extras, and the balance of the said contract and all duly authorised extras within thirty days after the contractors shall have rendered to the engineer a statement of the balance due and shall have obtained and delivered to the corporation the final certificate of the engineer shewing the net balance payable to the contractors."

Prior to the 28th September, 1909, the contractors became involved and applied to the plaintiff for financial assistance. Up to that date, the plaintiff had furnished material for the work, amounting to $595,63, and had advanced in cash for labour and material $1,265.98; and the contractors, requiring still further advances, applied to the plaintiff, who agreed to advance for wages the further sum

of $933, upon the contractors assigning to him all sums of money due or accruing due under the contract, and they expressly authorised the corporation to pay the sum to the plaintiff, who was authorised to give the corporation "full and ample releases and discharge for the further payment of any such money under the said contract."

On the 6th October, 1909, the plaintiff and defendants, desiring to save themselves as far as possible from liability under their bond, entered into an agreement. This agreement refers to the original contract and the bond, and further recites that the contractors "have failed to carry out the provisions of the said contract and have been obliged to apply to the said party of the second part, one of the said sureties as aforesaid, for financial assistance, and credit, work, and assistance in the carrying out of the said contract." And "whereas all of the parties to this agreement are equally responsible on said bond, and this agreement is entered into for the purpose of appointing the party hereto of the second part to represent all the parties to this agreement in seeing that the said contract is carried out and performed by the said John Lorne & Son so as to save the parties hereto from any loss or costs or damage in connection therewith, and the parties of the first part hereby appoint the party of the second part, and authorise him to continue to do all things necessary that he may think in the interests of himself and the parties of the first part as co-sureties on said bond and to protect them respectively from any liability or loss in connection therewith and to do all things necessary and to advance money necessary for the carrying out of the said work so as to protect the parties thereto. And the parties of the first part and the second part mutually agree to become responsible for their respective shares or proportion of one-third each for any money that may be necessary to be advanced, or any loss that may be occasioned under the said bond, or expenses in connection therewith."

On the 9th October the contractors entered into a further agreement with the plaintiff. This agreement refers to the assignment of the 28th September and recites that "whereas since the said assignment the party of the second part has been compelled to advance the further sum of $1,000 for material and expenses, and the further sum of $781.10 for wages in connection with the said contract work, on the understanding and agreement that the parties hereto of the first part would further assign all moneys due and accruing due under the said contract for the repayment of the said moneys so advanced." It then proceeds: "In consideration of the recitals above made and the

further advance of money aggregating $1,781.10, the contractors assign to the plaintiff all moneys due and accruing due under the said contract for the repayment of both the $2,794.63 advanced and referred to in the assignment, and also the further advance of $1,781.10, with authority for the corporation to pay and for the plaintiff to receive all such sums.

The judgment of the Chancellor was, that the plaintiff should be allowed all his outlay in money and materials to the contractors which went into the work in question, and all his outlay in work and materials upon the completion of the contract after it was assigned to him; that in taking the account all just allowances should be made for expenses of litigation incurred in protecting the various assignments and for the personal supervision of the plaintiff in the work; that, after deducting all moneys received from the contract, the balance should be borne equally by the three bondsmen, the plaintiff and the defendants, to the extent of the liability created by the bond.

The appeal was heard by CLUTE, LATCHFORD, and MIDDLETON, JJ.

E. S. Wigle, K.C., for the defendants.

A. H. Clarke, K.C., for the plaintiff.

MIDDLETON, J.:— . . . The effect of the contract between Lorne & Son and the town corporation was to entitle Lorne & Son to receive on progress certificates 80 per cent. of the value of the work done. The remaining 20 per cent. was to be retained by the town corporation, and would be answerable for any deficiency arising from Lorne & Son's default.

The assignment by Lorne & Son to Cadwell would operate on this 20 per cent., subject to this right of the town. The sureties would be entitled to require the town to apply this 20 per cent. in the way indicated, and their right would be paramount to any right which Cadwell would acquire as assignee of Lorne & Son. Cadwell, as assignee, would have no greater or higher right than his assignors; and clearly Lorne & Son could not demand this 20 per cent. from the town corporation, to the prejudice of their sureties.

When Cadwell made advances to Lorne & Son for the purpose of enabling them to carry on their contract, he had no right to claim contribution from the co-sureties, even though the making of these advances enabled Lorne & Son to that extent to carry on their contract work. It seems to me quite immaterial that Cadwell made the advances because he was surety. The contract of the sureties with the town corporation made them

liable for the loss which the town corporation might suffer from Lorne & Son's default. The right to contribution is a right with respect to any sums paid the town corporation. We cannot make this right any greater or wider; to do so would be to impose upon these defendants a liability which they never assumed, and this cannot be justified merely because the liability may be no greater than the liability which they did assume, had it not been for the voluntary action of Cadwell.

This precise point is well determined in Ludd v. Chamber of Commerce, 60 Pac. R. 713. The facts were precisely similar. The obligation of the defendants "was to the insurance company alone (*i.e.*, to the building owner), and there is neither allegation nor proof that it ever made or had any claim for damages under the bond. But, it is argued, a breach of the bond and consequent damages to the insurance company would have occurred if certain of the sureties had not pledged their individual credit for money with which to complete the building. . . . It does not follow that the action of a part of the sureties in borrowing money for the Chamber of Commerce (*i.e.*, the contractors) to use in the construction of the building will bind a non-participating surety. . . . Each surety had a right to stand upon the letter of his contract, and, in case of a breach or threatened breach of the bond, to exercise his own judgment as to whether it was better for him to suffer default and answer in damages to the obligee in the bond or to become liable on a new obligation."

When it became apparent that Lorne & Son were about to make default, a new obligation was, on the 6th October, entered into. The sureties agreed that the work should be completed by Cadwell; and for the loss in the completion of the work under that agreement they are all responsible, and the defendants must contribute. I cannot construe that agreement as in any way an assumption of the liability of Lorne & Son to Cadwell for advances theretofore made, but its operation is entirely in the future.

Upon the outgoings under that agreement, Cadwell must credit the money received from the town for work done under it, and also the 20 per cent. retained from the value of all work done before that date. This 20 per cent. is salvage saved by the joint efforts and liability of the sureties under this agreement.

The money paid on the 8th October was, no doubt, the 80 per cent. on work done prior to that agreement; and, if so, Cadwell had the right to this under the prior assignment, and need not bring this into account.

The judgment should be varied by making declarations in accordance with the above, and directing a reference upon this footing.

There may also be a declaration that Cadwell is entitled to reasonable remuneration for his services under the agreement. As each party claimed too much, there should be no costs up to this time, and the costs of the reference may be reserved. For the guidance of the Court the parties should now name sums which the one is ready to pay and the other to receive, so that the blame of any further litigation may be duly apportioned.

LATCHFORD, J.:—I agree.

CLUTE, J. (after setting out the facts as above):—On the argument, counsel for the defendants contended that the plaintiff was not entitled to the material and advances prior to the agreement of the 6th October; that, having regard to the work then done and to the balance still in the hands of the corporation, there was sufficient to complete the contract; and that the reference should proceed upon these lines.

The plaintiff in his evidence states that the advances made subsequent to the assignment of the 28th September were upon the understanding and agreement with the contractors that he should be paid out of the funds still in the hands of the corporation. It will be seen that, under the assignment of the 28th September, all moneys due and to become due were assigned; and, having regard to the evidence and the surrounding circumstances, I think there can be no doubt that it was the understanding between the plaintiff and the contractors that out of the fund in the hands of the corporation he should be paid for all material and advances made by him, and that the assignment on the 9th October was simply carrying out what had been previously agreed upon.

Although there is no special finding upon this point, this I take it to be the meaning of the judgment pronounced at the trial. I can see no reason to impugn the validity of these assignments or the plaintiff's right to apply the moneys received by him from the corporation in payment of material and advances so made by him; and, in this view, the plaintiff's claim to contribution is sufficiently supported.

I am strongly inclined to the view that, upon the true construction of the agreement of the 6th October, the plaintiff is also entitled to recover. That agreement recites the contract and the bond and the failure of the contractors to carry out

the provisions of the contract, and an application to the plaintiff, one of the said sureties, for financial assistance, credit, and work in carrying out the said contract. It recites that the agreement was entered into for the purpose of appointing the plaintiff to represent all the parties to the agreement in seeing that the contract is carried out so as to save the parties from loss, "and the parties of the first part hereby appoint the party of the second part and authorise him to continue to do all things necessary that he may think in the interests of himself and the parties of the first part as co-sureties on said bond," etc.

This, I think, clearly shews that all he was about to do under this agreement was simply a continuation of what had been done by him with a view to carrying out the agreement.

It then provides that the parties of the first and second part agree to become responsible for their respective shares or proportions of one-third each for any moneys that may be advanced or any loss that may be occasioned under the said bond or expenses in connection therewith. Having regard to the facts of the case, I think that what the agreement means is this, that the plaintiff was to continue to do all things necessary to complete the contract, and the defendants would be responsible for their proportion of any loss in so completing the work. The wording in the last clause is obscure. It says, "For any loss that may be occasioned under the bond or expenses in connection therewith." I think the fair meaning of that is, for any loss arising under the bond by reason of the contract not being completed or in the endeavour to carry it out.

I prefer, however, to rest my judgment upon the first ground.

The appeal should be dismissed with costs.

Judgment varied as stated by MIDDLETON, J.; CLUTE, J., *dissenting.*

RIDDELL, J. JANUARY 30TH, 1912.

RE SWAYZIE.

Will—Construction—Maintenance of Widow—Income of Estate—Corpus—Death of Widow—Debts—Funeral Expenses—Residuary Bequest—Religious Society—Identification.

Motion by the executors of the will of William Swayzie, deceased, for an order, under Con. Rule, 938, determining certain questions arising upon the construction of the will.

Casey Wood, for the executors.

E. C. Cattanach, for the Official Guardian representing the heirs and next of kin.

George Kerr, for the Methodist Church.

RIDDELL, J.:—The testator made his will in 1903, whereby, after revoking all former wills, etc., and directing his debts to be paid, he made the following provisions:—

"1st. I give devise and bequeath all my real and personal estate of which I may die possessed in the manner following that is to say: I give devise and bequeath to my wife Sarah Swayzie all my real and personal effects also my money mortgages bank accounts notes or any other real and personal effects that I may die possessed off (sic) for her sole and only use forever, subject nevertheless to the consent and advice of my executors hereinafter named.

"2nd. My will is further: If the interest on my real and purpose only for home missions exclusively, my executors to wife Sarah Swayzie then I instruct my executors to take sufficient of the principal money to meet her needs.

"3rd. After the decease of my wife Sarah Swayzie all the residue of my estate not hereinbefore disposed of I give devise and bequeath unto the King Street Methodist Church of Ingersoll to be held by the said King Street Methodist Church in trust to be disposed of as follows, the proceeds to be paid expended and applied for the benefit of the Woman's Home Missionary Society of the King Street Church, Ingersoll, and for no other purpose only for home missions exclusively, my executors to co-operate with the Woman's Home Missions of King Street Church, Ingersoll, to assist said Woman's Home Missionary Society to divide said proceeds.

"4th. Should it be deemed necessary to sell the house and lot on King street west before the decease of my wife, my executors hereinafter named may determine.

"I give devise and bequeath all my household furniture and wearing apparel bedding and so forth to my wife for her sole and only use forever.

"All the residue of my estate not hereinbefore disposed of I give devise and bequeath unto my wife Sarah Swayzie.

"And I nominate and appoint my wife Sarah Swayzie my executrix and N. H. Bartley of Ingersoll my executor of this my last will and testament."

N. H. Bartley has been relieved of the trust, and R. T. Agar appointed in his stead.

Sarah Swayzie died on the 19th January, 1912, intestate, leaving heirs and next of kin.

There is on hand in the estate $3,382.39.

Cash on hand	$869.19
Real estate	1,000.00
Chattels	200.00
Securities, notes, and interest	1,313.20
	$3,382.39

A motion is made to determine the meaning of the will and its effect. I ordered the Official Guardian to represent all heirs and next of kin.

Bearing in mind the two rules for the interpretation of a will of moment upon this inquiry, I do not think there is any real difficulty, although it was quite proper to ask a judicial interpretation. The two rules referred to are: 1. Where two clauses in a will are contradictory and inconsistent, the latter prima facie prevails. 2. The will should be read as a whole, and effect should be given so far as possible to all parts thereof.

It is plain that the clause giving the "household furniture and wearing apparel bedding and so forth" to the wife, is to be given full effect to—the "and so forth" referring to the beds, etc., used with or as part of the property specifically bequeathed. These, then, belong to Sarah Swayzie's estate.

Then clause 1 is modified by clauses 2 and 3. The last part of clause 2 shews that the executors are really to have the management of the estate.

The effect of these three clauses is, that Sarah Swayzie is to have her maintenance out of the whole estate for her lifetime—and, if the revenue should not be sufficient for that purpose, the corpus was to be cut in upon. But, after her death, everything was to go to the Society, except the articles spoken of later in the will.

The residuary clause is, of course, nugatory, there being nothing left undisposed of.

Then as to the debts of Sarah Swayzie, it is obvious that, if the estate did not furnish her sufficient to pay her way, the amount of the debts she incurred for maintenance must be paid to her estate as being maintenance.

Funeral expenses are not maintenance—these must be paid for out of her own estate, not out of the estate of her deceased husband.

It appears that there is no such society as "the Woman's Home Missionary Society of the King Street Church, Ingersoll," but there is a Women's Missionary Society of the Methodist Church, and this Society has an "Auxiliary" in the King Street Methodist Church, Ingersoll. This "Auxiliary" is the Society meant—and the executor has both the right and the duty of assisting the Auxiliary to divide the bequest.

Order accordingly. Costs out of the estate.

DIVISIONAL COURT. JANUARY 30TH, 1912.

YACKMAN v. JOHNSTON.

Limitation of Actions—Adverse Possession of Strip of Land—Ejectment—Evidence—Position of Fence—Motion for New Trial—Surprise—Discovery of Fresh Evidence—Insufficient Affidavits—Absence of Diligence.

An appeal by the defendant from the judgment of the District Court of the District of Nipissing in favour of the plaintiff in an action to recover possession of a strip of land. The defendant also asked for a new trial on the grounds of surprise and the discovery of new evidence.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

F. Arnoldi, K.C., for the defendant.

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

RIDDELL, J.:—The plaintiff is the owner of lot 31 on the north side of Second avenue in North Bay—the defendant, of lot 30, adjoining to the west. A wire fence runs apparently dividing the properties, but the plaintiff alleges that it is at the street line four feet in on his lot, and this is one of the disputes in the action—and the only dispute on the pleadings. But at the trial the Statute of Limitations was appealed to by the defendant, although no amendment of the pleadings was made or asked. The learned trial Judge, Judge Leask, found, and rightly found, that the plaintiff had the paper title, and, hold-

ing that adverse possession for the statutory period had not been proved, he gave judgment for the plaintiff. The defendant now appeals.

It cannot be successfully argued, although it was urged, that, upon the evidence given at the trial, the learned Judge was not right: it is said also that the defendant was taken by surprise by the evidence of his witnesses, and especially his main witness Turcotte, and that material evidence could have been given by three persons named, whose evidence, it is said, the defendant did not know of and could not with reasonable diligence have discovered before the trial.

At the trial the defendant swore that he had bought his lot in April, 1907, and that the fence was then in its present position—also that his house had been on the four feet in dispute and close against the fence, but he had moved it back, gardening and planting flowers and shade trees on the strip. McLean, Johnston's vendor, swore that the fence was placed as the defendant said, when he sold, and when he had bought the lot himself from Ferguson. Ferguson cannot fix this date accurately, but "it must have been in the latter part of the eighties." McLean was not asked, but the deed is produced, and the date is actually 1903. Ferguson says there was an old fence, a poor fence, for a line fence at the time, but does not say whether it was placed as the present fence is, nor for how long it had been so placed.

The defendant called Turcotte, who had bought lot 30 from Ferguson before the McLean deal, and 17, 18, or 19 years ago. He swears there was no fence when he took possession at all, but that he built the fence which was on the premises when McLean took possession, or "it looks like the same fence"—he sold again to Ferguson about 12 years ago, never having got his deed.

At the time he built the fence, there was no fence existing, but he found the surveyor's posts and laid his fence on the line so marked out, and this 17 or 18 years ago.

The learned Judge in giving judgment at the close of the trial says: "The only possible evidence as to the adverse possession is that of Johnston himself, and that only extends back to a period of approximately 5 years, more exactly 4 years in April last. The location of this fence is not at all definitely fixed by any other witness, nor the period for which it was there. Unless Turcotte was wrong when he said that he built his fence along the line of the surveyor's posts, or those surveyor's posts were incorrectly placed, it is evident that there must have been some alteration in the fence since its construc-

tion by Turcotte, as it is manifestly not now upon the proper dividing line between the two lots. When any such alteration was made does not appear, and the period during which Johnston or his predecessors were in adverse possession is anything but certain."

And that is the ground on which he proceeds.

The statement that "the location of this fence is not at all definitely fixed by any other witness" (than the defendant) is susceptible of two interpretations—the learned Judge may have overlooked the very definite statement by McLean that the fence when he bought, which was some 9 years ago (April, 1903), was in the present position—or the learned Judge may have taken this as a mild way of saying that he did not believe McLean, although not contradicted. The former can hardly be the case; the evidence had been given but a few minutes before; and, if the latter alternative is to be taken, it would have been much more satisfactory if it had been stated in plain language.

But, even so, the time runs back only to 1903—not sufficient for the defendant's purpose.

Ferguson cannot be definite—he says that he cannot remember how long the fence had been there when he sold to McLean—and the learned Judge was justified in holding that the defence had not been made out. Especially was this the case when Turcotte swore that the fence he built was on the surveyor's line, which the present line plainly is not.

As to the application for a new trial, it was put in the original notice of motion upon the ground of discovery of new evidence, but another notice was served setting up "surprise at the trial by the evidence then given by the witnesses for the defence, and particularly by the evidence of the witness Turcotte, who had previously stated that his knowledge and recollection supported the defendant's title."

The solicitor swears that "Turcotte . . . departed from the statements he had made to me of his evidence as to the position of the fence in question and as to the same being in position enclosing the 4 feet of land in question at the time McLean took possession. I had relied upon the said Turcotte to prove this fact."

This exasperatingly loose statement is inexcusable—we are not told what Turcotte said or what the departure was—there is no doubt, no possible doubt, and no one contends there is any doubt, "as to the position of the fence in question"—and no evidence of Turcotte can modify the finding in that regard. There is also no doubt—and no one contends there is—that this fence enclosed the 4 feet of land in question at the time McLean

took possession. The only things Turcotte swore that could be a surprise were: (1) that he put his fence on the surveyor's line—and no evidence is claimed to be available to contradict that; and (2) that he could not swear that the fence he built was the same as that when McLean took possession, though it looked to be the same. He never was even asked definitely about the position of the fence, the only important matter.

Then as to the other witnesses, the solicitor with the same looseness swears: "I was also taken by surprise by the inability of other witnesses for the defence to state positively in the witness-box facts which I had previously understood in my instructions they would prove in the box." What these facts were, we are not told, nor what the witnesses said about them—and no solicitor would think of being satisfied with an "understood." He must have "understood" from the witnesses themselves, and they must have given the instructions, as the defendant himself swears, "I never at any time deemed it necessary to procure evidence as to the fence in question." In the affidavit of the defendant, there is the same inexcusable lack of definiteness as appears in that of the solicitor—and he does not shew any diligence in seeking for evidence, although he swears in general terms to "all due diligence." The solicitor does not swear to any attempt at all, but says he relied upon the witnesses he adduced.

It must have been perfectly apparent from the beginning that the defendant must rely upon the Statute of Limitations; the plaintiff had had a survey made, and then attempted to take possession of the strip in dispute, and the defendant refused to give up possession; the plaintiff pulled down the existing fence and built it on the surveyor's line, and the defendant replaced it. At the trial, no attempt was made to shew that the survey made was at all incorrect; the surveyor was not even cross-examined—the whole defence was based upon the fence and possession up to the fence. That, even now, must be the whole defence.

This being so, the defendant swears that he never at any time deemed it necessary to procure evidence as to the fence in question—and it is perfectly plain that he did not look for any such witnesses; the solicitor does not pretend that he did; all he seems to have done was to "understand" something from those who were brought to him.

The only evidence intended to be adduced, if a new trial be granted, is that of persons who can (as they say) swear to the fence. There was no such diligence to obtain this evidence as would justify us in acceding to the motion.

It cannot be necessary to cite authorities, but the following may prove of interest: Robinson v. Rapelje, 4 U.C.R. 289; Murray v. Canada Central R.W. Co., 7 A.R. 646; Trumble v. Hortin, 22 A.R. 51; Caswell v. Toronto R.W. Co., 2 O.W.N. 1405, 24 O.L.R. 339.

The motion should be dismissed with costs.

FALCONBRIDGE, C.J., and BRITTON, J., agreed in the result.

DIVISIONAL COURT. FEBRUARY 1ST, 1912.

McEACHEN v. GRAND TRUNK R.W. CO.

Railway—Injury to Servant Walking on Track—Negligence—Warning—Findings of Jury—Negativing Grounds not Specifically Found—Contributory Negligence—Ultimate Negligence—Evidence.

Appeal by the plaintiff from the judgment of MEREDITH, C.J.C.P., at the trial, dismissing the action without costs, upon the answers of the jury to questions submitted to them.

The action was brought by Mary McEachen, widow of Allan McEachen, on behalf of herself and her two children, to recover damages for the death of Allan, who was run over by a train of the defendants, while engaged in work for the defendants, owing, as the plaintiff alleged, to the negligence of the defendants.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

J. G. O'Donoghue, for the plaintiffs.

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

RIDDELL, J.:—The deceased . . . , a foreman carpenter on the Grand Trunk Railway, was killed on the 21st December, 1910, on the defendants' line. At the place of the accident, a little west of Windermere avenue, there were, north of the elevated track, four separate lines running between the Bolt Works and the elevated track. Numbering from the south track. No. 3 held, immediately before the accident, a switching train, seven cars, a caboose and engine, making a train of some 300 feet long. The engine was facing westward, "nosing" the train, which was, therefore, west of the engine; and at the west end

of the train were the caboose and a box car, which were to be set up the straight track No. 3; the remainder of the train then to be switched around west of the Bolt Works.

This operation seems to have begun with the westerly car, about 50 feet east of Windermere avenue. The yard-helper, Rowan, got up on the foremost car, the box car west of the caboose, and saw the deceased walking "right in the centre between the two tracks on the eight feet" between tracks Nos. 2 and 3. The bell was continuously ringing, but no whistle was blown. There was nothing to indicate any danger to the deceased, as he would be well out of the way of the train. A train was coming from the west toward the locus on track No. 1.

When the box car on the track 3 was about a car length east of the deceased, Rowan saw him step to the north over upon track 3. Rowan "shouted and gave a frantic stop signal" to the engineer. The hand brakes on the box car were on the east end, and Rowan did not have time to apply them—he was taken up with trying to warn the deceased. The cars were going west about 4 or 5 miles per hour, and the yard-helper could not have stopped them in a car length, as he thinks. It seems probable that the train passing east on track No. 1 prevented the deceased hearing the bell, the noise of the west-going train, or the shouts of the yard-helper. He did not turn round to see if any train was approaching. The engineer applied the brakes as soon as he got the signal, but the cars did not stop in time, and the box car and short caboose ran over and killed the unfortunate man. The engineer, called by the plaintiff, says he could not have stopped any quicker.

At the close of the plaintiff's case, her counsel mentioned the several grounds of negligence upon which he relied, and the learned trial Judge charged the jury with great care upon the various allegations of negligence: (1) that Rowan should have warned the deceased; (2) "As to the whistle, there is no dispute . . . on the facts, and, if you attribute the happening of the accident to the omission to whistle, you will say so, and I will deal with the question of law or the Court will deal with that afterwards;" (3) "Then it is said that the train was not stopped in time;" (4) "It is said there ought to have been a brake at the rear of the car" (this is explained later as being the west end of the box car); (5) "That Rowan ought to have rushed immediately to the rear of the car and have applied the rear brake" (*i.e.*, in this case, as explained later, the east end of the box car).

The charge proceeds to deal with contributory negligence—and questions are submitted. Counsel upon this appeal complains that the learned Judge was not right in his law when addressing the jury; and, if we take out one sentence from all the rest, a plausible argument may be framed that this contention is correct—but the jury were not allowed to find a general verdict or to deal with the law at all—and any such error (if such there were, and I think there was not, taking the charge as a whole) could not affect the answers of the jury or the result.

The following questions were submitted (I subjoin the answers to save repetition):—

1. Were the defendants guilty of negligence in operating the shunting train? A. Ten for negligence, two against.

2. If so, what was the negligence? A. That the cars should not be cut loose without a man being in charge of the brake. Ten for, two against.

3. If there was negligence, was the accident to the deceased caused by such negligence? A. Ten say yes, two say no.

4. Or was the accident caused wholly or partly by the negligence of the deceased? A. Eleven say partly, one says wholly.

5. Damages? A. To the widow, $1,000; to Ronald, $750; to Catherine, $750.

Thereupon counsel for the plaintiff asked that the jury should be told that they were at liberty to say that, in all the circumstances, there was negligence, without mentioning any specific negligence. This the Chief Justice rightly refused. Counsel contended then that "kicking off the cars in the way it was done was negligence," and his Lordship left that to the jury.

The jury then retired; and counsel for the plaintiff addressed the Court:—

"Mr. O'Donoghue: I suggest to your Lordship that you should leave this question to the jury also: Could the defendants, notwithstanding the negligence, if any, of deceased, have avoided the accident?

"His Lordship: That is not the question you handed up to me. I will ask them, if you choose, whether Rowan, after he became aware of the position of this man—that he was crossing the track—could, by the exercise of reasonable care, have prevented the accident happening.

"Mr. O'Donoghue: I am submitting the general question.

"His Lordship: Well, I will not put the general question.

"Mr. O'Donoghue: I was just getting it on the notes.

"His Lordship: I will leave to the jury the question—although I think there is no evidence of it, the evidence is all against you on it—whether, after the trainmen—or it would really be this man Rowan—became aware that this man was going to cross the track, he could, by the exercise of reasonable care, have prevented the accident.

"Mr. O'Donoghue: I have no objection to that, but I also want to ask this one.

"His Lordship: Well, I will not do that.

"Mr. O'Donoghue: I only want to get it on the notes. The question I was asking was: Could defendants, notwithstanding the negligence, if any, of the deceased, have avoided the accident, by the exercise of reasonable care?

* * * *

"His Lordship: Call the jury back."

The jury are here accordingly brought back into Court, and the following takes place:—

"His Lordship: Counsel for the plaintiff desires me to ask another question. I am going to ask it, although it is involved in the questions you have already been asked. This is what I will ask you: Could the trainmen, after they became aware that the deceased was crossing the switching track, by the exercise of reasonable care, have prevented the accident?

"Mr. O'Donoghue: Your Lordship will understand that that is not the question I submit.

"His Lordship: I understand it perfectly. It is a better question than yours. I will not submit it the other way. If you want it, I will ask, 'Could Rowan?' "

The question following was then added and given to the jury. (I subjoin also their answer):—

"6. Could the trainmen, after they became aware that the deceased was coming to the switching-track, by the exercise of reasonable care, have prevented the accident? A. Yes: ten for, two against."

Upon this the learned Chief Justice said: "I think I must enter judgment for the defendants on these findings. The jury, in their answer to the second question, place the negligence of the defendants upon this ground: that the car should not have been cut loose without a man being in charge of the brake. The effect of that finding, according to the cases, is to negative all the other grounds of negligence that were put forward by the plaintiff—therefore, to negative the failure to whistle as not having been the efficient cause of the accident, and all the other grounds of negligence upon which Mr. O'Donoghue relied. It

was not even argued by counsel that there was negligence in not having a man in charge of the brake before the car was cut loose. There is no evidence to support either view—that it was negligence or that it would not have been negligence to have a man in charge of the brake—and what evidence there is is altogether against the idea that, if there had been a man in charge of the brake, it would have had any effect whatever. If the signal to the engine-driver could not have prevented it, through his stopping by means of his brake, it follows, as a matter of course, that the other man could not have stopped the car—it would have taken longer probably. Then I think, also, that there was no evidence whatever to support the answer to the sixth question. There was nothing that could have been done, upon the evidence—with the appliances that were there at all events—to have stopped the car in time to have prevented the accident after it was seen that the man was stepping on to this track upon which the shunting train was."

Counsel upon the appeal before us urged that, by reason of the form of the 6th question, the jury might have thought that they were precluded from finding negligence of the defendants before the deceased started for the track No. 3. It is plain that this is not so—the jury have found negligence of the defendants before this point of time—and it is equally clear that the trial Judge is right in confining all questions of "ultimate" negligence to the time from which the defendants or their servants could have anticipated any danger—any negligence before that time must be negligence covered by questions Nos. 1 and 2.

It is also plain that nothing appears in the evidence justifying the answer of the jury to question No. 6, or indeed to question No. 2. But, in any event, the answer to question 2 precludes a finding of any other negligence than that specifically found; it is not necessary to give authority for such a thoroughly established proposition. The jury then have found against the plaintiff upon whether the absence of the whistling, etc., caused the accident; and, even were the statutory duty to whistle to be held to exist under the circumstances, the jury have found it immaterial that such duty (if any) was not fulfilled.

It must be plain that the unfortunate man's own want of the most ordinary care contributed to the accident.

I think the motion must be refused, and with costs, if asked.

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

FALCONBRIDGE, C.J., agreed that the appeal should be dismissed with costs.

RIDDELL, J., IN CHAMBERS. FEBRUARY 1ST, 1912.

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

Parties—Order Allowing Third Party Notice to be Served after Issue Joined—Motion to Set aside—Con. Rule 209—Practice—Extending Time for Proceeding—Indemnity or Relief over—Proper Case for—Warehousemen—Auctioneers.

Appeal by the defendants from the order of the Master in Chambers, ante 601, setting aside an ex parte order allowing the defendants to serve a third party notice and the notice served pursuant to the order.

Shirley Denison, K.C., for the defendants.
W. Laidlaw, K.C., for the third parties.

RIDDELL, J.:—The plaintiff alleges that she, in 1908, delivered to the defendants, in Liverpool, England, 97 cases of settlers' effects for Toronto; that they arrived at Toronto in June, 1908, and she was duly notified of such arrival by the railway company; that, by delay . . . she was prevented from taking delivery till March, 1909 . . .; that thereafter the defendants retained the goods till the 21st October, when they proceed to advertise ninety of them; and that a portion of these was sold, realising $1,700. She further alleges that no proper account was kept of the sale, and in many instances the amounts accounted for are too small; also, that, while the goods were in the custody of the defendants, they were opened and unpacked, and a large quantity converted by the defendants to their own use; and the statement concludes: "11. By reason of the conversion by the defendant company of a large portion of the said goods and effects and its improper and wrongful accounting in regard to the sale of such portion of them as were sold as aforesaid, the plaintiff has suffered damages to a large amount, to wit, the sum of about $1,500; and she claims: (1) . . . a proper account of the goods sold by the defendants; (2) . . . to be paid the full value of the said goods converted . . .; (3) or for damages for the conversion . . .; (4) the costs of the action.

Upon the material and statements and admissions before me, it appears that the goods reached Toronto in July, 1908; that notice was given to the plaintiff of their arrival, but that

*To be reported in the Ontario Law Reports.

she neglected to remove them; that it was in October that the claim was made resulting in interpleader proceedings, and that the claim . . . was disposed of in her favour . . . in February, 1909. Then, in October, the railway company put the goods into the hands of Suckling & Co., auctioneers, to sell, to pay the charges they had against the goods. The auctioneers received all the goods the shipping bill called for, and they sold on the 21st October what they did sell for less than enough to pay the charges of the railway company. Some of the goods, however, the auctioneers delivered, both before and after the sale, to the husband of the plaintiff, her agent. The auctioneers so delivered some goods, before the sale, "at the solicitation of an intimate friend," and, it is said, upon an undertaking that the goods would be accounted for; and, after they had sold what they thought would be sufficient to cover the defendants' claim, they delivered the remainder to the husband.

The action was brought on the 1st February, 1910; the statement of claim was delivered on the 21st March, 1910; and the statement of defence and counterclaim on the 8th April, 1910. This pleading sets up the arrival and notice, neglect of the plaintiff to remove the goods, the interpleader and termination thereof; further neglect by the plaintiff to remove; sale by the defendants on the 21st October, 1909, realising $1,480.63 —the charges against the goods being $1,659.79; notification to the plaintiff of the time and place of sale and attendance thereat by the plaintiff or her agent without objection, and purchase by the plaintiff or her agent of some of the goods; account furnished in detail; and balance of $177.16 still due. The defendants claimed a dismissal of the action and judgment for $177.16 and interest.

No further pleading was filed except a formal joinder by the plaintiff on the 21st April, 1910.

The record was passed on the 8th February, 1911. On the 10th March, a notice of motion for a commission to examine witnesses in England was served by the defendants; and on the 13th March, Britton, J., upon application of the defendants in the trial Court, made an order for a commission to England, and ordered the case to be put at the foot of the list, but to be expedited. . . . In May, the defendants moved for particulars. The case came on again for trial, when Middleton, J., 16th September, 1911, directed it to stand off the list, but to be entered again when ready for trial.

On the 12th September, the solicitor for the defendants made an affidavit that he had but a short time before learned that the plaintiff or her agent had removed some of the goods, and

served notice of motion for leave to amend his pleadings, for better particulars . . . . This was opposed; but the Master in Chambers, on the 25th September, made an order for amending pleadings and for the examination of the plaintiff's husband—enlarging the motion in respect of the other matters.

On the 4th December, 1911, the defendants obtained an ex parte order to serve a third party notice on the auctioneers. Some correspondence took place between the solicitors for the defendants and the auctioneers; and at length the auctioneers moved to discharge the order last-mentioned. On the 19th January, 1912, the Master in Chambers set aside the third party order; and the defendants now appeal.

The order for a commission has been taken out, and the conduct thereof assumed by the plaintiff—and the commission has not been executed.

The plaintiff has not objected and does not object to the third party proceeding.

In support of the order appealed from, it was urged that the contract of the defendants was that of insurers, and consequently entirely different from any contract, express or implied, between the defendants and the auctioneers. Supposing that such a difference would prevent the proper service of a third party notice (which I do not at all think), it is plain, from all the material and from what took place before me, that the claim of the plaintiff is not against the railway company as common carriers, and consequently insurers, but as warehousemen. The plaintiff says, in effect, to the defendants: "You had my goods, you had the right to sell them; but it was your duty to keep the goods safe, to open the boxes, etc., with care, to advertise properly, to sell prudently, to keep and render an accurate account of your sales, and to pay to me the balance of the proceeds over and above your claim. You did not do that. Your servants took some of the goods; you unpacked the goods; you made no proper inventory so that a proper sale could be had; you did not keep and render a proper account of the sale." The defendants say: "We think we did all we were called upon to do;" and now they desire to say further: "But, if we are in default, it is because the persons whom we trusted to act for us, the auctioneers, have not done as they should: they owed us the same duty which we owed to you—it was they who opened the goods, they who sold, they who kept account; and, if we are liable to you, it was entirely their fault, and they are liable to us for precisely that sum."

It seems to me impossible to conceive of a case in which our Con. Rule 209 is more to the point—and I do not think the cases prevent its application. . . .

[Reference to Smith v. Matthews, 7 O.W.R. 598, 9 O.W.R. 62; Payne v. Coughell, 17 P.R. 39; Confederation Life Association v. Labatt (No. 2), 18 P.R. 266; Wilson v. Boulter, 18 P.R. 107; Windsor Fair Grounds Association v. Highland Park Club, 19 P.R. 130; Parent v. Cook, 2 O.L.R. 709, 3 O.L.R. 350; Langley v. Law Society of Upper Canada, 3 O.L.R. 245; Miller v. Sarnia Gas Co., 2 O.L.R. 546; Gagne v. Rainy River Lumber Co., 20 O.L.R. 433; Wade v. Pakenham, 2 O.W.R. 1183.]

I am convinced that Con. Rule 209 has been given quite too narrow an application, and hope that the matter may receive full consideration in an appellate Court. But, taking the tests laid down by my brother Teetzel, in Gagne v. Rainy River Lumber Co.; in the present case, there is the implied contract of the auctioneers with the defendants—and the damages recovered by the plaintiff, if any, from the railway company are the measure of damages recoverable by the defendants from the auctioneers, their agents. See also London and Western Trusts Co. v. Loscombe, 13 O.L.R. 34; Budd v. Dixon, 9 O.W.R. 371.

Applying the test in Wilson v. Boulter, it would be unfortunate if the damages on the two contracts should be assessed by two tribunals. See Benecke v. Frost, 1 Q.B.D. 419, 422; Ex p. Smith, In re Collie, 2 Ch. D. 51.

I have not considered the English cases as binding (being upon a Rule differently worded), though I have read those cited and several others.

Then as to time, the notice should have been served (Con. Rule 209) "within the time limited for the service of . . . defence." Power exists in the Court to extend this time (Con. Rule 353), and the time should be extended, if a proper case is made out for such extension.

The reason advanced for such extension is, that it was only recently that the defendants were aware that the auctioneers had had dealings with the plaintiff behind their back. This is to me no reason whatever. The statement is, that the auctioneers, without the knowledge of the railway company, allowed the plaintiff to take away certain of the goods intrusted to them to sell. This conduct, if it resulted in loss to the defendants, *e.g.*, if it prevented the full amount of the charges being obtained, no doubt gives a cause of action to the defendants—no doubt, the defendants could sue both the auctioneers and the plaintiff for taking these goods—and could have counterclaimed in this action. But the liability on the implied contract

to sell with care, etc., etc., was thoroughly known to the defendants from the beginning of the action. This conduct of the agents said to be recently discovered in no way increases the liability of the defendants to the plaintiff—but rather the reverse—for the plaintiff cannot make any valid complaint against the defendants, in respect of the goods she herself took from the custody of their agent.

I think, then, that I must consider the case as though no such discovery had been alleged.

I agree, however, sub modo, with what is said by the learned Master in Ontario Sugar Co. v. McKinnon, 3 O.W.R. 64: "The limitation imposed by Con. Rule 209 was not intended for any other purpose than to prevent unreasonable delay to the prejudice of the plaintiff." The case must be rare where any one but the plaintiff can be injured by the delay; and most of the cases have been cases in which he moved to set aside the third party notice—sometimes indeed the third party joining.

In Associated Home Co. v. Whichcord, 8 Ch. D. 457, 38 L.T.N.S. 602, and Birmingham, etc., Land Co. v. London and North Western R.W. Co., 56 L.T.N.S. 702, it was the plaintiff who moved; and in Molsons Bank v. Sawyer (referred to in Ontario Sugar Co. v. McKinnon), Mr. Winchester, Master in Chambers, would not give effect to an objection by the third party; nor did Mr. Cartwright, Master in Chambers, in Stuart v. Hamilton Jockey Club, 2 O.W.N. 254.

It is true that it was the third party who objected in Parent v. Cook, but the time was not enlarged in that case because, as the learned Chief Justice said: "The case is not, in my opinion, one in which I should, in the exercise of my discretion, enlarge the time allowed by the Rule for serving the notice. . . . It is probable that the only question which would be determined at the trial, as well between the respondents and the appellants, as between the former and the plaintiff, would be, whether or not the acts complained of were unlawful or were lawfully done under the authority which the respondents plead as their justification for doing them. The measure of damages in the one case might be . . . very different from that in the other." In the Divisional Court . . . one of the learned Judges thought that it was not a case for a third party notice at all. This is no authority for saying that where the plaintiff does not object, and the case is clearly one for a claim over, the time is not to be extended for serving the notice in a proper case.

In the present case, as I have said, it seems to me that it would be unfortunate if there were to be two trials by different tribunals of the same questions; and, as no possible harm can

accrue to any one from allowing the third party notice to be served, such service should be allowed.

The defendants might also, if so advised, have counterclaimed from the auctioneers along with the plaintiff damages for the unauthorised interference with the goods, the property of the defendants; but, as such an amendment is not asked, I do not make an order in that sense.

The defendants will pay the costs of the motion before the Master in any event; and there will be no costs of this appeal.

CLARKSON v. MCNAUGHT AND SHAW—CLARKSON v. MCNAUGHT AND MCNAUGHT—CLARKSON v. SHAW—CLARKSON v. C. B. MCNAUGHT—MASTER IN CHAMBERS—JAN. 29.

Summary Judgment—Con. Rule 603—Actions or Promissory Notes — Defence — Indemnity — Agreement.]—In these four actions on promissory notes, the plaintiff moved under Con. Rule 603 for summary judgments. The notes were all dated the 20th December, 1907, and were payable on demand. They were protested for non-payment on the 6th March, 1908. The Master said that the plaintiff, who only alleged title at the earliest on the 5th May, 1911, took them subject to all their equities. The Master referred to the remarks of Middleton, J., in the similar cases of Stavert v. Barton and Stavert v. Macdonald, ante 348, 349: "The defendants have all along contended that they have a right of indemnity against the Sovereign Bank, if they are liable on the notes; and they now seek to contend that Clarkson has in truth become a mere trustee for the Sovereign Bank and its shareholders, and is for this reason not entitled to recover against them. This defence they must be at liberty to set up, and it is proper that it should be dealt with at the hearing." The same contention was made in the present cases; and the motions must, therefore, fail, unless the plaintiff could succeed in the ground that a certain document given on the 13th January, 1909, to Mr. Stavert by Mr. Arnoldi, "on behalf of" the defendants, was equivalent to a consent to entry of judgment, whenever action should be taken by Mr. Stavert on those notes. In any case, even if that was the legal effect of this document (which is found at p. 20 of the joint appendix of exhibits and statutes to the appeal book in Stavert v. McMillan), the decision in Pirung v. Dawson, 9 O.L.R. 248, shewed that application must be made to a Judge in Court to have that agreement carried out. This rendered

it unnecessary to consider two preliminary points, which were by no means clear. The first was, whether such an agreement is assignable, as it was made only with Stavert. Then, if that were properly answered in the affirmative, it would still have to be determined if the indenture of the 5th May, 1911, by which Stavert purported to assign to Clarkson all the trust estate, etc., carried with it the right to enforce the agreement of the 13th January, 1909. The words used did not contain any express mention of this document; and it certainly formed no part of the trust estate conveyed to Stavert, as it was not at that time in existence. Whether it was included in the words, "all books of account, papers, and other documents of the Sovereign Bank of Canada," was a question on which opinions might well differ. Probably the existence of this document was not present to the mind of the draftsman; and, even if the other two difficulties were got rid of, this might still prevent the success of the plaintiff's motions. The Master still adhered to what he said in the Stavert cases, ante 265, that the change from Stavert to Clarkson constituted for some purposes a new action; and he was of opinion that this change in the situation thereby created might give the defendants the right to recede from the agreement with Stavert, even if otherwise binding on them. In view of all these considerations, it would be impossible to give summary judgment without acting in disregard of the judgment of the Divisional Court in Farmers Bank v. Big Cities Realty and Agency Co., 1 O.W.N. 397. Motions dismissed with costs to the defendants in the cause. F. R. MacKelcan, for the plaintiff. F. Arnoldi, K.C., for the defendants.

CALDWELL v. HUGHES—MASTER IN CHAMBERS—JAN. 31.

Particulars—Statement of Defence and Counterclaim—Postponement till after Examination of Defendant for Discovery—Leave to Examine before Pleading to Counterclaim.]—Motion by the plaintiff for further particulars of the statement of defence and counterclaim. The action was brought by the plaintiff, as administratrix, to obtain a settlement for the business done by her deceased husband with the defendant. The whole matter was one of account, and, the Master said, would probably be referred, unless some settlement should be reached by the parties. The statement of defence and counterclaim consisted of 30 paragraphs, and was very unusually minute and detailed. Particulars were demanded of 17 of these, and had

been furnished as to some of them. There was no written agreement between the deceased and the defendant. The Master said that the best disposition of the motion would be to let it stand until after examination of the defendant for discovery. The plaintiff could plead now, and have leave to amend afterwards, if necessary, or, if preferred by the plaintiff, the examination could be had before pleading, following the principle of Townsend v. Northern Crown Bank, 1 O.W.N. 69, 19 O.L.R. 489. It was to be remembered that particulars at this stage were asked for the purpose of pleading; and, the plaintiff not being aware of the facts, was entitled to all necessary information, and this could be best obtained by discovery. H. E. Rose, K.C., for the plaintiff. D. Inglis Grant, for the defendant.