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APPELLATE DIVISION.

DECEMBER 27TH, 1913.

*STORY v. STRATFORD MILL BUILDING CO.

Master and Servant—Injury to Servant—Work of Constructing Mill—Negligence of Foreman—Liability—Tort Committed in Province of Quebec—Remedy in Ontario—Quebec Law—"Actionable" Delict—Workmen's Compensation for Injuries Act—Extra-territorial Effect—Law of Domicile of Parties—Act or Omission not Justifiable in Quebec—9 Edw. VII. ch. 66 (Q.)—Findings of Jury—Judge's Charge—Damages—Quantum—Secs. 2, 14, 15, of Quebec Statute—Evidence—Improper Admission—Immateriality.

Appeal by the defendants from the judgment of KELLY, J., 4 O.W.N. 1212.

The action was brought in Ontario by a millwright formerly employed by the defendants, an Ontario corporation, in the work of building a mill at a place in the Province of Quebec, to recover damages for injuries sustained while working, owing, as alleged, to the negligence of the defendants, or some one in their employment.

The action was tried with a jury, and the trial resulted in a verdict for the plaintiff for $1,500, for which sum the trial Judge directed that judgment should be entered with costs.

The appeal was heard by MACLAREN, J.A., RIDDELL, SUTHERLAND, and LEITCH, JJ.

R. S. Robertson, for the defendants.

J. Hilliard, K.C., for the plaintiff.

*To be reported in the Ontario Law Reports.

RIDDELL, J.:— . . . The law respecting wrongs committed in another country, remedy for which is sought in England, has been more than once authoritatively laid down. . . .

[Reference to Phillips v. Eyre (1870), L.R. 6 Q.B. 1, 28; Carr v. Fracis Times & Co., [1902] A.C. 176, 182; Westlake's Private International Law, 5th ed., ch. 40, p. 282; Machado v. Fontes, [1897] 2 Q.B. 231; Varawa v. Howard Smith Limited, [1910] Vict. L.R. 509; The Halley (1868), L.R. 2 P.C. 193, 202.]

There being no authority for the proposition, and it being opposed to both principle and authority, we cannot give effect to the contention, that only the common law of the Province can be looked at in determining whether a delict is "actionable."

It is contended that, at all events, the Workmen's Compensation for Injuries Act cannot be appealed to. This argument is based upon two cases: Tomalin v. Pearson, [1909] 2 K.B. 61 (C.A.); and Schwartz v. India Rubber Co., [1912] 2 K.B. 299. . . .

[Discussion of these cases and reference to Chartered Bank of India v. Netherlands & Co. (1883), 10 Q.B.D. 521, 537.]

We cannot give effect to the argument for the plaintiff that the Legislature of the Province of Ontario had intended to give their Act an extra-territorial effect: British North America Act, sec. 92(13); McLeod v. Attorney-General, [1891] A.C. 457; In re Criminal Code, 27 S.C.R. 461; Attorney-General v. Cain, [1906] A.C. 542.

Nor can we agree to the proposition of the plaintiff that the parties must be held to have contracted that the law of the country of their domicile should govern them in all respects. This is based upon a Quebec case, Dupont v. Quebec Steamship Co. (1896), Q.R. 11 S.C. 188. . . .

[Discussion of and dissent from the doctrine of that case. Reference to The M. Moxham (1876), 1 P.D. 107, 110, 111, 113; Tomalin v. Pearson, [1909] 2 K.B. 61, 65.]

The law is, that where an act or omission would be actionable had it taken place in Ontario, it is actionable in our Courts when it took place in a foreign country, if by the law of that country, whether common law or statute, it was not justifiable. That an employer is not justified or excused in Quebec if his servant by negligence does injury to a fellow-servant is quite clear—that is admitted. And, although the Quebec Act of 1909, 9 Edw. VII. ch. 66, enables an employee to receive compensation for an accident which is not the result of negligence, it does not at all

justify or excuse any act of negligence. Whether what is complained of is actionable in our Courts depends upon the facts.

. . .

The jury have found the following in answer to questions:—

1. Q. Was the casualty caused by negligence or was it a mere accident? A. Caused by negligence.

2. Q. If it was caused by negligence, whose negligence caused it? A. By foreman, Mr. Cox.

3. Q. If there were such negligence, set out fully and clearly the various acts of negligence which caused or assisted in bringing about the accident. (Answer fully). A. We find that nailing the board under the rafters with nails was not sufficient to sustain the weight.

4. Q. Was there any negligence on the part of the plaintiff which caused or helped to cause the accident? A. No.

5. Q. Could the plaintiff, by the exercise of ordinary care, have avoided the accident? A. No.

(Q. 6 is immaterial).

The damages were assessed at $1,500.

It is plain from what was said before us in argument, as well as from the cross-examination of Cox and the expert evidence of Wickwire, that the charge of negligence against Cox was, not that he had nailed up the board to the rafters, but that he had not examined the board to see that it was safe before putting the plaintiff to work under it. The jury have not found this specifically, although it is more than likely that they intended so to find. If it had been necessary in order to support this verdict to interpret the answers of the jury in that way, I should require further consideration before so doing; it is probable that the true solution would be to order a new trial.

I think that the answers of the jury were put in the shape in which they are by the direction in the charge, the only direction in reference to answering these questions: "Q. 1. Was the casualty caused by negligence, or was it a mere accident? Q. 2. If it was caused by negligence, whose negligence caused it? I shall have to ask you not only to find whose negligence it was —if there was negligence—but to say what were the specific acts of negligence. The evidence is quite fresh in your minds. Whatever you do find about the putting up of the board from which the machine was suspended, whether it was done this, that, or the other way, you are to find whether there was negligence, and state what that negligence consisted of."

The answer to question 3 seems to me to be in obedience to

the direction contained in the last sentence; and the jury have in effect found that the manner of nailing the board was negligent, and there was "a defect in the condition . . . of the plant . . . used in the business of the employer" in that respect.

Markle v. Donaldson (1904), 7 O.L.R. 376, 8 O.L.R. 682, as I understand it, decides that any person who is directed by the employer to get ready for workmen an appliance necessary for their safety, is a "person intrusted by him with the duty of seeing that the condition . . . of the plant . . . is proper," under sec. 6 (1) of the Act. No sound distinction can be drawn between that case and this. In each case the board or cleat was to have weight put upon it in the work of the plaintiff, and it would be dangerous unless properly nailed. The jury having found that the board was negligently nailed, it was not at all necessary to find who was the negligent person: Markle v. Donaldson. The action then lies in Ontario.

The quantum of damages is attacked. The Quebec Act of 9 Edw. VII. ch. 66 provides, by sec. 2, for compensation to be paid: (a) in case of absolute and permanent incapacity; (b) in case of permanent and partial incapacity; and (c) in case of temporary incapacity. The injury in question could only come under (b) or (c), and the compensation awarded thereunder would be much less than $1,500. Section 14 provides that "the person injured . . . shall continue to have, in addition to the recourse given by this Act, the right to claim compensation under the common law from the person responsible for the accident other than the employer, his servants or agents . . . " and (sec. 15) "the employer shall be liable to the person injured . . . for injuries resulting from accidents caused by or in the course of the work of such person, in the cases to which the Act applies, only for the compensation prescribed by this Act." It follows that in Quebec no damages could be recovered in excess of the amount of compensation given by the Act; and no action could be brought against the employer under the common law.

Were the matter res integra, it might not unreasonably be held that the plaintiff, by suing in another jurisdiction, cannot put himself in a better position than if he had sued in the country delicti commissi.

Speaking for myself, I should have hesitated to hold that a man injured in Quebec could put himself in better position by coming to Ontario, and suing in our Courts, than if he had sued

where he received his injury. But authority binding upon us has decided otherwise in cases not disssimilar. . . .

[Reference to Scott v. Lord Seymour (1862), 1 H. & C. 219; Hart v. Gumbach (1872), L.R. 4 P.C. 439; Machado v. Fontes, [1897] 2 Q.B. 231, 234, 235, 236; Varawa v. Howard Smith & Co. Limited, [1910] Vict. L.R. 509; Trimble v. Hill, 5 App. Cas. 342; Scott v. Reikie (1865), 15 C.P. 200; Moore v. Bank of British North America (1868), 15 Gr. 308; Macdonald v. McDonald (1886), 11 O.R. 187; and McDonald v. Elliott (1886), 12 O.R. 98.]

It follows then that, the action being properly maintainable in our Courts, "we must act according to our own rules in the damages which we may choose to give."

I do not find that the damages, large as they are, larger perhaps than a Judge or another jury might give, are so large as to be considered excessive and such as twelve reasonable men could not honestly award to the plaintiff.

There remains but the question as to a new trial. First on the ground of improper admission of evidence; this is the evidence given by Wickwire of his opinion of the duty of a foreman. This was improper. Evidence of what a foreman usually did was admissible, but not the witness's opinion of what a foreman should do.

In my view of the case, however, this is wholly immaterial, and is accordingly no ground for a new trial. If the judgment were to rest upon negligence on the part of Cox, it would be quite a different matter.

The only objection taken to the charge was, that the learned trial Judge told the jury that they might allow the three years' wages. What he did say was wholly unexceptionable. . . .

[Reference on the general question to Story's Conflict of Laws, 8th ed., sec. 625, and notes thereto.]

I am of opinion that the appeal should be dismissed with costs.

LEITCH, J., agreed in the result and with the reasons of RIDDELL, J.

MACLAREN, J.A., and SUTHERLAND, J., agreed in the result.

Appeal dismissed with costs.

HIGH COURT DIVISION.

MEREDITH, C.J.C.P. DECEMBER 12TH, 1913.

*WESTON v. COUNTY OF MIDDLESEX.

Highway—Nonrepair—Injury to Traveller—Liability of County Corporation—Municipal Act, 1903, *sec.* 606—*Public Highways Improvement Act*, 7 *Edw. VII. ch.* 16—"*Repair*"—"*Maintained*"—*Highway* "*Assumed*" *by County Corporation—Gravelling Done in Winter in Centre of Road—Absence of Warning or Notice—Sleigh Travelling at Side of Road—Dangerous Slope towards Ditch—Plan of Construction of Road—Following Regulations of Department of Public Works—Employment of Competent Engineer—Method of Performing Work—Statutory Prohibition of Gravelling in Winter—Municipal Act*, 1903, *sec.* 558—*Cause of Action—*"*Rebuilding*"*—Negligence—Obstruction of Highway—Misfeasance—Proximate Cause of Injury—Evidence—Contributory Negligence—Findings of Trial Judge—Damages.*

Action for damages for personal injuries sustained by the plaintiff, as he alleged, by reason of nonrepair or obstruction of a highway upon which he was travelling in a loaded sleigh.

T. G. Meredith, K.C., and R. G. Fisher, for the plaintiff.
J. C. Elliott, for the defendants.

MEREDITH, C.J.C.P.:—. . . In the public interests, the highways must be maintained for the public benefit; and so legislation has for many years put that duty upon the municipal corporations of the Province, and given them the power, limited as to amount, of raising by taxation money generally to meet this and all other their obligations. . . .

"Every public . . . highway shall be kept in repair by the corporation, and, on default of the corporation so to keep in repair, the corporation, besides being subject to any punishment provided by law, shall be civilly responsible for all damages sustained by any person by reason of such default . . ." See the Consolidated Municipal Act, 1903, sec. 606, which was in force when the accident involved in this action happened; and

*To be reported in the Ontario Law Reports.

the Municipal Act, 1913, sec. 460, which has since come into force. . . . In respect of the obligation of the defendants in regard to roads assumed by them, as this one was, under an Act for the Improvement of Public Highways, 7 Edw. VII. ch. 16, in which the obligation is also expressly conferred, the words are: "shall be maintained and kept in repair by the corporation of the county in which such roads are situate;" though it may very well be that the obligation is really not widened by the addition of the word "maintained." . . .

After "assuming" the highway—as it is termed in the enactment—the defendants proceeded with the work needed in the fulfilment of the obligation to maintain and repair it; not by any means to make a perfect road of it, but to bring it into the category of a good country road; not macadamised; merely graded and gravelled, with the gravel left after raking, to "traffic consolidation," not consolidation by means of a steam roller, the incomparably better way, but, of course, considerably more costly.

The gravelling was intended to have been done in the summer of 1912; but wet weather interfered; it was not done in the autumn of that year, though that season is not said to have been excessively wet; but it was taken up and carried on in the winter following, which is said to have been a mild one; and the gravelling, in the way I have mentioned, was going on when the accident happened. The gravel was dumped in the middle of the road and at once raked over to give it an even rounding surface and to remove the largest stones near the top so as to bring them under the next load of gravel that was dumped; but no rolling or other work was done to consolidate the gravel, or make it any better fit for traffic.

Whilst the work was going on, the road was left quite open for traffic; no warning notice or sign of any kind was put up or given.

On the morning of the day of the accident, there was snow enough upon the ground to make sleighing, though sleighing of an indifferent kind; some vehicles on the roads were on wheels, but most of them were on runners. The plaintiff and his son, a young man, were in the plaintiff's sleigh on a pair of bobsleighs; and they had a load of three calves, weighing probably about 250 pounds each, securely tied in two boxes within the rack with which the sleigh was provided. They proceeded along the highway in question, which was their proper road and a much travelled one. The track was well broken before them, and ran along the

south side—their left-hand side—of the road between the newly laid gravel, which had no snow upon it, and the ditch; a space of seven feet or a little more. There was no track on the right-hand side of the gravel; plainly, upon the whole evidence, because the right-hand side was less safe and suitable for traffic than the other; and there was no track on either side between the road and the fences.

Until they came to the new-laid gravel they were able to get on comfortably, keeping in or towards the middle of the road, but, when compelled by that gravel to take to the single track on the side of the road, they encountered difficulty and danger, so much so that they thought it necessary or advisable to get out and walk, which they did, steadying the sleigh by holding it down to prevent an upset; but they had again got into the sleigh and were driving on slowly and steadily, from the driver's seat, when the accident happened. The difficulty and the danger they met with was the slewing of the bobs on the snow and ice owing to the slant in the road towards the ditch.

The sleigh upset eventually, and the men, as well as everything else in the sleigh, were thrown out in or over the ditch, and the plaintiff, a man of about 60 years of age, sustained a bad break, near the shoulder, in his right arm, and a painful blow on the right side of his body: and this action is brought to recover damages for the personal injuries thus sustained.

The work upon the road was placed by the defendants entirely in the hands of their county engineer, a man quite competent to carry it out, and he employed farmers living in the neighbourhood to do the work, none of whom were trained road-makers, though some of them had had some experience in work of the same character as that which was to be done.

The plan adopted by the county engineer in regard to the width and shape of the surface of the road was that recommended by the Department of Public Works of the Province in respect of work being done, as this was, under the provisions of an Act for the Improvement of Public Highways, which requires that the regulations of that Department with respect to highways be followed to entitle the corporation to the provincial grant provided for in the Act. . . .

The plaintiff's first contention is, that the defendants are liable to him in damages for the injuries and loss he sustained through the accident, because their plan of construction was an improper and dangerous one; and because by reason of such mode of construction the accident was caused. . . .

The defendants appointed a competent man, their own engineer, to plan and carry out the work; and he did that which legislation made necessary to obtain the benefit of the Act under which the highway had been "assumed" by the defendants. In this I am quite unable to find that the defendants were guilty of actionable negligence, whether or not it would have been better road-making if one, or less, in twenty-four, instead of one in twelve, had been the plan of construction.

This ground of action fails to support the plaintiff's claim.

The plaintiff's second ground is, that there was actionable negligence on the part of the county engineer in inefficient oversight of the work and in the employment of incompetent men to do it. The work was not let by contract, but was left altogether in the hands of the engineer, who purchased the materials and hired the men and teams and generally controlled the whole work. . . .

The method . . . adopted . . . is one that is, and long has been—perhaps quite too long—in vogue in this Province; and there are other considerations than merely what is really the best method, especially the consideration of cost; so that, upon the whole evidence and under all the circumstances of the case, I am unable to say that the method adopted was in itself a negligent one. . . .

This ground . . . is not given effect to as an efficient cause of action.

The third ground is, that it was not only negligence, but in the teeth of a statutory prohibition, to put gravel upon the highway in winter, as was done in this case, done designedly as to a very considerable portion of the road, and done after the county engineer had been warned—pointedly warned by ratepayers—as to the impropriety and the danger of so doing.

The Municipal Act, 1913, provides that "stone, gravel or other material shall not be put on any highway for the purpose of rebuilding or repairing it during the winter months so as to interfere with the use of sleighs, unless another convenient highway is provided while the rebuilding or repairing is being done:" sec. 495.

The Consolidated Municipal Act, 1903, provided that "no stone, gravel or other material shall be put upon the road for repairs during the winter months so as to interfere with sleighing:" sec. 558. . . .

The defendants' position upon the question of a statutory prohibition is this: there was no prohibition against "rebuild-

ing" until after the accident; and rebuilding is not "repair," as the later enactment shews; and what was done was not "repair."

But I am clearly of opinion that the work being done upon the highway in question, and which was the cause of all the trouble, was "repair" within the meaning of that word contained in sec. 558 of the Act of 1903; and, if so, the defendants purposely did, notwithstanding fair warning, that which the statute-law declared that they should not do; for, otherwise than as to the meaning of the word "repair," the work done was plainly, if not admittedly, of the character so prohibited. It was done in the winter months so as to interfere with sleighing so much that the plaintiff's sleigh was upset, to his serious bodily injury, and other sleighs were upset, and all sleighing interfered with in being forced to a narrow way along the side of the road close to a ditch, where, owing to the pitch of the road towards the ditch and the snow and ice, there was difficulty and danger in driving. . . .

The defendants' whole duty under the Municipal Act . . . is comprised in the elastic word "repair," which . . . makes "rebuilding" or reconstruction, or whatever other name may be applied to it, imperative when need for such work arises. The Act under which the road was "assumed" by the defendants adds—as I have said—the word "maintained"—"shall be maintained and kept in repair;" and so brings the defendants under the obligation to maintain; and assuredly the work being done was one of maintenance as well as repair—repair being really the more comprehensive word: sec. 12, 7 Edw. VII. ch. 16. This section also refers to construction, as well as repair; another word which was perhaps not necessary, but which was evidently intended to apply to a road not yet made; and so cannot apply to the road in question, which had long been constructed up to the state of a gravel road, which needed, and was getting, only repair for its improvement, its statute-required improvement, which the township ought to have done but did not, and which the defendants assumed.

The contention, strongly pressed by Mr. Elliott, that "repair," in the section of the Act of 1903 under discussion, was meant to apply only to loads dumped here or there in small quantities—that it was not intended to apply to any extended gravelling—seems to me . . . rather the opposite of that which the Legislature said and meant. Their purpose was to save the travelling public from the dangers which, in winter, gravel laid in the road would occasion—the danger of being driven from the centre to the sides of the road, in sleighs. . . .

Much reliance was placed by the defendants on the introduction of the word "rebuilding" in the enactment of last year; but it is quite obvious that that, or any other introduction in the later enactment, could not take away from the force or effect of the earlier; and . . . there seems to me to be no manner of doubt that the earlier enactment covered such work as that in question; that the word "repair," used in the section of the Act imposing the duty to repair, had quite too long been held to apply to such work, and much more advanced work, to leave any room for doubt: and no good reason can be suggested why the same word "repair" used in each section of the same—606 and 558 of the Act of 1903—should not have the same meaning attributed to it in the one as in the other. It is not necessary for me to consider why the word "rebuilding" was added to the earlier legislation; but we all know that verbal changes were very extensively made by the commission in their revision of very many enactments; whether this was an appropriate or inappropriate one need not be discussed; but I may say that, as the word "build" is not ordinarily applied to road-making, it occurred to me that it might have been meant to apply to bridges, though the word highway would have included them, and ordinarily stone or gravel, or other like material, is not part of a bridge. A very learned Judge, when a Law Lord sitting in the House of Lords, very emphatically repudiated the use of the word "build" even as to a railway . . . (Young v. Corporation of Leamington, 8 App. Cas. 517, at p. 528). . . .

How far the Courts go in favour of a suffering plaintiff in cases of disregard of a statutory mandate, and of a personal injury, is shewn in the recent case of Jones v. Canadian Pacific R.W. Co. (see 3 O.W.N. 1404), according to the judgment of the Privy Council. . . .

And, quite apart from any statute upon the subject, no one could but find that it is an act of negligence to place gravel in the centre of a road in winter, in this country, if that reasonably can be avoided. . . .

I cannot but find, on the whole evidence, that the gravel-laying should have been delayed until the next following gravel-laying season. Little, if any, time would have been lost, and no danger, such as that from which the plaintiff suffered, would have been incurred. . . .

On this ground, I cannot but think the defendants liable in damages to the plaintiff, unless the plaintiff lost such right by contributory negligence; that is, his own negligence.

The fourth ground of the plaintiff's claim is, that the defendants were, through their servants, the county engineer and those he employed in the work, guilty of misfeasance in needlessly obstructing the highway.

I can but find that the way was put in a needlessly dangerous condition by the defendants, and that that condition was the proximate cause of the plaintiff's injury. . . .

No notice was given, the road was not stopped up, no attempt was made to provide a safe way, but the public were left to pick out a road as best they could, in winter, with fresh snow falling from time to time, the centre of the road being effectually blocked against sleighs by the freshly laid gravel, uncovered with snow. . . .

Although there is contradictory testimony on the subject, the evidence seems to me to be overwhelming that this narrow track sloped so much towards the ditch, and owing to the snow and frost was so slippery, that it was impossible to prevent slewing so much and so great as to put sleighs, "cutters" as well as loaded sleighs, in much danger of being upset. Several were, and more would have been if those occupying them had not adopted various means of preventing it, such as getting out and walking, getting out and standing on the higher runner, and putting the weight on the higher side.

Nor can I have any doubt that the plaintiff's upset was caused by the sloping form of the road; that his sleigh slewed as much as he and his son testified to, and eventually went over through that slewing which was unpreventable with the road in the condition in which it then was owing to the gravel being placed in the middle of the road when it was, and remaining placed as it was. The road was not reasonably fit for traffic; nothing was done to make it so; and no notice was given of its condition. . . .

It would be much against the weight of evidence to find that the plaintiff's sleigh did not upset where the slope was as designed, that the accident happened a few feet away, where for a short distance the man in charge of the "grader" failed to get the right slope. The sleigh was assuredly more likely to go over where the greater danger was: it is less probable that it would have survived all the slewing and danger only to fall when it reached the one short safe spot, existing only through the "accident" of the man employed to do the grading failing there to obey his instructions and to keep to the scheme of construction without which there would not be any right to the provincial grant. . . .

On this ground also I am clearly of opinion, and find, that the defendants were guilty of negligence which was the proximate cause of the plaintiff's injury.

Is, then, the plaintiff deprived of any right of action by reason of any negligence on his part?

It is contended for the defendants that he is, on more than one ground:—

First, that he should not have gone upon this road at all with the load he had. But can the defendants fairly contend for that, in the face of the fact that they gave no warning of any kind against any kind of traffic over that road? . . . It is impossible for me to find that the plaintiff did not exercise ordinary care in travelling upon this road, which was a much travelled one and the proper road for him to take in the business in which he was engaged; it was an open highway, without any kind of warning, posted or otherwise, against its use.

Second, that the plaintiff's three calves which he had in the sleigh ought not to have been conveyed in that way, but should have been driven on foot over this road. That, however, is quite contrary to common knowledge and to the evidence. . . .

Third, that the way in which the calves were placed in the sleigh was negligent; but the evidence is all the other way; they were in two boxes, one in one and the other two in the other; and all securely tied by the head. There is nothing in this point.

Fourth, that, having found the road so dangerous, the plaintiff and his son both got out and walked; they should have so continued until they were past the place where the accident happened. They testified that they thought they were over the worst of it and might safely get into the sleigh again; and it seems to me that it cannot reasonably be found that in doing that they did any more in their own ease than reasonable men ordinarily would do. . . .

And fifth, that the plaintiff should not have followed the beaten track, but should have crossed to the north side of the road and have broken a new track there between the ditch and the fence. For more than one sufficient reason, that contention, however, has no weight in my mind; indeed, if the defendants had taken that course, and had "come to grief," the charge of contributory negligence would, as it seems to me, have had more force. . . .

It follows from what I have said that I cannot find that the accident was caused by anything other than the condition of the road. The suggestion that movement of the calves caused it is but a suggestion; there is no testimony in support of it. . . .

In order that it may not appear to have been overlooked, I should perhaps refer to the testimony of the witness Staunton, who testified that the plaintiff's son, the evening after the accident, told him that one of the horses had bit at the other, and just then the accident happened; the son had, of course, in his testimony, denied ever having made such a statement, saying also that he never had any conversation with the witness on the subject, or been where the witness said it took place at the time when it was said to have taken place. If it were true that the accident had happened just when such a thing took place, the fact would strengthen the defendants' case that it was not the condition of the road, how much or how little need not be considered. But it must be borne in mind that this evidence could be given, and was given, only for the purpose of discrediting the testimony of the plaintiff's son, who also was merely a witness in the case. It would be different if the plaintiff had made any such statement; it would be an admission making against his claim, provable against him whether he was called as a witness and contradicted it or not. Evidence such as this, for whatever purpose it may be given, is ordinarily not of the greatest weight.

. . .

On any such evidence as this, it is impossible to overturn the great weight of evidence, including the probabilities, that the condition of the road was the real cause of the accident.

The plaintiff, then, being entitled to recover, what should he have? He should have reasonable compensation under all the circumstances of the case; and the evidence adduced at the trial makes the task of ascertaining the amount of such compensation, usually difficult in such cases, easier than usual. Evidence has been given from which, with no difficulty, his actual loss in money can be computed; and the physicians and surgeons examined as witnesses on each side were quite agreed as to the nature and extent of the bodily injuries sustained; as to his present condition, and as to what the future has in store for him in respect of his injuries.

His outlay in money in the way of medical and surgical treatment and incidentals directly and indirectly connected with it I find to be $75.

His loss through being unable to attend to his own farm work and business I find to be $225. . . .

For his pain and suffering $300 seems to me to be a very reasonable amount, less perhaps rather than more than he should be awarded in this respect; however, I find, and award, that sum

to be, and as, reasonable compensation, under all the circumstances of the case, in this respect.

In regard to future physical disability by reason of the accident, and to possible future pain and suffering, things not unknown after the fracture of a right arm—a break which all the physician and surgeon witnesses described as a bad one, and which has shortened the arm an inch or more, preventing upward and backward motions very perceptibly, and which also, according to one of such witnesses at least, causes impairment by reason of shorter leverage, an award of $400 I consider also a very reasonable award, not erring in being too much. In that I make no allowance for the injury to the man's body from which he suffered, but from which I find that he has now recovered, and I also take into consideration his age—61—and the falling off in ability to work which naturally comes with increasing years after his present age, as well as the other possible, as well as certain, chances and changes of human life.

There will be judgment for the plaintiff, and $1,000 damages, with costs of action.

LATCHFORD, J. DECEMBER 29TH, 1913.

RE GODCHERE ESTATE.

Administrators—Allowance for Care, Pains, and Trouble—Compensation—Amount Fixed by Surrogate Court Judge—Appeal—Commission on Amount Collected and Distributed.

Appeal by the Official Guardian from an order of the Judge of the Surrogate Court of the District of Thunder Bay, fixing the amount of compensation to which the administrators of the estate of the late Peter Godchere were entitled for their care, pains, and trouble in connection with the estate, on the ground that the compensation should have been limited to commission on the amount collected and distributed by the administrators.

E. C. Cattanach, for the appellant.
C. A. Moss, for the administrators.

LATCHFORD, J.:—The real and personal estate, so far as realised upon, amounts to $21,234.17; and out of this there has

been properly paid $3,560.93, leaving in the hands of the administrators, when diminished by the compensation and costs fixed by the learned Judge, $16,957.36.

One of the administrators was allowed $425 and the other $200. The costs were taxed at $90.88, including $20 costs of the Official Guardian.

The compensation is not fixed on the basis of commission, as in Re McIntyre, McIntyre v. London and Western Trusts Co. (1904), 7 O.L.R. 548, 556, where the late Mr. Justice Street considered that, upon the facts there presented, commission should not have been allowed (as appeared to have been the case) upon the total amount realised, but only upon what was received and also distributed. See Re Hughes (1909), 14 O.W.R. 630, where the cases on the point are collected.

There is nothing before me to indicate that the learned Judge appealed from erred. The administrators were entitled to reasonable compensation. The learned Judge was in a position, on the passing of the accounts, to determine what labour, care, pains, and trouble they were at in realising, as well as expending. The amounts allowed are not large; and that they are different indicates that more time and trouble were bestowed by one administrator than by the other, and the compensation awarded accordingly.

The appeal is dismissed. Costs out of the estate.

MIDDLETON, J. DECEMBER 30TH, 1913.

*RE LORNE PARK.

Deed—Construction—Building Scheme—Conveyances of Land in Summer Resort Park—"Access to Streets, Avenues, Terraces, and Commons"—Meaning of "Commons"—Unenclosed Spaces on Plan—Right of Grantees—Dedication—Parcels of Land Set apart for Recreation Grounds—Easement—Implied Obligation — Co-operative Undertaking — Estoppel—Registry Act.

Appeal by the petitioner in a matter under the Quieting Titles Act and cross-appeal by the claimants from the report of the Referee of Titles at Toronto with respect to certain claims.

*To be reported in the Ontario Law Reports.

J. Bicknell, K.C., for the petitioner.
M. H. Ludwig, K.C., for the claimants.

MIDDLETON, J.:—By letters patent dated the 16th July, 1886, the Toronto and Lorne Park Summer Resort Company was incorporated by the Province of Ontario for the purpose of acquiring by purchase, owning, improving, and managing as a summer resort the property known as "Lorne Park," with power to make improvements and alterations, erect and construct all kinds of buildings, wharves, piers, etc., and to maintain roads, streets, avenues, lanes, etc., with the power to sell, mortgage, or exchange any part of the park, to establish a line of ferries, and to make contracts for the purpose of providing entertainment.

Thereafter the company duly acquired the park in question, and, after having had a survey made, subdivided a certain portion of it, as shewn by plan registered on the 7th August, 1886. On this plan were shewn a number of streets and building lots laid out and fronting thereon. There are two large blocks that were not in any way subdivided. Free access to these blocks appears to have been afforded by Longfellow, Sangster, and Burns avenues, which are shewn as communicating with them, and Tennyson avenue, shewn as passing between them. In 1888, the plan was amended by the company by the laying out of Roper avenue at right angles to Tennyson avenue, so subdividing the larger of these two parcels. Upon the amended plan these three blocks appear entirely enclosed by the street lines, and without any name, mark, or label of any kind to indicate their purpose. For convenience upon the reference they had been marked "X," "Y," and "Z" for the purpose of identification.

These undesignated blocks or places contain, it is said, about 25 acres, approximately one-third of the whole parcel.

Literature was issued by the company indicating its intention in dealing with the park property . . .

On the faith of statements contained in this literature and made orally, a number of the lots were sold. The individual lots were described simply by their number according to the registered plan. Each conveyance contained the following clause: "And it is hereby agreed that the party of the second part, his heirs, executors, administrators, and assigns, and his or their families, subject to the by-laws of the company, shall have free access to all the streets, avenues, terraces, and commons of the said park; and shall have free ingress and egress for him-

self and themselves, his and their family or families, servants and agents, with horses and carriages, or other vehicles, to and from the said lands by any of the streets or avenues in the said park; and, subject as aforesaid, shall have free ingress and egress to and from the said park at any wharf or wharves in front thereof." And also the following provisions:—

"And it is hereby declared and agreed that the said lands are granted by the parties of the first part to the party of the second part subject to the following provisoes and conditions, which shall be deemed to run with the land:—

"1. No intoxicating or spirituous liquors or beverages shall be sold or bartered upon the said lands, nor shall any be used thereon except for medicinal purposes.

"2. No business is to be carried on upon the said lands, nor is the same to be used for any other purpose than as a private dwelling, without the consent in writing under the seal of the said company.

"3. The party of the second part, his executors, administrators, or assigns, shall, before the first day of July, 1888, erect and complete a neat and respectable house or cottage on the said lands for a private dwelling, which will cost not less than $400.

"4. Only one dwelling shall be erected on the said lands, and no building shall be erected or placed on the said lands till the plans thereof have been approved by the president and two directors of the said company.

"5. No part of such dwelling or of any verandah or porch in front thereof shall be placed nearer than twenty feet from the front of the said lot.

"6. No cesspools or filth of any kind shall be allowed on the said lands. No fence on the said lands shall be higher than six feet, and all fencing within fifty feet from the front of said lands shall be wire or iron and not more than three feet high.

"7. All water-closets or privy pits must be approved by the company before being erected and must be kept clean and free from offensive odours.

"8. No animals or fowl shall be kept on said lands.

"9. No conveyance or lease of said lands or any part thereof shall be made or be valid without the consent, in writing, under seal, of the said company.

"10. And the parties of the first part shall have the right to pass by-laws and make regulations for the construction of sewers, drains, watercourses, waterworks, and for all kinds of

street improvements, in streets, avenues, terraces, and commons adjacent to the said lands, and also for lighting all or any of the streets, avenues, terraces, or other public parts of said park adjacent to said lands; and the lands hereby granted and the owners thereof, to the extent of the value of this said lands, shall be liable to contribute to the cost of all the above-named improvements equally with all other lands that are adjacent to the streets, avenues, terraces, and commons wherein the said improvements are made, such contributions to be assessed equally against each lot so situated.''

The different claimants now claim title under these conveyances. Their contention is, that the effect of the conveyances is to give them some right with respect to the three parcels which I have mentioned, which prevent the present owner from being declared to be the owner in fee simple without some qualification.

The learned Referee has held that the claimants have established their rights with reference to the parcels lying north-east of Tennyson avenue, but have failed with reference to the parcel to the south-west of that street. The right of the claimants to the streets, avenues, and unenclosed portions of the park has been conceded and need not be discussed.

The first question calling for consideration is the meaning of the expression contained in the deed by which it is stipulated that the grantee ''shall have free access to the streets, avenues, terraces, and commons of the said park.'' The claimants contend that this word ''commons'' should be taken to include the three parcels in question. The owner, on the other hand, contends that this is not the true meaning of the word, and that it is amply satisfied by referring it to the unenclosed spaces upon the plan, more particularly to the wide strip along the lake shore marked ''Boustead terrace.'' I think that this contention is somewhat militated against by the fact that the clause provides for ingress and egress to and from the lot sold ''by any of the streets or avenues in the said park.'' As the lots fronting on the lake shore face Boustead terrace, this is apparently regarded as a street or avenue rather than the commons. It is quite true that this word ''commons'' is not used in its more strict and literal sense, but it is a flexible word, and in Sydney v. Attorney-General for New South Wales, [1894] A.C. 444, the Privy Council had no difficulty in giving it a meaning wide enough to cover that which is contended by the claimants here. There certain lands had been dedicated as a permanent common. The question was, whether this created a common or pasturage only. It was held that it did not. . . .

Much was said upon the argument as to the nature of the right claimed, if any. I do not think that it is necessary to define the exact nature of the right. . . .

[Reference to City of Toronto v. McGill, 7 Gr. 462.]

It may be that the term "dedicate" is only appropriate where the right is conferred upon the public; here no public right was contemplated, nor do I think that it was given, because those to be benefited were not the public but the purchasers of the different lands. Indeed, I think it would be unprofitable to enter into a discussion to ascertain whether the right claimed can properly be called an easement or whether it created an implied obligation in the nature of a restrictive covenant, because, it sems to me, that all this is more a question of terminology than of real substance. The main question remains: was it the intention of the parties that these three parcels should be set apart and held as recreation grounds for the use of those who might buy lots upon the faith and strength of the scheme put forward by the vendors?

[Reference to 13 Cyc. 455; Clarke v. City of Elizabeth, 40 N.J. Law 172; Town of Guelph v. Canada Co., 4 Gr. 632, 645; Attorney-General v. Brantford, 6 Gr. 592.]

I quite appreciate that there is room for distinction between cases in which there has been a dedication to the public and the public right is being asserted, and cases such as this, where there is not in strictness any public right; but the allegation is that a private right has been conferred upon the individuals who purchase relying upon the scheme propounded by the vendor. It may well be that these cases may be more aptly likened to the class of cases in which the Court has been called upon to deal with building schemes. In Reid v. Bickerstaff, [1909] 2 Ch. 305, the principle underlying these cases is discussed in the Court of Appeal. All that is there regarded as essential appears to me to exist here. There is a defined area within which the scheme is operated; there is the reciprocity which is said to be the foundation of the idea of a building scheme; there is the local law imposed and yet to be imposed by the vendors over the whole area, for the extracts from the deed which I have quoted shew the co-operative nature of the whole undertaking. In the defined area of this park, the cottagers are to erect suitable dwellings. The lands are not to be conveyed or leased without the consent of the company, and the company is to have the right to pass by-laws providing for the construction of sewers, waterworks, etc., and all necessary improvements and

lighting in streets, avenues, terraces, and commons, and other public parts of the park, to the cost of which the owners must contribute.

Numerous cases can, no doubt, be found, where the plaintiff has failed to establish a valid building scheme or to prevent the user of the lands in a way inconsistent therewith. In none of these cases where the plaintiffs have failed, have I found the principle laid down opposed to that upon which I am now acting. For example, at first sight, what was said by Kekewich, J., in Whitehouse v. Hugh, [1906] 1 Ch. 258, affirmed, [1906] 2 Ch. 282, might appear inconsistent, where he says (p. 260): "The purchaser from a building owner is not entitled to say, 'On that plan you see a vacant space, and therefore I can insist as part of my bargain that the vacant space shall remain.'" This, it will be noticed, in spoken of a case in which there is nothing more shewn than the vacant space; and the case therefore resembles City of Toronto v. McGill, 7 Gr. 462. Here much more is shewn; and, when one reads the evidence shewing the conduct of the parties and the rights which it was assumed by both parties the purchasers had with respect to the lands in question, one cannot fail to be impressed with the idea that this is a case where the whole scheme was that of a group of summer residences surrounding ample recreation grounds.

Mackenzie v. Childers, 43 Ch.D. 265, is an effective answer to the suggestion that it is impossible to conceive that the promoters intended to sterilise for all time the 25 acres in question, and that all these statements are consistent with a mere expression of intention and the absence of obligation on the part of the vendors. . . .

The cases cited mostly arise upon plans, but the principle is of wider application, and includes all cases in which land is sold upon what may be called a "building scheme," a scheme by which a part of the entire tract is set apart by the vendors for the benefit of the purchasers. When this is shewn either by indications found upon a plan used in making the sales or otherwise, the vendors cannot depart from the plan or scheme which was the foundation of the sales. This may be regarded as an implied covenant, an implied grant of an easement, an equity in the nature of an easement, or it may rest on the principles of estoppel. In any case the property so dedicated or quasi-dedicated is rendered subject to the rights held out to the purchaser as an inducement to purchase. These rights may exist in perpetuity.

See in addition to the cases already cited: Archer v. Salmas City, 16 L.R.A. 145; Grogan v. Hayward, 4 Fed. Repr. 161; Mayor, etc., of Bayonne v. Ford, 43 N.J. Law 292; Price v. Plainfield, 40 N.J. Law 608; Elliston v. Reacher, [1908] 2 Ch. 374; Spicer v. Martin, 14 App. Cas. 12.

If the conduct of the parties and mode of user of the land in question can be looked at, the evidence conclusively shews that the three blocks were intended as the "commons" referred to in the deeds.

The right to use these parcels is not an exclusive right conferred upon the lot-owners, but is subject to the right of the vendors themselves to use and to lease or license for picnic purposes.

Reliance was placed on the Registry Act, as avoiding the purchasers' rights under the deeds in question. No evidence was given to shew that the present owners are purchaesrs for value without notice: Barber v. McKay, 19 O.R. 46. On the contrary, the purchasers took with knowledge of the infirmity of title, and cannot complain.

I cannot see any reason for confining the judgment to the two parcels. All three seem to me to be in the same position.

The result is, that the petitioner's appeal fails, and the claimants' appeal succeeds, and I cannot see any reason why costs should not follow.

KELLY, J. DECEMBER 30TH, 1913.

TOWNSHIP OF TORONTO v. COUNTY OF PEEL.

Highway—Nonrepair—Judgment against County Corporation for Damages by Reason of—Highway Improvement Act, 2 Geo. V. ch. 11—"Good Roads Fund"—Right of County to Charge Damages against Township Corporation.

Action to restrain the defendants from paying a sum of $1,431.75 out of funds in their hands belonging to the plaintiffs, and for a declaration that that sum should be paid by the defendants out of their general funds, and not out of the "Good Roads Fund."

The action was tried without a jury, at Brampton, on the 21st November, 1913.

B. F. Justin, K.C., and W. S. Morphy, for the plaintiffs.

T. J. Blain, for the defendants.

KELLY, J.:—This action is a result of the judgment in the action of Armstrong Cartage Co. v. County of Peel, 4 O.W.N. 1031, wherein the defendants were held liable to the Armstrong Cartage Company for damages sustained owing to the falling of a bridge on Hurontario street, in the township of Toronto, in the county of Peel, over which that company's motor truck was being driven. Prior to the accident, that part of Hurontario street had been assumed by the defendants as part of a county roads system, under the provisions of the Act for the Improvement of Public Highways, and amending Acts, and the defendants had participated in the sums set apart under these Acts to aid in the improvement of public highways. At the time of the accident, the defendants were, and, so far as the evidence shews, still are, liable for the maintenance and repair of this particular road.

The accident out of which the Armstrong company's action arose happened on the 22nd June, 1912. On the 8th June, 1912, by-law No. 426 of the defendants was passed, providing for their expending $30,000 in the improvement of highways in the township of Toronto, and authorising the issue of debentures to that amount for that purpose and the levying of a special rate annually upon the ratable property of the township to repay the amount of these debentures and interest as they should mature. This course was adopted on the authority of sec. 13 of the Highway Improvement Act, 2 Geo. V. ch. 11—the municipal council of the township having made application to levy a special rate upon the township for the construction, improvement, and maintenance of county roads within the township.

The defendants paid the amount of the Armstrong judgment, and then sought to charge against the plaintiffs' portion of what is referred to as the "Good Roads Fund" the amount so paid and the costs which the defendants incurred in defending the action and other items in connection with it, amounting in all to $1,431.75. The present action is in effect to prevent the defendants paying this sum out of the plaintiffs' portion of the "Good Roads Fund," and for repayment of it, if the defendants have so paid it or charged it against the plaintiffs.

I fail to see on what ground the defendants can successfully claim the right to charge this sum against the plaintiffs, either by deducting it from the plaintiffs' portion of the "Good Roads Fund" or otherwise. The occurrence in respect of which the Armstrong judgment was obtained was the result of the defendants' negligence in not having done what was their plain duty

to have done, namely, to maintain and repair the bridge which formed part of the road that they had assumed. There was no obligation on the plaintiffs to repair, and they were in no way responsible for what happened; nor was there anything entitling the defendants to claim over against the plaintiffs for the amount they paid as the result of the action of the Armstrong company. The plaintiffs are entitled to have the whole $30,000 expended upon the county road or county roads within that township, and should not suffer the loss to these roads that would result if these moneys or any part of them be diverted by the defendants towards meeting obligations of their own which they have incurred through their negligence or default, and from which the plaintiffs derive no benefit. Payment of the sum in dispute out of these moneys which were raised at the plaintiffs' request for another and different purpose would be a distinct loss to the plaintiffs. The same may be said about any attempt to charge the sum in dispute against the plaintiffs' portion of the other moneys which were obtained by the defendants from the appropriations by the Legislature for road improvements. If it were material to the issue (and I think it is not), it might be mentioned that, though the plaintiffs' application to the defendants in respect of the raising of the $30,000 was to levy a rate upon the property of the Township of Toronto, under sec. 13 of 2 Geo. V. ch. 11—that is, for the construction, improvement, or maintenance of the county roads, etc.—the defendants' by-law, passed in pursuance of that application, specifies that the $30,000 shall be expended by the county in the improvement of the highways of this township. How can it be said that payment of the sum in question, in the manner in which the defendants have appropriated it, is a proper application of that sum either for improvements or for construction, improvement, or maintenance of these roads?

The expenditure of these moneys is not in the hands or under the control of the township; and, there being no obligation on it to construct, repair, or maintain, it would be most unfair to deprive it of the full benefit of having all of its share of these moneys applied in the manner and for the purpose contemplated by the statute.

The defendants contend, too, that the decision of the matter here in dispute rests with the Minister of Public Works under 2 Geo. V. ch. 11, sec. 7. That section draws a distinction between what are works of maintenance or repair (for which the county are made liable in the earlier part of the section), and what,

on the other hand, constitutes works of construction, and the purchase, maintenance, and repair of road machinery, plant, and equipment; and it is in cases of doubt or dispute as between these two classes of works that the decision of the Minister of Public Works is to be invoked. The present dispute is not of that character.

In my view of the case, I can see nothing justifying the course pursued by the defendants of charging the $1,431.75 against the plaintiffs; and, to the extent that such charge or payment has been made, there will be a recharge or repayment to or in favour of the plaintiffs. Judgment will go accordingly with costs.

BRITTON, J. DECEMBER 30TH, 1913.

MOTHERSILL v. TORONTO EASTERN R.W. CO.

Private Way—Establishment of Right—Fixed Termini—Evidence—Continuous User—Easement — Expropriation — Railway—Damages.

Action by T. B. Mothersill and John Johnston to recover damages for an alleged wrongful entry upon and obstruction of a certain private way or strip of land bounding the respective lands of the plaintiffs immediately north thereof.

The action was tried without a jury at Whitby.

H. H. Dewart, K.C., and G. D. Conant, for the plaintiffs.

McGregor Young, K.C., for the defendants.

BRITTON, J.:—The wife of the plaintiff Mothersill owns a parcel of land on the north side of the Kingston road, and fronting on that road, 257 feet in width, by a depth of 5 chains more or less to a lane. This lane extends westerly from a public road, which public road lies to the east of the lands affected, and extends northerly from the Kingston road to a point beyond the lane in question.

The plaintiff Johnston owns a parcel of land to the west of and adjoining the land of Mothersill, having a frontage on the Kingston road of 55 feet, by a depth of 330 feet. The lane over which the plaintiffs claim the right of way extends along the whole width of Mothersill's land—but only along 35 feet of the land of the plaintiff Johnston.

The plaintiff Mothersill became the owner and went into possession of what he now claims, and of the Johnston parcel as well, on the 27th March, 1896. Johnston purchased his parcel from the plaintiff Mothersill on or about the 19th May, 1909. The plaintiffs claim an uninterrupted right of way over this lane. The plaintiff Mothersill, in using this right of way as a means of egress from and ingress to his land, used it only from a point some distance east from the easterly limit of Johnston's land, on easterly, and out to the public road.

The title to the lands of the plaintiffs seems to be as follows. The whole of lot 13 was granted by the Crown on the 16th May, 1798. On the 22nd December, 1855, by conveyance to him, William Henry Gibbs obtained three acres, and by conveyance dated the 30th July, 1856, he obtained half an acre, these two conveyances covering all the land in question south of the land over which the right of way is claimed. Gibbs conveyed all the three and a half acres to Joel Thompson Ray on the 23rd May, 1862. Ray mortgaged to the Ontario Loan and Savings Company on the 14th October, 1882, and under this mortgage that company conveyed to T. B. Mothersill, one of the plaintiffs, on the 27th March, 1896. Possession has, during all these years, been in accordance with the paper title.

It appeared at the trial that, after the sale by T. B. Mothersill to the plaintiff Johnston, the former executed a conveyance to his wife, Minnie Mothersill, in consideration of natural love and affection and of the sum of $350.

Upon the application of the plaintiffs, and without objection on the part of the defendants, I directed that, upon filing the written consent of the wife of the plaintiff Mothersill, she should be added as a party plaintiff. That consent, no doubt, was filed, although I do not find it with the papers. The Mothersills and their predecessors in title have had an uninterrupted and undisturbed right of way from the point upon the Mothersill land where there are now a large and small gate, over the whole of the private lane, to the east, to the public road before-mentioned. That right of way was limited to the use required of it, as access and ingress to and egress from the residence, farm buildings, and farm and premises, by persons on foot or with horses, vehicles and cattle, driving loads of meat or other loads, such as usually required, and generally for all purposes connected with the farm premises and buildings and with the work and business carried on there. It is part of the plaintiffs' case that this strip of land is a private way. They do not set up any

claim, either individually or on behalf of the public, to the land as a public road or for any other purpose, except that it is subject to their right of way. This way should have a terminus a quo and a terminus ad quem. It should be definite enough to be bounded and circumscribed to a place certain. See Gale on Easements, 8th ed., p. 370. The evidence in this case establishes the eastern terminus at the public road and the western terminus at or very near to where the opening in the Mothersill fence now is. To establish such a way, it is not necessary to have a definite road, narrower than the lane, somewhere marked out, between the northern and southern limits of the present lane. A number of tracks indifferently, but tending to the same points, will not prevent the right of way being acquired.

There is no doubt about the user of this way by the occupants of the lands now owned by the Mothersills. The land of these plaintiffs and the land over which the right of way is claimed were not owned by the same person since the ownership by Gibbs. It was stated that one Fewster owned or occupied the land now the lane, in 1849, and that he opened this lane in 1853. The circumstances under which that was done were not shewn. It may be that it was intended to be dedicated to the public as a road. It was never assumed by the township, no statute labour was performed upon it, and, in short, it is not alleged by the plaintiffs to be a public highway.

I find that the user of this way was continuous. The established Mothersill right of way would not permit them to change the western terminus to any point that might from time to time suit their convenience. They could not change it to or make an additional opening at the place where the plaintiff Johnston now has his opening, and successfully claim a right of way from this new opening to the public road. If the Mothersills, before the sale to Johnston, could not, Johnston cannot; so the action by Johnston fails.

The owner of the land, of this private lane, is not a party to this action, and he is not complaining of any assertion of a right of way by either plaintiff.

The defendants, without claiming under the owner, but by an alleged paramount right under their charter, proceeded to expropriate a part of this lane for their road.

On the 24th February, 1911, the defendants obtained from the Board of Railway Commissioners for Canada an order approving of the defendants' location of their line through the

townships of Whitby and Whitby East, as shewn by the plan and profile. No doubt, the line, as it is laid down upon the lane, is as upon the plan. On the 30th September, 1913, the defendants published in a Whitby newspaper notice of expropriation of part of the lane, and they described this part as "a strip of land used as a road," and further described it by metes and bounds, and "as running along the northerly boundaries of the properties of White, T. B. Mothersill, and Johnston." No mention is made of any easement of the plaintiffs, nor was any land of the plaintiffs required.

The notice of expropriation stated that a warrant for immediate possession would be applied for. It did not appear that a warrant of possession was actually obtained. That is of no importance, as the defendants went into possession and constructed their line. No special notice was given to either of the plaintiffs, and no notice to them or to any one as to interfering with the right of way. The defendants by notice offered $50—apparently for the strip—but nothing for the right of way over the strip—if any existed in favour of one not the owner of the strip.

I find that the defendants have interfered with and obstructed the Mothersill right of way as set out in the statement of claim. The right of way was of very considerable value to the Mothersill property, and I assess their damages occasioned by the interference with their right of way, by the defendants' construction of their line of railway, at the sum of $500. This does not include anything for loss or depreciation in the value of land fronting on the lane for building purposes, or for want of any right of way, except the loss of the right of way from the western terminus, as found by me, for the Mothersills in the use of their farm and premises. No damage for any land laid out in lots fronting upon the lane by reason of such lots being rendered of less value owing to the construction of the defendants' line of railway.

There will be judgment for the Mothersills for a declaration as to the expropriation of the right of way as above stated and for $500 damages, with costs on the High Court scale.

The claim of Johnston will be disallowed, and the action, so far as it is by him, dismissed without costs.

LATCHFORD, J. DECEMBER 31ST, 1913.

HOPKINS v. CANADIAN NATIONAL EXHIBITION ASSOCIATION.

Contract—Exhibition "Concession"—Exclusion of Right to Sell "Ice-cream Cones"—Sale of Fruit Ices in Cones—Sale Stopped by Manager of Exhibition—Clause in Agreement Making Manager Sole Judge of Conduct of Concessionaire and of Facts and Interpreter of Contract—Manager Acting in Good Faith and Reasonably—Domestic Forum—Action for Damages—Dismissal.

Action for damages for breach of a contract.

R. U. McPherson, for the plaintiff.
G. R. Geary, K.C., for the defendants.

LATCHFORD, J.:—By two agreements in writing and under seal, identical in terms, except that one is for one location and the other for another, the defendants granted the plaintiff the right to sell Hamburger steak and frozen fruits on the exhibition grounds during the exhibition of 1912. Both contracts expressly except from the concessions any right to sell ice-cream or ice-cream cones.

There was a special reason for this exception. The plaintiff had in previous years obtained a very profitable concession, giving him the exclusive right of selling ice-cream in cones of edible paste, known as the "Ice-cream Cone Concession." He tendered for the same privilege in 1912, but was outbid by the Neilson company, who paid $2,000 for the privilege—a sum which indicates how valuable was this exclusive right. The clerk in charge of such contracts, fearing a possible attempt by the plaintiff to encroach upon the rights of the Neilsons, was careful to stipulate that the right to sell frozen fruits did not empower the plaintiff to infringe upon the concession to the Neilsons.

On the first day of the exhibition the plaintiff sold, in addition to Hamburger steak, edible cones of the same size and general appearance as the cones which, filled with ice-cream, the Neilsons had the exclusive right to sell. The cones, as sold by plaintiff, were filled, not with frozen fruit, but with a mixture of fruit, water, and sugar, frozen as ice-cream is frozen—in short, a fruit ice.

Complaint was made to Dr. Orr, the defendants' manager,

that the plaintiff was infringing upon the Neilson privilege. Dr. Orr went toward one of the plaintiff's booths, and heard as he approached the cry of one of the plaintiff's employees "Ice-cream Cones!" When he came up, he saw prominently displayed dishes containing piles of the cones. Hopkins was absent at the time. Dr. Orr told the persons in charge for the plaintiff that they must discontinue selling the cones, and asked them to request the plaintiff to call at his office. The sale was stopped, and the plaintiff called on Dr. Orr, who told him that he must stop selling the cones and the fruit ices with which the cones disposed of were filled. Hopkins appeared to consider that, as Dr. Orr charged, he had infringed upon the ice-cream cone concession, but a day or two later protested against the act of the manager.

There is a conflict of testimony between Dr. Orr, on the one side, and the plaintiff and several of his employees, on the other, as to the signs and cries used to attract the people to the plaintiff's booths. The plaintiff says that his sign was "California Frozen Fruits," and his employees corroborate him. A photograph of one of the plaintiff's stands is in evidence, and the sign shewn there is "California Fruit Ices." It is hard to believe that the error of the plaintiff and his witnesses on the point can be a mere fault of recollection. I incline strongly to accept the testimony of Dr. Orr where it is in conflict with the evidence of the plaintiff or of the plaintiff's witnesses.

The plaintiff sold no more fruit ices in cones, and lost profits which he would have made had he been allowed to continue as he had begun. He claims $1,500 damages and the return of the $600 which he had paid for the concessions. His sales of steak were not interfered with; and, without regarding carefully his particulars of loss filed, because unnecessary in the view I am taking, I am satisfied that they are far less than the amount claimed.

In considering what Dr. Orr did, the fact must be borne in mind that the plaintiff had no rights on the defendants' property except such as were expressly granted to him. He had not the right to sell ice-cream cones even as such, nor to sell fruit ices in such cones.

Upon the evidence, it appears clear that to the ear of a hot and thirsty crowd the cry of "ice-cream cones" conveys the impression of "cones of ice-cream." The refreshing delicacy was best known by one of its commonest adjuncts when sold in public places—the cone. The container, by a familiar met-

onomy, was taken for the thing contained. The plaintiff, as an experienced caterer, appreciated this fact, I think, quite as much as Dr. Orr, who realised that the cry, combined with the piles of cones, misled the people, as I think it was beyond question intended to mislead them. The plaintiff was bound by his contracts not to allow any representations to be made in regard to the articles sold by him which he did not know to be true; and the defendants' manager was to be the sole judge or authority in determining the propriety or impropriety of the conduct of the plaintiff or his servants acting apparently on his behalf.

Each contract also provided that the manager should in all respects have the right to decide any question of fact that might arise under it, and that he should be the sole interpreter of the contract. There are no restrictions as to the time, place, or manner in which the manager is to exercise the power the plaintiff as a party executing the agreement expressly conferred upon him.

The exhibition lasts but two weeks or three. There are many hundred concessionaires. Difficulties frequently arise which the manager has to settle and settle promptly. This the plaintiff himself had experience of in other years. There is no time for protracted investigation. The manager is bound reasonably to exercise his powers of action and interpretation. It cannot be said that he did not so exercise his powers in the present case. He knew the terms of the plaintiff's contracts and of the contract with the Neilsons. He had the evidence of his senses that the plaintiff, through a person apparently acting for him, was not only misleading the public, but inducing the public to believe that the plaintiff had the privilege in 1912, which he had enjoyed in previous years, of selling ice-cream in cones. The actual sales of a fruit ice in the cones may not have been, upon a strict construction, any infringement upon the Neilsons' rights; but the pretence might properly be regarded as such.

It may be pointed out that the question is not what is in fact the true construction of the words "frozen fruits" in the concession held by the plaintiff; but whether Dr. Orr acted in good faith and after proper investigation in the interpretation which he, in the exercise of the discretion vested in him by the plaintiff, put upon the words.

I think that Dr. Orr was not bound to do anything which he did not do, and that he acted throughout reasonably and in good faith.

The numerous cases cited are not very helpful. There is no attempt to oust the jurisdiction of the Courts. What the parties did was to establish a domestic forum for the settlement of the questions that might arise between them; and, that forum having acted, with judgment and discretion, in the way the parties agreed it should have power to act, the dispute cannot be litigated.

A case much in point is McRae v. Marshall (1891), 19 S.C.R. 10, reversing the judgment of a Divisional Court, Marshall v. McRae (1888), 16 O.R. 495, and of the Court of Appeal (1890), 17 A.R. 139, and restoring the judgment of the trial Judge, the late Mr. Justice Rose. But, even in the Courts whose decisions were reversed, the ground upon which it was thought that the plaintiff was entitled to succeed was, that the defendant had acted arbitrarily and not in good faith and without giving the plaintiff an opportunity to be heard. In the present case none of these circumstances exist, and the plaintiff cannot go behind his contract.

See also Farquhar v. City of Hamilton (1892), 20 A.R. 86, and Good v. Toronto Hamilton and Buffalo R.W. Co. (1899), 26 A.R. 133.

The action fails, and is dismissed with costs.

BRITTON, J. DECEMBER 31ST, 1913.

LINAZUK v. CANADIAN NORTHERN COAL AND ORE DOCK CO.

Master and Servant—Injury to and Death of Servant—Negligence — Failure of Fellow-servant to Perform Statutory Duty of Master — Contributory Negligence — Evidence — Findings of Jury.

Action by the widow and administratrix of the estate of Stef Linazuk, under the Fatal Accidents Act, to recover damages for his death, caused, as alleged, by the negligence of the defendants, for whom he was working as a machine-oiler.

The action was tried before BRITTON, J., and a jury, at Port Arthur.

W. D. B. Turville, for the plaintiff.

W. F. Langworthy, K.C., for the defendants.

BRITTON, J.:—Questions were submitted to the jury, and the answers to all these, except the 8th, were such as to fix liability upon the defendants.

The 8th question was as follows: "Was the deceased guilty of contributory negligence, that is to say, could the deceased, by the exercise of reasonable care, have avoided the accident?" And the answer to that question was, "Yes." In addition to the formal answers, the jury wished to add that "in reference to the answer to the 8th question as to contributory negligence, in their opinion the accident to the deceased was due to the joint negligence of the defendants and deceased."

The jury assessed the damages, if the plaintiff was entitled to recover, at $1,200.

There was evidence to go to the jury upon the question of contributory negligence.

It would not have been surprising, and I cannot say that the jury would have gone wrong, had they exonerated the deceased.

There was by the jury what amounts to a finding of a failure by the employer to perform a statutory duty, and the fact that such failure was on the part of a fellow-workman with the deceased would not prevent the defendants from being liable; but contributory negligence is a defence, even where the accident is occasioned by the neglect of the employer to perform a statutory duty. Counsel for the plaintiff cited Pressick v. Cordova Mines Limited, 4 O.W.N. 1334, 5 O.W.N. 263. That case was tried by Mr. Justice Latchford, and he held that there was no evidence to support a finding of contributory negligence. I cannot so say in the present case. There was here some evidence. The jury could upon it have well found that, under all the circumstances, the deceased was not guilty of contributory negligence; but, as they have found otherwise, I cannot assist the plaintiff.

Smith v. Baker, [1891] A.C. 325, and McClemont v. Kilgour, 27 O.L.R. 305, were also cited. I agree that there is nothing in the present case to enable the maxim "volenti non fit injuria" to be applied.

The McClemont case decides that the maxim first quoted is not applicable in relief of a defendant guilty of violation of a statutory duty, such as is imposed by the Factories Act.

The action will be dismissed, but it will be without costs.

MIDDLETON, J., IN CHAMBERS. JANUARY 2ND, 1914.

RE BRAMPTON LOCAL OPTION BY-LAW.

Municipal Corporations—Local Option By-law—Voting on—List of Persons Entitled to Vote—Revision by County Court Judge—Scope of—Last Revised Voters' List—Addition of Names—Municipal Act, 1913, *secs.* 265, 266, 267.

Motion by Milton B. Chantler for an order prohibiting the Judge of the County Court of the County of Peel from entertaining an application of S. H. Mitchell, or any other application, to add certain names to the list of the names of persons entitled to vote upon the submission of a proposed local option by-law.

B. F. Justin, K.C., for the applicant.
W. H. McFadden, K.C., for the County Court Judge.
No one appeared for the other persons notified.

MIDDLETON, J.:—This motion, unavoidably made at a late hour, must be determined at once, or no good purpose can be served.

Under the new provisions found in the Municipal Act, the intention is to give finality to the voters' lists, and at the same time to allow the necessary amendments to be made up to the last possible moment, so that the exact list of those entitled to vote upon a by-law may be ascertained before the voting takes place.

The list to be certified is to be based upon the last revised voters' list, "omitting . . . persons whose names are entered on such voters' list, . . . but are not entitled as appears by such list . . . to vote on the by-law:" Municipal Act, 1913, sec. 266(2).

When the action of the clerk is complained of, it may be reviewed by the Judge (sec. 267), who may strike out the name of any person wrongly entered on the list, i.e., which the clerk should not have included in it, or of any person who is shewn to be dead; but the whole question of the right to be on the revised voters' list is not opened up—the names of those "entitled as appears by" the last revised voters' list, to vote on the by-law, must remain the test. The Judge may add "the name of any person whose name has been wrongly omitted from the list," i.e., the name

of any person who by the revised voters' list appears entitled to vote on the by-law, and whose name ought to have been included by the clerk in the list. There is no warrant for the addition of names improperly omitted from the revised voters' list. The function of the Judge is in this respect limited to the correction of the clerk's action. In the case of tenants who have not shewn the right to vote under sec. 265, the right is wider; and, when the tenant's name is on the revised voters' list, but he has failed to file the evidence which is required under sec. 265 to give him the right to vote on the by-law, the Judge is empowered to allow him at this later stage to establish his right. Save in the case of tenants and of nominees of corporations, the clerk may not go beyond the voters' list—his task is one of elimination and elimination only. Save as to the names of dead men and of tenants who have failed to comply with sec. 265, the function of the Judge is limited to the correction of the clerk's action. He is not making a new voters' list, but is correcting a list—based on the revised voters' list—of those who may vote on the particular by-law.

The prohibition should, therefore, go, restraining the Judge from including the names of any who do not appear by the last revised voters' list as entitled to vote. No costs.

In what I have said above I am speaking of the lists for voting on by-laws when tenants and nominees of corporations have the right to vote. When, as here, the list is being prepared for a local option by-law, and the tenants and nominees of corporations have no right to vote, the provisions of sec. 265 above referred to have no application.

MIDDLETON, J., IN CHAMBERS. JANUARY 3RD, 1914.

DIXON v. TRUSTS AND GUARANTEE CO.

Particulars—Statement of Claim—Paragraphs of, Ordered to be Struck out in Default of Particulars—Breach of Trust—Order Set aside—Leave to Apply after Discovery—Examinations—Costs.

Appeal by the plaintiff from an order made by HOLMESTED, Senior Registrar, in Chambers, on the 17th December, 1913, directing delivery of particulars and, in default, striking out certain paragraphs of the statement of claim.

Nathan Phillips, for the plaintiff.
Grayson Smith, for the defendants.

MIDDLETON, J.:—In my view, the order for particulars cannot stand. The plaintiff has spread his grievances at length upon the pleadings, which cover nearly thirty folios. He first sets out at length that he holds bonds issued by the Grand Valley Railway Company—the defendant company being trustees for the bondholders—the legislation under which the company were authorised to enter into an agreement with the Brantford Street Railway Company, and an agreement to which the plaintiff was a party for the consolidation of certain railways, the execution of a new mortgage upon the consolidated undertaking in lieu of three mortgages upon the three separate undertakings, and the exchange of the outstanding debenture bonds.

It is then said, in paragraph 16, that the Trusts and Guarantee Company knew of these agreements and became a party thereto and confirmed them. The plaintiff says that he consented to exchange his bonds, and delivered his bonds to the defendants, to be held in suspense until the exchange agreement had been carried out; that he afterwards received certain new substituted bonds, which he believed were in accordance with the agreements, and upon which interest was paid by the defendants for some time; but, these bonds now falling in default, he finds, on inquiry from the defendants, that the terms of the agreement upon which he gave up the bonds have not been complied with, in that two of the mortgages which were to be consolidated had not been released or discharged, but had priority over his new bonds; that a certain construction contract had been given priority over the new mortgage, yet the defendant company had issued bonds to a far greater extent than warranted by the original agreement. Other supposed grievances are set out in detail; and it is then alleged that the defendants acted wrongfully in respect of the matters aforesaid, and were guilty of breach of trust.

This, put shortly, is the complaint of the plaintiff. By the order in question he is required to give particulars shewing at what time and in what way the defendants became party to the agreements, at what time, on what date, in what manner, and to whom, whether by writing or otherwise, it was agreed that the bonds should be held in suspense and so forth; and particulars of the want of proper care, skill, and diligence in the administration of the trust, powers, and duties charged, and

particulars stating how and in what manner the defendants committed the wrongful and unlawful acts referred to. In default of complying with all this within one week, the pleading is to be emasculated by striking out certain named paragraphs, and the defendants are then to deliver their defence within ten days. If the paragraphs are struck out, the pleadings will be rather a sorry wreck, and manifestly the order has not been framed with artistic skill.

The more important point is, that it is reasonably clear that no particulars are necessary, nor is it right that the plaintiff should be compelled, before he can ascertain exactly what has been done by the defendants, to state, in the formal way which is prescribed, the details of every act of which he may complain when he learns exactly what the defendants have done in connection with their important duty under the trust mortgage.

Particulars should be ordered whenever necessary for the protection of the opposite party; but an order for particulars is not intended as a means to preclude a plaintiff from obtaining adequate discovery from the defendant. More particularly is this so when a relationship such as that suggested here exists. The plaintiff is necessarily ignorant of many details concerning the conduct of the defendants in connection with the carrying out of the trust; and what is really sought is so to tie him down by detailed particulars as effectually to preclude any due investigation with respect to the matters complained of in general terms.

It is impossible to enunciate any general principle applicable to all cases. Circumstances may indicate that an action is brought without any foundation, and that it is merely of a fishing character; and in such cases it may sometimes be proper to tie the plaintiff down; but, where the relation of trustee and cestui que trust exists, the plaintiff may well seek liberty to scrutinise with the greatest care the whole of the transactions of the trustee; and it seems to me an abuse of the process of the Court to hamper the fullest and freest inquiry. After discovery has been had, it may be proper that the plaintiff should be directed to confine his attack to matters which he can then specifically enumerate. This will depend partly upon the frankness of the disclosure given by the defendant.

I think that the appeal should be allowed and the order vacated, but that liberty should be reserved to apply for particulars to limit the issues at the trial after discovery has been had. I say nothing as to the probable fate of such a motion.

Costs here and below should be to the plaintiff in any event. The examinations were, I think, improper, and the plaintiff should pay the costs in any event.

The defendants may have ten days to plead.

MIDDLETON, J., IN CHAMBERS. JANUARY 3RD, 1914.

MEXICAN NORTHERN POWER CO. v. S. PEARSON & SON LIMITED.

Particulars—Statement of Claim—Former Order not Complied with—Inability to Furnish Particulars—Discovery—True Function of Particulars—Leave to Apply after Discovery.

Appeal by the plaintiff company from the order of HOLMESTED, Senior Registrar, in Chambers, ante 552.

W. N. Tilley, for the plaintiff company.

Glyn Osler, for the defendant company.

MIDDLETON, J.:—The plaintiff's statement of claim has already been the subject of attack, an order having been made by the Chief Justice of the King's Bench, on the 10th October, 1913, directing delivery of further particulars or the amendment of the pleading. The plaintiff adopted the latter course, making considerable amendments with respect to many of the matters set up.

I can find no record of any reasons given for the decision; and, inasmuch as the order does not in any way specify what particulars are required, I think the matter now falls to be dealt with upon a consideration of the pleading as it stands.

This case differs from many others, in that I am entirely satisfied of the absolute good faith of both parties litigant; and the amount involved is so large, and the complications which will inevitably result upon the trial will be so great, that factors are introduced not present in other cases.

Put shortly, the case is this. The plaintiff, a Canadian company, had acquired certain water privileges of great value on the Conchos river, Mexico; and, being desirous of having the necessary works located and constructed for the development of power, entered into a contract with the defendant, an English corporation, by which the latter undertook to act as consulting

and managing engineer for the designing and construction of the works in question. The works have been partly constructed, but it is said that they are not in accordance with the requirements of the contract. They have been taken over by the plaintiff. The pleading then set out some twenty-one heads of complaint. It is said that in August, 1912, the contractor abandoned work under the contract. Claim is made for damages, heads of damage are enumerated, but detailed sums are not given. The damage is said to amount in all to upwards of $1,000,000.

The agreement between the parties is framed upon very simple lines. Specifications are not given. The contractor agrees to design and construct, checking surveys already made, making all necessary surveys required, going thoroughly into the question of water supply and storage, etc., submitting an estimate of the cost of construction and available power for the approval of the plaintiff. When these plans were approved, the contractors had to supervise the construction of the entire works, furnishing the engineering staff and obtaining all materials and machinery necessary for construction purposes. The works to be constructed were mentioned in a general way, including twenty miles of railway, a dam sufficient to raise the level of the water sixty metres, another smaller dam to raise the water of another river to the same height, power-houses, machinery, etc., and two hundred and ten miles double circuit transmission line on steel towers, with sub-stations, a distribution system, and subsidiary structures and buildings. For all this work the plaintiff was to pay cost price and a commission.

The disputes between the parties, as already indicated, are of the most extensive description; and, in order adequately to prepare for trial, information will have to be obtained from men resident in different parts of the world, and to whom it is not easy to obtain access, owing to their being engaged on other engineering tasks of magnitude.

The plaintiff contends that the relationship which existed between the parties entitles them to obtain the fullest possible discovery from the defendant before being compelled definitely and finally to formulate the charges upon which it is intended to rely at the hearing.

With this I agree. At the same time, I think it will be essential for a fair trial of the action that some time before the hearing the precise matters which it is intended to bring in issue should be as definitely formulated as possible. In all cases of this description there cannot be a fair trial unless this

takes place. One has only to read the evidence in an ordinary building contract case which has been referred to the Master for trial, to see the great confusion that results, even in a small matter, where this course has not been adopted. Each succeeding witness proceeds to find further defects, and before the reference is closed the whole evidence is in a chaos from which it is almost impossible to evolve order.

In this case the real difficulty is to get some scheme by which the respective rights of the parties will be adequately protected.

Discovery is of necessity limited by the pleadings and by the particulars which may have been given under them. To order particulars at this stage would, I think, unfairly hamper the plaintiff. The plaintiff is entitled to search the conscience and the conduct of the defendant, its agent, to the utmost; and it is better that this should all be done before the final formulation of the particular charges to be investigated at the trial. If the particulars given in the pleadings turn out to be so vague and general as to be insufficient to direct the mind of the party to be examined for discovery to the real issues, this may create difficulty when the examination is on foot; but it seems to me to be better that this should be left to work itself out during the progress of the examination than that an attempt should be made unduly to tie the hands of the plaintiff at this stage.

As has often been remarked, the true function of particulars is dual: to give the information necessary for intelligent pleading by the opposite party and to define the issues to be dealt with at the hearing. Sometimes the one aspect completely overshadows the other. Sometimes the due conduct of the action indicates discrimination. In this case I think that there can be no difficulty in pleading to the statement of claim as it now stands. No doubt, the defendant intends to deny the charges made against it; in fact, its counsel said so, and intimated the intention to counterclaim for a large sum which is said to be due to the defendant upon the contract. When the plaintiff has had discovery, an order should, I think, then be made, as I have already indicated, directing the issue to be more clearly raised by means of some supplementary particulars.

I have felt some difficulty in devising some means by which the rights of the defendant will be adequately protected so as to secure to it full and fair discovery from the plaintiff. I do not think these particulars should be ordered until after the

plaintiff has exhausted its right of discovery, nor do I think that the defendant should be compelled to obtain from the plaintiff all the discovery it may have before such particulars are given.

I think the best course to pursue is simply to direct now that the order for particulars made by the Registrar be vacated, and that the defendant do plead within a limited time, reserving to the defendant the right to move for particulars for the purpose of the trial after the discovery is completed. The defendant should be at liberty to obtain such discovery as it may desire at the present time without restriction. If, as the result of the delivery of further particulars, new matter is raised upon which the defendant desires to have discovery, I think it should be understood that the defendant should have further discovery. This may involve delay in the trial if the plaintiff should substantially enlarge its claim or if the defendant fails to obtain satisfactory discovery by reason of the vagueness of the statements in the present pleading. No provisions should be made in the order with reference to these matters; they should be left to be worked out as the action may develope. To avoid any unnecessary or undue delay, the plaintiff will be well advised if it delivers supplementary particulars from time to time as it may be able.

After much thought, I believe that the course indicated will lead to a satisfactory solution of the difficulties incident to a full and fair hearing, which, it must not be forgotten, is the true aim and object of all preliminary proceedings.

Costs here and below will be in the cause.

TUCKER v. TITUS—FALCONBRIDGE, C.J.K.B.—DEC. 29.

Mortgage—Exercise of Power of Sale—Notice of Sale—Failure to State Amount Claimed as Due—Advertising before Expiry of Period Named in Notice—Mortgages Act, 10 Edw. VII. ch. 51, secs. 27, 28—Damages — Injunction — Costs.]—Action for damages for wrongfully advertising the plaintiff's property for sale under the power of sale in a mortgage and for a declaration and injunction. The action was tried without a jury at Belleville. The learned Chief Justice said that the defendant's proceedings in endeavouring to exercise the power of sale under the mortgage were irregular in two respects: first, the notice of exercising the power of sale did not state

the amounts claimed to be due for principal, interest, and costs respectively, as prescribed by the Mortgages Act, 10 Edw. VII. ch. 51, sec. 27; and second, the defendant proceeded before the expiration of the month to put up posters and to advertise the sale in a newspaper. This was a "further proceeding" under the statute: Gibbons v. McDougall (1879), 26 Gr. 214; Smith v. Brown (1890), 20 O.R. 165. The present provision is sec. 28 of the statute cited above. The notice of exercising the power of sale and subsequent proceedings by the defendant were set aside and declared null and void. Judgment for the plaintiff for $5 damages. The defendant opposed the motion for an injunction, and the plaintiff had to go to trial; and so the defendant must pay the costs on the High Court scale. E. G. Porter, K.C., for the plaintiff. A. Abbott, for the defendant.

MATSON v. MOND NICKEL CO. LIMITED—KELLY, J.—DEC. 30.

Master and Servant—Injury to Servant—Miner at Work Underground — Stone Falling from Pentice — Negligence — Failure to Complete Scaling—Damages.]—The plaintiff sought damages for injuries sustained while working as a miner in the employment of the defendants in a mine operated by them. While the plaintiff was engaged in drilling at the bottom of the mine, a stone or piece of rock fell from the under side of the pentice, several feet above him, and caused the injuries complained of. The pentice was formed of solid rock; and its object was to afford protection to the workmen at the bottom of the shaft against the danger of objects falling upon them from the higher levels. The plaintiff alleged that the defendants were negligent in not having the walls of the shaft and the under side of the pentice properly scaled; and the learned Judge, who tried the action without a jury, so found, upon conflicting evidence, which he discussed at length; and found also that the plaintiff had been directed by the foreman to proceed with the drilling before the scaling, which had been begun, had been finished. The learned Judge assessed the damages at $750, and gave judgment for the plaintiff for that sum with costs. J. S. McKessock, for the plaintiff. J. A. Mulligan, for the defendants.

OTTER MUTUAL FIRE INSURANCE CO. v. RAND—KELLY, J.—DEC. 30.

Fire Insurance—Action by Insurers against Alleged Incendiary for Indemnity—Evidence—Lunatic—Failure of Proof of Incendiarism.]—Action against D. Kingsley Rand for indemnity in respect of the plaintiff company's liability to Marshall Rand upon a policy of fire insurance on the latter's barn. The fire occurred about 11 o'clock in the forenoon of the 17th December, 1912. A short time before that, Marshall Rand saw the defendant running past the barn. He was not seen again by any person until a considerable time after the fire had started; he was then sitting on a fence about twenty-five rods from the barn, watching the fire. He had for some time shewn evidences of a weak mental condition, and, after the fire, was placed in an asylum for the insane. KELLY, J., said that there was no direct evidence of the defendant having started the fire, or even of his having been in the barn; and the evidence did not eliminate the possibility of the fire having originated from other causes. To hold the defendant responsible would be to found a judgment on a mere guess or supposition; and, improper as it would be to arrive at a conclusion by any such means, it would be particularly so in this case, where the defendant, owing to his unfortunate mental condition, was unable to speak for himself. Action dismissed with costs. S. G. McKay, K.C., for the plaintiffs. A. E. Watts, K.C., for the defendant.

RAND v. OTTER MUTUAL FIRE INSURANCE CO.—KELLY, J.—DEC. 30.

Fire Insurance—Policy—Loss Payable to Mortgagee—Action by Mortgagor—Mortgage Paid after Action Brought—Liability of Insurers.]—Action upon a fire insurance policy. At the trial the defendants admitted the application for the policy sued upon, the policy itself, and that it was in conformity with the application, the happening of the fire on the 17th December, 1912, and the receipt of proofs of loss. The only evidence submitted was on behalf of the plaintiff; and it shewed that there was no act, neglect, or default on his part which could in any way vitiate the claim or disentitle him to the benefit thereof. The policy covered loss on dwelling-house and contents, on three barns, and on the contents of outbuildings; the amount on these

contents being $850. The claim sued upon was for $700 upon barn No. 3, the defendants before action having paid the $850 on the contents. By the terms of the policy the loss was made payable to D. K. Rand, to the amount of $1,000, he being the mortgagee to that extent of the real property insured. Subsequent to the bringing of this action the plaintiff paid off the mortgage. KELLY, J., said that the ground of defence that the plaintiff was not entitled to maintain the action owing to the loss being so payable, was not tenable. There was nothing to distinguish the case in that respect from Prittie v. Connecticut Fire Insurance Co., 23 A.R. 449; and there was no other ground disentitling the plaintiff to bring the action. Judgment in favour of the plaintiff for $700 and interest, with costs. J. Harley, K.C., for the plaintiff. S. G. McKay, K.C., for the defendants.

MACDONELL v. THOMPSON—KELLY, J.—DEC. 31.

Husband and Wife—Land Purchased in Name of Wife—Action by Judgment Creditor of Husband to Establish Trust—Evidence—Findings of Fact of Trial Judge—Costs.]—Action by a judgment creditor of the defendant W. S. Thompson for a declaration that his wife, the defendant Mary Stuart Thompson, was a trustee for him of certain land which had been conveyed to her, and for equitable execution. KELLY, J., said that the uncontradicted evidence of the defendants was that the purchase of the land was made for the defendant Mary Stuart Thompson, and that her co-defendant acted merely as her agent and attorney in the buying of the land and the erection of the buildings and looking after the property; and that much of this evidence was corroborated by the vendor of the land; and, therefore, it was impossible to hold that the property belonged to the defendant W. S. Thompson or that his co-defendant was a trustee thereof for him. Action dismissed without costs. J. F. Boland, for the plaintiff. B. N. Davis, for the defendants.

MULHOLLAND v. BARLOW—FALCONBRIDGE, C.J.K.B.—DEC. 31.

Trespass to Land—Trifling Area and Value—Access to Land—Right of Way—Fences—Counterclaim—Injunction—Damages—Costs.]—Action for trespass. Counterclaim for a declar-

ation of the defendant's rights and for an injunction and damages. The action and counterclaim were tried without a jury at Hamilton. The learned Chief Justice said that the value of the property involved and its superficial area were so small as to be almost incapable of description or estimation. He had never tried or heard of a case where the land involved was of such small value to the plaintiff. On the other hand, the defendant would be seriously damaged and prejudiced if the plaintiff's contention were upheld, by reason of the defendant being deprived of reasonable access and user of a certain right of way. Action dismissed with costs; and judgment for the defendant on his counterclaim, declaring that the fence torn down by the plaintiff was the defendant's property, and on his own lands; declaring that the defendant was entitled to have a fence on the same land and in the same place as the fence that was torn down by the plaintiff; restraining the plaintiff from interfering with, tearing down, damaging or destroying the defendant's fence, and from trespassing upon the defendant's lands; awarding the defendant $5 damages for the tearing down of the fence and tearing up the defendant's cement walk; and awarding the defendant the costs of the action and counterclaim. J. L. Counsell, for the plaintiff. S. F. Washington, K.C., for the defendant.

BELL v. COLERIDGE—LATCHFORD, J.—DEC. 31.

Principal and Agent—Purchase of Farm—Fraud of Agent—Principal Entitled to Benefit of Purchase at Price at which Agent Purchased—Account—Repayment of Sums Obtained by Agent—Judgment—Terms of Carrying out Purchase.]—Action for an accounting by the defendant Coleridge for moneys paid to him by the plaintiff in respect of the purchase of a farm, which the plaintiff believed he was purchasing, through the defendant Coleridge as a friend or agent, from a syndicate, at $450 an acre, but which had in reality been purchased by the defendant Coleridge from the syndicate at $400 an acre, and turned over to the plaintiff at $450 an acre; for a declaration that the purchase by Coleridge was for the benefit of the plaintiff; for forfeiture of Coleridge's interest on the ground of fraud; and for a declaration that a sum of $2,500 was paid on the 2nd June, 1913, to the syndicate out of the funds of the plaintiff. The members of the syndicate were also made defendants, and the plaintiff asked relief against them; but, in

the course of the trial, the allegations made against them were withdrawn, and the action as to them dismissed with costs. The defendant Coleridge, by counterclaim, sought a declaration that the sum of $13,750 paid by the plaintiff was forfeited, and that he (Coleridge) was entitled to the farm free from any claim of the plaintiff. The learned Judge, after a full discussion of the evidence, found the facts in favour of the plaintiff as against the defendant Coleridge. There was no question that Coleridge received only $3,750 in the transaction, the rest of the plaintiff's money having been paid to the syndicate; and any further accounting between the plaintiff and Coleridge was unnecessary. The plaintiff was entitled to a declaration that the purchase from the syndicate was made for his benefit, as Coleridge represented, but at $400 an acre, and not, as Coleridge misrepresented, at $450 an acre. Coleridge should not be permitted to derive any advantage from the fraud which he practised on the plaintiff, nor from the payment of the $2,500 of the plaintiff's money fraudulently obtained made to the syndicate on the 2nd June, 1913. There should be a declaration, accordingly, that Coleridge had no interest in the purchase from the syndicate, and that the plaintiff was entitled to the benefit of the payment of $2,500 made. The defendants other than Coleridge being willing to carry out the sale, notwithstanding the default in payment of the instalment of purchase-money due on the 1st August, 1913, the learned Judge directed that, upon payment by the plaintiff of that instalment with interest, within one month from the entry of judgment, and the performance by the plaintiff of the other terms of the agreement of sale, the plaintiff should be entitled to a conveyance of the farm from the defendants other than Coleridge, freed from any claim of Coleridge or of persons claiming under him. Judgment also for the plaintiff against Coleridge for $1,250, with interest from the 20th May, 1913, and for the costs of this action. Counterclaim dismissed with costs. D. L. McCarthy, K.C., for the plaintiff. Matthew Wilson, K.C., for the defendant Coleridge. M. K. Cowan, K.C., for the other defendants.