The
Ontario Weekly Notes

VOL. VIII. TORONTO, APRIL 16, 1915. No. 6

APPELLATE DIVISION.

APRIL 6TH, 1915.

GOODISON v. DRENNAN.

Appeal—Items of Account—Questions of Fact — Findings of County Court Judge—Evidence to Support.

Appeal by the plaintiff from the judgment of the County Court of the County of Peel.

The plaintiff sued to recover $247.76 as the balance of an account. The defendant counterclaimed $257.22. The County Court Judge, who tried the action and counterclaim without a jury, found a balance in favour of the defendant of $27.92, for which amount, with costs fixed at $60, he gave judgment.

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

W. H. McFadden, K.C., for the appellant.

B. F. Justin, K.C., for the defendant, respondent.

The judgment of the Court was delivered by FALCONBRIDGE, C.J.K.B.:—I have carefully perused the evidence and exhibits, and I find that there is evidence to support the learned Judge's findings as to all the items complained of.

The appeal must be dismissed with costs.

APRIL 6TH, 1915.

LUCAS v. CITY OF TORONTO.

Negligence—Operation of Street Railway Car in City — Running over Valuable Dog—Findings of Jury—"Proper Control" of Dog by Owner—Police Commissioners' By-law—Contributory Negligence—Evidence.

Appeal by the plaintiff from the judgment of the County Court of the County of York in favour of the defendant, the

Corporation of the City of Toronto, in an action tried with a jury.

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

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

S. W. Graham, for the defendant corporation, respondent.

FALCONBRIDGE, C.J.K.B.:—The defendant is sued as owning and operating a street railway car on Danforth avenue, Toronto. The plaintiff alleges that his dog was struck and killed by a street car owing to the negligence of the defendant's motorman. The defendant says that the motorman of the car exercised all possible care and diligence, and that the accident occurred by reason of the negligence of the plaintiff, in that he did not observe the provisions of the by-law of the Police Commissioners which enacts that "no person shall allow his dog to run at large in the city. For the purposes of this by-law, a dog shall be deemed to be running at large when found in the street or other public place and not under the control of any person."

Questions were submitted to the jury by the learned Judge and answered as follows:—

(1) Were the plaintiff's injuries caused by the negligence of the defendant? A. Yes.

(2) If so, in what did such negligence consist? A. In not seeing the danger until too late.

(3) Was the plaintiff guilty of any negligence which contributed to the accident? A. Yes.

(4) If so, in what did such negligence consist? A. In not having his valuable dog in proper control while on the street.

(5) Could the motorman, after he first became aware that danger was imminent, have stopped the car in time to avoid the collision, by the exercise on his part of ordinary, reasonable care? A. No.

(6) At what sum do you assess the damages? A. $100.

Upon these answers the Judge was of opinion that the plaintiff was not entitled to judgment, and dismissed the action (in view of the finding of negligence against the defendant) without costs.

The plaintiff's counsel applied for and obtained an appointment for the reargument of the question whether the plaintiff or defendant would be entitled to judgment upon these findings; that argument was held, but the learned Judge was unable to see his way clear to change his opinion.

The plaintiff appeals from this judgment, on the ground that on the answers of the jury the plaintiff was entitled to judgment for $100 and costs; and, secondly, that the jury's finding of contributory negligence by the plaintiff is wholly unsupported by the evidence and against the law and the facts.

The dog in question was an Airedale with a very good pedigree. The plaintiff had owned him about nine or ten months at the time of the accident, and he was a little over four months old at the time he bought him.

The plaintiff was driving along Danforth avenue in a waggon drawn by one horse, and the dog was following him about 100 or 150 ft. behind. The plaintiff says that when the car was 50 ft. behind the dog, he (the plaintiff) made some effort to signal, and shouted to the driver of the car to stop, but that the motorman came on and killed the dog.

I think that there is evidence to sustain the findings of the jury, and the only question is whether the answer to question 4 as to the plaintiff's negligence is sufficient to disentitle him to succeed. I am of the opinion that, apart from the provisions of the by-law, allowing his valuable "pup"—as the plaintiff calls him—to follow him on a street car track at a distance of 100 ft. or more, was, in itself, such an act of negligence as to justify the entering of the verdict in favour of the defendant.

It is to be observed also that the negligence of the motorman, as found by the jury, is "in not seeing the danger until too late," and it seems to me that it would be placing too great a burden upon a motorman to hold that he was obliged in law to "see the danger" so as to stop his car to avoid running over a dog, whether he was a highly pedigreed animal or only a common and ordinary dog. Most dogs in Toronto know enough to get out of the way of a street railway car, and if this particular dog had not enough sense for that, his owner should have been—rather than the motorman—aware of the dog's want of sagacity, and should have had him, as the jury say, "in proper control while on the street."

I think, therefore, that the appeal fails and must be dismissed with costs.

RIDDELL and LATCHFORD, JJ., concurred.

KELLY, J., agreed in the result, for reasons stated in writing.

Appeal dismissed.

APRIL 7TH, 1915.

BATEMAN v. SCOTT.

Fraudulent Conveyance—Husband and Wife — Property Conveyed to Wife by Stranger—Interest of Husband—Rights of Creditor of Husband—Absence of Fraud—Finding of Trial Judge—Appeal.

Appeal by the plaintiff from the judgment of BRITTON, J., 7 O.W.N. 722, dismissing the action with costs.

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

J. M. McEvoy and A. E. Langman, for the appellant.

R. G. Fisher, for the defendants, respondents.

THE COURT dismissed the appeal with costs.

APRIL 8TH, 1915.

SMALL v. DOMINION AUTOMOBILE CO. LIMITED.

Contract—Agreement for Purchase of Vehicle—Cancellation—Action for Return of Deposit—Collateral Agreement—Evidence—Findings of Fact of Trial Judge—Appeal.

Appeal by the plaintiff from the judgment of LENNOX, J., 7 O.W.N. 700, dismissing the action.

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

C. A. Moss, for the appellant.

A. J. Russell Snow, K.C., for the defendants, respondents.

THE COURT dismissed the appeal with costs.

APRIL 8TH, 1915.

PEPPIATT v. REEDER.

Fraud and Misrepresentation—Sale of Theatre—Rescission of Contract of Sale and Return of Money Paid—Damages—Reference—Costs.

Appeal by the defendant from the judgment of LENNOX, J., ante 84.

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

J. J. Gray, for the appellant.

Edward Meek, K.C., for the plaintiff, respondent.

THE COURT set aside the judgment below in so far as it ordered rescission, and substituted a judgment for the plaintiff for damages for deceit, with a reference to the Master to assess the damages. No costs of appeal. Costs of trial to the plaintiff. Costs of reference to be in the discretion of the Master.

APRIL 8TH, 1915.

*DOWNS v. FISHER.

Motor Vehicles Act—"Owner"—Liability for Negligence of Trespasser Causing Injury to Stranger—2 Geo. V. ch. 48, sec. 19—Amendment by 4 Geo. V. ch. 36, sec. 3.

Appeal by the defendant Whalen from the judgment of the Judge of the District Court of the District of Thunder Bay, in favour of the plaintiffs.

The defendant Fisher was the agent at Port Arthur for the Hudson "6" automobile, and had a garage. The defendant Whalen bought a car of that description, which got out of order, and Whalen placed it in Fisher's garage for repair, as he was in the habit of doing. The defendant Smith, the servant of Fisher, appeared to have thought that it was a "demonstrating car," although it was not left at the garage for "demonstrat-

*This case and all others so marked to be reported in the Ontario Law Reports.

ing,'' but only for repairs. Another car broke down, and Smith, without the knowledge of Fisher or Whalen, took out Whalen's car, and was towing the disabled car into the garage, when, by his (Smith's) negligence in operating Whalen's car, the plaintiffs were injured. This was on the 13th November, 1913.

The plaintiffs, on the 18th February, 1914, began this action against Fisher alone. On the action coming down for trial, Whalen and Smith were added as defendants, and the plaintiffs amended by charging Whalen as the owner of the car, Smith as the servant of Fisher and the actual wrongdoer, and Fisher as his master. Each defended, and Whalen claimed indemnity over against Fisher and Smith. The question of indemnity was ordered to be tried at the trial of the action.

The trial took place before the District Court Judge, without a jury, and he gave judgment for the plaintiffs against the three defendants for $500 and costs, with relief over in favour of Whalen against the other two.

Notice of appeal was given by all the defendants, but the appeals of the defendants Fisher and Smith were not proceeded with.

The appeal of the defendant Whalen was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

W. N. Tilley, for the appellant.

C. A. Moss, for the plaintiffs, respondent.

RIDDELL, J. (after setting out the facts as above) :—The accident took place before the coming into force of the Act of 1914, 4 Geo. V. ch. 36, sec. 3, which adds to sec. 19 of the Motor Vehicles Act, R.S.O. 1914 ch. 207 (2 Geo. V. ch. 48) the words ''unless at the time of such violation the motor vehicle was in possession of a person, not being in the employ of the owner, who had stolen it from the owner,'' and must be decided upon the law as it stood before that statute. . . .

[Reference to Lowry v. Thompson (1913), 29 O.L.R. 478; Cillis v. Oakley (1914), 31 O.L.R. 603.]

Remembering that the car in Lowry v. Thompson had not been ''stolen by a thief,'' but had apparently been taken out by some one . . . and returned forthwith, both cases can stand; they are not at all inconsistent. It is, of course, our duty to follow both decisions. Certainly the former is not overruled, and could not be, and the latter stands unshaken.

The result will be that the law before the enactment of 4

Geo. V. ch. 36, sec. 3, is not very much altered by the Act. Before the Act an owner was liable for injury done by his car unless the person in charge of it had stolen it from the owner; now the law is the same, except that the owner is not excused if the larcenous person in possession of the car is his employee.

. . .

[Reference to Wynne v. Dalby (1913), 30 O.L.R. 67.]

If the car now is in the possession of one who has taken it not larcenously but by way of civil trespass, the owner is clearly liable. Were that not the law before 4 Geo. V. ch. 36, sec. 3, we should have the extraordinary case of a liability being imposed by a clause added to introduce an exception. There can, I think, be no doubt that the Legislature by this legislation have said that without it there would have been a liability; and the addition of the excepting clause does not and cannot impose a liability not imposed by that from which it is an exception. To give full effect to the decisions, we must hold that, while the owner was not before the Act, liable for the negligence of a thief, he was for that of a mere wrongdoer, a civil trespasser.

Here there can be no pretence that there was a crime committed. To constitute larceny at the common law the animus furandi must be present: Russell on Crimes and Misdemeanours, vol. 2, p. 1177. Our statute puts it (Criminal Code, sec. 347): "Stealing is the act of fraudulently and without colour of right taking," etc. No animus furandi is possible under the facts of this case . . .; and the taking was not fraudulent—there was no "intent to steal" the car: Criminal Code, sec. 347 (2).

I think, therefore, that the appeal fails and must be dismissed with costs.

FALCONBRIDGE, C.J.K.B., agreed in the result.

LATCHFORD and KELLY, JJ., also agreed in the result, for reasons stated by each in writing.

Appeal dismissed with costs.

HIGH COURT DIVISION.

MIDDLETON, J. APRIL 3RD, 1915.

OSHAWA LANDS AND INVESTMENTS LIMITED v. NEWSOM.

Fraud and Misrepresentation—Sale of Land — Misrepresentation by Vendor-company—Evidence—Rescission — Return of Purchase-money—Restitution—Assignees of Purchaser—Third Parties—Indemnity—Agency Contract — Res Judicata—Practice—Costs.

Action to recover the purchase-price of land sold.

The first defence was, that the defendant was not a purchaser, but merely a selling agent; and the alternative defence was, that any contract obtained was obtained by false and fraudulent misrepresentations with reference to the property.

The defendant brought in three persons, Medcalf, Poutney, and Mackenzie, as third parties, and claimed from them indemnity, upon the ground that they had assumed any contract entered into by him with the plaintiff, and had undertaken to pay the purchase-price.

The action and claim for indemnity were tried without a jury at Toronto.

H. C. Macdonald, for the plaintiff company.

N. W. Rowell, K.C., for the defendant.

E. T. Coatsworth, for the third parties Medcalf and Poutney.

The third party Mackenzie, in person.

MIDDLETON, J. (after setting out the facts) :—I do not think that the defendant ever was or intended to become the agent of the plaintiff company. He became a purchaser seeking to make a profit by turning the property over at an advance. In point of fact, he had in each case agreed with his purchaser before he contracted with the plaintiff company for the purchase.

I have then to consider the question whether there was fraud on the part of the plaintiff company in bringing about the sale to the defendant; and this task is made the more difficult because the defendant did not himself impress me favourably. Nevertheless I have come to the conclusion that he is entitled to relief.

The whole scheme of the plaintiff company and its mode of flotation were such as to call for investigation. It was conceived in sin, shapen in iniquity, nurtured in fraud, and during its whole brief life it lived in an atmosphere devoid of truth or any kind of business morality. . . .

The defendant has put forward the misrepresentation upon which he relies under six different heads.

First, that the Canadian Pacific Railway passenger station had been located upon the Ritson estate, as the land in question was called. The station never was located on the land in question. . . . The railway company did build a station for Oshawa, but not upon the Ritson estate.

The next representation complained of was, that the town council of Oshawa had chosen the Ritson estate for a new industrial centre, and that a large area of land had already been sold for factory sites. . . . The council had undertaken to give a site to the Oriental Textile Company under some bonus arrangement. An offer was made of a suitable site on this property at $2,500. The mayor announced that he could get a site which he regarded as equally satisfactory for $1,000. Thereupon the price was reduced to $1,000, and this was accepted by the company. On the strength of this, 25 acres, for which $25,000 had been asked, was marked upon the plan as "sold," and the significant words "factory site" were written on the plan. . . . Upon the plan other lots were marked off as sold which were not in fact sold. All this was done with the idea of conveying to prospective purchasers the impression that the land was selling rapidly. . . . At the time this advertisement was published, three sales had been made. . . . Not a single sale had been made to one who might be described as an outsider. No land save that purchased for the textile company has even yet been sold for a factory. . . .

[The learned Judge then set out the other representations and summarised the evidence with regard to them.]

All this chaos of untruth and exaggeration existed. . . . The defendant was taken to the property and was shewn the situation upon the ground. He made some inquiries himself, and he appears to have become intoxicated by the optimism which surrounded the whole undertaking. He passed on the representations made to him to those who purchased from him, and I incline to think that he did this after persuading himself that they were true. . . . The third parties . . . were all entirely innocent victims of the scheme. . . . The plaintiff

company and its agents, having clothed themselves in garments of falsehood, cannot be heard to complain when it is found that the fraud and misstatements did in truth bring about the contracts in question.

This is not the first time that this matter has been in Court.

. . .

[Reference to Medcalf v. Oshawa Lands and Investments Limited (1914), 5 O.W.N. 797.]

The judgment in that action is relied upon as in some way constituting a defence of res judicata. I cannot see that it in any way determines or precludes investigation of the issues raised in this action. The issue there was whether fraud had been practised on Medcalf. The issue here is whether fraud was practised upon Newsom.

I think the action fails, and ought to be dismissed with costs. The contracts should be directed to be cancelled, and the moneys paid under them should be directed to be repaid.

As there cannot be rescission except upon the terms of restitution, the defendant must relieve the plaintiff company from all embarrassment by reason of his assignment of the contract. The assignees were all before the Court, and were only too anxious to disclaim any interest under the contract. As the money which is to be repaid was in truth the money of the third parties, I think I am justified in directing repayment to be made direct to the third parties. The defendant, on his part, must do all that may be necessary, by signing any assignment or direction, in order that this may be worked out.

I have had much difficulty in making up my mind as to the proper incidence of costs between the defendant and the third parties. I am not sure that the defendant's practice has been entirely right. Possibly he ought to have made the third parties defendants by counterclaim. Details do not appear to be important, when all the parties are before the Court in one capacity or another. On the whole, justice will probably be done by giving the defendant his costs against the plaintiff company and making no award of costs as between the defendant and the third parties.

MIDDLETON, J., IN CHAMBERS. APRIL 6TH, 1915.

CLARKE v. ROBINET.

Discovery—Examination of Parties—Scope of—Limitation to Case Made on Pleadings—Foundation for Amendment.

Motion by the defendants Robinet, Healy, and Page, who counterclaimed against the plaintiff and their co-defendant Parker, for an order compelling the plaintiff and the defendant Parker to attend for re-examination for discovery and to answer questions which they refused to answer upon their examination before the Local Registrar at Sandwich.

A. C. Heighington, for the applicants.
A. W. Langmuir, for the respondents.

MIDDLETON, J.:—There does not seem to me to be any case made out for further examination. The deponents have given full discovery upon the case as now made, and the suggestion that by amendment the action may assume a wider scope does not help. Discovery is in aid of the case as pleaded, and there is no right to seek information for the purpose of founding some other complaint. See Hennessy v. Wright (1888), 24 Q.B.D. 445 (note); Yorkshire Provident Life Assurance Co. v. Gilbert & Rivington, [1895] 2 Q.B. 148; Kennedy v. Dodson, [1895] 1 Ch. 334.

Motion dismissed; costs to the respondents in any event.

MIDDLETON, J. APRIL 6TH, 1915.

RE MACKAY.

Will—Construction — Annuities — Payment out of Income or Capital—Accumulated Surplus Income—Priorities.

Motion by the executors of R. O. Mackay, deceased, for an order determining certain questions arising in the administration of the estate as to the proper construction of the will.

D'Arcy Martin, K.C., for the executors.
M. H. Ludwig, K.C., for the widow.
J. T. Richardson, for Eugènie Turner.
F. W. Harcourt, K.C., for the infants.

MIDDLETON, J.:—The testator, who died on the 25th January, 1913, after certain bequests, directs his trustees to pay out of the income of his estate to his wife during her lifetime the annual sum of $5,000, with certain provisions for the reduction of this sum in the event of her re-marriage. Next, he directs payment out of the income to his sister, Eugènie Turner, during her lifetime, of the annual sum of $1,000. Then, he directs payment out of the income to his brother Æneas Mackay of the annual sum of $500. Next, he provides for payment to his niece Mary Victoria Turner of the sum of $500 a year during the lifetime of his wife.

The annuity to the wife is directed to be in lieu of her right to dower; and all surplus income not required for the annuities is to be added to the capital. Upon the death of the wife, pecuniary legacies are given to a number of persons, including a legacy of $10,000 to Mary Victoria Turner.

The questions asked are: (1) When is it the duty of the trustees to add to the capital the surplus income not required for the annuities? (2) In the event of the estate not realising enough to pay the annuities at any particular time, is there a right to resort to the accumulated surplus income to make good the deficiency? (3) Is the annuity of Mary Victoria Turner payable only out of income or is it also a charge upon the capital?

The annuities to the wife, sister, and brother are expressly made payable out of the income. The annuity to the niece stands in a different position: it is not payable to the annuitant during her life, but is payable only during the lifetime of the wife, and upon the death of the wife the niece receives $10,000. This annuity is not directed to be paid out of the income, and I am satisfied that it was the intention of the testator to make this payable in any event, and that it is a charge upon the corpus.

The direction as to the surplus income becomes operative, I think, only sub modo during the continuance of the annuities. What is said in Edwards v. Grove (1860), 2 DeG. F. & J. 210, is applicable. It is not the intention that each year "all balances should be irrevocably carried to the capital account . . . but leave it open to add de bene esse to the principal sum for the purpose of accumulation the sums not wanted in that year but which may possibly be wanted in maintenance in another year." The charge of the annuities upon the income is a charge of the annuity upon the entire income so long as the annuities continue. The surplus to be added to the capital is the surplus

that remains of the income when the annuities are ultimately satisfied.

The fact that the annuities are payable annually does not make the surplus income of any particular year irrevocably capital. It still remains income, and may be resorted to, if necessary, to meet the subsequently accruing annuity instalments.

Nothing was said upon the argument concerning the priority of the annuities, but it is plain that the annuity to the wife, being in satisfaction of her dower, is entitled to priority.

The questions asked resemble those raised in Re Irwin (1912), 21 O.W.R. 562, 3 O.W.N. 936.

Costs of all parties may come out of the estate.

MIDDLETON, J., IN CHAMBERS. APRIL 9TH, 1915.

*RE M., AN INFANT.

Infant—Custody—Husband and Wife—Separation Agreement—Provision Giving Wife Custody of Child with Right of Access by Husband—Meaning of "Access."

Motion by the father of an infant for an order for its custody, or, in the alternative, for an order construing a separation agreement so far as it related to the custody of the child, a girl, born on the 11th July, 1912.

Upon the separation of the applicant from his wife, the child's mother, "charge and control" of the child were given to the wife, the applicant paying for its support and education—the agreement not being an admission on his part that the wife should always have the control and charge of the child. It was stipulated by the agreement that the applicant "shall have access to the said child at any reasonable time, upon sending notice to (the wife) that he desires such access."

It was arranged that the applicant should have access to the child at the apartments of the wife's mother once a week. The applicant complained that during his visits the mother, as well as the child's nurse, remained in the room with the child.

The motion was heard in Chambers.

E. G. Long, for the applicant.

G. H. Kilmer, K.C., for the wife, the respondent.

MIDDLETON, J. (after setting out the facts) :—Upon the material there is nothing to justify my making any order giving the father custody of the child. It is manifestly in the interest of the child that it should remain in the mother's custody, and I do not think that I can use the threat of an order to deprive the mother of the custody for the purpose of compelling a course of conduct on her part which might appear to be reasonable. The parties have made their agreement, and all I can do is to construe the agreement as I find it.

At the same time I may say that I am not satisfied that there is any reason why the wife should refuse to afford to the husband the satisfaction of being alone with his child during the short visits that he pays to it at her apartments. . . .

This case affords an illustration of the fact that there are many things which cannot be worked out through the Courts and must be left to the good sense of the parties concerned. . . .

All that the agreement gives to the father is a right of "access" to the child. I find that these words are employed not only in statutes but in the forms given for orders dealing with the custody of children and in precedents for separation agreements. I should therefore have expected to find somewhere an exposition of what this right of access really involves. The only case which I have found is Evershed v. Evershed (1882), 46 L.T.R. 690, where Kay, J. . . . said: "Access is a thing which can only be dealt with after the question of custody is determined. It means access to children who are in the custody of some other person. Custody is a much larger and more important thing than access." . . .

[Reference also to Rice v. Frayser (1885), 24 Fed. Repr. 460.]

I think the meaning of the clause in the separation agreement is, that the father is entitled to access to the child only while it is still in the mother's custody and control; and I cannot say, in the absence of any stipulation in the deed, that the mother is guilty of any breach of its provision by remaining in the room where the father is seeing the child. It is clear, I think, that the father has no right to have the child taken to his house or in any way to have it taken out of the mother's custody and control. He must be content with access to it while still in her custody and control. . . .

The husband must pay the wife's costs of these proceedings.

MIDDLETON, J. APRIL 9TH, 1915.

RE WOOD VALLANCE & CO.

Partnership—Death of Partner — Determination of Questions Arising upon Partnership Articles—Implication of Terms—Right of Surviving Partner to Take over Interest of Deceased Partner upon Payment of Share of Capital with Interest and Profits—Right of Representatives of Deceased to Share in Profits — Termination of Period—Goodwill — Valuation of Share—Balance Sheets.

Motion by the executors of the late William Vallance, upon originating notice, for an order determining certain questions arising upon the articles of partnership, dated the 31st January, 1910, between W. A. Wood and William Vallance.

Vallance died on the 28th November, 1913. The last balance sheet made up under the articles was on the 31st January, 1913. The partnership provided for by the articles was for a period of five years commencing on the 31st January, 1910.

Clause 2 of the articles provided that the capital of the partnership should consist of the assets of the former firm of Wood Vallance & Co. as they stood at the date of the articles, and that the parties transferred to the new firm of Wood Vallance & Co. all their interests in the assets.

Clause 4 declared that the parties were interested in the capital assets to the amounts following: Vallance, $479,243.32; Wood, $577,524.21.

Clause 5 provided for the allowance of interest at 6 per cent. upon the capital to the credit of each partner.

Clause 6 provided for an equal division of the profits after payment of interest.

Clause 7 provided that each partner should devote his whole time to the business.

Clause 8 provided that at the expiration of each year of the partnership an account should be taken of the stock in trade, assets, and liabilities of the partnership, and that an annual balance sheet should then be made out to the 31st January in each year, and be attested by each of the parties.

Clauses 9 and 10 are summarised below.

The motion was heard in the Weekly Court at Toronto.

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

W. N. Tilley, for W. A. Wood, the surviving partner.

MIDDLETON, J. (after setting out the facts) :—It is obvious that the difficulty in determining the rights of the parties under these articles arises from the paucity of the provisions found therein. . . .

The principle guiding in all attempts to imply terms in a written agreement was investigated by me to the best of my ability in the case of Hopkins v. Jannison (1914), 30 O.L.R. 305, where, at pp. 319 et seq., I collected the cases which establish and illustrate the principle. The Court must at all times avoid making a contract for the parties which they have not themselves made, but on the other hand all terms must be applied which are necessary to give to the transaction that effect which the parties must have intended it to have had, gathering the intention from that which is found in the document itself.

The first and main question asked upon this motion is, whether the surviving partner is not entitled to take over the interest of the deceased partner in the partnership assets, by paying to his estate the amount of his capital, with interest and profits.

The articles make no such express stipulation, but from what they do contain I think that this right must be implied. By clause 9 it is first provided that upon the death of the partner the partnership shall not be dissolved, but shall be continued by the surviving partner either during the current financial year or, at his option, for a period not exceeding 12 months from the date of the death, the capital of the deceased partner in the meantime remaining in the business and bearing interest at the rate of 6 per cent. per annum to the date of payment; and, in addition, the estate of the deceased partner shall receive its appropriate share of profits up to the end of the current financial year. There is embedded in this clause the significant provision that the surviving partner shall not be required to pay to the representative of the deceased partner any portion of his capital until the expiration of 12 months from his death.

Clause 10 is, however, the one that appears to me conclusively to point to the taking over by the surviving partner of the entire business, for it provides that, if any dispute or difficulty arises between the surviving partner and the representatives of the deceased partner as to the valuation of the assets, the dispute is to be referred to arbitration. This would be absolutely meaningless if the valuation was not required to determine some real question—and the only question can be the price to be paid by the surviving partner to the representatives of the deceased partner.

As subsidiary to this the question is asked as to when the right of the representatives of the deceased partner to share in the profits ends. I think the articles expressly provide that the right to share in the profits ends on the 31st January following the date of death, and that this is so whether the option given to the surviving partner to continue the business as a partnership for 12 months from the death is exercised or not. After the 31st January, the representatives of the deceased partner receive interest upon the capital, and that only.

The next question is, whether the goodwill of the business is to be taken into account in ascertaining the amount to be paid. I think that it is not. The capital of the firm consists of the assets set out in clause 2, and does not include anything allowed for goodwill. The balance sheets, I think, follow the intention of the partnership agreement, and no mention is made in them of goodwill. What is to be repaid is, I think, capital in the sense in which that word is used in the articles and the balance sheets. It represents the share of the partner in the value of the assets, as ascertained by the balance sheets, over the liabilities there shewn.

It is quite true that, if the articles of partnership make no provision, goodwill is an asset of the firm, and the goodwill must be realised for the benefit of all; but it is quite clear that, where the articles provide that the surviving partner is to pay the representatives of the deceased partner upon the footing of the balance sheets, goodwill is not included. Wedderburn v. Wedderburn (1855), 22 Beav. 84, is authority for the general proposition. Steuart v. Gladstone (1879), 10 Ch.D. 627, is an authority for the exclusion of the value of the goodwill in a case such as this. Scott v. Scott (1903), 89 L.T.R. 582, is to the same effect.

Hibben v. Collister (1900), 30 S.C.R. 459, is not in conflict with this principle, for there the articles did not provide for an adjustment of the rights of the parties according to former annual accounts, but directed a valuation of all the assets of the partnership after the death.

The next question is, whether, on the valuation for the purpose of ascertaining the share of the deceased partner, the balance sheet of the 31st January, 1913, is binding, or whether the actual value of the assets is now to be ascertained.

The 8th clause, providing for the preparation of the annual balance sheet, requires attestation so as to shew the assent of both parties thereto; but the 10th clause indicates that the bal-

ance sheet to be prepared is not a mere bookkeeping balance, but a balance to be based upon the value of the assets; for it is there provided that, if any dispute arises in the making up of the annual balance sheet as to the valuation of any of the assets of the partnership, the dispute shall be referred to arbitration; so that, I think, it must be taken that the balance sheet determined the valuation of the partnership assets as of its date. This will not prevent any correction or re-adjustment of the value if on the making of the balance sheet of the 31st January, 1914, it is shewn that, by reason of anything that has happened, the true value was not given in the earlier statement. For example, one of the items of assets represents the indebtedness of customers to the firm. A customer whose debt may have been included as being worth 100 cents on the dollar may have become in the meantime insolvent. The asset is not to be continued at the 100 cents but at true value. Or, taking another example, a machine may have been carried in stock at its cost; the progress of invention may have demonstrated that it is now of little value: it should be treated accordingly. On the other hand, where real estate is valued, the valuation being largely a matter of opinion, the valuation should not be changed unless the course of events in the year points to a change.

This, I think, covers all that was argued before me, and answers to the questions submitted can be framed accordingly.

The costs of both parties may be paid out of the partnership assets.

FALCONBRIDGE, C.J.K.B. APRIL 10TH, 1915.

LEVACK v. CANADIAN PACIFIC R.W. CO.

Master and Servant—Injury to Servant—Railway—"Hostler's Helper"—Negligence of Fellow-servant — Employment of Incompetent Person—Findings of Jury.

Action for damages for personal injuries sustained by the plaintiff while in the service of the defendant company, by reason of the plaintiff company's negligence.

The action was tried with a jury at Sudbury.

J. H. Clary, for the plaintiff.

W. H. Williams, K.C., for the defendant company.

FALCONBRIDGE, C.J.K.B.:—The plaintiff was in the employment of the defendant company in its engine-house in the village of Chapleau. He was what is known as "hostler's helper," and part of his duty was to open and close certain double doors to permit the locomotives to get in and out of the said engine-house, whenever so requested by those in charge. The hostler was a man named Peter Fedorczuk, a compatriot (Ruthenian) of the plaintiff's, coming from the same town, being in fact his second cousin.

The plaintiff charges that on the 14th February, 1914, he received a signal for the opening of the doors, and that the duty of the hostler who was temporarily in charge of the locomotive was to await the answering signal from the plaintiff before moving the engine. The plaintiff alleges that he had opened one of the doors, but could not quickly open the other half, because it was loaded with ice at the bottom thereof. He says that the hostler brought out the engine without receiving the signal from the plaintiff, and that the engine struck the partly open door, inflicting severe injuries upon the plaintiff.

The plaintiff did not bring his action within the six months from the occurring of the accident, and therefore was not within the Workmen's Compensation for Injuries Act.

His claim of negligence at common law was, that the defendant company did not employ an efficient and competent man for the duties which the hostler had to perform. Something was said also as to the ice, but that point has been ignored by the jury in their answers, and need not be further considered. The jury answered the questions as follows:—

1. Were the injuries received by the plaintiff caused by any negligence of the defendants? A. Yes.

2. If so, wherein does such negligence consist? A. In having an inefficient hostler that day.

3. Was the hostler, Peter Fedorczuk, an efficient and competent man for the duties which he had to perform? A. We think he was careless.

4. If you find that he was not an efficient and competent man, did the defendants, the Canadian Pacific Railway Company, know, or ought they to have known, that he was not competent or efficient? A. Yes.

5. Do you find that the plaintiff gave the signal to the hostler to bring out the engine, or did the hostler bring out the engine without receiving any such signal? A. Yes. The hostler brought it out without receiving the signal.

6. Was the plaintiff guilty of negligence which caused the accident or so contributed to it that but for his negligence the accident would not have happened? A. No.

7. At what sum should the compensation be estimated in case the plaintiff should be found entitled to recover? A. $1,500.

And upon these answers the plaintiff contends that he is entitled to succeed.

The answer to question 4 is entirely unsupported by the testimony. The defendant company had every reason to consider Fedorczuk to be an efficient and competent man, and further I do not think that the answers of the jury constitute a sufficient finding that Fedorczuk was not competent. Question 2 certainly points in that direction, but the answer to question 3 shews that what the jury had in mind was that he was careless upon this particular occasion. This is obviously not one of the cases in which a single act of negligence is sufficient to establish incompetency of a fellow-servant. See Alexander v. Miles (1904), 3 O.W.R. 109; Beven on Negligence, Canadian ed., pp. 646 to 649, and cases cited there.

The action must be dismissed with costs.

TORONTO ELECTRIC LIGHT CO. LIMITED v. INTERURBAN ELECTRIC CO. LIMITED—LENNOX, J.—APRIL 6.

Contract—Construction—Supply of Electric Power — Rate of Payment.]—Action to recover the excess beyond 2,000 h.p. of electric power supplied by the plaintiffs to the defendants at the rate specified in the contracts between the parties. The action was tried without a jury at Toronto. The learned Judge reserved judgment, and now briefly stated his conclusions. He said that there were no contracts between the parties referring to the matters in issue in this action other than those referred to in the statement of claim; that Parker Kimble had no actual or ostensible authority to make an agreement to furnish power beyond that provided for by the agreement of the 30th September, 1911, or to vary the scheduled rates or other terms or conditions of this agreement; nor did he in fact agree to furnish additional power or purport to make a final agreement of any kind; nor did the defendants understand that they had obtained a new, or an extension of the old, agreement. The defendants had no right to withdraw power from the plaintiffs'

plant in excess of the 2,000 h.p. provided for in the agreement; and, taking this power in the first instance, as it would appear, without notice to or arrangement with the plaintiffs, in the absence of satisfactory evidence, if any, to shew the charges to be excessive or unreasonable, and failing to dispute the charges at all until the 17th November following, the defendants were bound to pay for the excess beyond 2,000 h.p. at the rate specified in the plaintiffs' letter of the 14th July, 1913. The only question under the original agreement was the meaning and application of the two "twenty consecutive minutes" clauses. The same principle governed both. These clauses meant just what they said. "The greatest amount of power taken for any twenty consecutive minutes" above one half of the amount held in reserve, originally or by notice, under the contract, gave rise to a new factor of computation or basis of payment. The result was different in each case, but the principle was the same. The contract in both cases meant an unbroken period, twenty minutes without a break—that is, without a drop at any time below, or to, one half of the maximum power reserved. It meant a power *above* one half of the reserve sustained for twenty consecutive minutes, although the peaks would vary during this time, but it did not mean an average above, based upon peaks *above and below*. The principle being declared, counsel should be able to agree upon the terms of the judgment both as to this and the question previously disposed of. If counsel do not agree, the learned Judge may be spoken to, and will adjust it or refer it to the Master to take an account upon the basis in each case defined. The plaintiffs are entitled to recover $582 rental of the transformers, with interest, as claimed in the 2nd paragraph of the claim in the statement of claim, and subsequent rental, if any, at the same rate, to the time of actually obtaining possession; and (with some hesitation as to the amount) the plaintiffs are also entitled to recover $900 damages for detention of the motors beyond the period in the first instance agreed upon. The plaintiffs will also recover the expense of obtaining possession of and removing those machines. Judgment for the plaintiffs in the terms hereinbefore set out, with interest upon payments in arrear, and with costs, including the costs of the replevin proceedings. A. W. Anglin, K.C., and R. C. H. Cassels, for the plaintiffs. R. McKay, K.C., for the defendants.

CURLEY v. VILLAGE OF NEW TORONTO—CLUTE, J.—APRIL 7.

Contract—Claim for Payment for Work Done — Extras — Counterclaim — Delay.]—The plaintiff claimed payment for work done in the construction of the plant necessary for the completion of a system for the supply of water necessary for the village, under four separate contracts for: (1) pump and filter house; (2) reinforced concrete pump well and protecting wall; (3) laying intake pipe; (4) laying water mains. The plaintiff also claimed payment for work done outside of the contracts, and damages by reason of the defendants' delay in delivering water mains. The defendants counterclaimed damages for the plaintiff's delay in completing the work under the contracts. The case was tried without a jury at Toronto. Judgment was reserved, and was now given in favour of the defendants, for reasons stated in writing. The learned Judge finds as a fact that none of the contracts has been cancelled or has otherwise come to an end; and that the plaintiff is not entitled to succeed upon his claim under any of the contracts. In regard to extras, the learned Judge refers to a clause, contained in all the contracts, which provides that the defendants shall not be liable for extras supplied by the contractor which are not provided for in the plans and specifications or required by the written instructions of the engineer; and says that all the alleged extras arose out of these contracts, and are subject to the terms therein provided; and it is clear that the plaintiff is not entitled to recover anything in the present action. Reference to Silsby v. Village of Dunnville (1880-83), 31 U.C.C.P. 301, 8 A.R. 524; Waterous Engine Works Co. v. Town of Palmerston (1891-92), 20 O.R. 411, 19 A.R. 47, 21 S.C.R. 556; Hudson on Building Contracts, 3rd ed., vol. 1, p. 436. Action dismissed with costs; counterclaim dismissed without costs. J. J. Gray, for the plaintiff. W. A. McMaster and A. J. Anderson, for the defendants.

SIMMONS v. POWELL—BRITTON, J.—APRIL 9.

Easement—Right to Use Vacant Land for Turning Vehicles —Prescription — User—Evidence — Statute of Limitations — Unity of Title and Possession.]—Action for an injunction restraining the defendants from building on or in any way using or dealing with that part of lot 297 on Princess street, in the city of Kingston, owned by the defendant Charles H. Powell and

leased to the defendant Sands and not built upon, in such a way as to interfere with and restrict the right of the plaintiffs to use that part of the defendants' land in turning round with horses and vehicles in a certain yard to the east of the plaintiffs' premises and to the west of the defendants' premises, all being part of lot 297. The plaintiffs alleged that from the 22nd January, 1868, they and their predecessors in title had used the piece of vacant land now in question in turning round with horses and vehicles, as convenience demanded. The action was tried without a jury at Kingston. BRITTON, J., in a written opinion, reviewed the evidence, and said that it was insufficient to establish such an easement as was claimed—if such an easement could be established at all. Sufficient user had not been proved to warrant the inference that the predecessors of the plaintiffs used this land as of right—what they did was as consistent with leave and license and with acts of trespass as with user as of right. There was no question about the ownership of the land, and the onus was upon the plaintiffs to establish the easement. That could not be done by equivocal acts, occasionally, as convenience demanded, committed by the owners of the westerly part of lot 297. Reference to Adams v. Fairweather (1906), 13 O.L.R. 490. The very most that was done here was to exercise a supposed right as one of the occupiers of premises adjoining the yard. Then again, from 1883 to 1896 Jane and James Powell were lessees of the eastern part and lessors of the western part, and during that time the statute would not run in favour of the lessee of the western part against his lessors in reference to an easement or right of way appurtenant to the plaintiffs' land, where there was such unity of title and possession as existed. Action dismissed with costs, including the costs of the interim injunction and motions to continue. Judgment for the defendants upon their counterclaim for damages occasioned by the injunction order, the defendant Powell's damages being assessed at $40, and the damages of the defendant Sands at $30, with costs. J. L. Whiting, K.C., and A. E. Day, for the plaintiffs. A. B. Cunningham, for the defendants.

BRADSHAW v. GROSSMAN—SUTHERLAND, J., IN CHAMBERS—APRIL 10.

Pleading—Statement of Defence—Res Judicata.]—Appeal by the defendant Caplan and cross-appeal by the plaintiff from

an order of the Master in Chambers. The action was brought to set aside a chattel mortgage made by the defendant Grossman to the defendant Caplan, or, in the alternative, to recover the proceeds of the sale of the goods covered by the mortgage. In para. 3 of the statement of claim the plaintiff alleged that the sole proprietor of the Crown Ladies Tailoring Company was the defendant Grossman; that the latter became indebted to the plaintiff, who recovered a judgment against the company. By para. 3 of his statement of defence the defendant Caplan alleged that the plaintiff was not a creditor of the defendant Grossman, had no interest in the subject-matter of this action, was a bare trustee for M. Pullan & Sons, and could not maintain this action without joining his cestuis que trust as plaintiffs. By para. 4, the defendant Caplan denied that the defendant Grossman was now or at any time indebted to the plaintiff, and set out alleged facts to support his denial. By para. 13 the defendant Caplan stated that he would object at the trial that, the goods having been sold before action, the plaintiff could not maintain an action to set aside the mortgage. By para. 14, the defendant Caplan stated that he would object at the trial that the alternative claim to the proceeds of sale was a departure from the endorsement on the writ of summons. The plaintiff moved to strike out these 4 paragraphs; the Master in Chambers made an order striking out paras. 3 and 4; and both parties appealed. SUTHERLAND, J., was of opinion, for reasons stated in writing, that the Master had no power to determine that the matters pleaded in paras. 3 and 4 were res judicata (Rules 124, 136, 137, 205, 208); that paras. 3 and 4 should be restored, and the question of res judicata left to be determined by the trial Judge. SUTHERLAND, J., said also that the defendant might have the right to plead the matters set out in paras. 3 and 4, even if they were res judicata so far as the defendant Grossman was concerned: Allan v. McTavish (1881-3), 28 Gr. 539, 545, 546, 8 A.R. 440, 442; Zimmerman v. Kemp (1899), 30 O.R. 465, 470, 471; Smith v. McDearmott (1903), 5 O.L.R. 515, 517, 518. The Master was right in coming to the conclusion that the allegations contained in paras. 13 and 14 were properly pleaded. Appeal by the defendant Caplan allowed with costs. Appeal by the plaintiff dismissed with costs. Joseph Singer, for the defendant Caplan. George T. Walsh, for the plaintiff.

RE MCLAUGHLIN—SUTHERLAND, J.—APRIL 10.

Will—Construction—Devise—Estate — Bequest of Personal Property—Absolute Use during Lifetime of Legatee—Disposition of Remainder (if any)—"Issue."]—Application, upon originating notice, by the executors, for an order determining questions arising upon the will of Ellen C. McLaughlin, deceased. The important portions of the will were contained in two paragraphs: (1) "I hereby bequeath to my stepson Thomas W. McLaughlin my house and property in Fordwich, also all household effects and personal property, also he can use or sell part or whole of same if he so requires it for his own maintenance." (2) "I also leave him all my estate also if said Thomas W. McLaughlin should die without heirs the remainder of estate if any to be equally divided between my late husband's (David McLaughlin) children and grandchildren as follows: his daughter Minnie Stovin and children, Robert J. McLaughlin and children, David W. McLaughlin and children and the children of his daughter Jane Ann." SUTHERLAND, J., said that, in his opinion, Thomas W. McLaughlin took under the first paragraph a fee simple estate in the land and an absolute gift of the household effects and personal property in the house or otherwise thereon. The concluding words in this paragraph, commencing with the word "also" did not cut down the wide effect of the preliminary clause. As to the second paragraph a different view must be taken. The material filed shewed that it affected personal property only, consisting of mortgages, promissory notes, and cash in bank. While, under this paragraph, Thomas W. McLaughlin took the personal property, and appeared to have the absolute use of it during his lifetime, so that he might, if necessary, so trench upon it as that there might at his death be no remainder, it nevertheless provided that, if there should be, and he should die without issue, such remainder would be affected by the words which followed. The words "without issue" meant without children. In case Thomas W. McLaughlin should die leaving children, they would take such remainder: Shearer v. Hogg (1912), 46 S.C.R. 492. But, if he were to leave no issue, then such remainder would go to the children and grandchildren of the husband of the testatrix, as indicated. In this latter event, it was conceded in argument, as seemed plain, that the division would be per stirpes and not per capita. Costs of all parties out of the fund. W. Proudfoot, K.C., for the executors and unborn children of Thomas W. McLaughlin. R. Vanstone, for Thomas W. McLaughlin. J. R. Meredith, for the Official Guardian, representing the infants.

BENNETT v. PEARCE—SUTHERLAND, J.—APRIL 10.

Partnership—Profits—Account.] — Action by Joseph Bennett against Arthur Pearce to have it declared that a partnership existed between the parties from May, 1914, until the end of 1914; for a winding-up of the affairs and business of the partnership; and for an injunction restraining the defendant from disposing of the partnership assets. The action was tried without a jury at Toronto. The learned Judge, in a written opinion of some length, reviews the evidence and makes findings of fact. He finds that a partnership existed from the 24th May, 1914, down to the 31st December, 1914, and that the plaintiff is entitled to one-half of the profits of the partnership, less such sums as have been paid on account. Judgment declaring accordingly, with a reference to take the account, unless the parties agree upon the amount. Judgment not to issue for one week, and, if the parties agree, the amount is to be inserted in the judgment. The plaintiff to have his costs of the action. J. T. White, for the plaintiff. R. B. Henderson, for the defendant.