The

# Ontario Weekly Notes

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## APPELLATE DIVISION.

First Divisional Court. October 22nd, 1918.

### *A. J. REACH CO. v. CROSLAND.

*Way—Easement—Private Right of Way Appurtenant to Land—Extinction by Sale of Servient Tenement for Taxes—Assessment Act, R.S.O. 1897 ch. 224, secs. 7, 149—Municipal Act, R.S.O. 1897 ch. 223, sec. 2 (8)—"Land."*

Appeal by the defendants from the judgment of Mulock, C.J. Ex., 14 O.W.N. 247.

The appeal was heard by Meredith, C.J.O., Maclaren, Magee, Hodgins, and Ferguson, JJ.A.

J. H. Cooke, for the appellants.

G. W. Morley, for the plaintiffs, respondents.

The Court dismissed the appeal with costs.

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Second Divisional Court. October 22nd, 1918.

### BURFORD COAL AND GRAIN CO. v. McPHERSON.

*Contract—Delivery of Grain—Breach—Damages.*

Appeal by the defendant from the judgment of Britton, J., 14 O.W.N. 283.

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

The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

W. G. Owens, for the appellant.

A. H. Boddy, for the plaintiffs, respondents.

THE COURT dismissed the appeal with costs.

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FIRST DIVISIONAL COURT. OCTOBER 23RD, 1918.

## J. L. MICHAELSON & SONS LIMITED v. BABB.

*Sale of Goods—Dispute as to Value—Mistake of Vendor in "Approval Bill"—Knowledge of Vendee—Price Agreed upon.*

Appeal by the defendant from the judgment of the Judge of the County Court of the County of Perth in favour of the plaintiffs, in an action in that Court, brought to recover $37.50 as the value of some rings and $140 as the value of a parcel of 8 diamonds or brilliants all sold by them to the defendant.

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

R. S. Robertson, for the appellant.

Glyn Osler, for the plaintiffs., respondents.

MAGEE, J.A., reading the judgment of the Court, said that no question arose as to the rings, and the only question as to the brilliants was, whether they should be charged for as weighing 1.44 carats or 1.75 carats, the price being $80 per carat. In making out the "approval bill," the plaintiffs, by mistake, entered the package as weighing 1.44 carats; but the trial Judge, who saw the witnesses, had found the fact of mistake, and that the weight was really 1.75 carats; and that finding could not be questioned.

The conclusion to be drawn from the whole evidence was, that the defendant knew of the substantial difference in weight, and that there was a mistake, before he sold any of the brilliants.

The plaintiffs on finding out their mistake asked either to be paid for the true value or to have the goods returned. The defendant refused to return even those on hand, unless with their mounts, and on being paid for the mounting. The plaintiffs notified him that as soon as the period of credit expired they would sue for the corrected price. Whether the plaintiffs were entitled as for a

conversion or as adopting the conversion and suing for the proceeds, or as vendors on a sale assented to by the defendant in treating the goods as his own, the fair measure of their claim, in the absence of other evidence, was the carat price agreed on. This the judgment appealed from had allowed. The case was like Cox v. Prentice (1815), 3 M. & Sel. 344, where the purchaser recovered back the overpayment for silver, and where the thing sold was not of arbitrary value, but depended on the quantity of silver it contained. It was not the case of a unilateral mistake with want of knowledge thereof on the other side, as in Islington Union v. Brentnall and Cleland (1907), 71 J.P. 407, cited for the defendant.

*Appeal dismissed with costs.*

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SECOND DIVISIONAL COURT. OCTOBER 23RD, 1918.

## CROMPTON CORSET CO. v. CITY OF TORONTO.

*Municipal Corporations—Drains and Sewers—Claim for Flooding of Premises—Evidence as to Cause of Flooding—Liability—New Trial—Costs.*

Appeal by the plaintiffs from the judgment of MIDDLETON, J., 14 O.W.N. 197.

The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

Shirley Denison, K.C., for the appellants.

Irving S. Fairty, for the defendants, respondents.

THE COURT directed that, unless the parties agreed to a judgment for the plaintiffs for $105 and County Court costs of the action and appeal, there should be a new trial, and the costs of the former trial and of the appeal should be costs in the cause.

FIRST DIVISIONAL COURT. OCTOBER 24TH, 1918.

## *OTTAWA SEPARATE SCHOOL TRUSTEES v. QUEBEC BANK.

*Constitutional Law—Act respecting the Roman Catholic Separate Schools of the City of Ottawa, 7 Geo. V. ch. 60 (O.)—Intra Vires —British North America Act, secs. 92 (13), (14), (16), 93— Expenditures of Commissioners Carrying on Separate Schools— Account—Liability.*

Appeals by the Attorney-General for Ontario and the defendants and cross-appeal by the plaintiffs from the judgment of CLUTE, J., 41 O.L.R. 594, 13 O.W.N. 369.

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

McGregor Young, K.C., for the Attorney-General.

W. N. Tilley, K.C., for the Bank of Ottawa, the defendant Mackell, and other separate school supporters.

G. F. Henderson, K.C., for the Quebec Bank.

N. A. Belcourt, K.C., and J. H. Fraser, for the plaintiffs.

The judgment of the Court was read by MEREDITH, C.J.O., who said, after stating the facts, and setting out the provisions of the Act 7 Geo. V. ch. 60:—

Unless the legislation in question violates the provisions of sec. 93 of the British North America Act, it is clearly valid legislation, it being competent for the Legislature to have enacted it under the powers conferred by sec. 92 of that Act (paras. 13, 14, and 16).

In my view, the legislation does not violate the provisions of sec. 93. Assuming that legislation which diverts, from a separate school, money which by law should be applied for carrying it on, would be invalid, I am unable to see how legislation which validates expenditures properly made in carrying on a school or a number of schools by a de facto body not lawfully created can be said to affect any such right or privilege as the section deals with, still less prejudicially to affect it within the meaning of the section.

The situation as disclosed on the evidence was that the School Board was conducting the schools under its charge in contravention and defiance of the law, and had brought about such a state of things that the Legislature, in order to secure for the children of the supporters of separate schools in Ottawa the education to

which they were by law entitled, found it necessary to intervene and to place the schools under the control and management of a Commission; the Commissioners appointed entered upon their duties and in good faith carried on the schools and expended the moneys in question in carrying them on; and what is argued is, that, because the Commission, as it has been held, had no legal existence, the supporters of the schools are entitled, though they have enjoyed the benefit of that expenditure, to say that it was improperly made and that the Commissioners must pay the money out of their pockets, with the result that the schools will have been carried on, while the Commission was in charge of them, free of expense to the supporters of the schools, and that the Commissioners must pay over to the School Board what will probably suffice to carry them on for a further period of a year or more.

It cannot, I think, be that the Legislature is powerless to prevent such a wrong from being perpetrated. While the School Board is a separate entity, it is a trustee for the supporters of the separate schools, and what is argued is that these supporters who have enjoyed the benefit of having their schools carried on are entitled to say to the Commissioners, "You have carried them on without authority and must lose all that you have expended in so doing." The Commission was the de facto trustee for the time being of the separate school supporters, and in all justice is entitled to be recouped the expenditure it has made for the benefit of its cestuis que trust.

In my judgment, the case does not differ from that of an incorporated company whose affairs were managed by a board of directors not validly chosen, and in such a case I am aware of no principle of law which would prevent the de facto board from successfully claiming to be allowed against what had come to its hands of the company's money, the expenditures which it had properly made in carrying on the company's business, and to be indemnified against any liability it had incurred in so doing.

If this be the correct view, why are the Commissioners to be held to be in a worse position than the de facto directors in the case I have suggested? I know of no reason.

If then this be the measure of the Commissioners' right, how can it be said that legislation which declares that right prejudicially affects any right or privilege of the supporters of the Ottawa Separate Schools?

True it is that if the legislation is effective the School Board is deprived of the right to have the accounts taken, but nothing substantial has been taken away in view of the result of the audit which the School Board had made, which shewed that the accounts

were substantially correct, and that only a few small items were open to question, and that as to these, or indeed as to any item that was questioned by the School Board, the evidence at the trial made it clear that the accounts were correct.

If effect were given to the contention of the School Board, it would follow that if it had borrowed money for a legitimate purpose, and had applied it to that purpose, but, in consequence of the absence of some statutory formality, the lender could not enforce his claim in the Courts, it would not be competent for the Legislature to enact that, notwithstanding the informality, the debt should be recoverable. Legislation of that character is not often passed by the Imperial Parliament, but in a new country like Canada it is sometimes necessary that it should be and it is passed.

I would, for these reasons, allow the appeals of the defendants with costs, reverse the judgment of the learned trial Judge, and substitute for it a judgment dismissing the actions with costs and directing that judgment be entered for the Commissioners on their counterclaim with costs, and I would dismiss the appeal of the School Board with costs.

If I had reached a different conclusion as to the validity of the Act, I should nevertheless, for the reasons I have given, have been of opinion that the Commissioners are entitled to be recouped the money they have expended in carrying on the schools, and the result would be the same.

*Appeal allowed.*

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FIRST DIVISIONAL COURT. OCTOBER 25TH, 1918.

## HAMILTON MOTOR WORKS LIMITED v. BROWNE.

*Patent for Land—Water-lot Granted by Crown—Boundaries—Surveys—Plans—Determination of True Boundary-line—Evidence—Declaration—Costs.*

Appeal by the defendant from the judgment of KELLY, J., 13 O.W.N. 120.

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

J. L. Counsell, for the appellant.

George S. Kerr, K.C., and T. B. McQuesten, for the plaintiffs, respondents.

Middleton, J., reading the judgment of the Court, said that the fundamental question was the true location of the boundary between lots 4 and 5 on the north side of Brock street, Hamilton.

The conclusion of the trial Judge could not be supported.

There was a survey of the land made about 1855, when the land to the west was owned by the father of the witness Zealand, and the land to the east by the father of the defendant. A dispute had arisen as to the location of the boundary, and a survey was made and a fence built on the line then located. A few years after this the house referred to in the evidence was erected.

It did not satisfactorily appear that the house was built upon the exact line of the fence; there may have been a narrow space between it and the fence; but the probability was that it was built up to the boundary of the Zealand property.

The evidence of Zealand, when he spoke of the line running 10 feet from the corner of Browne wharf, must not be taken to refer to the corner of the present wharf, but to a slip near the coal-shed, as it then stood, much further south.

This survey was made to determine a dispute as to the boundary, and it was accepted by both owners. The fence was erected upon the boundary; and in a few years, while the matter was fresh in the minds of all, the house was erected either upon or approximately upon the same line. In these circumstances the presumption ought to be that this was the true line, or that the parties agreed to accept it as a conventional boundary between the properties.

The trial Judge had given effect to the evidence of the surveyor Lee, who prepared a plan and survey starting from buildings on Burlington and McNab streets, from which he had measured the distances on the courses shewn by the registered plan, and had thus located what he assumed to be the true boundary.

The presumption that these old buildings were lawfully located where they were found was not to be lightly disregarded, but in olden times surveys upon the ground were seldom made with nice accuracy, either as to course or distance; and, even if the location of Burlington and McNab streets might be inferred from these old buildings, it did not follow that the true boundaries of lots on another street some distance away, or originally laid out upon the ground, could be deduced in the way indicated. This was the error condemned in Diehl v. Zanger (1878), 39 Mich. 601, approved in Home Bank of Canada v. Might Directories Limited (1914), 31 O.L.R. 340.

The existence of the iron post planted very many years ago to indicate the east limit of the Browne property (i.e., the line between

lots 2 and 3) was a factor of importance, as it was consistent with the true boundary being in accordance with the Zealand survey, and was also consistent with other old landmarks.

The boundary should be declared to be the line shewn by the stone monuments and that line produced.

The declaration as to the plaintiff company's right to maintain the projecting eaves of the house should stand.

The claim to reform the patent failed and should be dismissed.

The appeal should be allowed with costs, and the judgment should be varied as indicated, and the plaintiff company should pay the costs of the action.

The disposition of the motion to admit further evidence should not be interfered with.

*Appeal allowed.*

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## HIGH COURT DIVISION.

MIDDLETON, J. OCTOBER 23RD, 1918.

### WALSHAW v. SECURITIES LIMITED.

*Mortgage—Bonus for Delay—Credit on Mortgage-debt—Mortgage Given for Balance of Purchase-money—Money-Lenders Act, secs. 4, 5—Application of—"Money Lent"—Cost of Loan"—Interest in Arrear—Mortgagors and Purchasers Relief Act—Appropriation of Payments—Costs—Parties—Addition of, in Master's Office.*

Action upon a mortgage given to secure a balance of purchase-money.

The action was tried without a jury at Toronto.

J. P. White, for the plaintiff.

J. D. Coffey, for the defendants.

MIDDLETON, J., in a written judgment, said that two questions were raised:—

(1) When the mortgage (or an instalment) fell due, the defendants offered a bonus to the mortgagee for delay. This was paid in three instances, and in one other instance was included in notes given as collateral security, but was not actually paid.

It was contended that the parties who paid should be relieved from this and that the amounts paid should be credited on the debt.

Sums promised but not paid do not form part of the mortgage-debt, and cannot be charged against the lands, at any rate as against third parties; and it was admitted that the whole equity of redemption has been sold or agreed to be sold under a scheme of subdivision. The only sum not paid seemed to be $60.

Sections 4 and 5 of the Money-Lenders Act, passed in 1912, now R.S.O. 1914 ch. 175, were relied on. But these sections, which refer to "money lent," do not apply when the mortgage is for the balance of purchase-money. The "cost of the loan" (having regard to the interpretation of that expression) cannot be found excessive or the transaction harsh and unconscionable.

The mortgage bore 6 per cent. interest, and since the war this was below the market rate. The security was vacant land purchased in boom days for subdivision purposes, and now inadequate security. The "bonus" was agreed to by a barrister of experience, and in fact was in one instance suggested by him.

(2) The second contention was, that there was no interest in arrear when the action was begun, in February, 1917, and so the action could not be brought without leave under the Mortgagors and Purchasers Relief Act. Nothing had been paid since the 27th November, 1915, when $50 was paid, and interest fell due on the 27th December, 1915, and each 6 months thereafter.

All payments made must, in the absence of some appropriation to the contrary, be applied first to discharge arrears of interest and next in discharge of arrears of principal. The creditor by his statement so applied them. What was now contended was, that the creditor must hold money paid in excess of arrears of interest in suspense, and that the debtor could prevent this sum so held being applied on principal in arrear and apply it to meet accruing instalments of interest. There was no such law.

There should be judgment for the plaintiff, with a declaration, if so desired, that credit need not be given for the two sums paid by way of bonus. The account might be as in exhibit 15—eliminating the $60 item and correcting the computation of interest if any error can be pointed out.

The costs of the action on the notes could not be added as against any third person, and ought not to be included in any personal judgment.

The persons having agreements for purchase should be added, under Rule 490 (2), in the Master's office.

The plaintiff should have the costs of the action.

LENNOX, J. OCTOBER 25TH, 1918.

## HEINSTEIN & SONS v. POLSON IRON WORKS LIMITED.

*Contract—Building of Ship—Completion—Delay—Price not Fully Paid—Delivery over upon Payment into Court of Balance Due —Injunction.*

Motion by the plaintiffs to continue an injunction restraining the defendants, until the trial of the action or other final determination of the matters, from selling or otherwise interfering with or disposing of the steamship "Asp," except by delivery to the plaintiffs, and for delivery to the plaintiffs.

The motion was heard in the Weekly Court, Toronto.
J. H. Fraser, for the plaintiffs.
J. H. Moss, K.C., for the defendants.

LENNOX, J., in a written judgment, said that the contract for the building of the ship was made by the defendants with one Hannevig, whose interest had, by assignments, become vested in the plaintiffs: the contract price was $415,000, and it had all been paid except the final instalment of $41,500 and a sum of $4,370 for insurance and extras.

The defendants refused to deliver the ship until payment was made to them of these two sums, and threatened to exercise a right of rescission provided for in the contract. The plaintiffs contended that, by reason of delay in completing the vessel and the provisions of the contract in reference thereto, they were entitled to immediate delivery upon giving security for or paying into Court $45,870.

After setting out the facts and the provisions of the contract, the learned Judge said that there should be an order directing that the plaintiffs pay into Court to the credit of this action the sum of $45,870, on or before the 29th October, and that, upon payment, the defendants do forthwith deliver to the plaintiffs' agent and their solicitors the vessel called the "Asp" and the certificates provided for by the contract.

The injunction should, if desired, be continued until the trial or determination otherwise of the questions in dispute; the plaintiffs to proceed to trial as rapidly as possible.

The costs of the injunction and of this motion should abide the event.

LENNOX, J. OCTOBER 25TH, 1918.

MAYFAIR INVESTMENTS LIMITED v. SOMERS.

*Notice of Trial—Regularity—Rules 173 (1), 248—Computation of Period of 10 Days—Practice.*

Appeal by the defendant from an order of the Master in Chambers dismissing the defendant's motion to set aside a notice of trial served by the plaintiffs on the 18th October for trial of the action at the Kitchener sittings commencing on the 28th October.

A. J. Russell Snow, K.C., for the defendants.
F. C. Carter, for the plaintiffs.

LENNOX, J., in a written judgment, referred to Rules 173 (1) and 248 and to Morell v. Wilmott (1870), 20 U.C.C.P. 378; and said that under the Rules as they now stand the first day is clearly excluded, and just as clearly the last day is included.

*Appeal dismissed with costs.*

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MASTEN, J. OCTOBER 25TH, 1918.

*BAILEY COBALT MINES LIMITED v. BENSON.

*Company—Winding-up—Claim upon Assets by Assignee of Chose in Action—Judgment Held by Company against Assignor of Claimant—Evidence—Set-off—Equity—Dividend.*

Appeal by the Profit Sharing Construction Company, claimants, from an interim report of the Master in Ordinary.

The appeal was heard in the Weekly Court, Toronto.
R. S. Robertson, for the appellants.
W. Laidlaw, K.C., for the plaintiffs and the liquidator, respondents.

MASTEN, J., in a written judgment, said that the appeal was from the determination of the Master that the appellants should not be permitted to receive any distributive share of the fund arising from the assets of the plaintiff company in liquidation,

unless and until the amount of a judgment held by the plaintiffs against one Benson, the appellants' assignor, had been contributed by or on behalf of Benson to the assets of the plaintiff company.

After setting out the facts, the learned Judge said that the appellants' first contention was, that the respondents had not given legal proof of facts establishing as against the appellants a set-off or an equity to prevent them ranking in the liquidation. The learned Judge was of opinion that the Master in this respect had been misled, and that the respondents had failed to establish, by any evidence admissible against the appellants, the facts on which to found a claim.

The second ground of appeal was, that, on the assumption that the evidence was admissible and adequately established the facts, the appellants, as assignees of a chose in action, stood in a better position than Benson, and as against the appellants the equity did not exist.

The learned Judge said that he was bound to follow the express ruling of the Court of Appeal in In re Milan Tramways Co., Ex p. Theys (1884), 25 Ch. D. 587, followed as it was in In re Goy & Co. Limited, [1900] 2 Ch. 149, and hold that, if due notice was given to the plaintiff company by the assignor of the appellants before the declaration of any dividend and before recovery of the judgment against Benson, and if the assignment from Benson to the appellants was bona fide, no right of set-off and no right to retain the dividend arose; but meantime, and until those questions should be determined, no dividend should be paid to the appellants.

The learned Judge must be understood as deciding no more than the preliminary questions directly raised before the Master, and as leaving open all other issues in regard to the rights of the appellants and respondents.

The appeal should be allowed with costs, the interim report set aside, and the whole matter referred back to the Master.

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RE SOLICITOR—LENNOX, J., IN CHAMBERS—OCT. 22.

*Solicitor—Taxation of Bill of Costs—Place of Reference—Solicitors Act, sec. 38 (3).*]—An appeal by the solicitor from an order of the Master in Chambers, directing delivery and taxation of a bill of costs, in so far as the order provided that the taxation should be before the Senior Taxing Officer in Toronto. LENNOX, J., in a written judgment, said that the reference for taxation should, unless otherwise ordered, be to the proper Taxing Officer for the county in which the solicitor resided: Solicitors Act, R.S.O. 1914

ch. 159, sec. 38 (3). There were no facts and circumstances shewing that the ordinary rule should not be followed. The solicitor resided and practised in the district of Temiskaming, and the reference should be to the Local Officer at Haileybury. The order should be amended so as to provide for a reference to the Local Officer, and the solicitor should have the costs of his appeal, to be allowed or adjusted on the taxation. J. M. Ferguson, for the solicitor. J. Gilchrist, for the client.

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RE DALY—ROSE, J.—OCT. 24.

*Will—Construction—Widow's Annuity Declared First Charge on Net Income of Residuary Estate—Deficiency—Resort to Corpus—Abatement of Legacies.*]—After the question whether the widow's annuity was a first charge upon the income of the residuary estate had been decided (15 O.W.N. 32), directions were given as to the service of notice upon some interested parties who had not been separately represented upon the argument of that question, and the motion came on for further argument in the Weekly Court, Toronto. ROSE, J., in a written judgment, said that the matters discussed were: the respective rights of the widow and of the legatees, in the event of the income from the residuary estate proving insufficient either for the payment of the widow's annuity or for the payment of both the annuity and the legacies; together with the question whether a certain sum directed to be set aside to provide an income for Mary Croft was to be treated differently, in any way, from the other legacies. Upon a consideration of the authorities cited and of some others, the learned Judge reached the conclusion that the true construction of the will was that, if the income from the residuary estate proved insufficient for the payment in full either of the annuity alone or of the annuity and the legacies, resort must be had to the corpus, the annuity being the first charge; and that if, after the annuity was provided for, there was a deficiency, the legacies (including the sum directed to be retained during the lifetime of Mary Croft) must abate proportionately. There was no argument as to what disposition ought to be made of the Mary Croft fund upon Mary Croft's death (either before or after the death of the widow) in case it should turn out that the estate was now insufficient to pay the legacies in full. It would, obviously, be inexpedient to try to dispose of that question in advance. The questions submitted should be answered as above indicated. The costs of all parties ought to come out of the estate. Daniel O'Connell, for the executors and residuary legatees.

D. W. Dumble, K.C., for the children of John Dorgan and the children of Catherine Daly, legatees. E. C. Cattanach, for the Official Guardian. V. J. McElderry, for the widow of the testator and for Mary Croft. F. J. Hughes, for Irene Gibbons and other legatees.

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## COUNTY COURT OF THE COUNTY OF HASTINGS.

DEROCHE, Co. C.J. OCTOBER 18TH, 1918.

### McAFEE v. TOWN OF DESERONTO.

*Highway—Nonrepair—Injury to Person Falling on Sidewalk Covered with Ice—Municipal Act, sec. 460—"Gross Negligence"—Evidence.*

Action by Lillie McAfee against the Corporation of the Town of Deseronto to recover damages for injury sustained by the plaintiff from a fall upon a highway in the town, said to be out of repair: Municipal Act, sec. 460.

Section 460 (4) requires "notice in writing of the claim and of the injury complained of."

The notice relied on by the plaintiff was contained in a letter written by her to the Mayor of the town, on the 2nd March, 1918, in which she said: "This is to notify you that on Sunday Feb. 24th I fell on the icy pavement of a street in Deseronto, which fall resulted in a broken ankle, and that I intend to enter action for damages against the Town of Deseronto."

The action was tried by the County Court Judge without a jury.

W. S. Herrington, K.C., for the plaintiff.

W. N. Ponton, K.C., and R. D. Ponton, for the defendants.

DEROCHE, Co. C.J., in a written judgment, said that, aside from the wording of the notice served on the Mayor, it must be found that there was no cause of action.

The particular spot where the plaintiff fell and broke her ankle was on a well-constructed cement-walk, level, except the usual fractional slant to shed water. It was therefore (as some of the witnesses testified) in perfect condition as to construction and repair, except as it might have been affected by snow and ice.

At the time of the injury the ice covered the walk, as it covered

all level cement walks in the town, and, owing to the long-continued cold weather, was very smooth.

The fall of the plaintiff was on Thomas street, a level street, but only a few feet from St. George street, which is hilly both before and after reaching Thomas street. St. George street was spoken of as a very dangerous street in winter, owing to the great slope of the walk, and the crossing at the intersection is spoken of as a bad crossing, but due entirely to the St. George street slope, and not due to any special danger on Thomas street. References to and quotations from German v. City of Ottawa (1917), 39 O.L.R. 176, affirmed in 56 S.C.R. 80. The facts that the level walk was covered with smooth ice, and that slipping on that ice caused the broken ankle, are not sufficient to make a corporation liable.

By sec. 460 (3), except in case of gross negligence, a corporation shall not be liable for any personal injury caused by snow or ice upon a sidewalk.

Leaving the ice upon the sidewalk might be considered gross negligence, if nothing were done to overcome it; but there was evidence that abundance of sand had been provided by the corporation for use on dangerous portions of the sidewalks; that this particular street was sanded from time to time, and that this particular spot was sanded on Saturday, and again on Sunday afternoon. The accident occurred on Sunday evening, when the high wind had carried off most or all of the sand. There could not be said to be gross negligence or even ordinary negligence on the part of the defendants.

*Action dismissed with costs.*

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