

COMMERCIAL LAW REPORTS.

(ANNOTATED.)

BEING REPORTS OF IMPORTANT DECISIONS
RELATING TO COMPANIES, BANKS AND
BANKING, INSURANCE, INSOLVENCY,
AND SIMILAR SUBJECTS IN THE
FEDERAL AND PROVINCIAL
COURTS;

TOGETHER WITH

ANNOTATIONS, A TABLE OF CASES CITED
AND AN INDEX-DIGEST.

VOL. II.

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An Act Respecting Copyright.

Note.—The original Act is chaptered 88 of the Statutes of 1875, although there is another Act passed in the same year also chaptered 88. HER MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

SHORT TITLE.

1. *Short Title.*—This Act may be cited as “*The Copyright Act.*” 38 V., c. 88, s. 31.

INTERPRETATION.

2. In this Act, unless the context otherwise requires,—

(a.) “*Minister.*”—The expression “the Minister” means the Minister of Agriculture;

(b.) “*Department.*”—The expression “the Department” means the Department of Agriculture;

(c.) “*Legal representatives.*”—The expression “legal representatives” includes heirs, executors, administrators and assigns, or other legal representatives.

REGISTERS OF COPYRIGHTS.

3. *Minister of Agriculture to keep registers of copyrights.*—The Minister of Agriculture shall cause to be kept, at the Department of Agriculture, books to be called the “Registers of copyrights,” in which proprietors of literary, scientific and artistic works or compositions, may have the same registered in accordance with the provisions of this Act. 38 V., c. 88, s. 1.

SUBJECTS OF COPYRIGHT AND CONDITIONS TO BE COMPLIED WITH.

4. *Who may obtain copyrights.*—Any person domiciled in Canada or in any part of the British possessions, or any citizen of any country which has an International copyright treaty with the United Kingdom, who is the author of any book, map, chart or musical composition, or of any original painting, drawing, statue, sculpture or photograph, or who invents, designs, etches, engraves or causes to be engraved, etched or made from his own design, any print or engraving, and the legal representative of such person or citizen, shall have the sole and exclusive right and liberty of printing, reprinting, publishing, reproducing and vending such literary, scientific or artistic works or compositions, in whole or in part, and of allowing translations to be printed or reprinted and sold, of such literary works from one language into other languages, for the term of twenty-eight years, from the time of recording the copyright thereof in the manner hereinafter directed. 38 V., c. 88, s. 4, *part*.

5. *Condition for obtaining copyright.*—The condition for obtaining such copyright shall be that the said literary, scientific or artistic works shall be printed and published or reprinted and republished in Canada, or in the case of works of art that they shall be produced or reproduced in Canada, whether they are so published or produced for the first time, or contemporaneously with or subsequently to publication or production elsewhere; but in no case shall the said sole and exclusive right and liberty in Canada continue to exist after it has expired elsewhere:

(2). *Exception as to immoral works, etc.*—No immoral, licentious, irreligious, or treasonable or seditious literary, scientific or artistic work, shall be the legitimate subject of such registration or copyright. 38 Viet., c. 88, s. 4, *part*.

6. *Copyright in Canada of British copyright works—on what conditions obtainable.*—Every work of which the copyright has been granted and is subsisting in the United Kingdom, and copyright of which is not secured or subsisting in Canada, under any Act of the Parliament of Canada, or of the legislature of the late

Province of Canada, or of the legislature of any of the Provinces forming part of Canada, shall, when printed and published, or reprinted and republished in Canada, be entitled to copyright under this Act; but nothing in this Act shall be held to prohibit the importation from the United Kingdom of copies of any such work lawfully printed there:

(2). *As to foreign reprints imported before copyright is obtained in Canada.*—If any such copyright work is reprinted subsequently to its publication in the United Kingdom, any person who has, previously to the date of entry of such work upon the registers of copyright, imported any foreign reprints, may dispose of such reprints by sale or otherwise; but the burden of proof of establishing the extent and regularity of the transaction shall, in such case, be upon such person. 38 V., c. 88, s. 15.

7. *Registration of work first published in separate articles in a periodical.*—Any literary work, intended to be published in pamphlet or book form, but which is first published in separate articles in a newspaper or periodical, may be registered under this Act while it is so preliminarily published, if the title of the manuscript and a short analysis of the work are deposited at the department, and if every separate article so published is preceded by the words "Registered in accordance with the Copyright Act," but the work, when published in book or pamphlet form, shall be subject, also, to the other requirements of this Act. 38 V., c. 88, s. 10, *part*.

8. *Anonymous books may be entered in the name of first publisher.*—If a book is published anonymously, it shall be sufficient to enter it in the name of the first publisher thereof, either on behalf of the un-named author or on behalf of such first publisher, as the case may be. 38 V., c. 88, s. 25.

9. *Deposit of copies, etc., with the department.*—No person shall be entitled to the benefit of this Act unless he has deposited at the department two copies of such book, map, chart, musical composition, photograph, print, cut, or engraving, and, in the case of paintings, drawings, statuary and sculpture, unless he has furnished a written description of such works of art; and the

Minister shall cause the copyright of the same to be recorded forthwith in a book to be kept for that purpose, in the manner adopted by him, or prescribed by the rules and forms made, from time to time, as herein provided. 38 V., c. 88, s. 7.

10. *Copies to be sent to the Library of Parliament.*—The Minister shall cause one of such two copies of such book, map, chart, musical composition, photograph, print, cut or engraving, to be deposited in the Library of the Parliament of Canada. 38 V., c. 88, s. 8.

11. *As to second and subsequent editions.*—It shall not be requisite to deliver any printed copy of the second or of any subsequent edition of any book, unless the same contains very important alterations or additions. 38 V., c. 88, s. 26.

12. *Notice of copyright to appear on the work.*—No person shall be entitled to the benefit of this Act unless he gives information of the copyright being secured, by causing to be inserted in the several copies of every edition published during the term secured, on the title-page, or on the page immediately following, if it is a book,—of if it is a map, chart, musical composition, print, cut, engraving or photograph, by causing to be impressed on the face thereof, or if it is a volume of maps, charts, music, engravings or photographs, upon the title-page or frontispiece thereof, the following words, that is to say: "Entered according to Act of the Parliament of Canada, in the year _____, by A.B., at the Department of Agriculture;" but as regards paintings, drawings, statuary and sculptures, the signature of the artist shall be deemed a sufficient notice of such proprietorship. 38 V., c. 88, s. 9.

13. *Interim copyright, how obtainable, and its effect.*—The author of any literary, scientific or artistic work, or his legal representative, may, pending the publication or republication thereof in Canada, obtain an interim copyright therefor by depositing at the department a copy of the title or a designation of such work, intended for publication or republication in Canada,—which title or designation shall be registered in an interim copy-

right register at the said department,—to secure to such author aforesaid or his legal representatives, the exclusive rights recognized by this Act, previous to publication or republication in Canada,—but such interim registration shall not endure for more than one month from the date of the original publication elsewhere, within which period the work shall be printed or reprinted and published in Canada :

(2). *Notice to be given.*—In every case of interim registration under this Act the author or his legal representatives shall cause notice of such registration to be inserted once in the *Canada Gazette*. 38 V., c. 88, s. 10, *part*.

14. *Application for registration may be made through an agent.*—The application for the registration of an interim copyright, of a temporary copyright and of a copyright, may be made in the name of the author or of his legal representatives, by any person purporting to be the agent of such author or legal representatives; and any damage caused by a fraudulent or an erroneous assumption of such authority shall be recoverable in any court of competent jurisdiction. 38 V., c. 88, s. 23, *part*.

ASSIGNMENTS AND RENEWALS.

15. *Copyright and right to obtain it to be assignable.*—The right of an author of a literary, scientific or artistic work, to obtain a copyright, and the copyright when obtained, shall be assignable in law, either as to the whole interest or any part thereof, by an instrument in writing, made in duplicate, and which shall be registered at the department on production of both duplicates and payment of the fee hereinafter mentioned :

(2). *Duplicates, how disposed of.*—One of the duplicates shall be retained at the department, and the other shall be returned, with a certificate of registration, to the person depositing it. 38 V., c. 88, s. 18.

16. *Copyright to assignee of author.*—Whenever the author of a literary, scientific or artistic work or composition which may be the subject of copyright, has executed the same for another per-

son or has sold the same to another person for due consideration, such author shall not be entitled to obtain or to retain the proprietorship of such copyright, which is, by the said transaction, virtually transferred to the purchaser,—and such purchaser may avail himself of such privilege, unless a reserve of the privilege is specially made by the author or artist in a deed duly executed. 38 V., c. 88, s. 16.

17. *Renewal of copyright, for what term and on what conditions.*—If, at the expiration of the said term of twenty-eight years, the author or any of the authors (when the work has been originally composed and made by more than one person), is still living, or if such author is dead and has left a widow or a child, or children living, the same sole and exclusive right and liberty shall be continued to such author, or to such authors still living, or, if dead, then to such widow and child or children, as the case may be, for the further term of fourteen years; but in such case, within one year after the expiration of such term of twenty-eight years, the title of the work secured shall be a second time registered, and all other regulations herein required to be observed in regard to original copyrights shall be complied with in respect to such renewed copyright. 38 V., c. 88, s. 5.

18. *Record of renewal to be published.*—In all cases of renewal of copyright under this Act, the author or proprietor shall, within two months from the date of such renewal, cause notice of such registration thereof to be published once in the *Canada Gazette*. 38 V., c. 88, s. 6.

CONFLICTING CLAIMS TO COPYRIGHT.

19. *Cases of conflicting claims in respect of copyright to be settled before a competent court.*—In case of any person making application to register as his own, the copyright of a literary, scientific or artistic work already registered in the name of another person, or in case of simultaneous conflicting applications, or of an application made by any person other than the person entered as proprietor of a registered copyright, to cancel the said copyright, the person so applying shall be notified by the Minis-

ter that the question is one for the decision of a court of competent jurisdiction, and no further proceedings shall be had or taken by the Minister concerning the application until a judgment is produced maintaining, cancelling or otherwise deciding the matter:

(2). *Action on decision.*—Such registration, cancellation or adjustment of the said right shall then be made by the Minister in accordance with such decision. 38 V., c. 88, s. 19.

INFRINGEMENT OF COPYRIGHT.

20. *Liability of persons printing Mss., without owner's consent.*—Every person who, without the consent of the author or lawful proprietor thereof first obtained, prints or publishes, or causes to be printed or published, any manuscript, not previously printed in Canada or elsewhere, shall be liable to the author or proprietor for all damages occasioned by such publication, and the same shall be recoverable in any court of competent jurisdiction. 38 V., c. 88, s. 3.

LICENSES TO RE-PUBLISH.

21. *Provision for the case of a copyrighted work being out of print.*—If a work copyrighted in Canada becomes out of print, a complaint may be lodged by any person with the Minister, who, on the fact being ascertained to his satisfaction, shall notify the owner of the copyright of the complaint and of the fact; and if, within a reasonable time, no remedy is applied by such owner, the Minister may grant a license to any person to publish a new edition or to import the work, specifying the number of copies, and the royalty to be paid on each to the owner of the copyright. 38 V., c. 88, s. 22.

FEEES.

22. *Fees payable under this Act.*—The following fees shall be paid to the Minister before an application for any of the purposes herein mentioned is received, that is to say:—

On registering a copyright.	\$1 00
On registering an interim copyright.	0 50

On registering a temporary copyright.....	0 50
On registering an assignment.....	1 00
For a certified copy of registration.....	0 50
On registering any decision of a court of justice, for every folio.....	0 50

On office copies.—For office copies of documents not above mentioned, the following charges shall be made:—

For every single or first folio, certified copy.....	\$0 2
For every subsequent hundred words (frac- tions under or not exceeding fifty, not be- ing counted, and over fifty being counted for one hundred).....	0 25

(2.) *Fees to be in full for all services.*—The said fees shall be full of all services performed under this Act by the Minister or by any person employed by him under this Act:

(3.) *To form part of Con. Rev. Fund.*—All fees received under this Act shall be paid over to the Minister of Finance and Receiver General, and shall form part of the Consolidated Revenue Fund of Canada:

(4.) *No exemption from payment of fees.*—No person shall be exempt from the payment of any fee or charge payable in respect of any services performed under this Act for such person, and no fee paid shall be returned to the person who paid it. 38 V., c. 88, s. 28.

GENERAL PROVISIONS.

23. *Provisoes as to scenery, etc.*—Nothing herein contained shall prejudice the right of any person to represent any scene or object, notwithstanding that there may be copyright in some other representation of such scene or object. 38 V., c. 88, s. 14.

24. *As to newspapers, etc., containing portions of British copyright works.*—Newspapers and magazines published in foreign countries, and which contain, together with foreign original matter, portions of British copyright works republished with the consent of the author or his legal representatives, or under the

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law of the country where such copyright exists, may be imported into Canada. 38 V., c. 88, s. 10, *part*.

25. *Clerical errors, how corrected.*—Clerical errors which occur in the framing or copying of any instrument drawn by any officer or employee in or of the department shall not be construed as invalidating such instrument, but when discovered they may be corrected under the authority of the Minister. 38 V., c. 88, s. 20.

26. *Certified copies and extracts,—their effect.*—All copies or extracts certified, from the department, shall be received in evidence, without further proof and without production of the originals. 38 V., c. 88, s. 21.

27. *Minister to make rules, forms, etc.*—The Minister may, from time to time, subject to the approval of the Governor in Council, make such rules and regulations, and prescribe such forms, as appear to him necessary and expedient for the purposes of this Act; and such regulations and forms, circulated in print for the use of the public, shall be deemed to be correct for the purposes of this Act; and all documents, executed and accepted by the Minister shall be held valid, so far as relates to all official proceedings under this Act. 38 V., c. 88, s. 2.

OFFENCES AND PENALTIES.

28. *Making false entries, etc., to be a misdemeanor.*—Every person who wilfully makes or causes to be made any false entry in any of the registry books hereinbefore mentioned of the Minister, or who wilfully produces or causes to be tendered in evidence, any paper which falsely purports to be a copy of an entry in any of the said books, is guilty of a misdemeanor, and shall be punished accordingly. 38 V., c. 88, s. 24.

29. *Fraudulent assumption of authority, a misdemeanor.*—Every person who fraudulently assumes authority to act as agent of the author or of his legal representative for the registration of a temporary copyright, an interim copyright, or a copyright, is guilty of a misdemeanor and shall be punished accordingly. 38 V., c. 88, s. 23, *part*.

30. *Penalty for the infringement of copyright of a book.*—Every person who, after the interim registration of the title of any book according to this Act, and within the term herein limited, or after the copyright is secured, and during the term or terms of its duration, prints, publishes, or reprints or republishes, or imports, or causes to be so printed, published or imported, any copy or any translation of such book without the consent of the person lawfully entitled to the copyright thereof, first had and obtained by assignment, or who, knowing the same to be so printed or imported, publishes, sells or exposes for sale, or causes to be published, sold or exposed for sale, any copy of such book without such consent, shall forfeit every copy of such book to the person then lawfully entitled to the copyright thereof; and shall forfeit and pay for every such copy which is found in his possession, either being printed or printed, published, imported or exposed for sale, contrary to the provisions of this Act, such sum, not exceeding one dollar and not less than ten cents, as the court determines,—which forfeiture shall be enforceable or recoverable in any court of competent jurisdiction; and a moiety of such sum shall belong to Her Majesty for the public uses of Canada, and the other moiety shall belong to the lawful owner of such copyright. 38 V., c. 88, s. 11.

31. *Penalty for the infringement of copyright of a painting, etc.*—Every person who, after the registering of any painting, drawing, statue or other work of art, and within the term or terms limited by this Act, reproduces in any manner, or causes to be reproduced, made or sold, in whole or in part, any copy of any such work of art, without the consent of the proprietor, shall forfeit the plate or plates on which such reproduction has been made, and every sheet thereof so reproduced, to the proprietor of the copyright thereof; and shall also forfeit for every sheet of such reproduction published or exposed for sale, contrary to this Act, such sum, not exceeding one dollar and not less than ten cents, as the court determines,—which forfeiture shall be enforceable or recoverable in any court of competent jurisdiction; and a moiety of such sum shall belong to Her Majesty for the public uses of

Canada, and the other moiety shall belong to the lawful owner of such copyright. 38 V., c. 88, s. 12.

32. *Penalty for the infringement of copyright of a print, chart, music, photograph, etc.*—Every person who, after the registering of any print, cut or engraving, map, chart, musical composition or photograph, according to the provisions of this Act, and within the term or terms limited by this Act, engraves, etches or works, sells or copies, or causes to be engraved, etched or copied, made or sold, either as a whole or by varying, adding to or diminishing the main design, with intent to evade the law, or who prints or reprints, or imports for sale, or causes to be so printed or reprinted or imported for sale, any such map, chart, musical composition, print, cut or engraving, or any part thereof, without consent of the proprietor of the copyright thereof, first obtained as aforesaid, or who, knowing the same to be so reprinted, printed or imported without such consent, publishes, sells or exposes for sale, or in any manner disposes of any such map, chart, musical composition, engraving, cut, photograph or print, without such consent as aforesaid, shall forfeit the plate or plates on which such map, chart, musical composition, engraving, cut, photograph or print has been copied, and also every sheet thereof, so copied or printed as aforesaid, to the proprietor of the copyright thereof; and shall also forfeit, for every sheet of such map, musical composition, print, cut or engraving found in his possession, printed or published or exposed for sale, contrary to this Act, such sum, not exceeding one dollar and not less than ten cents, as the court determines,—which forfeiture shall be enforceable or recoverable in any court of competent jurisdiction; and a moiety of such sum shall belong to Her Majesty for the public uses of Canada, and the other moiety shall belong to the lawful owner of such copyright. 38 V., c. 88, s. 13.

33. *Penalty for falsely pretending to have copyright.*—Every person who has not lawfully acquired the copyright of a literary, scientific or artistic work, and who inserts in any copy thereof printed, produced, reproduced or imported, or who impresses on any such copy, that the same has been entered according to this

Act, or words purporting to assert the existence of a Canadian copyright in relation thereto, shall incur a penalty not exceeding three hundred dollars:

(2). *Penalty for registering interim copyright without publishing.*—Every person who causes any work to be inserted in the register of interim copyright and fails to print and publish, or reprint and republish the same within the time prescribed, shall incur a penalty not exceeding one hundred dollars:

(3). *Recovery and application of penalties.*—Every penalty incurred under this section shall be recoverable in any court of competent jurisdiction; and a moiety thereof shall belong to Her Majesty for the public uses of Canada, and the other moiety shall belong to the person who sues for the same. 38 V., c. 88, s. 17.

34. *Limitation of actions.*—No action or prosecution for the recovery of any penalty under this Act, shall be commenced more than two years after the cause of action arises. 38 V., c. 88, s. 27.

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CHAP. 29.

An Act to amend "The Copyright Act," Chapter sixty-two of the Revised Statutes.

[Assented to 2nd May, 1889.]

Note:—This Act is not in force in Canada, the Bill having been reserved, and the royal assent not having as yet been given.

HER MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. *Sections 4 and 5 of R.S.C., c. 62, repealed; new sections.*—Sections four and five of "The Copyright Act" are hereby repealed and the following substituted therefor:—

"4. *Who may obtain copyright.*—Any person domiciled in Canada or in any part of the British possessions, or any citizen of any country which has an International copyright treaty with the United Kingdom, in which Canada is included, who is the author of any book, map, chart or musical or literary composition, or of any original painting, drawing, statue, sculpture or photograph, or who invents, designs, etches, engraves or causes to be engraved, etched or made from his own design, any print or engraving, and the legal representatives of such person or citizen, shall have the sole and exclusive right and liberty of printing, reprinting, publishing, reproducing and vending such literary, scientific, musical or artistic works or compositions, in whole or in part, and of allowing translations to be printed or reprinted and sold of such literary works, from one language into other languages, for the term of twenty-eight years from the time of recording the copyright thereof in the manner and on the conditions, and subject to the restrictions hereinafter set forth.

"5. *Conditions for obtaining copyright.*—The conditions for obtaining such copyright shall be that the said literary, scientific, musical or artistic work shall, before publication or production elsewhere, or simultaneously with the first publication or production thereof elsewhere, be registered in the office of the Minister of Agriculture, by the author or his legal representatives, and further that such work shall be printed and published or produced in Canada, or reprinted and republished or reproduced in Canada, within one month after publication or production elsewhere; but in no case shall the sole and exclusive right and privilege in Canada continue to exist after it has expired in the country of origin:

"(2). *Exception.*—No immoral, licentious, irreligious, or treasonable or seditious literary, scientific or artistic work shall be the subject of such registration or copyright:

"(3). *Reprints previously imported may be sold.*—If any such copyright work has been reprinted previously to the coming into force of this Act, any person who has, previously to such date, imported any foreign reprints, may dispose of such reprints by sale or otherwise; but the burden of proof of establishing the extent and regularity of the transaction shall, in such case, be upon such person:

"(4). *Previous contract for supplying reprint may be fulfilled.*—In the case of any person who has contracted, previously to the coming into force of this Act, to supply any reprint of any work, either in its complete state or by serial numbers, of which work copyright has been obtained either in the United Kingdom or any such country as aforesaid, but not in Canada, such person shall be entitled to complete such contract, and, subject to the provisions of the Acts respecting duties of Customs, to import the same; but the burden of proof of establishing the extent and regularity of the transaction shall, in such case, be upon such person."

2. *Section 6 repealed.*—Section six of the said Act is hereby repealed.

3. *License, if no copyright is taken out.*—If the person entitled to copyright under the said Act as hereby amended fails to

take advantage of its provisions, any person or persons domiciled in Canada may obtain from the Minister of Agriculture a license or licenses to print and publish or to produce the work for which copyright, but for such neglect or failure, might have been obtained; but no such license shall convey exclusive rights to print and publish or produce any work:

(2). *Royalty to be paid.*—A license shall be granted to any applicant agreeing to pay the author or his legal representatives a royalty of ten per centum on the retail price of each copy or reproduction issued of the work which is the subject of the license and giving security for such payment to the satisfaction of the Minister.

4. *How collected and paid.*—The royalty provided for in the next preceding section shall be collected by the officers of the Department of Inland Revenue, and paid over to the persons entitled thereto, under regulations approved by the Governor in Council; but the Government shall not be liable to account for any such royalty not actually collected.

5. *Importation from foreign countries may be prohibited.*—Whenever, under the foregoing provisions of this Act, a license has been issued permitting the printing and publishing or the producing of any work, and evidence has been adduced to the satisfaction of the Governor in Council that such work is in course of being printed and published or produced in such manner as to meet the demand therefor in Canada, the Governor General may, by proclamation published in the *Canada Gazette*, prohibit the importation, while the author's copyright or that of his assigns is in force, subject to the provisions hereinafter contained, of any copies or reproductions of the work to which such license relates; but if, at any time thereafter, it is made to appear to the Governor in Council that such work is not, under such license, printed and published or produced in such manner as to meet such demand, the Governor General may, by proclamation published as aforesaid, revoke such prohibition.

6. *No prohibition of importation from United Kingdom.*—Nothing in this Act contained shall be deemed to prohibit the im-

portation from the United Kingdom of copies of works of which the copyright is there existing, and which are lawfully printed and published there, nor shall anything in this Act contained be deemed to apply to any work for which copyright has been obtained in the United Kingdom or in any such country as aforesaid before the coming into force of this Act; but the law in force at the time of the coming into force hereof shall be deemed to be still in force as respects such works.

7. *Commencement of Act.*—The foregoing provisions of this Act shall come into force on a day to be named by proclamation of the Governor General.

53 VICTORIA.

CHAP. 12.

An Act to amend "The Copyright Act."

[Assented to 24th April, 1890.]

HER MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. *R.S.C., c. 62, s. 19 amended.*—Section nineteen of "The Copyright Act" is hereby amended by adding thereto the following sub-section:—

"(3). *Jurisdiction of Exchequer Court.*—The Exchequer Court of Canada shall be a competent court within the meaning of this Act, and shall have jurisdiction to adjudicate upon any question arising under this section, upon information in the name of the Attorney General of Canada, and at the relation of any party interested."

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54-55 VICTORIA.

CHAP. 34.

An Act to amend the Copyright Act.

[Assented to 28th August, 1891.]

HER MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. *R.S.C., c. 62, s. 19 amended.*—Section nineteen of “*The Copyright Act*,” chapter sixty-two of the Revised Statutes, as amended by the Act fifty-third Victoria, chapter 12, is hereby further amended by striking out of sub-section three the words “and at the relation of any party interested,” and substituting therefor the words “or at the suit of any person interested.”

58-59 VICTORIA.

CHAP. 37.

An Act to amend the Copyright Act.

[Assented to 22nd July, 1895.]

HER MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. *R.S.C., c. 62, s. 9 amended. Deposit of copies of books, etc., in Department of Agriculture.*—Section nine of *The Copyright Act*, chapter sixty-two of the Revised Statutes of Canada, is hereby amended, by substituting the word “three” for the word “two” in the second line thereof.

2. *Section 10 amended.*—Section ten of the said Act is hereby amended by substituting the word “three” for the word “two” in the first line thereof, and by adding the words “and one in the British Museum” after the word “Canada” in the last line thereof.

3. 52 *Vict. (D.), c. 29, s. 3 amended.*—Sub-section one of section three of chapter twenty-nine of the Statutes of 1889, amending *The Copyright Act*, is hereby repealed and the following substituted therefor:—

“3. *License, if no copyright is taken out.*—If any person entitled to copyright under the said Act as hereby amended, neglects or fails to take advantage of its provisions, or, having obtained copyright thereunder, at any time after the first publication in Canada of the work for which copyright has been so obtained, fails to print and publish in Canada the work for which copyright might have been or has been so obtained as aforesaid in sufficient numbers and in such manner as to meet the demand in Canada for such work, any person or persons domiciled in Canada may obtain from the Minister of Agriculture a license or licenses to print and publish or to reproduce such work in Canada, but no such license shall convey exclusive right to print and publish or produce any work.”

4. *Section 5 amended.*—Section five of the said Act is hereby amended by adding after the word “force” in the ninth line thereof, the words, “or would have been in force had copyright for the work been obtained in Canada under the provisions of sections four and five of the Act as hereby amended.”

5. *Section 5 further amended.*—The said section five is hereby further amended by adding the following words thereto:—“Provided, however, that as to any work for which copyright has been obtained in Canada, the Governor in Council may, upon its being established to his satisfaction that the holder of such copyright is prepared and *bonâ fide* intends during the remaining period of his term of copyright to print and publish such work in Canada in sufficient numbers and in such manner as to supply the demand for such work in Canada, revoke all licenses for the printing and publication of such work then in force; but such revocation shall not render unlawful the subsequent sale and disposal in Canada of all or any of the copies of such work then printed under the authority of the license so revoked.”

63-64 VICTORIA.

CHAP. 25.

An Act to amend the Copyright Act.

[Assented to 18th July, 1900.]

HER MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. *In case of license to reprint book copyrighted in U. K. or British possession, Minister may prohibit importation of other reprints.*—If a book as to which there is subsisting copyright under *The Copyright Act* has been first lawfully published in any part of Her Majesty's dominions other than Canada, and if it is proved to the satisfaction of the Minister of Agriculture that the owner of the copyright so subsisting, and of the copyright acquired by such publication has lawfully granted a license to reproduce in Canada, from movable or other types, or from stereotype plates, or from electroplates, or from lithograph stones, or by any process for facsimile reproduction, an edition or editions of such book designed for sale only in Canada, the Minister may, notwithstanding anything in *The Copyright Act*, by order under his hand, prohibit the importation, except with the written consent of the licensee, into Canada, of any copies of such book printed elsewhere; provided that two such copies may be specially imported for the *bonâ fide* use of any public free library or any university or college library, or for the library of any duly incorporated institution or society for the use of the members of such institution or society.

2. *Suspension or revocation of prohibition.*—The Minister of Agriculture may at any time in like manner, by order under his hand, suspend or revoke such prohibition upon importation if it is proved to his satisfaction that —

(a.) the license to reproduce in Canada has terminated or expired; or

(b.) the reasonable demand for the book in Canada is not sufficiently met without importation; or

(c.) the book is not, having regard to the demand therefor in Canada, being suitably printed or published; or

(d.) any other state of things exists on account of which it is not in the public interest to further prohibit importation.

3. *Failure of licensee to supply book.*—At any time after the importation of a book has been prohibited under section 1 of this Act, any person resident or being in Canada may apply, either directly or through a book-seller or other agent, to the person so licensed to reproduce such book, for a copy of any edition of such book then on sale and reasonably obtainable in the United Kingdom or some other part of Her Majesty's dominions, and it shall then be the duty of the person so licensed, as soon as reasonably may be, to import and sell such copy to the person so applying therefor, at the ordinary selling price of such copy in the United Kingdom or such other part of Her Majesty's dominions, with the duty and reasonable forwarding charges added; and the failure or neglect, without lawful excuse, of the person so licensed to supply such copy within a reasonable time, shall be a reason for which the Minister may, if he sees fit, suspend or revoke the prohibition upon importation.

4. *Customs Department to be notified.*—The Minister shall forthwith inform the Department of Customs of any order made by him under this Act.

5. *Penalty for unlawful importation.*—All books imported in contravention of this Act may be seized by any officer of Customs, and shall be forfeited to the Crown and destroyed; and any person importing, or causing or permitting the importation, of any book in contravention of this Act shall, for each offence, be liable, upon summary conviction, to a penalty not exceeding one hundred dollars.

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COMMERCIAL LAW REPORTS OF CANADA.

(ANNOTATED.)

BEING REPORTS OF IMPORTANT DECISIONS RELATING TO
COMPANIES, BANKS AND BANKING, INSURANCE,
INSOLVENCY, AND SIMILAR SUBJECTS IN
THE FEDERAL AND PROVINCIAL
COURTS, TOGETHER WITH
ANNOTATIONS.

IN THE HIGH COURT OF JUSTICE FOR ONTARIO.

(BEFORE STREET, J.)

R. E. DENISON v. J. J. TAYLOR.

*Contract—Sale of goods—Warranty—Absolute—Breach of—Latent defect
—“Burglar-proof”—“Reasonable protection against burglars”—
Measure of damages—Consequential damages.*

During negotiations for the sale of a vault door between the defendants, safe makers, and the plaintiffs, a private banker, the former wrote enclosing cuts from their sample book of three vault doors called Nos. 67, 68, and 69; the two latter were “fire and burglar proof vault doors.” No. 67 was called “fire proof vault door with chilled steel lining” and was described as being “made with a lining of chilled steel covering the entire surface of outer door.” In a former letter No. 67 had been described as “protected by hardened drill-proof plate.” The plaintiff replied to this, “Would No. 67 furnish a fair protection against burglars?” To which the answer was “Number 67 door gives both fire and burglar proof protection.” The plaintiff purchased the door on these representations and some months later it was blow open by burglars.

Held, that, on a true construction of the correspondence, no absolute warranty or insurance against burglary had been given by the defendants, but that they did warrant (1) a fair *i.e.*, a reasonable protection against burglars and, also, that (2) the entire surface of the door was protected by hardened drill-proof plate composed of chilled steel.

Held, further, that as the door was not lined with chilled steel and, hence, not burglar-proof to any extent as capable of being drilled by an ordinary hand drill, all the warranties had been broken, but that the loss of the money contained in the vault was not a natural consequence of the defects in the vault door and the proper measure of damages was the price paid for the door.

This was an action to recover damages for loss sustained by the destruction of a vault door furnished to the plaintiff by the defendants on certain representations, and for certain property destroyed and money and valuables removed from the vault. The facts appear in the judgment of STREET, J.

The action was tried at St. Catharines on the 5th, 6th and 7th of May, 1903, without a jury.

Hellmuth, K.C., and *Denison*, for the plaintiff.

Cassels, K.C., and *W. H. Blake*, K.C., for the defendants.

May 28, 1903. STREET, J.:—The plaintiff is a private banker carrying on business at Niagara-on-the-Lake, and the defendants are safemakers carrying on business at Toronto. The plaintiff alleges in his statement of claim that he entered into negotiations with the defendants in August and September, 1902, for the purchase by him from them of a fire and burglar proof vault door for the safe keeping of money and other valuables which were from time to time in his possession in the ordinary course of his business as a banker; that the defendants during the negotiations represented to the plaintiff that a certain vault door described in their catalogues and circulars as No. 67, was burglar proof and afforded fire and burglar proof protection; and further that the outer door of the said vault door No. 67 was $1\frac{1}{8}$ inches thick, that the entire surface was protected with hardened drill proof plate * * * and that the same was built with a lining of chilled steel covering the entire surface of the outer door; and that the defendants warranted and guaranteed the truth of the facts aforesaid; that the defendants also entered into a certain guarantee or warranty with the plaintiff whereby they warranted and guaranteed that the said vault door No. 67 was fire and burglar proof and afforded fire and burglar proof protection; that the plaintiff relying upon the truth of such representations and upon the guarantees and warranties aforesaid purchased from the defen-

dants a vault door No. 67 and paid them \$250 therefor; that the said vault door was not fit for the purposes for which it was intended and was not burglar proof and did not furnish burglar proof protection; nor was the outer door thereof $1\frac{1}{8}$ inches thick, nor was the entire surface protected with hardened drill proof plate nor with a lining of chilled steel; that by reason of the misrepresentations and breaches of warranty aforesaid, burglars were able to open such vault door on 11th November, 1902, and destroyed the said vault door and destroyed property in such vault to the value of \$200 and took therefrom money and valuables to the extent of \$1,800, and the plaintiff claims \$250 for the said vault door, \$200 for the property so destroyed in his vault and \$1,800 for the money and valuables taken away.

The defendants in their defence deny making any misrepresentations, and deny that they entered into the warranties alleged; they allege that the vault door purchased by the plaintiff was known in the trade and to the plaintiff and the public as the fire and burglar proof description of door and a statement to a purchaser that such door was burglar proof would be understood to mean that it combined certain structural features used in the description of door described as burglar proof; that there were many varieties of such doors, ranging in price from \$250 to many thousands of dollars, as the plaintiff well knew, and that the plaintiff chose the cheapest of them knowing that he must expect to receive a much less degree of protection against burglars than the purchaser of the most expensive would receive.

The plaintiff wrote the defendants on 27th August, 1902, upon notepaper headed "R. E. Denison, Banker," "Can you give me a rough estimate of what a burglar proof door with proper frame complete will cost?" The defendants replied on 28th August, 1902, "We can build you a burglar proof door of any size and description you wish. The cheapest door we now make is \$250. * * * The door we have reference to is our No. 67, the outer door being $1\frac{1}{8}$ inches thick, the entire surface protected with hardened drill proof plate. * * * Next better quality of door to this is one $1\frac{1}{2}$ inches thick at \$400 and the

next \$550." In this letter they enclosed cuts from their sample book of three vault doors called Nos. 67, 68 and 69; the two latter were "Fire and Burglar Proof Vault Doors." No. 67 was called "Fire Proof Vault Door with chilled steel lining," and the printed note below the cut read as follows: "The above cut represents our vault door suitable for Postoffices, Court Houses, Insurance Offices, etc., and are made with a lining of chilled steel covering the entire surface of outer door."

The plaintiff replied to this: "Would No. 67 furnish a fair protection against burglars? Kindly answer this before Tuesday." The defendants replied on September 2, 1902, by telegram, "Letter just received. Number 67 door gives both fire and burglar proof protection." On 11th September the plaintiff wrote to the defendants, "Please forward by first boat vault door No. 67 referred to in our recent correspondence and draw on me for amount," and on the same day the defendants wrote to the plaintiff accepting his order. On 11th November, 1902, the plaintiff wrote the defendants that the door had been blown open by burglars and that from the ease with which the lock was forced he thought the door was defective and that he would look to them for his loss. From the evidence I should come to the conclusion that the handle to the spindle by which the lock is turned had been knocked off and dynamite had been introduced between the spindle and the door plates; the explosion of the dynamite then stripped the nuts which held the door plates together, and gave easy entrance to further explosives by which the door was wrecked. It appears from the evidence that less than half an hour's work by an expert would accomplish this result. The door having been taken to pieces during the progress of the trial it was found that the centre layer of the three layers making up the door, which was supposed and represented to be hardened drill proof plate, was neither hardened nor drill proof, and was easily perforated by an ordinary hand drill in a minute and a half.

I am asked by the plaintiff's counsel to construe the correspondence between the parties as containing an absolute

warranty on the part of the defendants that the door furnished by them to the plaintiff was proof against the efforts of burglars without qualification as to time or place. This, as has been pointed out in the cases, would in fact amount to a contract by the defendants insuring for years, if not for all time, the contents of the vault, whatever they might be, against burglars; *Walker v. Milner*, 4 F. & F. 745; *Herring v. Skaggs*, 62 Ala. 180; *Samborn v. Herring*, 6 Am. Law. Reg. N.S. 457.

Such a contract might of course be made, but the responsibility incurred under it would be so great, that the intention of the parties to make it ought clearly to appear.

I think the circumstances here negative an intention on the part of the defendants to give a warranty so far reaching; and it is apparent, I think, that the plaintiff did not expect to ask for one. The wood-cuts taken from the defendants' catalogue which they sent him before the contract was made showed several doors of which he chose the cheapest. The more expensive ones—those he rejected—were called "Fire and Burglar Proof Vault Doors"; the one he chose was called only "Fire Proof Vault Door." He cannot reasonably be supposed to have expected the same security against burglars from a cheap door which the makers only called "Fire Proof" as from an expensive one which they called Burglar Proof as well as Fire Proof. His view at the time was expressed by the terms of the letter he wrote them asking whether the door in question would furnish "a fair protection against burglars." The defendants' reply to this letter was a telegram that the door in question "Gives both fire and burglar proof protection." It would be straining the language of this reply to construe it into a warranty that no fire however hot and however long continued could destroy the doors, and that no burglar however skilful could with sufficient time at his disposal break through them, and I must therefore I think determine that no absolute warranty or insurance of this kind was given. If no absolute warranty was given, then I think the warranty which was given is that which would have been created by an answer simply in the affirmative to the plaintiff's question

whether the door in question would furnish "a fair protection against burglars." The defendants therefore I think did warrant in this part of the correspondence that the door in question would furnish a fair, that is to say, a reasonable protection against burglars; and in a former part of the correspondence that the entire surface of the door was protected by hardened drill proof plate which was composed of chilled steel. The warranty that the door would furnish a reasonable protection against burglars means, I think, that so far as the thickness of the plates used would admit, the securities against burglary were as complete as the experience of safe makers could make them. The more expensive doors had thicker plates, which enabled the manufacturers to make closer fitting spindles, and so offered or were supposed to offer, greater protection against burglars than than the door selected by the plaintiff.

In my opinion all the warranties I have referred to as having been given were broken. Through the negligence of the defendants' workmen, and not by any wilful act of the defendants, the door which they sold to the plaintiff was, as it now appears, lacking in the simplest and first requisite which should be found in a door intended to resist burglars, that is to say, a chilled steel or drill proof lining. The lining which was intended to be drill proof was there, but it had not been chilled and could therefore be easily drilled in any part by an ordinary hand drill. This defect however was not taken advantage of by the burglars who robbed the plaintiff. They appear to have proceeded upon the assumption that the door was drill proof and they adopted other means of introducing their explosive than by attempting to drill the door. I should find upon the evidence before me that even had this door been as complete as doors of the same thickness could be made, so far as the experience of safe makers extended at the time it was sold, it would not have resisted the attack of the burglars who broke it open, taking into consideration the favourable circumstances under which they worked, and the means at their command. The warranties given however have been broken as I have pointed out, and the question is as to the

amount of damages recoverable. I find that the loss of the money contained in the vault was not a natural consequence of the defects in the vault door, because the presence of those defects was not the reason why the burglars were enabled to break it open, and the result would not have been different had the defects been absent.

The ordinary rule as to damages where an article supplied with a warranty that it is of a particular character or fit for a particular purpose proves to be of a different character or unfit for the purpose for which it is supplied, is that the purchaser is entitled to the difference in value between the article supplied and one which would have complied with the warranty. That rule is easily applied where the article actually supplied and that which should have been supplied have each some commercial value. In the present case it is difficult to apply it; the plaintiff needed a door which should afford reasonable protection against burglars and the defendants supplied a door which they warranted would give that protection. Being applied to the purpose for which it was intended it was found not to comply with the warranty and was rendered practically valueless. The defect was a concealed one and under ordinary circumstances was only discoverable by a test which would destroy it. The defendant, Thomas West, in his evidence says that the door would not be called burglar proof without the chilled steel plate, which this door was warranted to contain and did not contain. The plaintiff therefore did not get that which he paid for and which the defendants warranted he should get; what they gave him in its place has become useless and valueless while being put to the use for which it was intended. It is not therefore the case of a partial loss, as it would have been had it been a mere case of a difference in commercial value, but that of a total loss like that of the broken carriage pole in *Randall v. Newson*, 2 Q.B.D. 102.

The plaintiff is entitled in my opinion therefore to recover as damages the price, \$250, which he paid to the defendants for the door in question and the costs of the action.

Notes:

WARRANTY AS DISTINGUISHED FROM INSURANCE.

Such a warranty as was set up in the case above—an absolute warranty of perfect security—must necessarily be express and it may well be a question whether, even if actually given, it would be legal and valid. The ordinary meaning of warranty is certainly as to some present, latent incident of the article sold; as for instance, of copper sheathing for a barge that *it is* sound or reasonably fit for its purposes, though there may be, perhaps, a specific warranty that it shall last for a specific time, at the ordinary wear and tear: *Jones v. Bright* (1829), 5 Bing. 533.

A warranty is a representation made part of the contract. This implies that it is a representation of some certain and existing—past or present—matter affect, known or capable of being known: *Potter v. Burnham*, 4 A. & E. 473; *Powell v. Horton*, 2 B.N.C. 668. Again, a warranty that is absolute is a warranty of something which a man *can* undertake, but he *cannot* as to something future, unless it is necessarily the consequences of something present and containing in the nature of the article. All cases of warranty appear to apply to some present certain property, or quality, or condition of the article: *Brown v. Elkington* (1841), 8 M. & W. 132; the only difference between a representation and a warranty being that a mere representation is not part of the contract and a warranty is a representation which is so: *Hopkins v. Elkington* (1854), 15 C.B. 130. It would seem that a warranty is something which, if not part of the contract, would render the seller liable, if it were wilfully false; that is, that it must be something which *could* be wilfully false, and *could* be reasonably understood to be a matter of absolute undertaking. But a statement that an article would last a hundred years or that it would resist all future and indefinite violence could not be understood by anyone as being wilfully untrue or as being an absolute undertaking. That would be to turn warranty into insurance. On the other hand, so far as anything is a matter of absolute certainty, it may be a subject of warranty, as for instance, that a steel beam will resist a certain pressure: for that is a matter of mechanical science. But, again, it would be a warranty only that the steel beam *now*, or within a reasonable time, having regard to the life of such a beam, and with ordinary wear or tear would bear such a pressure. There would be an absurdity

in a warranty that it would resist all future efforts of scientific or mechanical ingenuity to test, weaken or destroy it.

In *Walker v. Milner* (1866), 4 F. & F. 745, a jeweller brought action against a firm of safe makers for the breach of an alleged warranty that the safe sold to him was strong enough to resist all attempts that might thereafter be made to force it open. It was broken open more than six years after the sale and there was evidence that it was broken open easily. But it was held that the warranty as set up at the trial—an absolute warranty of perfect safety for all time to come—was so extensive, even if it would be valid, as was doubted, that it was not sustainable by proof of mere representations that the safe would be strong enough to resist burglars.

If a manufacturer sells a safe with an *express* warranty that it is burglar proof or upon representations to that effect fraudulently made with intent that they should form part of the contract the purchaser can recover the value of the money and goods lost: *Sanborn v. Herring* (1866), 6 Am. Law Reg. N.S. 457. In the notes to this case it was said that an undertaking against all possible force and skill of all future burglars is like a contract of insurance and such a warranty could not be created by general words of warranty. And *Herring v. Skaggs* (1878), 62 Ala. 180 laid down that in the absence of fraud or bad faith, the proper measure of damages in a suit by a purchaser of a safe against the maker who warranted it burglar proof was the difference between the value of the safe as it was and what would have been its value if it had been as represented, and not the consequential damage sustained in the loss of valuables, money, etc.

See also the able notes following the reports of the *Walker v. Milner* and *Sanborn v. Herring* cases.

[IN THE COURT OF APPEAL FOR ONTARIO.]

DILLON V. THE MUTUAL RESERVE FUND LIFE ASSOCIATION.

Life Insurance—Application—Misrepresentation as to Age and Health—Effect of—Evidence—Onus—Bonâ fides.

Where in an application for insurance it was erroneously stated that the applicant was forty-one years of age when he was really forty-four. Held that, evidence was admissible to show that the statement was made in good faith and without intention to deceive. *Cerri v. Ancient Order of Foresters* (1897), 28 O.R. 111; 25 O.R. 22-23, and *Hargrave v. Royal Templars of Temperance* (1901), 2 O.L.R. 126 followed. Where a statement as to age is found to be material and untrue, it lies upon the person seeking to uphold the contract to make proof that the statement was made *bonâ fide* and without intention to deceive. A new trial ordered to allow plaintiff to bring in evidence of good faith.

THIS was an appeal by the defendants from the judgment of Britton, J., at the trial of this action, which was brought by Elizabeth Dillon, widow of the late John Dillon, on a policy of insurance on his life taken out in the Provincial Provident Institution, the liabilities of which company were assumed by the defendants. The defence to the action was fraud, concealment and misrepresentation in the application for insurance—(a) in respect of the applicant's health; (b) in respect of his age.

The case was tried at Owen Sound on February 25th and 26th, 1902, before Britton, J., and a jury.

Certain questions were submitted to the jury, who gave a verdict in favour of the plaintiff on all questions except as to the age of the insured, which they found had been wrongly stated, but not with intention to deceive. On this verdict Britton, J., entered judgment for the plaintiff, less the amount of difference in premium as provided by R.S.O. 1897, ch. 203, sec. 149.*

* R.S.O. 1897, ch. 203, sec. 149 (1)—Where the age of a person is material to any contract, and such age is given erroneously in any statement or warranty made for the purposes of the contract, such contract shall not be avoided by reason only of the age being other than as stated or warranted, if it appears that such statement or warranty was made in good faith and with-

The appeal was argued on November 28th, 1902, before MOSS, C.J.O., and GARROW and MACLAREN, JJ.A.

E. D. Armour, K.C., and *R. B. Henderson*, for the appellants.

I. B. Lucas and *W. H. Wright*, for the respondents.

In the arguments, the following references were made: *Jackson v. Grand Trunk R.W. Co.* (1901), 2 O.L.R. 689, 32 S.C.R. 245; *Thomson v. Weems* (1884), 9 App. Cas. 671; *Jordan v. Provincial Provident Institution* (1898), 28 S.C.R. 554; *Connecticut Mutual Life Ins. Co. of Hartford v. Moore* (1881), 6 App. Cas. 644; *Confederation Life Association v. Miller* (1887), 14 S. C. R. 330; *Hayes v. Union Mutual Life Assurance Co.* (1879), 44 U. C. R. 360; *Cerri v. Ancient Order of Foresters* (1898), 25 A. R. 22; *Dolan v. Mutual Reserve Fund Life Association* (1899), 173 Mass. 197; *Home Mutual Life Association of Pennsylvania v. Gillespie* (1885), 110 Penn. 84, 89; and *Corbett v. Metropolitan Life Ins. Co.* (1899). 89 N.Y. St. Rep. 775. R.S.O. 1897, ch. 203, secs. 144, 149.

January 26, 1903. The judgment of the Court was delivered by MOSS, C.J.O.:—The main defences to this action were that in his application, made on January 27th, 1891, the insured John Dillon untruly stated that he was born on August 24th, 1850, and was then forty-one years of age, the fact being that he was nearly forty-four; and, further, that in the same application, he untruly stated that he had not at the date of the application, and never had, the disease of abscess or of open sore, the contrary being the fact.

At the trial the defendants proved beyond reasonable doubt that the insured was in fact nearly forty-four years of age at the date of the application, instead of forty-one as therein stated.

out any intention to deceive, but the person entitled to recover on such contract shall not be entitled to recover more than an amount which bears the same ratio to the sum that such person would otherwise be entitled to recover as the premium proper to the stated age of such person bears to the premium proper to the actual age of such person, the said stated age and the actual age being both taken as at the date of the contract . . .

Counsel for the plaintiff was proceeding to elicit evidence from James Clark, a witness called for the defendants, as to statements made by the insured many years before the application, tending to shew his belief that he was born in 1850, but objection was taken by counsel for the defendants, and the learned trial Judge having indicated his view as in favour of the objection, the witness was not allowed to answer fully.

We think that the evidence sought to be elicited was admissible for the purpose of shewing that the statement regarding his age made by the insured in the application was made in good faith and without intention to deceive, and that the witness ought to have been allowed to answer fully. There seems to us to be no valid objection to the admissibility of such evidence on the question of good faith, and the jury should have been allowed to hear all that the witness could say: *Fellowes v. Williamson* (1829), M. & M. 306; *Vacher v. Cocks* (1829), M. & M. 353; *Cerri v. Ancient Order of Foresters*, 28 O.R. 111, and in appeal, 25 A.R. 22-23; *Hargrove v. Royal Templars of Temperance* (1901), 2 O.L.R. 126.

At the conclusion of the evidence the learned trial Judge put certain questions to the jury, and amongst them the following, bearing on the question of age:—

1. Was the statement by the deceased that he was born on the 24th of August, 1850, untrue?
2. If not true, is that statement material except as to fixing the amount of premium?
3. Was any untrue statement made by the deceased John Dillon material to the contract of insurance, and if so, what statement?

And, after considerable discussion, he added the following:

8. If you find that the deceased misstated his age, did he do so in good faith, believing it to be true, and without any intention to deceive the company?

Counsel for the defendants objected that there was no evidence on which the jury could find good faith and want of

intention to deceive, but the learned Judge submitted the question, observing that the objection would still be open to the defendants.

The answers of the jury to these questions were as follows:

To the first—"Yes."

To the second—"No."

To the third—"That respecting his age."

To the eighth—"Yes."

Questions were also put on the second branch of the defence, and upon the answers to them and the answers above set forth, judgment was entered for the plaintiff.

Upon the appeal the defendants contended that the jury having by their answers to the second and eighth questions found that the statement made by the insured as to his age was material, and there being no evidence to support the finding of good faith and want of intention to deceive, judgment should have been entered for the defendants. Plaintiff's counsel took the position that under the pleadings, and in view of section 149 of the Insurance Act, R.S.O. 1897, ch. 203, the onus was on the defendants to shew want of good faith and an intention to deceive. But we do not think the language of the section warrants this contention. We think that where the statement as to the age is found to be material and untrue, an avoidance of the contract follows, unless that result is prevented by its being made to appear that the statement was made in good faith and without intention to deceive. And it must lie upon the person seeking to uphold the contract to make proof of it.

The jury found that the statement was material and untrue, and on those findings the defendants were entitled to judgment in their favour if the jury could not properly find that the statement was made in good faith and without intention to deceive.

But the plaintiff was interfered with and prevented from eliciting evidence on the point. And we think there should be a new trial to afford the plaintiff an opportunity of adducing evidence on the point.

As there is to be a new trial, we do not enter upon a discussion of the other branch of the case further than to say that we think it would have been more satisfactory if, in addition to or in lieu of some of the questions put to the jury, other questions framed in such manner as to obtain direct findings on the point of whether or not the statements made by the insured that neither at the date of the application nor previously thereto had he the disease of abscess or open sore, were untrue, and if so, whether such statements were material had been submitted to the jury. The question in the application is not whether the insured ever had an abscess or an open sore, but "Have you now (*i.e.*, at the date of the application) or have you ever had any of the following diseases or complaints?" And amongst others enumerated are "abscess" and "open sore."

And the opinion of the jury might very properly be taken upon the point of whether the existence of an abscess or open sore in earlier years was something material to be stated by the insured in answer to the interrogatories: *Connecticut Mutual Life Ins. Co. of Hartford v. Moore*, 41 U.C.R. 497, 3 A.R. 230, 6 App. Cas. 644.

We may say further that we think the question of materiality was properly left to the jury.

There will be a new trial; the costs of the former trial and of the appeal to be costs in the action.

[IN THE HIGH COURT OF JUSTICE FOR ONTARIO.]

[BOYD, C.]

GRIFFITH V. HOWES.

Life Insurance — Benevolent Society — Certificate — Effect of Will on Insurance Money — “Legal Heirs designated by Will” — Election — R.S.O. (1887), ch. 136, secs. 5, 6, 7 and 10.

Where a testatrix, who had obtained a certificate of insurance in a benevolent society and had declared “her legal heirs as designated by her will” to be the beneficiaries thereunder, devised the life insurance money to pay certain debts.

Held, this disposition was inoperative as being repugnant to the statute under which the insurance arose: R.S.O. 1887, ch. 136, secs. 5 and 10, and that the insurance moneys should go to the “legal heirs” designated in the will.

Held, also, that the children of the testatrix were not bound to elect between the benefits specifically devised to them and the insurance money as the direction was nugatory and the will should be read as if the invalid clauses were expunged.

Hearle v. Greenbank (1749), 1 Ves. Sr. at p. 307, followed.

THIS was an action brought by the three infant children of Sarah Elizabeth Lowery, deceased, by their next friend, John Lowery, against the executors of the will of the said Sarah Elizabeth Lowery, for the construction of that will and for the determination of certain questions arising in the administration of her estate. The only question of general interest was as to the effect of the will upon insurance money payable under a benefit certificate issued in favour of the testatrix.

The testatrix on the 11th of November, 1889, being then the wife of one John A. Griffith and the mother of two children, Elizabeth Maud Griffith and John Arthur Griffith, obtained a certificate of membership in the Canadian Order of Chosen Friends, which certified that she was entitled to a benefit of not exceeding \$1000, payable after her death to her children, Elizabeth Maud Griffith and John Arthur Griffith. Her husband, John A. Griffith, having died, the testatrix married John Lowery, and on the 25th of October, 1892, being then the mother of another child, Lena May Lowery, she surrendered the certificate of the 11th of November, 1889, and

obtained a new certificate in the same terms, except that the benefit was declared to be payable to her "legal heirs as designated by her will." The testatrix died on the 14th of November, 1892, leaving the three children and her husband her surviving, and having made the will in question in this action, dated the 30th of September, 1892, with a codicil dated the 10th of October, 1892. By the will she directed payment of all her debts; gave to each of her three children by name specific properties and legacies; gave to her executors certain lots in the village of Parham and village of Sydenham in trust to sell them, and to apply the proceeds of sale as far as necessary for the purpose of paying off a mortgage made by her to one Warner; to pay \$300 of the proceeds to her daughter Lena; and to pay the balance to the three children. The will then continued: "My life insurance in the 'Chosen Friends' I give and bequeath to my executors for the purpose of paying thereout all debts due by me at my decease, including the mortgage made by me to one Warner." After some specific bequests to her husband, the testatrix left all the rest and residue of her estate to her brother "to be distributed by him to all or such of my children as he shall think proper;" adding, "And after all debts are paid the money remaining to be placed in the bank to the credit of my children." After the death of the testatrix the Order of Chosen Friends paid the money into Court, where it was when this action was brought.

The action was tried on the 2nd of April, 1903, at Kingston, before BOYD, C.

G. M. Macdonnell, K.C., for the plaintiffs.

W. H. Sullivan, for the defendants.

April 4. BOYD, C.:—The disposition by the will of the money is repugnant to the statute under which the insurance arises, by which it is declared that so long as any object of the trust remains, the money payable under the policy shall not be subject to the control of the creditors, or form part of the

estate of the deceased: R.S.O. 1887, ch. 136, sec. 5, and by sec. 10 it is to be paid so as to be "free from the claims of any creditors." This woman's legal heirs were the three children of her body. She had designated them by name in the first certificate, and under the statute they would have taken equally: ch. 136, sec. 7 (1). It was competent on the birth of the last child for her to vary or alter the statutory appointment by extending the benefits of the insurance to the third child, which would be the statutory result if the three had been simply named as beneficiaries: sec. 6. That is, I think, the legal result in this case. The disposal of the money by the will is inoperative, and the last certificate alone speaks, by which it goes to her legal heirs, and the three children answering that description are named and referred to in what I take to be a sufficient "designation" to carry out the wishes of the deceased as expressed in the certificate. In the Oxford Dictionary "designate" is defined as "to point out," "to point out by name or descriptive appellation." Here the will refers to "my son John Arthur Griffith," "my daughter Lizzie Mand," "my daughter Lena," and "my three children." I declare, therefore, that the insurance money and its accretions in Court go equally among these three children as "legal heirs designated" in the will pursuant to the certificate: *Moffet v. Catherwood* (1833), Alc. & Nap. 472; *Mearns v. Ancient Order of United Workmen* (1892), 22 O.R. 34.

It is argued that a case of election arises in respect of the clause in the will disposing of the insurance money to pay debts, by which the children must choose between the insurance money (given away from them by the will) and the other benefits validly given to them by the will. But I incline to think that the will does not present a case of election, though the claim to the insurance money under the certificate may be contradictory of the direction to pay debts therewith. See *Huggins v. Alexander* (1741), unreported, cited in *East v. Cook* (1750), 2 Ves. Sr. 30. The question arises only in respect of the

mortgage debt due on the farm, but by the terms of the will the payment of that debt is primarily charged on the Parham and Sydenham lots. These were sold, and the proceeds applied as directed by the will, but a balance of \$347 was still left on the mortgage, which was paid by the executor, George Howes, out of his own money. Justice will be done by letting that stand as a charge on the farm in his favour, collectable when the two Griffith children attain 21. This will be without interest, as he is tenant and owner of the farm till that time. But on the general point as to election, though the cases are in conflict, I think the rule laid down by Pearson, J., in *In re Warren's Trusts* (1884), 26 Ch. D. 208, and followed by the Court of Appeal in Ireland in *In re Handcock's Trusts* (1889) 23 L.R. Ir. 34, is applicable. He says: "The ordinary case of election is when a testator attempts to give by his will property which belongs to some one else. Such a gift is not *ex facie* void." But when the gift is *ex facie* void it is the law which disappoints, and the attempted disposition is one forbidden by law. Here the statute controls and limits the destination of the insurance money, and the testatrix must be taken to know the law that her direction was nugatory, and the will is to be read as if the invalid clause were expunged: see *Hearle v. Greenbank* (1749), 1 Ves. Sr. 298, at p. 307.

[The learned Chancellor then dealt with some further questions not necessary to be reported, and continued:]

The costs, so far as the insurance money is concerned, of both parties to come out of that fund. As to the rest of the litigation let each party stand his own costs.

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[IN THE COURT OF APPEAL FOR ONTARIO.]

RITCHIE v. VERMILLION MINING COMPANY.

Company—Mining—Directors—Majority—Power to sell whole property—Irregularity—Rights of minority—Shareholders—Shares held in Trust.

A mining company incorporated under the Ontario Companies Act, R.S.O. 1897, ch. 191, and the Ontario Mining Companies Act, R.S.O. ch. 197, may sell all the land owned by the company, provided the sale is made in good faith, and with the consent of the majority of the shareholders, and, even though irregularities in the proceedings occur and improper motives govern the majority, the sale cannot be attacked by a dissenting minority of the shareholders.

But a sale proposed to be made at a time of the year when inspection of the property is impracticable or impossible, or when the property is not in fit condition for inspection by intending purchasers may be restrained by injunction.

THIS was an appeal from the judgment of STREET, J., reported below, in an action brought to restrain a sale by the defendant company of their mining lands. The facts appear in the judgment of STREET, J., which follows:—

April 19, 1901. STREET, J.:—The defendants, the Vermillion Mining Co., were incorporated on February 21st, 1888, under the provisions of the Act respecting the incorporation of joint stock companies then in force in this Province, being R.S.O. 1887, ch. 156, for the carrying on of mining operations and all other work in connection therewith in the district of Algoma. They acquired at the time of their incorporation a large tract of land in the townships of Denison and Graham in the district of Algoma, in payment for which partly paid-up shares of the company were issued. The capital of the company authorized by the letters patent was \$240,000, divided into 2,400 shares of \$100 each. There is an unpaid balance of some \$36 or \$37 upon each share, and all the shares have been issued subject to this liability. Of these shares, thirteen are held by the plaintiffs, five are not represented in this litigation, and the other 2,382 are held by the defendants other than the defendant company. The assets of the company consist of some

\$6,000 or \$8,000 in cash, the lands acquired at the formation of the company as above mentioned, and the uncalled capital on the shares, which amounts to about \$88,000. The individual defendants are the acting directors of the company, and they have decided to sell the land. They have advertised for the past five months an auction sale of it to be held in Toronto on May 13th, 1901, and this action is brought to restrain the sale. The defendants, the individuals, say that they have long since come to the conclusion that the assets of the company, even if the unpaid capital were called up, are utterly insufficient to enable them to open up and develop the property; that to do so would require from \$400,000 to \$500,000; that drillings made upon the property do not warrant the belief that there is any body of ore upon it justifying the large preliminary expenses, although the surface shewing is extremely rich, and that they have exercised their best judgment in refusing to proceed with the working and development of the lots. It further appears that the Government of the Province has threatened the forfeiture of the charter of the company by reason of work not having been proceeded with, and that the necessity for a sale of the lands in question has therefore become urgent.

The plaintiffs shew that the defendants are all shareholders in a company carrying on mining operations some twenty miles from the lands of the Vermillion Co., called the Canada Copper Company, and that the shares in the Vermillion Co., held by the defendants, have been purchased with the funds of the Canada Copper Co., and have been distributed *pro rata* amongst the shareholders of that company since this action was brought, having been theretofore held in trust for them by one of the defendants, except four or five shares which the other defendants have held in their individual names. And it is urged by the plaintiffs that the sale is being had in the interest of the shareholders in the Canada Copper Co. rather than in that of the Vermillion Co.

The position appears to be this: the Vermillion Co. has not

assets of its own sufficient to enable it to develop its property; more than ninety-nine per cent. of its shareholders are opposed to making any effort to develop it, and are unwilling to pay up their shares in order to provide funds for the purpose. Moreover, owing to the threatened action of the Government, it has become necessary to act at once, and the majority shareholders wish to sell the property.

Under these circumstances the only question appears to me to be whether there is any power to make the sale. It is objected that the sale being of the whole property of the company, apart from its cash and uncalled capital, a sale is beyond the power of the directors or of the majority of the shareholders, and can be prevented by the objection of even a single shareholder.

I am of opinion that this is not the case, and that the directors have a discretionary power to sell this property as a part of their duty and authority to manage the affairs of the company after honestly coming to the conclusion that a sale is in the interest of the company.

The company has power to sell lands acquired for the purposes of the company under sub-sec. (g) of sec. 25 of the present Act, R.S.O. 1897, ch. 191, and under sec. 46 the directors have power to administer in all things the affairs of the company. The directors have decided to sell the property in question, and their action has been confirmed by a special meeting of the company at which fully ninety-nine per cent. of the shares were represented, and only two votes were recorded against the sale. The distinction between a sale of the property of the company such as is here proposed and a sale of the whole of its business is pointed out at page 207 of Lindley on The Law of Companies, and *Wilson v. Miers*, 10 C.B.N.S. 348, which seems to me very much in point here, is referred to as an instance where such a sale has been held to be within the powers of directors whose powers were no greater than those of the directors of the defendant company here.

It is urged, however, that the directors have not been regu-

larly appointed, that their meetings have not been regularly called, and that the meetings of the shareholders have not been properly called or regularly held. I think the answer to that is that these are all matters of internal regulation and management. If there were any doubt here as to whether the majority of the company were really in favour of a sale of the property, if there were the slightest reason for believing that the irregularities complained of had at all affected the policy of the company, and that if a new board were to be elected or a new meeting of shareholders called a different result would be arrived at, it might be proper to try the experiment. But here there is no doubt whatever that the plaintiffs are in an utterly hopeless position so far as their influence is concerned, and so it would only lead to further delay and expense to try it.

Where the question is one of mere irregularity in the conduct of the affairs of the company, and where there is undoubted power in the company to do what is proposed to be done, there (in the absence of fraud, which does not here exist) the company is the proper plaintiff to complain of the irregularities and not individual shareholders; and the practical result of this rule is that unless the persons complaining can shew themselves to have a majority of the votes of the company, their complaints receive no attention from the Courts, for a minority are not entitled to use the company's name in litigation: *Macdougall v. Gardiner* (1875), 1 Ch.D. 13; *Purdum v. Ontario Loan and Debenture Co.*, 22 O.R. 597.

The action must therefore be dismissed with costs.

The appeal was held before ARMOUR, C.J.O., OSLER, McLENNAN, MOSS and LISTER, J.J.A., on the 8th, 9th and 10th of May, 1901.

Aylesworth, K.C., and *N. F. Davidson*, for the appellants.

Wallace Nesbitt, K.C., *Riddell*, K.C., and *McKay*, for the respondents.

The following references were made in the arguments:—*Brice on Ultra Vires*, 3rd ed., pp. 47, 110, 113; *Lindley on*

Companies, 5th ed., p. 579; Palmer's Company Law, p. 44; *Bird v. Bird's Patent Deodorizing Co.* (1874), L.R. 9 Ch. 358; *Simpson v. Westminster Palace Hotel Co.* (1860), 8 H.L.C. 712; *In re Sovereign Life Ass. Co.* (1889), 42 Ch.D. 540; *Wilson v. Miers* (1861), 10 C.B.N.S. 348; *Whiting v. Hovey* (1886), 13 A.R. 7, and 14 S.C.R. 515; *Cotton v. Imperial, etc., Investment Co.*, [1892] 3 Ch. 454; *Lord v. Copper Miners' Co.* (1848), 18 L.J. Ch. 65; *Browne v. La Trinidad* (1887), 37 Ch.D. 1; *Purdom v. Ontario, etc., Co.* (1892), 22 O.R. 597; *Allen v. Ontario and Rainy River Ry. Co.* (1898), 29 O.R. 510.

September, 19, 1902. MACLENNAN, J.A.:—The first question in this appeal is whether the company had power to make the sale sought to be restrained. The company was incorporated under the Ontario Joint Stock Companies Act, R.S.O. 1887, ch. 157, by letters patent dated the 21st of February, 1888. The purposes of the company are declared to be the carrying on of mining operations, and all other work in connection therewith, in the District of Algoma. The patent recites that fifty per cent. of the capital already subscribed, namely, \$206,000, had been paid in by the transfer of property, and provides for forfeiture, at the option of the Government, of lands held by the company, or any trustee on its behalf, longer than seven years, without being disposed of. The land so liable to forfeiture is defined to be land at any time acquired by the company, and not required for its actual use and occupation, or not held by way of security, or not situate within the limits, or within one mile of the limits, of any city or town in the said Province. Besides R.S.O. 1887, ch. 157, the company was subject to the provisions of the Companies' Clauses Act, R.S.O. 1887, ch. 156, as enacted by sec. 4 of that Act. The provisions of these two Acts were recast, and, since 1897, the company is regulated by the Ontario Companies Act, R.S.O. 1897, ch. 191, by sec. 5 whereof the provisions of secs. 17 to 105 inclusive are made applicable to this company. The company is also subject to the Ontario Mining Companies' Incorporation Act, R.S.O.

1897, ch. 197, by sec. 2 of which all mining companies, whether theretofore or thereafter incorporated under any general Act, were made subject thereto.

By sec 25 (g) of ch. 191, the company had power to acquire any real estate necessary for the carrying on of its undertaking, and to hold, use, sell, alienate and convey the same. The section which confers this power is followed by a proviso for forfeiture of the company's lands if held for a longer period than seven years, in the same terms as the proviso in the company's charter. I cannot help thinking that the provision for the forfeiture of land not situate within the limits, or within one mile of the limits, of any city or town in the Province, is a mistake, both of the Government in preparing this charter and of the Legislature in passing the Act. It is not suggested that this land is within the limits, or within one mile of the limits, of any city or town, nor in general are mining lands likely to be situate within such limits or distance. No point, however, was made of this upon the argument, and the proceedings for forfeiture taken by the Government were taken under another clause of the charter, which authorizes a forfeiture thereof by the Government for non-user during three consecutive years, or if the company should not go into actual operation within three years.

The Mining Companies' Act also contains a section enabling such companies to acquire land. By sec. 4 of that Act a mining company shall, if the letters patent permit, have power for its mining, milling, reduction, and development operations only: "(b) To acquire by purchase . . . mines, mining lands . . . or any interest therein . . . and to lease, mortgage, sell, dispose of, and otherwise deal with the same or any part thereof, or any interest therein."

The Companies' Act restricts the power of a company to acquire lands to what is necessary for the carrying on of its undertaking; and the Mining Act confines it to what is necessary for the company's mining, milling, reduction, and de-

velopment operations. And in neither case is there any express qualification of the power of alienation.

I am unable to see that any restriction upon the express power of alienation can be implied. The company is not limited to the purchase for their purposes of any particular parcel or parcels of land, except perhaps they are confined to the District of Algoma. They might buy land for a mine and find it unsuitable, or not so suitable as other land; why should they not have the same liberty as a private person to act from time to time, as they deem to be for their interest, and to sell and buy as their interest seemed to require? It is said that the sale of this land is a sale of the company's business, and so is *ultra vires*. I do not think so. There is nothing to prevent the business being continued by the purchase of other mines or mining lands afterwards; and it is for the company to determine what shall be done afterwards. *Wilson v. Miers*, 10 C.B.N.S. 348, cited in the judgment, appears to me to be a distinct and satisfactory authority on this point, and a case which I have not found doubted anywhere. I also refer to *Whiting v. Hovey*, 13 A.R. 7, 14 S.C.R. 515.

The next ground taken by the appellants is that a sale would be injurious to the plaintiffs. The answer to that is that the affairs of a company must be managed according to the judgment of the majority of shares, by which the directors, the executive body, are elected; and so long as what is done is legal, it cannot be prevented or undone merely because it may be disadvantageous to a minority of the members. It is said that the defendants, who control 2,382 shares out of a total number of 2,400, are selling this property not so much in the interest of the defendant company as in the interest of the Canada Copper Company, another mining company operating in the neighbourhood of the defendant company's lands, in which they are large shareholders; and not only so, but that their action is or will be ruinous to the defendant company. That may even be so, and yet if the company has the legal power to make this sale, as I think it has, the plaintiffs are

without remedy. In *Pender v. Lushington* (1877), 6 Ch.D. 70, at p. 75, Jessel, M.R., said: "In all cases of this kind, where men exercise their rights of property, they exercise their rights from some motive, adequate or inadequate; and I have always considered the law to be that those who have the rights of property are entitled to exercise them whatever their motives may be for such exercise." And further on he says: "I am confirmed in that view by the case of *Menier v. Hooper's Telegraph Works* (1874), L.R. 9 Ch. 350, 354, where Lord Justice Mellish observes: 'I am of opinion that although it may be quite true that the shareholders of a company may vote as they please, and for the purpose of their own interests, yet that the majority of shareholders cannot sell the assets of the company and keep the consideration.' In other words, he admits that a man may be actuated in giving his vote by interests entirely adverse to the interests of the company as a whole. He may think it more for his particular interest that certain course may be taken, which may be in the opinion of others very adverse to the interests of the company as a whole, but he cannot be restrained from giving his vote in what way he pleases, because he is influenced by that motive. There is, if I may say so, no obligation on a shareholder of a company to give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right if he thinks fit to give his vote from motives or promptings of what he considers his own interest." The Master of the Rolls adds: "This being so, the arguments which have been addressed to me, as to whether or not the object for which the votes were given would bring about the ruin of the company, or whether or not the motive was an improper one which induced these gentlemen to give their votes, or whether or not their conduct shews a want of appreciation of the principles on which the company was founded, appear to me to be wholly irrelevant." I refer also to *North West Transportation Co. v. Beatty* (1887), 12 App. Cas. 589.

The plaintiffs' grievance is that the defendants, other than

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the company, are all shareholders in a rival company, and have acquired all the shares of the defendant company except eighteen for the express purpose of preventing the defendant company from opening up its mines and carrying on its business. I think there is very strong evidence that such was the motive of the defendants in acquiring the stock. That seems to have been done as long ago as 1890, and although a good deal had previously been done by the former shareholders in developing the property by sinking shafts and extracting ores nothing whatever has been done since. There is also some evidence that one motive of some of the defendants in taking proceedings for a sale of the property is to get rid of the plaintiffs. But I do not think these charges, if proved, would entitle the plaintiffs to maintain this action if the company has power to sell its property. It is clear that the Courts could not compel the company, or its directors, to proceed with the development of the property or to work its mines; and if it chose to suspend for a long time, or even to abandon all mining operations, the Court could afford the plaintiffs no assistance, and the motives of such conduct would be immaterial. It appears, also, that the shares were ultimately paid for with the money of the rival company, and have been since the commencement of this action divided ratably among the shareholders of the other company.

It was further contended that the proceedings by which the sale was authorized were irregular and void, and that the company was not bound by them; that the meetings of the shareholders and directors respectively were not properly called; and that the directors were not only not duly elected, but that they were not legally qualified.

But whether the meetings of shareholders were regularly called or not, there is no doubt that only a small fraction of the shares were unrepresented at any of them. And at the meeting of shareholders on the 16th of July, 1897, by which the sale of the property was authorized, 2,296 shares were re-

presented, of which 2,289 voted in favour of the sale, and only seven against it.

The same observation may be made as to the annual election of directors. Whatever irregularity or want of qualification there may have been, everything that was done by the directors was approved of by the vast majority of the shares. With regard to the objection to the qualification of the directors, which is that they held their shares as trustees for the rival company, and not absolutely in their own right, as required by sec. 42 of the Companies Act, I think it by no means clear that the shares were held in trust. There was no express trust, and the seven shares excepted from the resolution of the 26th of August, 1890, were intended as a qualification of the directors, and may have been a transfer to them in advance of the ultimate distribution of the shares among the shareholders of the other company. If the shares held by the directors, or any of them, were actually held in trust, and not beneficially, I do not think, having regard to the discussion of the subject in the three English cases—*Pulbrook v. Richmond Consolidated Mining Co.*, 9 Ch.D. 610; *Cooper v. Griffin*, [1892] 1 Q.B. 740; and *Howard v. Sadler*, [1893] 1 Q.B. 1—we could hold them qualified. The language of our Act is much stronger than that of the English Act by reason of the use of the word *absolutely*, and I think we ought to hold it to mean a beneficial holding. That difficulty, however, was got over shortly after the commencement of this action by the transfer to each of the defendants of a considerable number of shares beneficially.

But I am of opinion that the company having power to do what is sought to be restrained, the plaintiffs cannot succeed on any ground of mere irregularity. The company is made a defendant, and is here on the face of the record ratifying and confirming what has been done, and insisting upon what has been begun being proceeded with.

I think the appeal must be dismissed.

Moss, J.A.:—The Vermillion Mining Company, of Ontario,

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Limited, was duly incorporated by letters patent issued by the Lieutenant-Governor of this Province on the 21st of February, 1888, under the authority of R.S.O. 1887, ch. 157. The purposes and objects expressed by the letters patent were the carrying on of mining operations and all other work in connection therewith in the District of Algoma, and by the said letters patent the applicants for incorporation were created a body corporate and politic, capable forthwith of exercising all the functions of an incorporated company for the purposes and objects aforesaid. The letters patent further directed that the company should be subject to the provisions of R.S.O. 1887, ch. 157, and to such further and other provisions as the Legislature of Ontario might thereafter deem expedient in order to secure the due management of its affairs and the protection of its shareholders and creditors. By sec. 16 of ch. 157, every company incorporated under its provisions was authorized to acquire, hold, alienate and convey real estate, subject to any restrictions or conditions in the letters patent set forth. The only restrictions or conditions imposed upon the company by the letters patent were the limitation to seven years after acquisition of the holding of any parcels of land or interest therein not required for its actual use or occupation, or not held by way of security, or not situate within the limits, or within one mile of the limits, of any city or town in the Province.

Upon its incorporation, the company became possessed of 1872 acres of land in the 4th concession of the township of Denison, and 564 acres in the 3rd and 4th concessions of the township of Graham, in the District of Algoma, through the transfer thereof by the applicants for the letters patent as payment on account of their subscribed shares in the company. No special mention is made of these lands in the letters patent, and the only reference that may be taken as applying to them is the statement that in the case of each of the applicants fifty per centum of the amount of the stock subscribed by them has been paid in by the transfer of property. It is not to be

gathered, therefore, from the letters patent that the sole purpose or even the main object of the company was the working of the mines, if mines there be, on or under the parcels of land so acquired by the company upon its incorporation, though it is scarcely to be doubted that this was the prevailing idea with the original incorporators. Under the letters patent and R.S.O. 1887, ch. 157, the objects, purposes and powers were the carrying on of mining operations and all other works in connection therewith in the District of Algoma, and to acquire, hold, alienate and convey real estate for its use and purposes anywhere within that district, if not elsewhere. After its incorporation, the company sank some shafts and carried on some operations for a time, but in the course of two years or thereabouts the shares of the original incorporators, as well as the other shares of the capital stock, were acquired by others, the chief part of them having been purchased with the funds of another mining company called the Canada Copper Company, and vested in an officer of that company as trustee for its shareholders, and at the time of the institution of this action the defendant Stevenson Burke held 2,375 shares in trust. Of the remaining twenty-five shares, thirteen were held by the plaintiffs, seven by the individual defendants, and five by others. After the acquisition of the shares as above, a reign of inactivity ensued, until, as the result of proceedings taken and others threatened to forfeit the charter of the company, the directors were moved to take proceedings to sell the property of the company. On the 23rd of June, 1897, they resolved that the president and secretary-treasurer be authorized and empowered to sell the property, real and personal, of the company, and to that end to advertise it in such papers in Canada as they elect, the terms of sale to be cash, and to have the necessary notices served on the stockholders of the intention to do this. Thereupon a general meeting of the shareholders was called for and held on the 16th of July, 1897, for the special purpose of considering the advisability of a sale of all the assets of the company, real and personal, or of such portion as might be deemed

advisable by the said meeting to sell, and, if considered advisable, to ratify and confirm a by-law passed by the board of directors in reference to the sale of the assets of the company, real and personal, and for other business.

At this meeting 2,296 shares were represented in person or by proxy. A resolution was presented confirming the action of the board of directors. An amendment was submitted which was voted down, the poll standing 7 shares in favour and 2,289 against. It is contended that the original resolution was not afterwards voted upon and passed, but upon the evidence I think the proper conclusion is that the motion was duly submitted and properly declared carried by the chairman. Thereafter the company caused the parcels of land owned by it to be advertised for sale by public auction at the office of the company at Copper Cliff, on the 23rd of August, 1897, and thereupon an action was commenced by certain shareholders against the company and the Attorney-General of Ontario to restrain the sale of the company's assets, and particularly the sale of the lands advertised for sale on the 23rd of August. Upon motion for injunction to restrain the sale made on the 21st of August, an order was pronounced whereby, upon the plaintiffs undertaking not to make any application to the Attorney-General or the Executive Council of the Province, or otherwise to the Government, or any administrative officer thereof, until after the expiry of the time limited by the order for the sale of the lands, to forfeit the company's charter or lands or other property, and upon the Attorney-General undertaking not to proceed with a pending application to forfeit the charter during the time limited, it was ordered that the sale be not proceeded with on the 23rd of August, and the defendants, the Vermillion Mining Company, submitted and agreed that no sale or disposal of the said lands, or any portion thereof, be made or had prior to the 15th of April, 1898, and then only after they should have been advertised for five consecutive months in certain specified journals and newspapers and in a specified form.

There can be no question but that the intended sale which was thus put a stop to was being conducted in a manner which could not be countenanced by any Court, and the object and intent of the order pronounced was to secure to those interested in the company and its property a sale brought on after due and proper advertisement, at an appropriate season of the year, and after affording to all or any intending purchasers a full and favourable opportunity of examining and testing the properties and their products. Any sale held regardless of attention to these matters, or ignoring due and proper measures for giving wide publicity to the proposed disposition of the properties, and affording every facility to persons likely to be interested in such properties to judge for themselves of their possibilities, could only be a careless, improvident and improper proceeding, or else be conceived for the benefit of interested parties desirous of securing the property at their own price. And that the object of the order was to guard against anything of this kind the company and its managers must have been fully aware. In view of this, it is very unfortunate that not very long after the date of the order, the officers of the company should, under pretence of guarding the property from trespassers, have taken steps to drive away a number of persons who had gone up with the plaintiff McVittie to make an examination of the mines, and to dismantle and fill up with rocks, stones and earth the main shaft, thereby rendering a proper examination very difficult even in the summer season, and impossible at any other season of the year. And I think the proper conclusion from the testimony is that the company and its managers were not desirous of enabling others to make a thorough and proper investigation of the properties and to gain a knowledge of their probable capabilities and value.

No further steps were taken by the company to bring the properties to a sale until the year 1900. In March of that year an application was made to the Provincial Secretary to revoke the company's charter, and on the 31st of March an order in council was approved by the Lieutenant-Governor ordering

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that the charter be revoked, forfeited and made void, but reserving the power of waiving or cancelling such forfeiture within six months. This order, which was apparently made without notice to the company and without full knowledge of the facts, was rescinded on the 27th of July, 1900. On the 1st of October, 1900, the board of directors held a meeting, and the minute book shews the following: "The secretary submitted the order of Justice MacMahon of September 21st, 1897 [should be August 21st], about the sale of the Vermillion Mining Company property, and was authorized and instructed to advertise and sell said property in compliance with said order." There is no record of any other or further action by the board in reference to the sale of the properties.

Soon afterwards advertisements appeared announcing a sale of the parcels of land in question on the 14th of May, 1901. The advertisements are substantially in the form contained in the order pronounced by Mr. Justice MacMahon on the 21st of August, 1897, and the defendants in this action set up, and it must be taken as the fact, that the proceedings were instituted in assumed pursuance of the terms of that order. The advertisement states that the premises may at any time be inspected on behalf of intending purchasers. But nothing had been done, nor has anything yet been done, towards removing the obstructions placed in the main shaft or restoring the timber and framing to a condition which would enable the shaft to be cleared of water and permit of proper inspection and examination. Besides this, the season of the year intervening between the appearance of the advertisements and the date of the proposed sale was the very time during which the intending purchasers would be deterred from attempting an inspection or examination. In fact, the five months chosen for the running of the advertisements covered the very worst season of the year for shewing the property to advantage or attracting visitors to the locality.

This action was commenced on the 27th of December, 1900, against the company and also against the individual defendants as the persons alleging themselves to constitute the board of directors, and as the holders either beneficially or in trust of all but eighteen shares of the capital stock.

The statement of claim charges the individual defendants with having acquired the shares in the interest of the Canada Copper Company in order to control its conduct and affairs, and prevent the opening up of its mines and carrying on of its business, and sets forth a number of matters from which it is claimed it is to be inferred that the said charges are true. It questions the power of the company to sell the properties in question, and also the right of the individual defendants, as directors or otherwise, to direct or take proceedings for a sale of the properties. It also alleges that the conduct of the defendants in obstructing the access to the properties and in assuming to bring it to a sale under present conditions, are depreciatory of its value, and will result in deterring any but the Canada Copper Company from bidding for it and prevent a fair sale. It also questions the status of five of the individual defendants as directors, and charges that they hold no shares in their own right, and are not qualified to act as directors, and that no valid meeting of the shareholders for election of directors or other purposes has been held since June, 1890, and that all elections, resolutions and by-laws since that date are illegal and void.

The claim is (a) for an injunction against any sale, disposition or parting with the real estate in question by the defendants, and also against proceeding with the sale advertised for the 14th of May, 1901; (b) for an injunction against defendant Burke continuing to act as a director and from voting upon the shares held by him in trust; (c) a declaration that defendant Burke is not the properly constituted trustee of the shares standing in his name, and has no right to vote on them; (d) a declaration that the defendants Burke, Paget, McIntosh,

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McArthur, and Turner are not qualified to act as directors, and have not been legally elected; (*e*) other relief.

The statement of defence, besides denying the title of some of the plaintiffs as shareholders, and the charges of misconduct alleged against themselves, sets up that the proposed sale is being proceeded with in all respects under and in accordance with the terms of the order of Mr. Justice MacMahon, and that a sale was duly authorized by resolution of the directors, and approved of by a meeting of the shareholders.

At the trial before Street, J., it appeared that subsequently to the commencement of the action the shares held in trust by the defendant Burke had been distributed *pro rata* amongst the shareholders of the Canada Copper Company. The title of the plaintiffs as shareholders was not seriously questioned, and is not now in dispute.

Street, J., dismissed the action on the ground that the company had power to sell the lands in question, and that the circumstances justified the action of the directors in proceeding with the sale. He also held that the alleged irregularities with regard to the meetings of shareholders, the elections of directors, and the meetings of the board, could not be considered as invalidating the proceedings towards the sale.

The plaintiffs' principal object is to obtain a declaration as to the power of the company to sell and dispose of the lands in question. It is argued that such a sale is *ultra vires*, at least in the sense that it can only be carried into effect with the consent of all the shareholders, and that it is competent for any objecting shareholder to stop any such contemplated sale.

Since the Act 60 Viet. ch. 28 (O.) came into force on the 13th of April, 1897, the company has had, in addition to its other powers, the power to acquire by purchase, lease, or other title, and to hold, use, sell, alienate and convey any real estate necessary for the carrying on of its undertaking: see 25 (*g*). These are very considerable increases to the original powers of the company, and apparently are wide enough to enable it to make disposition of the whole or any portion of its real estate,

not excluding even those portions which may have been acquired for the carrying on of the undertaking.

In the face of these provisions, it seems to me impossible to say that the company has not the power to sell the real estate in question if in good faith the majority of the shareholders decide to do so.

I do not say that if, upon the face of the letters patent, it plainly appeared that the main purpose of the company was the acquisition of and working the mines upon the properties in question, and that this purpose formed the foundation of the company, it might not even yet be held that it was not within the power of the company to put an end to that purpose by a sale of the properties without the consent of all the shareholders. But this does not and cannot be made to appear. The sale of these properties need not disable the company from carrying on its operations as a mining company within the District of Algoma. It does not work a dissolution of the corporation, nor put an end to its powers.

I agree, therefore, that the company has power to make sale of the properties in question. I think the objections to the status of the directors have been properly disposed of, and that it was competent for them to proceed with a sale under proper conditions.

But I am of opinion that the proposed sale on the 14th of May, 1901, ought not to have been allowed to proceed, and that while as to all other matters the action was rightly dismissed, it ought to have been retained for the purpose of enjoining that sale.

The attempt to sell without having put the properties into a condition in which they might be properly inspected and examined by intending purchasers, and fixing the date of the sale at a time which rendered any inspection or examination before it was held a matter of extreme difficulty, if not an impossibility, was not a compliance with, but, on the contrary, a violation of the spirit of the order of the 21st of August, 1897, in pursuance of which the defendants were professing to

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make the sale. I have already made reference to the manner in which the sale proceedings were being conducted.

Under the circumstances, if the sale had taken place as intended, it could not have failed either to have proved wholly abortive for want of bidders, or to have resulted in the properties falling into the hands of the Canada Copper Company, as the plaintiffs allege the defendants designed they should, at an inadequate price.

The proceedings in this Court arrested the sale, and there is now an opportunity of bringing the properties into the market in such manner as to secure the most favourable terms of sale, and protect the interests of all the shareholders.

It is not now necessary to retain the action, but I think that, inasmuch as the plaintiffs were right in their contention on this branch of the case, though they have failed in the others, there ought to have been no costs of the action, and there should be no costs of this appeal.

ARMOUR, C.J.O., and OSLER, J.A., concurred.

LISTER, J.A., died before the delivery of judgment.

Appeal dismissed, with variation as to costs.

Notes:

SALE OF WHOLE ASSETS OF COMPANY.

General powers of management must necessarily include power to sell in ordinary course, but such powers do not authorize sales of an uncommon kind, *e.g.*, a sale of the business of the company: Lindley's Company Law, 6th ed., p. 255. But the sale of the business of the company as a whole, and the sale of all the lands, goods and chattels of the company are quite distinguishable. In *Wilson v. Miers* (1861), 10 C.B.N.S. 348, the directors of a steamship company, which was *in extremis*, contracted for the sale of the whole fleet. The purchasers desired to withdraw from the contract on the ground that the directors could not, in the absence of a resolution dissolve the company, sell off all its ships at once. It was held, however, that the contract was one that the directors could

enter into and complete without any special authority from the shareholders. In *Whiting v. Hovey* (1886), 13 A.R. 7, affirmed 14 S.C.R. 515, *sub-nom. Hovey v. Whiting*, referred to with approval by Maclellan, J.A., a company being in insolvent circumstances the directors authorized an assignment of all the real and personal estate, stock in trade, etc., of the company for the benefit of creditors. This transaction was attacked by execution creditors, when it was held that the directors had acted within their powers, the want of special authority from or of ratification by the shareholders not being good grounds of objection.

QUALIFICATION OF DIRECTOR—RIGHT OF TRUSTEES.

In England, where the word "absolutely" does not appear in the section dealing with qualification, it has been held that the words "in his own right" do not import a beneficial holding. In *Pulbrook v. Richmond Mining Co.* (1878), 9 Ch.D. 610, it was thought, by Sir George Jessel, that a man holds in his own right if he is registered without qualification though he be a trustee. In *Bainbridge v. Smith* (1889), 41 Ch.D. p. 470, this was questioned by Cotton, L.J., but Lindley, L.J., in the same case, said he did not think the test is beneficial interest, but being or not being on the register as a member. This, he said, was the conventional meaning which the phrase had acquired. In *Cooper v. Griffin*, [1892] 1 Q.B. 740, Coleridge, L.J., commented adversely on the *Pulbrook Case*, though he distinguished it from the *Cooper Case* on the ground that the words in the latter case requiring construction were "standing in his name in his own right" (1 & 2 Vict. (Imp.), ch. 110, sec. 14). In the same case, however, the Court of Appeal felt bound to follow *Pulbrook v. Richmond* on the same grounds as expressed by Lindley, L.J., in *Bainbridge v. Smith*. This decision was followed shortly after in *Howard v. Sadler*, [1893] 1 Ch. 1, and this construction of the meaning of words seems now to be definitely established.

In Canada, however, in all of the Provincial Acts and Ordinances, with the single exception of that of British Columbia, the word "absolutely" occurs in the section dealing with qualifications of directors. The language of our Acts is, therefore, much stronger than that of the English Act, and, if the point came up for decision, there seems no doubt that

it would be held that a beneficial holding is intended. This was not decided in *Ritchie v. Vermillion*, but the *obiter dicta* of MacLennan, J.A., are to that effect—*vide* p. 28.

The British Columbia statute reads:—"No person shall be capable of being a director unless he be a shareholder, nor unless he be possessed of the prescribed number, if any, of shares." It seems clear from this wording that *Pulbrook v. Richmond* would apply in that Province.

RIGHTS OF MINORITY SHAREHOLDERS.

For a concise statement of the rights of minority creditors, see Buckley's Companies Acts, 7th ed., p. 522.

In all matters of purely internal management the majority, so long as they act *bonâ fide* and with due consideration for the opinions of the minority, is supreme: *Foss v. Harbottle* (1843), 2 Hare 461.

This rule means that if the act done, though it be the act of the directors only, be one which a general meeting of the company could sanction, a bill by some of the shareholders, on behalf of themselves and others, to impeach that act cannot be sustained because a general meeting of the company might immediately confirm and give validation to the act which the bill instances: *Bagshaw v. Eastern Union R. Co.* (1849), 7 Hare 113; *Purdom v. Ontario Loan Co.* (1892), 22 O.R. 597.

Actions to redress a wrong done or to recover money or damages due to a company must be brought by the company itself, except where a minority of the shareholders complain of conduct on the part of the majority which is either fraudulent or *ultra vires*. No mere informality or irregularity which can be remedied by the majority of shareholders can of itself entitle the minority to sue: *Burland v. Earle*, [1902] A.C. 83; 1 Com. Law R. 93; *Atwool v. Merryweather* (1868), L.R. 5 Eq. 464; *Heath v. Erie R. Co.*, 8 Blatch 347; *Waddell v. Ontario Canning Co.* (1889), 18 O.R. 41; *Browne v. La Trinidad* (1887), 37 Ch.D. 1.

The minority may invoke the aid of the Court when they suffer a special detriment by the directors taking the profits or using the assets for their own ends: *Hodgkinson v. National Live Stock Ins. Co.* (1859), 4 DeG. & J. 422; *Hichens v. Congreve* (1828), 4 Russ. 562.

A leading English case is that of *Menier v. Hooper's Telegraph Works* (1874), L.R. 9 Ch. 350. There the majority of the shares were owned by another company, and Mellish, L.J., said that the majority could not be allowed to sell the assets of the company and keep the consideration, but must allow the minority to have their share of any consideration that might come to them. And the majority, *i.e.*, the rival company, will be restrained from controlling the management of the corporations so as to advance their own profits by lessening those of the other company: *Memphis & Charleston R. Co. v. Woods*, 16 Am. St. 81.

The majority will also be restrained from paying dividends on common stock in derogation of the rights of preference stockholders: *Henry v. Great Northern B. Co.* (1886), 4 K. & J. 1; *Bannatyne v. Direct Spanish Telegraph Co.* (1886), 34 Ch.D. 287; *Sturge v. Eastern Union R. Co.* (1855), 7 D. M. & G. 158. And similarly when special rights are given to ordinary shareholders as to division or appropriation of profits: *Fawcett v. Laurie* (1860), 1 Dr. & Sm. 192; but see *Johnston v. Consumers' Gas Co.* (1895), 27 O.R. 9. And the majority cannot agree to levy calls otherwise than on every shareholder alike: *Preston v. Grand Collier Dock Co.* (1840), 11 Sim. 326.

A majority may also apply for an Act of Parliament to change or modify the nature of the company, but the use of the company's money for this purpose may be restrained: see *Ward v. Society of Attorneys* (1844), 1 Coll. 370; *Ware v. Grand Junction Waterworks Co.* (1831), 2 R. & M. 470; *Steele v. N. Metropolitan R. Co.* (1867), L.R. 2 Ch. 237; *Telford v. Metrop. Board of Works* (1872), L.R. 13 Eq. 574; *Munt v. The Shrewsbury & Chester R. Co.* (1850), 13 Beav. 1; *Simpson v. Denison* (1852), 10 Hare 51.

While a director is precluded from entering into engagements in which he has a personal interest conflicting with that of the company, a contract so entered into may be adopted by the company, provided that its adoption is not brought about by unfair or improper means, and is not illegal or fraudulent, or oppressive, towards those shareholders who propose it: *North-West Transportation Co. v. Beatty* (1887), 12 App. Cas. 589; and in such a case a director has a perfect right to acquire sufficient shares to give him a majority, and to exercise his voting power in such a manner as to secure the election of directors who will support the transaction and ratify the pro-

ceeding at a shareholders' meeting: *ibid.*, and see *Christopher v. Noxon* (1884), 4 O.R. 672.

But where directors had made a misapplication of the funds to their own purposes it was held that they could not subsequently validate them by a directors' by-law, ratified at a shareholders' meeting, at which they controlled the majority of votes: *Waddell v. Ontario Canning Co.* (1889), 18 O.R. 41. And in this case the circumstances were considered ample by Robertson, J., to bring it within the rule as to harsh treatment.

And see *Purdom v. Ontario Loan Co.* (1892), 22 O.R. 597, for a discussion of the general rule that the Court does not interfere with the doing of an act by a company which should have been sanctioned by a majority of the shareholders before the act was done, if such sanction can be afterward obtained. See also *Re Bolt & Iron Co.* (1887), 14 O.R. 211.

[PRIVY COUNCIL.]

BANK OF TORONTO v. ST. LAWRENCE FIRE INSURANCE COMPANY.

On appeal from the Court of King's Bench for the Province of Quebec.

Law of Lower Canada—Transfer of rights under policy—Civil Code, arts. 1570 and 1571—Construction—Signification to debtor of transfer of debt.

Under arts. 1570 and 1571 of the Civil Code of Lower Canada, signification to the debtor of the transfer of his debt need not be by a notarial act. *Quære*, whether the debtor is a "third person" within the meaning of the latter section, against whom signification is necessary in order to perfect possession.

The institution of an action against the debtor to recover the debt is of itself a sufficient signification of the act of sale of the debt.

Murphy v. Bury (1895), 24 S.C.R. 668, doubted.

THIS was an appeal from a decree of the Court of King's Bench for Quebec affirming a judgment of the Superior Court dismissing the action. The judgment of WURTELE, J., who dissented from the judgment in the Court of King's Bench, is reported at p. 105 of Vol. I., Com. Law Reports. This judgment is said by Lord Maenaghten to be a careful and accurate exposition of the law, and is adopted as the basis of the judgment of the Court.

Russell, K.C., Riddell, K.C., and Geoffrion, for the appellants.

Blake, K.C., and Beaudin, K.C., for the respondents.

In the arguments reference was made to *Abbott v. Fraser* (1874), L.R. 6 P.C. 96; *Citizens' Insurance v. Parsons* (1881), 7 A.C. 96; *Murphy v. Bury* (1895), 24 S.C.R. 668; *Aylwin v. Judah* (1864), 9 L.C.J. 179; *Martin v. Coté* (1851), 1 L.C.R. 239; *Paré v. Derousselle* (1850), 6 L.C.R. 411; *Lamothe v. Fontaine* (1857), 7 L.C.R. 49; *Quinn v. Atcheson* (1854), 4

*Present: The Lord Chancellor, Lords Maenaghten, Davey, Robertson and Lindley.

L.C.R. 378; *Moody v. Jones*, Mont. L.R. 6 Q.B. 354; *McCorkill v. Barrabé* (1885), Mont. L.R. 1 S.C. 319.

November 19, 1902. The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—The John Eaton Company, Limited, were the owners of a large dry goods store in the city of Toronto. Their stock was insured in a number of offices, and among others in the office of the St. Lawrence Fire Insurance Company of Montreal to the amount of \$2,500.

On May 20th, 1897, the store with its contents was entirely destroyed by fire. The value of the goods burnt exceeded the aggregate amount of the insurance upon them.

It is not disputed now that the respondent company would have been liable for the sum intended to be secured by the policy effected in their office, if the interest in that policy had remained vested in the John Eaton Company.

It appears, however, that the John Eaton Company were under large advances to the Bank of Toronto, and that they had given the bank an undertaking that in the event of their goods being damaged by fire they would hold the policy moneys in trust for the bank, and would, if required, assign all the policies to them.

On May 22, 1897, two days after the fire, the John Eaton Company assigned to the bank their interest in all the insurances on their stock, including the moneys payable under the policy effected with the St. Lawrence Company.

Notice of the assignment was given to the several offices concerned, and due proof of loss was furnished. The respondent company was requested to concur with the other offices in the adjustment of the claim. The solicitors of the bank wrote several letters to the respondent company and pressed for an answer to their applications, or at least for an acknowledgment of their communications. The respondent company, however, systematically disregarded all communications, whether

oral or written, and did not answer or acknowledge a single letter written to them on behalf of the bank—a course of conduct so little in keeping with the usages of business men that one of the learned Judges in the Court of King's Bench, whose view of the facts is accepted as correct by all his colleagues, did not hesitate to describe it as being "to say the least rather devious."

By the terms of the policy all claims under it were to be barred at the expiration of six months. So in November, 1897, when the period was just running out, the bank served the respondent company with a formal notice of the assignment, and at the same time furnished them with a copy of the assignment itself. Later on the same day this action was brought.

The respondent company set up several defences, of which one and one only was seriously argued at the bar.

It was strenuously contended, and the contention had already found favour with the Superior Court and a majority of the Court of King's Bench, that the action must fail because the bank had not duly made "signification" as required by the Civil Code "of the act of sale" which gave rise to their claim. It was not disputed that there had been a transfer of the debt, that notice of the transfer had been given to the respondent company, and that a document which purported to be and was in fact a copy of the transfer had been furnished to them. But they maintained that "signification" must be made by a notary, and that the copy ought to have been authenticated or certified, and that for want of these formalities the notification of the transfer was without legal effect. On this point their Lordships have had the advantage of considering the reasons given by Wurtele, J., for dissenting from the majority of the Court. His judgment, in which Hall, J., concurred, seems to their Lordships to be careful and accurate exposition of the law, and their Lordships are satisfied to adopt it as the basis of their judgment. It will, therefore, not be necessary for them to do more than state very briefly the grounds on which they think the decision under appeal ought to be reversed.

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It appears to their Lordships that the question must depend simply upon the provisions of the Civil Code, without introducing or importing any requirements which, though necessary under the custom of Paris or under modern French law, are not found in the Code as it stands. Now, the provisions of the Code as regards the sale of debts are contained in Arts. 1570 and 1571. Article 1570 provides that "the sale of debts . . . is perfected between the seller and the buyer by the completion of the title if authentic, or the delivery of it if under private signature." Then Art. 1571 declares that "the buyer has no possession available against third persons until signification of the act of sale has been made and a copy of it delivered to the debtor," except in case the transfer is accepted by the debtor himself, as mentioned in Art. 1571.

There is nothing in the Civil Code to shew that the intervention of a notary is required. It is certainly not prescribed in terms, nor is there, in their Lordships' opinion, any room for implication in this matter.

The view of Wurtele, J., in which their Lordships concur, is confirmed by the provisions of Art. 1571 (A), added by the Revised Statutes of Quebec (1888), which explains how "the signification of the sale required by Art. 1571" may be effected whenever "the debtor has left or never had his domicile in the province." It receives further confirmation from the exceptional provisions made in the Revised Statutes "for the assignment and transfer of consolidated rents replacing seigniorial dues." Those provisions which are embodied in Art. 5610 do require "a notarial act in authentic form." Apparently this requirement would have been unnecessary if a notarial act had been the universal rule.

Their Lordships do not stop to inquire whether the debtor is a "third person" within the meaning of Art. 1571, as seems to have been assumed in the Courts below, and is stated expressly by Sir A. Lacoste, C.J. The question is not material in the present case. It appears, however, to their Lordships

that if the point should hereafter arise it would require further consideration.

There is one point which their Lordships cannot leave unnoticed. Some of the learned Judges who have taken part in this case express a strong opinion that it is competent for the assignee of a debt to bring an action for the purpose of enforcing his claim against the debtor until "signification" of the act of sale has been made and a copy of it delivered to the debtor. This view is in accordance with a recent ruling of the Supreme Court (*Murphy v. Bury* (1895), 24 S.C.R. 668), though until that decision was pronounced the general opinion seems to have been the other way: see *Aylwin v. Judah*, 9 L.C.J. 179; *Martin v. Coté* 1 L.C.R. 239; *Quinn v. Atcheson*, 4 L.C.R. 378. It appears to their Lordships that the institution of an action against the debtor to recover the debt is of itself a sufficient signification of the act of sale, and their Lordships agree with Wurtele, J., in thinking that there is nothing in the Code which requires the signification of the act of sale and the delivery of a copy of it to the debtor to be made at one and the same time.

For these reasons their Lordships are of opinion that the judgment under appeal must be reversed, and that an order should be pronounced condemning the respondent company to pay to the bank the amount secured by the policy in question, with interest and costs in the Superior Court and the Court of King's Bench.

Their Lordships will humbly advise His Majesty accordingly. The respondent company will pay the costs of the appeal.

Solicitors for appellants: *Charles Russell & Co.*

Solicitors for respondents: *S. V. Blake.*

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IN THE HIGH COURT OF JUSTICE FOR ONTARIO.

(BEFORE MEREDITH, C.J.C.P.)

CARSWELL ET AL. V. LANGLEY.

Bankruptcy and insolvency—Assignment for benefit of creditors—Accruing payments to annuitant—Right to rank—R.S.O. (1897), ch. 147, secs. 20, 21.

An insolvent, E.R.P., assigned to the defendant for the benefit of his creditors pursuant to R.S.O. (1897) ch. 147. E.R.P. had before the assignment covenanted with plaintiffs to pay to J.R. \$100 per quarter on the first day of each quarter during her natural life.

Held, that the growing payments were in the nature of contingent debts and not provable for their present value under ch. 147.

Grant v. West (1896), 23 A.R. 533; *Mail Printing Co. v. Clarkson* (1898), 25 A.R. 1, followed.

Such claims are not subject to attachment under the garnishee provisions of the English Judicature Act and Rules, as accruing debts. *Webb v. Stenton* (1883), 11 Q.B.D. 518, disapproving of *In re Cowans' Estate* (1880), 14 Ch. D. 658.

MOTION by the plaintiffs for judgment on the pleadings in an action for a declaration that the plaintiffs are entitled to rank upon the estate of E. F. Robinson, in the hands of the defendant as assignee of the estate and effects by virtue of an assignment under the Assignment Act, R.S.O. 1897 ch. 147, as creditors of the estate in respect of an annuity of \$400. The facts and the contentions of the parties are stated in the judgment.

The motion was heard by MEREDITH, C.J.C.P., in the Weekly Court, on the 23rd January, 1902.

J. J. Warren, for the plaintiffs.

F. E. Hodgins and *W. N. Irwin*, for the defendant.

February 11, 1902. MEREDITH, C.J.:—The defendant is the assignee for the benefit of creditors of one Ernest Frankish Robinson, by virtue of an assignment bearing date the 3rd day of September, 1901, and made pursuant to R.S.O. 1897 ch. 147, and this action is brought for the purpose of establishing the right of the plaintiffs to prove against and rank upon the estate of

Robinson for the present value of \$100 per quarter, which he, before the date of the assignment, covenanted with them to pay to one Jane Robinson on the first day of each and every quarter during her natural life.

It is clear that the growing payments to be made to Mrs. Robinson, being payable during her natural life, are in the nature of contingent debts.

Under the early English Bankruptcy Acts, such claims were not provable, the arrears actually accrued before the bankruptcy alone being provable: *Perkins v. Kempland* (1776), 2 W. Bl. 1106; Robson on Bankruptcy, 7th ed., pp. 238, 246.

This proceeded upon the view that the growing payments were not debts, but became debts only upon the happening of a contingency, *i.e.*, the annuitant being alive at the time when they were to be made.

The language of ch. 147 makes it necessary to give to it the same construction as was in that respect placed upon the early Bankruptcy Acts to which I have referred; and that such claims as that which the plaintiffs seek to prove are not provable under ch. 147, is settled by *Grant v. West* (1896), 23 A.R. 533, and *Mail Printing Co. v. Clarkson* (1898), 25 A.R. 1, from which it is impossible to distinguish this case.

It was argued by Mr. Warren that such claims had been held to the subject to attachment under the garnishee provisions of the English Judicature Act and Rules, as accruing debts. Had he been able to establish that proposition, the decisions of the Court of Appeal of this Province would, nevertheless, have prevented me from giving such a construction to the provisions of the Act now under consideration. The decided cases do not, however, support his contention: *Webb v. Stenton* (1883), 11 Q.B.D. 518, and cases there cited, disapproving of the decision of Vice-Chancellor Hall in *In re Cowans' Estate* (1880), 14 Ch. D. 638.

I see no escape from the conclusion—however hard the law may press upon the annuitant—that the claim is not one prov-

able against the estate of the assignor, and there must therefore be judgment for the defendant, but without costs.

Notes:

NATURE OF CLAIMS WHICH MAY RANK.

There are no specific provisions in the various provincial acts as to what classes or kinds of claims are to be permitted to rank: *vide*, R.S.O. (1897), ch. 147, secs. 20 and 21; R.S.M. (1903), ch. 8, sec. 29; N.S. 61 Viet., ch. 11, secs. 32, 33; N.B., 58 Viet., ch. 6, sec. 20; B.C., 1 Ed. VII., ch. 15, secs. 17, 30.

The Act relates to the estate of an insolvent person who is unable to pay his "debts" in full. He is spoken of as the "debtor" and the claimant as the "creditor." The language used throughout seems to point to commercial demands due or accruing due, whether the liability therefor is contested or not. The Acts provide also that where the claim is not accrued a deduction shall be made for interest, a provision that certainly could not contemplate unadjudicated claims for damages. A claim for damages is nowhere mentioned. In *Grant v. West* (1896), 23 O.R. 533, the claimant was seeking for damages for breach of contract, and it was held that he could not, after the assignment, either bring an action to ascertain the damages nor rank for the amount on the estate. *Magann v. Ferguson* (1898), 29 O.R. 235, decided that a claim for damages against an overholding tenant was an unliquidated claim and so not provable. Nor can claims for amounts payable under a contract for work not done rank: *Mail Printing Co. v. Clarkson* (1898), 25 O.R.; *Ashley v. Brown* (1890), 17 O.R. 500; *Gurofski v. Harris* (1896), 27 O.R. 201. Compare, however, *Tillie v. Springer* (1892), 21 O.R. 585, where it was held that a debt payable in five annual instalments might be proved, and the provisions of the Winding-up Act, R.S.C. ch. 129, sec. 56, which give a right to rank for damages; and *Re Dumbill* (1884), 10 P.R. 216.

The holder of notes which had been guaranteed was held not entitled to rank against the estate of the guarantor who had assigned: *Clapperton v. Mutchmoor* (1899), 30 O.R. 595. This case must be distinguished from the case where the assignor is the endorser of notes which are not mature or exigible, in which case it is expressly provided by the Acts that a creditor may rank.

Rights of sureties to rank arise when the guarantee has been paid: *Martin v. McMullen* (1900), 19 O.R. 230; 18 A.R. 559; *Re Parker* (1894), 3 Ch. 400; *Young v. Spiers* (1889), 16 O.R. 672.

A *cestui que trust* can rank as a preferred claimant only where the trust funds can be traced into specific property: *Cullhane v. Stuart* (1887), 6 O.R. 97; *Long v. Carter* (1896), 23 A.R. 121; 26 S.C.R. 430; *Harris v. Truman* (1882), 9 Q.B.D. 264; *Gamble v. Lee* (1878), 25 Gr. 326.

The Crown has no priority: *Clarkson v. Attorney-General of Canada* (1889), 16 O.R. 202. If it elects to come in under the assignment, it is bound by the terms thereof, and can take only ratably and proportionately with the other creditors.

[IN THE COURT OF KING'S BENCH FOR MANITOBA.]

[BEFORE KILLAM, C.J.]

SCHWARTZ V. WINKLER.

Fraudulent preference—Trust assignment made to a creditor—Pressure—Creditor's knowledge of the debtor's insolvency—Assignments Act, R. S.M. ch. 7, sec. 33—63 and 64 Vict. (M), ch. 3, sec. 1.

An assignment under the Assignments Act, R.S.M. ch. 7, need not be in the language given by section 3 of the Act, which contains merely a general form of words; and an assignment which after reciting the assignor's insolvency and his agreement to assign, purports to grant and assign all the property of the assignor, real and personal, is good by virtue of section 2, of the Act.

When an assignment under the Act is made to a creditor, the assignee may bring an action to set aside a fraudulent preference without showing that the benefit of the assignment has been accepted by or that it has been communicated to any other creditor. *Mackinnon v. Stewart* (1850), 1 Sim. N.S. 76; *Siggers v. Evans* (1855), 5 E. & B. 367, followed.

A mortgage given to a creditor to secure his claim at a time when the debtor knew he was insolvent may be set aside as a fraudulent preference although it has been obtained by pressure and was given without any desire on the part of the debtor to prefer the mortgagee, if he knew or should have known that that result would follow.

It is not necessary to show notice to the transferee of the debtor's insolvent condition and, in any case, notice will be imputed to him that he has such knowledge of the debtor's circumstances as would lead any ordinary man of business to conclude that the debtor was unable to pay his debts in full. *National Bank of Australasia v. Morris* [1892] A.C. 287, and *Stephens v. McArthur* (1890), 6 Man. 496, followed.

THIS was an action by an assignee for the benefit of creditors to set aside a mortgage of the debtor's property given to a creditor immediately before the assignment.

Wiebe, the debtor, was a small miller and farmer at Altona. On the 11th or 12th of July, 1900, he was indebted to the defendant, Winkler, in the sum of \$1,702, and he gave him a mortgage on all his realty to secure that sum. At this time Wiebe was, and knew himself to be insolvent. There was an interview on the 10th of July between Wiebe and Winkler as to which the evidence was conflicting. Wiebe claimed that he told Winkler plainly of his insolvent circumstances and of his inability to carry on his business; Winkler denied this. Wiebe stated that no request was then made by him for time, and no security was then

spoken of; Winkler said that he agreed to give time if security were given, and that Wiebe agreed to give a mortgage. At any rate the mortgage was executed on the 11th or 12th of July, and on the 26th of July the assignment was made to the plaintiff. There was no evidence of the acceptance of the benefits of the assignment by any creditor except the plaintiff (who was a creditor), or even of communication of it to any other.

A. J. Andrews and *H. F. Maulson*, for the plaintiff.

W. E. Perdue and *S. J. Rothwell*, for the defendant Winkler.

October 15, 1901. KILLAM, C.J.:—It was argued that the plaintiff was not an assignee who could maintain this action. I think that he is.

In the first place, I do not think it necessary for the purpose that the assignment should be in the language given by sec. 3 of The Assignments Act, R.S.M., ch. 7, or to that effect.

By section 39, where there is "an assignment under this Act," the assignee is the party to bring the action. The expression, "Assignment under this Act," is defined by sec. 2, sub-sec. (a), and this assignment fulfils that definition. Section 3 merely gives a general form of words which may be used and determines their effect. Even if it should be considered, which I doubt, that the assignment must be one transferring all the property covered by this general form, the assignment in question is such. I cannot take the recital as controlling the clear, plain and absolute transfer made by the operative portion of the instrument.

As stated by Mr. Justice Sedgwick, in *Rennie v. Block*, 26 S.C.R., at page 370, "It is established law that an assignment of property by a debtor to a trustee for the payment of debts without the knowledge or concurrence of the creditors is a revocable direction by the assignor as to the mode in which he wishes his own property to be applied for his own benefit, and that the creditors named are not constituted *cestuis que trustent* and cannot claim to have the trusts of the assignment executed either against the debtor himself or his trustee."

But in the present case the assignee was a creditor and entitled to the benefits of the assignment. This circumstance rendered it irrevocable: *Mackinnon v. Stewart*, 1 Sim. N.S. 76; *Siggers v. Evans*, 5 E. & B. 367.

The fact of Wiebe having given the firm some security for the debt does not seem to me to affect the assignment or to render the assignee incapable of bringing this action under the statute.

Under section 33 of The Assignments Act, R.S.M., ch. 7, a transfer of property "made by any person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, with intent to defeat, delay or prejudice his creditors, or to give one or more of them a preference over his other creditors or over one or more of them, or which has such effect, shall, as against them, be utterly void."

In *The Molsons Bank v. Halter*, 18 S.C.R. 88, it was held that the words "or which has such effect," in the similar enactment of the Legislature of Ontario, related back only to the portion referring to the giving of a preference; that they applied only to a case where that had been done indirectly, which if it had been done directly, would have been a preference within the statute; that the word "preference" in the section implied a voluntary act of the debtor; and that the old decisions, that priority obtained through pressure and not by the voluntary act of the debtor did not constitute a preference, applied to this enactment.

In *Stephens v. McArthur*, 19 S.C.R. 446, the same interpretation was given to our statute.

After these decisions, by Act 56 Viet. ch. 20, the Legislature of Ontario repealed the clause and substituted for it several others. The first applied only to transfers, etc., made with intent to defeat, defraud, hinder or delay creditors. The second made void transfers made with intent to give an "unjust preference." The words including such as had the effect of giving a preference were not added. But the third clause provided that, if the transaction had the effect of giving a preference and was impeached within sixty days, it should be presumed to have been

made "with the intent aforesaid and to be an unjust preference, whether made voluntarily or under pressure."

In applying this legislation some conflict of judicial opinion arose upon the question whether the presumption was absolute or could be rebutted. But the opinion which prevailed was that the only effect of the legislation was to abolish the doctrine of pressure and to leave the question of intent still open and to be determined in other respects upon the same principles as before the amendment: *Lawson v. McGeoch*, 22 O.R. 474, 20 A.R. 464; *Webster v. Crickmore*, 25 A.R. 97.

The Legislature finally settled the difficulty in accordance with this view by inserting the words *prima facie* before presumed," and with this amendment the clause is found in R.S.O. (1897), ch. 147, sec. 2.

After all this legislation and these decisions, our Legislature undertook to amend section 33 of The Assignments Act by adding a clause framed largely upon the same principles as the Ontario legislation, but differing from it in some respects. The former section, including transfers having the effect of giving a preference, was retained intact. The added clause was as follows:—

"If such transaction with or for a creditor has the effect of giving that creditor a preference over other creditors of the debtor or over one or more of them it shall, in and with respect to any action or proceeding which within sixty days thereafter is brought, had or taken to impeach or set aside such transaction, or if the debtor within the same period after the transaction makes an assignment for the benefit of his creditors, be presumed *primâ facie* to have been made with the intent aforesaid and to be a preference within the meaning of this section and no pressure on the part of the creditor will be sufficient to support the transaction or to rebut the presumption of preference." 63 & 64 Viet. ch. 3, sec. 1 (M. 1900).

In interpreting this provision it is obviously necessary to place upon the words "has the effect of giving that creditor a preference" a construction somewhat different from that given by the Supreme Court of Canada to the words "has such effect"

in the original section. That section declared utterly void a transfer which "has such effect." As to it, then, the further enactment that it should be presumed to be made with a certain intent also rendering it void under the previous section was wholly unnecessary and inoperative. And under the decision a transfer induced by pressure should be sufficient to support it or to rebut the presumption of preference would be meaningless.

In *Lawson v. McGeoch*, 20 A.R., at p. 473, MacLennan, J., said: "By this additional sub-section 2, the Legislature has dealt with cases which are not strictly cases of preference. . . . These are cases where the effect as regards other creditors is the same as in cases of preference, namely, where disproportion in payment or satisfaction is the result, where one creditor gets an advantage either in point of security for or satisfaction of his debt over others."

This language appears to me to properly describe a transaction having "the effect of giving that creditor a preference" in our amending Act. Such was the nature of the transaction impeached in the present action.

It is not enacted, however, that every transaction having this effect is to be void, but that it is to be presumed *primâ facie* to have been made with the intent to prefer and to be a preference, and, then, that no pressure shall support the transaction or rebut the presumption of preference. The result is clearly to abolish entirely what is sometimes called the doctrine of pressure, but to leave the transaction to be judged in other respects in regard to the question of preference, upon the same principles as it would have been under the judge-made law of England, with a legislative declaration of an inference to be drawn from the effect of the transaction.

As stated by me in *Colquhoun v. Seagram*, 11 M.R. at page 347, "The doctrine of fraudulent preference was, in its origin, a creation of the English Courts. It was thought that if a person, contemplating the falling of his estate within the operation of the Bankruptcy Acts, used a portion of his estate in satisfying or securing one creditor, and thus withdrew it from the fund to

be divided among his creditors generally, this was an evasion of the objects of the Acts, amounting to a fraud."

To constitute such a fraud two things were considered necessary: First, that the payment, delivery or transfer should have been made in contemplation of bankruptcy; and, secondly, that it should have been the voluntary act of the debtor: *Tudor's Leading Cases in Merc. Law*, 2nd ed., p. 534; *Strachan v. Barton*, 11 Ex. 647; *Morgan v. Brundrett*, 5 B. & Ad. 289.

Thus, there arose two separate questions for the determination of a jury. First, as to contemplation of bankruptcy by the debtor; second, as to the transaction having been his voluntary act: *Brown v. Kempton*, 19 L.J.C.P. 169; *Gibson v. Boutts*, 3 Sc. 229.

The first of these questions cannot arise here, as we have no bankrupt laws. The Legislature has substituted other alternative conditions, namely, that the debtor was in insolvent circumstances, or was unable to pay his debts in full, or knew that he was on the eve of insolvency.

In the present case there can be no doubt that Wiebe, when he gave the mortgage to Winkler, was in insolvent circumstances and unable to pay his debts in full. There remains only the question whether the giving of the mortgage was with intent to prefer or was so far the voluntary act of the debtor as to constitute a preference under the English cases. Upon the construction which I have given the amending Act, the execution of the mortgage had the effect of giving Winkler a preference over the unsecured creditors of Wiebe; and we begin the consideration of the question propounded with the presumption that the mortgage was executed with intent to prefer and that it constituted a preference within the meaning given to that term by the Supreme Court of Canada.

The impression produced upon my mind by the evidence is that the mortgage was given solely because Winkler asked for it. I do not think that Wiebe had any active desire to prefer Winkler to his other creditors. But he knew the effect of the transaction, as is evident both from his confessed knowledge of his posi-

tion and from his demurring to including his dwelling house when he was so heavily indebted for the materials used in its construction. He should be presumed to have intended the natural consequences of his own acts. See *Gibson v. Boutts*, 3 Sc. 229.

Under the statute the transaction is to be taken as none the less voluntary because of the pressure which induced it. I do not think that Wiebe's denial of an intent to prefer, unsupported by circumstances, is sufficient to rebut the statutory presumption, even if we could rely—as in this case we cannot—upon his understanding of the expression.

I do not think that Wiebe had entirely given up hope that circumstances might occur which would place him in a position to pay off all his creditors. He felt that, if someone would supply the funds to run the mill and his creditors would give him time, there was a possibility of the next season turning out so favorably that he would be able to extricate himself from his difficulties. He naturally desired to take the chance. He was not trained in business, and was probably more sanguine than a shrewd man of business would be. In his view the consideration of getting time was an important one.

But Wiebe knew that his assets were wholly insufficient to meet his liabilities, that he was placing Winkler in a position to realize a larger portion of his claim than he could pay upon the claims of his unsecured creditors or they could realize from his property, and that, by granting this mortgage, he was making the position of the other creditors worse than before. As far as he was concerned, it was purely a matter of chance whether matters would be improved by delay. The effect when the mortgage was executed was to leave a deficiency.

Upon the question of contemplation of bankruptcy, as it arose in England, these feelings and hopes might possibly be important, but I deem them wholly unimportant in rebuttal of the presumption declared by statute. It was purely a case of yielding to pressure. To allow the consideration of time granted under such circumstances to rebut the presumption would be to annul the effect of the amending Act.

In *Johnson v. Hope*, 17 A.R. 10, and *Ashley v. Brown*, Id. 500, the Court of Appeal for Ontario held that it is necessary to show notice to the transferee of the debtor's insolvent condition. The contrary view was taken by the Full Court of this Province in *Stephens v. McArthur*, 6 M.R. 496. While our decision was reversed upon appeal to the Supreme Court, this was upon the ground that the transfer was not made with the intent to give preference and had not such an effect. The question of notice was untouched by the Supreme Court, and I know of no decision binding upon this Court which overrules the view which we took in *Stephens v. McArthur* upon this point.

I think that, for the present, I am bound by the decision of the Full Court, and that such notice should not be required. But, in view of the further discussion of the subject since *Stephens v. McArthur* was decided here and of the express reservation of opinion by the Supreme Court, I deem it best to make some remarks upon the question of notice in the present case.

In view of his denial upon oath of the express notice directly alleged, and of the conflict of evidence between Wiebe on the one side and Winkler and Wahn on the other, I am not prepared to find affirmatively that Winkler was expressly informed of Wiebe's insolvent condition. But Winkler admits knowing that Wiebe's real estate was heavily encumbered, and that two of his creditors, Lang and Penner, had recently combined and obtained security on his real estate. He claims to have understood that this was for \$1,700. In reality it was made to secure \$2,900, and as the description for Winkler's mortgage, according to his own account, was taken from Penner's, I should consider him affected by notice of its actual amount so far as that can be deemed material. Winkler also knew the nature of the season and the failure of the crops, which must affect Wiebe's business both as thrasher and as miller. He knew of the failure of the water supply. As a man of business he must be taken to have understood the effect of these circumstances in depreciating the selling value of Wiebe's property.

He went to Wiebe and asked for money, and Wiebe told him

he hadn't any just then. He states that Wiebe also told him that the mill and the two farms would pull him through if he had a good crop, but admits that he knew the crop was bad and that that was the reason for giving an extension. He also states: "I think he told me the mill was not paying then, but he said he expected it would when he got more grain." He also admits being told of the debt to Schwartz for building materials and Wiebe's objection at first to including the house in the mortgage, but claims only that the amount was understated. Apparently he made no inquiries as to other liabilities, although he should naturally have contemplated the probability of their existence.

In *Ashley v. Brown*, it was "knowledge" of the debtor's insolvency that was said to be necessary. I do not understand, however, that by this was meant actual, positive knowledge, or express and distinct information. The opinion that has prevailed in Ontario is based upon the view that the legislation is *in pari materia* with that in the statute, 13 Eliz., ch. 5, which protects conveyances made upon good consideration, without "any manner of notice or knowledge of such covyene, fraud or collusion as is aforesaid," and that an intention to effect what was considered to be an injustice to innocent parties should not be imputed to the Legislature. The language of the Act of Elizabeth is "any manner of notice or knowledge," which includes constructive notice or gives the ordinary right to infer from circumstances actual notice not expressly proved otherwise.

In *National Bank of Australasia v. Morris*, [1892] A.C. 287, the Judicial Committee of the Privy Council had to consider the effect of some provisions in an insolvency law of New South Wales allowing certain payments to creditors to be good, with a proviso that the creditor should not at the time of payment have known that the debtor was then insolvent; and their Lordships held that, "if the creditor who receives payment has knowledge of circumstances from which ordinary men of business would conclude that the debtor is unable to meet his liabilities, he knows, within the meaning of the Act, that the debtor is insolvent." This where the Act expressly required knowledge of insolvency.

The conclusion of the Ontario Courts is reached only by implying an intended reservation conceived to be necessary for the prevention of injustice. At any rate the implication should not go further than justice demands. I can conceive no injustice in imputing *prima facie* to a creditor asking, under the circumstances of this case, for a payment which the debtor admits his inability to make and taking security, with the knowledge which Winkler admittedly had of Wiebe's affairs and without further inquiry, notice of the debtor's insolvency and of the intent and effect required to avoid the security.

It is a well established practice to require less clear evidence of notice of fraud where the transaction is one in which no actual advance of money or property constitutes the consideration or a part of the consideration for the transfer than in a case of such advance. And it is also a doctrine of Courts of Equity in many cases to impute constructive notice of facts which might be learned upon reasonable inquiry suggested by known facts.

In my opinion, if evidence of notice should be exacted in such a case as the present, the evidence that is given should be taken as *prima facie* sufficient to throw the onus upon the defence. And while I do not find affirmatively that the information was expressly given as alleged, I am not satisfied that Winkler had not a great deal more information than he admits. To my mind he has not discharged himself of the onus.

In this view, I find that, at and before the execution of the mortgage, Winkler had notice of Wiebe's insolvency and of the mortgage being made with intent to give him a preference over other creditors and having such effect.

There will be judgment declaring the mortgage null and void as against the plaintiff and the creditors for whom he is trustee. The defendant Winkler must pay the costs of the action.

Judgment for plaintiff.

Notes:

INTENT UNDER PROVINCIAL ACTS.

Except in Manitoba, it may be regarded as generally settled that both in regard to the interest to defeat creditors and the intent to prefer, the transferee must be shown to have had notice, if not of the actual interest, at least of the embarrassed condition of the debtor: *Hepburn v. Park* (1884), 6 O.R. 472; *Burns v. McKay* (1885), 10 O.R. 167; *McRoberts v. Steinhoff* (1886), 11 O.R. 369. And this notwithstanding that the effect of the transfer as evidence of the intent has several times been the subject of recent legislation, while the provisions regarding transfers to defeat creditors remain substantially as they were when first enacted. Parker, *Frauds on Creditors*, p. 61.

CONCURRENCE OF INTENT.

The weight of authority leans to the view that, in order to constitute a fraudulent preference to the creditor, there must be a concurrence of intent of the part of both the debtor and creditor. The Court will not act of mere suspicion: *Burns v. McKay* (1885), 10 O.R. 167; *Hepburn v. Park*, *supra*; *McRoberts v. Steinhoff*, *supra*; *Ivey v. Knox* (1885), 8 O.R. 632. This has been said to be on the principle that if the person taking security be innocent of any fraudulent intent, he cannot be affected by the fact, if it be a fact, that there was a fraudulent intent unknown to him in the mind of the borrower: *Hepburn v. Park*, *supra*. In *Johnson v. Hope* (1890), 17 A.R. 10, it was said that it has always been the policy of the law to protect persons acting *bonâ fide* with an embarrassed debtor, *i.e.*, without notice that he intends to give a preference, and who at the time of the transaction has no notice of his (the debtor's) embarrassed position, is safe from the penalties imposed by the Act. It would paralyze trade and business if transactions entered into in all honesty and good faith and for valuable consideration, with persons apparently solvent and prosperous, were liable to be undone if later it was discovered and proved that such persons were at the time in embarrassed circumstances. This construction would make the Act a trap. If there is no proof of notice or knowledge of the debtor's insolvency, or of any fraudulent intent on his part, it is held that the transfer will stand: *Gibbons v. McDonald* (1890), 19 O.R., p. 293; *Ashley v. Brown* (1890), 17 A.R., p. 504. The most recent case in Ontario on this point is *Dana v. McLean* (1901), 2

O.L.R. 466, where the Court of Appeal held that as the creditor took the transfer in good faith without notice or knowledge or without any reason to know of the debtor's insolvency, the transaction could not be set aside.

The decision above reported, however, is quite at variance with the Ontario and Supreme Court decisions (*Molsons Bank v. Haller* (1890), 18 S.C.R. 88; *Gibbons v. McDonald* (1891), 20 S.C.R. 587), it not being regarded as necessary to show notice to the transferee of the debtor's insolvent condition: *vide supra*. It, however, is said to be controlled by the decision of the Full Court of King's Bench in *Stephen's v. McArthur* (1890), 6 Man. 496. In that case the facts as found by the Full Court were as follows—At the time the chattel mortgage was given, the mortgagors were insolvent, but the mortgagee was not aware of that fact. The mortgage was straightforward and honest, and given in response to a *bonâ fide* demand of plaintiff for security, and not with any such intent, on either side, as would render it fraudulent and void under the Statute of 13 Eliz., or under 49 Viet. (Man.), ch. 45, sec. 2. It was held that the mortgage was void as against creditors. Taylor, C.J., said, p. 605: "I cannot come to any other conclusion than that a conveyance *which has the effect* of delaying, defeating creditors, or preferring one creditor to another, is void equally with one executed with the intent to do so." The judgment here seems to turn rather on the construction of the words "which has the effect" to delay and defeat, rather than on the question of the necessity of knowledge in the transferee. *Vide pp.* 502-5.

INFERRING INSOLVENCY.

Knowledge of insolvent circumstances may be readily inferred. The Insolvency Act of New South Wales provided that every payment made by a person before the sequestration of his estate to any creditor on account of any just debt due at the time of the payment shall be deemed a valid payment provided that such creditor shall not at the time of the payment have known that the debtor was then insolvent: *Vide National Bank of Australasia v. Morris*, [1892] A. C. 287, 66 L.T. 240, 61 L.J.P.C. 32. The facts here were that on the 17th of April, 1886, one Braun opened an overdraft account with the Sydney branch of the appellant bank, whose head office is in Melbourne. His overdrafts were secured to the extent of £2,000 by the guarantee of a gentle-

man named Davies, of whose solvency the bank was confident. The cheques in question were paid in by Braun on the 27th and 29th of June, 1887; a time when, as was admitted at the trial, Braun was insolvent. On the 8th of September, 1887, his insolvency was declared. The assignee brought an action to recover the amount of the cheques so paid to the bank. A verdict was entered by consent for the plaintiff, with leave reserved to the defendants to move to set aside the verdict. On the motion the verdict was sustained and the defendants appealed from that judgment.

The Privy Council held that if the creditor who received payment has knowledge of circumstances from which ordinary men of business would conclude that the debtor is unable to meet his liabilities, he knows within the meaning of the Act that the debtor is insolvent. It appeared that not only had the creditors cause to believe the trader to be insolvent, but that they were seriously uneasy about his debt to them. The local agent of the creditors set up that he did not believe or suspect the debtor to be insolvent, but the Court thought it was sufficient that he knew facts which ought to have shown him clearly that the debtor could not be but insolvent. See also *Segsworth v. Meriden Silver Plating Co.* (1883), 3 O.R. 413.

On the whole question of intent in preferential transactions, *vide* Parker's *Frauds on Creditors*, ch. 15, pp. 163-168.

[IN THE COURT OF KING'S BENCH FOR MANITOBA.]

[BEFORE KILLAM, C.J., DUBUC AND RICHARDS, JJ.]

CODVILLE V. FRASER.

Fraudulent preference—Doctrine of pressure—Motive of debtor in giving Security—Assignments Act, R.S.M., ch. 7, sec. 33—63 and 64 Vict. (M.), ch. 3, sec. 1.

Where in giving a chattel mortgage covering all the debtor's assets, it appeared that the desire and motive in the mind of the debtor was to make an arrangement for continuing his business, and to avoid insolvency, the defendant having induced him to give it by promise of assistance, although the defendant, a creditor, was placed in a more advantageous position than others.

Held (Richards, J., dissentiente), that under section 33 of the Assignments Act, R.S.M. ch. 7, as amended by 63 and 64 Vict. (m), ch. 3, sec. 1, there must still be the intent on the part of the debtor to prefer the particular creditor in order to set aside the impeached conveyance.

The presumption arising under the Act being only *prima facie* may be rebutted by evidence and the court may consider the proved facts as to the actual intent.

Held, also, the court need not determine whether the preferred creditor was acting *bona fide* or really looked for a continuance of the business through an arrangement with other creditors as it was only the mental attitude of the debtor that should be considered.

THIS was an appeal from the judgment of Bain, J. On the 14th of January, 1901, the plaintiffs recovered judgment against Rice, who was carrying on business as a general storekeeper, and a day or two afterwards they issued a writ of execution against his goods indorsed to levy \$525.98, and placed it in the sheriff's hands for execution. Rice was indebted to the defendant also, and on the 24th of December, 1900, he executed a chattel mortgage to the defendant on all the goods that he then had in his store to secure the payment of \$550, which was about the amount he then owed him. By the terms of the chattel mortgage, \$100 were made payable on the 28th of December following its date, and the balance in monthly payments thereafter. The mortgage was filed in the County Court office for Dauphin on the 4th of January, 1901. Rice did not pay the \$100 on the 28th of December, and early in January following the defendant took possession of all his goods and removed them to Dauphin,

and on the 23rd of January sold them for 50 cents on the dollar on the invoice price.

The plaintiffs sued to have it declared that the chattel mortgage from Rice to the defendant was fraudulent and void as against them; and they claimed further that, if it should appear that the defendant had sold and disposed of the goods, he might be ordered to account for the proceeds of the sale or the value of the goods.

H. M. Howell, K.C., and *T. G. Mathers*, for plaintiffs.

H. J. Macdonald, K.C., and *A. Haggart*, K.C., for defendants.

BAIN, J.:—It is quite clear that at the time Rice executed the chattel mortgage to the defendant, which is in question in this suit, he was in insolvent circumstances and unable to pay his debts in full. The defendant knew, I think, that Rice was in this position, or, at all events, he had knowledge of circumstances from which an ordinary man of business would conclude that he was unable to meet his liabilities; *National Bank of Australasia v. Morris*, [1892] A.C. 287. The effect of Rice giving the chattel mortgage to the defendant on all his goods was to give him a preference over the plaintiffs and the other creditors; and I think the mortgage was given with the intention that it should have that effect. But the evidence showed that the defendant had insisted on getting security, and, as I think that Rice *bonâ fide* yielded to the demand, I would have to find that the giving of the mortgage was not his own spontaneous act; and before the amendment to the Assignments Act in chapter 3 of the statutes of 1900, the law was settled that a transfer, assignment, etc., given as the result of *bonâ fide* pressure could not be considered to be a fraudulent preference under section 33; *Stephen v. McArthur*, 19 S.C. R. 446; *Colquhoun v. Seagram*, 11 M.R. 339.

The amendment in question is in the form of a sub-section, added to section 33, and it provides that "if such a transaction with or for a creditor has the effect of giving that creditor a preference over other creditors of the debtor or over one or more of

them, it shall in and with respect to any action or proceeding which within sixty days thereafter is brought to impeach or set aside such transaction * * * be presumed *primâ facie* to have been made with the intent aforesaid and to be a preference within the meaning of this section; and no pressure on the part of the creditor will be sufficient to support the transaction or to rebut the presumption of preference."

In *Stephens v. McArthur*, Mr. Justice Strong said that the primary and natural import of the word preference is a voluntary act of the debtor, and that the term is not applicable to an act which is brought about by the active influence of the creditor; and so, if a creditor gets an advantage over the other creditors by exercising pressure upon the debtor, he does not get a preference, nor has the debtor's act the effect of giving him a preference, in the meaning of the word in section 33. The amendment applies only to such a transaction as has the effect of giving a creditor a preference, and it is unfortunate, perhaps, that this word, with the strict meaning that it has in section 33, should have been used by the Legislature. However, the direction that "no pressure will be sufficient to support the transaction or to rebut the presumption of preference" is explicit, and I think it shows clearly that the Legislature intended to do away with what has come to be called the doctrine of pressure, so that, in cases to which the amendment applies, proof of pressure cannot be considered at all as displacing, or tending to displace, the intention to give a fraudulent preference. In the Ontario Act, which our Legislature has followed in this amendment, the provision as to pressure is not as explicit or as comprehensive as it is here; but the Ontario Courts have held that it had the effect of doing away altogether with the doctrine of pressure: *Webster v. Crickmore*, 25 A.R. 97; *Lawson v. McGeoch*, 20 A.R. 464.

Whether this provision in the amendment applies to all cases, or only to those in which the transaction is impeached within sixty days, is a question that is open to argument; but in the present case the action was begun within sixty days after the chattel mortgage was executed.

I think, then, it would have to be held that the chattel mortgage was void under section 33; but it appears, as the defendant sets up in his statement of defence, that before the plaintiffs began this action, though after their execution against Rice's goods had been placed in the sheriff's hands, the defendant sold and disposed of the goods he took under the chattel mortgage to a *bonâ fide* purchaser for value. The goods were sold for 50 cents on the dollar on the invoice price, and realized \$512.78; and the defendant says he discounted the notes which he took from the purchasers in one of the banks and received the proceeds. On behalf of the defendant, Mr. Macdonald has argued strongly that, as the defendant has thus disposed of the goods, the plaintiff has now no remedy against him; and *Union Bank v. Barbour*, 12 M.R. 166, is cited as a decision in this Court affirming that view.

Although the statute declares that the conveyance which is a fraudulent preference shall be utterly void, this must be understood to mean only that it is voidable at the election of creditors, and it is valid as between the parties to it until it is set aside; *Longweay v. Mitchell*, 17 Gr. 195; *Stuart v. Tremain*, 3 O.R. 190; *Meharg v. Lumbers*, 23 A.R. 51; *The Meriden Britannia Co. v. Braden*, 21 A.R. 352. And it follows from this view that, so far as sec. 33 extends, creditors would not be entitled to the relief the plaintiff asks when once the property has passed out of the hands of the fraudulent grantee into those of a *bonâ fide* purchaser for value. In *Davis v. Wickson*, 1 O.R. 369, Boyd, C., said: "The right of the plaintiff in this class of cases is to have any impediment removed or declared invalid which intercepts the action of his writ of execution; and so long as the property of the execution debtor remains distinguishable, and so long as no purchaser for value and without notice intervenes, so long may the Court award relief against that property in the hands of fraudulent or voluntary holders."

In *Union Bank v. Barbour*, 12 M.R. 166, the action was brought to set aside a conveyance as fraudulent, and for the payment to the plaintiff of the balance of purchase money that remained due to the fraudulent grantee by a subsequent purchaser

for value, and Taylor, C.J., held that the plaintiffs were not entitled to succeed. "Any right the plaintiff would have to attack the transaction by which the property was conveyed to Mrs. B. as fraudulent," he said, "is derived from the statute, and it goes no further than giving a right to have the fraudulent conveyance set aside as against them."

It would appear, however, that the attention of the learned Chief Justice had not been called to section 34 of the Act, which provides that, "If the person to whom any such gift, conveyance, etc., has been made, shall have sold or disposed of the property which was the subject of such gift, conveyance, etc., or any part thereof, the money or other proceeds realized therefrom may be seized or recovered as fully and effectually as the property if still remaining in the possession or control of such person could have been seized or recovered." This provision is taken from the Ontario Statutes, R.S.O., 1887, ch. 124, sec. 8; and as MacMahon, J., pointed out in *Robertson v. Holland*, 16 O.R. 532 it was passed after *Stuart v. Tremain*, 3 O.R. 190, and with the object, probably, of meeting the difficulty that Boyd, C., had pointed out in that case, that the statute did not permit the Court to give any relief to a creditor when once the fraudulent assignee had disposed of the property to a *bonâ fide* purchaser.

This provision in the Ontario Act has been much amplified by subsequent legislation; and between the section in our Act and the original one in the Ontario Act, there was this important difference, that under the latter the right of action was given exclusively to the assignee or to a creditor suing in his name by order of a Judge. It was only in cases, therefore, when the debtor had assigned under the Act for the benefit of creditors that the provisions applied for following the proceeds of the sale of the property: *Robertson v. Holland*, 16 O.R. 536; *Tennant v. Gallow*, 25 O.R. 56. There is nothing in our Act, however, that limits this right of action to the assignee, except in cases where there has been an assignment under the Act; and there is no reason that I can see why the plaintiffs here should not be given the benefit of the provisions of the section. At the time they began the ac-

tion they had obtained a judgment against the debtor and had their execution against his goods in the sheriff's hands. If, then, the goods were still in the possession of the defendant, they could be seized under the execution as soon as the chattel mortgage was set aside as fraudulent, and, if it were necessary, the Court could give consequential relief by way of equitable execution. And what the section says is that the proceeds realized "may be seized and recovered as fully and effectually as the property if still remaining in the possession" of the fraudulent grantee himself. The sheriff cannot seize the money that the defendant has received for the goods he sold, but the word "recover" is used as well as "seize"; and the Court has ample power to give effect to what seems to me to be the clear intention of the section.

This section was not, as far as the report of the case shows, brought to the attention of the learned Chief Justice on the argument of *The Union Bank v. Barbour*; and he seems to have overlooked it in the decision of the case. I think I am justified, notwithstanding that case, in holding that the plaintiffs are entitled to call upon the defendant for an account of the proceeds of Rice's goods that he sold. It has not been questioned that the price at which he sold them was as much as the goods were fairly worth.

By section 695 of the Queen's Bench Act priority of claim upon what a sheriff realizes under writs of execution in his hands is abolished; and the plaintiffs, therefore, as regards any money that is recovered from the defendant, are not entitled to be placed in a better position than they would be if the sheriff realized the money under the execution.

I think the plaintiffs should have judgment declaring that the chattel mortgage from Rice to the defendant is void as against them; that the defendant should account for the moneys that he has received from the sale of the goods that he took under the chattel mortgage; that the defendant do forthwith pay into Court the amount found due by him on such account, or so much thereof as may be necessary to satisfy the judgment of the plaintiffs against the said Rice; and that the moneys so paid in be subject

to the further order of the Court, and that for that purpose further directions and subsequent costs be reserved. The defendant must pay the costs of the action.

From this decision defendant appealed to the Full Court.

J. S. Ewart, K.C., and *H. J. Macdonald*, K.C., for the appellant.

H. M. Howell, K.C., and *T. G. Mather*, for respondents.

February 15th, 1902. KILLAM, C.J.:—Two main questions arise in the present case. That which is naturally the first is whether a mortgage to the defendant of the stock in trade of a retail merchant to secure his indebtedness to the defendant was made with intent to give the defendant a preference over the other creditors or had such effect.

Under the decision of the Supreme Court of Canada in *Stephens v. McArthur*, 19 S.C.R. 446, a transaction is not to be considered as having the effect of giving a preference unless the debtor has the intent to prefer.

Mr. Justice Bain found that in this case there was the intent and his decision upon that point is challenged on this appeal.

The received doctrine now in England appears to be that, in order to avoid a transaction as entered into "with a view of giving" a creditor a preference under the Bankruptcy Acts, it should appear that the "dominant" motive of the debtor was to give a preference: *New, Prance and Garrard's Trustee v. Hunting*, [1897] 1 Q.B. 607, 2 Q.B. 19; S.C. *sub nom.*; *Sharp v. Jackson*, [1899] A.C. 419; *In re Vautin*, [1900] 2 Q.B. 325.

In the first of these cases, Lord Esher, M.R., and Chitty, L.J., considered that the word "view" was equivalent to "intention." Lord Esher said: "The question is whether in fact he had the intention to prefer certain creditors. It has been argued that the debtor must be taken to have intended the natural consequences of his act. I do not think that is true for this purpose. I think one must find out what he really did intend." [1897] 2 Q.B., at p. 27. These remarks were cited, with approval, by Lord Halsbury, L.C., in the House of Lords, [1899] A.C., at p. 421.

I do not understand Lord Esher to have meant that you are not in any case to infer intent from the obvious consequences of the act. There is authority to the contrary: *Gibson v. Boutts*, 3 Sc. 229. But while the effect may be to place one creditor in a more advantageous position and the debtor may recognize at the time that this will be the effect, this may be done for the purpose of accomplishing something else; and I conceive it to be clearly established that what we are to search for under our Act, as under the English Bankruptcy Acts, is the "dominant" or governing motive of the debtor.

I fully concur in the opinion of the learned Judge, that the amending Act, 63 & 64 Viet. ch. 3 (M., 1900), has eliminated the factor of pressure. But, though speaking subject to the development of an unexpected combination of facts in some other case, I doubt if the amendment has accomplished much more.

Under legislation somewhat similar the Ontario Courts have held that the effect is not conclusive where the debtor has acted with some other dominant motive than that of preferring the creditor: *Lawson v. McGeoch*, 20 A.R. 464; *Webster v. Crickmore*, 25 A.R. 97; *Armstrong v. Johnston*, 32 O.R. 15.

In this case the plaintiffs themselves put forward the debtor as their sole witness to the circumstances under which the transaction took place and which influenced his act. They brought these out from him as part of their case. They neither treated him as adverse nor attempted to show that he was incorrect in details. He was not contradicted.

If the debtor's account is to be taken as correct, it appears to me that there could not properly be any other inference than that his dominant motive was to make an arrangement for continuing the business. As we can see the case now, this was practically hopeless; but parties in his position do not usually recognize this so clearly as it appears afterwards to others. I do not think that we are warranted in assuming that all this is mere subterfuge. It is true that the amending Act declares that a *prima*

facie presumption is to arise from the effect of a transaction. But I do not think that this would justify us in looking only to the effect and in refusing to attach any weight to the debtor's account of the circumstances upon an assumption that his account has not been accepted by the trial Judge.

It is quite true that the alleged arrangement between the debtor and the defendant was not a definite, enforceable agreement. But for the purpose of estimating intent, this does not seem to be necessary: *In re Wilkinson*, 22 Ch.D. 788; *Webster v. Crickmore*, *supra*.

Nor does it appear to me important to determine whether the defendant's agent was acting *bonâ fide* or anticipating that the other creditors could be arranged with and the business continue, it being only the debtor's mental attitude that we are considering.

The remarks in *In re Wilkinson* that may seem opposed to this view related to the question of the transaction being an act of bankruptcy and not to that of the intent to prefer.

The transaction was not attacked as a fraud upon the debtor himself; and, while the statement of claim alleged that the mortgage was given with intent to defeat, delay and prejudice the creditors, there was no attempt to uphold the judgment upon such a ground.

With considerable regret I have come to the conclusion that we cannot affirm the judgment. Having formed this opinion upon the first ground of appeal, it is unnecessary to express any opinion upon the second. Such an expression is the less called for at present, as there seems a probability that the Legislature will shortly substitute other provisions for those upon which the difficulty arises.

I would allow the appeal with costs and dismiss the action with costs.

RICHARDS, J.—I concur in the views of the Chief Justice that the dominant motive in the debtor's mind was the hope that by

giving the conveyance he would be enabled to carry on business, and that it is not necessary that the promises on which the transfer was got should be legally binding on the defendant.

But, with deference, I am unable to agree that the question of good faith on the part of defendant's agent, in making those promises, is not material.

On a careful consideration of the evidence I am led to the conclusion that there was not in this case an intention at any time to carry out the promises made to the debtor. If so, then I think that a good consideration to uphold the transaction as against the plaintiffs has not been shown by proving merely what was in the mind of the debtor.

It is strongly arguable from the absence of reference in the cases to the transferee's good or bad faith that the question is immaterial. But, in that absence, I feel at liberty, though with much hesitation, to hold that the question is material. A debtor facing the question of business failure will usually grasp at anything that may be held out to him as a means of tiding over. To hold that an undue advantage given by him when in that condition of mind, on the strength of promises merely made to procure that advantage and without intention to fulfil them, can be maintained and enjoyed by the party making such promises, seems to me to put a premium on fraud.

It is argued that, even if the debtor could set aside such a transfer, a creditor attacking it can not, as there was no privity of contract between him and the creditor who got the advantage. The best opinion I can form as to that is that it is the intention of the Act to allow the attacking creditor to set aside what the debtor could, and for that purpose the Act should, I think, be liberally, and not strictly construed.

As my brother judges are in favor of allowing the appeal, and as new legislative enactments are about to be made on the questions in dispute in this action, it is unnecessary for me to go into the other points raised, further than to say that I think the judgment appealed from should be upheld and a liberal construe-

tion in favor of attacking creditors given to the sections of the statute in question. Without such they would be of little practical value.

DUBUC, J., concurred with Killam, C.J.

*Appeal allowed with costs and
action dismissed with costs.*

Notes:

INTENT TO PREFER IN TRANSACTIONS ATTACKED
WITHIN SIXTY DAYS.

In the reported case the transfer was taken out of the statute because the debtor gave it for some other purpose or actuated by a motive different from that to prefer. This case excellently illustrates the change introduced by the amendment of 63—64 Viet. (M) C. 3, sec. 1. (which made the Manitoba section practically similar to that of Ontario and other provinces.) Before the amendment, as was decided in *Stephens v. McArthur* (1890, 6 Man. 496), where a transaction *had the effect* of preferring, no matter what was the intent, the transaction was void. Since the amendment while the doctrine of pressure has been eliminated it is not enough that the transaction effects a preferment of the creditor. In *Schwartz v. Winkler*, (reported *ante*, p. 51) it was pointed out that not every transaction having this effect is to be void, but that it is to be presumed *prima facie* to have been made with the intent to prefer. The transaction is to be judged in regard to the question of preference, upon the same principle as it would have been under the judge-law of England: *vide*, per Killam, C.J., *ibid*. This is also the opinion in Ontario. Where the debtor has acted with some other dominant motive than that of preferring the creditor, it has been held the effect is not conclusive: *Lawson v. McGeoch* (1893), 20 A.R. 404; *Webster v. Crickmore* (1898) 25 A.R. 97; *Armstrong v. Johnson* (1900), 32 O.R. 15.

In the corresponding section of the Act in Nova Scotia, R.S. N.S. (1900), ch. 145, sec. 4, the words *prima facie* have been omitted and the view appears to have been recently adopted by the Supreme Court of the Province that the question is but one of intent and that the presumption of invalidity raised by the statute is irrefutable: *Shediac v. Buchanan* (1903), 1 Com. Law R., p. 481.

The defence of *pressure* has been abolished in transactions attacked within 60 days: *Webster v. Crickmore* (1898), 25 A.R. 97; *Schwartz v. Winkler* (*ante*, p. 51). And for a summary of the statute and case in Ontario on the point, see *Dana v. McLean* (1901), 2 O.L.R. at p. 470.

The defence of pressure having been removed, it yet is open to raise certain other defences. It is open to establish another intent, as in the case reported here—and in this connection it may be *quaered* whether it might not have been argued, in cases like *Halwell v. Township of Wilmot* (1897), 24 A.R. 628; *Molsons Bank v. Halter* (1890), 18 S.C.R. 88; *Grant v. Van Norman* (1882), 7 A.R. 526, that another intent was present and that the doctrine of pressure in the strict sense was not raised; *vide Parker, Frauds on Creditors*, p. 174. For instance, in the *Halwell v. Wilmot* case, where a defaulting trustee restored trust property actuated, as was held, by fear of prosecution and hence by pressure of circumstances, it might have been viewed in another light *i.e.* that the debtor had a desire to protect himself from disgrace and punishment. And so, in the case of *Grant v. Van Norman* where a solicitor restored clients' moneys to avoid being struck off the rolls.—Another defence is found in showing that the transfer was in pursuance of a pre-existing agreement: *Webster v. Crickmore* (1898), 25 A.R. 97; *Breese v. Knox* (1897), 24 A.R. 203. So the statutory presumption may be rebutted by evidence that the transaction was entered into and consummated in perfectly good faith without any reason to know or believe that the transferors were, at the time, insolvent: *Dana v. McLean* (1901), 2 O.L.R. 470. So where a new mortgage is given in substitution of a former one instead of renewing it: *Rogers v. Carroll* (1899), 30 O.R. 328.

For a full discussion of the doctrine of "dominant motive" see the English cases of *Sharp v. Jackson*, [1899] A.C. 419; *In re Vautin*, [1900] 2 Q.B. 325; *Re Lake*, [1901] 1 K.B. 710.

[IN THE SUPREME COURT OF CANADA.]

MARY D. S. CORNWALL, APPELLANT.

AND

THE HALIFAX BANKING COMPANY, RESPONDENTS.

IN RE ESTATE OF IRA CORNWALL, DECEASED.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Insurance—Beneficiary not named in policy—Policy not in accord with application—Mutual mistake—Right to proceeds—Act for benefit of wives and children—58 Vict. (N.B.), ch. 25.

C. applied for insurance, the policy to be payable in event of death to his wife, but the company, in accordance with its rules, issued a policy payable on its face, to the personal representatives though in fact in such circumstances it would pay the proceeds only to the beneficiary named in the application. C. was unaware of this at the time of his death. *Held* (Davis and Mills, J.J., dissenting), that the wife was entitled to the proceeds of the policy as against the representatives of the estate. *Per* Sedgewick, J., The New Brunswick Act (58 Vict., ch. 25) for securing to wives and children the benefit of life insurance applies to accident insurance as well as to straight life insurance.

THIS was an appeal from a judgment of the Supreme Court of New Brunswick, affirming the decree of the Probate Court, which declared that the proceeds of a policy on the life of the late Ira Cornwall belonged to his estate, and not to his widow.

The facts of the case are fully set out in the opinions of the Judges.

C. J. Coster, for the appellant.

J. R. Armstrong, K.C., for the respondents.

May 27, 1902.—The Court gave judgment as follows:—

TASCHEREAU, J.:—This is an appeal from a judgment of the Supreme Court of New Brunswick, affirming a decree of the Judge of Probate of St. John, by which, upon the hearing of passing accounts in the insolvent estate of the late Ira Cornwall,

the appellant, his widow, on the application of the respondent, creditor of the estate, was ordered to account for a sum of one thousand dollars which she has received from an insurance company upon a policy for two thousand dollars on her deceased husband's life. She claims that she was the beneficiary under that policy. The creditors, on the other hand, claim that the amount of the insurance passed into the estate of her late husband.

The substantial facts of the case are not complicated.

On the twenty-sixth day of February, 1896, the late Ira Cornwall applied in writing for an accident insurance, the sum to be insured two thousand dollars, policy to be payable in case of death by accident under the provisions thereof to present appellant. The company, however, issued their policy payable on its face to the personal representatives of the said Ira Cornwall.

Hugh Scott, the chief agent for Canada of the insurance company, stated as follows in his evidence:—

Q.—Why did you not endorse on the policy that it was payable to Mary D. S. Cornwall, wife of the deceased, as expressed in application?

Ans.—It is not the practice of this association to do so, and it never has done so under our management in Canada.

Under such an application and our policy we would pay the beneficiary only named in the application.

After receiving the policy from the company, the said Ira Cornwall, believing that it was payable to his wife, as he had ordered it to be, handed it to her and told her that it was payable to her. She did not look at it, but kept it in her possession as her own until after his death, after which it was found that it was through error on its face payable to his personal representatives.

On the 26th July, 1897, while the said policy was in force, the said Ira Cornwall was found drowned, in the River St. John, under circumstances which induced the company to believe that there had been a breach of the condition in the policy against suicide.

The appelliant then applied to the company for payment of the amount of the policy to her as beneficiary.

The company thereupon set up merely the defence of suicide and refusal to pay the amount of the insurance. Under the New Brunswick law, an action could not be brought in the name of the beneficiary. Administration had, therefore, to be taken out on Ira Cornwall's estate to obtain a nominal plaintiff, and, upon action by the appelliant as such administratrix for the two thousand dollars covered by the policy, the insurance company compromised her claim, and paid her the one thousand dollars now in controversy.

The Judge of Probate determined that as, in law, the policy on its face was not payable to the appelliant, he could not recognize the equitable or beneficiary right she claims, and, therefore, ordered her to account for that sum to the estate. With deference, I think that this determination, though affirmed by the Supreme Court of the Province, is erroneous.

As I view the case, it seems to me to be a very simple one. First, it cannot but be conceded that principles of equity govern the administration of estates in Probate Courts in New Brunswick in the same way, in effect, as they would if the estate was being administered in equity. *Harrison v. Morehouse*, 4 N.B. Rep. 584. Now, it seems to me incontrovertible, upon the evidence upon record, from the facts found and the fair inferences therefrom, that the deceased believed that the policy he received from the company was payable in the case of death to the appelliant, as he had directed in his application, and agreed to receive the policy exclusively upon that belief. Then, the company themselves admit that by their real contract the appelliant was, in case of death, to be the sole beneficiary of the insurance. That the policy is not in terms payable to her is, therefore, clearly a mutual mistake. And that, under these circumstances, a Court of Equity would not refuse a reformation of the policy so as to make it payable to appelliant as both parties to it intended it to be, seems to me plain.

That, in my opinion, concludes the case. The learned counsel

for the respondents invoked the acquired rights of the creditors, and argued that as, at the death of Ira Cornwall, these one thousand dollars had passed to his estate, the appellant was now precluded from asserting any equitable rights in the matter she might have had during his life. But that is a *petitio principii*. It is assumed that she was not *ab initio* the beneficiary of this insurance. Now, that is the very question in issue. And by determining, as we do, that she was, at the date of the policy, the sole beneficiary thereunder, it follows that, at the death of her husband, the amount of the policy did not pass into his estate.

The respondents' attempt to imply a waiver or an estoppel against the appellant from certain allegations she made in her petition for letters of administration entirely fails. It would be most unfair to declare her precluded from now asserting her just rights merely because she made a mistake of law in such a document which, as to the respondents, was *res inter alios acta*.

The appeal is allowed with costs; a decree to be entered that the \$1,000 in question formed no part of Ira Cornwall's estate. Costs in all the Courts will be against the respondents.

SEDGEWICK, J.:—I concur in the judgment of my brother Tasehereau, but I think it desirable to make a few observations relating to a point upon which he is silent.

As he has shewn, the policy in question is one which a Court of Equity would, under the circumstances, rectify upon the ground of mutual mistake, the assured thinking that he was to receive a policy payable to his wife and the company thinking that they were giving him a policy payable to his wife.

Assume then, that the policy in question is a policy in which the widow is named as the beneficiary; what rights does the widow possess under it? It is clear that, at law and apart from the statute, she could not sue upon it because there is no privity between her and the company. But the company has contracted with the assured that it, upon his death, will pay the widow. The contract is clearly fulfilled and the company's liability has ceased if it specifically performs its contract, namely, pays the insur-

ance money to the widow. Upon such payment, in the absence of special circumstances or arrangements to the contrary, the transaction is forever closed.

I have been unable to find a single case in England or elsewhere, where, under such circumstances, moneys so paid were ever declared to be estate funds payable to the executors or administrators of the assured. It is only by virtue of the technical rule as to privity of contract that the insurance moneys could ever come into their hands, and, coming into their hands, it comes there ear-marked, and then, subject to the rights of the beneficiary named in the policy and forming no part of the general estate.

Against this proposition has been cited the celebrated case of *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147, where one Maybrick insured his life for the benefit of his wife, Mrs. Maybrick, who afterwards murdered him. In that case the insurance company endeavoured to escape liability upon the ground that inasmuch as the beneficiary, Mrs. Maybrick, had murdered her husband, it was not liable. The Court, however, held that while, on grounds of public policy, Mrs. Maybrick could not recover the money, yet the personal representatives were, nevertheless, liable to the state of which the insurance moneys in that event would form part.

It is evident in that case that, had Mrs. Maybrick been an innocent woman, she would have been both at law and in equity entitled to the money. The insurance company had contracted to pay her, and they would have paid her except for her conduct. It is true that Lord Esher in his judgment states that at common law in a case like the present the money would, in the event of non-payment by the insurance company, to the beneficiary, become the estate property, but that statement was not necessary to determine the case, and it appears to have been inadvertently made, because Fry, L.J., states that the effect of the transaction was, in his opinion, to create a contract by the defendants with James Maybrick that the defendants would, in the event which has occurred, pay Florence Maybrick the £2,000 insured. *It*

would be broken by non-payment to her, and he never suggests that in the event of payment to her the estate could recover it back.

But if there were any doubt about this, I think the question is settled by ch. 25 of 58 Vict., "An Act to secure to wives and children the benefit of life insurance." It is the enactment here of the same law which prevails in England and through most of the Provinces of Canada. It expressly gives the beneficiary, if a wife or child of the deceased, a beneficial interest in the insurance moneys. The only difficulty suggested is that the policy here is not a life insurance policy, but an accident insurance policy, and section 3 of the Act, providing that its provisions shall apply to every lawful contract of insurance in writing now in force or hereafter effected, which is based on the expectation of human life, does not apply.

I cannot see why the contract here is not based upon the expectation of human life. The contract so far as this question is concerned, is that, should the assured die by accident within a year from its execution, it will pay the amount insured. It expects him to live. It takes the chance and runs the risk of an accident bringing him to an untimely end, so that, in my view, the statute clearly applies.

GIROUARD, J.:—I concur in the opinion of Mr. Justice Taschereau.

DAVIES, J. (dissenting):—For the reasons given by Mr. Justice Barker in the Supreme Court of New Brunswick, speaking for the majority of that Court, and to which I feel I can add little if anything useful, I am of opinion that this appeal should be dismissed with costs.

To my mind the reasoning of Mr. Justice Barker is conclusive. There was admittedly no mutual mistake in the issue of the policy by the company in the form it did and making the amount insured payable in case of death by accident to the executors of

the assured. And I thoroughly concur with Mr. Justice Barker that, the company having paid the sum of \$1,000 as a compromise to the administratrix of the estate in an action brought by her to recover the money on the policy, the evidence of Mr. Scott as to the general practice of the insurance company in paying the beneficiary only, in cases where an application for insurance named a beneficiary, and the policy issues payable instead to the insured's executors, is of no importance in the present case,—even if it should have been admitted at all.

There having been no mutual mistake there can of course be no reformation. Even if the policy was reformed as now contended for, unless the New Brunswick Statute "Securing to wives and children the benefit of life insurance" was held applicable to an "accident" policy, the reformation of the policy would not avail the appellant.

I quite agree with Mr. Justice Barker that, outside of the statute and in the absence of any independent act of the assured declaring a trust respecting the moneys payable under the policy for the benefit of his wife or assigning them to or for her benefit, the proceeds of the policy would go to the estate. But as the proper construction of this statute, and its application to such a policy as the one in question, was not argued before us and, in the view I take of this appeal, it is not necessary to decide this question, I express no opinion upon it.

MILLS, J. (dissenting):—I am of the same opinion as my brother Davies.

Appeal allowed with costs.

Solicitor for the appellant: *C. J. Coster.*

Solicitor for the respondents: *J. R. Armstrong.*

Notes:

INSURANCE FOR BENEFIT OF WIFE AND CHILDREN.

1. *Statutory Enactments Regarding.*

Most of the Provinces have legislation which secures to wives and children the benefit of insurance by the husband. It gives

the wife, children, grandchildren and mother of the deceased a beneficial interest in the insurance moneys. The following are the different enactments: *Nova Scotia*: R.S. (5th Ser.), 1884, ch. 94, sec. 12. *Manitoba*: "The Life Assurance Act," R.S., 1891, ch. 88, secs. 2-4, 26. *British Columbia*: "The Families Insurance Act," R.S., 1897, ch. 100, sec. 7. *Quebec*: Civil Code, secs. 5581, 5584, 5604. *Ontario*: "The Insurance Act," R.S., 1897, sec. 159. *New Brunswick*: 58 Vict., ch. 25, sec. 6.

In Ontario, Manitoba, British Columbia and Quebec the legislation is, in terms, wide enough to cover not only life insurance, but also accident. The British Columbia Statute (R.S.B.C., 1897, ch. 104) contains (sec. 3) a provision that the Act "shall apply to every lawful contract of insurance. . . . which is based on the expectation of human life." In Ontario, the provisions of section 159, ch. 203, R.S.O., 1897, are, when read in connection with sub-sec. 9 of sec. 159, and sub-secs. 37 and 41 of sec. 2, wide enough to cover accident, as well as other kinds of insurance. The Manitoba Act, 61 Vict. (M.), ch. 25, sec. 2, makes the provisions of chapter 88 "applicable to and inclusive of policies of insurance on the lives of married men. And the Quebec statute covers any policy of insurance held by the husband on his life. In view of these various provisions it may be fairly concluded that the decision of Sedgewick, J., above, would apply in the Provinces mentioned.

2. "Create a Trust."

Where the words of the statute are in terms or effect "create a trust for the benefit of the wife or children," a vested interest is created, provided the beneficiary survive, and, contingent on that and if no subsequent variation of the insured be made, the assignee of a beneficiary will succeed to the benefits of the policy.

In *Re Adam's Policy Trusts* (1883), 23 C.D. 525, Chitty, J., held that these words, taken with the effect of the policy, constituted a declaration of an executed trust, and in *Re Seyton* (1887), 34 C.D. 511, it was doubted whether anything but the policy was to be looked at in determining what the trust was. In Ontario, *Scott v. Scott* (1890), 20 O.R. 313, holds that not only the proceeds, but the policy itself was not to be under the control of the husband, or to form part of the estate: *vide, In re Turnbull*, [1897] 2 Ch. 415. This agrees with the view held in *Cleav-*

er v. Mutual Reserve, etc., Association, [1892] 1 Q.B. 147, where it was pointed out that the policy does not vest in husband's personal representatives at his death in trust so long as any object of the trust remains unperformed.

Under the Ontario Act, sec. 159, sub-sec. 1, the insurance contract creates a trust in favor of the beneficiary, but it is only the money payable thereunder that is not subject to the control of the insured, and forms no part of his estate so long as any object of the trust remains. It is clear, therefore, that the view expressed in *Re Seyton, ante*, is the correct view of the scope of the Ontario Act, *i.e.*, that the policy can only be looked at in determining the trust.

The right to create a trust apart from the Statutes has been recognized in *Wicksteed v. Munro* (1886), 13 A.R. 486, and *Fisher v. Fisher* (1898), 25 A.R. 108.

But the contract is with the husband alone, the wife being no party to it. Hence the right to sue will not vest in her, but in the husband's representatives.

The words "create a trust" or words of similar import, must be read with what follows and there is no vested interest given by the trust to a beneficiary who dies before a policy matures: *Re Adam's Policy Trusts* (1883), L.R. 23 C.D. 525; *In re Seyton* (1887), L.R. 34 C.D. 511; *Re Davies*, [1892] 3 Ch. 63. Boyd, C., in *Re McKellar* (1901), 37 C.L.J. (N.S.) 403, said: "It does not appear to me desirable to incorporate the somewhat technical and not always satisfactory doctrine as to the vesting of legacies into these policies of insurance." But in the United States decision of *Millard v. Brayton* (1901), 52 L.R.A. 117, a policy on a man's life for the benefit of his wife and, in case of her death, payable to his children was held to be a contract with the wife and to give the children, in case of her death during his lifetime, a vested interest which will inure to their estates if they die while the father is living.

A policy may be effected, assigned or settled on a beneficiary according to the ordinary rules of law. The insurer will not, in such a case, obtain the benefit of the Act and secure the proceeds from his creditors to the extent of the Act, unless the settlement is valid by the ordinary requirement of law relating to settlements of personal property, both as to form and substance: *Re Roddick* (1896), 27 O.R. 537; *Book v. Book* (1900), 32 O.R. 206; 1 O.L.R. 86; *Connecticut Mutual Life v. Burroughs* (1867), 34 Conn., p. 315.

Burton, C.J.O., in *Fisher v. Fisher* (1898), 25 A.R. 108, said that when once a policy was issued in favor of wife or children, it became an *irrevocable trust*, placing it not only beyond the reach of the husband's creditors, but beyond his control. But (per McLennan, J.A., *ibid.*, p. 116) there remains to the husband a right, a contingent reversion, in the event of his surviving his wife.

In Ontario it has been settled (*Fisher v. Fisher, supra*), that a policy which falls within the wording of the Insurance Act, sec. 159, is controlled by it, and, if so, creates a trust in favor of the named beneficiary, if within the preferred class, and can only be dealt with to the extent which the Act permits (*vide*, sec. 151, sec. 3, sec. 160 sub-sec. 1 and 2) and except to that extent is irrevocable unless the sole or only surviving beneficiary does in the lifetime of the insured; *Re Fenwick* (1898), 30 O.R. 483; *In re Wilson* (1897), 30 O.R. 486; *Racher v. Pew* (1899), 30 O.R. 483; *Fisher v. Fisher, supra*; *Scott v. Scott* (1890), 20 O.R. 313; *King v. Yorston* (1895), 27 O.R. 1; *Re Harrison* (1900), 31 O.R. 314; *Mingcaud v. Packer* (1891), 21 O.R. 267, 19 A.R. 290; *Potts v. Potts* (1900), 31 O.R. 452; *Book v. Book, supra*; *Re Snyder* (1902), 4 O.L.R. 320. And further, if such a state of circumstances exists (as is usually the case), that what is done is what the Acts describe, then the Acts will govern and the control of the benefits of the policy will pass from the insured, except so far as he is permitted by the Acts to vary and change the beneficiary or the appointment. It is not necessary that the policy or other instrument should be expressed to be made in pursuance of the Acts. If it is such a policy or declaration as is mentioned in the Act, this is sufficient: *Fisher v. Fisher, supra*.

The will of the insured is a writing within the meaning of section 159 of the Ontario Act: *Re Lynn* (1891), 20 O.R. 475; *Beam v. Beam* (1893), 24 O.R. 189; *McKibbon v. Feeagan* (1893), 21 A.R. 87.

N.B.—A very excellent article on the above question by C. B. Labatt, Esq., may be found in (1900), 36 C.L.J., pp. 252-271.

[IN THE COURT OF APPEAL FOR ONTARIO.]

RE CITY OF KINGSTON AND KINGSTON LIGHT, HEAT AND POWER
COMPANY.

Company—Franchise—Sale of gas works to municipal corporation—Arbitration as to price—Ten per cent. addition—“Works, plant, appliances and property”—Rule of Ejudem Generis.

By an agreement between the parties, the corporation of Kingston and the company, the former was to have the option of purchasing and acquiring all the works, plant, appliances and property of the company upon giving to the company one year's notice of their intention previous to the expiration of the period of the contract, at a price to be fixed by arbitration under the Municipal Act. The arbitrators in ascertaining the price, did not include anything for the earning power or franchise and rights of the company, nor did they allow ten per cent. addition to the price as upon expropriation under R.S.O. (1887), ch. 164, sec. 99.

Held, that they were right in so doing.

Decision of Lount, J., affirmed.

THIS was an appeal by the company from an order of Lount, J., dismissing an appeal by the company from the award of the majority of three arbitrators appointed to ascertain the price to be paid upon a purchase by the city corporation of the works, etc., of the company. The facts are stated in the judgment of LOUNT, J., which follows:—

March 14, 1902. LOUNT, J.:—

This was an appeal by the company from an award of the arbitrators appointed in this matter, or for an order setting aside the award or referring it back to the arbitrators.

By an agreement between the parties, dated July 14th, 1896, having five years to run from January 1st, 1897, it was agreed that at the expiration of a certain contract contained in the agreement, the corporation should have the option of purchasing and acquiring all the works, plant, appliances and property of the company used for light, heat and power purposes, both gas and electric, upon giving to the company one year's notice of their intention previous to the expiration of the period of the contract of a price to be fixed by three arbitrators to be

chosen as therein mentioned, such arbitration to be held under the provisions of the Municipal Act.

Notice by the corporation was duly given. The arbitrators—Judge McDougall for the corporation, Judge Price for the company, and Judge MacTavish, the third arbitrator, chosen by the other two arbitrators—were duly appointed.

The arbitrators entered upon the reference, and made their award on November 15th, 1901, which is as follows:—

“We find and fix the value of the works, plant, appliances and property of the company used for light, heat and power purposes, both gas and electricity (not including anything for the earning power or franchise and rights of the company) at one hundred and seventy thousand, three hundred and seventy-three dollars (\$170,373). Judge MacTavish and Judge McDougall, two of the said arbitrators (Judge Price being of the contrary view) are of the opinion that upon the true construction of the agreement of July 14th, 1896, between the said parties above referred to, the said company is not entitled to be allowed any sum as the value of the franchise or rights conferred upon the said company by 54 Vict., ch. 107 (O.), or otherwise.

“In fixing the price referred to in clause 11 of the said agreement, the said arbitrators, however, have heard and considered evidence upon the value of the said franchise and rights, and place the value of the same at the sum of eighty thousand dollars (\$80,000) if the company is entitled to any sum therefor.

“The arbitrators have not included any amount representing the ten per cent. addition provided for in sec. 99 of R.S.O. 1887, ch. 164, and incorporated with 54 Vict., ch. 107 (O.), in arriving at the said sum of one hundred and seventy thousand, three hundred and seventy-three dollars or the said sum of eighty thousand dollars; Judge Price contending that to the present value ten per cent. should be awarded to the company.”

From this award the company now appeal, asking that it be set aside or referred back on the following grounds: 1st.

That in addition to the amount allowed to the company by the award, the \$80,000 found by the arbitrators to be the value of the franchise or goodwill was part of the company's property which the arbitrators were required by the agreement of reference to value and allow to the company;

2nd. That the valuation of the works, plant, appliances and property of the company be increased by \$80,000, as being part of the actual value thereof as a going concern;

3rd. Or that to the value of the works, plant, appliances and property ten per cent. of the amount of value placed thereon be added in accordance with the direction of the statutes referred to in the award;

4th. Or by way of appeal that the conclusions denying the right of the company to have the value of the franchise or goodwill allowed is erroneous, and the value of the franchise or goodwill should have been allowed to the company as part of their claim;

5th. Or that the \$80,000 should have been, but was not, added to the value of the said works, plant, appliances and property of the company;

6th. Or that the arbitrators should in any event have allowed the said ten per cent. and have added the same to the amount of the award.

Counsel for the corporation took the preliminary objection that under the agreement the submission being a voluntary one, and with no provision for an appeal from the award, it is final. I heard argument on this objection and on the merits, but from the conclusion I have come to on the merits I have not felt it necessary to dispose of the preliminary objection.

It was strongly urged upon me by counsel for the company that the word "property," as used in the agreement, included the franchise or goodwill of the company, and therefore the \$80,000 should have been allowed by the arbitrators in fixing the price for "all the works, plant, appliances and property of the company used for light, heat and power purposes, both gas and electric." I have not been able to reach this conclusion.

In my opinion, the determination of the question is not to be decided by the meaning to be attached to the word "property," but by the fair interpretation and construction of the agreement.

By 54 Viet. (1891), ch. 107, sec. 10 (O.), it is provided that sec. 35 of the Act 11 Viet., ch. 6, incorporating the City of Kingston Gas and Light Company "is repealed" (this section provided that the Act shall be and remain in force for fifty years and no longer) "but at any time from and after the expiration of twenty years from the passing of this Act the corporation of the city of Kingston shall have the right on giving twelve months' notice to the Kingston Light, Heat and Power Company of such their intention, to expropriate the works and property of the said company under and in accordance with the provisions of the general Act in that behalf, being ch. 164 of the Revised Statutes of Ontario, 1887, or any Act amending the same; and the said corporation shall have and possess all the powers, rights and privileges conferred by the Legislature of Ontario on any company incorporated under R.S.O. 1887, ch. 165, or on municipalities by R.S.O. 1887, ch. 191, and nothing in this Act contained shall effect the rights and powers of the said corporation under the last named Act or under any Act of the Legislature of Ontario passed or to be passed."

This Act was passed on May 4th, 1891, and but for the right of the corporation to expropriate the works and property at the expiration of twenty years from the passing thereof, the company would have a fifty years' franchise. The right of the corporation to expropriate under sec. 10 would, but for the agreement of July 14th, 1896, be not before May 4th, 1911. The parties, however, by the agreement agreed that at the expiration of this contract—that is, five years from the 1st day of January, 1897—the corporation shall have the option of purchasing and acquiring all the works, plant, appliances and property of the company used for light, heat and power purposes, both gas and electric, upon giving the company one year's notice of their intention previous to the expiration of the period of the

contract, at a price to be fixed by arbitrators, etc., and that such arbitration shall be proceeded with forthwith after the giving of the said notice, and shall be held under the provisions of the Municipal Act.

The submission to arbitration is a voluntary one, and not under sec. 10 of 54 Viet., ch. 107.

By clause 12 of the agreement, it is provided that forthwith after the corporation shall have given the notice of their intention to exercise their option, the corporation shall have access to the works, plant, property and appliances of the company.

By clause 15 it is provided that in the event of the works, plant and property of the company being acquired by the corporation, then the company shall cease to exist as a corporate body for the purposes for which they were constituted, except as far as may be necessary to wind up the affairs of the company, and shall surrender, assign, transfer and set over to the corporation all their rights, franchises, privileges and immunities. In my opinion the word "property" as used in these clauses, can only be held to mean tangible and not intangible property, such as the franchise or goodwill of the company.

The corporation were not under any necessity to purchase and acquire the franchise of the company; for all purposes necessary, the corporation could and can operate under and by virtue of the Municipal Light and Heat Act, R.S.O. ch. 191. What was agreed to be paid for under clause 11 are the works, plant, appliances and property used for light, heat and power purposes. I think the doctrine of *ejusdem generis* applies. In *Anderson v. Anderson*, [1895] 1 Q.B. at p. 753, Lord Esher, M.R., says: "Nothing can well be plainer than that to shew that *primâ facie* general words are to be taken in their larger sense, unless you can find that in the particular case the true construction of the instrument requires you to conclude that they are intended to be used in a sense limited to things *ejusdem generis* with those which have been specifically mentioned before."

The word "property" as used in the agreement is on the

fair construction of the instrument limited to the preceding words, and these words are not to be construed so as to include such an intangible right as the franchise or goodwill of the company.

In *Church v. Mundy* (1808), 15 Ves. 396, at p. 406, Lord Eldon said: "The best rule of construction is that which takes the words to comprehend a subject that falls within their usual sense, unless there is something like declarations plain to the contrary."

The limited sense is, I think, shewn in clause 12, where it is provided that the corporation shall have access to the works, plant, property and appliances of the company. What is here meant is that the corporation shall have access to the tangible property. Again, the 15th clause provides "that in the event of the works, plant and property being acquired by the corporation the company shall cease to exist as a corporate body for the purposes for which they are constituted, except so far as may be necessary to wind up the affairs of the company, and shall surrender, assign, transfer and set over to the corporation all their rights, franchises, privileges and immunities." That is, as I read it, the corporation having acquired the tangible property at a price to be fixed by arbitration, the company ceases to exist, and, as part of the bargain, surrender or yield up without other consideration their franchise and rights.

Moreover, by clause 15, the words "rights, franchises, privileges and immunities" are expressly used, and these words are not used in the preceding clauses. If it had been intended that the value of the rights, franchises, privileges and immunities were to be paid for at a price to be fixed by the arbitrators, one would expect to find express provision made or appropriate words used in clauses 11 and 12.

By the agreement the rights and privileges of the company were terminable at the option of the company in twenty years—that is, in May, 1911—at which time, if the corporation should elect to purchase the works, etc., the privileges and franchises of the company would cease to exist.

See *The Toronto Street Railway Company v. The City of Toronto*, 20 A.R. 125, and in appeal, [1893] A.C. 506, where Sir Richard Couch, at p. 515, quotes with approval from the judgment of Burton, J.: "We are dealing, therefore, with the license or consent given for that fixed term of thirty years, at the expiry of which, according to my reading of the agreement, the corporation having elected to exercise its option of purchasing, the privileges or franchises of the railway company ceased."

The parties having agreed to accelerate the time and shorten the period from twenty to five years, the same conclusion would apply at the end of five years as would be applicable at the end of twenty years—the privileges and franchises of the company would cease.

As to the right of the company to have ten per centum added to the valuation fixed for the works, plant, appliances and property, I do not see how this can be upheld. By R.S.O. 1887, ch. 164, sec. 99, "The arbitrators in determining the amount to be paid for such works and property, shall first determine the actual value thereof, having regard to what the same would cost if the works should be then constructed or the property then bought, making due allowances for deterioration, wear and tear, and making all other proper allowances, and shall increase the amount so ascertained by ten per centum thereof, which increased sum the arbitrators shall award as the amount to be paid by the corporation to the company, with interest from the date of the award." The ten per centum to be allowed by this section is when there has been an expropriation by the corporation of the company's property under the Act, and is allowed apparently as consideration for the exercise of that right of expropriation, and as compensation for disturbance and for the interference with and determination of the company's rights and privileges against the assent of the company.

It is entirely different in this case. There has been no expropriation. The submission to arbitration is voluntary; the

terms and conditions are expressed in the agreement; nothing is there said as to any allowance of ten per centum. This agreement must control, and not the provision of sec. 99 of the Act referred to.

Motion dismissed with costs.

From this judgment the present appeal was taken. The arguments were heard before OSLER, MACLENNAN, MOSS (now C.J.O.) and GARROW, J.J.A., on the 23rd September, 1902.

R. T. Walkem, K.C., and *J. L. Whiting*, K.C., for the appellants.

D. M. McIntyre, for the respondents.

In the arguments the following references were made:—*Re G. T. Ry. Co. and Petrie* (1901), 2 O.L.R. 286; *In re Christie and Toronto Junction* (1895), 22 A.R. 21, 25 S.C.R. 551; *Anderson v. Anderson*, [1895] 1 Q.B. p. 753; *Fenwick v. Schmalz* (1868), L.R. 3 C.P. 313, at p. 315; *Re Toronto Street Ry. Co.* (1892), 22 O.R. 374, 20 A.R. 125, [1893] A.C. 511; *Edinburgh Street Tramways Co. v. Lord Provost, etc., of Edinburgh*, [1894] A.C. 456, at pp. 465-471; *Stockton v. Kirkleatham*, [1893] A.C. 444; *In re London City Council and London Street Tramways Co.*, [1894] 2 Q.B., pp. 200-1; *In re Wilkes' Estate* (1880), 16 Ch.D. 597.

January 26, 1903. The judgment of the Court was delivered by Moss, C.J.O.:—

The main question in this appeal turns upon the proper construction of an agreement entered into between the Kingston Light, Heat and Power Company, and the city of Kingston, on the 14th July, 1896.

The City of Kingston Gas and Light Company was incorporated by Act of the Legislature of the Province of Canada, 11 Vict., ch. 13, with extensive but not exclusive rights with regard to the manufacture and supply of gas in the city of

Kingston. Under sec. 35 of the Act, the company and its powers were to end at the expiration of fifty years, *i.e.*, on the 23rd March, 1898.

In 1891, the company having in the meantime entered into an arrangement with the Kingston Electric Light Company for the purchase of its plant, an Act of the Legislature of Ontario, 54 Viet., ch. 107, validated the agreement and changed the name of the City of Kingston Gas Light Company to the Kingston Light, Heat and Power Company. By sec. 10 it was enacted that sec. 35 of 11 Viet., ch. 13, be repealed, thus extending the duration of the company. But it also placed a limit to its existence by providing that, at any time from and after twenty years from the date of the passing of the Act (4th May, 1891), the city of Kingston should have the right to expropriate the works and property of the company in the manner specified. By this enactment the company was protected against compulsory parting with its works and property to the city until May, 1911. But in 1896 the company entered into the agreement now in question, by which it gave to the city a new right to acquire the works and property at an earlier period. The agreement is a lengthy instrument, dealing with several matters; but, as regards the acquisition of the property by the city, the substance of it is, that upon the city giving one year's notice previous to the 1st January, 1902, it should have the option of purchasing and acquiring all the works, plant, appliances, and property of the company used for light, heat and power purposes, both gas and electric, at a price to be fixed by arbitration; and that, upon the acquisition by the city of the works, plant, and property, the company should cease to carry on its business.

The city having exercised its option, it was contended before the arbitrators, on behalf of the company, that in ascertaining the price to be paid by the city the arbitrators should allow for the value of the earning power, or franchise, or rights of the company, under 54 Viet., ch. 107, or otherwise. The majority of the arbitrators held that the company was not entitled to

any allowance in respect of this claim. Their decision was upheld by Lount, J., and the company has renewed its contention in this Court.

We think the arbitrators placed the correct construction upon the agreement. What the company asks is, in effect, that it shall be compensated for the termination of the right which, but for the agreement, it would have of carrying on the business until 1911. That is to say, the company is claiming, not merely the price of the works, plant, appliances and property of the company used for light, heat and power purposes, but this price and the price of something else in addition.

No objection has been taken to the amount allowed as the price of the works, plant, appliances and property, and we must assume that, after due consideration of the value, having regard to their purposes and use, there was fairly allowed for them all that should have been allowed. But the company seeks to add to the sum so allowed something as the value of the earning power which these works, plant and property might have in its hands if retained until 1911. There is no language in the agreement to justify this contention. The company claims that the right which is thus ended by the agreement is a franchise, and passes under the term "property." But it is manifest that the word is not used in its widest sense, and it was not the intention of either party that it should be so read. Its meaning is restricted by the words which precede it, as well as by those which follow it. It was evidently not intended to comprehend everything the company possessed. The so-called franchise is no more included in the word "property" than the money in the bank, or the book debts or assets of a like nature belonging to the company. It is far from clear that the company parted with anything in the nature of a franchise which it would be of any value to the city to acquire. The company could not, and did not, part with its corporate franchise. The privilege of using the streets for the purposes of the business ended naturally with the purchase of the works, plant, appliances and property; and it was not needful for the

city to acquire either one or the other to enable it to carry on the business.

A good deal was said in argument about the justice of the city paying for all it acquired under the agreement; but the real question on the construction of the agreement is, for what did the city agree to pay? And upon this question the arbitrators came to the proper conclusion.

The appeal also fails as to the claim to add 10 per cent. to the amount of the price found by the arbitrators. There is nothing in the agreement, or in the circumstances, to warrant the arbitrators dealing with the case as one of expropriation under the statute. And, doubtless, the arbitrators in arriving at the price took all the circumstances into consideration, and made every reasonable allowance.

The appeal should be dismissed.

[IN THE HIGH COURT OF JUSTICE FOR ONTARIO.]

THE LONDON LIFE INSURANCE COMPANY

v.

THE MOLSONS BANK.

Banks and banking—Cheques drawn to fictitious payees—Fraud of insurance agent—Payment by bank—Right of company to recover amount so paid.

N. was an assistant superintendent of a branch of the plaintiff company and had sole control of its business. He sent in a number of applications all of which, with the exception of five, were fictitious, the names of the supposed applicants being forged. Policies were issued in due course. The cheques in question were issued to pay the supposed claims of the several persons in whose favour they were drawn, who were thought to have died. The claim papers were prepared and forwarded by N. It was usual after a claim had been passed to send N. a cheque for the amount of it, payable to the claimant or his order. N. to deliver the cheque to the proper person and obtain a discharge of the claim under the policy. Each of the cheques was endorsed with the name of the payee and most of them had been certified by N., and were paid in good faith through the Ottawa branch of the plaintiffs, to whom or how did not appear, the amounts thereof being charged to the company's account. The endorsement had all been forged by N.

Held, that the company, being affected by what was done by N., could not dispute the right of the bank to pay the cheques and charge it with the amounts so paid.

THIS was an action tried before MEREDITH, C.J.C.P., without a jury, at Ottawa, on the 19th June, 1902.

Aylesworth, K.C., and *Edgar Jeffery*, for the plaintiffs.
Hellmuth, K.C., and *C. H. Ivey*, for the defendants.

The learned Chief Justice reserved his decision, and subsequently delivered the following judgment, in which the facts, so far as material, are set out:—

January 16, 1903. MEREDITH, C.J.:—The plaintiffs sue to recover from the defendants, who were their bankers, moneys which were paid, as the plaintiffs allege, without their authority, and improperly charged to their account, having been made upon cheques drawn by the plaintiffs on the defendants, pay-

able to various persons or their order, the endorsements of which by those persons were, as the plaintiffs allege, not genuine but forged.

The defendants resist the plaintiffs' claim on two grounds:

(1) That in the circumstances under which they were issued all the cheques were payable to fictitious or non-existent persons within the meaning of sub-sec. 3 of sec. 7 of the Bills of Exchange Act, 1890, and were therefore payable to bearer.

(2) That if they are to be treated as payable to the order of real payees, the defendants were justified under all the circumstances in paying them and debiting them to the plaintiffs' account.

I will deal first with the second of these contentions, for if it is made out, it will be unnecessary to consider the first.

There is no doubt upon the evidence that the proceeds of all the cheques came into the hands of a man named Niblock, who was the assistant superintendent of the plaintiff company, having his office at Ottawa, and were appropriated by him to his own use by means of a system of fraud and forgery on his part.

The cheques were issued for the purpose of paying supposed claims of the several persons in whose favour they were drawn, under policies of insurance made by the plaintiffs, and in the belief by the plaintiffs that the persons upon whose lives the policies had been granted had died; but in fact none of them had died, and there was no real claim by any of the beneficiaries against the plaintiffs.

In all of the cases, except five (those of Burns, McKendry, Coghill, Miller and Little) the applications on which the policies were issued were entirely fictitious, the names of the supposed applicants, and of the supposed signers of the documents which accompanied them, being forged.

In all of the cases the signatures to the proofs of loss were also forged, as were the indorsments purporting to be those of the payees of the cheques.

In the five cases of the genuine applications, the policies had lapsed before the dates when the lives were said to have dropped and the claims were made.

The claim papers were in all the cases forwarded by Niblock from Ottawa to the head office of the plaintiffs at London, and shew on their face that they were in part at least prepared by him.

With the exception of two (each for \$1,000) all the insurances were in the Industrial branch, and for small sums.

Niblock was appointed assistant superintendent on the 23rd August, 1892, and the earliest of these fraudulent claims was received at the head office of the plaintiff company on the 25th February, 1896.

He had under his agreement with his employers, which is in writing, somewhat extensive powers; but nothing is said in it as to any connection he should have with the settlement and payment of claims under policies issued in respect of the insurances effected through his office.

It was, however, the practice whenever a claim was sent in from his office, after it had been passed, to send him the cheque for the amount of it, payable to the claimant or supposed claimant, or his order. It was his duty to deliver the cheque to the person in whose favour it was drawn, and to obtain from him a discharge of the claim under the policy in settlement of which it was given. According to the evidence of the plaintiffs' accountant Niblock sometimes paid a claim in money, and in such a case returned the cheque for it to the plaintiffs.

It was the practice of the plaintiffs not to notify the claimants that the cheque had been sent in the case of an insurance in the Industrial branch, but to do so where the insurance was not in that branch. Whether or not notices had been sent to the supposed claimants in the two cases of insurance of the latter character was not shewn, but it is probable from the testimony given at the trial that notice was not sent in those cases.

Each of the cheques is indorsed with the name of the payee

of it; all of them except two (McKendry's and Hale's) are also indorsed by Niblock—his name following that of the payee; of the cheques thus indorsed three have above the name of Niblock, the word "witness."

It was not shewn to whom or how the moneys which were paid on the cheques were paid.

All of the supposed claimants lived or were represented to live at or in the vicinity of Ottawa, and the cheques were all payable at any branch bank of the defendants, and were paid through their Ottawa branch.

The proper conclusion upon the testimony is, I think, that all the cheques were paid by the defendants in good faith and upon the representation of Niblock, acting for the plaintiffs, that the persons to whom payment was made were the persons named in the cheques as payees of them. No distinction in this respect ought to be made, as I think, between the cheques upon which Niblock's name was endorsed and the two upon which it does not appear. With regard to the former, there is the representation in writing by Niblock that the name indorsed as that of the payee is the genuine signature of the payee, for that I take to be the effect of his indorsement; and as to the latter, though there is not the same kind of representation, there was, I think, equally a representation to the same effect, for the proper inference is as to those that Niblock wrote the name of the payee intending that the defendants should accept and act upon them as their genuine signatures.

What was done as to these two cheques was the same, I think, as if Niblock in each case had gone to the defendants' bank with some one whom he represented to be the payee, and had, upon that representation, induced the officers of the bank to pay the cheques as bearing the genuine indorsements of the real payees.

Assuming this view to be correct, are the plaintiffs affected by what was done by Niblock, so as to preclude them from disputing the right of the defendants to pay the cheques and charge the amount paid to the plaintiffs' account?

In my opinion they are. Niblock was the representative of the plaintiffs at Ottawa, having the sole conduct and supervision at that point of all the business done through his office. The cheques were sent to him in order that delivery of them to the person for whom they were intended might be secured, and that proper discharges might be obtained from them of the company's liability on the policies in respect of which they were issued. The plaintiffs knew, or ought to have known, that their bankers would in all probability require the persons presenting the cheques for payment to be identified as the persons named as the payees of them, and that Niblock was the most likely, or at least a likely person to be called upon to do that, and as to most of the cheques they had notice that Niblock was in fact certifying to the bankers the genuineness of the indorsements. It was not shewn that the practice of Niblock so certifying was exceptional in these particular cases; and the fair inference is, I think, that he did this throughout the period of his agency, which, as I have said, began in the year 1892; but if that inference ought not to be drawn from the testimony given at the trial, I would give leave to the defendants to shew what the fact is in that regard.

It would, as it seems to me, be a startling thing, at all events to business men, if it were to be held that a banker paying the cheques of his customer under circumstances such as existed in this case should be bound to suffer the loss occasioned by the fraud committed by the person whom the customer had entrusted with the powers and duties which were entrusted to Niblock. I am not, I think, required to so decide, but am warranted in holding that the loss must fall, where, in my opinion, in justice it ought to fall—upon the plaintiffs.

Having reached this conclusion, it is unnecessary to consider the otherwise important and also very difficult question raised, as to the payees of the cheques being fictitious or non-existent persons within the meaning of sub-sec. 3 of sec. 7 of the Bills of Exchange Act, 1890.

The action is dismissed with costs.

Notes:

FICTITIOUS OR NON-EXISTING PAYEES.

The provisions respecting a cheque or bill payable to a fictitious or non-existing payee in the Bills of Exchange Act, 1890, sub-sec. 3 of sec. 7, are very concise, it being stated that in such a case the cheque or bill may be treated as payable to bearer. This section is a re-enactment of the Imperial Bills of Exchange, 1882, sec. 7, sub-sec. 3.

Chalmers (Bills of Exchange, 5th ed.) says, p. 22: "This sub-section was inserted in committee in place of a clause working out in detail the effect of the cases. The words 'or non-existing' seem superfluous; but they were probably intended to cover the case of *Aspitel v. Bryan* (1864), 32 L.J.Q.B. 91, affirmed 33 L.J.Q.B. 328 (where by an arrangement between the acceptor and indorsee a bill payable to drawer's order was drawn and indorsed in the name of a deceased person).

"Before the Act it appears that even the holder in due course could not enforce a bill which he held under the indorsement of a fictitious person, except as against parties who were privy to the fiction; the exception that bills drawn to the order of a fictitious or non-existing payee might be treated as payable to bearer was based uniformly upon the law of estoppel, and applied only against the parties who at the time they became liable on the bill were cognizant of the fictitious character or non-existence of the supposed payee: *Vagliano v. Bank of England* (1889), 23 Q.B.D. 243, at p. 260, per Bowen, L.J., reviewing the cases: Story on Bills, secs. 56, 200.

"But the Act has swept away the former qualifications, and now any holder who could recover if the bill had been drawn payable to bearer can recover if the payee be fictitious. Where a bill is payable to the order of a fictitious person, it is obvious that a genuine indorsement can never be obtained, and in accordance with the language of the old cases and text-books, the Act puts it on the footing of a bill payable to bearer. But inasmuch as a bill payable to one person, but in the hands of another, is patently irregular, it is clear that the bill should be indorsed, and perhaps a *bonâ fide* holder would be justified in indorsing it in the payee's name. It might have been better if the Act had provided that a bill payable to the order of a fictitious person might be treated as payable to the order of any one who should indorse it, or, in other words, as indorsable by

the bearer. Though the bill may be payable to bearer, it is clear that a holder who is party or privy to any fraud acquires no title. What the Act has done is to declare that the mere fact that a bill is payable to a fictitious person shall not effect the rights of a person who has received or paid it in good faith."

In *Clutton v. Attenborough*, [1895] 2 Q.B. 707, [1897] A.C. 90, a clerk of the plaintiffs, by fraudulently representing to them that one B. had done work for them, induced them to draw cheques in favour of B. He then forged B.'s name and negotiated the cheques to the defendant for value, who took them in good faith. The bankers paid the defendant. When the transaction was discovered, the plaintiffs sued the defendant for money paid in mistake of fact. It was held that the case was governed by the *Vagliano Case* (see *infra*), and that the payee was not the less a fictitious or non-existing person because the drawers supposed him to be a real person, and that the cheques were payable to bearer. (See article in *Law Quarterly Review*, Vol. 10., p. 40).

Vagliano's Case (1889), 23 Q.B.D., [1891] A.C. 107, gave rise to a great conflict of judicial opinion. Here the facts were that a bill purporting to be drawn by A. to the order of P. & Co., and to be indorsed by them, was accepted by the drawee, Vagliano, payable at his bankers. The bankers paid it at maturity. A. was a correspondent of the acceptor's, who often drew bills in favour of P. & Co. It turned out afterwards that the names and signatures of the drawer and payees were forged by a clerk of the acceptor's, who obtained the money. In these circumstances P. & Co. were held to be fictitious payees, and the bankers could debit the acceptor's account with the sum so paid. The reason ascribed by the majority of the Lords for this holding was that the bill was a forgery throughout and the real P. & Co. never were, and never were intended to be the payees. If they had obtained the bill they would not have been entitled to it, and their indorsement could have conveyed no title against the supposed drawer whose name was forged. It was as if the forger had inserted the first name he came across in a directory.

In an able article dealing with this case, in the *Law Quarterly Review*, Vol. 7, p. 216, Mr. Chalmers says, at p. 217: "The main controversy turned on the construction to be placed on sec. 7, sub-sec. 3 . . . In *Vagliano's Case*, the bill and

the transaction it purported to represent were shams throughout. By no possibility could the acceptor be called on to pay the amount of the bills again. The instruments in this case were not bills of exchange, for there was neither drawer nor payee. They could only be described as bills by estoppel (see sec. 54 of the Dominion Act). . . . There was a real firm of Petridi & Co. (the payees), and how, then, could a real person cease to be a real person and become a fictitious one, because the drawer's name had been forged? Lord Herschell answered this by saying it is not a question of intention, but of fact. The instruments in question were not payable to Petridi & Co., as the forger intended the acceptor to believe. They represented no transaction with Petridi & Co., or any existing person. If Petridi & Co. had obtained possession of the bills they would have acquired no rights under them, and if Petridi & Co. had endorsed them, it is by no means clear that their indorsement would not have amounted to a forgery. The test is this—was the bill in fact payable to any existing person? If not, the name inserted was a mere *nominis umbra*, and the payee was a fictitious person.”

The signature of a fictitious person must be distinguished from (a) the forged signature of a real person, and (b) the signature of a real person using a fictitious name—for instance, John Smith may trade as “The Toronto Hardware Company,” and sign accordingly; *Schultz v. Astley* (1836), 2 Bing. N.C. 544.

Where a bill is drawn payable to a deceased person in ignorance of his death his personal representatives may enforce the bill: *Murray v. East India Co.* (1821), 5 B. & Ald. 204.

Where a note is made payable to a fictitious payee, and not to his order or bearer, a holder for value cannot maintain an action against the maker as on a note payable to bearer, as it is not negotiable: *Williams v. Noxon* (1858), 10 U.C.R., 259.

A note in favor of one who is absent, and who (as it happens) is dead, is not void, and his executors may maintain an action on it: *Grant v. Wilson* (1814), 2 Rev. de Leg. 29.

And see *Edinburgh Ballarat, etc., Co. v. Sydney* (1891), 7 T.L.R. 656; *Blodgett v. Jackson* (1859), 40 N.H. 21; *Lewinsohn v. Kent* (1895), 87 Hun. (N.Y.) 257.

Where a bill purporting to be drawn by A. and indorsed in blank by C., the payee, is accepted *supra* protest for the

honour of the drawer, and it turns out that A.'s signature is forged and S. is a fictitious person, the acceptor for honour is estopped from setting up these facts if the bill is in the hands of a holder in due course: *Phillips v. Im Thurm* (1865), 1 C.B.N.S. 694; L.R. 1 C.P. 463.

This clause of the Act as applicable to *promissory notes* was discussed in *City Bank v. Rowan and Another* (1893), 14 N.S.W.R. (Law) 126. The New South Wales Act is in the same words as the Dominion Act. The facts were that one W. S. called on the defendant, representing that he was acting for J. S. & Co., of Melbourne, and entered into negotiations for the sale of wool. Later he brought in one J., who, he said, was the agent of J. S. & Co. in Sydney. On the conclusion of the bargain, a store warrant for the wool was handed to the defendants, who then handed the promissory note, the subject of the action, to J., who gave a receipt for it. W. S. and J. forged on the note an endorsement in the name of J. S. & Co. and discounted it at the City Bank. There had been a firm of J. S. & Co. in the wool business in Melbourne; but it had been out of business for some time. The Court held the case was controlled by the *Vagliano Case*, that the payee was a fictitious or non-existing person, and that the note might be treated as payable to bearer. The forged endorsement was treated as a nullity, as the firm of J. S. & Co. were not real payees, and so could not indorse.

An interesting note on this case appears in the Law Quarterly Review, Vol. 10, p. 44, from the pen of Arthur R. Butterworth, who argues very strongly against the application of the principle of the *Vagliano Case* to cheques and promissory notes. Briefly, his contention is that the maker of a note himself promises to pay a sum of money on demand or at a future time. If he promise to pay a certain existing person only, no one else can, as a general rule, demand payment. If he promise to pay to a certain existing person's order, he can, as a general rule, refuse to pay except on that person's endorsement. If he has been induced to make the promise by means of false representations, can he not still refuse to pay except on that person's endorsement? Does the fact that some rogue, who by false representations got the note made, never intended that the payee named therein should receive the money, deprive the promisor of this right to refuse payment if the note is not endorsed by the payee named by him? Does *Vagliano's Case* establish such a proposition?

In the United States, an instrument, containing a fictitious or non-existent payee, to be payable to bearer must be executed by the maker or drawer *with knowledge* that the payee is fictitious or non-existent: N.I.L., sec. 16 (3). This was the former English rule: *Minet v. Gibson* (1791), 3 Term R. 481; *Collis v. Emett* (1791), 1 H. Bl. 313; *Gibson v. Hunter* (1793), 2 H. Bl. 187, 288; *Phillips v. Im Thurm* (1866), 18 C.B.N.S. 694.

[IN THE HIGH COURT OF JUSTICE FOR ONTARIO.]

CRRERAR ET AL.
V.
CANADIAN PACIFIC R. W. CO. ET AL.

*Mechanic's lien—Action—Practice—Affidavit verifying statement of claim
—Particulars of residence of plaintiff.*

In the case of an action under the Mechanics' and Wage Earners' Lien Act, R.S.O., 1897, ch. 153, the affidavit verifying the statement of claim required by sec. 31 (2) may be made by the plaintiff's solicitor as agent. The plaintiffs were day labourers who did work for the defendants on a railway in an unorganized district, and it was set forth in the statement of claim that they resided in that district; the name and address of the plaintiffs' solicitor was also stated therein.

Held, that it was not necessary to give more precise particulars of the places of residence of the plaintiffs.

AN appeal by the plaintiffs from an order of the Judge of the district Court of Rainy River, in an action to enforce mechanics' liens, directing an amendment of the statement of claim; and a cross-appeal by the defendants Vigeon Brothers from the same order in so far as it refused to set aside the statement of claim because not verified by an affidavit or affidavits made by the plaintiffs. The facts are stated in the judgment.

The appeal was heard by BOYD, C., in Chambers, on the 6th March, 1903.

J. H. Spence, for the plaintiffs.

H. L. Drayton, for the defendants Vigeon Brothers.

March 6, 1903. BOYD, C.:—Having regard to the canons of construction laid down in *Bickerton v. Dakin* (1890-91), 20 O.R. 192, 695, and seeing that the object of the legislation has been to simplify the procedure, I think the learned Judge rightly ruled that the affidavits of verification by the solicitor, as agent, was a sufficient compliance with the statute. The statutory act which gives vitality to the lien is its due registration, and this may be effected by the affidavit of an agent or an assignee of the claimant. The bringing of the action is, as

it were, ancillary to this, and in order to its enforcement. The original of R.S.O. 1897, ch. 153, sec. 31 (2),* provided merely that the statement of claim should be verified by affidavit though a form of affidavit was given in the schedule. The revised Act refers to this form in the body of the statute. But these forms are not of inflexible use, and if the verification is in the same way and to like effect as in the case of registration, I think there has been "substantial compliance," to use the phrase found in sec. 19 (1), with the scheme of the Act.

The learned Judge, however, has directed that the plaintiffs amend the statement of claim by indorsing thereon "the particulars of the plaintiffs' residence as required by the Rules in that behalf." The ten plaintiffs are day labourers who did work for the defendants on the railway in the district of Rainy River, and it is set forth in the statement of claim that they reside in that district. The plaintiffs' solicitor says in an affidavit that they move about from place to place as they obtain employment, and it is said that defendants were present during the carrying on of the work and have knowledge of who the plaintiffs are, and that the information given as to residence is as much as is practically possible. It is evident that these plaintiffs have no fixed place of abode, to which reference could be made in order to find them. What may be a salutary provision as to the ordinary litigant in town or country might work injustice in the case of newly opened territories, occupied by "wage-earners" who move with their job of work. It is not desirable nor is it needful that all the niceties of practice in due sequence should attach to the summary procedure provided for the realization of workmen's liens.

Now, what are the Rules applicable? In the case of a writ of summons, where the plaintiff sues by solicitor, the writ is to be indorsed with the solicitor's name and place of business: Rule 134. True it is, that by the practice in the High Court

*Without issuing a writ of summons, an action under this Act shall be commenced by filing in the proper office a statement of claim, verified by affidavit (Form 5).

and by the incorporation of the form of writ, which is not a part of the Rule, the address of plaintiff himself is also to be given (*i.e.*, his place of residence). But the Rules themselves only require *that* to be given when the plaintiff sues in person: Rule 135. The Rule which applies to this case is Rule 136: "Indorsements similar to these mentioned in the two next preceding Rules shall also be made upon every writ issued and upon every document by which proceedings are commenced in cases where proceedings are commenced otherwise than by writ of summons." This statement of claim under the Act R.S.O. 1897, ch. 153, sec. 31, contains the name and address of the solicitor by whom it is issued and filed, and that meets the legitimate requirements of Rule 136. It was suggested that the address of the plaintiffs should be set forth in order to facilitate the obtaining security for costs in a proper case (see Rule 1199), and that is probably the reason why the practice in the High Court has settled into this form, even when a solicitor acts for the litigant. But, according to the scheme of the Rules, it is from the solicitor whose name is indorsed on the process that the information is to be derived as to the occupation, place of abode, and even street and house number, of the plaintiff, in cases where the defendant is at a loss to know his opponent, or suspects his absence from the country: Rule 143.

The Act allows these wage-earners to group themselves as litigants (sec. 32), and it would involve much waste of time and needless expense to have them all personally attend to make affidavits as to the claim, or to have their particular whereabouts in the district discovered to enable the solicitor to describe their precise locality at the time of amendment. They have a shifting residence, and, as it appears that all are within the limits of the district, I do not think the action should be stayed till more precise local information is given.

I allow the appeal with costs in the cause to the plaintiffs.

[IN THE HIGH COURT OF JUSTICE FOR ONTARIO.]

THE RATHBUN COMPANY, LIMITED
AND
THE STANDARD CHEMICAL COMPANY.

*Company—Arbitration—Matter "arising in the course of the reference"—
Questions of law.*

An agreement between two companies provided that there should be referred to arbitration any dispute, disagreement or difference of opinion arising between the parties to it, in regard to *inter alia* is "the meaning or construction of the agreement"....or "of the mutual obligations of the parties," or "of any other act, matter or thing relating to or concerning the carrying out of the true spirit, intention and meaning" of the agreement. The agreement further provided that one company should provide the other with a certain amount of cordwood to be carbonized into charcoal, the maximum amount of which to be delivered per month was 85,000 bushels. Disputes arose between the parties and the arbitrators were asked to pass on the question of damages for alleged short delivery of charcoal. One of the parties applied under section 41 of the Arbitration Act, R.S.O., 1897, ch. 62, for a direction to the arbitrators to state a special case as to what was the true construction of the contract as to the amount of charcoal called for per month:—

Held, that this was a question of law "arising in the course of the reference" within the meaning of the said section, and a special case might properly be directed as to it which might well include the two other questions in controversy, though had they been the only matters in dispute, no case should be directed as to them.

Nor is a party to a reference entitled *ex debito justitiae* to have a direction given whenever a question of law has arisen in the course of a reference. This rests in the discretion of the court.

The fact that arbitrators are specially qualified to decide a question of law is not sufficient to preclude a party to a reference from obtaining a direction.

Different considerations apply to the exercise of the discretion to give leave to revoke a submission from those which are to be applied in exercising the discretion to direct the arbitrators to state a case under the provisions of section 41 of R.S.O., 1897, ch. 62.

This was an application by the Standard Chemical Company under the Arbitration Act, R.S.O. 1897, ch. 62, sec. 41, for a direction to the arbitrators to state a special case. The reference to arbitration was pursuant to a certain agreement of July 22nd, 1898, between the two companies, whereby the Rathbun Company, being the owners of buildings, machinery, kilns, power and plant at Deseronto for the production of charcoal and the conversion of smoke and fumes from wood into wood-

alcohol and other products, contracted and agreed with the Standard Chemical Company for the sale of the smoke and fumes from wood and for the lease of premises, plant, and privileges, and for the supply of water, steam and power, etc. Amongst other provisions, the Rathbun Company covenanted with the Standard Chemical Company to find and provide at their own expense for daily use, Sundays excepted, a maximum of 66 cords of cordwood, of which not more than 30 per cent. should be soft wood, and the balance hardwood, all said wood to be cut at least four months before delivery; and the Standard Chemical Company agreed to take the wood from cars promptly and pile it direct in kilns or retorts, and to employ competent and satisfactory men to run the kilns and properly carbonize the wood into charcoal of suitable quality and without waste, and to carry off the smoke and fumes, and they were to be entitled to manufacture all by-products of charcoal and grey acetate of lime, paying for all labour in the carrying on of this work from the receiving of the wood until the charcoal was delivered to the Rathbun Company as in the agreement provided, and the Rathbun Company were to supply them with all water and steam for power necessary to carry on the manufacture except during temporary delays caused by any unavoidable stoppage; and the Standard Chemical Company agreed to make such expenditure in the enlargement of the refinery kilns and retort plant as might be necessary to ensure the production and delivery of charcoal from wood to be delivered by the vendors to the maximum quantity of 85,000 bushels (of 20 lbs. per bushel) per month or such less quantity in the manner required for daily delivery to the Deseronto Iron Company under their agreement with the Rathbun Company, but the total expenditure, inclusive of \$7,200 agreed to be contributed by the latter company, was for the purposes of this agreement, approximated at \$30,000.

The 22nd clause provided "that in case of any dispute, disagreement or difference of opinion arising between the said parties in regard to the meaning or construction of this agree-

ment, or of any part thereof, or of the mutual and respective obligations of the said parties, or of the subjects to be referred to arbitration as hereinafter mentioned, or of any other act, matter or thing relating to or concerning the carrying out of the true spirit, intention, and meaning of these presents, the same shall be determined by arbitration, one arbitrator to be appointed by each of the parties . . . and the said arbitrators, or the majority of them, shall determine the same, either in a summary manner after hearing the claims and contentions of the parties respectively and examining the premises, or by taking evidence, and they shall have all power necessary for such purposes, and shall have power over the costs of the arbitration, and the award of the arbitrators or a majority of them shall be final and binding on the parties."

The motion was argued before MEREDITH, C.J.C.P., on November 18th and 20th, 1902, in Weekly Court.

W. Laidlaw, K.C., and J. Bicknell, K.C., for the Standard Chemical Company.

E. D. Armour, K.C., and C. A. Masten, for the Rathbun Company.

In the arguments, reference was made to *In re Jenison and Kakabeka Falls Land and Electric Company* (1898), 25 A.R. 361, 364; *In re Palmer & Co. and Hosken & Co.*, [1898] 1 Q.B. 131; *Kirk v. West and East India Dock Co.* (1887), 12 App. Cas. 138; *James v. James* (1889), 23 Q.B.D. 12; *Gibbon v. Parker* (1862), 5 L.T. 584; *Adams v. Great Northern of Scotland R.W. Co.*, [1891] A.C. 32; *In re Grey, Laurier Co. v. Boustead & Co.* (1892), 8 T.L.R. 703; *In re Knight*, [1892] 2 Q.B. 613.

January 16, 1903. MEREDITH, C.J.:—This is an application under sec. 41 of the Arbitration Act, R.S.O., ch. 62, by the Standard Chemical Company of Toronto, Limited, one of the parties to a voluntary reference to arbitration, for a direction to the arbitrators to state in the form of a special case for the opinion of

the Court certain questions of law which have arisen, as they contend, in the course of the reference, within the meaning of that section.

The parties to the arbitration on the 22nd of July, 1898, entered into an agreement which provides by its 22nd paragraph for a reference to arbitration of any dispute, disagreement or difference of opinion arising between the parties to it, in regard to its meaning or construction, or as to the mutual and respective obligations of the parties, or as to the subjects to be referred to arbitration, or "any other act, matter or thing relating to or concerning the carrying out of the true spirit, intention and meaning" of the agreement.

Disputes, disagreements and differences did arise between the parties, and on April 17th, 1901, the applicants gave to the Rathbun Company notice that they admitted their obligation to take the cordwood mentioned in the agreement from the cars and to employ competent men to operate the kilns and properly carbonize the cordwood into charcoal of suitable quality and without waste, and to deliver the charcoal produced to the Rathbun Company, and that the applicants alleged that they had done so.

The notice then, referring, as it says, to the claims against the applicants by the Rathbun Company for alleged shortage in the delivery of charcoal under the agreement, states that the applicants dispute that claim.

Then referring to the 22nd paragraph of the agreement, notice is given that the applicants invoke the provisions of that paragraph "for the determination of the said claim of the Rathbun Company, Limited, for alleged shortage of the delivery of charcoal produced, or which ought to have been produced, from the said wood," and that the applicants appointed an arbitrator "to hear and determine the said claim of the Rathbun Company, Limited," and require the Rathbun Company to appoint its arbitrator.

How and when the claim to which this notice refers was made by the Rathbun Company does not appear.

On May 2nd, 1901, the Rathbun Company gave to the applicants notice of certain alleged breaches by them of the agreement, and of the intention of the Rathbun Company to avail itself of the powers given to it by the 20th paragraph of the agreement to take possession of the works and premises of the applicants.

The breaches alleged are that the applicants had failed to manufacture as agreed by them and to carry out the provisions of the agreement according to the spirit, true intent and meaning of it;

(1) In not delivering to the Rathbun Company pursuant to the agreement "a quantity of charcoal to the extent of 85,000 bushels of 20 pounds to the bushel per month in order that the Rathbun Company might deliver the same to the Deseronto Iron Company;

(2) In burning a quantity of about 300 cords of wood out of the wood delivered and kept in store and reserved for the purposes of the agreement over and above the maximum quantity of sixty-six cords per day, except Sundays, provided for by the agreement;"

"Whereby," as the notice reads, "you, the Standard Chemical Company, of Toronto, Limited, are in default both as to proportionate yield of charcoal and as to gross quantity to be delivered."

On May 3rd, 1901, the applicants gave to the Rathbun Company a notice in which they denied that they had failed to manufacture and deliver the charcoal according to the spirit, true intent and meaning of the agreement, disputed the right of the Rathbun Company to take possession, invoked the provision of the agreement for a reference to arbitration, and appointed an arbitrator "to determine the question whether the Rathbun Company is entitled to enter into possession of the said premises in pursuance of the said notice," and required the Rathbun Company to appoint its arbitrator.

On July 10th, 1901, the Rathbun Company gave to the applicants notice that the latter had not delivered the full quan-

tity of charcoal which they had agreed by their contract to deliver, namely, 85,000 bushels of 20 pounds per bushel, per month;

That the applicants had used more wood than they were entitled to use under the contract;

That the applicants had not used soft wood in as large a quantity or proportion as is provided by the contract;

That the applicants had not received the wood in accordance with their obligation under the contract, and that in consequence the Rathbun Company had been put to expense in unloading and piling it;

That the Rathbun Company claimed that it was entitled to receive and that the applicants were bound to deliver the 85,000 bushels, of 20 pounds per bushel, per month, and that the Rathbun Company claimed compensation in damages for the shortage in delivery of charcoal;

That the applicants were not entitled to use more than a quantity of wood equal to 66 cords per day, Sundays excepted, and the Rathbun Company claimed compensation or damages for the use of the excess in quantity that was used, and that the applicants were bound to use the proportion of soft wood mentioned in the contract, and compensation or damages for the use of soft wood in less quantities and proportions than provided for by the contract;

That thereafter the proper quantities of wood per day or per month and proportions of hard and soft wood should be adhered to and maintained by the applicants;

And that the Rathbun Company claimed that the applicants had failed to manufacture as agreed and to carry out the provisions of the agreement according to the spirit, true intent and meaning of the delivery of the charcoal for the Deseronto Iron Company, and had burned more wood than the applicants were entitled to use, and that such failure, default and wrongful burning continued and occurred for more than fifteen days before the giving of the notice of taking possession by the Rathbun Company, dated May 2nd, 1901, whereby the Rathbun

Company were entitled to possession of the works, pursuant to the terms of the contract;

And that the Rathbun Company thereby appointed its arbitrator "to hear and determine the said claim of the Rathbun Company."

By an instrument executed by both parties, dated October 18th, 1901, addressed to the arbitrators appointed by them respectively, and to Christopher Robinson, Esquire, K.C., who was thereby appointed the third arbitrator, (his appointment being expressed to be made by the parties, to determine the questions submitted by and in pursuance of the notices of April 17th, 1901, May 3rd, 1901, and July 10th, 1901, already referred to), the applicants confirmed the appointment made by them of their arbitrator "for the determination of the said questions," and the Rathbun Company confirmed the appointment made by it of its arbitrator "for the determination of the said questions"; and the parties agreed that all of the questions referred should be determined as one reference, and that one award should be made therein.

The applicants during the course of the reference applied to the arbitrators to state a case under sec. 41 of the Arbitration Act, R.S.O. 1897, ch. 62, as to various questions which were in dispute, and the arbitrators having declined to state a case as to some, at all events, of the questions as to which they had reached a conclusion and announced it, this application was made.

Upon the argument, I expressed the opinion that as to certain of the questions no direction should be given, and as to the others I reserved my decision.

The questions reserved for decision were:

(1) Whether upon the true construction of the contract the applicants were for the sixty-six cords of wood delivered daily, Sundays excepted, bound to deliver 85,000 bushels (of twenty pounds to the bushel) of charcoal per month, or whether delivery of what was, or might have been with proper care and skill and without waste, produced from the wood, though less

than 85,000 bushels per month, was a compliance with the terms of the contract.

(2) Whether there had been a breach of the agreement on the part of the applicants which entitled the Rathbun Company to take possession of the works.

The answer to the first question might and probably would affect the determination of the second question;

(3) Whether the claim of the Rathbun Company for the use of more wood than sixty-six cords per day was properly the subject of a reference to arbitration under the provisions of paragraph 22 of the agreement.

It was objected by counsel for the Rathbun Company

(1) That the dispute as to the construction of the contract was a question specially referred, and that sec. 41 was inapplicable because, as it was argued, the question was not therefore one "arising in the course of the reference" within the meaning of the section;

(2) That the applicants were precluded by the course taken by them on the reference from invoking the aid of the Court under sec. 41;

(3) That at all events as a matter of discretion the direction asked for ought not to be made.

As to the first objection, I was upon the argument very much impressed by the contention of Mr. Armour that it would be anomalous, and was not contemplated by the Legislature, that where parties had agreed to refer a specific question, such as the true construction of the agreement which had arisen in this case, to arbitration, either of them should be at liberty at the outset of the proceedings to call upon the arbitrators to state in the form of a special case for the opinion of the Court the very question of law which the parties had deliberately chosen to submit for their arbitrament, and that the questions it was intended might be so stated were such as arose incidentally upon the reference, for example, where the reference was of all matters in dispute between the parties, and in the course of the refer-

ence it became necessary for the arbitrators to construe an instrument, the question of what its true construction was.

Upon further consideration, I have come to the conclusion that the objection is not well founded. Owing to the way in which the reference to the arbitrators has been effected, it is necessary to spell out from the various documents by which it was completed the subject matter of the reference, and as I understand the effect of these documents, one of the claims of the Rathbun Company, and the principal one, is that the applicants have not delivered the quantity of charcoal which, under the terms of the agreement, it was their duty to deliver, and to recover damages for that breach.

The Rathbun Company does not rest this claim solely upon the construction of the contract for which they contend, but while taking the position that that construction is the right one, they also claim that even if the contention of the applicants as to the meaning of the contract is right, there has been a shortage in the delivery of charcoal for which they are entitled to recover damages from the applicants.

The claim which is by the notice of the applicants of April 17th, 1901, referred to arbitration, is the claim of the Rathbun Company "for alleged shortage of the delivery of charcoal produced, or which ought to have been produced, from the said wood."

The claim as to this branch of the case, which is by the Rathbun Company's notice of July 10th, 1901, referred, is that the Rathbun Company was entitled to receive, and that the applicants were bound to deliver, 85,000 bushels of charcoal of twenty pounds per bushel, per month, and compensation or damages for the shortage in delivery of charcoal.

I do not read this as meaning that the question of the obligation of the applicants to deliver 85,000 bushels of charcoal irrespective of what they had or might have produced from the daily supply of sixty-six cords of wood was specially referred, but as being a reference of the claim of the Rathbun Company for damages for short delivery of the charcoal a short-

age being claimed, whatever view may be taken as to the meaning of the agreement.

I think, therefore, that this question was one arising in the course of the reference within the meaning of sec. 41.

It is in this view unnecessary to express an opinion as to whether or not the meaning of the words "arising in the course of the reference" is that for which counsel for the Rathbun Company contended.

As to the second question, it is not open to question that much was done by counsel for the applicants in the course of the proceedings before the arbitrators to lead to the conclusion that they did not desire that a case should be stated by the arbitrators, but were content to leave to them the determination of all the questions in dispute, including that as to the construction of the agreement, without asking or requiring the arbitrators to seek the advice of the Court as to that or any other matter of law, which they were called upon to decide. It does appear, however, that Mr. Laidlaw, who acted as counsel for the applicants before the arbitrators, at a comparatively early stage of the proceedings,—at what stage exactly does not appear,—gave notice that after the evidence had been taken he would apply to the arbitrators to state a case for the opinion of the Court, and that application he did make later on with the result I have already mentioned.

I have doubted whether, in view of these circumstances, it is now open to the applicants to obtain a direction to the arbitrators under the statute, but I have come to the conclusion that, having regard to the very large amount at stake and the fact that the agreement had several years to run, and that the construction which the arbitrators put upon it will conclude the applicants not only as to the damages now claimed but as to future operations under the agreement in the years for which it has to run, and also to what I cannot help thinking is a serious question as to the correctness of the interpretation which the arbitrators have put upon the contract, I ought not to refuse the application if it is otherwise well founded.

If it was proper to direct the arbitrators to state a case where the parties had agreed in writing not to require, or apply to the Court to require, the arbitrator to state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference but that such question should be determined by the arbitrator, it would seem that *a fortiori* what happened in this case should not bar the right of the applicants, if otherwise entitled to do so, to require a question of law to be referred under the section. Arbitrators were directed to state questions of law where the agreement contained such a provision as I have mentioned, by Mr. Justice Mathew, in *In re Hansloh and Reinhold, Pinner & Co.* (1895) 1 Com. Cas. 215, and I think I safely follow where that distinguished Judge has led.

Mr. Armour also relied upon the fact that actions had been brought by the Rathbun Company to restrain the applicants from proceeding under their notices to arbitrate, and that the motions for injunction to that end were resisted by the applicants. The object of these actions, it was said, was to have the construction of the contract determined by the Court, and it was urged that having prevented that being done and having insisted upon the method of determining the questions in dispute being by arbitration, the applicants ought not now to be allowed to avail themselves of the provisions of sec. 41.

The answer to this contention is, I think, that one of the incidents of an arbitration is or may be the stating of the questions of law for the opinion of the Court either of the arbitrators' own motion or when they are directed by the Court to do so, and it may well be that the applicants preferred, as they had a right to do, to have their disputes settled by arbitration with the opportunity, if a proper case was made for that being done, of having the arbitrators advised by the Court upon any question of law that might arise in the course of the reference, to having the disputes, including questions of fact and assessment of damages, dealt with in an action.

There remains to be considered the question whether the

case is one in which in the exercise of its discretion the Court should give the direction asked for.

That a party to a reference is not entitled *ex debito justitiæ* to have the direction given whenever a question of law has arisen in the course of the reference, is, I think, clear. The matter is one resting in the discretion of the Court, and no hard and fast rule can be laid down as to when the discretion should and when it should not be exercised in favour of giving the direction, but each case must depend upon its own facts and circumstances.

Re Nuttall and Lynton and Barnstaple R.W. Co., 82 L.T. 17, was referred to by Mr. Armour as authority for the proposition for which he contended, that where the arbitrators are specially qualified to decide the question of law, the discretion should not be exercised in favour of giving the direction, but I do not understand that any such general proposition is laid down. It is true that Lord Justice Collins says, at page 20, "I think that the decisions have gone to this length, that if the Court is satisfied that there is a real point of law, and that the arbitrator is not specially qualified to decide that point, the Court will order the arbitrator to state a special case under sec. 19 of the Act."

There is nothing in the judgments of Lord Justice Smith and Lord Justice Williams indicating that either of them thought that the fact that the arbitrator was specially qualified to decide the question of law was sufficient to preclude a party to the reference from obtaining a direction under the section; all that was decided was that the giving of the direction was a matter resting in the discretion of the Court, and that in the circumstances of that case it was proper to give it.

The fact that an arbitrator is specially qualified to decide the question of law is a circumstance which, taken in connection with other circumstances, may affect the exercise of the discretion, and it may be that as a general rule, as a matter of discretion, where the arbitrator is so qualified and has not dealt with the question, or there is no reason to think that he will decide

it erroneously, the direction ought not to be given. It was, I think, to such a case as this that Lord Justice Collins referred in the passage which I have quoted from his judgment, and the case he was dealing with, as the Court treated the application (the parties having agreed to that) as if it had been made while the reference was proceeding, was a case of that kind.

I can see no reason why such a rule should be applied where the arbitrator has ruled upon the question of law, or is about to do so, and it is open to serious question whether his actual or intended ruling is right, or why the exercise of the discretion in such a case should depend upon whether the arbitrator is or is not specially qualified to decide the question of law.

The object of sec. 19 of the English Act, which is the same as our sec. 41, is discussed in *The Tabernacle Permanent Building Society and Knight*, [1892] A.C. 298, and I refer particularly to what is said by the Lord Chancellor at pp. 301-2.

After pointing out that where during the progress of an arbitration it was seen that the arbitrator had mistaken the law and was about to act upon his error, the power of putting him right used to consist in the right of either party to revoke the submission to arbitration, and that that power had been greatly controlled by legislation, so that it may be extremely difficult for a party to make such a case to a Court as will induce it to make an order giving leave to revoke unless a case is stated, he goes on to say that this is obviously a clumsy and incomplete remedy, and that the Court ought to have in its own hands power to compel in a fit case a reference to a Court of competent jurisdiction so as to prevent a failure of justice (page 301), I understand him to mean that the purpose of the section was to give that power to the Court, and this he makes clear, I think, by what is said afterwards on page 302: "I think the object of sec. 19 . . . was rather to hold a control over the arbitration while it was proceeding by the Courts and not to allow the parties to be concluded by the award when, as it is said,

parties may be precluded by the arbitrator's bad law once the award is made. . . ."

In *James v. James*, 23 Q.B.D. 12, relied on by Mr. Armour as supporting his second and third objections, the application was for leave to revoke the submission, and leave was refused. The submission provided that the arbitrator might deal with the question of liability before dealing with the question of damages, and the parties had agreed that he should do this, and he had done it and decided the question of liability. The leave appears to have been refused because of the agreement that the arbitrator's decision on the question of liability should be a final decision, and in the view of Lord Justice Lindley it was not quite consistent with good faith that having done so he should, after the decision had been given, seek to revoke the submission.

That case is, I think, distinguishable from the present. The application was to the Court to exercise the discretion vested in it by the statute, Imp. 3 & 4 Will. IV., ch. 42, sec. 39, and if granted would have resulted in the revocation of the submission and the putting an end to the arbitration, while in this case the result of the application being granted will be that the arbitrators will have the benefit of the opinion of the Court on the questions of law presented for their decision. The reference is not otherwise interfered with, and the arbitrators remain the ultimate judges and their award will be final. In that case on the particular facts of it, the Court decided that a case had not been made for the exercise of its discretion to give leave to revoke the submission. Different considerations, in my opinion, apply to the exercise of the discretion to give leave to revoke a submission to arbitration from those which are to be applied in exercising the discretion to direct the arbitrators to state a case under the provisions of sec. 41. The one discretion is to be exercised only under exceptional—perhaps very exceptional—circumstances; the other is a new discretion which was intended to be and ought to be exercised whenever it is necessary to exer-

ease it to prevent grave injustice being done to one of the parties to an arbitration.

My view is, I think, in accordance with the opinions of the Master of the Rolls and Lord Justice Chitty in *In re Palmer & Co. and Hosken & Co.*, [1898] 1 Q.B. 131, where the effect of sec. 19 of the English Act is discussed, and it is pointed out that it gives the Court very extensive powers beyond any which the Court previously possessed; and I am supported also by the opinion of the present Lord Chancellor, to which I have referred.

Under all the circumstances, I have come to the conclusion that my discretion should be exercised in favour of granting the application as to the questions as to which I reserved judgment.

My reasons for taking this course are, in addition to what I have just said, and those which I have given in dealing with the second objection to the application, that in my opinion in addition to the question of the interpretation of the contract being a substantial and a very important one, it is open to serious question whether the arbitrators have not erred in the interpretation which they have placed upon it.

There is some question as to whether the arbitrators have ruled upon the second and third questions. Mr. Armour contended that they have, but if they have not done so, and if, had they been the only questions which the applicants desired to have stated, I ought not to direct a case to be stated for the reasons mentioned in the *Nuttall* case, I think that I may properly direct them to be stated, as I have decided that the other and principal question should be stated.

An order will therefore issue directing the arbitrators to state in the form of a special case the three questions.

I refer to *In re Richmond Gas Co. and Mayor, etc., of Richmond* (1892), 62 L.J. Q.B. 172, for the form of a case stated under sec. 19 of the English Act.

I make no order as to costs, but leave them to be dealt with by the arbitrators: *In re Knight and The Tabernacle Permanent and Building Society*, [1891] 2 Q.B. 63.

[IN THE HIGH COURT OF JUSTICE FOR ONTARIO.]

THE ONTARIO ELECTRIC LIGHT AND POWER COMPANY^{*}

v.

THE BAXTER & GALLOWAY COMPANY, LIMITED.

Contract—Supply of electric power—Continued existence of property—Implied warranty—Impossibility of performance.

Where there was an agreement to supply electric power at a certain rate per annum to be used in the business of the consumers as millers and for no other purpose, and the mill, which was on the premises of the consumers at the time of the agreement, was destroyed.

Held, that the agreement was not terminated by the latter event and the consumer was under obligation to take and pay for the electric current agreed to be supplied.

Taylor v. Caldwell (1863), 3 B. & S. 826, distinguished.

This was an appeal by the defendants from the judgment of the County Court of the county of Wentworth, in favour of the plaintiffs after the trial of the action before the senior Judge of that Court, sitting without a jury, on the 12th February, 1902.

On May 9th, 1902, the appeal was argued before a Divisional Court composed of MEREDITH, C.J.C.P., and MACMAHON, J.

Tetzl, K.C., for the appellants.

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

February 16, 1903. The judgment of the Court was delivered by MEREDITH, C.J.:—The claim of the respondents, as presented by their pleadings and at the trial, is upon a written agreement, for the supply of an "electric current, to the extent of fifty horsepower" by them to the appellants, bearing date the 20th August, 1900, and is to recover three instalments (less \$85.39 paid on account) alleged to be due by the appellants under a provision of the agreement which is in the following words:—

"The customers (*i.e.*, the appellants) agree to pay for the electric current supplied as aforesaid the sum of \$1,250 per

annum, such sum to be paid in equal monthly payments on the last day of each month during each year of the said term of five years."

The defence of the appellants is that the agreement is, according to its true construction, one for the supply of electric current for a particular specified mill, and that it is, therefore, one coming within the rule laid down by Blackburn, J., in *Taylor v. Caldwell*, 3 B. & S. 826, which is thus stated: "Where from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor"; and that the mill having been destroyed by fire on the 25th April, 1901, without default and before any breach of the agreement on the part of the appellants, performance of the agreement had thereby become impossible, and the parties were excused.

The respondents' contention is that the agreement is not to be construed as one for the supply of the electric current for a particular specified mill; and that for this reason and in any case because, as they contend, there must be taken to have been an implied warranty on the part of the appellants that the mill should exist, the rule invoked by them does not apply.

The learned County Court Judge construed the agreement in accordance with the contention of the appellants; but held that there was an implied warranty on their part that the mill should exist during the term of the agreement (but for which he was of opinion that the rule laid down in *Taylor v. Caldwell*

would have applied); and he accordingly directed that judgment should be entered for the respondents.

I am, with great respect, unable to agree with the opinion of the learned Judge as to the true construction of the agreement.

The agreement of the respondents for the supply of the current is that they will "upon the conditions, and for the purposes, and within the limits" stated in the agreement, supply it for and to the appellants, "in the premises" of the appellants.

The learned Judge relied on this provision, taken in connection with that of the second paragraph, as indicating that the current was to be supplied for a particular specified mill, but I do not so read those provisions.

The second paragraph is as follows:—

"It is understood and agreed that the said electric current so to be supplied shall be used by the customers for the purpose of operating their machinery and for the purpose of obtaining power for use in their business as millers, and for no other purpose."

The object of this provision, as it appears to me, was to guard against the current being used by the customers for any other than power purposes for use in their own business as millers, and there is nothing in the provision, as I read it, to prevent the customers using the current for those purposes in any place to which they might choose after it was delivered to them, to transmit it, and certainly, nothing to confine the use of it by the customers to any existing mill on the premises to which it was to be brought by the respondents.

Having come to that conclusion, it follows that, in my opinion, the performance of the agreement has not become impossible, and the rule laid down in *Taylor v. Caldwell* is, therefore, inapplicable, and the destruction without default on the appellants' part and before breach, of the mill which was on the premises when the agreement was entered into did not put an end to the agreement.

The respondents were not, however, in my opinion, entitled

to recover the monthly payments for which they claimed. The current was not supplied after the 25th April, 1901, it having been on that day cut off from the premises of the appellants if not by, certainly with the consent of, the respondents; readiness to supply the current is not enough to entitle the respondents to recover, and it was for the current which they supplied under the agreement that the annual payment of \$1,250 in monthly instalments was to be made, and none was supplied. The respondents are, no doubt, entitled to damages for the refusal of the appellants to perform their contract, but that is not the form of their action, and there is no evidence upon which the damages can be assessed. Such evidence the respondents sought to give at the trial, but it was excluded, and properly so, because they were not suing for damages for non-performance of the agreement, but to recover the instalments which they claimed had become payable under the terms of it.

It follows that, in my view, the judgment cannot stand.

We ought not, however, under all the circumstances, to direct that the action be dismissed, but an opportunity should be afforded to the respondents to do down to trial again on amended pleadings.

The appeal will, therefore, be allowed, and the judgment reversed without costs, and a new trial directed, with liberty to the respondents to amend their pleadings as they may be advised, and the costs of the former trial will be costs in the cause to the party who is ultimately successful, unless the Judge before whom the action is tried otherwise directs.

Notes:—

PERFORMANCE IMPOSSIBLE IN FACT.

It is an admitted rule supported by positive decisions that impossibility of performance by reason of the particular circumstances is in itself no excuse for the failure to perform an unconditional contract, whether it exists at the time of the making the contract or arises from events which happen afterwards: Addison on Contracts, 10th ed., p. 135; Pollock on Contracts, 7th ed.,

p. 408; *Atkinson v. Ritchie* (1809), 10 East 530, 10 R.R. 372; *Hills v. Sughrue* (1846), 15 M. & W. 253, where a contract to loan a full cargo of guano was not discharged by there not being enough guano to make a cargo: *Kearon v. Pearson* (1861), 7 H. & N. 386; *Thiis v. Byers* (1876), 1 Q.B.D. 244; *Ashmore v. Cox* (1899), 1 Q.B. 436; *Boswell v. Sutherland* (1882), 8 A.R. 233; *McCraney v. McCool* (1890), 19 O.R. 470, affirmed 18 A.R. 217, where there was a contract to deliver lumber to a firm of partners and the partnership was dissolved before delivery, it was held the dissolution of the firm was no justification for refusal to carry out the contract. Unexpected difficulty or inconvenience will, of course, not make an excuse: *Brown v. Royal Insurance Co.* (1859), 1 E. & E. 853; *Jones v. St. John's College* (Oxford) (1870), L.R. 6 Q.B. 115; *Thorn v. Mayor of London* (1876), L.R. 6 Ex. 163, 1 App. Cas. 120. Where there is a positive contract to do a lawful thing the contractor must perform it or pay damages: for not so doing: *Taylor v. Caldwell* (1863), 3 B. & S. 833, 32 L.J. Q.B. 166.

Prohibition by reason of foreign law is deemed to create an impossibility not in law but in fact. In *Barker v. Hodgson* (1814), 3 N. & S. 267, 15 R.R. 485, intercourse with a foreign port was interdicted by the authorities of the port, in consequence of which a freighter was unable to furnish a cargo, but it was held that his obligation was undissolved; *Jacobs v. Credit Lyonnaise* (1884), 12 Q.B.D. 589; *Spence v. Chodwick* (1847), 10 Q.B. 517. If the effect of the foreign law is to prevent both parties from performing their parts of the contract, both are excused; *Cunningham v. Dunn* (1878), 3 C.P.D. 443.

The accidental destruction of a leasehold building, or the tenant's occupation being otherwise interrupted by inevitable accident, does not terminate the obligation to pay rent: *Paradine v. Jane* (1648), Aley 26; *Leeds v. Cheetham* (1827), 1 Sim 146, 27 R.R. 181; *Lofft v. Dennis* (1859), 1 E. & E. 474.

Where the impossibility has been caused by the act of a stranger or by the act of the defendant himself, it constitutes no defence to an action: *Webster v. De La Tour* (1853), 2 E. & B. 688; *Ryan v. Willoughby* (1899), 30 O.R. 411. Here the defendant, who was a member of a municipal council and who would have been disqualified under sec. 80 of the Municipal Act, R.S.O. 1897, ch. 223, from contracting with the corporations, entered into a sub-contract to do work on some town build-

ings, which were being erected. He refused to resign his seat in the council on the ground that the corporation declined to accept him as a sub-contractor. The council then passed a resolution accepting him, but he refused to carry out the contract. It was held that he was liable for the damages sustained by the plaintiff through his non-performance.

The general rule is not, however, without its exceptions. "Where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens. It is on this principle that the act of God is in some cases said to excuse the breach of contract": *Baily v. De Crespigny* (1869), L.R. 4 Q.B., p. 185.

Where the performance depends on the existence of a specific thing, if that thing is destroyed, the obligation of the contract is at an end. This principle was enunciated clearly in *Taylor v. Caldwell* (1863), 3 B. & S. 826, 32 L.J. Q.B. 164. Here the occupier of a music hall agreed with the plaintiff that the plaintiff should have the use of the hall on certain days for the purpose of giving concerts therein and the plaintiff agreed to pay a certain sum *per diem* for the use of the hall, and the hall was consumed by fire before the first of the days, it was held that both parties were discharged from the contract. The Court said: "Where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time arrived for the fulfilment, some particular thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; there in the absence of any express or implied warranty that the thing shall exist, the contract is not to be considered a positive contract, but subject to the implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." Referring to this passage Mr. Pollock (*Contracts*, 10th ed., p. 416) remarks that the word *implied* means here *understood in fact* between the parties, the whole scope of the passage being that it is not to be implied by law. And see further on this point *Appleby v. Myers* (1867), L.R. 2 C.P. 651; *Nicholl v. Ashton*, [1901] 2 K.B. 126; *Anglo-Egyptian, etc., Co. v.*

Rennie (1875), L.R. 10 C.P. 271; *Howell v. Coupland* (1876), L.R. 9 Q.B. 462, 466, affirmed 1 Q.B.D. 258; *Osborn v. Nicholson* (1871), 13 Wallace 654. Where the plaintiff was engaged by the defendants for "the season," *i.e.*, from early in May till some time in November, as master of a ship and the steamer was burnt in September, it was held the contract was subject to the continued existence of the vessel and performance was excused by its destruction without default of the defendant: *Ellis v. Midland Ry. Co.* (1881), 7 A.R. 464. And where an executory contract is entered into with respect to property or goods which are destroyed by an act of God or *vis major* without either party's default, the parties are relieved: *McKenna v. McNamee* (1887), 14 A.R. 339. A contract for electric lighting of a city for a named number of nights before a fixed date at a fixed price per light per night cannot be enforced when in fact there are not as many nights before the fixed date as named in the contract: *Stratford Gas Company v. City of Stratford* (1899), 26 A.R. 109.

Impossibility existing at the time of the making of the contract due to a state of things not contemplated by the parties is a good cause for avoiding the agreement. In such a case the agreement of the parties as induced by a *mistaken* assumption on which they both proceed. On this point see *Courturier v. Hastie* (1856), 5 H.L.C. 673; *Clifford v. Watts* (1870), L.R. 5 C.P.; *Ridgway v. Sneyd* (1854), Kay 627.

Where the performance of the contract depends on the health or life of a person, there is an implied condition that the person shall remain alive and well enough for the purposes of the contract: *Taylor v. Caldwell*, *supra*; *Hall v. Wright* (1858), E.B. & E., p. 795, 29 L.J. Q.B., at p. 51. In this last case, Pollock, C.B., said: "A contract by an author to write a book, or by a painter to paint a picture within a reasonable time, would in my judgment be deemed subject to the condition that if the author became insane or the painter paralytic, he would not be liable personally in damages any more than his executors would be if he had been prevented by death"; *Boast v. Firth* (1868), L.R. 4 C.P. 1; *Robinson v. Davison* (1871), L.R. 6 Ex. 269, was where an eminent piano player was engaged to play at a concert. When the time came she was disabled by illness. It was said per Bramwell, B., "This is a contract to perform a service which no deputy could perform, and which, in case of death, could not be performed by the executors of the deceased, and I am of opinion that by virtue of the terms of the original bar-

gain, incapacity of either body or mind, without default on his or her part, is an excuse for non-performance." But illness unfitting a man for marriage is no ground for avoiding a marriage contract: *Hall v. Wright* (1858), E.B. & E. 746. In such a case it rests with the woman to say whether she will enforce or renounce the contract: *Boast v. Firth* (1868), L.R. 4 C.P. 8.

PERFORMANCE IMPOSSIBLE BY LAW.

In such a case there is no doubt that the obligation of the contract or agreement is at an end. In *Baily v. Crespigny* (1869), L.R. 4 Q.B. 180, a lessor covenanted with the lessee that neither he nor his heirs nor his assigns would allow any building on a small piece of land of the lessor's, fronting on the demised premises. Later a railway company purchased the land under the compulsory powers of an Act of Parliament and built a station thereon; it was held that the Act of Parliament discharged the lessor, as it put it out of his power to perform his covenant. "A covenant of warranty does not extend to the State in the exercise of its eminent domain": *Osborn v. Nicholson* (1871), 13 Wallace, p. 657. Even, when the Act is a public one, where the party bound procures the Act to be passed, yet is the contract discharged: *Brown v. Mayor of London* (1861), 9 C.B. N.S. 726. See also *Brewster v. Kitchell* (1697), Salk. 198; *Newington Local Board v. Cottingham, L.B.*, (1879), 12 Ch.D. 725; *Slipper v. Tottenham* (1867), L.R. 4 Eq. 112; *Newbry v. Sharp* (1878), 8 Ch.D. 39; *Mills v. East London Union* (1872), L.R. 8 C.P. 79.

S. and Co., contractors for a building for the respondent in *St. John, N.B.*, brought an action claiming to have been prevented by the respondent from carrying out their contract. By the terms of the contract the building when erected would not have conformed to a by-law passed two days after the contract had been signed. It was held that the by-law made the contract illegal and so the plaintiffs could not recover: *Spears v. Walker* (1884), 11 S.C.R. 113; *Walker v. McMillan* (1881) 6 S.C.R. 241. The claimants sought to recover from the Crown the amount of damages they alleged they were obliged to pay to a contractor who was prevented by the expropriation from completing the construction of a wharf he had undertaken to build for them. But as the contractor had been prevented from completing the wharf by the exercise of powers conferred by Act of Parliament, the claimants were under no liability to him and so could not maintain any claim against the Crown in that behalf: *Samson v. The Queen* (1888), 2 Ex. C.R. 30.

[IN THE COURT OF APPEAL FOR ONTARIO.]

RE PUBLISHERS SYNDICATE.

PATON'S CASE.

Company—Winding up—Transfer of stock—Power of attorney—Payment to directors.

A company under the mistaken belief that there was no unallotted stock which could issue to applicants, authorized an agent, Stark, to obtain powers of attorney from persons desirous of becoming shareholders. This power of attorney made the attorney the appointor's agent "for me and in my name and on my behalf to receive from the vendor a transfer of shares of the capital stock of the Publishers' Syndicate, Limited, purchased by me from him, at the sum of \$, and to sign on the books of the company my name to the acceptance of the transfer of the said shares, etc." This agent obtained powers of attorney from a number of persons. All of these paid for and received certificates for the amount of the shares specified in their powers. Some time later, C., who was a director and officer of the company, seeing the powers of attorney and knowing that no transfer had been made thereunder, filled in opposite the names of the various appointors transfers of his stock from him to them and procured the agent as their attorney to accept transfers and caused the agent to be paid by the company \$60 for alleged commission.

Held, that neither the transfer of stock made by P. nor the \$60 payment could be supported and that P. must be placed upon the list of contributors.

At a meeting of the directors soon after the incorporation of the company when the directors were the only shareholders, \$300 was voted to P. for alleged services as director. The resolution was contained in the minutes read at the annual meeting next following, which were confirmed in the ordinary way. It appeared that no profits had been made at this time and, according to the books, nothing had been paid in by any person on account of his stock.

Held, that the payment must be returned as being a gratuity which should be authorized by by-law and as being made out of capital and not of assets properly divisible among the shareholders.

This was an appeal and a cross-appeal from the judgment of Meredith, C.J.C.P.

Under letters patent issued on the 6th May, 1897, Robert B. Willing, William, S. Milne, John H. Paton, James L. Ross and M. M. Fenwick were appointed the provisional directors of a company, incorporated under the name of "The Publishers' Syndicate of Ontario, Limited."

The corporation were to constitute a syndicate for the purpose of handling the publications of British, American and

Canadian publishers, for publishing, importing, buying and selling and trading in books, etc., and in carrying on the business of printing, bookbinding, etc.

The form of the stock subscribed was as follows:—

“The Publishers’ Syndicate of Ontario, Limited.

Memorandum of Agreement and Stock Book.

We, the undersigned, do hereby severally covenant and agree, each with the other, to become incorporated as a company under the provisions of the Ontario Companies’ Act, under the name of the Publishers’ Syndicate of Ontario (Limited), or such other name as the Lieutenant-Governor-in-Council may give to the company, with a capital of forty-five thousand dollars, divided into four hundred and fifty shares of one hundred dollars each.

And we do hereby severally, and not one for the other, subscribe for and agree to take the respective amounts of the capital stock of the said company set opposite our respective names as hereunder and hereafter written, and to become shareholders in such company to the said amounts.”

John H. Paton had subscribed for twenty shares of stock in the company.

Immediately after the issue of letters patent, notice was sent to the above provisional directors, who were then the only shareholders of the company, notifying them of a meeting of the shareholders to be held on the 22nd May, 1897, for the election of directors, the making of by-laws, and transacting any other business which might lawfully be done at such meeting.

The meeting was duly held, and while the above named persons were present, resolutions were moved and carried appointing each of the said provisional directors officers of the corporation, namely—M. M. Fenwick, president; Robert B. Willing, managing-director; William S. Milne, secretary-treasurer; John H. Paton, superintendent; and Messrs. Rowan & Ross, solicitors; the above named James L. Ross being the Ross referred to.

A resolution was also moved and carried that Mr. Fenwick as president, and Mr. Willing as managing director, be each

paid a salary of \$100 a month, to commence on the 1st May, 1897; and as a further remuneration each of these should be allowed \$1,000 in paid-up stock; that Mr. Paton be paid a salary of \$50 a month, to commence on the 1st June, 1897; and as a further remuneration he should also be allowed \$1,000 in paid-up stock; and that as soon as he could give his whole services to the business his salary should be the same as the president's and the managing director's.

At this meeting a resolution was also carried that the sum of \$300 be paid to each of the provisional directors for services rendered.

This meeting was adjourned until the 24th May, to enable Dr. Ferguson, who desired to become a shareholder, to be elected a director; and at the adjourned meeting on the 24th May, on its being reported that Dr. Ferguson had become a shareholder, he was elected a director and made vice-president of the company.

On the 8th January, 1898, at a meeting of the board of directors, as appeared from the minutes, the board were informed that Mr. Milne had been acting as accountant under special agreement as to salary; whereupon it was resolved that he be employed in that capacity for a term to end on the 31st December in 1898, and that he be paid therefor \$1,000 in paid-up stock.

On the 9th January the account of Messrs. Rowan & Ross was submitted to the board of directors, amounting to \$405, which was passed. A resolution was also passed acknowledging same, and in consideration of their undertaking to do all the solicitors' work for the company until the 31st December, 1898, they were to be paid \$1,000 in fully paid-up shares of the company.

On July 28th, 1898, immediately preceding the first annual general meeting held on that day, a meeting of the directors was held at which Messrs. Fenwick, Ross, Milne and Ferguson were present, when a resolution was passed directing that Dr. Ferguson should be paid \$375 for services rendered.

At the meeting of shareholders then held the old board were re-elected directors; and at the first meeting of the new board on the same day, it was decided that the question of salaries for the year be postponed to a future meeting; and on the 17th October, 1898, it was resolved that the salaries of Messrs. Fenwick, Willing and Paton be at the rate of \$100 a month until the end of 1898, being the same as those paid in the latter part of 1897, less the \$1,000 of fully paid-up stock.

At a meeting of the directors held on the 25th April, 1899, these salaries were continued till the end of May, 1899; and at a meeting of the board on the 10th May, 1899, they were continued until the regular meeting in June.

At a meeting of the board held on the 2nd August, 1899, a resolution was passed retaining Mr. Willing on a monthly engagement of \$100 a month; and at a meeting of the board on the 6th September, 1899, the salaries of Mr. Fenwick and Mr. Paton were fixed at \$125 a month from the 1st July, 1899. Mr. Willing ceased to be a director in July, 1899, and shortly afterwards left the services of the company.

The salaries of Messrs. Fenwick and Paton continued at the above rate until the end of June, 1901, when in consequence of the state of the finances the salaries were stopped on that date.

In July, 1900, a bonus of \$500 was given to Mr. Fenwick and Mr. Paton.

In August, 1900, under the belief that there was no unallotted stock which the company could issue to applicants for shares, the company, instead of applications to the company for stock being made directly, authorized a number of agents to obtain powers of attorney from persons desirous of becoming shareholders. These agents procured powers of attorney to be signed by the following persons, amongst others, Dr. Moorhouse, of the city of London, for three shares; Malcolm Brodie, of the village of Forest, five shares; W. H. Hopper, J. J. Farley, and M. J. Clarke, for one share each; M. Hermine Connolly for four shares, and James Mitchell for two shares, which were handed

into the company and pasted by the secretary in the transfer book.

The power of attorney appointed the attorney the appointor's agent, "for me," *i.e.*, the appointor, "and in my name, and on my behalf, to receive from the vendor a transfer of shares of the capital stock of the Publishers' Syndicate, Limited, purchased by me from him, at the sum of \$, and to sign on the books of the company my name to the acceptance of the transfer of the said shares; and to do all other acts, and to sign all such other papers as are necessary to vest in me the title to the said shares."

Mr. Paton paid for three of the shares, applying the \$300 paid him by the company. As to the other unpaid shares held by him, he in 1901, seeing the powers of attorney, and that no transfers had been made thereunder, filled in opposite the names of the various appointers transfers of his stock from him to them, transferring three of his shares to Dr. Moorhouse and five of his shares to Mr. Brodie, one to W. H. Hopper, J. J. Farley, and M. J. Clarke respectively; four to M. Hermine Connolly, and two to James Mitchell, and he procured the agent as their attorney, to accept the transfers, and he caused the agent to be paid by the company \$60 for alleged commission.

Dr. Moorhouse had on the 19th October, 1900, signed an application for three shares, which was accepted and entered in the register of shareholders, and he was given credit for three shares of the stock of the company in the stock ledger.

On the 24th January, 1901, the company drew on Dr. Moorhouse a three days' sight draft for \$300 in payment of these shares, which Dr. Moorhouse accepted and paid, and a certificate for the three shares, dated 30th January, 1901, was issued and sent to him signed by Dr. Ferguson as vice-president, and Mr. Paton as acting secretary, and a certificate was then issued to him for these three shares; and his name was entered on the stock ledger.

As to Mr. Brodie, on the receipt of his power of attorney, the company drew on him for \$200, the value of two shares, and on his acceptance and payment of the draft, the company sent him a certificate for two shares. The secretary was of the opinion that Brodie had made an application for two shares, but he was apparently mistaken as to this. Subsequently he paid to the company the value of the three remaining shares by three instalments of \$100 each; and his name was entered in the stock ledger for the five shares.

As to the said other parties, shortly after the receipt of the powers of attorney, they paid for the respective number of shares, and certificates were issued to them; and they were entered in the stock ledger.

The additional evidence, so far as material, is set out in the judgments.

On September 16th, 1901, an order was made by Ferguson, J., declaring the company insolvent, and directing it to be wound up; and by another order of the same date a liquidator was appointed, and the matter was referred to Mr. Winchester as official referee, to whom all the powers conferred upon the Court under the Winding-up Act and amendments were delegated.

Upon an application made by the liquidator to place the name of John H. Paton on the list of contributories, the official referee directed that he should be placed on the list of contributories as to the sum of \$300; but as to the \$1,000, while holding a very strong opinion that this was given without any consideration, he felt he was bound by the decision *In re Ontario Express and Transportation Company* (1894), 25 O.R. 587, 589, and could not therefore hold him liable for that sum.

He further directed that the said John H. Paton should be placed on the list of contributories in respect of the three shares transferred to Dr. Moorhouse, and the five shares transferred to Malcolm Brodie. He refused to place him on the list of contributories for nine other shares, transferred by him to W. H.

Hopper, J. J. Farley, M. J. Clarke, M. Hermine Connolly, and James Mitchell; but he held he should pay the amount of the commissions paid to the agents.

From this judgment John H. Paton appealed to a Judge sitting in Weekly Court.

There was a cross-appeal by the liquidator against the allowance by the official referee of the \$1,000, and also to place the said John H. Paton on the list of contributories for the said nine shares.

On October 1st, 1902, the appeal was argued before MEREDITH, C.J.C.P.

A. T. Kirkpatrick, for the appellants.

C. D. Scott, for the respondents.

October 1. MEREDITH, C.J.:—With regard to the \$60 which the referee has assumed, upon the motion to settle the list of contributories, to charge the appellant with, it seems to me that upon that application there was no jurisdiction to do anything of the kind. It may be that the appellant is indebted to the company in respect of the \$60, and that he can be reached in the ordinary way for that, or it may be that he is amenable to the jurisdiction under the Winding-up Act to proceed against directors: section 83; but the case has not been dealt with under that section. The appeal as to the \$60 must, therefore, be allowed, without prejudice to any right of the company or the liquidator against the appellant in any other form or by any other means, if there is any such right.

With regard to the five shares said to have been transferred to Dr. Moorhouse and Brodie respectively—three to Dr. Moorhouse and two to Brodie—I am of opinion that the appeal fails and must be dismissed. It appears from the evidence that the company had upon its books a number of shareholders, who were not men of ability to answer their engagements, holding stock that had not been paid for, and that the company was desirous of getting in other shareholders; and it appears to have

been thought that there were no unallotted shares which the company could issue to applicants for shares. That appears to have been a mistake. There were shares sufficient to answer these two applications, at all events, unallotted, which might have been allotted to the applicants.

Matters being in this position, the company determined to send out its agents for the purpose of getting persons to become shareholders in the company, and the form devised for the purpose of carrying out the arrangement to which I have referred, was to put in the hands of these agents blank powers of attorney, which were to be signed by persons desiring to become shareholders, giving authority to some one whose name is blank, or to J. W. Stark, one of the agents who was commissioned by the company to enter upon this work, to receive from the vendor a transfer of shares of the capital stock of the Publishers' Syndicate, and to accept them upon the books of the company.

Dr. Moorhouse was waited upon by Mr. Stark, and signed one of these powers of attorney authorizing Stark to receive from the vendor three shares of the capital stock of the Publishers' Syndicate, and to accept them upon the books of the company. That power of attorney is dated the 27th August, 1900.

Dr. Moorhouse was subsequently waited upon by another agent of the company, and on the 29th October signed an application for three shares in the company. That application was submitted to the board, the shares were allotted to Dr. Moorhouse, and he paid for them, and a certificate was issued to him in respect of them.

It is manifest that Dr. Moorhouse never intended to become a shareholder for more than three shares in the company, and that the company understood this. An examination of the stock ledger makes it clear that the company understood that three shares only were to be given to Dr. Moorhouse either by allotment or under this power of attorney or otherwise.

The appellant was a director of the company, and, after the

three shares had been allotted to Dr. Moorhouse and paid for, and the certificate had been issued, as I have said, upon his attention being called to the fact that a number of applications had been pasted in the book opposite to which no transfers were made of shares, filled out opposite Dr. Moorhouse's name a transfer from himself to Dr. Moorhouse of three shares, and procured Stark to accept the shares on behalf of Moorhouse.

The document of transfer and acceptance is dated the 8th February, 1901, which is probably an earlier date than that on which it was actually signed.

The proper conclusion from the evidence is, I think, that contemporaneously with the doing of this, Paton directed the clerk or manager, or the bookkeeper of the company, to alter the entry in Dr. Moorhouse's account, and, contrary to the truth, to make it appear that the three shares for which Dr. Moorhouse had paid were not shares that had been allotted to him by the directors, and to substitute for those three shares the three shares which he purported upon this day to transfer to Dr. Moorhouse.

Now it is manifest, I think, that it was perfectly understood that these powers of attorney were to be used only for the purpose of enabling the company, as far as it was unable to do so by unallotted shares, to answer the contracts which it had entered into with the applicants for shares. If that be so, it follows that this power of attorney could not rightly have been used for the purpose of loading Dr. Moorhouse with three shares besides those which had already been allotted to him by the company and for which he had paid.

There is the further difficulty that the power of attorney is to accept from the vendor three shares. There never was any purchase by anybody on Dr. Moorhouse's account of three shares. There is no pretence that Stark ever bought any shares from Paton on behalf of Dr. Moorhouse, and, although it is not necessary to determine that, my view of the power of attorney is that it was only when Dr. Moorhouse had purchased shares

from a vendor that the power to Stark to accept the transfer of them operated.

The power of attorney is not to purchase shares on his behalf, but to receive from the vendor a transfer of three shares. It seems to me, therefore, to make it effective that there must follow this power of attorney a transaction by means of which Dr. Moorhouse becomes the purchaser of the shares, and there was no such transaction.

The power of attorney, it is true, is headed, "A power of attorney to buy," but there is nowhere authority given to Stark to buy shares, and there never was, as I have said, any purchase from Paton.

It appears to me a most unjust and unreasonable thing that Paton, one of the directors of the company, should under these circumstances attempt to use this form adopted by the company to unload upon Dr. Moorhouse three shares which he never intended to purchase, and by so doing relieve himself from his obligation to pay for these shares for which he had himself subscribed.

The long delay after the date of the power of attorney—27th August, 1900—is also a circumstance very much against the contention urged by Mr. Kirkpatrick. I do not think that it was at all necessary that there should be any formal revocation of the power of attorney. Dealing with an outsider, perhaps a longer delay than occurred in this case might have been necessary to put him into inquiry; but here months had elapsed before any attempt was made to use the power of attorney, and I think that put Mr. Paton on inquiry as to how it came that the power of attorney had not been previously acted upon.

With regard to the Brodie shares, it appears that Brodie on the 1st September signed a power of attorney similar in form to that signed by Dr. Moorhouse. He made his application for five shares. The company, notwithstanding its ability to pay the comparatively large sums which had been paid to its directors, seems to have been rather impecunious, and made applications to Brodie to pay \$200, the par value of two shares.

Brodie paid that, and there was entered in the stock journal an allotment of the two shares in the company for which he had paid. There then remained three shares, for which he had still to pay. These were paid for in three instalments of \$100 each.

It is plain from the book that there never was any idea—as, indeed, is part of Mr. Kirkpatrick's argument—on the part of Brodie that he should ever have any more than the five shares; but the argument is that the allotment of the two shares of what is called "treasury stock" should be treated as erroneous, and that Brodie should be treated as having taken the five shares which Paton assumed to transfer to him by the transfer of 8th February, 1901. I think that is not so. The company had the two shares, and they allotted them to Brodie, and he paid for them, and there remained only three more to be acquired by him.

The same observations which I have made with regard to the Moorhouse case apply to this case, and Paton had no right to use this power of attorney for any other purpose than to enable the company to complete the contract which it made, or to complete the transaction by giving to the shareholder the number of shares for which he was applying. He had got two, and there remained only three, and therefore the power of attorney must be limited to the three.

I was very much pressed by Mr. Kirkpatrick to have regard to the documents. It would be, I think, a very extraordinary thing to have regard to the documents in the face of the clear evidence as to the purpose of all these documents and the intentions of the parties. That would be looking to the form instead of to the substance of the transaction. According to the substance of the transaction, I think that this director Paton was at the time of the winding-up order the owner of at least five shares, and has been properly placed upon the list of contributories in respect of them.

There remains the question as to whether the referee has properly determined that the sum of \$300, which has been credited to the appellant in respect of three other shares, pay-

ing them up in full, was improperly so credited, and that he was liable as a contributory in respect of these shares.

As I understand the facts, the company was composed of five persons; that the original shareholders were the five provisional directors, being also the shareholders of the company, and in form constituted themselves directors and shareholders and assumed to resolve that each of the directors should be paid \$300 for services which, before that date, had been performed by them for the company.

The minutes of that meeting appear to have been read at the next annual meeting of the company, when there were real shareholders of the company, a body of shareholders, and to have been approved. I should have had very great difficulty in coming to the conclusion that it was within the power of the provisional directors, who were also the nominal shareholders or stockholders of the company before the charter of the company had been accepted, and at the meeting when it was accepted and when they had met for organization, to have assumed to deal with the moneys of the company in the way in which these gentlemen seem to have thought it was in their power to do.

However, the subsequent meeting was a ratification apparently by the body of the shareholders of what had been done, and the appellant is entitled to succeed, unless the referee was right in coming to the conclusion that the fact was that these payments could be made only out of the capital, and that was fatal to the right of the directors to receive payment. In the case of *Re Lundy Granite Co., Ltd., Lewis's Case* (1872), 26 L.T.N.S. 673, cited by Mr. Kirkpatrick, it appears to have been determined that there is nothing to prevent the payment out of the capital to the directors for services rendered; and the observations in the case of *Re Newman*, [1895] 1 Ch. 674, from the judgment of Lord Justice Lindley, appear to be applicable not to the case of a payment for services, but to a present made by shareholders to a director; and what Lord Justice Lindley seems to say there is that there is no power to withdraw from

the capital of the company moneys for the purpose of making a present to the directors. That is not opposed to the decision in the *Lewis* case, that directors may be paid for their services out of the capital of the company. My present impression is that the learned referee was wrong in holding that the \$300 were not properly credited to the appellant, and unless that impression is removed by further consideration, the appeal will be dismissed as to the three shares alleged to have been transferred to Dr. Moorhouse, and the two shares alleged to have been transferred to Brodie, and will be allowed as to the \$60 and as to the \$300, and there will be no costs to either party.

I allow the appeal as to the three shares which are entered in the books as paid up, and dismiss the appeal as to the other five shares. I allow the appeal, also, as to the \$60 charged to the defendants, without prejudice, as I have already intimated, to the company or the liquidator seeking to recover that in any other way.

Then, as to the cross-appeal. I affirm the judgment of the Master in his refusal to put the said John H. Paton on the list of contributories for the said nine shares.

As to the \$1,000, I think I am bound by the decision in the *Ontario Express* case, which the referee properly followed, to hold that any payment made to a director for services as such, is not to be treated as a mere voluntary payment and within the provisions of the statute, which has already been referred to. It is impossible, in this case, to say that this was a present to the respondent. It may be that he was very well paid for his services; but I do not understand that if a company says to a man, to induce him to enter into its services, we will give you \$1,000 of stock and \$50 a month as long as we can get on, and he agrees to that, that is not a bargain with consideration on both sides, or why the whole bargain must not stand.

I think this appeal must, therefore, be dismissed. If there is a consent to allow the costs to be set-off against the claim, I will dismiss it with costs, but if not, without costs.

From this judgment there was an appeal and cross-appeal to the Court of Appeal.

On December 1st, 1902, the appeal was argued before MOSS, C.J.O., MACLENNAN, GARROW and MACLAREN, J.J.A.

E. B. Ryckman, and *A. T. Kirkpatrick*, for the appellant.
C. D. Scott, for the respondent.

January 26, 1903. The judgment of the Court was delivered by MACLAREN, J.A.:—Mr. Paton has appealed from the judgment of the learned Chief Justice of the Common Pleas affirming that part of the report of the official referee which held him liable as a contributory for five unpaid shares in the company, viz., three which he had transferred to Dr. Moorhouse and two Malcolm Brodie.

In my opinion the evidence shews clearly that the real transactions between the company on the one hand, and Moorhouse and Brodie on the other, were that the two latter should become shareholders in the company, and that the powers of attorney given by them were taken instead of ordinary applications for stock, at the instance of the company, under the mistaken belief that there was at that time no treasury stock to meet such applications, and that it would be necessary to receive transfers of shares which had been allotted to prior applicants who were unable to pay for them. Moorhouse and Brodie having paid the company for the five shares in question, and having received their stock certificates for them some time previous to the transfers from Paton, the latter could not relieve himself from liability by attempting to transfer his unpaid shares to these parties, when he did not and could not make them liable to the company for their payment. It may be noted that the motion for the allotment of the three company shares to Dr. Moorhouse was made at the meeting of the board by Paton himself.

It was strongly argued before us on behalf of Paton that he could transfer his unpaid shares, even although his object

might be to escape liability, and that we should accept as conclusive the entries in the books.

I do not consider the authorities cited to us on this point to be applicable to the present case. It was known to the company, and to Paton, that these applicants did not apply for or desire more shares than mentioned in the powers of attorney. After they had paid the company for and accepted certificates of paid-up shares in fulfilment of their contracts, Paton could not effectually transfer to them his unpaid shares without their knowledge or consent, and I do not think that the old powers of attorney could properly be used to accept transfers of these shares under the circumstances.

In my opinion, the judgment appealed from is in this respect correct, and the appeal of Paton should be dismissed.

The liquidator has brought a cross-appeal from that part of the judgment of the learned Chief Justice which allowed Paton a credit of \$300, and which reserved the report of the official referee on this point.

This sum was voted to Paton and a like amount to each of the other provisional directors for alleged services as such directors. It was done at what was called a joint meeting of shareholders and provisional directors held for organization, sixteen days after the date of the letters patent, the provisional directors being the only shareholders at the time.

These directors were not servants of the company, but managers, and, apart from contract or agreement, could not claim remuneration for their services, so that such a payment would be in the nature of a gratuity, and should be authorized by by-law.

Section 46 of the Ontario Companies' Act, 1897, under which the company was incorporated, provided that no such by-law should be valid or be acted upon until it had been confirmed at a general meeting of the shareholders. I am of opinion that the resolution in question was not a sufficient compliance with this section, even although it formed part of the

minutes which were read at the annual meeting held the following year, and which were confirmed in the ordinary way.

It is further to be observed that no profits had been made at this time, and, according to the books, nothing had been paid in by any person on account of his stock.

I think this case is clearly distinguishable from *Re Lundy Granite Co., Ltd., Lewis's Case*, 26 L.T.N.S. 673, to which we have been referred. There the payment in question was expressly authorized by the articles of association of the company. Here there is no such provision in the Act or the letters patent, and nothing to take it out of the general rule laid down by Lord Lindley in *Re George Newman & Co.*, [1895] 1 Ch. 674, at p. 686, that the remuneration of directors for their trouble as such, even when authorized by the shareholders, can only be made out of assets properly divisible among the shareholders themselves, and not out of capital.

The liquidator has also appealed to this Court against the decisions of the referee and the Chief Justice in refusing to place Mr. Paton on the list of contributories with respect to nine other unpaid shares which he transferred to certain other parties at the same time as he made the transfers to Moorhouse and Brodie, viz., one share to W. H. Hopper, one to J. J. Farley, one to M. J. Clarke, four to M. Hermine Connolly, and two to James Mitchell. I am unable to find anything in the circumstances relating to these nine shares to place them on a different footing from the five shares transferred to Moorhouse and Brodie, and the same rule should be held to apply.

The cross-appeal with respect to the \$300 and to these nine shares should therefore be maintained, and Mr. Paton placed on the list of contributories for \$1,700. The liquidator to have the costs of this appeal and cross-appeal, and the costs below in respect of the cross-appeal.

Notes:—

PAYMENT OF DIRECTORS.

Primâ facie directors of a company are not entitled to remuneration: *Dunstan v. Imperial, etc., Co.* (1832), 3 B. & Ad. 125; *Hutton v. West Cork Ry Co.* (1883), 23 Ch.D. 672. But where, as is usually the case, directors are paid, it is not necessary that the remuneration should be paid out of profits provided that the payments are for *services rendered*: *Harry Lewis's Case* (1872), 26 L.T. 673. In Canada, under the Dominion and most of the Provincial Acts, payments to directors are, however, safe-guarded in that a by-law authorizing the payment and subsequent confirmation of the by-law is required: *vide*, Ontario R.S. 1897, ch. 191, sec. 48; N.B. 56 Vict. (1893), ch. 7, sec. 37; Man. R.S. (1891), ch. 25, sec. 30, sub-sec. (b); N.W.T. C.O. (1898), ch. 61, sec. 31; B.C. R.S. (1897), ch. 44, Sched. I. (54); Imperial Act (1862), ch. 89, Sched. I. (54).

The directors of a company may not appropriate to their own use any money of the company by way of recompense for their services without having first come before the shareholders to have their services recognized and remuneration fixed, and a directors' by-law, under which funds of the company were appropriated without any lawful authority, cannot be ratified by the shareholders so as to have the retroactive effect of covering up a misapplication of the funds: *Waddell v. Ontario Canning Company* (1889), 18 O.R. 41, 54.

But where a person has accepted the office of director of a company and has acted as such, there may be inferred an agreement between him and the company on his part that he will serve the company on the terms as to qualification and otherwise contained in the articles of association, and on the part of the company that he shall receive the remuneration and benefits provided by the by-laws for the directors: *Re Anglo-Austrian Co.* (Isaac's Case), [1892] 2 Ch. 158.

By-law 17 of the B. & I. Company provided that the managing director should be paid for his services such sums as the company "may from time to time determine at a general meeting." The only provision was made at a general meeting on the 27th January as follows: "The salary of the managing director was fixed until October 31st next, as at the rate of \$4,000 per annum." L., the managing director, sought to re-

cover for services rendered as such subsequent to October 31st. Held that he could not do so; *Re Bolt and Iron Co., Livingstone's Case* (1887), 14 O.P. 211; 16 A.P. 397. The position of L. as managing director rendering services for which remuneration was given, is not that of a servant hired by the company, but of a working member of the company, whose rights as to payments are to be measured by the provisions of the charter and by-laws of the Company; *Ibid.*

L. having withdrawn from the moneys of the company a certain sum on the assumption that he was entitled to it in payment of his services. *Held*, that this was a breach of trust on L.'s part, and the amount thus withdrawn formed a debt based on a breach of trust, recoverable by the liquidator, and as to which no set-off was permissible against any debt or dividend due from the company to L.; *Ibid.*

An objection was raised to the president of an insurance company acting as such, because he acted as the inspector of the company for which he was paid a salary. *Held*, that no weight could be given to it, because three directors formed a quorum, of which the president need not be one, and a quorum might have acted without him; and, moreover, for all that appeared it might be that he received only an addition—an allowance as president while acting as inspector; *Victoria, etc., Ins. Co. v. Thompson* (1882), 32 C.P. 476.

Where an Act of incorporation provided that no by-law for the payment of the president or any director, should be valid or acted on until the same had been confirmed at a general meeting of the shareholders, it was *held* that this applied only to payment for the services of a director *quâ* director, and for the services of the president as presiding officer of the board. Where a company appointed directors to various salaried offices without a by-law fixing amount of salaries, and such appointments were later confirmed by legislation, they were *held* entitled to prove on the winding-up for a *quantum meruit* for services rendered; *Re Ontario Express and Transportation Company, Directors' Case*, (1894), 25 O.R. 587.

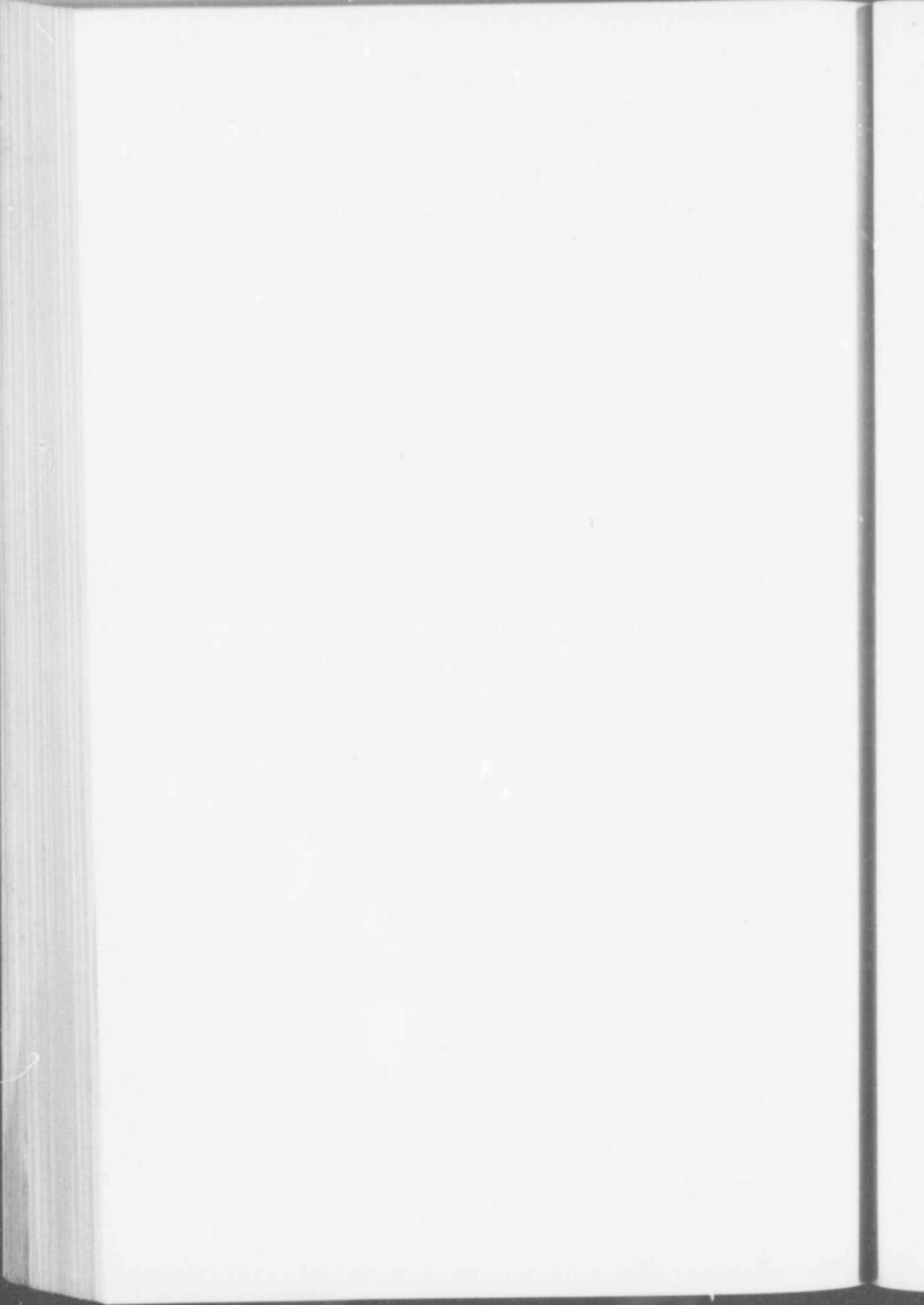
By the by-laws of a company, the board of directors was to consist of three persons, two of whom constituted a quorum. At a meeting, at which two of the directors, C. and G., the plaintiffs, were present, one being the president and the other the secretary of the company, a resolution was passed that "the matter of the compensation of C., the editor, and G., the

advertising solicitor, was considered, and the sum of \$1,000 each be ordered to be placed to their respective credits for services rendered during the year in addition their regular salary." C., as a matter of fact, had not been appointed editor nor G. as advertising solicitor. The object of the resolution was to appropriate all the funds of the company so as to prevent a stockholder owning the greater part of the stock being paid. *Held*, the resolution could not be sustained nor any moneys received under it be retained: *Gardner v. Can. Mfg. Publishing Co.* (1899), 31 O.R. 488.

If the directors of a company have abused their position so as to set an advantage at the expense of the company it is for the company or its shareholders to complain and not for an outsider: *Bank of Toronto v. Coboury Ry.* (1885), 10 O.R. 376, and see *Greenstreet v. Paris* (1874), 21 Gr. 229.

Where a company has agreed to pay remuneration to a director he can sue for it: *Orton v. Cleveland Co.* (1865), 3 H. & C. 868; *Nell v. Atlanta* (1895), 11 T.L.R. 407; and prove in the winding-up like an ordinary creditor: *Beckwith's Case*, [1898] 1 Ch. 324; *Dale v. Plant* (1890), 43 Ch.D. 255. But to take remuneration in excess of what is payable properly is a mis-feasance; and directors party thereto are jointly and severally liable to make good the amount: *George Newman*, [1894] 1 Ch. 674; *Oxford, etc., Society* (1887), 35 Ch.D. 502; *Leeds Estate Co. v. Shepard* (1887), 36 Ch.D. 809; *Re Whitehall Court* (1887), 56 L.T.R. 280.

Where a director is to be paid so much per annum he cannot maintain an action for an unapportioned part where he vacates office before the end of the year: *Sallon v. New Beeston Tyre Co.*, [1899] 1 Ch. 775; *Central DeKapp Gold Mines* (1900), 69 L.J. Ch. 18; *McConnell's Claim*, [1901] 1 Ch. 128. But if the directors' work for the year is complete and the company goes into liquidation before the end thereof, he is entitled to pay for the year: *Shawes Bryant & Co.*, W.N., (1901), 124. The remuneration was to be paid "at such time as the directors shall determine": *held*, a director had no right in such determination: *Caridad Copper Co. v. Swallow, C.A.*, 12 May, 1902.



CANADIAN COPYRIGHT CASES.

(1) COMMON LAW RIGHTS OF AUTHORS AND ARTISTS.

[IN THE COURT OF QUEEN'S BENCH FOR QUEBEC.]

BERNARD V. BERTONI.

Copyright—Artistic Property—Remedy for Violation of—Measure of Damages.

Per ANDREWS, J., in the Superior Court:—

An action of damages will lie at common law for invasion of property in artistic works, and is not taken away by the Copyright Act giving an action for penalty.

The affixing of his signature by a sculptor to a bust made by him is sufficient proof, under the statute, of notification of his privilege as author.

The certificate of registration of a copyright is *prima facie* evidence that the requirements of the law, previous to its issuing, have been complied with.

The assignee of a copyright may recover for infringements made before the registration of the assignment, but after the registration of the copyright.

Per the Court of Queen's Bench—reversing ANDREWS, J., on this point—Where there is clear proof of the counterfeiting of a copyright, the damages will not be measured by the price realized through the sale of the counterfeit, but vindicative damages will be allowed.

This was an action to recover \$500 damages for infringement of the plaintiffs' right as owners of the copyright in a bust through assignment from the sculptor.

The facts are stated in the judgment of ANDREWS, J.

June 25th, 1888. ANDREWS, J.:—

This is an action for \$500 damages. The plaintiffs allege that a sculptor named Dunbar made a bust of Cardinal Taschereau, had his copyright to it duly registered at Ottawa, and assigned it to them to the extent of fifty copies, to be sold at a certain price, in Quebec and in the surrounding counties;

that the defendants copied the bust and sold it within the territory assigned to the plaintiffs, for a price below that at which they, the plaintiffs, were by contract bound to sell, and thereby made it impossible for them to sell at all, and caused them damage, which is estimated, at the rate of \$10 a bust, to amount to \$500.

The defendant's first plea and contention at bar is that this is an action for damages at common law. That no such action lies. That the only remedy the plaintiffs have is the action for penalty under the Copyright Act. I think this defence unfounded. I am of opinion that property in works of art, such as the bust in question, is recognized by our common law and that a trespass upon it gives rise to a claim for damages. The rule that the ordinary remedy is not taken away because a special one is given by statute, therefore applies, and I hold the action to be well brought.*

It is next pretended that there is no allegation in the plaintiffs' demands of the publication of the author's privilege, that is, his copyright. The declaration sets forth a transfer which it calls legal and complains of the acts of the defendants as illegal. No exception to the form has been put in. The parties have joined issue and gone to trial, and the evidence shows that publication of the copyright was made by Dunbar's affixing his signature to the bust. This is all that is required by the statute and I must therefore declare this objection unfounded.

The defendants say, for a third plea, that there is no proof of compliance by the plaintiffs, or their assignor, with the conditions imposed by law, preceding the registration of the copyright. The answer is that a certificate, under the hand and seal of the proper officer, of the registration is filed, and that under the maxim *omnia presumuntur rite esse acta*, it must

* [Note.—If the learned Judge intended to lay down that there is now copyright apart from statute subsequent to publication, this decision is at variance with the generally accepted doctrine. See notes *infra*, p. 161. The decision, however, may be supported on other grounds.—Ed.]

be supposed to have been properly granted, and is *prima facie* evidence that all was done that should have been done. In the case of *Alleya v. The Corporation of Quebec*, the judgment rendered by me proceeded on this rule, and was confirmed in appeal by the Court of Queen's Bench.

Another objection relied on by the defence, is that the assignment of the copyright to the plaintiffs, having been registered on the first of March, they could not recover for infringements, which are proved to have been made before that date. They are proved to have been made, however, after the 16th of January, the date of the registration of the copyright, and that is, in my opinion, sufficient to make the defendants liable. There can be no doubt that Dunbar himself could have founded an action upon them, and as his assignment to the plaintiffs is of all his rights, without any other qualification than a limit put on the number of busts to be sold, and the extent of territory in which the sales were to be made, the plaintiffs, in all other respects, are entitled to claim as he could have done.

The last and most serious difficulty is as to the amount of damages to be awarded to the plaintiffs. The defendants contend that the evidence is insufficient to justify a condemnation. The proof as to the counterfeiting is conclusive and shews, beyond dispute, that the defendants were guilty of the torts charged against them. As to the loss which they suffered in consequence, the plaintiffs examined.

1st Emile Parè, who says he was employed by them, and tried for three or four weeks to sell for them, but was always met with the objection that the Italians, *i.e.*, the defendants, sold the same busts for two dollars, and therefore he could not get ten. He thinks that otherwise he could have sold three or four.

2nd Théophile Gosselin, who tried for five weeks, all through Quebec and Sillery : sold one in Montreal, but could sell none here, on account of the opposition of the Italians. He thinks that otherwise he could have sold the fifty.

The defendants admit the sale of seven busts by themselves, at \$2 a piece. It is, therefore, plain I cannot allow damages as on more than seven busts, because, if only seven could be sold at \$2, what likelihood or reason is there to suppose that more than seven could have been sold at \$10 ? But, in fact, I do not see how I can allow the plaintiffs' demand of \$10 per bust, even on these seven. The plaintiffs retain the busts. If their declaration offered to give them up to the defendants, there might be less injustice in giving them the full \$10 ; though, I do not at all say it could be done. There is much difficulty on this point. In the case of the *Leather Cloth Co. v. Hirschfeld*, L.R. 1 Eq. p. 299, which was for violation of a trade mark, Vice Chancellor Wood held that "the onus lies on the plaintiff of proving some special damage by loss of custom or otherwise, and it will not be intended, in the absence of evidence, that the amount of goods sold by the defendant, under the fraudulent trade mark, would have been sold by the plaintiff, but for the defendant's unlawful use of the plaintiff's mark." I read in Sebastian, on Trade Marks, ed. 1878, p. 99 : " That a plaintiff is entitled to recover some damages where his trade mark has been infringed, appears clearly from *Blofeld v. Payne* . . . his right has been invaded by the fraudulent act of the defendants." And further, p. 143, "For damages, to be recovered, it is not necessary that special damage should be proved ; it is sufficient to shew that the plaintiff's right has been invaded, in which case, some damages, even if only nominal, will be given." I have decided to follow *Graham v. Plate*, 716 Sedgwick's Cases on the Measures of Damages, in which it was held that "the whole profit obtained by the defendant may be recovered, although this is not the only measure of the plaintiff's damage." I will allow the plaintiffs the money received by defendants for the seven busts sold by them—\$14.

Judgment accordingly.

From this judgment, the plaintiffs, dissatisfied with the

measure of damages. appealed to the Court of Queen's Bench, composed of DORION, C.J., TESSIER, BABY, CHURCH and BOSSÉ, JJ.

Beaubien, for the appellants.

Lemieux, for the respondents.

October 5, 1889. The Court delivered judgment as follows :—Whereas the plaintiffs demand \$500 damages for that they, having purchased from F. T. Dunbar his copyright interest in fifty busts of His Eminence Cardinal Taschereau, the defendants unlawfully counterfeited and sold imitation busts at a much reduced price thereby preventing plaintiffs from effecting sales of the busts so by them purchased from F. T. Dunbar;

Whereas the defendants have pleaded a general denial, and by peremptory exception that the busts by them sold were original of their own design ;

Considering that the due obtaining by Dunbar of the copyright in question and his sale to the plaintiffs of his interest therein to the extent of said fifty busts is sufficiently established ;

Considering the admissions by the defendants of the sale by them of seven busts similar to that produced in this cause as plaintiffs' Exhibit B, which latter is one of those made by said Dunbar for said plaintiffs under and by virtue of said sale and transfer by him to them ;

Considering that it is clearly proved that the busts sold by the defendants were not originals, but counterfeits, made by them, from one of those modelled by said F. T. Dunbar ;

Considering the said illegal and tortious acts of the said defendants in counterfeiting and selling said busts ;

Considering that it has been established in this case that had it not been for the said acts of the said defendants, the said plaintiffs would have been able to dispose of the busts by them purchased from the said Dunbar ;

Considering that under all the facts and circumstances shewn in this case, the plaintiffs were justified in instituting their action in the Superior Court ;

And considering that it has been shewn that the plaintiffs have suffered, by the illegal and tortious acts of the said defendants, loss and damage, and considering that this Court doth assess such damage at the sum of \$50, and considering that in assessing the damage sustained by the plaintiff at the sum of \$14, and costs as in an action for that amount, there was, in the judgment of the Court below, error, this Court doth cancel, annul and set aside the said judgment, and condemn defendants to pay to plaintiffs the sum of \$50, with interest, and costs as in an action of the lowest class of the Superior Court, and costs of this Court.

Notes :—

COMMON LAW RIGHTS.

1. *General Theories.*

There are two theories of ownership in creations of the mind radically opposed to each other.

The one theory is that intellectual creations are property like to other species of property and belong by right of the highest possible title to their originator, his heirs and assigns forever; that, whether published or unpublished, and forever, they are to be secured to their producers and their successors in interest to the same extent as other kinds of property, and that the public has no more right or justification to take away or impair the originator's property in his mental creation than it has to deprive him of any other possession. This is the view of many eminent jurists, including Lord Mansfield and Sir William Blackstone, and it is almost unanimously adopted by modern text-book writers upon the subject.

The other theory, which, in the Courts and Legislatures at least, has been generally accepted, is that the producer of a work of the mind has no natural property in it, and has and enjoys only such rights in respect thereof as the public chooses to confer. Under this theory a writing, a work of art, a musical composition, may be said to be a contribution to the common stock of knowl-

edge and enjoyment of mankind which the public have a heritage in. This is the theory that prevails in the case and statute law today in England, Canada and the United States.

In the early English cases prior to the first copyright statute (8 Anne, ch. 19, 1709), the bills of complaint contain as an essential averment the statement that the complainant had, at the time of the commission of the piracy, on hand for sale copies of the pirated work sufficient to supply the public with all it required at a reasonable price.

In the case of *Donaldson v. Beckett* (1774), 2 Bro. P.C. 129, Lord Camden, in moving the judgment of the House of Lords, said: "If there be anything in the world common to all mankind, science and learning are in their nature *publici juris*, and they ought to be as free and general as air and water." Again, in *Jeffreys v. Boosey* (1854), 4 H.L.C. 815, 24 L.J. Exch. N.S. 81, Baron Pollock said: "Copyright is altogether an artificial right, not naturally and necessarily arising out of the social rules that ought to prevail among mankind assembled in communities, but is a creature of the municipal law of each country to be enjoyed for such time and under such regulations as the law of each state may direct." The whole doctrine is admirably summed up by Virgin, J., in *Carter v. Bailey* (1874), 18 Am. Rep. 273, where he says: "The public are interested in the development and promulgation of all new and wholesome ideas, and in new combinations and illustrations of old ones. Without publication and some exclusive right thereto, the products of authors would prove comparatively profitless. The public, then, for the addition to its general stock of knowledge, and the author, in consideration of the pecuniary profit derivable therefrom, are jointly interested in the publication of new works." "Copyright statutes," he continues, "were not considered as regulations of existing common law rights, but "the exclusive right to their respective writings for limited time" was thereby created and conferred on authors as a compensation for their contributions to the promotion of general knowledge."

2. *Rights Before Publication.*

It is settled law, universally accepted without question, that there is at common law an absolute property in an unpublished intellectual creation, which none can take from the producer without his consent. He and his grantees alone at pleasure may

keep it from the public for all time, may prevent its use or enjoyment by others, may publish it when, how and where they choose.

The following is an outline of the course of the decisions.

The earliest reported case occurred in 1732 upon a bill filed by the son and devisee of a conveyancer against his father's former clerk, to prevent the threatened publication of his father's draft of precedents: *Webb v. Rose*, cited in 4 Burr. 2330.

In 1741, the publication of manuscript notes was enjoined at the instance of a lawyer, the plaintiff, who had loaned them to a friend, whose clerk copied them: *Forrester v. Waller*, cited in 4 Burr. 2331.

A druggist's clerk, who set up in business on his own account, was restrained at the suit of his former employer from making use of, or communicating, the formulæ of certain veterinary remedies he had copied from the latter's manuscript books: *Yovatt v. Winyard* (1820), 1 Jac. & W. 394.

So, a receipt for a proprietary medicine kept in manuscript and assigned to trustees for the benefit of the owner's daughter for life, to be sold at her decease for the benefit of her children, was held to be property, and could be followed to and made to be accounted for by, one who had purchased it from the eldest son, to whom the daughter communicated it after she had destroyed the manuscript: *Green v. Folgham* (1823), 1 Sim. & Stu. 398; 1 L.J. Ch. 203.

Then, in 1848, an injunction was procured on behalf of the Prince Consort to prevent the public exhibition of prints of etchings made by the Queen and himself for private entertainment, and surreptitiously taken by some workmen employed on the presswork: *Prince Albert v. Strange* (1849), 2 De G. & S. 652. See also the remarks of Lord Watson in *Caird v. Sims* (1887), L.R. 12 App. Cas. 326, at pp. 343-4. He said: "The author of a lecture on moral philosophy, or of any other original composition, retains a right of property in his book which entitles him to prevent its publication by others until it has, with his consent, been communicated to the public."

It has also been held that information furnished to subscribers for their private use of stock transactions by means of letter-press sheets and printed stock ticker tapes were unpublished manuscript's to be protected accordingly: *Exchange Telegraph Co. v. Gregory*, [1896] 1 Q.B. 147. This case was followed in *Exchange Telegraph v. Central News*, [1897] 2 Ch. 48.

3. *Rights after Publication.*

Whether property in an intellectual creation after it has been given out to the general public ever existed at common law or not, there is now no question but that it no longer survives an unrestricted unlimited publication.*

Whatever rights an author or artist has at the present day are conserved by statute only, and if not so protected are gone forever after publication. *Vide*: Drone, Copyright, 58, 116; *Jeffreys v. Boosey* (1854), 4 H.L.C. 815; Schouler on Law of Personal Property, Vol. 2, sec. 28; Bell, Law of Scotland, sec. 1356.

In 1760 a case arose over the right to publish "The Spectator." The plaintiff claimed the right of Addison and Steele. His contention was that independent of statute there was an exclusive right in the author and his assigns in perpetuity. The Court inclined to the plaintiff's contention, but the action was dismissed on another ground: *Tonson v. Collins* (1760), 1 W. Bl. 301.

The famous case of *Millar v. Taylor* (1769), 4 Burr. 2303, arose over a dispute concerning the right to publish Thomson's "Seasons." The question presented to the Court for decision were in short: (1) Whether the copyright of a book or literary composition belongs to the author by the common law; (2) Whether the Statute of 8 Anne had taken that right away. The decision was in favour of the author's right, by a majority of three to one, Lord Mansfield and Willes and Aston, J.J., being opposed to Yates, J. It is mainly from the elaborate judgments of Mr. Justice Willes and Lord Mansfield that the advocates of the "author's" right have drawn their inspiration ever since.

In 1774, after a decision in the Scotch Courts denying the common law right, the question came up for decision on an appeal to the House of Lords in the case of *Donaldson v. Beckett* (1774), 4 Burr. 2408. The facts were: The poet Thomson had published his poem "The Seasons" in 1726-1730; statutory copyright therefore expired in 1758. Thomson had sold the copyright to Millar (plaintiff in *Millar v. Taylor, supra*), whose executors had sold the "copy" to Beckett. He sued Donaldson for piracy. The House of Lords called in the Judges for their opinion. Several questions were submitted and answered. The Judges were practically unanimous on the question of the existence of the author's common law right before publication, and a large majority

* See, however, *Bernard v. Bertoni, supra*, p. 154.

held that publication at common law did not divest copyright. The third and vital question was: If such an action (*i.e.*, one for infringement) would have lain at common law, is it taken away by the Statute of 8th Anne? and is an author by the said statute precluded from every remedy except on the foundation of the said statute, or on the terms and conditions prescribed therein? *Answer*:—On this point five Judges (and Lord Mansfield) answered "No"; six Judges answered "Yes." On the answers of the Judges, Lord Camden moved the House to give judgment for the appellant and against the common law right. The division resulted in the defeat of the champions of the authors' rights by a vote of 22 to 11.

The great case of *Jeffreys v. Boosey* (1854), 4 H.L.C. 815, though most directly concerned with international copyright and the extension of the copyright statutes to cover it, yet raised a question as to the existence and nature of common law copyright. Among the Judges who were called in, Erle and Coleridge, JJ., pronounced in favour of the existence of such a right. Pollock, C.B. (*ibid.*, p. 935), gave the opinion quoted *ante*, p. 159. The Law Lords also were unanimous against a copyright at common law. Lord Campbell, L.C., said: "Copyright, if not the creation of our statute law, as I believe it to be, is now entirely regulated by it." Lord Brougham said: "In my judgment it is unquestionable that the Statutes alone confer the exclusive right."

4. *Publication* has the effect of destroying the common law right, and vests the statutory copyright if the conditions of the statute are complied with. It is defined as "making a thing public in any manner in which it is capable of being communicated to the public": Cf. *Blank v. Footman* (1888), 39 Ch. D. 678. In *McFarlane v. Hulton*, [1899] 1 Ch. at p. 889, Cozens-Hardy, J., says: "A paper is published when and where it is offered to the public by the proprietor." Publication need not necessarily be for sale, though it is generally so. Publication "for private circulation only," that is, on conditions imposed by the author, does not divest the common law right: *Jeffreys v. Boosey* (1854), 4 H.L.C., p. 962; *Caird v. Sime* (1887), 12 A.C., p. 344. In *Kerrick v. Danube Collieries Co.* (1891), 39 W.R. 473, printing one hundred copies of a report on a proposed company, and showing or giving some of them to persons interested in floating the company, was held not to be such a publication as divested the common law right.

5. Section 20 of the R.S.C. ch. 62, the Copyright Act, contains a statutory recognition of the common law right of an author to the exclusive use of his manuscript before publication. It is to the effect that persons who, without the consent of the author or lawful proprietor thereof, print or publish any manuscript not previously printed anywhere, shall be liable to the author or publisher for all damages occasioned by such publication. *Vide* Appendix.

6. It has been decided that the representation of a picture (or a statue) by a *tableau vivant*, formed by grouping in the same way as the figures in the picture (or statue) living persons dressed in the same way and placed in the same attitudes as the figures in the picture (or statue) is not an infringement of copyright in the picture (or statue). It seems, also, that a drawing or picture of a statue would not infringe copyright in the statue, and, conversely, that a statue or bas-relief representing the picture would not infringe copyright in the picture: *Hanfstaengl v. Empire Palace*, [1894] 2 Ch. 1.

But a sketch in a daily illustrated newspaper of a *tableau vivant* representing a picture (or a statue) may, though the *tableau* does not, constitute an infringement of the copyright of the picture (or statue): *Hanfstaengl v. Empire Palace*, (No. 2), [1894] 3 Ch. 109, 63 L.J. Ch. 681 (C.A.), affirmed in the House of Lords, 64 L.J. Ch. 81.

(2) COPYRIGHT IN BOOKS,

[IN THE SUPERIOR COURT FOR QUEBEC.]

LANGLOIS V. VINCENT.

Copyright—Author and Legal Representative—Works Becoming Public Property by Long User—Scope of the Copyright Act—Penalties—R.S.C., ch. 62, sections 30, 4, and 17.

Only the author or the legal representative of the author of a work can avail himself of the provisions of the Copyright Act. And neither the author nor his legal representative can maintain an action for penalties under the Copyright Act where the registration of the work under the Act has not been made until after the publication of several editions of the work.

So where *Le Grand Catéchisme de Québec* had been in public use for nearly 175 years without copyright having been applied for, it was held that the work was no longer susceptible of being made private property, and the plaintiff, who had acquired his title in the book by sale to him by the Archbishop of Québec, had no ground to maintain an action for penalties against the defendant, who had published an edition of the work.

This was a *qui tam* action based on the Copyright Act 31 Viet., ch. 54, sec. 10 (now R.S.C. ch. 62, sec. 30). The plaintiff claimed penalties to the amount of \$6,000 and forfeiture of any copies of the book found in the possession of the defendant.

The facts appear in the judgment of the Court.

M. Chouinard, for the plaintiff.

C. T. Suzon, for the defendant.

Québec, February 7, 1874. STUART, J.:—The plaintiff alleges himself to have the copyright of a book called *Le Grand Catéchisme de Québec*, and complains that the defendant in violation of his rights has printed and offered for sale the said book, whereby he has incurred penalties to the amount of \$6000, whereof he prays a condemnation of one half for the Crown and the other half for himself and for the forfeiture in

his favour of any copies of the book found in the possession of the defendant. The present *qui tam* action is based upon the Copyright Act 31 Viet., ch. 54, sec. 10. (Now R.S.C. ch. 62, sec. 30.)

To this action the defendant pleads in substance that the book referred to is a public book approved of by all the bishops met in Council at Quebec, in 1853. That the Archbishop of Quebec never was proprietor of it nor its author nor the legal representative of its author, but that the book was made for the benefit of the whole Province and has gone through twelve editions by different persons, none of whom were enrolled under the Copyright Act, that the enrolment of it by the owner is not warranted and is inoperative.

The plaintiff's title to this book consists in a sale of it to him by the Archbishop of Quebec, on the 12th May, 1873. Soon after this sale, on the 19th of the same month, the plaintiff enregistered *Le Grand Catéchisme de Québec*, as if he were the author or the legal representative of the author, and the penalties are now claimed because of the infringement of rights conferred upon the plaintiff by this registration. The plaintiff admits that before he purchased the work he knew that the defendant was engaged in printing it. Being asked whether it was not in consequence of this fact that he procured a sale of it to himself, he answered, "not exactly, it was to register it."

The catechism in question was composed by the second Bishop of Quebec, Monseigneur de St. Valier, about the year 1700, and many editions of it have been printed and sold from time to time since, one of them by the defendant himself; this is the edition of which the plaintiff had information before he purchased the book, and which he complains was printed to his prejudice.

The question is then one of literary property. It is sometimes difficult to define with precision where the exclusive rights of the author end and those of the public commence, but the present case is not one of any nicety. So long as writings and works are within the possession of the author he has the

same right to exclusive enjoyment of them as of any other species of property. But when they are circulated abroad and published with the author's consent they become common property, subject to the free use of the community—such is the common law on the subject. But for the encouragement of learning, and that men of genius and science may reap the well merited fruits of their labors, authors and their legal representatives by observing the formalities of the Copyright Act are secured for a limited time in the exclusive right of publishing their own works. Whether after a voluntary publication of an author's works by himself or by his authority the author has a sole and perpetual property in that work, so as to give him a right to confine every subsequent publication to himself and his assigns for ever, or, whether all the property of the author did not cease and the work become open by his own act of publication, are questions set at rest more than a century ago by the decisions of the English courts, when the respective rights of authors and of the public were examined with profound erudition and the most consummate legal skill. The rights of authors are now confessedly those conferred upon them by the copyright laws and no other. The plaintiff relies on the Copyright Act in this case.

It is fitting to have the language of the law under one's eye when treating the subject (31 Vict., ch. 54, sec. 3 & 4). (Now secs. 4 & 17.)

“ Any person who is the *author* of any book, etc., and the *legal representatives* of such persons, shall have the sole right and liberty of printing, re-printing, publishing, reproducing and vending such literary, scientific or artistical works or compositions in whole or in part, etc., for the term of twenty-eight years from the time of recording the title thereof in the manner hereinafter directed.

Sec. 4.—If after the expiration of the term aforesaid, such *author*, or *any* of the *authors* where the work has been originally composed and made by more than one person, be *still living* and residing in Canada or in Great Britain or Ireland, or

being *dead* has left a *widow* or a *child* or *children* living, the same exclusive right shall be continued to such author, or if dead, then to such widow or child or children (as the case may be) for the further time of fourteen years.'"

The questions that present themselves are, what are the rights of the plaintiff to these provisions ;

Is he the author ? or

Is he the legal representative of the author ?

If the one or the other, is he still in time to take advantage of the law ? Does he come within the purview and scope of the Copyright Act ?

The author of the book died more than a century ago ; whether he left any legal representative in Canada, is not alleged or shewn. It does not appear that the author ever published it for his own profit, nor that he did not intend to make it open by permitting the publication. Considering the nature of the work and the source whence it emanated, it being a summary of religious doctrine compiled by the head of the church in this country obviously for the comfort and use of his flock, it is to be presumed that it was intended for the widest and most unfettered circulation, and with no eye to private advantage. The voluntary publication of this book by the author or with his consent would make it common property, subject to the free use of the community, and I can hardly doubt that if the author were alive at this day, when his book has been in public use for 170 years and upwards, he could not acquire an exclusive right to print and publish it by the mere formality of registering its title in the manner prescribed by the Copyright Act through the author. Such registration to secure any rights must precede the publication of the work, it is inoperative after it has been thrown open to the public by its publication. If the author could not, can his legal representatives ? But is the plaintiff in any sense the legal representative of Monseigneur de St. Valier ? This is not alleged or shewn ; he bought the right of publishing the work for ten years from the Archbishop of Quebec. The defendant does not contest this sale, but he

says that that confers upon him no exclusive rights and does not purport to do so on its face. It is admitted that the Archbishop of Quebec is not the author, and he is not shewn to be the legal representative of the author. It follows that neither the plaintiff nor his vendor are clothed with the character of legal representative of Monseigneur de St. Valier, and therefore it follows as an irresistible legal consequence, that the enregistration by the plaintiff not being the act of the author nor of his legal representatives, for all practical and legal purposes is a fruitless, worthless formality in no way justified by the Copyright Act.

Looking at the case technically, do the facts bring the defendant under the lash of the law invoked? This law imposes penalties upon *any other person, after* the recording of the title of any book, who prints, publishes, or imports, etc. It is admitted by the plaintiff himself that the defendant printed the book in question before it was recorded, consequently when he lawfully could do so since there was no legal impediment in his way, and when he acquired a legal title to every copy he so printed. If what the defendant did was legal, when done it could not become illegal by an act of the plaintiff subsequently done. It would be subverting every principle to hold that the defendant could be liable to a penalty for doing what no law forbade him to do, and that the copies he so legally printed should be forfeited to the plaintiff. That which the law forbids under heavy penalties is the printing and sale of a book to the prejudice of the author. The defendant has done nothing in violation of any such law. A printing before the recording is supposed to carry a penalty imposed by law on the printing after the recording. The pretension is extravagant and excessive.

There seem to be public considerations deserving of grave consideration, why a book of the nature of the one in question should not lightly be admitted to the tenure and franchise of private property. Such a book contains, I presume, nothing of the author's own; to be of any real value, it must contain the

received doctrine of the Roman Catholic Church, and if once the exclusive right to publish such a catechism is conferred upon an individual, he comes to be vested with a monopoly of it coextensive with the Dominion, and it will be the duty of all the Courts of the Dominion to protect him in it, and to punish any invasion of such monopoly. I doubt whether the Bishops of the various dioceses and their congregations would be disposed to look upon the interpretation put upon the statute by the plaintiff as quite consistent with their rights. I could be brought with difficulty to the conclusion that the church throughout the Dominion is now confined in the use of this catechism to the copies printed by the plaintiff because of his action in the matter, yet if he has any rights at all they go all that length.

After a very patient consideration of this case I am forced to the conclusion that the plaintiff is neither the author nor the legal representative of the author of *Le Grand Catéchisme de Québec*, and could not therefore invest himself with the right to the exclusive printing and vending this book throughout the Dominion by the mere formality of enrolling the title of the book under the Copyright Act. That the said Catechism has been for a century and three quarters in public use, and is no longer susceptible of being made private property. That the defendant at the time of printing the said Catechism had a right to do so, and that he violated thereby no law and exposed himself to no penalties : that the claim of the plaintiff against the defendant is aggressive in the extreme and groundless.

Action dismissed.

CADIEUX V. BEAUCHEMIN.

Copyright—Infringement—Evidence—Textual Copy.

In an action for infringement of copyright in a dictionary, the un rebutted evidence shewed that the publication complained of treated of almost all its subjects in the exact words used in the dictionary first published, and repeated a great number of errors that occurred in the plaintiff's work. *Held*, affirming the judgment appealed from, that the evidence made out a *prima facie* case of piracy against the defendants which justified the conclusion that they had infringed the copyright.

Appeal from the judgment of the Court of Queen's Bench, appeal side; Q.R. 10 Q.B. 255; reversing the judgment of the Superior Court, District of Montreal, maintaining the plaintiffs' action with costs.*

The facts established by the evidence sufficiently appear from the head-note and judgments reported. The judgment appealed from reversed the trial court judgment (H. T. Taschereau J.) which dismissed the action with costs, ordered the defendants immediately to cease the publication and sale of the work complained of, to render an account of the total edition printed and published and of sales made, and directed that the record should be returned to the court of first instance for taking accounts and adjudications as to damages and the other conclusions of plaintiffs' *demande*, the defendants being also ordered to pay the costs of the appeal.

Fitzpatrick, K.C., (Solicitor General for Canada) and *Aimé Geoffrion* for the appellants.

Mignault, K.C., for the respondents was not called upon.
May 22nd, 1901.

THE CHIEF JUSTICE (Oral).—We do not consider it necessary to call upon counsel for the respondents in this case.

I have read all the evidence and listened carefully to the very able arguments by counsel for the appellants, but I must say that I entirely agree with every word said by the Chief

PRESENT:—Sir Henry Strong, C.J., and Taschereau, Gwynne, Sedgewick and Girouard, JJ.

* [Note.—The judgments herein in the Courts below will appear in the next number of the C.L.R., the translations thereof not having been received in time for the present publication.—Ed.]

Justice, Sir Alexander Lacoste in the court below, and have not been in any way convinced that the judgment of the Court of Queen's Bench was wrong. I think also with my brother Gwynne, as he shortly remarked, that the repetition of the great number of errors in the work of the appellants could not possibly have been accidental or have happened otherwise than by making a textual copy of the respondents' supplement. It appears as if the book published by the appellants had not been made with the pen, but with scissors and paste pot. I have read the notes of Mr. Justice Taschereau and Mr. Justice White in this case. I think the former goes too far in his judgment in the Superior Court in finding excuses for the defendants. Mr. Martin, who prepared the manuscript of the work complained of ought to have been called. No doubt the manuscript was destroyed or lost in the process of printing and the printers cannot be expected to have any recollection as to how it was made, whether it was written by hand or simply with printed sheets pasted in. Mr. Martin was possibly the only person who could have given the information on this point which the defendants ought to have been prepared to give. It was clearly upon the defendants to shew what he did and how it was done in order to rebut the *prima facie* case against them made out by the plaintiffs' evidence of piracy. I would add that the case was most ably argued by Mr. Geoffrion on behalf of the appellants.

The appeal should be dismissed with costs.

TASCHEREAU, GWYNNE and SEDGEWICK, JJ., concurred in the judgment dismissing the appeal with costs.

GIROUARD, J. (Oral).—I concur in the judgment dismissing the appeal for the reasons just stated by His Lordship the Chief Justice but I wish to add that I consider it was not possible that the supplement complained of could have been compiled as admitted, in eight or nine months, unless by borrowing largely from the publication of the respondents.

Appeal dismissed with costs.

Solicitors for the appellants : *Geoffrion, Geoffrion, Roy & Cusson.*

Solicitor for the respondent : *P. B. Mignault.*

[IN THE HIGH COURT OF JUSTICE FOR ONTARIO.]

GRIFFIN ET AL.

v.

KINGSTON AND PEMBROKE RAILWAY COMPANY.

Copyright—Railway Ticket—Subject of Copyright—Failure to Deposit Copy of Work.

Section 5 of the Con. Stat. C., ch. 81, which required an author to deposit a copy of his work in the library of the Legislative Assembly of Canada, being merely directory, the neglect of the author of a work to do so, did not incapacitate him from proceeding for an infringement thereof.

NOTE.—The author was, however, required to deposit a copy of his work in the office of the Registrar of the Province before becoming entitled to the benefit of the Act: Con. Stat. C., ch. 81, sec. 4. Cf. R.S.C., 1886, ch. 62, sec. 9, for which see Appendix. The Con. Stat. C., ch. 81, was repealed by 31 Vict., ch. 54, sec. 19 (D.).

The object and principle underlying the legislation from Queen Anne's time to the present is to protect, advance and encourage learning and art; and not, unless it be casually and indirectly, to promote or assist progress in mechanical or industrial appliances or inventions, and accordingly a railway conductor's duplex ticket is not the subject of copyright.*

The plaintiff sued as assignee of an alleged copyright in a railway ticket. He claimed damages, and an injunction, and an account of profits.

The action was tried at Kingston at the Spring Assizes of 1889, without a jury.

Bain, Q.C., for the plaintiff.

Cattanach and *R. Vashon Rogers*, for the defendants.

February 27, 1889. FALCONBRIDGE, J.:—The first objection to the plaintiff's recovery is that there is no evidence that the

* See, however, the next case.

author deposited a copy of the work in the Library of Parliament under sec. 5 of the Consol. Stat. C., ch. 81.

I shall dispose of this by observing that it is not pleaded. The section is merely directory, and the neglect of this duty does not incapacitate the proprietor of a copyright from proceeding for an infringement of it as failure to give information does by virtue of sec. 6.

It is next urged that the ticket is not the subject of copyright at all.

The words of the Con. Stat. C., ch. 81, sec. 1, are: "Any person . . . who is the author of any book, map, chart, or musical composition, already made or composed but not printed or published, or hereafter made or composed, or who invents, designs, etches, engraves or causes to be engraved, etched or made from his own design, any print or engraving, . . . shall have the sole right, etc."

Is the ticket fairly described by any of these words?

If I had to decide the case with reference to the present statute there would not, I apprehend, be any doubt on the subject.

The corresponding section in the Copyright Act, R.S.C., ch. 62, sec. 4, is as follows:

"Any person . . . who is the author of any book, map, chart or musical composition, or of any original painting, drawing, statue, sculpture or photograph, or who invents, designs, etches, engraves or causes to be engraved, etched or made from his own design, any print or engraving . . . shall have the sole and exclusive right . . . of printing . . . *such literary, scientific or artistic works or compositions, etc.*"

The italicised words surround what precedes them with a limitation which would, I think, not include an article like the plaintiff's ticket.

But having regard to the statute with which I have to deal;

The ticket is certainly not a map, chart or musical composition, nor is it a print or engraving, within the meaning of the section, although it may be printed or engraved.

Is it a book ?

Sec. 16 of the statute defines "book," but only with reference to sec. 15.

I attach no importance to the mere shape or form of the card or ticket. Book and *liber* were primarily, and primarily meant the bark of a tree. So a book need not necessarily be a book in the common acceptance of the term, viz., a volume made up of several sheets bound together. It may be printed on only one sheet: *Clayton v. Stone*, 2 Paine 382; *Scoville v. Toland*, 6 Western L.J. 84; *Drury v. Ewing*, 1 Bond 540.

The first Copyright Act in England is 8 Anne, ch. 19. In the preamble it is stated that printers, booksellers, and other persons were frequently in the habit of printing, re-printing and publishing "books and other writings without the consent of the authors or proprietors of such books and writings to their very great detriment, and too often to the ruin of them and their families.

"For preventing, therefore, such practices for the future and for the encouragement of learned men to compose and write useful books, it is enacted, etc."

In *Routledge v. Low*, L.R. 3 H.L. 100, Lord Cairns said, at p. 111: "The aim of the legislature is to increase the common stock of the literature of the country."

In *Page v. Wisden*, 20 L.T.N.S. 435, Malins, V.C., says with reference to a cricketing scoring-sheet, at p. 436: "On the question whether this is a fit subject for copyright I have no doubt whatever that it is not."

In *Davis v. Committi*, 54 L.J. Ch., N.S. 419, the card or dial on the face of a barometer displaying special letter-press was held not capable of registration under the Copyright Act of 1842. That Act (5 & 6 Vict., ch. 45) in sec. 2 gives the same definition of "book" as is given in sec. 16 of our Con. Stat.

A label intended for no other use than to be pasted on vials or bottles containing a medicinal preparation, is not the proper subject of a copyright: *Scoville v. Toland*, 6 Western L.J. 84.

An advertising card used to display the different colors of paints is not a subject of copyright: *Ehret v. Pierce*, 18 Blatch. 302. Bank account books are not the subject of a copyright: *Baker v. Selden*, 101 U.S. 99.

These American decisions are under the U.S. Revised Stat., sec. 4952, which is somewhat wider than our section: "Any citizen . . . who shall be the author, inventor, designer or proprietor, etc."

Our statute speaks only of the author.

The (American) statute was passed for the encouragement of learning, and was not intended for the encouragement of mere industry unconnected with learning or science: *Clayton v. Stone*, 2 Paine 382.

Thus we see that the object and principle underlying the legislation and the judicial interpretation of the legislation from Queen Anne's time to the present is to protect, advance, and encourage learning and art; and not, unless it be casually and indirectly, to promote or assist progress in mechanical or industrial appliances or inventions, as to which the law makes beneficial provision otherwise.

What is the literary property to be protected in this ticket? Surely not the card itself which, without the application of the conductor's punch, is "senseless and unmeaning." Then, to adapt the illustration of Chitty, J., in *Davis v. Committi*, would a deposit of the card or ticket in the library of Parliament be a compliance with sec. 5? The necessity of delivering the punch as part of the work effects a *reductio ad absurdum* of the plaintiff's argument.

I am, therefore, of the opinion that this card or ticket is not a proper subject of copyright.

If the Imperial Act, 5 & 6 Viet., ch. 45, is in force in this country, as contended by the plaintiff, it will not advance the plaintiff's position in this regard.

The plaintiff also claimed in argument a common law right of copy and property irrespective of the statute. I do not dis-

cuss this interesting and much-vexed question because I do not think the card or ticket to be such an intellectual production as could have claimed for its author or inventor any protection at common law.

Taking this view of the matter in controversy I deem it unnecessary to go into the other objections which are said to stand in the way of the plaintiff's recovery.

The action will be dismissed with costs.

[IN THE HIGH COURT OF JUSTICE FOR ONTARIO.]

CHURCH V. LINTON.

Copyright—Circulars—"Forms" and "Blanks"—Books and Literary Compositions under the Copyright Act—Copyright Act, R.S.C., section 4, as amended by 52 Vict. ch. 29, section 1 (D).

The purely commercial or business character of a composition or compilation does not oust the right to protection if time, labour, and experience have been devoted to its production.

The plaintiff had obtained copyright in respect of four productions used in connection with his School for Stammerers, and called (1) "Applicant's Blank," containing questions to be answered by applicants for entrance; (2) "Information for Stammerers," an advertising circular; (3) "Entrance Memorandum," being an agreement to be signed by applicant; and (4) "Entrance Agreement," which was like No. 3, but of a more extended character.

Held, that the plaintiff had copyright in these publications, and was entitled to protection in respect thereto.

Griffin v. Kingston and Pembroke Ry. Co. (1889), p. 172, *supra*, dissented from.

This was an action brought by Samuel T. Church, against George W. Linton, for an injunction to restrain the defendant from infringing certain copyright publications, and for damages.

The plaintiff was the principal and proprietor of a school for the cure of stammerers called "Church's Auto-Voce School," and had copyrighted the four publications mentioned in the head note. The defendant, having taken a course at the plaintiff's school, founded a school having the same object, called

Linton Institute for the Cure of Stammering; he issued two circulars, called (1) "Applicant's Question Sheet," and (2) "Entrance Condition." The plaintiff claimed these were infringements of his copyrighted publications, especially in the particulars following:

PLAINTIFF'S.

(2) The Auto-Voce method is strictly educational in its character, excluding all artifice, trickery, magnetism, hypnotism, faith cures, drugs or surgical operations or appliances, restoring the voice to a natural normal state, and strengthening the physical, mental and moral organisms.

This method is not understood by any other than its author, Mr. S. T. Churen, Toronto, Canada.

Under the Auto-Voce method, there has been no marked difference with regard to age as to results.

QUESTIONS.

1. Age ? 7. Condition of health ? 8. Is there any deformity of tongue, jaw or facial muscles ? 9. Memory ? 10. Occupation ? 11. Does applicant use artificial teeth ; 13. How far advanced in school studies ? 20. Does the jaw drop and become rigid ? 30. Is the applicant inclined to avoid society ?

(3) I, ——, agree of my own free will and accord to the following conditions and have subscribed my name thereto.

I bind myself to remain a regular daily student of Church's Auto-Voce school till I have successfully passed the requirements of the fourth and highest grade in the Auto-Voce course of training.

I promise not to converse with any person or persons, neither in the Auto-Voce school or out of it regarding the method of training as a whole or any individual case. Neither to communicate the same to any person or persons by writing or otherwise.

DEFENDANT'S.

(1) My method is strictly of an educational character, and excludes all trickery, hypnotism, faith cures, drugs or surgical

operations, restores the voice to a natural normal state, and strengthens the mental, physical and moral organisms.

This method is known only by its author, Mr. G. W. Linton, Toronto, Canada.

Under my method, the age of the person does not signify as to the result.

QUESTIONS.

1. Age ? 4. Health ? 7. Has applicant any deformity of the tongue or jaw ? 2. Memory ? 5. Occupation ? 8. Has applicant any artificial teeth ? 21. How far is applicant advanced in education ? 19. Does the jaw become rigid ? 12. Is the applicant inclined to avoid society ?

(2) I, ———, do hereby agree of my own free will and accord to the following conditions and have subscribed my name thereto.

I bind myself to remain a regular student of G. W. Linton's school for the cure of stammering until I have successfully passed the fifth and graduating grade in the course of said school.

I promise that I will at no time, either in the school or out of it, impart or attempt to explain to any person or persons, either by word of mouth, writing or in any other manner whatsoever the method by which I shall be cured, or the methods of instruction of said school.

The defendant, among other defences, denied that he was using the plaintiff's so-called method or system and alleged that he was using one of his own ; denied that the plaintiff was the author of the books and circulars ; and that they were such literary or scientific or artistic works as to make them the subject of copyright, and that the plaintiff had any such copyright therefor which was valid.

The action was tried at Toronto on April 16th, 1894, without a jury.

Watson, Q.C., and *Bentley*, for the defendant.

George Bell, for the plaintiff.

April 18th, 1894. BOYD, C. :—

The plaintiff has obtained copyright in respect of four productions called (1) "Applicant's Blank," giving a series of questions to be filled up with answers for the applicant for admission to the plaintiff's school; (2) "Information for Stammerers," intended for circulation as an advertisement; (3) "Entrance Memorandum," in the form of an agreement to be signed by the entrant; and (4) "Entrance Agreement," which is like No. 3, but of a more extended character.

Objection is made as to the inherent invalidity of the copyright because the documents are not within the scope of the statute, ch. 62 R.S.C. sec. 4, as amended by 52 Viet. ch. 29, sec. 1 (D), applies to the author of any "book" . . . considered as a "literary composition."

These sheets of printed matters are, of course, sufficient in form to be protected by the Act; *Griffin v. Kingston and Pembroke R.W. Co.* (1889), 17 O.R. at p. 664.

Though these circulars as to their substance would fall within Charles Lamb's catalogue of "books which are no books—*a-biblia*," nevertheless under copyright law comprehensiveness they may be reckoned as books and literary compositions. The circulars distributed by railway companies are now called "literature." It has been held, moreover, that publications which are in the nature of business notices are usable as advertising mediums for distribution gratis or otherwise, may be the subject of copyright: *Grace v. Newman* (1875), L.R. 19 Eq. 623, and *Maple & Co. v. Junior Army and Navy Stores* (1882), 21 Ch. D. 369.

So one may copyright a book of forms or a series of papers to be filled in by applicants for liquor licenses, *Brightley v. Littleton* (1888), 37 Fed. R. 103. In this the Judge said: "The matter must be original and possess some possible utility. The originality, however, may be of the lowest order, and the utility barely perceptible."

I do not go with the limitation suggested in 17 O.R. at p. 665, that the legislation is to be applied, having regard to

literary merit as an ingredient. The purely commercial or business character of the composition or compilation does not oust the right to protection if time, labour, and experience have been devoted to its production. That this is so in the present case the plaintiff testifies, and that the papers must be of some merit and utility would seem to be proved by the defendant's willingness to abstract or convey various passages in them so as to form parts of his rival advertisements. The invasion of the plaintiff's rights as to this part of the case is well proved.

I gave judgment as to the other part of the action against the plaintiff at the close of the hearing, and as the success is thus divided, I give no costs.

The injury from the invasion of copyright is too insignificant to ground a reference for damages.

Notes :—

COPYRIGHT IN BOOKS.

There is no definition of the word "book" in the Canada Copyright Act, but the terms map, chart or musical composition are set out in section 4, which terms in the English Act of 1842, 5 & 6 Vict. ch. 45, are included in the definition of the word, thus:—"Every volume, part or division of a volume, pamphlet, sheet or letter-press, sheet of music, map, chart or plan separately published."

In the last two cases reported *supra*, the learned Judges proceeded to define the word "book" from entirely opposite points of view. Mr. Justice Falconbridge was much struck with the words "such literary, scientific or artistic works or compositions, etc.," found in the 4th section of the Copyright Act. Though he was dealing with another statute, *i.e.*, section 5 of the Con. Statute C., ch. 81, the idea that the statutes were for the protection, advancement and encouragement of *learning* and *art* was present to his mind. Hence, he was adverse to allowing the protection of the statute to any mechanical or industrial appliances or inventions. He felt the necessity of there being some literary property to be protected in the subject of copyright. He said: "The card without the application of the conductor's punch is 'senseless and unmeaning.'"

On the other hand the learned Chancellor took the view that literary merit need not be an ingredient. The expenditure of time, labor and experience on the production serves to counter-balance the want of this. He spoke of the "comprehensiveness" of copyright legislation and thought that circulars of a purely business character might be reckoned as books and literary compositions.

In view of the great diversity of opinion shown in these, the only judgments reported in Canada dealing with the definition of a book, it is to be regretted that neither case was carried to a higher Court to obtain a binding statement of the proper principles of construction to be used in dealing with our Act. A consideration of the English cases will, however, lead one to the conclusion that the line of reasoning adopted by Boyd, C., is the preferable.

There are three, or perhaps four, essential elements which must be found in every book:—

1. Literary Value: The works must contain some composition or arrangement of words, figures, sentences, or paragraphs giving information or instruction or pleasure: *Chilton v. Progress*, [1895] 2 Ch. 29; *Maxwell v. Hogg* (1867), L.R. 2 Ch., p. 318; *Hollindrake v. Truswell*, [1894] 3 Ch. 420, at pp. 424, 427, 428.

2. There must be originality of some kind.

3. The book must be innocent, that is—(1) Not seditious or libellous: *Hime v. Dale* (1803), 2 Camp. 27; *Southey v. Sherwood* (1817), 2 Mer. 435. (2) Not immoral: *Stockdale v. Onwhyn* (1826), 5 B. & C. 173; *Baschet v. London Illustrated Standard*, [1900] 1 Ch. 73. (3) Not blasphemous: *Lawrence v. Smith* (1822), 1 Jacob 471; *Murray v. Benbow* (1822), 1 Jacob 474. (4) Not fraudulent: *Wright v. Tallis* (1845), 1 C.B. 893; *Hayward v. Lely* (1887), 56 L.T., p. 421.

4. There must be a certain physical form.

Literary Value or Matter:—The law of literary copyright is not intended to protect ideas or inventions, except as embodied in words: Serutton on Copyright, 4th ed., (1903), 115. Thus in *Davis v. Committi* (1885), 52 L.T. 539, a card for the face of a barometer, utterly meaningless without the barometer, but with it a scientific instrument of some value, Chitty, J., held not to be a "book" capable of copyright. A mechanical device consisting of

a cardboard pattern sleeve was refused protection by the Court of Appeal: *Hollingrake v. Truswell*, [1894] 3 Ch. 420. Another mechanical device consisting in a perforated roll used in a mechanical musical instrument, and having a few printed words for direction in its use, was held not actionable in *Boosey v. Wright*, [1900] 1 Ch. 122. On the authority of these cases, the judgment in *Griffin v. Kingston and Penbroke Ry.* might well have proceeded without laying down the necessity for the presence of "literary quality" in a work sought to be copyrighted. The railway ticket therein referred to was not the ordinary one consisting of a stub and one or more coupons, with which most travellers are familiar, but was the special ticket only issued by the conductor on the train. As most people are aware, it contains the names of many stations, the amount of money collected, the date of issue, etc., and it is not until the manipulation of the punch in the hands of the conductor that it becomes a ticket in reality, from, say, Tompkinsville to Podonk. It is more of a receipt than a ticket. It is, in truth, a mechanical device.

In *Walter v. Lane*, [1900] A.C. 539, at p. 548, Lord Halsbury, L.C., referring to the verbatim reports of Lord Roseberry's speeches, which were the subject matter of that action, said:—"Although I think in these compositions (*i.e.*, the work of the stenographer) there is literary merit and intellectual labour, yet the statute seems to me to require neither—nor originality either in thought or language—the right in any view is given by the statute to the first producer of a book, whether that book be wise or foolish, accurate or inaccurate, of literary merit, or of no merit whatever." And here it is to be noted that the English Statute, 5 & 6 Viet. ch. 42, is possessed of a preamble in the words:—"Whereas it is expedient to amend the law relating to copyright, and to afford greater encouragement to the production of literary works of lasting benefit to the world"; a statement from which it has been argued that the Act intends to protect only those works which are likely to prove a substantial addition to the world's literature. That this argument is fallacious was pointed out by Sir Geo. Jessel, M.R., in *Maple v. Junior Army and Navy Stores* (1882), 21 Ch. D., at p. 378. He said: "The Act does not say that it is expedient to afford greater encouragement to the production of literary works of lasting benefit to the world, and to amend the law of copyright relating thereto, but that it is expedient to amend the law of copyright generally, merely adding the principal reason for doing so. There is, therefore, nothing in the

preamble to cut down the enacting part, even if the enacting part had not been clear."

The purpose for which the matter was composed or published is quite immaterial, but there must be composition or arrangement conveying some intelligible proposition. There must be brain work: Cf. Lindley, L.J., in *Trade Co. v. Middlesborough, etc.*, *Association* (1889), 40 Ch. D., at p. 435.

Originality.—From the decision in *Walter v. Lane* (*ante*), where the verbatim report of the noble Lord's speeches was allowed copyright, it would appear that the "author" need not have invented or supplied either a single idea or word of the book or the arrangement thereof in order to secure protection for his "original" work. The meaning of originality as an essential element of a book is that the composition in the "book" must not have been copied from some other literary composition in "book" form: Macgillivray on Copyright, 1902, p. 15. Copyright is given to the first producer in "book" form of a literary composition: *Walter v. Lane, ante*. Thus a book would be an original book if the literary matter therein contained were taken by the author verbatim from the oral utterances of an orator. But where an article is written from dictation and as the servant of another, the amanuensis can claim no property in what he so writes: *Ibid*. Again, two books may be exactly the same in every respect, and yet the later one will be entitled to copyright as original if derived from common sources, and not copied from the older book: *Bailey v. Taylor* (1829), 1 Tamlyn, at p. 299 n (the same calculations made by two mathematicians); *Mathewson v. Stockdale* (1806), 12 Ves, 270 (two travellers made charts of the same island or district); *Walter v. Lane, ante* (two reporters making two shorthand reports of the same speech).

In *Jarrold v. Houlston* (1857), 3 K. & J. 708, which case involved two similar works in the form of questions and answers, dealing with the common phenomena of nature, the Court held that, provided the second book was originated from his own resources and through his own labour, the author thereof might produce a work in the same general form. He might in so doing:—

- (1) Use all common sources of information.
- (2) Use the work of another as a guide to these common sources.
- (3) Use another work to test the completeness of his own.

Form.—The form is immaterial. It need not be a book in the common acceptance of the term. A single sheet of music: *Clementi v. Golding* (1809), 2 Camp. 25; *Storace v. Longman* (1788), 2 Camp. 26 n; *Hime v. Dale* (1803), 2 Camp. 27 n; *White v. Geroch* (1819), 2 B. & Ald. 298. The book may be printed on one sheet only: *Griffin v. Kingston* (*ante*), and cases cited there. A newspaper: *Trade Auxiliary v. Middlesborough* (1888), 40 Ch. D. 425; *Cate v. Devon* (1889), 40 Ch. D. 500. The form must be conveniently adapted for conveying intelligence to the mind: Macgillivray on Copyright, p. 11, quoting *Boosey v. Wright*, [1900] 1 Ch. 122, and *Nichol v. Pitman* (1884), 26 Ch. D. 374, which, though cases of infringement, are considered to apply equally to a question whether a certain scroll or document would be a "book" entitled to copyright under the Acts.

Examples of What are Books.—Road-books: *Taylor v. Bayne* (1776), Mor. Dic. 8303; *Carman v. Bowle*; (1793), 2 Bro. C.C. 80; *Cary v. Faden* (1799), 5 Ves. 24; *Cary v. Longman* (1801), 1 East. 858. Directories: *Mathewson v. Stuckdale* (1806), 12 Ves. 270; *Longman v. Winchester* (1809), 16 Ves. 269; *Kelly v. Morris* (1866), L.R. 1 Eq. 697; *Morris v. Ashbee* (1867), L.R. 7 Eq. 34; *Morris v. Wright* (1870), L.R. 5 Ch. 279; *Kelly v. Gavin & Lloyds* (1901), 1 Ch. 374; *Garland v. Gemmill* (1887), 14 S.C.R. 321. Trade directory: *Lamb v. Evans*, [1893] 1 Ch. 218. Catalogues: *Hotten v. Arthur* (1863), H. & M. 603; *Grace v. Newman* (1875), L.R. 19 Eq. 623; *Maple & Co. v. Junior Army and Navy Stores* (1882), 21 Ch. D. 369, overruling expressly *Cobbett v. Woodward* (1872), L.R. 14 Eq. 407. Telegraph codes: *Ager v. P. & O. Steam Navigation Co.* (1884), 26 Ch. D. 637; *Ager v. Collingridge* (1886), 2 T.L.R. 291. Time tables: *Leslie v. Young* (1894), A.C. 335. Tables of calculations: *Baily v. Taylor* (1829), 1 R. & M. 73; *McNeil v. Williams* (1847), 11 Jur. 344. Forms and precedents: *Webb v. Rose* (1732), cited 2 Bro. P.C. 138 (conveyancing precedents); *Alexander v. Mackenzie* (1847), 38 Sol. J. 681, cf. *Church v. Linton* (*ante*). Selections and extracts from other works: *Rundell v. Murray* (1821), Jac. 311; *Marzials v. Gibbons* (1874), L.R. 9 Ch. 518; *Lewis v. Fullarton* (1839), 2 Beav. 6; *Lennil v. Pillans* (1843), 5 D. 416; *MacMillan v. Suresh Chunder Deb.* (1890), Ind. L.R. 17 Cal. 951. Translations and adaptations: *Wyatt v. Barnard* (1814), 3 V. & B. 77; *Chatterton v. Cave* (1875), 10 C.P. 572; (1878), 3 A.C. 483; *Tree v. Bowkett* (1896), 74 L.T. 77; *Hatton v. Kean* (1859), 7 C.B.N.S. 268; *Wood v.*

Boosey (1867), 7 B. & S. 869; *Boosey v. Fairlie* (1877), 7 Ch. D. 301; *Lover v. Davidson* (1856), 1 C.B.N.S. 182; *Leader v. Purday* (1849), 7 C.B. 4. New editions and notes (to the extent of the new material used): *Tonson v. Walker* (1752), 3 Swanst 672; *Cary v. Longman* (1801), 1 East. 358; *Murray v. Bogue* (1852), 1 Drew. 353; *Black v. Murray and Son* (1870), 9 Mo. 341; *Thomas v. Turner* (1886), 33 Ch. D. 292; *Hedderwick v. Griffin* (1841), 3 D. 383. Reports and law reports: *Butterworth v. Robinson* (1801), 1 Ves. 709; *Sweet v. Shaw* (1839), 3 Tur. 217; *Sweet v. Maughan* (1840), 11 Sim. 51; *Saunders v. Smith* (1838), 3 My. & Cr. 711; *Sweet v. Benning* (1855), 16 C.B. 459.

(3) ARTISTIC OR FINE ART COPYRIGHT.

[IN JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.]

GRAVES v. GORRIE.

Copyright—Works of Fine Art—"What we Have we Hold"—Application of Imperial Act to Canada—25-26 Vict. ch. 68 (Imp.).

The Imperial Act, 25-26 Vict., ch. 68, an Act for amending the law relating to Copyright in Works of Fine Art, does not extend to the Colonies, and, therefore, copyright thereunder is confined to the United Kingdom.

This was an appeal, by special leave, from the judgment of the Court of Appeal for Ontario affirming the judgment of a Divisional Court which affirmed a decision of ROSE, J. The various judgments delivered in the case are set out below and the facts sufficiently appear therein.

The matter came on in the first instance before ROSE, J., in the form of a motion for an injunction.

J. T. Small, for the plaintiffs.

J. H. Denton, for the defendant.

NOVEMBER 6, 1900. ROSE, J.—

The question to be determined is whether the copyright, conferred by 25-26 Viet., ch. 68 Imp., was confined to Great Britain, or whether extended throughout the Dominions of the Crown.

As said by Lord Cranworth, in *Routledge v. Low* (1868), L.R. 3 H.L., at p. 113, "The British Parliament in the time of Queen Anne must be taken *primâ facie* to have legislated only for Great Britain just as the present Parliament must be taken to legislate only for the United Kingdom." And in *Penley v. Beacon Assurance Co.* (1864), 10 Gr., at p. 428, Vankoughnet, C., said: "While I admit the power of the Imperial Legislature to apply by express words their enactments to this country, I will never

admit that without express words they do apply or are intended to so apply."

It is necessary, therefore, carefully to examine the language and effect of the statute to see whether either by express words, or at least by necessary implication, it extended to the Dominions of the Crown.

In the most carefully prepared and able arguments that were addressed to me by the counsel engaged in this case, much was said with reference to the effect of the language of the first section of the Act, Mr. Small relying upon that as showing the intention to legislate so as to extend the benefits of the Act not only to Great Britain, but also to the colonies.

There had been some discussion as to the persons to whom the benefits of the prior legislation respecting copyright had been extended, see *Jefferys v. Boosey* (1854), 4 H.L.C. 815, and possibly the language of sec. 1 was made express to prevent any doubt as to the persons who should have the benefit of the Act. The words are "The author, being a British subject or resident within the dominions of the Crown, of every original painting, drawing, and photograph, which shall be, or shall have been, made either in the British dominions or elsewhere, shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing."

These words clearly confer copyright upon all British subjects, and upon all persons whether British subjects or not resident within the dominions of the Crown in respect of every original painting, drawing or photograph, whether made in the British dominions or in a foreign country; but it is quite consistent with that language that the copyright thus conferred should be confined to Great Britain. By sec. 4 no proprietor of any such copyright is entitled to the benefit of the Act until registration at Stationers Hall. As has been pointed out in the cases, the copyright is conferred by sec. 1, but the benefit of the Act is withheld until registration.

By sec. 6 penalties are enacted for importation into any part

of the United Kingdom of paintings, etc., which are an infringement of the copyright. By sec. 8 it is provided that pecuniary penalties may be recovered before certain courts in England, Ireland, and Scotland; and sec. 9 gives power to Her Majesty's Superior Courts of Record at Westminster, and in Dublin, to give protection and relief in cases of infringement. By sec. 10 importation into the United Kingdom is prohibited.

So far, apart from the prohibition on importations, there is nothing to indicate any intention to deal with any act done outside of the United Kingdom.

These sections to which I have referred, when contrasted with the provisions of 5-6 Viet. ch. 45 (Imp.), which is made expressly to extend to every part of the British dominions, give great strength to the argument that it is manifest that Parliament in passing 25-26 Viet. ch. 68 was legislating only for copyright in the United Kingdom, and was not dealing with a copyright conferred for the whole of the dominions of the Crown.

In this Act, sec. 15, it is provided "that if any person shall, in any part of the British dominions, after the passing of this Act, print, or cause to be printed, . . . such offender shall be liable to a special action on the case. . . . to be brought in any court of record in that part of the British dominions, in which the offence shall be committed." Sec. 17 prohibits the importation "into any part of the United Kingdom or into any part of the British dominions."

But it is said that the language of sec. 10 of ch. 68 shews that no "repetitions, copies or imitations of paintings, drawings, or photographs," shall be made in any foreign state, or any part of the British dominions, without the consent of the proprietor of the copyright thereof. No doubt for anyone to make a repetition, or copy, or imitation of a painting, drawing, or photograph, without the consent of the proprietor would be a wrong done to such proprietor, but it is apparent that the only protection that that section gives against such wrong is prohibition against importation of any such unlawful repetition, etc., into the United Kingdom.

Looking at the Act itself and comparing it with 5-6 Viet. c. 45 (Imp.) I have come to the conclusion that there is nothing on its face to indicate that the copyright thereby conferred extended beyond the United Kingdom.

I find that Lindley, L.J., in *Tuck and Sons v. Priester* (1887), 19 Q.R.D. at p. 643, was apparently of that opinion. His language was, "it appears to me, therefore, that there was vested in the present plaintiffs a copyright in this picture, but that that copyright was conferred by the Act and was confined to this country. They had no copyright abroad. There was no piracy—there was nothing 'unlawful'—in copying in Germany or elsewhere abroad that picture in which the plaintiffs had acquired a copyright under this Act. If by virtue of the international treaties the plaintiffs have a copyright in Germany we have not been informed of it, and I assume that they had not. They are not at liberty, therefore, to complain under this Act of any infringement of their copyright which took place abroad, for they had no copyright abroad."

Although the learned Judge was not dealing with an infringement within the dominions of the Crown, it is, I think, clear that he would have used similar language if he had been dealing with such a case, and his language is a complete answer to the argument which was based upon the language of sec. 10 of ch. 68, namely, "which, contrary to the provisions of this Act, shall have been made in any Foreign State or in any part of the British dominions." It was urged that that language shewed that an infringement made in any part of the British dominions was contrary to the provisions of that Act, but if so, equally would be an infringement outside of the British dominions.

But it was further urged that the effect of 49-50 Viet., ch. 33 (Imp.), was to extend the provisions of ch. 68 to all parts of the British dominions, and if not that the language, especially of secs. 8 and 9, amounted to a declaration by the Imperial Parliament that the provisions of 25-26 Viet., ch. 68 (Imp.), did so extend.

It must be remembered that 49-50 Viet., ch. 33 Imp. (the International Copyright Act, 1886), was passed to extend to authors of literary and artistic works first published in a foreign country, copyright in Great Britain in return for copyright extended to British authors in such foreign country, and was not intended to extend the copyright conferred by any previous Act. We should not, therefore, expect to find a clause declaring that the copyright conferred by chapter 68 was extended beyond the territorial limits named in that Act, unless it were necessary for the working out of the provisions of that Act.

Section 8 provides "The Copyright Acts" (which include 25-26 Viet., ch. 68) "shall, subject to the provisions of this Act, apply to a literary or artistic work first produced in the United Kingdom." This did not extend the language of sec. 1 of 25-26 Viet., ch. 68, Imp., which conferred copyright upon the persons within the class named with respect to every painting, etc., whether made in British dominions or elsewhere, unless the word "production" includes more than the word "made," which I do not understand to be the case, and in any event the section only enlarges the rights and privileges of the proprietors of such works, and does not purport to extend the rights of proprietors of copyright conferred by the copyright Acts.

It must be remembered that in drafting sec. 8 the draftsman had in mind that he was preparing a section which must cover not only 25-26 Viet., ch. 68, Imp., but ch. 45 of 5-6 Viet., Imp. I see nothing in section 8 which indicates any intention to extend the copyright conferred by that Act beyond the limits of the United Kingdom. Some of the language of section 8 is more peculiarly applicable to the provisions of chapter 45. Even if that section was passed in forgetfulness of the fact, if it be a fact, that the copyright conferred by 25-26 Viet., ch. 68, Imp., did not extend beyond the United Kingdom, such forgetfulness or mistake would not enlarge the scope of such Act: *Mollwo v. Court of Wards* (1872), L.R. 4 P.C., at p. 437; *Earl of Shrewsbury v. Scott* (1859), 6 C.B.N.S., at p. 141; *Metcalf v. Hanson*

(1866), L.R. 1 H.L., at p. 250; *Labrador Company v. The Queen*, [1893] A.C. 104.

As I read ch. 33 of 49-5 Vict., Imp., I do not find any declaration of the meaning of ch. 68 of 25-26 Vict., Imp.

The concluding words of sec. 9 were much pressed upon me by Mr. Small: "But save as provided by such declaration the said Acts and this Act shall apply to every British possession as if it were part of the United Kingdom."

When we come to see what the words "the said Acts and this Act" embraced, we find by looking at the first schedule that only sec. 12 of 25-26 Vict., ch. 68, is included. But Mr. Small urged that as sec. 12 of ch. 68 introduced into that Act the provisions of 7-8 Vict., ch. 12, Imp., it showed manifestly that chapter 68 extended the copyright to the whole of the dominions of the Crown.

When we look at the provisions of 7-8 Vict., ch. 12, Imp., we find that its effect is stated in the last recital as follows: "And whereas the powers vested in Her Majesty by the said 'International Copyright Act' are insufficient to enable Her Majesty to confer upon authors of books first published in foreign countries copyright of like duration, and with the like remedies for the infringement thereof, which are conferred and provided by the said 'Copyright Amendment Act,' with respect to authors of books first published in the British dominions. . . . and it is expedient to vest increased powers in Her Majesty in this respect. . . ." There is nothing here to show that by its introduction into 25-26 Vict., ch. 68, it was intended to extend the limits of the copyright conferred by that Act. The confining of the declaration in sec. 9 of 49-50 Vict., of ch. 33, Imp., to sec. 12 of ch. 68, is significant. Either sec. 1 of ch. 68 did confer copyright extending throughout the dominions of the Crown, or it did not. If it did, then sec. 12 would be as wide in its application as sec. 1 for the purpose for which it was enacted, and there was no necessity for declaring that either section extended beyond the United Kingdom, and if it did not, the confining of the

declaration to section 12 and thus excluding section 1 shews that the Parliament carefully avoided extending the effect of sec. 1 as originally passed. I find nothing in sec. 12 of 25-26 Vict., ch. 68, or in 7-8 Vict., ch. 12, Imp., or in 49-50 Vict., ch. 33, Imp., or in the reason for passing such Act to lead me to the conclusion that it was intended to extend the copyright conferred by sec. 1 of ch. 68 beyond the limits of the United Kingdom.

The result is that I must hold that the copyright conferred by 25-26 Vict., ch. 68, sec. 1, Imp., was confined to the United Kingdom and did not extend to Canada, and that the plaintiff is not entitled to the injunction asked for. His motion therefore must be dismissed with costs in the cause to the defendant in any event.

In addition to the above cases the following authorities may be referred to: *Smiles v. Belford* (1877), 1 A.R. 436; Coppinger on Copyright, 3rd ed.; Scrutton on Copyright, 3rd ed.; Winslow on Artistic Copyright; and Lefroy on Legislative Power in Canada.

From this judgment the plaintiffs appealed to a Divisional Court and the appeal was heard before FALCONBRIDGE, C.J.Q.B., and STREET, J., on the 13th of December, 1900.

J. T. Small, for the appellants.

Riddell, Q.C., and *Denton*, for the respondents.

In the arguments the following references were made: Sessional paper (Canada) vol. 27, No. 17, 1894, paper No. 50, par. 33; Lefroy on Legislative Power in Canada, p. 219; *Penley v. The Beacon Co.* (1864), 10 Gr., at p. 428; *Smiles v. Belford* (1877), 1 A.R. 436; Winslow's Law of Artistic Copyright, pp. 93-94; Coppinger's Law of Copyright, 3rd ed., p. 609; Scrutton's Law of Copyright, 3rd ed., p. 199; *Mollwo, March & Co. v. The Court of Wards* (1872), L.R. 4 P.C. 419; *The Earl of Shrewsbury v. Scott* (1859), 6 C.B.N.S., per

Cockburn, C.J., at p. 141; *Metcalf v. Hanson* (1866), L.R. 1 H.L., per Lord Cranworth, at p. 250; Wilberforce's Statute Law, p. 13, and Maxwell's Interpretation of Statutes, 3rd ed., pp. 13, 437, 438; *Routledge v. Low* (1868), L.R. 3 H.L. 100.

January 18, 1901. FALCONBRIDGE, C.J.Q.B.:—I do not think that I can usefully add anything to the reasons given by my learned brother Rose in his judgment, either as to the main question whether the rights and remedies conferred by 25 & 26 Vict., ch. 68 (Imp.), were confined to the United Kingdom or whether that Act extended to all the dominions of the Crown, including Canada; or as to the further question, much pressed by Mr. Small in his extremely able argument, whether the latter result was brought about by the operation on that statute of the 49 & 50 Vict., ch. 33 (Imp.), and orders in council passed in pursuance thereof.

There is an almost absolute consensus of opinion among text writers on the subject.

In Winslow on the Law of Artistic Copyright, pp. 93, 94 and note, the subject is discussed, and the author comes to the conclusion that the Acts relating to artistic works do not give copyright out of the United Kingdom; and in Coppinger's Law of Copyright, 3rd ed., 609, this opinion is cited without disapproval.

In Scrutton's Law of Copyright, 3rd ed., 199, the copyright under the Act of 1862 is said to be limited in its remedies to the United Kingdom, and there is also discussion as to the application of the Act of 1886.

The last named writer was examined as a witness before a select committee of the House of Lords on the Copyright Bill on the 14th July, 1898, when he handed in a paper, being his report to the Board of Trade on the bills prepared by Lords Herschell and Monkswell, in which he repeats the above opinion. (Report from select committee, session 1898, at p. 278, et seq.)

This appeal and the action must be dismissed with costs.

STREET, J.:—The plaintiffs are art publishers in London, England, and the defendant is a printer and publisher in Toronto.

The plaintiffs claim to be entitled to the copyright in Great Britain and Ireland and in the British colonies and possessions of a picture known as "What we have we'll hold," first published in London in July, 1896, and duly entered by the plaintiffs at Stationers' Hall, pursuant to the Imperial Statutes 25 & 26 Vict., ch. 68 (Imp.), and 49 & 50 Vict., ch. 33 (Imp.).

The defendant, since the date of the entry at Stationers' Hall, has, without the leave of the plaintiffs, printed, published and sold in Canada and elsewhere a large number of copies of the said picture.

The present action is brought to restrain the defendant from continuing to publish and sell copies of the picture, for an account of the sales, for damages, and for the penalties imposed by the Imperial Acts.

The defendant denies that the plaintiffs' copyright extends to Canada.

The plaintiffs moved upon notice before the Hon. Mr. Justice Rose for an injunction in September, 1900, and judgment was given dismissing the motion with costs.

The plaintiffs then appealed to a Divisional Court, and by consent the motion was turned into a motion for judgment, there being no facts in dispute, and was so argued.

In considering the statutes to which we have been referred in the course of the learned and careful arguments addressed to us, it is necessary to bear in mind the well known principles referred to in the judgment of my brother Rose, namely, that statutes passed by the Imperial Parliament are to be treated *prima facie* as intended to apply to the United Kingdom only, and that in order that they may be held to apply to the colonies as well, there must be upon their face express language showing an intention that they should be so applied.

The Acts under which the plaintiffs claim to be entitled to copyright in Canada by virtue of their entry at Stationers'

Hall in London, England, of the picture in question, are the Imperial Statutes 25 & 26 Viet., ch. 68, and 49 & 50 Viet., ch. 33. But with these statutes certain others, and parts of others, are incorporated by special provision, and must be read along with them.

By sec. 12 of 25 & 26 Viet., ch. 68, it is provided that "This Act shall be considered as including the provisions of the Act passed in the session of Parliament held in the seventh and eighth years of Her present Majesty, intituled 'An Act to amend the law relating to International Copyright,' in the same manner as if such provisions were part of this Act."

Then by 49 & 50 Viet., ch. 33, sec. 1, sub-sec. 3, the following enactments, therein referred to collectively as "The International Copyright Act," are to be construed together with the Act, that is to say, 7 & 8 Viet., ch. 12 (Imp.), 15 & 16 Viet., ch. 12 (Imp.), 38 & 39 Viet., ch. 12 (Imp.), sec. 12 of 25 & 26 Viet., ch. 68 (Imp.).

It becomes necessary, therefore, to examine the provisions of all these Acts before the scope of the two Acts 25 & 26 Viet., ch. 68, and 49 & 50 Viet., ch. 33, upon which the plaintiffs rely, can be determined in order to see whether anything is to be found in them to support their contention.

The Act 7 & 8 Viet., ch. 12, was an Act to amend the law relating to international copyright, and its general purport and effect is to enable Her Majesty by orders in council to give to the producers of certain specified classes of works first published in foreign countries the benefit of the provisions of the English laws of copyright.

It is to be observed that by this Act no extension of the privileges of the persons entitled to English copyrights as they existed at the time of the passing of the Act is effected, but foreign publishers were to become entitled to those privileges upon the foreign country granting reciprocal privileges to British publishers. So that no British publisher and no foreign publisher acquired or could acquire under the Act any privileges in the

British dominions which a British publisher did not acquire before it became law under the British Copyright Acts then in force.

The 15 & 16 Viet., ch. 12, carries the law applicable to this case no further. It amends in certain particulars the provisions of 7 & 8 Viet., ch. 12, with special regard to a convention with France, and by the 9th section it prohibits the importation into any part of the British dominions of pirated copies of any works of literature or art coming within the Copyright Acts, produced anywhere outside the British dominions.

Next in order is the 12th section of the Act, 25 & 26 Viet., ch. 68, which I have above quoted in full. By it the provisions of the 7 & 8 Viet., ch. 12, are practically re-enacted and made part of the Act, 25 & 26 Viet., ch. 68; and being also re-enacted and embodied in 49 & 50 Viet., ch. 33, by sub-sec 3, of sec. 1, of that Act they become an integral part of each of those Acts.

Coming now to the Act 25 & 26 Viet., ch. 68 (the only one of the Acts scheduled at the end of the Act 49 & 50 Viet., ch. 33, and therein referred to collectively as "The Copyright Acts," to which it is necessary here to refer), it is found that Act opens with a recital that "Whereas by law, as now established, the authors of paintings, drawings, and photographs have no copyright in such, their works; and it is expedient that the law should in that respect be amended."

I understood it to be suggested by counsel for the plaintiffs that this recital of the state of the law at the time was not incontrovertible, but my researches have not led me to doubt in any respect its absolute accuracy.

The first section provides that the author, being a British subject or resident within the dominions of the Crown, of every original painting, etc., made either in the British dominions or elsewhere, shall have the sole right of copying and reproducing it, subject to certain rights of assignees of the picture or the right to reproduce it which are protected by the Act. The fourth section prescribes the manner and place in which the entry of a claim to copyright is to be made in order to entitle

the author or owner to protection. The seventh section fixes penalties for the contravention of the rights of persons entitled to copyright under the Act; and the eighth and ninth sections prescribe the practice to be followed in England, Ireland, and Scotland for the recovery of the penalties and damages. The tenth section prohibits the importation into the United Kingdom of any copies of protected pictures, "which, contrary to the provisions of this Act, shall have been made in any foreign state, or in any part of the British dominions." And finally, the twelfth section, as I have said, re-enacts and embodies the provisions of 7 & 8 Vict., ch. 12.

I have found myself unable to discover on the face of this Act anything which would justify us in holding that it was intended to the colonies. On the contrary, I think, the internal evidence leads to the contrary conclusion.

The special remedies given by the statute for contravention of its provisions appear intended to be pursued in the Courts of the United Kingdom, and although it is plain that the Act could not govern foreign countries, yet piratical reproductions of copyrighted pictures made in the colonies are placed in the same category as those made in foreign countries, the importation into the United Kingdom of both being prohibited in the same sentence. At all events, no express intention can be found upon the face of the Act that it should extend to the colonies, and that is all that is necessary to oblige us to hold that it does not. If the Act is to be held to extend to the colonies it must be by virtue of the Act 49 & 50 Vict., ch. 33, and not of its own inherent power.

The remaining Act included in the schedule of International Copyright Acts is the Act 38 & 39 Vict., ch. 12, but that Act relates only to translations of dramatic pieces first publicly represented in a foreign country, and has, therefore, no application to the question before us.

At the time of the passing of the International Copyright Act, 1886, being the Act 49 & 50 Vict., ch. 33, the position of the law of England with regard to copyright in a painting, wherever

made, provided the author were a British subject or resident within the dominions of the Crown, was that he could by an entry at Stationers Hall entitle himself to copyright in the United Kingdom; and that he could by the virtue of the 7 & 8 Viet., ch. 12, incorporated with the Act 25 & 26 Viet., ch. 68, by sec. 12, obtain copyright in any foreign countries to which the provisions of the various British Copyright Acts were extended by orders in council under 7 & 8 Viet., ch. 12, but that he could not obtain copyright for it in the colonies under an Imperial Act, as distinguished from an order in council.

The scheme of the International Copyright Act, 1886, 49 & 50 Viet., ch. 33, was to form a copyright union between the United Kingdom and the foreign nations, parties to the convention, so as to give to authors of literary and artistic works first published in one of the countries, parties to the convention, copyright in such works throughout the other countries, parties to the convention.

In the United Kingdom the object intended was to be carried out mainly by means of orders in council authorized to be made from time to time under the provisions of the Act, and, as I shall point out, these orders in council might under the ninth section extend the protection given to foreign productions to the colonies as well as the United Kingdom.

Certain sections of the Act deal expressly with its application to the colonies. Section 8 provides that the Copyright Acts mentioned in the schedule, and, therefore, including the whole of the Act 25 & 26 Viet., ch. 68, "shall, subject to the provisions of this Act, apply to a literary or artistic work first produced in a British possession in like manner as they apply to a work first produced in the United Kingdom; provided that (a) the enactments respecting the registry of the copyright in such work shall not apply if the law of such possession provides for the registration of such copyright." The other provisions in this clause do not affect copyrights in artistic works.

There is nothing in this eighth section which can help the plaintiffs, because the picture in question here was not first pro-

duced in a British possession as distinguished from the United Kingdom.

The ninth section was much relied on by counsel for the plaintiffs. It is as follows:

“Where it appears to Her Majesty expedient that an order in council under the International Copyright Acts made after the passing of this Act as respects any foreign country, should not apply to any British possession, it shall be lawful for Her Majesty by the same or any other order in council to declare that such order and the International Copyright Acts and this Act shall not, and the same shall not, apply to such British possessions, except so far as is necessary for preventing any prejudice to any rights acquired previously to the date of such order; and the expressions in the said Act relating to Her Majesty’s dominions shall be construed accordingly; but, save as provided by such declaration, the said Acts and this Act shall apply to every British possession as if it were part of the United Kingdom.”

The effect of this section, as I understand it, is to enable Her Majesty by order in council under the Act of which it is part, or under any of the other International Copyright Acts set out in the schedule, which are to be construed with the Act itself, to give to the authors, etc., of works produced in any foreign country the same rights in the British possessions as might formerly have been given to them in the United Kingdom by orders in council under the Acts mentioned in the schedule, or as may now be given to them by orders in council under the earlier sections of the Act of which it is a part. It further authorized Her Majesty to exclude, if she deem proper, the application of any such orders in council to any British possession. But it has no effect upon the Copyright Acts as distinguished from the International Copyright Acts, that is to say, it relates only to those laws which are carried into effect by orders in council, and does not relate to those laws which take effect by direct enactment, as the Copyright Acts do.

Now the claim of the plaintiffs here is that their rights come from the British Copyright Acts directly, and not from any orders in council made under any of the International Copyright Acts, and, therefore, they are not in any way helped by the ninth section of the Act of 1886 above quoted.

Mr. Small's argument upon this ninth section was that section 12, of the 25 & 26 Vict., ch. 68, had the effect of consolidating that Act with the Act 7 & 8 Vict., ch. 12, so that when the ninth section of the Act of 1886, above quoted, enacts that 7 & 8 Vict., ch. 12, as well as the twelfth section of 25 & 26 Vict., ch. 68, shall apply to every British possession as if it were part of the United Kingdom, the necessary result is to extend all the provisions of 25 & 26 Vict., ch. 68, to the British possessions. I am clearly of opinion, however, that that construction cannot be supported. The object of the twelfth section of 25 & 26 Vict., ch. 68, was plainly to bring the new copyright in pictures within the provisions of the existing International Copyright Acts, and that part of the law, and that object of the twelfth section, is preserved by the addition to the schedule of International Copyright Acts in the Act of 1886 of the twelfth section, but the remainder of the Act 25 & 26 Vict., ch. 68, is found in the other schedule to the Act of 1886, and is not one of the Acts extended to the colonies by the ninth section of that Act, though it is one of the Acts the benefits of which may be extended to them by order in council.

My conclusion, therefore, is that the Act 25 & 26 Vict., ch. 68, is the only Copyright Act which gives copyright through registration in England to the owners of the picture in question; that by the proper construction of that Act the protection given by such registration does not extend to the colonies; that that protection is not extended to the colonies by any other Act, and that, therefore, the plaintiffs, having failed to obtain protection for the picture by registration in Canada, are not entitled to restrain its production in Canada by the defendant.

The action must, therefore, be dismissed with costs.

From this judgment the plaintiffs appealed to the Court of Appeal. The argument was had on the 22nd and 23rd of May, 1901, before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS and LISTER, J.J.A.

J. T. Small, for the appellants.

J. H. Denton, for the respondents.

April 12, 1902. ARMOUR, C.J.O.:—The copyright which the plaintiffs have obtained under the provisions of the Act, 25 & 26 Vict., ch. 68 (Imp.), is the creation of that Act, and is only entitled to protection over and through the area to which that Act territorially applies.

And the first question raised is as to the territorial application of the Act, which includes within its provisions the provisions of the Act 7 & 8 Vict., ch. 12 (Imp.).

There are no words in the Act expressly extending the area of protection of a copyright granted by it to the colonies.

And it was laid down by Lord Mansfield as long ago as 1769, in *Rex. v. Vaughan* (1769), 4 Burr. at p. 2500, that "No Act of Parliament made after a colony is planted, is construed to extend to it without express words showing the intention of the Legislature to be that it should."

If this was a proper rule to be laid down at that time, it was much more proper that it should prevail in 1862, at the time this Act was passed.

In *Routledge v. Low* (1868), L.R. 3 H.L. 100, Lord Cranworth, in discussing that case, which arose under the Act 5 & 6 Vict., ch. 45 (Imp.), said: "The British Parliament in the time of Queen Anne must be taken *prima facie* to have legislated only for Great Britain, just as the present Parliament must be taken to legislate only for the United Kingdom and not for the colonial dominions of the Crown. It is certainly within the power of Parliament to make laws for every part of Her Majesty's dominions, and this is done in express terms by the 29th section of the Act now in question."

In *Williams v. Davies*, [1891] A.C. 460, it was held that the English Bankruptcy Act of 1869 had the effect of vesting in the trustee in bankruptcy the bankrupt's title to real estate situate in Lagos, but this was by reason of the express words of the Act and the policy of the Legislature in reference to bankruptcy laws, and the Judicial Committee in that case said (p. 466): "If a consideration of the scope and object of a statute leads to the conclusion that the Legislature intended to affect a colony, and the words used are calculated to have that effect, they should be so construed."

In *New Zealand Loan and Mercantile Agency Company v. Morrison*, [1898] A.C. 349, it was held that the Imperial Joint Stock Companies Act, 1870, did not apply to the colonies, and the Judicial Committee in that case said (p. 357): "It is impossible to contend that the Companies Acts, as a whole, extend to the colonies or are intended to bind the colonial Courts. The colonies possess and have exercised the power of legislating on these subjects for themselves, and there is every reason why legislation of the United Kingdom should not unnecessarily be held to extend to the colonies, and thereby overrule, qualify, or add to their own legislation on the same subject." And further: "Nor do their Lordships think that any assistance is to be derived from what has been held with regard to the application of the Bankruptcy Acts to the colonies. It has been decided that by the express words of the Bankruptcy Acts, all the property real and personal of an English bankrupt in the colonies, as well as in the United Kingdom, is vested in his assignees or trustees. Their title must, therefore, receive recognition in the colonial Courts, from which it has been considered to follow that the bankrupt, being denuded of his property by the English law, is also entitled to plead the discharge given him by the same law."

I do not think that a consideration of the scope and object of the Act leads to the conclusion that the Legislature intended to affect the colonies, and it cannot be said that the words used

are calculated to have that effect, nor can it be said that the policy of the Legislature supports such a conclusion.

And a reference to the various Copyright Acts passed by the Legislature shows that whenever the area of protection of a copyright granted by any of the Acts was intended to include the colonies, the intention was manifested by express words.

The original Copyright Act, 8 Anne, ch. 19, protected the copyright in books granted by that Act throughout Great Britain only. The Act, 41 Geo. III., ch. 107 (Imp.), extended the area of protection throughout the whole of the United Kingdom and the British dominions in Europe; and the Act, 54 Geo. III., ch. 156 (Imp.), extended the area of protection over the whole of the British dominions.

These Acts were repealed by the Act 5 & 6 Viet., ch. 45 (Imp.), which by sec. 29 provided that it should extend to Great Britain and Ireland, and to every part of the British dominions.

The Acts granting copyright in engravings and similar works of art, 8 Geo. II., ch. 13, 7 Geo. III., ch. 38, and 17 Geo. III., ch. 57, did not extend the area of protection beyond Great Britain until the Act 6 & 7 Will. IV., ch. 59 (Imp.), extended the area of protection to Ireland.

The Act granting copyright in sculpture, 38 Geo. III., ch. 7 (Imp.), did not extend the area of protection beyond Great Britain, and the Act 54 Geo. III., ch. 56 (Imp.), did not extend it beyond the United Kingdom.

The Act granting copyright in dramatic literary property, 3 Will. IV., ch. 15 (Imp.), gave protection throughout the United Kingdom of Great Britain and Ireland, the Isles of Man, Jersey, and Guernsey, and every part of the British dominions.

The Act granting copyright in lectures, 5 & 6 Will. IV., ch. 65 (Imp.), did not extend the area of protection beyond the United Kingdom.

The preamble to the Act 7 & 8 Viet., ch. 12 (Imp.), shows also the area of protection granted by the different copyright Acts therein referred to.

It was contended that the language of the Act raised a necessary implication that it extended to the colonies, but I think the contrary to be the implication derivable from its language.

The first section of the Act provides that "the author being a British subject or resident within the dominions of the Crown, of every original painting, drawing, and photograph which shall be or shall have been made either in the British dominions or elsewhere, and which shall not have been sold or disposed of before the commencement of this Act, and his assigns, shall have the sole and exclusive right, etc.," and there is obviously nothing in these words which can have the effect of extending the area of protection to the colonies.

Sec. 3 provides that "all copyright under this Act shall be deemed personal or moveable estate" that is within the area of protection, "and shall be assignable at law."

Sec. 5 applies several of the enactments of the Act 5 & 6 Vict., ch. 45 (Imp.), to this Act "in such and the same manner as if such enactments were here expressly enacted in relation thereto," but does not apply to it the enactment of sec. 29 of that Act providing that it should extend "to every part of the British dominions."

The words "unlawfully made" in the sixth section mean made without the consent of the proprietor.

Secs. 7, 8, and 9 clearly show that the area of protection granted by the Act was not intended to be extended to the colonies.

The provision of sec. 10 is to the same effect.

Sec. 12 provides that "this Act shall be considered as including the provisions of the Act passed in the session of Parliament held in the seventh and eighth years of Her present Majesty, intituled 'An Act to amend the law relating to international copyright' in the same manner as if such provisions were part of this Act," and the contention of the plaintiffs is that by force of this section and of the International Copyright Acts, 7 & 8 Vict., ch. 12 (Imp.), 15 & 16 Vict., ch. 12 (Imp.), 38 & 39 Vict., ch. 12

(Imp.), 49 & 50 Viet., ch. 33 (Imp.), and the Order-in-Council of the 28th of November, 1887, the area of protection of their copyright was extended to all the British possessions, but I do not think that any such result was thereby intended or effected.

Reliance was placed in support of this contention chiefly upon secs. 8 and 9 of 49 & 50 Viet., ch. 33 (Imp.).

The plaintiffs' drawing was first produced in the United Kingdom and not in any British possession, and I do not see, therefore, how sec. 8 affects the plaintiffs' case.

Authors of some literary and artistic works first produced in the British possessions were entitled to the benefit of the Copyright Acts, and authors of other literary and artistic works first produced in the British possessions were not so entitled, and the object of the eighth section was, as I understand it, to put authors of all literary and artistic works first produced in the British possessions upon the same footing, and entitling the authors of all literary and artistic works first produced in the British possessions to the benefit of the Copyright Acts, but this had not the effect of extending the area of protection granted by the Copyright Acts to the British possessions: *Page v. Townsend* (1832), 5 Sim. 395; Winslow on Copyright, p. 92.

And I do not understand by what reasonable construction the application by sec. 9 of the International Copyright Acts "to every British possession as if it were part of the United Kingdom," can have the effect of applying the Copyright Acts "to every British possession as if it were part of the United Kingdom," and of extending the area of protection granted by those Acts "to every part of the British possessions as if it were part of the United Kingdom."

In my opinion, the judgment appealed from is right, and should be affirmed, and the appeal dismissed with costs.

OSLER, J.A.:—I have attentively considered the able arguments which were addressed to us by counsel for the respective parties. The question at issue turns, as it appears to me, wholly upon the construction of two Acts of the Imperial Parliament,

25 & 26 Vict., ch. 68, and 49 & 50 Vict., ch. 33, and I entirely agree with the manner in which the relative sections of these Acts have been expounded in the judgments of my late brother Rose, and, in the Divisional Court, of my brother Street. I think the plaintiffs have not acquired copyright for their picture in this country by its registration at Stationers' Hall, pursuant to the provisions of the former Act. The appeal should, therefore, be dismissed.

Moss, J.A.:—I do not deem it necessary to add more than a few words to what has been said in the Courts below and by my learned brothers in this Court.

I am of opinion that the appeal fails for the reasons already given. I paid close attention to the very interesting and able arguments addressed to us, and have since had the opportunity of considering the case with some care, but I have not discovered any ground for reversing the judgment complained of.

I cannot agree that the provisions of the Imperial Act, 25 & 26 Vict., ch. 68, extend *ex proprio vigore* to the Dominion of Canada. Nor can I accede to the argument that by force of subsequent legislation, and the adoption of the Berne Convention, they have been extended so as to give to a British author of a work of art which he has registered at Stationers' Hall under 25 & 26 Vict., ch. 68 (Imp.), the same rights in this Province as he has in Great Britain.

I think the appellants have shown no right to the intervention of the Court, and that their action was rightly dismissed.

MACLENNAN, J.A., concurred.

LISTER, J.A., died before the delivery of judgment.

By special leave, the plaintiffs took an appeal against the judgment of the Ontario Court of Appeal to the Judicial Committee of the Privy Council.

The arguments were recently heard before a Board consisting of Lord Maenaghten, Lord Shand, Lord Robertson, Lord Lindley and Sir Arthur Wilson.

Haldane, K.C., Scrutton, K.C., and Beven for the appellants.
J. H. Denton, of the Canadian Bar, for the respondents.

July 28th, 1903. LORD LINDLEY, in delivering their Lordships' judgment, said :—The appellants and plaintiffs in this case are the registered owners of the copyright of a picture called "What we have we'll hold." They acquired this copyright under statute 25 and 26 Viet., ch. 68, commonly called the Fine Arts Copyright Act, 1862. They have not complied with the Canadian Copyright Act and have acquired no copyright in Canada apart from the copyright to which the statutes of the United Kingdom entitle them. The defendant is a printer and publisher in Toronto and he has printed, published and sold in Canada copies of the plaintiffs' picture without obtaining any license from them. The plaintiffs complained of this as an infringement of their copyright, and they instituted legal proceedings in Canada against the defendant for an injunction and damages. The case was heard in the High Court for Ontario and the plaintiffs' application for an injunction was dismissed with costs. An appeal to the Divisional Court was unsuccessful. A further appeal to the Court of Appeal met with no better fate. The Courts in Canada decided that the plaintiffs had no copyright in Canada. The present appeal has been brought in order that this decision may be reconsidered and finally reviewed. The question depends entirely on the true construction and effect of the Act of 1862 above referred to. Other statutes were called in aid by the appellants' counsel, and will be noticed presently, but they do not extend the rights conferred by the Act of 1862. The Act of 1862 begins by reciting (as their Lordships believe quite accurately) that the authors of paintings, drawings, and photographs had, as the law then stood, no copyright in such works, and that it was expedient to amend the law in that respect. Then follows sec. 1, which confers copyright in such works on their authors, being British subjects or residents within the dominions of the Crown. Copyrights in such works and assignments of such copyrights

have to be registered in Stationers' Hall ; and no one is entitled to the benefit of the Act until such registration (sec. 4) ; penalties are imposed on persons who infringe such copyrights (see sections 6, 7, and 8) ; facilities are given for obtaining injunctions (sec. 9) ; importations into the United Kingdom are prohibited (sec. 10) ; the remedy by action for damages is preserved (sec. 11) ; and the then International Copyright Act (7 and 8 Vict., ch. 12) is incorporated. The Act of 1862 confers on British subjects and persons resident in British dominions copyright in pictures, drawings, and photographs. Such copyright extends to the whole of the United Kingdom. But there is not a word in the Act to indicate any intention on the part of the Legislature to extend the limits within which the copyright is to be enjoyed to any part of the British dominions outside of the United Kingdom. There are clauses, especially sec. 4, relating to registration, and sec. 10, prohibiting importation, which negate any such intentions. In the absence of language clearly shewing an intention to confer copyright in such dominions, their Lordships are of opinion that the plaintiffs' contention cannot be supported. This view of the Act is by no means new. It was adopted in *Tuck and Sons v. Priester* [(1887), L.R. 19 Q.B.D. 629], in which the effect of non-registration and of the penal clauses had to be considered. The appellants' counsel, however, called in aid some other statutes, and notably the Canadian Copyright Act, 1875, 38 and 39 Vict., ch. 53, sec. 3 ; and the International Copyright Acts. The Canadian Copyright Act, 1875, does not, by sec. 3, make the Canadian Act set out in the schedule an Imperial Act applicable to Canada. The section simply removes a difficulty which had arisen in Canada by reason of sec. 91 of the British North America Act and some Orders in Council. Copyright is placed by that Act under the Dominion Legislature ; and, having regard to some Orders in Council, it was doubtful by whom the Act in the schedule should be assented to. The effect of the Act was considered by the Court of Appeal for Ontario in *Smiles v. Belford* [(1877) 1 A.R. 436], and it is plain from that case, and, indeed, from the

Act itself, that it in no way assists the plaintiffs. The International Copyright Act, and especially the Act of 1886 (49 and 50 Vict. ch. 33), were relied on with the view of shewing that, unless the Act of 1862 were held to confer copyright not only in the United Kingdom but also in the British dominions, unforeseen anomalies would arise and those Acts would not have the effects intended under the Berne convention. It is unfortunately true that the International Copyright Acts and the Berne Convention give rise to many serious difficulties when they have to be applied to particular cases. But their Lordships are unable to discover any language in those Acts which, without more, extends the area of the copyright conferred by the Act of 1862 on British subjects and persons resident in British dominions to any country beyond the limits of the United Kingdom. The short result is that those who want copyright in Canada for paintings, drawings, and photographs must obtain such copyright by complying with the laws of that country. There is no difficulty or expense worth mentioning in doing this. Their Lordships will, therefore, humbly advise his Majesty to dismiss this appeal, and the appellants must pay the costs.

Notes:

ARTISTIC COPYRIGHT.

Owing to the recent decisions in *Graves v. Gorrie*, above noted, regarding the Fine Arts Copyright Act, 1862, 25-26 Vict. ch. 68 (Imp.), it would now seem that in everything relating to artistic works the provisions of the Canadian Copyright Act, 1875, govern. This rule will apply *a fortiori* to engravings, excluding the English Engraving Acts of 8 Geo. II. ch. 13 (1735), 7 Geo. III. ch. 38 (1766), 17 Geo. III. ch. 57 (1777), 67 Wm. IV. ch. 59 (1836), and 15 & 16 Vict. ch. 12, sec. 14 (1852). It is said that in regard to sculptures, the rule may be different in that there is no express limit contained in the Sculptures Act, 1814, 54 Geo. III. ch. 56; but probably a limitation of protection to the United Kingdom would be implied. Thus, in regard to engravings, prints, paintings, drawings, photographs and sculptures, the Canadian law is much simpler than the English, there being here but

the one statute to interpret, as opposed to the varied, complex, and, in some instances, extremely badly drawn statutes in force in the motherland. A curious reason has been assigned by Mr. Dawson, in his book on the Law of Copyright (p. 15), accounting for the absence from the English Artistic Acts of provisions extending the Acts to the colonies and Canada. He states that the English publishers of engravings and prints were so well satisfied with the state of the law as it was that they declined any interest in imperial legislation so far as Canada was concerned. The author does not give any explanation of this statement.

A few remarks on the general principles obtaining in the law apart from the statutory enactments are submitted.

1. *Unpublished Works.*—The owner of a picture, engraving, drawing, photograph, sculpture, or other work of fine art, has a right at common law, to prevent any copy being made of it before publication: *Turner v. Robinson* (1860), 10 Ir. Ch. Rep. 121, 510; *Prince Albert v. Strange* (1849), 1 MacN. & G. 25. This rule is based on the same principle that is set out in a prior note on common law rights, *vide* p. 159.

The question as to this common law right in regard to artistic works first arose in the celebrated case of *Prince Albert v. Strange* (*supra*). Lord Cottenham, L.C., set out the law in the following language (*ibid.*, p. 42): "The property of an author or composer of any work whether of literature, art, or science, in such work, unpublished and kept for his private use or pleasure, cannot be disputed after the many decisions in which that proposition has been affirmed or assumed, I say assumed, because in most of the cases which have been decided, the question was not as to the original right of the author, but whether what had taken place did not amount to a waiver of such right—a question which could not have arisen if there had not been such original right or property": and, again, "the exclusive rights in the author of unpublished compositions, which depend entirely upon the common law right of property." Again, in *Jeffreys v. Boosey* (1854), 4 H.L.C. 815, this same question was dealt with. Lord Cranworth, L.C., says (p. 954): "The right now in question is not the right to publish, or to abstain from publishing, a work not yet published at all, but the *exclusive right of multiplying copies of a work already published*. Copyright *thus defined*, if not the creature, as I believe it to be, of our own statute law, is now entirely regulated by it." Lord Brougham said (p. 962): "The right of the author before publication we may take to be unques-

tioned." Lord St. Leonards, also, held (p. 977): "No common law right to copyright exists *after* publication;" and (p. 979): "The common law does give a man who has composed a work a right to that composition, just as he had a right to any other part of his personal property; but the question of right of excluding all the world from copying, *after he has published it to the world*, is a totally different matter."

The later Irish case of *Turner v. Robinson* (1860), 10 Ir. Ch. 121, 510, also fully confirms the common law right.

The law being thus clearly settled that there was a common law right of property ("copyright") in unpublished artistic works, the English Act, 25 & 26 Vict. ch. 68, The Fine Arts Copyright Act, was passed containing the famous preamble: "Whereas by law as now established, the authors of paintings, drawings and photographs have no copyright in such their works." It was thought that, if this was a true statement, the common law right must have no existence. But it is clear that the word "copyright" is here used in the limited sense in which it is used in *Jeffreys v. Boosey*, and which was referred to in *Turner v. Robinson*, *i.e.*, the exclusive right to multiply copies of a work after publication.

This interpretation was adopted in *Tuck v. Priestler* (1887), 19 Q.B.D. 629, and seems to be the only possible one unless it be considered, as is most unlikely, that the statute meant, in effect, to reverse the decisions of the highest authority the cases above referred to.

It may be concluded, therefore, that the author or proprietor of an unpublished work of fine art has by the common law the right to prevent any copy of such work being made or published without his consent.

2. *Publication*.—Sir J. F. Stephen in his Digest says (C. C. Rep. p. 90): "As to what amounts to publication of a work of art, I know of no precise authority." But in *Turner v. Robinson* the matter was discussed, though no very clear principle of publication is enunciated. The facts were shortly these: In 1856, Wallis painted a picture and sold it to Egg; in 1859, Turner bought from Egg "the sole right to engrave and publish an engraving of the picture," and also the right for a limited time to exhibit the picture with a view to booming his engraving. Robinson the defendant attended the exhibition and arranged models to represent the picture, and from them made a photo-

graph which he offered for sale. Turner applied for an injunction to restrain the sale. The question was whether the prior dealings with the picture constituted a publication. These were (1) an exhibition by Wallis at the Royal Academy in 1856, (2) permitting an engraving of the picture to be published in a magazine with a descriptive article, (3) exhibition at Manchester in 1857, and in Dublin in 1859. It was held that there had been, in the case of the exhibitions, limited or conditional publication, the condition being that the public were not to use their inspection for the purpose of reproducing copies, but that such publication did not divest plaintiff's rights. As to the wood engraving, held not to effect the copyright.

In *Blank v. Footman* (1888), 39 Ch. D. 678, shewing a design to two customers and asking for orders was held publication.

3. Engravings and Prints.

(a) *Subject Matter*.—Copyright may exist in any original ("his own") engraving or print which shall be or have been made by any person domiciled in Canada or in any part of the British possessions, or by any citizen of any country having an international copyright treaty with the United Kingdom: R.S.C. ch. 62, sec. 4, part. The following countries have an international treaty with the United Kingdom:—Belgium, France, Germany, Hayti, Italy, Spain, Switzerland, Tunis, Monaco, Luxembourg, Japan, Norway and Austria-Hungary.

There is no definition of "print" in our Act. The English Act, 7 Geo. III., ch. 38, sec. 1, defines it as follows: "Any historical print or prints, or any other print or prints of any portrait, conversation, landscape or architecture (map, chart or plan), or any other print or prints whatsoever," and includes "prints taken by lithography, or any other mechanical process by which prints or impressions of drawings or designs are capable of being multiplied indefinitely" (15 & 16 Viet. ch. 12, sec. 142).

(b) *Originality*.—The only originality required is an originality in execution. If an engraver copies from another engraving he may see how the other has produced the required effect by management of light and shade produced by dots and lines. Thus without skill or attention he may be a successful rival: Cf. per Best, C.J., in *Newton v. Cowie* (1827), 4 Bing. at p. 246.

(c) *Infringement*.—The question here is whether the defendant's work is in substance a copy of the plaintiff's. Copy is defined as "that which comes so near the original as to give to every person seeing it the idea created by the original": *West v. Francis* (1822), 5 B. & Ald. 737. It is not piracy to make another engraving of the original picture, though it may be piracy of the picture: *DeBerenger v. Wheelble* (1819), 2 Stark N.P.C. 548. A photograph of an engraving is an infringement: *Graves v. Ashford* (1867), L.R. 2 C.P. 410; *Gambart v. Ball* (1863), 14 C.B.N.S. 306. In *Dick v. Brooks* (1880), 15 Ch. D. 22, a printed pattern for Berlin wool work from an engraving of "The Huguenot," by Millais, was held not an infringement as not containing a reproduction of the meritorious work of the engraver. As to copies in pen or pencil the cases are not clear, but the true line of distinction seems to be that laid down by Erle, C.J., in *Gambart v. Ball* (1863), 14 C.B.N.S. 306, that any mode of copying or multiplication of copies which depreciates the commercial value of the engraving to its proprietor is an infringement: Cf. also, *Dicks v. Brooks* (*supra*); *Scrutton*, Copyright, 4th ed., pp. 176-177.

4. *Paintings, Drawings and Photographs.*

(a) *Subject Matter*.—Copyright may exist in any original painting, drawing or photograph which shall be or has been made by any person domiciled in Canada or in any part of the British possessions, or by any citizen of any country which has an International Copyright treaty with the United Kingdom: R.S.C. ch. 62, sec. 4, part. There is no definition either in English or Canadian Acts as to what is a painting, etc., within the Acts. So long as it is what is ordinarily meant by a picture, drawing, or photograph, the production will be protected.

(b) *Originality*.—There must be something either in the design or execution of the work that is not a mere copy from some other artistic work. But the originality need not extend to the whole work. But if a drawing is merely a reproduction with improvements of a previous one, it is not an "original drawing." If the additions and improvements are substantial, there may be copyright in them alone, as in the case of new editions of books: *Thomas v. Turner* (1886), 33 Ch. D. 292. In the case of a photograph, the execution is the only thing that can be original; all photographs are in one sense "copies" of something: *Graves'*

Case (1869), L.R. 4 Q.B. 715. The degree of *artistic merit* will not be inquired into by the Court. No matter how coarse or commonplace the production may be, provided that it consist in the representation of some object by means of light and shade or colour, protection will be granted against any exact reproduction thereof: *Kenrick v. Lawrence* (1890), 25 Q.B.D. 99.

(c) *Infringement*.—There can be no monopoly in the subject matter of a painting, drawing or photograph. But a piratical copy need not necessarily be an artistic work of the same kind as the work pirated. Thus an oil painting is infringed by a photograph of it: *Ex parte Beal* (1868), 3 Q.B. 387; and a photograph by a pencil sketch: *Bolton v. Aldin* (1895), 65 L.J.Q.B. 120. The infringement may consist in the taking of the design or of the execution or of both. Where the general idea of a picture is ancient, as, for instance, a young man standing at a stile courting a young woman, there can be no infringement unless the treatment in the copy be the same. The question depends on the effect produced on the mind by a study of the picture and of the alleged copy thereof: *Hanfstaengl v. Baines*, [1895] A.C. 20, per Lord Herschell, L.C. Again, there is no piracy of an artistic work unless a material part of the work is taken. This is a question of fact in each case in regard to which no general rule can be laid down: see *Moore v. Clarke* (1842), 9 M. & W. 692; *Brooks v. Religious Tract Society* (1897), 45 W.R. 476; *London Sterco v. Keely* (1888), 5 T.L.R. 169; *Bolton v. London Exhibition* (1898), 14 T.L.R. 550. Indirect taking of the design or execution or treatment may also be an infringement. A photograph of an engraving may infringe the copyright of the picture from which the engraving is taken: *Ex parte Beal* (1868), L.R. 3 Q.B.D. 87; and cf. *Hanfstaengl v. Baines*, [1895] A.C. 20; *Turner v. Robinson* (1860), 10 Ir. Ch. 121, 510.

Mr. Serutton in his work on Copyright, gives at pp. 195-196, a useful summary of the points agreed on in the living picture cases (*Hanfstaengl v. Empire Palace*, [1894] 3 Ch. 109, and *Hanfstaengl v. Baines*, [1895] A.C. 20). In short they are:— (1) That the copy was made from a legitimate reproduction or a reproduction which plaintiff could not prevent is not a defence: per Stirling, J., at p. 116; Lindley, L.J., p. 127; Lopes, L.J., *ibid.*, p. 131; Lord Watson (1895), A.C. p. 28. (2) Defendant's ignorance of the copyright is no defence: per Lindley, L.J., [1894] 3 Ch. p. 127; Lopes, L.J., *ibid.*, p. 131; Lord Ashbourne, [1895] A.C. p. 29. (3) Immaterial that the defendant's

picture is a bad or inartistic copy: Lord Watson, [1895] A.C. 26. (4) Immaterial whether defendant's picture is made for profit or not: Kay, L.J., in *Hanfstaengl v. Empire Theatre*, [1894] 2 Ch. p. 9. (5) It must be something in the nature of a picture: a *tableau vivant*, or it seems, a statue or bas-relief will not be infringements: per Lindley, Kay, and Smith, L.JJ., [1894] 2 Ch. pp. 6, 8, 10.

5. *Sculptures and Statues.*

(a) *Subject Matter.*—The same statutory provisions protect sculptures as protect paintings, drawings and photographs and engravings and prints: R.S.C. ch. 62, sec. 4. In our Act there is no expansion of the term "sculpture" except that it must be "original" to be protected. The English Act reads: any "new and original sculpture," which words were held to apply to any subject "being matter of invention in sculpture," and hence to cover casts of fruit and leaves used for instruction in drawing: *Caproni v. Alberti* (1892), 40 W.R. 235.

(b) *Infringement.*—Reproducing, in any manner, or causing to be reproduced, made, or sold in whole or in part any pirated copies of the copyrighted article is the statutory infringement: R.S.C. ch. 62, sec. 31, part.

It would appear that a drawing or painting of a statue would not infringe copyright in the statue, and conversely that a statue or bas-relief representing a picture would not infringe copyright in a picture: *Hanfstaengl v. Empire Theatre*, [1894] 2 Ch. 1.

(4) IMPERIAL COPYRIGHT.

[IN THE COURT OF APPEAL FOR ONTARIO.]

SMILES V. BELFORD ET AL.

Copyright—38 Vict. ch. 88 (D.)—5 & 6 Vict. ch. 45 (Imp.).

Held, affirming the judgment of PROUDFOOT, V.-C. (23 Grant 590), that it is not necessary for the author of a book, who has duly copyrighted the work in England under 5 & 6 Vict. ch. 45, to copyright it in Canada under the Copyright Act of 1875, with a view of restraining a reprint of it there; but if he desires to prevent the importation into Canada of printed copies from a foreign country, he must copyright the book in Canada.*

Quære, as to the admissibility, with a view to the construction of a statute, of the language used by the Secretary of State for the Colonies in introducing it in Parliament.

Appeal from a decree of the Court of Chancery, granting an injunction to restrain the infringement of a copyright, reported 23 Gr. 590. The facts, shortly, were: *Samuel Smiles*, of London, England, published in November, 1875, his book "Thrift," and duly entered same at Stationers' Hall, London, on 3rd January, 1876, in pursuance of the English Copyright Act. The defendants, the *Belfords*, of Toronto, Canada, printers and publishers, issued a reprint of the work in Canada and sold many copies. The Canada Copyright Act of 1875 came into force on the 11th of December of that year about a month before *Smiles* registered his book in England.

The appellants' reasons of appeal were:—

1. That since the British North America Act (sec. 91, subsec. 23), the Parliament of Canada has had the sole and exclusive authority to legislate in relation to "Copyright" in Canada, and that such authority is exclusive of the Imperial Parliament as well as of the Legislatures of the several Provinces in the Dominion; and consequently the Act of 1875

* [NOTE.—This decision is no longer law on this latter point. See next case.—Ed.]

is operative, and has the force of law in Canada, notwithstanding the Act of 1842, or any other Act whatever : *Regina v. Taylor* (1875), 36, U.C.R. 183, 220 ; *Re Goodhue* (1872), 19 Gr. 396 ; *Shortt* on Copyright, 65, 92 ; British N.A. Act, sec. 56 ; Imperial Act, 28 & 29 Viet. ch. 63.

2. The appellants contend that the respondent, not having registered at Stationers' Hall the book "Thrift" at the time (11th December, 1875,) at which the "Copyright Act of 1875" came into force, had no copyright under the Imperial Act, 5 & 6 Viet. ch. 45 (1842), and that he could not after that date acquire copyright in Canada, except under the Canadian Copyright Act, 38 Viet. ch. 88, and that registration thereunder is necessary to secure the copyright in Canada, or the sole and exclusive right to print, publish, and sell in Canada.

3. That the Imperial "Canada Copyright Act, 1875" 38 & 39 Vic. ch. 53), and the Queen's proclamation pursuant to that Act stating the date when the Canadian "Copyright Act" should come into operation, gave the "Canadian Copyright Act" the force of law in Canada, notwithstanding the "Colonial Laws Validity Act" (28 & 29 Viet. ch. 63), or the "Imperial Copyright Act" (5 & 6 Viet. ch. 45), or any other Act whatever, and to the extent of the provisions of the Canadian "Copyright Act," superseded, or in effect repealed, the Imperial Copyright Act of 1842 in Canada from the 11th December, 1875 ; or at all events the legislation is cumulative, and if the Imperial Act is in force in Canada, the provisions of the Canadian Act are super-added, and must be complied with to give copyright in Canada : 38 & 39 Viet. ch. 53, sec. 3 Imp. ; *Dwarris* on Statutes, p. 530 ; *Dow v. Black*, (1875), L.R. 6 P.C. 272 ; *L'Union Jacques de Montreal v. Belisle* (1874), L.R. 6 P.C. 31.

4. The Imperial Copyright Act, 1875, not only removed the difficulty as to repugnancy of the Canadian Act, as against the Order in Council of July, 1868, but also, read in conjunction

with the confirmed Act, makes it necessary for the British author to secure copyright in Canada, under the Canadian Act, to prevent the reprinting, republishing, and sale in Canada, as well as the importation of foreign reprints of works of British authors, and unless such copyright be secured under the Canadian Act, there is no legal prohibition to the reprinting, republishing, or sale of any work of a British author in Canada: Imperial Act, 38 & 39 Vict. ch. 53; Preamble, paragraph 3, and sees. 4 & 5.

5. The Canadian Copyright Act requires all authors desirous of obtaining copyright in Canada to print and publish and register under that Act. And the appellants contend that the said Act in that respect includes and applies to authors or publishers in England, though they should have copyright under the Imperial Act of 1842: 38 Vict. ch. 88, sees. 4, 11, 15.

6. That the respondent not having printed or published in Canada, and not having registered either for interim copyright or otherwise, the said book in the office of the Minister of Agriculture, as required by the Canadian Copyright Act, is not entitled to copyright in Canada, or the sole and exclusive right of publication and sale therein: 38 Vict. ch. 88, sec. 4; 31 Vict. ch. 54, sec. 6 (Canadian Act of 1868.)

7. That the respondent, not having obtained interim or other copyright in said book, and not having printed or published the same in Canada, and the appellants having first printed and published said book after the time allowed by the said Act (see sec. 10) for the author to print, publish, and register in Canada, they, the appellants, are solely entitled to copyright thereof, under sees. 11 and 15 of said Act.

8. That the bill is not sustained in law, and the plaintiff is not entitled to the relief prayed for, and the decree of the Court below is erroneous in granting an injunction or any relief in favour of the plaintiff, and should be reversed, and exceeds the jurisdiction of the Court in restraining the publication or sale beyond the Province of Ontario; and no costs should have been decreed against the defendants below.

The appellants also refer to the report of this case in 23 Gr. 590, and the cases cited therein by counsel for the appellants.

The following were the respondent's reasons against the appeal :—

1. The respondent by publishing in England, in November, 1875, the work "Thrift," of which he is the author, secured "the sole and exclusive right of printing and otherwise multiplying copies" of the said book throughout "Great Britain and Ireland and all the Colonies thereof," and "every part of the British dominions," including Canada: 5 & 6 Viet. ch. 45, sec. 2 (Imp. Stat.); 5 & 6 Viet. ch. 45, sec. 29 (Imp. Stat.); *Routledge v. Low* (1868), L.R. 3 E. & I. App. 100, 110, 113, 118; *Low v. Routledge* (1865), L.R. 1 Ch. App. 45, 47.

2. The copyright secured by the Imperial Statute 5 & 6 Viet. ch. 45, in any book accrues upon and takes effect from the date of "the first publication of such book." The registration at Stationers' Hall permitted by this statute, and the preceding Acts of 8 Anne, ch. 19, 41 Geo. III. ch. 107, and 54 Geo. III. ch. 156, was intended only to give notice of existing copyrights. Non-registration affected only the right to sue or to exact the penalties imposed by these Statutes, not the existence of the copyright: 5 & 6 Viet. ch. 45, secs. 3, 17; *Chappell v. Davidson* (1856), 25 L.J.C.P. 225; *Jeffreys v. Boosey* (1854), 4 H.L.C. 815, 847, 886, and per Lord Cranworth, C., at p. 955; 8 Anne ch. 19, sec. 2; 41 Geo. III. ch. 107, sec. 4; 54 Geo. III. ch. 156, sec. 5; 5 & 6 Viet. ch. 45, secs. 13, 24; *Tonson v. Collins* (1761), 1 W. Bl. 330, per Lord Mansfield; *Beckford v. Hood* (1798), 7 T.R. 626; *Cambridge v. Bryer* (1812), 16 East 317, 322; *Murray v. Bogue* (1852), 1 Drew. 533, 364.

3. Upon publication in England on the 15th November, 1875, the respondent became entitled to the protection of the said Act of 5 & 6 Viet. ch. 45, except in so far as that protection was affected in certain colonies by the Imperial Act 10 & 11 Viet. ch. 95, and by Colonial Statutes passed thereunder. By virtue of certain Canadian Statutes, passed under the authority of the said Act, 10 & 11 Viet. ch. 95, the respondent's rights in

Canada on the 15th November, 1875, were less than his rights in England in this :—that foreign reprints of his said book were, under the authority of the said Acts, permitted to be imported into Canada without the consent of the respondent upon payment of a certain duty for his benefit : 13 & 14 Vict. ch. 6 (1850) ; 22 Vict. ch. 76, sec. 2 (1858) ; 22 Vict. ch. 2, sec. 2 (1859) ; 31 Vict. ch. 7 (Ca.) Sched. p. 150 (1867) ; 31 Vict. ch. 56 (Ca.) (1868) ; Proclamation of 24th September, 1868, in *Canada Gazette* of that date.

4. Except as aforesaid, the Imperial Act 5 & 6 Vict. ch. 45, and the copyright thereby secured, was not and could not before Confederation be affected by colonial legislation, since such legislation would have been repugnant to and inconsistent with the said Imperial Acts : 8 & 9 Wm. III. ch. 20, sec. 69 ; 7 & 8 Wm. III. ch. 22, sec. 3 ; 3 & 4 Wm. IV. ch. 59, sec. 56 ; 3 & 4 Vict. ch. 35, sec. 3 ; 8 & 9 Vict. ch. 93 ; 28 & 29 Vict. ch. 63, sec. 2 ; 30 & 31 Vict. ch. 3, sec. 129 ; *Pomeroy's Sedgwick's Statutory Law*, 2nd ed., 89 *et seq.*

5. And the copyright secured to the respondent by the said Imperial Acts being personally situate in England, could not be affected by colonial legislation either before or since confederation : 5 & 6 Vict. ch. 45, sec. 25 ; *Re Goodhue* (1872), 19 Gr. 366 ; *Pomeroy's Sedgwick's Statutory Law*, 2nd ed., 57, 58.

6. All that the Colonial Legislature could do or has ever done is to prescribe the terms and conditions of a copyright valid within the colony alone, and to afford the necessary protection to such a copyright.

Such colonial copyright, independent of and different from the Imperial copyright, secured by 5 & 6 Vict. ch. 45, has existed in Canada ever since 1841 ; 4 & 5 Vict. ch. 61 (1841) ; 10 & 11 Vict. ch. 28 (1847) ; Consol. Stat. C. ch. 81 (1858) ; 31 Vict. ch. 54 (1868) ; 38 Vict. ch. 88 (1875).

7. No additional power to legislate in reference to copyrights was given to the Parliament of the Dominion of Canada by the British North America Act, 1867 : 14 Geo. III. ch. 83, sec. 12 ; 31 Geo. III. ch. 31, sec. 1 ; 3 & 4 Vict. ch. 35, sec. 3 ; 30 & 31 Vict. ch. 3, sees. 91, 129.

8. The view expressed in the last answer is strengthened by the following consideration, viz. —

The Dominion Copyright Act of 1868 was reserved for and obtained the assent of Her Majesty in Council before it was passed.

The Order in Council assenting to the said Act, recognizes by implication the 5 & 6 Viet. ch. 45, as in force in Canada; and the Parliament of Canada, since the British North America Act, 1867, has also recognized the previous Imperial legislation relative to copyright as still in force in Canada: 31 Viet. ch. 7, schedule C. (Ca.) p. 150; 31 Viet. 56 (Ca.)

9. The respondent's rights are not in any way affected by the Canadian Copyright Act of 1875, and the Imperial legislation in reference to it.

The Copyright Act of 1875 either repeals the Acts under which the respondent has acquired copyright, or it does not. If it does, the respondent's rights are preserved by the final saving clause: 38 Viet. ch. 88, sec. 30. If it does not repeal such Acts the respondent's copyright continues unimpaired.

10. The Copyright Act of 1875 (38 Viet. ch. 88), required to be confirmed by Imperial legislation (38 & 39 Viet. ch. 53), since it was repugnant to the Imperial Order in Council of 7th July, 1868, and therefore void: *Canada Gazette*, 24th September, 1868; 38 Viet. ch. 53, sec. 5 (Imp. Stat.) preamble; 28 & 29 Viet. ch. 63, sec. 2 (Imp. Stat.).

11. The Copyright Act of 1875 (38 Viet. ch. 88), was intended for the protection of authors, not of publishers, and in order to induce those who have already an Imperial copyright under 5 & 6 Viet. ch. 45, to conform to the further provisions of the Canadian Act, it secures to them, in the event of their doing so, that protection against the importation into Canada of foreign reprints of their works, which they had not under the Imperial Act of 5 & 6 Viet. ch. 45, as modified by 10 & 11 Viet. ch. 95; 38 Viet. ch. 88 (Ca.), secs. 4 (1), 15 (2); 38-39 Viet. ch. 53, sec. 5 (Imp. Stat.); 38 Viet. ch. 88 (Ca.), sec. 11.

12. The respondent's bill is sustained in law, and the respondent is entitled to the relief given, and the injunction granted does not exceed the jurisdiction of the Court, inasmuch as it is a personal order, directed against the appellants, who reside within the Province of Ontario.

13. The respondent relies on the reasons given by the learned Judge in the judgment appealed from in this case, together with the arguments urged by the counsel for the respondent, and refers to the authorities cited in the report of this case in 23 Gr. 590.

The case was argued on the 15th December, 1876.

C. Robinson, Q.C., and *J. Beaty*, Q.C., for the appellants.
W. N. Miller and *C. W. R. Biggar*, for the respondent.

March 17, 1877. BURTON, J.A.:—An erroneous impression would appear to prevail as to the powers conferred upon the Parliament of the Dominion of Canada by the British North America Act of 1867, in reference to copyright. That impression may have been strengthened by a remark which fell from the learned Chief Justice of this Court in delivering judgment in *Regina v. Taylor* (1875), 36 U.C.R. 183, which has been referred to in the reasons of appeal as apparently sanctioning that view. I took occasion to state during the argument that although any opinion emanating from that learned Judge was entitled to the greatest respect, the expressions used by him were wholly unnecessary to the decision of that case, and were not concurred in by the other members of the Court.

It is clear, I think, that all that the Imperial Act intended to effect was to place the right of dealing with colonial copyright within the Dominion under the exclusive control of the Parliament of Canada, as distinguished from the Provincial Legislatures, in the same way as it has transferred the power to deal with banking, bankruptcy, and insolvency, and other specified subjects, from the Local Legislatures, and placed them under the exclusive jurisdiction and control of the Dominion.

I entirely concur with the learned Vice-Chancellor in the opinion he has expressed, that under that Act no greater powers were conferred upon the Parliament of the Dominion to deal with this subject than had been previously enjoyed by the Local Legislatures.

By the 29th section of the Imperial Act, 5 & 6 Vict. ch. 45, that Act is extended to every part of the British Dominions, and it was unsuccessfully contended in *Routledge v. Low* (1868), L.R. 3 H.L. 100, that Canada, having a Legislature of her own, and not being directly governed by legislation from England, was not included in these general works.

The 15th section of that Act prohibits Her Majesty's colonial subjects from printing or publishing in the colonies, without the consent of the author (whatever may be their colonial laws), any work in which there is copyright in the United Kingdom.

The same Act prohibits the importing into any part of the British possessions any foreign reprint of any book first written or published in the United Kingdom, entitled to copyright therein.

This Act was subsequently amended by the 10-11 Vict. ch. 95, and it was then provided that in case the Legislature of any British possession should be disposed to make due provision for securing or protecting the rights of British authors in such possession, and should pass an Act for that purpose, and transmit the same to the Secretary of State, and in case Her Majesty should be of opinion that such Act was sufficient for the purpose of securing to British authors reasonable protection within such possession, it should be lawful for Her Majesty to express her Royal approval of such Act, and thereupon, by order in council, to suspend, so long as the provisions of such Act should continue in force in such colonies the provisions of the 5 & 6 Vict. ch. 45, *against the importing, selling, or exposing for sale foreign reprints of British copyright works.*

The Canadian Act, 31 Vict. ch. 56, D., was accordingly passed with the object of giving such reasonable protection to authors, and upon its being approved of and assented to by Her Majesty,

she did by order in council suspend those provisions of the 5 & 6 Vict., which related to the importing or selling of foreign reprints.

At this time then, and up to the time of the coming into operation of the recent Act, 38 Vict., the Act of 1875, the 5 & 6 Vict., as modified by the order in council, was in full force within this Dominion—in other words, no one was at liberty, without the consent of the owner of the copyright, to print or reprint the subject of that copyright in any part of the Dominion.

It was conceded that if the Colonial Act just referred to (the Canadian Act of 1875) had been reserved for and had received the Royal Assent in the usual way, it could not have the effect of repealing the 5 & 6 Vict.: but it was contended that inasmuch as it had been confirmed by an Act of the Imperial Parliament, it must be regarded as having the force of an Imperial Statute, and that being, as it was contended, inconsistent with the former Act, it must be held to have impliedly repealed it.

But on referring to the Imperial Act we find the reason, and the only reason, alleged for its passage to be the assumed repugnancy of the reserved bill to the orders in council of 1868. Those orders and the modifications which they effected in the provisions of the 5 & 6 Vict. are referred to in the preamble, and after reciting that a bill respecting copyrights had then been recently passed by the Parliament of Canada, whereby provision was made (subject to such conditions as in the said bill mentioned) for securing in Canada the rights of authors in respect of matters of copyright, *and for prohibiting the importation into Canada of any work for which copyright under the said reserved bill had been secured*, it is declared to be expedient to remove the doubts which had arisen as to whether a mere assent would make the bill operative as against the orders in council, which had the force of statutory enactments, and it was therefore desirable to confirm the bill by Imperial Legislation.

It is scarcely reasonable to suppose that if the Imperial Parliament had thought fit to accept the Canadian enactment as a substitute for the 5 & 6 Vict., they would not have repealed it

so far as it affected Canada in express terms, or that when stating a reason for Imperial Legislation they would have confined themselves to a reference to the order in council which dealt only with a portion of the prohibitions referred to in that statute.

I am of opinion, therefore, that they have stated the only reason which rendered it expedient to seek a confirmation of the Provincial Act, and that it was intended to preserve intact so much of the Imperial Act as prohibits the printing of a British copyright work in Canada, but giving to the author a further right on certain conditions of securing a Canadian copyright, and thus preventing the importation into Canada of foreign reprints.

Some reference was made upon the argument to the language used by the Secretary of State for the colonies in introducing the bill. I apprehended that in this as in the case of any ordinary enactment little or no weight could be attached to the language or opinions of individual members of the Legislature or Government, even if there were any mode of bringing that language under our notice judicially; but if it were allowable to refer to the remarks of Lord Carnarvon when introducing the measure, I should say that it seems to favour the view which I have expressed. As reported in Hansard, 255 vol. 425, he says the bill did two things. 1. It affirmed the principle that copyright in England should carry copyright in Canada. 2. It would make the owner of an English copyright secure of a copyright for 28 years in Canada on condition of publishing there, by which I understand him to mean that, whilst under the English law the author could prevent the printing in Canada, being still subject, however, to be driven from the Canadian market by foreign reprints, he could, by availing himself of the Canadian Act, make his copyright perfect, as he would thereby acquire the additional right of preventing the importation of foreign reprints.

For he says in a subsequent part of his speech: "The bill is a compromise. He believed most authors and publishers would avail themselves of it. Those who did not wish to do so would keep themselves under *the existing law*, and take their chance of

what they might receive under the 12½ per cent. ad valorem duty.”

For these reasons I think the decree made by the learned Vice-Chancellor was correct, and that the appeal should be dismissed with costs.

Moss, J.A. :—I confess that it is not without reluctance that I have arrived at the same conclusion. I fear that the state of the law which we find inflicts a hardship on the Canadian publisher, while it confers no very valuable benefit upon the British author. Its effect, if I rightly understand the matter, is to enable the British author to give an American publisher a Canadian copyright. It is no very violent assumption that every American publisher, who treats with a British author for advance sheets of his work, will stipulate for the use of the author's name to restrain a Canadian reprint. By this arrangement he will be enabled to secure the practical monopoly of the Canadian market, for which he may be induced to pay the author some consideration; but however small this consideration may be, I apprehend it will be found sufficient to induce the author to concede the privilege rather than secure Canadian copyright by treating with the Canadian publisher. But I need scarcely remark that the possible or probable effect upon a branch of industry, however valuable or important, cannot affect the interpretation which the Court is bound to place upon the statutes by which the subject is governed.

It was contended in the Court below, and stated as one of the grounds of appeal, that by the British North America Act the exclusive right to legislate in relation to copyright was vested in the Parliament of Canada, and that consequently the Canadian Copyright Act by its own intrinsic force superseded the Imperial Act of 1842. This point was not pressed in argument by the learned counsel for the appellants, but was simply suggested for consideration out of deference to the language used by his Lordship, the Chief Justice of this Court, in *Regina v. Taylor* (1875), 36 U.C.R. 183. I believe that his Lordship did not deliberately

entertain the opinion which these expressions have been taken to indicate. He simply threw out a suggestion in that direction, but further consideration led him to adopt the view that the Act did not curtail the paramount authority of the Imperial Parliament, but merely conferred exclusive jurisdiction upon the Dominion Parliament as between itself and the Provincial Legislatures.

It must be taken to be beyond all doubt that our Legislature had no authority to pass any laws opposed to statutes which the Imperial Parliament had made applicable to the whole empire. Now it was settled by the highest authority, that a copyright when secured in England extended to every part of Her Majesty's dominions, including Canada: *Routledge v. Low* (1868), L.R. 3 H.L. 100. Except so far as his rights were affected by the Act 10 & 11 Viet. ch. 95, and the order in council made under its provisions, he was absolutely entitled to the protection of the Imperial Copyright Act. By that Act he had the sole and exclusive right of printing and otherwise multiplying copies of his work in Canada. The Act of 10 & 11 Viet. did not touch the question of Canadian reprints. It only permitted the importation of foreign reprints upon payment of a duty for the benefit of the author. Independently then of the legislation of 1875, it is clear that the respondent was entitled to copyright in this country, with the single limitation that foreign reprints might be imported. It is equally clear that colonial legislation alone could not have affected his rights.

The Canadian Copyright Act of 1875, is adopted by the two branches of the legislature and assented to by the Crown in the usual manner, would have been wholly powerless to abridge his existing right. He would still have been entitled by virtue of his British copyright to restrain any Canadian reprint.

These propositions, which were scarcely contested in argument, narrow the controversy to a consideration of the true scope and effect of the Imperial Act 38 & 39 Viet. ch. 53, entitled: "An Act to give effect to an Act of the Parliament of the Dominion of Canada respecting copyright." Is its effect to make the Canadian equivalent to an Imperial enactment, so that assuming the

terms of the Canadian Act itself to be sufficiently wide to have compelled the British author to comply with its conditions before becoming entitled to copyright, if the British Parliament had been divested of and the Canadian Parliament exclusively invested with the legislative jurisdiction, he is now subject to these conditions. Or is its effect merely to remove a real or supposed difficulty in the way of Her Majesty assenting to the bill in the usual manner, without giving to the Act any greater force or operation than if no difficulty had existed and the usual assent been given?

The more I have considered the case and weighed the able arguments addressed to us, the less doubt have I felt upon the answer that must be given to these questions.

The first recital in the Act is a statement of the effect of the order in council of the 7th July, 1868, made under the authority of 10-11 Vict. ch. 95, by which prohibitions against the importation and sale of foreign reprints were suspended so far as regarded Canada. This order, therefore, was the first matter to which the author of the bill deemed it necessary to direct legislative attention with the view to a proper comprehension of the measure; and the recital is confined to the announcement of the simple fact that such an order existed.

The second recital states that the Senate and House of Commons of the Dominion had passed a bill intitled, "An Act respecting copyrights," which had been reserved. It is obvious that no special inference can be drawn from this recital.

The third states that by the reserved bill provision is made, subject to such conditions as in the said bill are mentioned, for securing in Canada the right of authors in respect of matters of copyright, and for prohibiting the importation into Canada of any work for which copyright *under the said reserved bill* has been secured.

The significance of this declaration was much debated before us. I do not think that, upon any legitimate principle of construction, it can be held to involve an assertion that a British author is deprived of his rights under the Act of 4 & 5 Vict., and is

obliged to subject himself to the conditions of the bill in recital, if he desires to insist upon copyright in Canada. It does no more than state, and so far as it goes correctly states, the purport of the bill. Consider the position of the British author independently of the bill. By the combined effect of the Act 4 & 5 Viet. and the order in council of 1868, he was entitled to a limited copyright in Canada. He could restrain a Canadian reprint, but he could not prevent the importation of a foreign reprint. The bill was to enable him, by compliance with its conditions, to prevent this importation and to secure a perfect Canadian copyright. But there is no trace of an affirmation that if the bill were assented to the author would be compelled to accept its terms. It is not suggested that if he did not desire the complete copyright which the bill offered, its intention was to deprive him of the measure of protection he already enjoyed.

Thus far the recital has consisted of statements of facts. It now proceeds to mention the ground for appealing to Parliament and that is, that doubts have arisen whether the reserved bill may not be repugnant to the order in council, and it is expedient to remove such doubts and to confirm the bill. This is the reason, and apparently the only reason, given for the passage of the enactment. It seems almost equivalent to a declaration that but for the existence of these doubts, Her Majesty would have dealt with the bill without any reference to the Legislature.

Nor can I find in the enacting clauses any support for the appellants' contention. It is not declared that the Canadian Act shall have the effect of an Imperial Statute. It simply empowers Her Majesty to signify her assent, if she should be so pleased, and enacts that, if Her assent is given, the bill shall come into operation at such time and in such manner as shall be directed by order in council. It thus carries out the theory that legislative action was only sought to remove the supposed impediment to executive action.

It was strenuously argued that the terms of the fourth section showed that copyright in Canada could only be secured under the Act. It declares that where any book in which at the

time when the reserved bill comes into operation there is a copyright in the United Kingdom, or any book in which thereafter there shall be such copyright, *becomes entitled* to copyright in Canada, *in pursuance* of the provisions of the reserved bill, it shall be unlawful, without the consent of the owner of the British copyright, to import Canadian reprints into the United Kingdom. The contention is, that this language is repugnant to the notion that the possession of copyright in Great Britain gives any right in this country. I do not think it can be so construed. It certainly implies that the possession of British copyright does not entitle to complete copyright in Canada, as is undoubtedly the case, for it does not prevent the importation of American reprints. But it does not imply that if the author chooses to remain content with the protection offered him by the Act of 4 & 5 Viet., as modified by the order in council, he shall not be at liberty to do so.

By the 5th section the order in Council is expressly preserved in force with regard to books not entitled to copyright in pursuance of the reserved bill. That order, while it removed the prohibition against the importation of foreign reprints, had, of course, left the Canadian publisher under the disability imposed by the Act of 4 & 5 Viet. Under that disability I think he still remains.

I am not prepared to assent to the proposition that we are at liberty to regard the language of Lord Carnarvon when introducing the question to the House of Lords. But if we were, I agree with my brother Burton, that it does not aid the appellants. On the contrary, I think it is strongly in favour of the respondent's view. His Lordship said pointedly that the reason why he was unable to advise the Crown to sanction the Act passed by the Canadian Legislature without the bill he was then proposing, was, that sanction could not be given by order in council to any colonial bill which was repugnant to an Imperial Statute, and as the Act of 1847 allowed the importation of foreign reprints on payment of a certain duty, the recent Act of the Canadian Parliament was in form repugnant to it. He added that the re-

pugnancy was only technical. It seems clear that, in his Lordship's view, Her Majesty might, without any Act of Parliament, have assented to the reserved bill and given it full effect, but for the prohibition it contained against the importation of foreign reprints. But as no Canadian Act, although reserved and assented to by Her Majesty, could impair the author's right to restrain a Canadian reprint, which the Imperial Act of 4 & 5 Viet. had given him, it is certain that His Lordship would not have used such language, if he had deemed that this was the effect of the reserved bill. He would undoubtedly have told the House that the necessity for legislation arose from the Act trenching upon the privileges which the Imperial Copyright Act conferred upon the British author.

I agree that the appeal must be dismissed.

SPRAGGE, C., and PATTERSON, J.A., concurred.

Appeal dismissed.

(See next case.)

[IN THE HIGH COURT OF JUSTICE FOR ONTARIO.]

GEORGE N. MORANG & Co., LIMITED

v.

THE PUBLISHERS' SYNDICATE, LIMITED.

Copyright—Books—Infringement—5 & 6 Vict. ch. 45 (Imp.)—Application to Colonies—Importation of Foreign Reprints—Assignment of Ownership—Necessity for Registration Thereof—Right to Maintain Action.

Section 17 of the Imperial Act to amend the Copyright Act, 5 & 6 Vict. ch. 45, prohibiting the importation of foreign reprints of a British copyright book by any person, not being the proprietor of the copyright or some person authorized by him, is now in force in Canada.

Therefore, where the defendants had imported from the United States of America into Canada, and exposed for sale, copies of a book written by Francis Parkman, known as "A Half Century of Conflict," the ownership and copyright of which had, after the death of the author, who had died owning and being entitled to the said copyright, been assigned and transferred to the plaintiffs by the persons entitled thereto, it was held that the plaintiffs were entitled to prohibit the importation of foreign reprints into Canada.

Held, however, that section 24 of 5 & 6 Vict. ch. 45 (Imp.), requiring the proprietor of copyright in any book to make an entry of such book in the book of registry of the Stationers' Company before any action may be brought by such proprietor in respect of any infringement of such copyright, not having been complied with by the plaintiffs, they were not entitled to maintain the action, the word "proprietor" in said section 24 meaning the person who is the present owner of the work.

Dictum of COCKBURN, L.C.J., in *Wood v. Boosey* (1867), L.R. 2 Q.B. 340, not followed.

Weldon v. Dickz (1878), 10 Ch. D. 247, and *Liverpool General Brokers' Association v. Commercial Press Telegram Bureaux*, [1897] 2 Q.B. 1, followed.

Motion for an order and injunction restraining the defendants until the trial or other disposition of the action from importing into Canada for sale, and from exposing and offering for sale, copies of the book written by Francis Parkman known as "A Half Century of Conflict" in infringement of the plaintiffs' copyright in the said book, and in infringement of the plaintiffs' copyright in the book known as "Chapters from Parkman"; but as to the latter the plaintiffs abandoned the motion. The facts were set forth in the affidavit of Mr. Morang, the president of the plaintiff company, in which he stated: That the plaintiffs were the proprietors of and entitled to the copyright for the

British dominions, including Canada, of the book "A Half Century of Conflict," of which Francis Parkman was the author. That the certificate of the entry of such book under the hand and seal of the registering officer appointed by the Stationers' Company was marked Exhibit "A" to his affidavit. That the said Francis Parkman died in or about the month of September, 1893, being still the owner of and entitled to the copyright in the said book for the British dominions, including the Dominion of Canada, and the right and title of the said Francis Parkman in such copyright thereupon devolved upon and became vested in Grace P. Coffin, of Brookline, in the State of Massachusetts, and in Catharine S. Coolidge, and the said Catharine S. Coolidge having subsequently died, and John T. Coolidge, junior, of the city of Boston, in the State of Massachusetts, having been appointed her executor, the copyright in the said book for the British dominions, including the Dominion of Canada, thereupon became and was, on the 17th day of August, 1900, vested in the said Grace P. Coffin and John T. Coolidge, as executors of the estate of the said Catharine S. Coolidge. That on the 17th day of August, 1900, the said Grace P. Coffin and John T. Coolidge junior transferred and assigned to the plaintiffs the said copyright and the proprietorship of the works of the said Francis Parkman, amongst other of the said book "A Half Century of Conflict," and the plaintiffs thereupon became the owners of the copyright therein for the British dominions, including the Dominion of Canada, and the sole persons entitled to publish the said book "A Half Century of Conflict" in the Dominion of Canada, or to import the same into the Dominion of Canada or offer the same for sale therein. That the said Grace P. Coffin and Catharine S. Coolidge, being then the proprietors of and entitled to the copyright for the British dominions, including the Dominion of Canada, in the said book known as "A Half Century of Conflict," on the 9th day of December, 1898, assigned to the plaintiffs the proprietorship and ownership and copyright, amongst other portions of the works of the said Francis Parkman, of the first chapter of the book called "A Half Century of

Conflict," the said chapter being entitled "Eve of War." That the defendant company had recently imported into Canada for sale, and had exposed and offered for sale, copies of the said book, published by the firm of Little, Brown & Company, of the city of Boston, in the State of Massachusetts. That in the spring of the year 1900 the defendants were importing from the United States of America copies of the works of the said Francis Parkman, amongst others, the said "A Half Century of Conflict," and the plaintiffs then notified the defendants that they claimed to be entitled to the sole copyright of the works of Francis Parkman, amongst others in the said book "A Half Century of Conflict," and the defendants were importing the said book for sale and offering the same for sale with full knowledge of the plaintiffs' rights in the premises, and in direct defiance thereof.

Exhibit "A" to this affidavit showed that the time of entry at Stationers' Hall, London, was the 16th June, 1892, the title of the book "A Half Century of Conflict," by Francis Parkman; name of publisher and place of publication, MacMillan & Co., 29 and 30 Bedford Street, Covent Garden, London; name and place of abode of the proprietor of the copyright, Francis Parkman, U.S.A.; date of first publication, 21st May, 1892.

The assignment referred to as Exhibit "A" was, as to the effective words: "Do give and grant unto the party of the second part (the plaintiffs) the proprietorship and ownership of the works of the said Francis Parkman particularly defined and described as: "Pioneers of France in the New World," "The Jesuits in North America," "La Salle and the Discovery of the Great West," "The Old Régime in Canada," "Count Frontenac and New France under Louis XIV., and "The Oregon Trail," each in one volume, and "A Half Century of Conflict," "Montcalm and Wolfe," and "The Conspiracy of Pontiac," each in two volumes."

There was no other evidence of assignment or registration.

The motion was heard by ROBERTSON, J., in the Weekly Court, on the 20th December, 1900.

Walter Barwick, Q.C., and J. H. Moss, for the plaintiffs.
J. L. Ross and A. W. Holmsted, for the defendants.

The following authorities were cited in the argument: *Low v. Rutledge* (1864), 10 L.T.N.S. 838; *Liverpool General Brokers' Association v. Commercial Press Telegram Bureau*, [1897] 2 Q.B. 1; *Wood v. Boosey* (1867), L.R. 2 Q.B. 340; *Weldon v. Hicks* (1878), 10 Ch. D. 247, at p. 253; *Lacy v. Toole* (1867), 15 L.T.N.S. 512; *Graves v. Gorrie* (1900), 32 O.R. 266.

December 27, 1900. ROBERTSON, J., (after setting out the facts and arguments as above):—

I will consider the last objection taken by the defendants first, for the reason that if the Imperial "Act to amend the Copyright Act," 5 & 6 Vict., ch. 45, is not in force here, that unquestionably puts an end to the plaintiffs' case.

The 29th section expressly extends copyright to the United Kingdom, and to every part of the British dominions. And the 17th section prohibits the importation of foreign reprints by any person, not being the proprietor of the copyright or some person authorized by him; and it empowers the officers of the Customs to seize and destroy such books, etc. See *Routledge v. Low* (1868), L.R. 3 H.L. 100.

In *Smiles v. Belford* (1877), 1 A.R. 436, it was held, affirming the judgment of Proudfoot, V.-C., 23 Gr. 590, that it is not necessary for the author of a book, who has duly copyrighted the work in England under 5 & 6 Vict., ch. 45, to copyright it in Canada under the Canadian Copyright Act of 1875, with a view of restraining a reprint of it there; but, if he desires to prevent the importation into Canada of printed copies from a foreign country, he must copyright the book in Canada. See, also, R.S.C. ch. 62, sec. 6.

In 1847 the Imperial Act which bears the title of "The Colonial Copyright Act, 1847," was first passed. This Act authorized Her Majesty in case the Legislature in any British possession should be disposed to make due provision for securing or pro-

tecting the rights of British authors of such possession, and should pass an Act or make an ordinance for that purpose, to express Her Royal approval of said Act or ordinance, and thereupon to issue an order in council declaring that so long as the provisions of such Act or ordinance continued in force within such Colony the prohibitions against the importation of foreign reprints and any prohibitions contained in any Act against the importing, selling, letting out to hire, exposing for sale or hire, or possessing foreign reprints, should be suspended so far as regards such Colony; and thereupon such Act or ordinance was to come into operation, except so far as might be otherwise provided therein.

Every such order in council was to be published in the *London Gazette*.

The Province of Canada placed itself under the provisions of this Act by the passing of 13 & 14 Viet. (1850), ch. 6 (consolidated in 1859 with the Copyright Acts, C.S.C., ch. 81, and becoming in that Act sees. 15, 16, and 17).

The proclamation of the Governor-General (Lord Elgin) signifying Her Majesty's royal approval of the Act of 1850 and the passing of the Imperial order in council (*London Gazette*, 24th December, 1850) was issued on the 23rd of April, 1851, (*Canada Gazette*, 1851, p. 10631).

On the 25th April, 1851, an order of the Governor-General in council was passed imposing a duty of twelve and a half per cent. on foreign reprints of works copyrighted in Great Britain and described in lists to be published in the *Canada Gazette*, in order that the proceeds of such duty might be paid over to the persons beneficially interested in the copyrights.

This still left the proviso of the Imperial Act, 1842, in force in Canada which prohibited reprinting.

In 1868 the Parliament of Canada passed an Act (31 Viet. ch. 56) similar to the statute of the old Province of Canada, 1850, 13 & 14 Viet. ch. 6. Apparently, from the recitals of this Act, it was passed to remove doubts as to the intent of the Act passed at the then present session of Parliament imposing duties

of customs with the tariff of duties payable under it, and the Act declares that it was not the intention of the Customs Act referred to (31 Vict. ch. 7) that any duty imposed on foreign reprints of such British copyright books as are mentioned in the foregoing sections of this Act, by any Act of the late Province of Canada or by any order of the Governor of that Province of Council made or to be made under such Act, or by any Act of the Legislature of the Province of Nova Scotia or New Brunswick, for the purpose of being distributed to or among the party or parties beneficially interested in the copyright, should be repealed, and any such duty shall continue to be collected for the purposes aforesaid until a duty shall be imposed for like purposes under this Act, after which it shall cease.

Her Majesty by order of the Privy Council approved of the Act of 1868 on the 7th July, 1868, and on the same day an order of the Privy Council was passed providing that, so long as the provisions of the Act of 1868 continued in force within Canada, the prohibitions against the importing, etc., of foreign reprints first composed, written, printed, and published in the United Kingdom and entitled to a copyright thereunder, should be suspended as far as regards Canada.

The proclamation of the Governor-General (Lord Monck) signifying Her Majesty's royal approval of the Act and the issuing of the Imperial Order in Council was issued on the 24th September, 1868.

On the 28th September, 1868, an order in council was passed imposing a duty of twelve and a half per cent. *ad valorem*.

In the schedule to the Revised Statutes, 1886, shewing the history and disposal of Acts prior to revision, the Act of 1868 is stated to have been superseded by 42 Vict. (1879) ch. 15, and is recommended for repeal. And is repealed by the repealing schedule A, R.S.C., p. 2278. The Act of 1879 is the National Policy Tariff Act. There is no reference in this Act to the provisions of the statute of 1868 beyond this in the schedule of duties (see schedule "A," p. 123): "British Copyright works, reprints of; six cents per lb. and in addition thereto twelve and a half per cent. *ad valorem*."

On the 28th March, 1894, the following order of the Governor-General-in-council was passed in reference to the proposed abandonment in the Tariff then before Parliament of the collection of the twelve and a half per cent. *ad valorem*:—

“On a report dated 24th March, 1894, from the Minister of Trade and Commerce, upon the provisions of the Canadian Tariff, about to be introduced in the House of Commons of Canada, affecting the subject of copyright, stating that hitherto, at great expense and trouble, a duty of twelve and a half per cent. has been collected on foreign reprints of British copyright works for the benefit of copyright holders, over and above the duty payable for the benefit of the revenue of Canada, and calling attention to the fact that in the tariff now proposed this collection of twelve and a half per cent. will cease to be made after the expiration of the next session of Parliament, in view of the changes which are expected in the Imperial Copyright laws in so far as they apply to Canada.

“The Committee on the recommendation of the Minister of Trade and Commerce advise that Your Excellency be moved to forward a certified copy hereof to the Right Honourable the Secretary of State for the Colonies.”

The Tariff of Customs Act, 1894, contained the following provision (57 & 58 Vict. ch. 33, Item 101):—

“British copyright works, reprints of, six cents per pound and in addition thereto twelve and one half per cent. *ad valorem* until the end of the next session of Parliament, and thereafter six cents per pound.”

The collection of twelve and a half per cent. ceased on the 22nd July, 1895, when the session of Parliament of 1895 ended.

The effect of the repeal, at the revision of 1886, of the Act of 1850, and the abandonment in 1895 of the collection of the twelve and a half per cent. *ad valorem* duty upon foreign reprints for the benefit of the owner of British copyright, revived the provisions of the Imperial Act of 1847, prohibiting the importation of foreign reprints of British copyrights, for the Imperial Act of 1847 and the order of the Queen in council

under which the prohibitions contained in the Act of 1842 against the importation of foreign reprints were suspended only provided for such suspension so long as the provisions of the Canadian Act of 1850, under which the twelve and a half per cent. was collected, continued in force within Canada.

I am, therefore, of opinion that the objection taken by the defendants is not sustainable, and that, on that ground, the plaintiffs' copyright is in force in Canada, and they are entitled to prohibit the importation of foreign reprints into Canada.

Then, as to the objection first taken, as regards the right of the plaintiffs to maintain this action or proceeding, they being assignees of "the proprietorship and ownership" of the works.

The 24th section of the "Act to Amend the Law of Copyright," 5 & 6 Vict. ch. 45 (Imp.), declares "that no proprietor of copyright in any book which shall be first published after the passing of this Act shall maintain any action or suit, at law or in equity, or any summary proceeding, in respect of any infringement of such copyright, unless he shall, before commencing such action, suit, or proceeding, have caused an entry to be made, in the book of registry of the Stationers Company, of such book, pursuant to this Act: Provided always, that the omission to make such entry shall not affect the copyright in any book, but only the right to sue or proceed in respect of the infringement thereof as aforesaid," etc., etc.

The evidence shews that Francis Parkman, the author of "A Half Century of Conflict," on the 16th June, 1892, made such an entry as the above section requires, in form given by the Act.

There is, unfortunately, no direct judicial decision on the point except that of Mr. Justice Kennedy in *Liverpool General Brokers' Association v. Commercial Press Telegram Bureaux*, [1897] 2 Q.B. 1, who held in most emphatic terms that the assignee of a copyright under the above Act must be registered before he can maintain an action for its infringement—not following the dictum of Lord Cockburn, C.J., in *Wood v. Boosey*, L.R. 2 Q.B. 340, cited by the plaintiffs; and, so far as I have been

able to ascertain, the judgment of Kennedy, J., has not been disturbed. Had there been no decision nor the expression of any opinion by any judicial authority, much less by a Judge of so great eminence as Lord Chief Justice Cockburn, I confess that my own reading of the Act would have led me to the same conclusion as Kennedy, J., arrived at in the case cited ; but the reasoning of the Chief Justice has influenced my mind to make further research, and I find that there is other judicial conclusion as well as the opinions of eminent counsel and authors which support the opinion of Kennedy, J. Assuming for the present that I am not bound by the opinion of Kennedy, J., I may consider his reasoning in coming to the conclusion in the case decided by him, and I confess I am impressed with the reasons given by that learned Judge for differing from the Lord Chief Justice. Kennedy, J., at p. 4 says, in reference to *Wood v. Boosey*: "That case was decided by the Lord Chief Justice, and by the rest of the Court, on other and different grounds ; but, of course, the opinion of the Chief Justice is entitled to great weight. What he says is : 'I must say that the result of the discussion has been to cause me very strongly to incline to the opinion that sec. 24 of 5 & 6 Viet. ch. 45, which requires that the proprietor shall be registered before he shall be entitled to bring an action for the infringement of his copyright, does not apply to the case of an assignee to whom the proprietorship is assigned.' The Chief Justice states his reasons, the principal of which appears to be the chance of an injustice to the assignee, he having, in the words of the judgment, 'no power under the statute, either through the means of this Court or any other means that I can see, to enforce the registration of an entry by way of assignment under sec. 13.' With due deference, as the assignee, if the entry of the assignment is not made under sec. 13, can, so far as I understand the Act, always enter himself on the book of registry as proprietor. I am unable to perceive the reality of the suggested danger of injustice to the assignee."

Now, in the case under consideration, the assignment conveys the "proprietorship and ownership of the work." These several documents are mute as to the copyright, so that, for all that appears by the paper title of the plaintiffs, there may have been no entry at Stationers Hall of the proprietorship of Parkman's works or any of them, in which case the assignee or assignees of the proprietorship, I presume, could make the entry required by the statute. The entry made by Parkman in his lifetime gave him the copyright for the British dominions, which included Canada, etc. The plaintiffs, it appears, are the proprietors by the assignment to them by the executors and trustees of Parkman, and Grace P. Coffin, his only surviving child, and John T. Coolidge junior, executor of Catharine S. Coolidge, a deceased daughter, described in exhibit B, dated 17th August, 1900, of certain of Parkman's works, which included "A Half Century of Conflict."

Kennedy, J., also refers to *Tuck v. Canton* (1882), 51 L.J.N.S.Q.B. 393, which was a case under the Fine Arts Copyright Act, 1862 (25 & 26 Viet. ch. 68), sec. 4 of which is the same as 5 & 6 Viet. ch. 45, as to registration of proprietors of copyright of books, etc. And the latter part of the section is in these words: "And no proprietor of any such copyright shall be entitled to the benefit of this Act until such registration, and no action shall be sustainable nor any penalty be recoverable in respect of anything done before registration."

Mathew, J., in regard to this said: "I do not think it necessary to deal with the other questions that have been suggested, whether or not there is necessity for registering any assignment, assuming that there was a registration of the original copyright. That is a difficult question, and one that I should take further time to consider, if I thought it necessary to decide it for the purposes of this case."

I think the case of *Weldon v. Dicks* (1878), 10 Ch. D. 247, is of great assistance in coming to a proper conclusion in this case. That was an action to restrain the publication of a book called "Trial and Triumph," and a question among others was raised

as to who was the "proprietor" in case the original proprietor had assigned his copyright. At p. 253 Malins, V.-C., says: "Then a doubt is raised as to the fourth column, the 'name and place of abode of the proprietor of the copyright.' It is said that means the original proprietor. I am clearly of opinion that it means nothing of the kind, but that it means the person who is the proprietor at the time the registration takes place. What difference can it make to anybody who the original proprietor was? It may be material to know who the original publisher is, the object being that a person registered may not pass off a fraudulent entry, but that he shall give the public an opportunity of inquiry of the publisher whether it was a genuine transaction, or whether the date has been fictitiously inserted, and therefore it is required that the name of the original publisher should be given; but it does not mean that the original proprietor, but that the present proprietor should be given. Upon this ground I am of opinion that the registration is perfectly sufficient."

If this is correct, the word "proprietor" in the 24th section of the Act means the person who is the present owner of the work, and the copyright shall be and is to be deemed to be personal estate, etc. And it is as such "proprietor" that the plaintiffs can restrain any other person from importing into any part of the United Kingdom, or into any part of the British dominions, for sale or hire, any printed book, etc., as mentioned in sec. 17 of the Act.

In *Goubaud v. Wallace* (1877), 36 L.T.N.S. 704, there was a demurrer to a statement of defence in an action for a breach of copyright. The statement of claim alleged that the plaintiffs were proprietors of the copyright in a book published in parts, and called "Life of the Earl of Beaconsfield," and had, before action brought, entered their proprietorship in the registry of the Stationers Company as required by 5 & 6 Viet. ch. 45, sec. 24, and that the defendant, being the printer and publisher of the newspaper called the *Morning Advertiser*, infringed the said copyright by publishing portions of the plaintiffs' book in

the said newspaper. The material defence was that the plaintiffs had not made the entry required by the statute before the alleged infringement. To this the plaintiffs demurred, on the ground that the entry need not have been made before infringement. It was contended by counsel for the plaintiffs that sec. 24 of the Act threw no burden on the proprietor of a copyright to register before action, and that without express words no such burden could exist. Counsel for the defendants cited *Cassell v. Stiff* (1856), 2 K. & J. 279, per Wood, V.-C., 7 & 8 Viet. ch. 12, and argued that the intention of the Legislature was that registration should take place immediately on the copyright being acquired, inasmuch as upon any other construction of the law infringements might take place without any knowledge on the part of the person infringing.

Mellor, J., after expressing himself as being much perplexed by the consideration of the practical difficulties which might arise from giving a literal construction, etc., says: "I am of opinion that under these sections the registration of copyright is merely a condition precedent to the bringing of an action for infringement and not to the existence of the copyright itself. Registration, in fact, is necessary only to perfect the right to sue, not to create it." Field, J., was of the same opinion, but enters more fully into the statutory law in regard to copyright. It may be said that, as regards registration before action brought, this decision is *obiter*, but it shows what these two learned Judges thought as to the necessity of registration taking place before action, etc.

Then there is the opinion of Sir James Stephen, Q.C., supported as it is in the report of the Royal Commission presented in 1878, for the investigation of the subject of copyright. In an extract from the report of that commission published in Putnam on Copyright, 2nd ed., at p. 215, I find it stated, paragraph 6: "Our colleague Sir James Stephen has reduced this matter to the form of a digest, which we have annexed to our report, and which we believe to be a correct statement of the law as it stands." Then at p. 200 Sir James Stephen says under Article

24—"Effect of Registration in case of books:"—"No proprietor of copyright in any book can take any proceedings in respect of any infringement of his copyright unless he has before commencing such proceedings caused an entry to be made in the said Register under the last article."

Now, these are almost the words used in the 24th section, and they were written since the dictum of the late Lord Chief Cockburn in *Wood v. Boosey*, and since the judgment in *Goubaud v. Wallace*, creating doubts as to registration.

Apart from the judgment or opinion of any other Judges or the opinion of any author or learned counsel, the conclusion I have come to is, after much thought and consideration, and contrary, I may say, to an impression made on my mind at the close of the argument, that the plaintiffs are not in a position to take this proceeding. I am satisfied that they are the owners, and, as before stated, would have the right to prohibit the importation of foreign reprints into Canada, had they been registered owners. And, with all due respect to the view expressed by the late Lord Chief Justice Cockburn, I cannot see my way to follow him as he has expressed himself in *Wood v. Boosey*, before referred to. The 24th section of 5 & 6 Vict. ch. 45 (Imp.), appears to be plain, that no proprietor of a copyright in any book, which shall be first published after the passing of that Act, shall maintain an action or suit, etc., in respect of any infringement of such copyright, unless he, that is, the owner whose copyright has been infringed, shall, before commencing such action, etc., have caused an entry to be made, etc., as required by that section. No one else has a right to complain but the present owner, consequently no one, unless the present owner, has any right of action. The author cannot be meant, nor his legal representatives who are entitled to his estate by devise, bequest, gift, or otherwise, for the reason that neither the author, if he was living, nor his said representatives, can in any sense of the word be "proprietors." The ownership in the work and the copyright passed from them by virtue of the assignment produced at the hearing.

I must confess that I regret that I am forced to this conclu-

sion, as I feel that an infringement has taken place by these defendants, and on that account I will not order the plaintiffs to pay the costs. The motion goes off on what may be called a technicality in which there is no merit—except what the statutes require as a preliminary to bringing an action. The copyright is not, in any way, affected. I am therefore obliged to refuse the injunction, but I do so without costs.

[IN THE HIGH COURT OF JUSTICE FOR ONTARIO.]

THE ANGLO-CANADIAN MUSIC PUBLISHERS' ASSOCIATION
(LIMITED) v. J. SUCKLING & SONS.

Copyright—British and Canadian—Effect of Priorities—Importation of Copyright Works—The Copyright Act, R.S.C. ch. 62, sections 6 and 4.

Where there is prior British copyright, and thereafter Canadian copyright is obtained by production of the work, that local copyright is subject to be invaded by the importation of lawful British reprints. But where the Canadian copyright is first, then monopoly is secured from all outside importations. (See, however, Copyright Act of 1900, in subjoined Appendix).

The possessor of a prior Canadian copyright is secured completely against all interference to the territorial extent of all the Dominion of Canada, even as against English reproductions or copies made under a subsequent British copyright.

This was a special case stated for the opinion of the Court in the above action, and was in the following words :

1. The plaintiffs are a duly incorporated company having their registered office in London and their trading and publishing establishment in the City of Toronto, in the Province of Ontario.

2. That the opera known and designated as "Ruddigore, or the Witch's Curse," was written by W. S. Gilbert, and the music composed by Sir Arthur Sullivan, and the said Gilbert & Sullivan were, at the dates of the following assignments, the proprietors of the said opera.

3. That by deeds of assignment, bearing date respectively the 27th and 31st days of January, 1887, the said Gilbert & Sullivan sold and assigned to the plaintiffs all their (the vendors') respective rights within and through the Dominion of Canada, but not elsewhere, in the words and music of the said opera, and also the exclusive liberty and license to do all acts necessary to obtain copyright of the said words and music.

4. The said deeds are produced and may be referred to for greater certainty as to their contents.

5. The said deeds were duly recorded in the office of the Minister of Agriculture for the Dominion of Canada, on the 24th day of February, 1887, and the 12th day of March, 1887, respectively.

6. That under the provisions of sec. 13 of ch. 62, of the R.S.C., being the Canadian Copyright Act, and in the manner prescribed by the Act the plaintiffs, as the assignees and legal representatives of the authors, secured interim copyright to the said opera at the times following—namely, to the words thereof on the 14th day of February, 1887, and to the musical composition on the 12th day of March, 1887, notice of which interim copyright was duly published as required by the Act.

7. That the plaintiffs duly obtained the final copyright to the said words and music at the times following—that is to say, in the said words on the 23rd day of February, 1887, and in the musical composition on the 23rd day of March, 1887, and the said copyright still continues in full force and effect.

8. That on or about the 7th day of January, 1887, the said W. S. Gilbert and Sir Arthur Sullivan by a verbal license granted to Chappell & Company, music publishers in London, England, the right to publish the opera in Great Britain and Ireland.

9. That the said opera and all the arrangements or adaptations of the music of the said opera in the waltz, polka or otherwise, were first published within the United Kingdom of Great Britain and Ireland, by the said Chappell & Company, under the said verbal license on the 14th day of March, 1887, and that

the copyright in the said operas has not yet been entered at Stationer's Hall in England, as provided by the Copyright Act in force in Great Britain and Ireland.

10. That the defendants, after the plaintiffs obtained their Canadian copyright imported into Canada from Great Britain and Ireland for the purpose of sale and offered for sale without the consent and license of the plaintiffs, adaptations and arrangements of and taken from the said opera and published under the names of "Ruddigore Waltz," "The Ruddigore Polka," "The Ruddigore Lancers," and the "Ruddigore Quadrille."

11. The said adaptations and arrangements were sold on the English market by the said Chappell & Company, and were purchased by the defendants from them.

12. That the said several arrangements and adaptations are based upon the original designation and music of the opera and contain a large and substantial portion of the original music, and it is admitted that they would be infringements upon the plaintiffs' copyright if the defendants are not legally entitled under the facts to import them.

13. The defendants claim that under the Canadian Copyright Act, they were entitled to purchase in England and to import from Great Britain and Ireland for the purposes of sale, and to sell in Canada copies of the said publications published and sold there under the said license, notwithstanding the plaintiffs' Canadian copyright; while on the other hand the plaintiffs contend that they are the assignees and legal representatives of the authors within the meaning of the Act, and have as such acquired their Canadian copyright, and are entitled to an injunction prohibiting such importations from Great Britain and Ireland into Canada for the purposes of sale and for selling the said copies here.

The question submitted to the opinion of the Court is :

1. Whether under the circumstances stated the defendants were entitled to import into Canada from Great Briain and Ire-

land for the purposes of sale the arrangements of the works published and sold there of which the plaintiffs have the Canadian copyright.

2. It is agreed that should the question be answered in the negative, that is, against the right to import, that judgment be entered upon the special case, and in the action for the plaintiffs for \$8 damages and the costs of the action, including the motion for injunction and special case.

3. And in the event of the question being answered in the affirmative, that is against the plaintiffs' claim, then that the judgment be entered for the defendants upon the special case, and in the action with costs of the said case and action, including the motion for injunction.

The matter came on for argument on January 17th, 1889, before Boyd, C.

Bain, Q.C., for the plaintiff.

Cassels, Q.C., for the defendant.

The following Acts relating to copyrights, were referred to and commented on in the argument : R.S.C. ch. 62 ; Imp. 5 & 6 Viet. ch. 45 ; Imp. 10 & 11 Viet. ch. 95 ; 31 Viet. ch. 56, (D) ; 38 Viet. ch. 88, (D) ; Imp. 38 & 39 Viet. ch. 53. Also Copinger on Copyright, 2nd ed., pp. 499, 707, 709 ; Shortt's Law of Literature, 2nd ed., p. 749 ; Canadian Debates of the House of Commons of the Dominion of Canada, for 1875, p. 778. Senate Debates, 1875, p. 256 ; and *Smiles v. Belford* (1876), 23 Gr. 590, 604, were also referred to.

February 28th, 1889. Boyd, C. :—

A very clear distinction is to be observed in this Act, R.S.C. ch. 62, between the works which are of prior British copyright, and those which are of prior Canadian copyright. If there is prior British copyright, and thereafter Canadian copyright is obtained by production of the work, then by sec. 6, that local copyright is subject to be invaded by the importation of lawful

British reprints. But if the Canadian copyright is first on the part of the author or his assigns, then under sec. 4 the monopoly is secured from all outside importation.

The former Copyright Act of 1872, was disallowed by the Imperial authorities, because it was in conflict with Imperial legislation. But in the notification of disallowance, Lord Carnarvon recognized the constitutional position that the Parliament of Canada under the B.N.A. Act, had power to deal with Colonial copyright within the Dominion, and intimated his hope that a measure would be passed which, while preserving the right of the owner of copyright works in the United Kingdom and Ireland, would give effect to the views of the Canadian Government and Parliament: Canadian Sessional Papers, 1875, vol. viii. No. 28.

The outcome of these negotiations is to be found in the present Act, passed in 1875, and ratified by the Imperial Statute the same year, 38 & 39 Vict. ch. 53. There is a clause in this English Act providing that Canadian reprints under the Dominion Act of 1875, shall not be imported into the United Kingdom unless by or with the authority of the English copyright owner (sec. 4). That appears to be in some sense the converse of the provision now in question in the Canadian Act. That severed from its connection, reads thus: "Nothing in this Act shall be held to prohibit the importation from the United Kingdom of copies of such works legally printed there." But the word "such," introduces the context, and limits the context, and limits the proviso to cases where there is an existing or a prior British copyright, in respect of which the Canadian one may be considered subordinate, as being in time subsequent.

This construction of the Act is entirely in harmony with the suggestions of the Royal Copyright Commissioners on the subject of Colonial copyright. The commission was appointed because of the Canadian Act of 1875, 38 Vict. ch. 88, (D), which it was feared might clash with the Imperial Act, 5 & 6 Vict. ch.

45. Appointed in the same year they reported in May, 1878, and among their recommendations was this: that Colonial reprints of copyright works first published in the United Kingdom, should not be admitted into the United Kingdom, without the consent of the copyright owner; and that reprints in the United Kingdom of copyright works first published in any colony should not be admitted into such colony without the consent of the copyright owners; Copinger on Copyright, 2nd ed., pp. 504-5; Scrutton's Principles of Copyright, sec. 94. Clause 4 of the English Act of 1875, Imp. 38 & 39 Vict. ch. 53, is on the line of the first part of their suggestions; and the clause now in question in our Act, looks very like a response to the latter part of their advice. I gather from the remarks of the Hon. Alex. Mackenzie, (then premier), in the Hansard of March 11th, 1875, that the draft of this measure had been submitted by the Imperial authorities to the Canadian Government, pp. 642, 781. Subsequent legislation in England is also in accord with the construction I place upon the clause in dispute. Then in the late statute of 49 & 50 Vict. ch. 33, respecting Colonial copyright to which my attention was not called during the argument, I would refer to sec. 8: "The Copyright Acts shall . . . apply to a work first produced in a British possession, in like manner as they apply to a work first produced in the United Kingdom;" and sub-sec. of the same section, it reads, "Nothing in the Copyright Acts . . . shall prevent the passing in the British possessions of any Act . . . respecting the copyright within the limits of such possession of works first produced in that possession," and by the dictionary clause of the Act "produced," means "published," etc., (sec. 11). This latest English Act was first in force on June 25th, 1886, and the assignment of the Canadian copyright of this musical composition was made by Gilbert and Sullivan to the plaintiffs in January, 1887.

Very different was the question agitated in *Smiles v. Bedford*, 23 Gr. 590. There the owner of the British copyright sought to restrain the unauthorized use of his work in Canada.

no Canadian copyright being involved. But here the British authors before publication or copyright in England, assign their right in the work over Canadian territory, upon which a perfect Canadian copyright is obtained prior to publication or copyright in England. My reading of the Act is such as to protect fully this Colonial copyright. It does not purport to inhibit dealers in England from selling to whom they will ; but if the purchasers seek to introduce the copies so purchased into Canada, then the Act applies, and rightly so, as against an English author who has previously parted with his rights in Canada, and all taking under him in England. Mr. Cassels' arguments as to the indirect effect of the statute in hampering English trade, and so being in conflict with Imperial policy, if not legislation, might have had prevailing force some years ago—I need not say how many—but happily now, more liberal commercial relations obtain between the mother country and her dependencies ; and in regard to Canada, one may venture to say that its practical commercial independence has been recognized.

To sum up the whole matter (the validity of copyright monopolies not being now open to discussion) the Imperial Parliament sanctions and reiterates Colonial legislation whereby the possessor of a prior Canadian copyright is secured completely against all interference to the territorial extent of all the Dominion even as against English reproductions or copies made under a subsequent British copyright.

According to the terms agreed upon in the special case, as I answer the question submitted, in the negative, *i.e.*, against the right to import, judgment will be entered for the plaintiffs for \$8 damages and costs.

[IN THE HIGH COURT OF JUSTICE FOR ONTARIO.]

BLACK ET AL. V. IMPERIAL BOOK CO., LTD., ET AL.

BEFORE STREET, J.

Copyright—Encyclopaedia—Prima Facie Proof of Proprietorship—Entry at Stationer's Hall—License to Print and Sell—Foreign Reprints—Notice to Commissioners of Customs—Imperial Acts in Force in Canada—Imp. 39-40 Vict. ch. 36, sec. 152—Imp. 5-6 Vict. ch. 45, secs. 17, 18, 19.

The defendants, the Imperial Book Company, imported into Canada large numbers of an American reprint of the plaintiffs' encyclopaedia, which plaintiffs maintained was an infringement of their copyright. They had registered the publication pursuant to 11th section of the Copyright Act of 1842, and produced and gave in evidence a certificate of the entry.

Held, the production of the certificate was all that was necessary to make out a *prima facie* proprietorship in the copyright of an encyclopaedia under secs. 18 and 19.

Held, also, that sec. 152 of the Imperial Customs Law Consolidation Act, 1876, 39-40 Vict., ch. 36, which requires notice to be given to the Commissioners of Customs of copyright and of the date of its expiration, is not in force in Canada, despite that, in Part IV. of the appendix to vol. III. of the Revised Statutes of Ontario, 1897, a statement to the contrary appears.

Seem, such a notice would be invalidated by an erroneous statement of the date of the expiration of the copyright.

The plaintiffs, in consideration of a large sum of money, by an agreement in writing, gave certain other persons the exclusive right to print and sell the publication in question for a period terminating four years before the expiration of the plaintiffs' copyright, and agreed to deliver to them the plates used in the publishing, and not to publish or announce a new edition until the expiration of such period. The other parties agreed to sell only at certain prices, not to alter the text of the book, and on the expiration of the period mentioned, to deliver up any unsold copies and all the plates used in printing them. The plaintiffs expressly reserved the copyright to themselves.

Held, the agreement must be construed as a license merely and not as an assignment, and need not be registered pursuant to section 19 of 5-6 Vict. ch. 45 (Imp.).

NOTE.—The above case will be found reported in Volume I. Commercial Law Reports at p. 417. An appeal to the Court of Appeal has been taken from the judgment delivered and is now pending.

Notes:

IMPERIAL COPYRIGHTS.

The latter part of the decision in *Smiles v. Belford*, regarding the importation of foreign reprints into Canada, is no longer law. That decision, declaring that to prevent importation into Canada of foreign reprints of an Imperial copyright book copyright in Canada was required, was made in 1877, when the Foreign Reprints Act (Imp.), 1847, was in force. Under the latter Act, duties were imposed on foreign reprints for the benefit of the owner of the Imperial copyright; but in 1894, by the Tariff Customs Act (Canada) collection of these duties were abandoned. The result has been to revive in Canada the provisions of the Imperial Copyright Act, 1842, sec. 17, under which the importation of foreign reprints of books having an Imperial copyright is forbidden.

The Act of Canada, 63 & 64 Vict. ch. 25, The Fisher Act, purporting to affect the importation into Canada of books published under an Imperial copyright was passed in 1900. The bill provided that if copyright under the Copyright Act, Canada, is subsisting in any book, and copyright in the same book is also subsisting owing to prior publication in any part of the British Dominions other than Canada, *i.e.*, if there are two copyrights, the one Canadian, the other Imperial, and if the owner of both copyrights has granted a license to reproduce such book in Canada, then the importation of any copies of such book printed out of Canada and imported without the licensee's consent may be prohibited. The powers granted under this bill had been long sought for by Canadians. It was sought to insert a clause in the Copyright Bill of England enabling the Parliament of Canada to pass such a provision. And in Lord Monkswell's Literary Copyright Bill of 1900 such a clause appears. The delay of copyright reform in England, however, has been such that the Canadian Act of 1900 was passed without waiting for the Imperial sphinx to speak. Even though the Act is *ultra vires*, as has been thought, and though it runs counter to the express enactments in the English Copyright Act of 1842, and though the decision in *Smiles v. Belford* (*supra*) is opposed to its principle, it may yet serve a useful purpose in forcing the Imperial Parliament to action.

An excellent summary of the result of the various enactments with reference to the Colonies is given in *Macgillivray*, on Copy-

right, pp. 190-191. As regards Canada the situation is this:— As regards copying, every book first published in any part of the British Dominions is protected in every part of the British Dominions. (International Copyright Act, 1886, 49 & 50 Viet. ch. 33). The book must be duly registered either in the colony or dependency where it is produced, or, if such colony or dependency does not provide a proper system of registration, at Stationers' Hall in London. As to importation of copies, if the book has been printed or published, or reprinted and republished (though the type need not be set in Canada: *Frowde v. Parrish* (1896), 27 O.R. 526), and registered in Canada, there shall not be imported into, or sold in Canada, without the consent in writing of the owner of the copyright:—

Copies printed outside Canada (*Anglo-Canadian v. Suckling* (1889), 17 O.R. 239), unless legally printed in the United Kingdom under an Imperial copyright existing prior to the acquirement of a Canadian copyright. (*Ibid.*).

If a book has acquired Imperial copyright by first publication within the British Dominions outside Canada, and the owner of the copyright has granted a license to reproduce it in Canada, there shall not be imported (if the Minister of Agriculture so order) without the consent in writing of the Canadian licensee:—

Copies printed outside Canada: 63 & 64 Viet. (Can.), ch. 25.

In other cases there shall not be imported or sold without the written consent of the owner of the copyright:—

Copies printed outside of the British Dominions.

As to copyright in artistic works *vide* note on Artistic Copyright, *ante*. Shortly, it may be said that all artistic works are protected in the Colonies (and dependencies) under local legislation: Cf. especially, *Graves v. Gorrie* (1900), *ante*.

The law relating to copyright in books as now settled in Canada may be thus summarized:—

(a) The Parliament of Canada has full powers of legislation over the subject of copyright within the Dominion: *Smiles v. Belford*; *Anglo-Canadian v. Suckling*.

(b) The English Copyright Act, 5 & 6 Viet. ch. 45, extends to Canada, and is in full force and effect here: *Smiles v. Belford*; *Anglo-Canadian v. Suckling*; *Morang v. Publishers' Syndicate*.

(e) The copyright given by the Canadian Act is concurrent but not co-terminous with English copyright under 5 & 6 Vict. ch. 45, being limited to Canada.

(d) Copyright under the Canadian Act may prevail in Canada as against copyright under the English Act provided the Canadian copyright is first in time: *Anglo-Canadian v. Suckling*.

(e) Copyright under the English Act is paramount to later Canadian copyright: *Anglo-Canadian v. Suckling*.

(5) DRAMATIC AND MUSICAL COPYRIGHT.

[IN THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.]

CARTE V. DENNIS.

Copyright—Sole Right of Dramatic Representation—Infringement—Imperial Acts—Evidence—Examination for Discovery—Admissibility thereof as Evidence Against Co-Defendants.

Sec. 16 of the Imperial Copyright Act, 1842 (5 & 6 Vict. ch. 45), provides that the defendant in pleading shall give to the plaintiff a notice in writing of any objections on which he means to rely on the trial of the action. Sec. 26 allows the pleading of the general issue.

Held (RICHARDSON, J.), that sec. 16 is complied with if the objections intended to be relied on are taken in the statement of defence. *Dicks v. Yates* (1880), 50 L.J. Ch. 809; 18 Ch. D. 76; 44 L.T. 660, followed.

Where, under Rule 201 of the Judicature Ordinance, 1898, a party to the action has been orally examined before trial, Rule 224, which allows any party to use in evidence any part of the examination so taken of the opposite parties, does not limit the effect of such evidence, or provide that it may only be put in as against the party examined, and, therefore, any part of such examination is admissible as evidence against opposite parties other than the one actually examined, provided they had an opportunity to cross-examine the party actually examined.

At the trial of an action against the officers and members of the committee of management of an unincorporated society for infringement of plaintiff's sole right of dramatic representation of an opera, plaintiff put in as evidence parts of the examination for discovery of B., one of the defendants, the secretary-treasurer of the society. All the defendants were represented by the same advocate, who had attended such examination on behalf of all the defendants, and cross-examined the witness.

Held, that the testimony given on such examination was admissible as evidence against all the defendants as well as against B. himself.

Plaintiff proved that the opera in question, and an assignment to him of the sole right of dramatic representation thereof, had been duly registered at Stationers' Hall. On said examination B. testified that he knew the opera in question, and that the performances complained of were meant to be performances of this opera. He also identified one of the programmes used on the occasions in question, and what he thought to be a poster advertising the performances. Both programme and poster designated the opera by its registered name, and specified the author and composer thereof. L. also testified at the trial that he knew the opera in question, which he had seen and heard performed many times; that he had been present at one of the performances complained of, and that what had been performed on such occasion was the opera in question.

Held, that this was sufficient proof of the identity of what was performed by defendants with the opera in question, and consequently of the infringement.

Per WETMORE, J.—Objection to secondary evidence of the contents of a written document must be distinctly stated when it is offered, and if not objected to it is received, and is entitled to its proper weight, and the weight to be attached to it will depend upon the circumstances of each case.

Each programme of an entertainment is an original document, not a mere copy.

Per MCGUIRE, J.—The rule excluding oral testimony of a witness of the contents of a written document which he had read was not applicable to the present case. What was sought to be proved was not the contents of any book or document, but the resemblance or identity of two performances, partly verbal, partly musical, and partly made up of dramatic action, gesture, and facial expression.

Sufficiency and admissibility of evidence of resemblance or identity of the performance or of copy with original discussed.

Judgment of RICHARDSON, J., reversed.

[RICHARDSON, J., October 29th, 1900.

[*Court en banc*, March 7th, 1901.

THE action was tried before Richardson, J., June 22nd, 26th and 28th, 1900.

Ford Jones, for plaintiff.

T. C. Johnstone, for defendants.

The pleadings and evidence are sufficiently set forth in the judgment. No evidence was adduced on behalf of the defendants.

October 29th, 1900.

RICHARDSON, J. :—By the plaintiff's claim he asserts :—

1. He is the assignee of a copyright in a musical composition or comic opera, "The Pirates of Penzance," registered 18th August, 1880.

2. Defendants on 27th and 28th December, 1899, infringed plaintiff's copyright by representing or causing to be represented (without plaintiff's consent) the said musical composition at a place of dramatic entertainment, that is, the Town Hall, Regina.

Damages claimed, \$200.

Injunction and costs.

Defence.

1. That plaintiff is not assignee of the alleged copyright.
2. That said musical composition was not copyrighted.
3. Defendants did not nor did any of them infringe the said copyright by representing or causing to be represented as alleged.
4. Plaintiff's claim discloses no cause of action.

At the hearing Mr. Jones appeared for plaintiff and Mr. Johnstone for defendants.

Before submitting any testimony the plaintiff's counsel drew attention to the fact that no notice had been given by the defendants under the Copyright Act, 1842, 5 & 6 Viet. (Imp.) c. 45, s. 16, and consequently the plaintiff's title to the copyright was admitted.

When this Act was passed an entirely different system of pleading was in use from that brought into operation by the Judicature Act, 1873, practically followed in this Court. By section 26 of that Act, 5 and 6 Viet. c. 45, the general issue was pleadable, under which a defendant could give special matter in evidence. The importance of giving notice of objection a defendant intended to rely upon at the trial is obvious, as otherwise the plaintiff would be ignorant of what might be set up on the trial and be taken by surprise. Since 1873, when, as in this case, the facts on which the defence is based are set out in the pleadings it has been held (*Dicks v. Yates* (1880), 18 Ch.D. 76, in appeal, and I follow this), that the notice called for by section 16 is sufficiently given if the facts intended to be relied upon are stated in the pleadings.

By them the defendants simply traverse the facts on which plaintiff asserts his right of action, and before he can recover in his action the plaintiff is required to prove them.

Towards proving them :

1. The plaintiff put in exhibit "A," a certificate purporting to be signed by the registering officer appointed by the Stationers' Company under Imperial Act 5 & 6 Viet. ch. 45, shewing that on August 18th, 1880, William Schwenek Gilbert and Arthur Sey-

mour Sullivan, alleging themselves to be proprietors of the sole liberty of representation or performance of a dramatic or musical composition entitled, "The Pirates of Penzance," the time and place of first representation or performance being the Bijou Theatre, Brighton, Devon, 30th December, 1879, of which they, Gilbert and Sullivan, were the author or composer, obtained an entry thereof in the book of Registry of Copyrights and Assignments kept at the Hall of the Stationers' Company pursuant to the Act above named.

2. The plaintiff followed exhibit "A" by putting in exhibit "B," a certificate of the same officer showing that on 18th December, 1893, the same Gilbert and Sullivan assigned to the present plaintiff the sole liberty of representation or performance of the dramatic piece or musical composition described in exhibit "A" for Great Britain and Ireland (outside the four-mile radius of London), Canada, Australia, and all British colonies and possessions, also for the continent of Europe (in the English language).

These two exhibits "A" and "B" established, section 11 (their authenticity not having been questioned), the proprietorship and the assignment of the dramatic piece or musical composition as therein expressed, with the time and place of its first representation or performance, so far as the right of representation or performance of the same extends within the limit named, in the plaintiff as assignee of the composers.

The examination before the clerk of one of the defendants, Briggs, for discovery was put in, in which he stated that he knew a comic opera called "The Pirates of Penzance," and had heard what was so called; that the comic opera he knew and had seen is practically the same; that he last heard it performed on 27th and 28th December, 1899, in the Town Hall, Regina; that admission to these performances was by tickets sold to such of the public as chose to purchase them, of which numbers availed themselves and did attend; that the performance was got up and made by the Regina Musical Society, an unincorporated society of which all the defendants were members, and of whom all except the defendants, Haultain, Hogg, Goggin, Fraser and Pocklington took part in the performance.

With the exhibits put in on this examination, identified by Briggs, is a public advertisement or poster, giving public notice that the Regina Musical Society intended to perform "Gilbert and Sullivan's opera, *The Pirates of Penzance*," at the place and on the dates I have referred to, to which the public would be admitted on paid-for tickets.

Briggs further stated that at a meeting of members of the society, held in September, 1899, at which defendants Dennis, Goggin, Brown, Pocklington and Napier were present, it was agreed upon to produce and entertain the public with the opera named; that early in November a notice was received demanding payment of license fees to plaintiff as a condition for allowing the proposed performance, it being protected by copyright, and that as some members of the society had learned that in other places, which he named, the same opera had been performed without license fees being paid, no notice beyond acknowledging its receipt was given to that letter. Mr. Briggs produced vouchers and accounts showing receipts and expenses in connection with the performance, and further stated that no permission was ever asked or obtained from any person so far as he knew for the production of the opera, nor did he know of his own knowledge whether or not the opera of "*The Pirates of Penzance*" is or ever was copyright; that the scores of the opera the society produced were obtained from New York before its production, and returned after, they being only hired for the occasion.

Mr. LeJenne was called as a witness. He was present at the public performance of 28th December, 1899, and purchased and paid for a ticket which admitted him. He identified defendant Pocklington as one who took part in the performance, and several of the others named by Briggs. He, about twenty years ago, in England, saw and heard an opera which had been publicly advertised to be performed, as stated in the advertisement, by one of the D'Oyly Carte Companies as "*The Pirates of Penzance*," and what he heard produced 28th December, 1899, was the same he had heard in England twenty years ago.

By the production of exhibits "A" and "B" the plaintiff's right to bring his action is established. Then, by his claim, the

plaintiff charges the defendants with having given representation in public of the opera "The Pirates of Penzance," of which he holds the copyright as assignee of the author, without his permission.

The defence set up in the action, that is, the defendants did not, nor did any of them, infringe said copyright by representing, or causing to be represented, the said composition at a place of public entertainment known as the Town Hall in the town of Regina, raises the question whether or not the representation proved to have been made infringed the rights of the plaintiff secured to him by the registration at Stationers' Hall, and upon the plaintiff devolves the onus of establishing:

(1) The original composition to which the certificate of registry relates.

(2) That what was performed on the occasions, or either of them, at the dates named, was practically the same as contained in the original composition, in order to convince the Court of the identity of the production in Regina with the original composition alleged. The original composition itself, which would be the best legal evidence of its contents, was not produced, nor was its non-production accounted for in order to admit secondary evidence of its contents.

LeJeune's statement that twenty years ago he heard in England a company advertised as D'Oyly Carte's, who at best has only been the owner of the copyright seven years, perform what, according to his memory, was performed under a like name or title in Regina, in my judgment, falls far short of compliance with the rule laid down in *Boosey v. Davidson* (1849), 13 Q.B.D. 257; 18 L.J.Q.B. 174; 13 Jur. 678, and *Lucas v. Williams*, [1892] 2 Q.B. 113; 66 L.T. 706, and is insufficient to raise the presumption of identity on which the plaintiff's case depends.

As I had already on an interlocutory application decided that the plaintiff's statement of claim was sufficient in point of law, reference to clause 4 of the defence is not now necessary.

The plaintiff appealed. The appeal was heard December 3rd and 5th, 1909.

Ford Jones, for appellant:—Though the term “copyright” is often used to designate the right in question (Cunningham & Mattinson’s Precedents of Pleading, 2nd ed., 246; Ruling Cases, Vol. 9, 868; Encyclopædia of Laws of England, Vol. 3, 398) it is so used incorrectly. This “sole right of dramatic representation” is distinct from “copyright” proper—*Chappell v. Boosey* (1882), 51 L.J. Ch. 625, 21 C.D. 232, 46 L.T. 854, 30 W.R. 733; *Clark v. Bishop* (1872), 25 L.T. 908. Copyright is strictly protected by the Courts: *Walter v. Lane* (1900), 69 L.J. Ch. 699, (1900), A.C. 539, 83 L.T. 289, 49 W.R. 95; *Warne v. Secbohm* (1888), 39 Ch. D. 73. The remedy is conferred by 3 & 4 Wm. IV., ch. 15, and 4 & 5 Viet. c. 45. *Wall v. Taylor* (1883), 52 L.J. Q.B. 558, 11 Q.B.D. 102.

The performance complained of need not be in a public place, nor for profit: *Duck v. Bates* (1884), 53 L.J.Q.B. 338, 13 Q.B.D. 843; *Russell v. Smith* (1848), 12 Q.B. 217, 17 L.J.Q.B. 225. No guilty knowledge is necessary: *Lee v. Simpson* (1847), 3 C.B. 871.

Plaintiff’s evidence at trial was not secondary. There is no original composition which could have been produced. Registry of copyright of a drama and of the sole right of representation thereof is effected by making an entry in the register at Stationers’ Hall only (5 & 6 Viet. ch. 45, sec. 20), and a copy is not deposited anywhere, as is the case with books, etc. (5 & 6 Viet. ch. 45, secs. 6, 8 and 9.) The evidence was at least sufficient to make out a *prima facie* case. LeJeune’s evidence was not secondary—*Lucas v. Williams*, [1892] 2 Q.B. 113. *Lucas v. Williams* is an authority strongly in favour of the appellant.

T. C. Johnstone and *Horace Harvey*, for respondents:—Power having been conferred upon the Federal Government by section 91 of the B. N. A. Act to legislate as to copyright, and that Government having passed “The Copyright Act,” the Imperial Acts no longer apply. There was no sufficient evidence of infringement: *Boosey v. Davidson* (1849), 13 Q.B. 257; *Lucas v. William, ante*. Plaintiff complains of infringement of copyright, but the evidence goes only to show infringement of the sole right

of representation. The trial Judge's findings are findings of fact, and should not be disturbed. There is no evidence connecting the programme and poster with the defendants. The evidence of Briggs given on his examination for discovery is an admission, and as such can be used against himself only: *Saltmarsh v. Hardy* (1872), 42 L.J. Ch. 422.

Ford Jones, in reply:—The Imperial Acts are still in force in Canada: *Smiles v. Belford* (1876), 25 Grant 590, 1 O.A.R. 436; *Routledge v. Lowe* (1868), L.R. 3 H.L. 100; *Anglo-Canadian v. Suckling* (1889), 17 O.R. 239. The trial Judge made no findings of fact, but even if so, the Court will not hesitate to overrule such findings if the Court would not, on the evidence, have come to the same conclusion: *Coghlan v. Cumberland*, 67 L.J. Ch. 402; [1898] 1 Ch. 704; 78 L.T. 540; *Colonial v. Massey*, [1896] 1 Q.B. 38. Briggs' examination is available to plaintiff as evidence at trial: J. O. r. 224. The exhibits form part of the examination: *In re Hinchliffe*, [1895] 1 Ch. 117; *Hands v. Upper Canada Furniture Co.* (1887), 12 P.R. 292. Briggs' evidence can be used against all the defendants, they being connected together as the officers and committee of an unincorporated society, and being all represented by the one advocate, who, on behalf of all, attended the examination and cross-examined Briggs: *Allan v. Allan & Bell*, [1894] P. 248; and *Saltmarsh v. Hardy* (1872), 42 L.J. Ch. 422, refer to admissions contained in pleadings. Having established his legal right and its invasion, plaintiff is entitled to an injunction and damages as of course: *Fullwood v. Fullwood*, (1878), 9 Ch. D. 176; *Cooper v. Whittingham* (1880), 15 Ch. D. 501; *Shelfer v. City of London El. L. Co.*, [1895] 1 Ch. 287; *Ager v. P. & O. Steam Nav. Co.* (1884), 26 Ch. D. 637; *Warne v. Seebohm* (1888), 39 Ch. D. 73. Plaintiff paid to defendants' advocate their taxed costs in the Court below. This amount should be refunded by defendants to plaintiff.

March 7th, 1901.

WETMORE, J.:—This was an action for infringing the plaintiff's rights as assignee of the copyright in a musical composition

or comic opera called "The Pirate of Penzance," by representing or causing the same to be represented without his consent at a place of dramatic entertainment known as the Town Hall in Regina. The plaintiff claims damages and an injunction restraining the defendants from representing or causing to be represented without his consent the said musical composition or comic opera during the term of the copyright. The right infringed was really the sole right of representation or performance of the piece or composition. In the shape the case was presented to this Court nothing, however, turns upon that fact. A question of law was raised by the fourth paragraph of the statement of defence. It does not appear from the appeal book to have been urged before the learned trial Judge, and it was not urged before this Court on appeal. I assume, therefore, that it was abandoned. Probably the defendants' counsel was satisfied that it could not be successfully put forward.

The learned trial Judge in effect found that the proprietorship of the sole right of representation in Canada of a dramatic piece called "The Pirates of Penzance" was vested in the plaintiff. This finding was not questioned by any of the parties to this action. The learned Judge, however, found that the evidence failed to establish that the composition or comic opera in question performed at Regina was identical with the original the right to represent which was registered in the book of the Stationers' Company, and he, therefore, gave judgment for the defendants. From this judgment the plaintiff appealed.

It was urged on behalf of the defendants that, assuming that all the evidence offered on the part of the plaintiff and received by the trial Judge was properly received, the finding was correct. And it was also urged that a portion of the evidence, namely, the examination of Briggs, one of the defendants, was improperly received, and that in the absence of such testimony there was no evidence to establish the identity of the piece performed at Regina with that registered. I will first deal with the question of the admissibility of this testimony.

The defendants' factum alleges that the evidence of Briggs was put in subject to objection. The plaintiff's counsel at the

argument stated that no objection was taken to the reception of it. I can find nothing in the appeal book which shews that the reception of this testimony was objected to. I made enquiry of the trial Judge whether any and what objections were taken to its admissibility, and he informs me that when the evidence was tendered counsel for the defendants raised the objection that the exhibits referred to by Briggs in his examination were not properly before the Court, because there was no notice to produce them, and stated that when Briggs was examined before the clerk he had objected to their production, but his objection was overruled, and he renewed the objection before the Judge. It does not appear that any other objection was then taken to the admissibility of this evidence. There was nothing in this objection. In the first place the minutes of the examination before the clerk do not disclose that the defendants' counsel took any such objection except as to one question respecting the contents of certain correspondence between Briggs and one Tams. Briggs answered that question subject to the objection, but the answer was entirely immaterial and does not affect the matters in issue. So far as certain documents were concerned, counsel for the defendants refused to produce them for reasons stated by him, and the Clerk ruled with him. I think possibly the plaintiff had more reason to complain of that ruling than the defendants had. So far as the clerk's minutes of the examination shew the exhibits actually put in at Briggs' examination were put in without any objection whatever. But apart from this there was nothing in the objection. The only object of a notice to produce is to enable the party giving it to put in secondary evidence of the contents of a writing if the original, being in the possession of a party to the suit to whom the notice is given, is not produced. If the party chooses to produce the original without notice, or if the person desiring to put in the original gets possession of it and puts it in, it is no objection that a notice to produce was not given. The exhibits in question were not copies, they were originals, so I gather from the clerk's minutes and the examination.

After Briggs' examination was put in, and during the argument of the case upon its merits, a question was raised as to the effect of that testimony, and that was that it was only admissible as against Briggs, and did not affect the other defendants. That question was also raised on appeal, and it, in my opinion, requires careful consideration. The examination of Briggs was taken under Rule 201 of The Judicature Ordinance, and was offered in evidence and received under Rule 224. There can be no doubt that this testimony was admissible as against the defendant Briggs, and I am of opinion that under the rule it was admissible against the other defendants, or, in other words, that it was testimony in respect to the whole case. The defendant Haultain was president, Brown vice-president, Briggs secretary-treasurer, Dennis conductor and manager, and the other defendants members of the committee of management of an unincorporated society known as The Regina Musical Society, which it is alleged infringed the plaintiff's right to represent the piece in question. The object of Rule 201 is for discovery, to obtain from a party to the suit opposed in interest to the examining party evidence, not merely as against the party examined, but for the purpose of the case, and Rule 224, which allows the evidence to be put in, does not limit the effect of such testimony or provide that it may only be put in as against the party examined. Why should it be necessary to recall the party examined and reswear him, and go all over the ground again? *Allan v. Allan*, [1894] P. 248, was cited on behalf of the plaintiff. It seems to me that it is only important, in so far as the question involved in this case is concerned, in that it establishes that it is not open to the defendants to object to the testimony on the ground that there was no opportunity to cross-examine Briggs on behalf of the other defendants, because Mr. Johnstone appeared at the examination for all the defendants, and was at liberty to cross-examine the witness if he wished to do so. I am not prepared to state what the consequences might have been as to the admissibility of this testimony as against the other defendants if counsel for such defendants had not had an opportunity of cross-exam-

ining Briggs. *Saltmarsh v. Hardy* (1872), 42 L.J. Ch. 422, was cited for the defendants. That was a suit by a wife against the trustee in bankruptcy of her husband to establish her equity to a settlement. The husband was a party defendant, and filed an answer, in which he admitted a certain statement in the plaintiff's bill. The plaintiff asked to put this admission in as against all the defendants, and counsel for the trustee in bankruptcy objected that it was not evidence against his client. The Lord Chancellor at first was disposed to overrule the objection, but eventually allowed it. He evidently allowed it on the ground that being an admission, it was only evidence against the party making it, and, moreover, that a party to a suit making an admission in his answer, in the manner the husband had, does not bind himself to the truth of it. He merely submits to have it considered true as against himself for the purpose of the suit. It must be remembered that the testimony of Briggs is not merely an admission by Briggs, it is sworn testimony by him of facts within his knowledge.

Having reached the conclusion that Briggs' examination was admissible, as well as against all the defendants as against himself, I am of opinion that the plaintiff establishes a fair *prima facie* case against at least some of the defendants, and that the judgment of the trial Judge ought to be reversed.

The evidence established that the sole liberty of representation or performance of "The Pirates of Penzance," a dramatic piece or musical composition, of which William Schwenck Gilbert and Arthur Seymour Sullivan were the author and composer, was registered at Stationers' Hall in favour of the author and composer on the 18th August, 1880, and that an assignment of such sole right to the plaintiff was registered there on the 18th December, 1893. These facts were found by the trial Judge and were not disputed at the hearing of the appeal. Briggs testified in substance that he *knew* an opera called "The Pirates of Penzance," and that he had heard an opera called "The Pirates of Penzance" at the town hall in Regina on 27th and 28th December, 1899, which was intended to be the same as the opera which

he knew called "The Pirates of Penzance;" although it was not identically the same, and that this opera was so produced at the town hall by the Regina Musical Society. These productions were the infringement complained of. Briggs also produced a programme which he testified was a copy of the programme of the performance given by such society on the occasions referred to, and that programme stated on its face that the programme was of "*Gilbert and Sullivan's Opera, The Pirates of Penzance.*" I may remark that Briggs testified that this was "a copy of the programme." I do not understand him to have meant that it was a copy of an original document. We all know that a number of programmes of such performances are printed for the use of the people going to the performance, and circulated among them, and I understand Mr. Briggs to mean that the document put in evidence was a copy of one of those programmes, and therefore it was not secondary evidence. I mention this in view of what I have hereinbefore held as to the admissibility of the testimony. Returning to the effect of the testimony, we have the fact established that the society caused to be published programmes stating that the opera they were performing was Gilbert and Sullivan's Pirates of Penzance. Briggs also produced a poster, which he stated he thought was a poster advertising the performance. He did not remember having seen them; he had nothing to do with the advertising, but he knew from the accounts that the performance in question was advertised, and that this poster was put in evidence. Now, all this evidence as to the poster was received without any valid objection. The only objection raised, as I have stated, was that no notice to produce had been given. It was not necessary to give a notice to produce in order to enable testimony of that character to be given or put in. I can conceive of a most serious objection to the reception of this poster, but it was not raised before the trial Judge or on this appeal. And I am very strongly of opinion that an objection to the reception of testimony cannot be raised after the case is closed. So we have this poster in evidence. It refers to the performances in question, and states that "The Regina Musical Society" will perform "*Gilbert and*

Sullivan's opera, *The Pirates of Penzance*." We ought to assume that the opera which the society advertised they would perform was the one they actually did perform. In fact, I think the evidence establishes that, apart from any assumption, I have referred to the testimony of and respecting the poster. That testimony might be struck out and the strength of the plaintiff's case not impaired, because the evidence of and respecting the programme would remain with all the inferences to be drawn therefrom. *Lucas v. Williams*, [1892] 2 Q.B. 113; 66 L.T. 706, was an action for the infringement of copyright in a painting by Marcus Stone. The original picture was not produced in evidence. The alleged infringement was a sale of a photograph of a picture, and at the time of the sale a card was attached to the photograph with the words "Painted by Marcus Stone, R.A.," upon it. The Court held that there was evidence in that case for the jury, that the picture which the defendant sold was a copy of the original picture, in respect of which the plaintiff had copyright, and the verdict was sustained. The judgment did not altogether turn upon the fact that the photograph had this card attached to it. In fact, the especial weight was given to other testimony which was given, but Lord Esher, M.R., in delivering his judgment, stated (see p. 117):—"There was more proof in the present case, because on one of the pictures sold by the defendants were the words, 'Painted by Marcus Stone, R.A.,' which is some evidence of an admission by the defendants that the picture which they sold was a copy of the picture painted by that artist." So, in my opinion, going a step further than Lord Esher, the announcement made by the society in their programmes that the play they put on was Gilbert and Sullivan's opera *The Pirates of Penzance*, afforded, with the other testimony in the case herebefore and hereinafter referred to, strong *prima facie* evidence that it was the piece or composition of which William Schwenke Gilbert and Arthur Seymour Sullivan were the author and composer. Then there was the evidence of Henry Le Jeune, who swore that he *knew* the opera "*The Pirates of Penzance*," of which W. S. Gilbert and A. Seymour Sullivan were the author and composer, that he had heard and seen performances of it

several times, that the first time he heard and saw it it was advertised as by one of the plaintiff's companies about twenty years before the trial, and that he heard and saw the same opera performed in Regina on 28th December, 1899. There was no objection whatever raised to the reception of this testimony, and counsel for the defendants declined to cross-examine the witness. The learned trial Judge commented on the fact that Le Jeune swore that twenty years before he had heard and seen the opera, as advertised by one of plaintiff's companies, and that the plaintiff had only been owner of the right since December, 1893. Le Jeune swore to *about* twenty years before, and there was nothing improbable in it, for one of the plaintiff's companies might have put on the piece by license of the author and composer, who then had the sole right of representation, just as the defendants in this case might lawfully have performed it at Regina if they had complied with the request of the plaintiff's advocates, and paid the royalty they demanded. The trial Judge found for the defendants, because he was of opinion that the evidence of identity fell short of compliance with the rule laid down in *Boosey v. Davidson* (1849), 13 Q.B. 257; 18 L.J.Q.B. 174; 13 Jur. 678, and *Lucas v. Williams*, [1892] 2 Q.B. 113; 66 L.T. 706, above cited. I do not understand *Boosey v. Davidson* (1849), 13 Q.B. 257; 18 L.J.Q.B. 174; 13 Jur. 678, as laying down any rule as to what evidence is necessary to prove identity between the piece or composition registered and that by which its right of representation is alleged to be infringed. That case turned partly on the question of the admissibility of certain testimony, not upon the effect which that testimony would have had if it had been admitted. The action was brought for the infringement of the plaintiff's copyright in musical pieces taken from Bellini's opera of "La Sonnambula." The infringement was by *publishing* the pieces. Bellini was an Italian, and the defendant called a witness who stated that the opera was represented at Milan about March, 1831. The witness was then asked whether he had seen printed copies of some of the airs in "La Sonnambula," in the shops at Milan prior to 10th June, 1831? This question was objected to

at the trial and rejected on the ground that it amounted to parol evidence of the contents of a written document without accounting for the nonproduction of the original. In other words, that the evidence offered was secondary evidence, and was not admissible for the reasons stated. This ruling was upheld by the Court of Queen's Bench. The same witness testified that before the 10th June, 1831, he had heard persons in society sing parts of the opera in question at a piano with printed music before them as if performing therefrom. (I have extracted this from the judgment of Lord Denman, at p. 177 of the Law Jour. Rep. It is slightly different from what the reporter alleges that the testimony was. I assume that Lord Denman's statement would most likely be correct.) It does not appear from the report in the Law Journal that the admission of this evidence was objected to. The defendant was endeavouring to shew that there was a publication not merely a representation of the opera in question prior to 10th June, 1831, the date of entry at Stationers' Hall. The trial Judge ruled that there was no evidence of such publication. According to the judgment referred to, "the evidence in question was adduced to shew that the printed paper lying before the musical performer had been purchased in the usual way, . . . and also that its contents were the same as those of the work registered by the plaintiff." The Court held that for the then argument it might be assumed that the printed paper lying before the musical performer had been purchased in the usual way, but that "the printed paper itself is the legal evidence of its contents, and that the plaintiff had a right to object that there was no legal evidence of its contents unless it was produced or accounted for." It will be borne in mind that the witness in that case did not inspect the printed paper that was before the performer. His testimony was the same as if some person attempted to prove the contents of a written document, and that they were the same as another document, because he had heard a third person read from the document first mentioned. I can quite understand that evidence of that character, even if admitted without objection, would prove nothing. But,

suppose the witness had gone further, and sworn that he inspected and read the printed paper, and that it was the opera in question, and that such evidence had been tendered and received without objection. Would it prove nothing? I am of the opinion that it would amount to evidence of the contents of the paper so inspected and read by the witness. I do not understand the judgment in *Boosey v. Davidson* (1849), 13 Q.B. 257, to intend to dissent from it in that respect. My understanding of this rule has always been that objection to secondary evidence of the contents of a written document must be distinctly stated when it is offered, and if not objected to, it is received and is entitled to proper weight, and the weight to be attached to it will depend upon the circumstances of each case. I think that this is borne out by the text in Rosecoe's *Nisi Prius Evidence* (16th ed.) 7, and *Williams v. Wilcox* (1838), 8 A. & E. 314, there cited. The rule laid down in that case is a safe one, not only for the reasons stated by the same learned Judge (Denman, C.J.), but because it is quite possible if the objection is raised the party offering the testimony may be able to account for the non-production of the original. In *Lucas v. Williams*, [1892] 2 Q.B. 113, the evidence in question there was objected to when tendered. The evidence was received, and at the argument it was urged that the evidence ought not to have been received, because it was secondary evidence, but the Court held that it was properly received, because it was original evidence. While I am not prepared to hold that the testimony of Briggs or Le Jeune is of the same character as that in *Lucas v. Williams* (*supra*), I am inclined to think that the trend of that case is more favourable to the plaintiff than to the defendants in the case now under consideration. It is certainly in favour of the plaintiff in that it establishes that it is not necessary in every case to produce the original of the book, piece, composition, or picture the copyright or sole right of representation of which is registered at Stationers' Hall. Giving the weight to the evidence of Messrs. Briggs and Le Jeune to which it is entitled, it having been received

without objection, and to the exhibits produced by Mr. Briggs, to which I have already referred, I have come to the conclusion that the opera performed at Regina was the piece or composition of which the plaintiff had the sole right of representation. That the Regina Town Hall was a "place of dramatic entertainment" within the statute is beyond question. Tickets for admission of the public were sold. The hall was, therefore, used for the public representation for profit of the opera, and comes within the decision in *Russell v. Smith* (1848), 12 Q.B. 217.

The next question which arises is how many and which of the defendants are liable. The evidence establishes that the performance complained of was produced and put on by The Regina Musical Society, before referred to. There can be no doubt as to the liability of the defendants Dennis, Brown, Briggs, Hamilton, Martin, Napier, Balfour, and Poeklington. That is, assuming there was any liability by any person, because they took an actual part in the performance, and this was practically conceded by the defendants' counsel. I am of opinion that there is also evidence to fix the liability of the defendant Goggin. While it is true that there is no evidence to establish that he took an actual part in the performance, the evidence of Briggs establishes that Mr. Goggin was a member of the executive committee of the society, or committee of management; that a meeting of such committee was held, at which he and others were present, when it was decided that the society should take up "The Pirates of Penzance;" that the productions in question were the result of that decision, and that all who were present agreed to the proposition. Then, at a meeting on 29th September, 1899, Mr. Goggin was present and seconded a resolution: "That the secretary be instructed to write to Tams, of New York, regarding rent of orchestral and vocal scores." This resolution was carried, and Briggs swore that that resolution referred to renting orchestral and vocal scores of the opera in question for the performance thereof in December (the time when the performances complained of were had). Then, as appears by the minutes, Mr. Goggin seconded a resolution "That Messrs. Poek-

lington, Balfour, and Hamilton be a stage committee." This was also carried, and evidently has reference to the same performances. This sufficiently fixes Mr. Goggin with taking an active part in procuring the representation to be performed, and the plaintiff's rights infringed. I am also of opinion that there was evidence sufficient to fix the liability on the defendant Hogg, although it is not so strong as that to which I have referred as fixing the liability on the defendant Goggin. Mr. Hogg was a member of the executive committee, and, while there is no evidence that he was present at the meeting of that committee which resolved to put the performance on the stage, he was present at a meeting of the committee on 15th November, and seconded a resolution "That Mr. Dennis be authorized to procure the necessary coats 'for policemen and wigs.'" This was carried, and Mr. Briggs swore that it referred to costumes to be used in the productions in question. That is, in my opinion, sufficient to fix his liability. I have some doubts whether there is sufficient evidence to fix liability on the defendant Haultain. While it is true that he was president of the society, there is no evidence to shew that he was present at any meeting which authorized the production or performance of the opera, or at which any action was taken or had respecting its production or performance. It is true that he was present at a couple of rehearsals, and took part in the chorus thereat, but, as the other members of the court are of opinion that this is sufficient to fix his liability, my doubts are not sufficient to warrant my dissenting. I can discover no evidence whatever to fix liability on the defendant Fraser.

It is not necessary to support this action, for the plaintiff to prove registration under "The Copyright Act" (R.S.C. ch. 62), the Imperial Act, 5 & 6 Viet. ch. 45, applies to Canada by express enactment. The Dominion Act has no provision relating to the right to dramatic representation, and, moreover, the reasonings of the learned Judges in *Smiles v. Belford* (1896), 1 A.R. 436, appear to me as quite conclusive, so far as the question is concerned. As to the question of damages and costs, I am of opinion that the Imperial Act, 51 & 52 Viet. ch. 17, applies to this coun-

try, and that the damages should be for such an amount as this Court considers reasonable, and that the costs should be in the discretion of the Court.

The judgment of the trial Judge should be reversed, and judgment entered in the Court below against all the defendants, except the defendant Fraser, for thirty-five dollars (\$35.00) damages and costs, and that the defendants, except Fraser, should be restrained by injunction order from representing or causing to be represented without the authority or consent of the plaintiff or of his assigns, the said musical composition or comic opera called "The Pirates of Penzance" during the term of the sole right of representation therein, and that the said defendants, except Fraser, pay to the plaintiff his costs of this appeal. Under the circumstances there will be no costs to the defendant Fraser either here or in the Court below. The costs paid by or on behalf of the plaintiff to the defendants' advocate to be repaid by the defendants.

MCGUIRE, J.:—The plaintiff appeals from the judgment of Mr. Justice Richardson, dismissing the plaintiff's action brought to recover damages for infringement, by the defendant, of what is described in the statement of claim as his copyright in the musical composition or comic opera called "The Pirates of Penzance," but which would be more accurately described as an infringement of his sole right of representation or performance of said opera, on the 27th and 28th of December, 1899, at Regina.

The plaintiff claims that he is the proprietor of the sole right of representation or performance of said dramatic piece or musical composition by virtue of an assignment by the authors, Messrs. Gilbert and Sullivan, that such right extends to Canada, and that the defendants infringed his said rights by representing and performing said opera at a place of dramatic entertainment at Regina on the dates mentioned without his license or consent. The defendants deny the assignment, that the said musical composition was copyrighted, and the alleged infringement, and object that the statement of claim does not disclose any cause of action, because it does not show where the alleged copyright was obtained

or how it was assigned or that the assignment was registered, or that the representation complained of was for profit. At the trial the plaintiff put in a certified copy of the entry in the book of registry of copyrights and assignments kept at the Hall of the Stationers' Company pursuant to Act of Parliament, 5 & 6 Viet. (Imp.) ch. 45, being the original entry by the authors, W. S. Gilbert and Arthur S. Sullivan, on August 18th, 1880, of a "dramatic piece or musical composition," the title of which was "The Pirates of Penzance, or The Slave of Duty—Comic Opera," and the first representation or performance of which was at the "Bijou Theatre, Brighton, Devon, on 30th December, 1879;" also a certified copy of an entry in said book on December 18th, 1893, of an assignment of the sole liberty of representation or performance of said opera, described in the above entry, from said Sullivan and Gilbert to the plaintiff for, among other places, Canada. These copies had underwritten certificates duly signed and stamped by Charles Robert Risington, describing himself as "Registering Officer appointed by the Stationers' Company," pursuant to sec. 11 of said Act, 5 & 6 Viet. ch. 45. By said section the said book of registry is required to be kept at said hall, and the officer appointed by said company is authorized to give a copy of any entry in said book certified and impressed with the stamp of said company, and it further makes such certified copy *primâ facie* proof of the proprietorship or assignment of copyright or license as therein expressed, and in the case of dramatic pieces or musical compositions it shall be *primâ facie* proof of the right of representation or performance. The learned Judge in the judgment appealed from found that the production of the certified copies above mentioned established the plaintiff's right to bring his action for any unauthorized representation or performance of said opera, and nothing was shown in the argument before this Court to affect the correctness of such finding.

The learned Judge, however, dismissed the action on the sole ground that the evidence was not sufficient to establish the identity of the composition to which the certificates relate with the opera shown to have been performed by the defendants. The evi-

dence before him on that point was that of Mr. LeJeune, given orally at the trial. He swore that he knew the opera "The Pirates of Penzance," author and composer W. S. Gilbert and A. Seymour Sullivan—had heard and seen the performance several times. First time was about twenty years ago—when it was advertised as by one of the plaintiff's companies—that he last saw it performed on 28th December, 1899, in Regina, and that the performance in Regina was the same he had heard and seen twenty years ago, and he mentions that the defendant Dennis was the conductor of the representation, and that the defendants Brown, Briggs, Hamilton, Napier, Balfour and Pocklington took part in the performance on 28th December, 1899. This witness was not cross-examined by the defendants' advocate. The learned Judge took the view that this evidence "falls far short of compliance with the rule laid down in *Boosey v. Davidson* (1849), 13 Q.B. 257, and *Lucas v. Williams*, [1892] 2 Q.B. 113, and is insufficient to raise the presumption of identity on which the plaintiff's case depends." In *Boosey v. Davidson* the evidence relied on was that of a man who asserted that some sixteen years before he had seen in Milan a printed copy of the music in question, which statement, if sufficient, would have destroyed the plaintiff's copyright on the ground of prior publication in a foreign country. It was pointed out in the judgment there that this evidence was an attempt to prove by oral evidence the contents of a document alleged to be in existence sixteen years before. In the present case there is no evidence offered as to the contents of any document or book. Mr. LeJeune says he heard and saw something performed and that that something was the comic opera named in the plaintiff's statement of claim. The performance would be something appealing both to the eye and the ear—to the ear by words sung or spoken and with orchestral accompaniment, to the eye by the scenery and costumes and by the dramatic action of the players. Some at least of this could not well be printed or written, and there is no evidence that what Mr. LeJeune speaks of ever was so printed or written. He is not speaking of the score or music from his recollection of seeing the same on paper. He

says he heard and saw this opera performed several times. Then he says he heard and saw the opera that was performed in Regina Town Hall on 28th December last, and he says the opera so performed was the same as the opera he had seen and heard on the previous occasions. Given, a witness with a good memory, a trained ear for music, a familiarity with that class of performance and a faculty for observation, the testimony of such a one might be much more satisfactory evidence than the attempted record on paper of so much of such a performance as is capable of being represented to the eye alone on paper. It seems to me that the rule rejecting the oral testimony of a witness as to the contents of a document he had read does not apply here at all. What is sought to be proved in this case is not the contents of any book or document, but the resemblance or identity of two performances, partly verbal, partly musical, and partly made up of dramatic action, gesture and facial expression. It is quite possible that the argument of the case before the learned trial Judge was less full than it was before this Court, and especially would more emphasis be laid by the counsel for the plaintiff, on the argument for this appeal, upon the point on which the judgment in the Court below was adverse to him. The learned Judge was possibly of opinion that by the copyright law in England a copy of the dramatic piece or musical composition was required to be delivered at the British Museum under section 6 of 5 & 6 Viet. ch. 45, or at the Stationers' Company's Hall, under section 8. These sections, however, speak only of books, and the opera in this case comes within not the definition of a "book" but of a "dramatic piece." By section 20 the "provisions hereinbefore enacted in respect of the property of such copyright and of registering the same shall apply to the liberty of representing or performing any dramatic piece or musical composition . . . except that the first representation or performance of any dramatic piece or musical composition shall be deemed equivalent . . . to the first publication of any book." The provisions as to "property" are in section 3, and as to "registering" in section 11. This latter section, it will be noted, does not make registration compul-

sory—"a register wherein may be registered, etc." It is section 24 which makes registration necessary, but only in the case of copyright in books by making it a condition precedent to bringing an action for infringement. Section 20, it will be remembered, speaks of "provisions . . . hereinbefore," which obviously does not include the provisions of section 24. This latter section, however, expressly (though possibly with superfluous caution) provides that nothing herein shall prejudice the remedies which the proprietor of the sole right of representing any dramatic piece shall have "by virtue of 3 & 4 Wm. IV. ch. 15, although no entry shall be made in the book of registry aforesaid." There is, therefore, no statute requiring the delivery at the British Museum or elsewhere of a printed copy of a dramatic piece or musical composition. If there ever was, therefore, anything which could be called an original (in print or manuscript) of "The Pirates of Penzance," it was the manuscript scores furnished by Messrs. Gilbert and Sullivan respectively. Will it be argued that such original must be produced on every trial for infringement of the proprietor's rights? There is by statute no means provided whereby a certified copy of such original could be obtained. There are, it is true, the provisions in sections 8 and 13, qualified by section 20, that certain entries may be made in the book there mentioned, and that certified copies thereof shall be *primâ facie* proof of the right of representation of dramatic or musical pieces.

It comes, then, so far as LeJeune's evidence is concerned, to a question of whether it is such as to be entitled to any appreciable weight, for—as there was no attempt to deny, by any evidence tendered for the defence, that the two performances were identical with each other, and with the one referred to in the certificate from the Stationers' Company—the plaintiff must succeed on the question of identity if LeJeune's testimony is entitled to rank as at least *primâ facie* evidence of the fact. I do not understand that the learned Judge at the trial rejected Mr. LeJeune's evidence on the ground of being of no weight. He thought he was governed by the decision in *Boosey v. Davidson* and *Lucas v. Williams, supra*. As already pointed out, I do not think the former

case was parallel to this one, and as to *Lucas v. Williams*, it seems to me a fairly strong case for the plaintiff. In that case there was an original painting in existence, yet a witness was allowed to use an engraved copy of it, and to speak from memory of the picture, and to say that the photograph complained of as an infringement was a bad photograph of the engraved copy of such original painting. In that case, it is true, one of the two things between which the plaintiffs sought to prove a sufficient resemblance to constitute an infringement was in Court, i.e., the infringing photograph, but if it was allowable to speak from memory as to one of the two things compared—the painting itself—it is only carrying the principle one step further to allow the witness to speak from memory of the other subjects of comparison. The Master of the Rolls, in fact, discusses this very proposition, but, for an obvious reason, does not actually decide the point. He says: "Supposing that neither the alleged copy nor the original picture was produced. It is not necessary now to say, and I do not say that it would not be sufficient to call a witness who had seen both to say that they were exactly alike. . . . I do not know that it is necessary to produce either the original picture or the alleged copy."

Lopes, J., said: "I am of opinion that in an action like this you may call a witness to prove the infringement by saying that he knows the original picture, and that the alleged copy is exactly like it. That is not secondary evidence." So far as the evidence of the witness is concerned, it would seem immaterial whether or not he had the copy before him at the moment of expressing his belief in their similarity—its production could only be of advantage (if any) in enabling the jury to see it and compare it with the description given of the original. But that would, as pointed out in *Lucas v. Williams*, affect only the weight of the evidence.

It may be remarked that the language just quoted from *Lucas v. Williams*, and particularly that of Lopes, J., is quite in point in this case. LeJeune is a witness called "to prove the infringement by saying that he knows the original, and that the alleged infringing performance was exactly like it. That is not secondary evidence."

As to the proof of identity between the performances LeJeune saw twenty years ago and what is spoken of in the entries in the book of Stationers' Hall, I think the identity of the rather peculiar name of the piece—of the authors—of there being two authors—and of the time of its performance and that by one of the plaintiff's companies—and that no two different pieces could be registered under the same name—all amount to sufficient to shift the onus to the defendants of showing want of identity.

But there was other evidence produced by the plaintiff, the examination on oath of the defendant Briggs, who says he was secretary of the society to which the defendants belonged, and who undertook the representation which constitutes the alleged infringement. Before further considering his evidence it is necessary to deal with the objection that Briggs' evidence taken on examination and not at the trial, would bind only himself, and not his co-defendants. Rule 224 of the Judicature Ordinance says: "Any party may at the trial of an action or issue . . . use in evidence any parts of the examination of the opposite party." There is nothing here limiting it to use against himself. The Judicature Ordinance permits the cross-examination of such a party after his examination in chief—and Briggs was, in fact, cross-examined by Mr. Johnstone, who was the advocate for all the defendants, and who all joined in their defence. I have found no case to support the contention that the use of Briggs' examination would be admissible only as against himself. The decision in *Allen v. Allen and Bell*, [1894] P. 248, contains language that shows the test to be whether the other defendants or their counsel had the opportunity to cross-examine the witness. If they were denied that privilege, then the evidence given by a co-defendant ought not to be used against them. In the *Allen* case, if counsel for Bell had been allowed to cross-examine Mrs. Allen, her evidence would have been held usable as against him, but as the trial Judge refused him such privilege, her evidence ought not to have been used against him. Here, as we have seen, the defendant could have been cross-examined on behalf of his co-defendants by

their common counsel, and he was in fact so examined. His interest was identical with that of the other defendants. There is no suggestion that he was otherwise than friendly to them, and he was the secretary of the dramatic society. I am of opinion that this evidence was admissible against all the defendants.

That being so, I think there was ample evidence to show that the opera produced was the one mentioned in the certificates put in. Exhibit "W" to Briggs' examination (the programme) sets out that the performance was by the Regina Musical Society, to which he says all the defendants belonged, says it is a "performance of Gilbert and Sullivan's opera 'The Pirates of Penzance,'" and sets out the names of all the defendants as officers of the society as taking part in the performance. Exhibit "X" to Briggs' examination is the poster advertising the performance, and is also spoken of by Mr. LeJeune. It also represents the opera as being produced by the Regina Musical Society, and that it is Gilbert and Sullivan's "with full cast, chorus and orchestra." Mr. Briggs in his evidence says he knows the comic opera called "The Pirates of Penzance," that it was produced in the Regina Town Hall on 27th and 28th December, 1899, by the Regina Musical Society, and that he thought none of the prominent parts or features of the opera were omitted in the performance in question. "Was it practically the same? It was intended to be the same." (Briggs' examination.) I think this was ample evidence, uncontradicted as it was, to entitle the plaintiff to succeed.

The Regina Town Hall was, I think, unquestionably a place of dramatic entertainment—on the occasions referred to at least—the performances being public and in no sense private or domestic: *Duck v. Bates* (1884), 13 Q.B.D. 843.

Smiles v. Belford (1876), 1 A.R. 436, is a decision that 5 & 6 Viet. ch. 45, is in force in Canada, and was not repealed by the Canadian Copyright Act of 1875. Chapter 62 of R.S.C. does not make any provision as to sole right of representation or performance.

As to the damages, Briggs' evidence shows that the net proceeds of the entertainments was \$50.89. 3 & 4 Wm. IV. ch. 15,

sec. 2, provides that the damages shall be forty shillings for each representation, or the full amount of the benefit or advantage arising from such representation or the injury or loss sustained by the plaintiff, whichever shall be greater. There is no evidence as to what the injury or loss sustained by the plaintiff was, but the pecuniary benefit arising from the performance was \$50.

This Act was amended by 51-2 Viet. ch. 17, making the damages in the discretion of the Court or Judge, so that they "be reasonable." The costs also are left in the discretion of the Court. Double and treble costs were abolished by 5 & 6 Viet. ch. 97.

The Act 51-2 Viet. ch. 17, is, I think, in force here. The Act 3 & 4 Wm. IV. ch. 15, extended to Canada by its terms, and is in force here not by virtue of the North-West Territories Act. That being so, amendments or changes made since 1870 are to be observed here. It appears on evidence that the license fee demanded by the plaintiff would have been \$35. I think the verdict should be for that amount in favour of the plaintiff.

I think there is evidence implicating all the defendants except the defendant Fraser, who does not seem to have taken any part in causing the alleged infringing representation, nor at the rehearsals nor in the representations themselves, and judgment should not be against him. The formal judgment should, therefore, be in accordance with the judgment in this Court of my brother Wetmore just read.

ROULEAU and SCOTT, JJ., concurred.

Appeal allowed with costs.

Notes:

PERFORMING RIGHTS.

(a) *Nature of Performing Right.*

Performing right is the exclusive right of representing or performing in public dramatic or musical compositions. It is quite distinct from copyright which is the exclusive right of multiplying copies of a book; but the two rights

exist side by side in the same work. To dramatize a novel and to cause it to be represented on the stage without the author's consent is no infringement of his copyright which is the exclusive right of multiplying copies of a book; but the two rights exist side by side in the same work. To dramatize a novel and to cause it to be represented on the stage without the author's consent is no infringement of his copyright in the novel: *Reade v. Conquest* (1861), 9 C.B.N.S. 755; but it is an infringement to print and publish a play constructed from a copyright novel: *Tinsley v. Lacy* (1863), 1 H. & M. 747. In that case, Page Wood, V.C., said: "The only way in which an author can prevent other persons from reciting or presenting as a dramatic performance the whole or any portion of a work of his composition, is himself to publish his work in the form of a drama." But it is infringement of a drama to dramatize a novel founded on it: *Schlesinger v. Turner* (1890), 63 L.T. 764.

An author of a novel dramatized it, but the drama was never printed, published, or represented on the stage. In ignorance of this drama, another drama was written based on the novel, though in different form. This drama was represented on the stage. It was held that although the two dramas were founded on the one novel, the representation was not an infringement either of the novel or the author's dramatization thereof: *Toole v. Young* (1874), L.R. 9 Q.B. 523. It seems, moreover, that it makes no difference whether the author has published his dramatized version before the second drama was represented: *Schlesinger v. Bedford* (1890), 63 L.T. 762. There can, however, be no publication of copies of the dramatization of a copyright novel: *Warne & Co. v. Seebohm* (1888), 39 Ch.D. 73. Stirling, J., said (*ibid.*, p. 80): "The gratuitous distribution among the audience of copies of a poem or other work which an actor or declaimer thought fit to recite in public would be an infringement of the copyright therein. This being so, I am unable to see that the multiplication of an indefinite number of copies of a play (which if printed and published would be an infringement of copyright) for the purposes of enabling that play to be publicly represented can be otherwise than an infringement." These remarks do not seem quite consistent with the authorities given above, but are to be explained on the ground that the play complained of contained large portions of the novel verbatim. It was as such an abridgment of the novel as a dramatization thereof. It is impossible to present a play without multiplying copies of it for the use of the

actors etc., engaged in the representation. This view is borne out by the fact that the learned Judge ordered the extraction from the copies of the play and the delivery up of all passages copied, taken, or colourably imitated from the novel.

The right to a performing right is not infringed by publishing as a book a "dramatic piece" or play that has been publicly presented: *Clark v. Bishop* (1872), 25 L.T. at p. 911; but it may be an infringement of the common law right in the MS.: *Macklin v. Richardson* (1770), Amb. 694. The first publication of a dramatic piece or musical composition in book form does not divest the performing right: *Chappell v. Boosey* (1882), 21 Ch.D. 232. On the other hand, the performance of a play is not a publication so as to divest the common law right of the author to publish it as a book and his copyright therein: *Macklin v. Robertson* (1770), Amb. at p. 696.

Under the statutes 3 & 4 Will. IV. ch. 15, sec. 1, and 5 & 6 Viet. ch. 45, secs. 15, 2, performing rights extend to all the British Dominions, including Canada. The performing right in musical compositions is governed by these two Acts, as modified by the Copyright (Musical Compositions) Acts of 1882 and 1888.

(b) *What is a Musical Composition.*

The necessary originality in a musical composition consists either in a new air or melody, or in the arrangement and composition of an old air. Thus whefe N. composed and published an opera in full score at Berlin, and after his death B. arranged the score of the whole opera for the pianoforte, also the overture for the piano, and the whole opera pour le piano seul, it was held that the arrangements for the pianoforte were independent musical compositions of which B. was the composer: *Wood v. Boosey* (1867), L.R. 2 Q.B. 351. Mellor, J., said (*ibid.*, p. 355): "It was contended that it was not an independent work which required independent thought, skill, and composition. I think . . . that it is not within the definition of accessory; it is something quite independent of the original opera itself. It is a work which makes the music of the opera a new mode of enjoyment by persons who can perform it on the piano." The adaptation of new words and accompaniment to an old air is a fit subject for copyright. This was said to be very like the common case of improvements in a machine where the patent is taken out for an improved machine: *Leader v. Purday* (1849), 7 C.B. 4; *Lover v. Davidson* (1856), 1 C.B.N.S. 182. The limitation of this rule is found in

the novelty of the new arrangement or adaptation, for it is only so far as it is novel that it can be protected.

(c) *What Musical Works are Protected.*

As to when the statutory protection begins there is conflict of opinion. The statutes covering the question are 3 & 4 Will. IV. ch. 15, and 5 & 6 Vict. ch. 45, sec. 20. Under the first, the author of a dramatic piece or a musical composition is given a perpetual performing right in his work not printed and published in book form. This right is to be taken no doubt as beginning at composition. If the dramatic piece or musical composition is printed and published as a book the limit of protection is twenty-one years from publication, or for the life of the author, whichever be the longer period. Under the second statute, sec. 20, after stating that the provisions of 3 & 4 Will. IV. ch. 15, and of this Act shall apply to musical compositions, limits the term of protection for the performing right to forty-two years, commencing from the first public performance or representation.

It is submitted that, as to published dramatic pieces and musical compositions, the protection is for forty-two years, or for the life of the author plus seven years from the first performance or representation. But as to unperformed dramatic pieces and musical compositions which are covered by 3 & 4 Will. IV. ch. 15, and given perpetual protection, does the statute of Victoria deprive them of the protection given by the statute of William? The point came up in *Reichardt v. Sapte*, [1893] 2 Q.B. 308. The facts were that A. wrote a dramatic piece and B. subsequently wrote one very similar. B.'s drama was first performed, and a few days later A.'s. In an action by B. against A. for infringement of performing right, Hawkins, J., held that A. had acquired his performing right under 3 & 4 Will. IV. when he wrote his drama, and the right having vested, there was nothing in any subsequent legislation to deprive him of it, this, too, even assuming the two plays to be substantially alike either wholly or in material parts. The learned Judge said (at p. 312): "In none of the enactments in 5 & 6 Vict. ch. 45, will be found anything which prejudicially affects the right of sole representation conferred by 3 & 4 Will. IV. ch. 15. The first production of a dramatic piece mentioned in sec. 20 of the Victorian statute, confers no priority on the first producer, nor does it confer a title to the sole liberty of representation. That is conferred by the statute 3 & 4 Will. IV. ch. 15, upon the author or his assignee;

it only fixes the first production as the point from which the endurance of the sole liberty of representation is to be calculated."

The result seems to be:

(j.) *Dramatic work or musical composition performed*: performing right protected for forty-two years from date of first performance, or author's life plus seven years: 5 & 6 Viet. ch. 45, sec. 20.

(ii.) *Dramatic work or musical composition unperformed*: Performing right given on composition and for ever if the work is not printed or published as a book within British Dominions: 3 & 4 Will. IV. ch. 15; or if so printed and published, then performing right for forty-two years from date of publication, or for author's life and seven years: 5 & 6 Viet. ch. 45, sec. 20.

As to whether the extension of 3 & 4 Will. IV. ch. 15, is only applicable to musical compositions of a dramatic nature, the law is not definitely settled. In *Russell v. Smith* (1848), 12 Q.B. 217, this point was quered, but as the song in question there was held to be a "dramatic piece," no decision on the point was made. Then the case of *Wall v. Taylor* (1883), 11 Q.B.D. 102, is said by *Macgillivray*, Copyright, p. 131, to be authority for the proposition that all musical compositions are protected. That was a decision of the Court of Appeal, Cotton, L.J., dissenting from Brett, M.R., and Bowen, L.J. On a careful reading of the case, however, there seems to be nothing in it to justify such a conclusion. On the contrary, the point decided was merely that in order to recover the penalties provided for under sec. 21 of 5 & 6 Viet. ch. 45, which incorporates 3 & 4 Will. IV. ch. 15, there need not be a representation of the musical composition at a place of dramatic entertainment, a condition required by 3 & 4 Will. IV. ch. 15, sec. 2. This is a very different matter from deciding that all musical compositions are protected. Again, in *Fuller v. Blackpool Winter Gardens*, [1895] 2 Q.B. 429, Lord Esher, M.R., said (at p. 434): "I do not know that it is possible to define with precision what is a dramatic piece and what is a musical composition. A musical composition may also be a dramatic piece; but it does not follow that all are. To bring a musical composition within the Dramatic Copyright Act, 1833 (3 & 4 Will. IV. ch. 15) it must have the qualities that belong to such dramatic pieces as are mentioned in the Act." Thus, we have a *quere* and

a deliberate dictum to the effect that 3 & 4 Will. IV, ch. 15, does not extend to musical compositions not of a dramatic nature, while on the other hand we have Mr. Macgillivray's statement based on no authority at all, or rather based on authorities that are clearly against him. In such a condition of things, it may be safely concluded that the musical composition must possess dramatic qualities to be protected under the extension of 3 & 4 Will. IV, ch. 15.

Once a musical composition has been printed and published without notice of reservation, it will in all probability be impossible to obtain any protection for the performing right afterwards by publishing copies with reservation.—Per H. L. Smith, L.J.: *Fuller v. Blackpool*, [1895] 2 Q.B. 429.

(6) INTERPRETATION OF THE CANADIAN ACT.

[IN THE HIGH COURT OF JUSTICE FOR ONTARIO.]

ALLEN V. LYON.

Copyright—License to Publish—Writing—Injunction.

To create a perfect right under the Copyright Act, R.S.C. ch. 62, sec. 30, there should be an assignment in writing of the license to print and publish; but, without any writing, there may be such conduct on the part of the owner in consenting to and encouraging the infringement alleged as will disentitle him to an injunction.

THIS was an action brought by Charles W. Allen against James W. Lyon claiming an injunction restraining the defendant from printing, publishing and selling a certain book said to contain certain passages pirated from the plaintiff's book.

In his defence, the defendant set up that the plaintiff consented to his publishing such parts of the plaintiff's book as had been published by him.

The action was tried at Whitby, on October 20th, 1883, before Boyd, C.

W. Cassels, Q.C., for the plaintiff.

B. B. Oster, Q.C., and *Guthrie*, for the defendant.

The learned Chancellor held that a verbal consent or licence on the part of the plaintiff had been proved, but reserved judgment as to whether the consent must be in writing.

November 21st, 1883. BOYD, C.:—To create a perfect right under the statute (38 Viet., ch. 88, now R.S.C., ch. 62), there should be an assignment in writing of such parts of the book as the owner of the copyright therein is willing to permit his licensee to publish; but, without any writing, there may be such conduct on the part of the owner, as disentitles him to relief in equity by way of injunction. I have found upon the

facts in this case, that the plaintiff was aware of the defendant's intention to publish what is now complained of in pursuance of an assent given by the plaintiff, and encouraged the defendant in so doing. That is, in substance, the case of *Rundell v. Murray* (1821), Jac. 311. See also *Saunders v. Smith* (1838), 3 My. & Cr. 711. In both injunctions were refused, and the parties left to their strict right at law. I said, at the close of the argument that the plaintiff's damages were but trifling, at the outside, not over \$20, and if this case were before me in its purely legal aspect I would give no more. This amount is too small to litigate about in this Court; and I have no doubt my proper course is, to dismiss the action. I have hesitation about costs. It would perhaps be unreasonable to withhold costs from the defendant, who succeeds; yet there being some cause of action in the plaintiff, he should not pay all costs; as a rough way of doing justice, I think that the plaintiff should get his costs on the lower scale.

Notes:

ASSIGNMENT DISTINGUISHED FROM LICENCE.

It is to be noted that in this case there was no question of the assignment of the copyright itself. By sec. 15, R.S.C. ch. 62, an assignment of the copyright must be by an instrument in writing made in duplicate.

The difference between an assignment and a licence must be carefully observed. An *assignment* is a transfer of the right leaving nothing in the grantor and bestowing on the grantee the whole interest with right to sue for infringement and to re-assign. A *licence* is the transfer of a beneficial interest, to a limited extent agreed upon between the parties, whereby the transferee acquires an equitable right in the copyright. Hence the licensee can bring action only in the name of the licensor. "The question whether any transaction amounts to an assignment or a licence is answered by considering (1) whether on a true construction of the statute, the right purported to be given can be given by assignment or only by licence. If the right is one so limited that it cannot legally be the object of assignment, the transaction must

necessarily be a licence; but if it can legally be the object of an assignment, (2) the further question arises as to what was the intention of the parties as evidenced by what they have said and done. Often the form of transfer used will be found ambiguous; the principal test in such cases is to examine the contract and the circumstances under which it was made and see whether or not it bears the impress of a reliance by the grantor on the personal skill or reputation of the grantee. If it does a licence will be presumed rather than an assignment; for instance, in a publishing agreement a licence only will be presumed, since either the pocket or the reputation of the author would suffer if the right of publication were to pass into incompetent hands:" *Macgillivray*, Copyright, p. 81, quoting *Hole v. Bradbury* (1879), 12 Ch.D. 886; *Stevens v. Bradbury* (1854), 1 K. & J. 168; *Reade v. Bentley* (1857), 3 K. & J. 271; *Cooper v. Stephens*, [1895] 1 Ch. 567; *Ex parte Bastow* (1854), 14 C.B. 631. In one case it was said: "If the agreement is that certain persons shall have the sole power of printing a certain work for all time, that would be parting with the copyright; but if the agreement is that the publishers shall, so long as they perform certain conditions, have the right of printing and publishing the book, that is a very different thing." *i.e.*, a licence: Lord Hatherley in *Stevens v. Benning* (1855), 1 K. & J. p. 174.

The principle established by *Stevens v. Bradbury*, *Reade v. Bentley*, and *Hole v. Bradbury*, that a publishing agreement between an author and a publisher or a firm of publishers, is personal to the individuals entering into it, and that the benefit of such an agreement is not assignable without the author's consent was extended to the case of a similar agreement between an author and a limited company: *Griffith v. Tower Publishing Co.*, [1896] 1 Ch. 21.

A licence will not be treated as a sole licence unless it is expressly stated or must necessarily be implied from the circumstances that it is so. Hence the first licensee cannot, these conditions not being present, restrain the licensor from granting, or a second licensee from acting on, a second licence: *Warne v. Routledge* (1874), L.R. 18 Eq. 497; *Cooper v. Stephens*, [1895] 1 Ch. at p. 571.

It seems that the author of an article who has licensed its use in some general book, as for instance, an encyclopædia, fairly and reasonably intends, in the absence of some explicit declaration to

the contrary, that future editions of the work may be issued, and also that such future editions may be modified by the omission or addition of articles or changes in the other articles within reasonable limits. Thus, the defendant had been licensed, by the owner of the copyright, to publish a song in a collection. Later the song was published in an abridged and also in an enlarged edition of the original collection. In neither republication was the song changed in any particulars. It was held that the defendant was entitled to make the republications: *Gabriel v. McCabe* (1897), 74 Fed. Rep. 743.

[IN THE SUPREME COURT OF CANADA.]

NICHOLAS GARLAND V. JOSEPH A. GEMMILL.

Copyright—Infringement of—Sources of Information—Statutory Form of Notice of—Decree Form of—R.S.C. ch. 62, secs. 12 and 33.

The publishers of a work containing biographical sketches cannot copy them from a copyrighted work, even where he has applied to the subjects of such sketches, and been referred to the copyrighted work therefor.

In works of this nature, where so much may be taken by different publishers from common sources, and the information given must be in the same words, the Court will be careful not to restrict the right of one publisher to publish a work similar to that of another, if he obtains the information from common sources and does not, to save himself from labour, merely copy from the work of the other that which has been the result of the latter's skill and diligence.

The notice of copyright to be inserted in the title-page of a copyrighted book is sufficient if it substantially follows the form given in the statute. Therefore the omission of the words "of Canada" is not a fatal defect; and, even if a defect, such defect is removed by sec. 7, sub-sec. 44, of the Interpretation Act (R.S.C. ch. 1).

Depositing in the office of the Minister of Agriculture copies of a book containing notice of copyright before the copyright has been granted does not invalidate the same when granted.

THIS was an appeal from a decision of the Court of Appeal for Ontario affirming the judgment of Boyd, C., in favour of the plaintiff; that judgment follows and contains the facts of the case so far as is necessary to the understanding of the points decided.

June 12th, 1886. *BOYD, C.*:—After the best consideration which I can give to this case, my conclusion is, that the plaintiff is entitled to an injunction to protect his copyright against the invasion of the defendant. The plaintiff is entitled, in my judgment, to rest upon his edition of the "Canadian Parliamentary Companion" of 1883, of which he is the compiler, and which I find that he has duly copyrighted. This book is made up of old matter extracted from former editions of 1874 and 1881, and in great part of new matter collected and arranged by the plaintiff, giving information as to Senators, Members of Parliament, and prominent officials, who first appeared in public life since the edition of 1881. At the trial I compared this new matter in many different places with the defendant's compilation, called "The Parliamentary Directory and Statistical Guide" of 1885, and found as a fact that there was in the latter a literal transcription by wholesale of long passages from the former, which entitled the plaintiff to an injunction if he had a title to the copyright of his book. Two points of law were made against his title: First, that section 17 of the Copyright Act has been violated by the plaintiff. I am against this objection as fatal. It may be a matter of penalty, but I do not think it would be even that considering what was done. The plaintiff appears to have had printed the book which he was going to copyright, with notice thereon of copyright having been secured, before he had actually taken the requisite steps to obtain a copyright. This, however, was merely in anticipation of applying for and obtaining it. It saved expense, it was sanctioned by the practice of the office at Ottawa, and there was no publication of the book till after his statutory title was complete.

Second, it is said that section 9 of the Act has not been complied with. That is as follows: "No person shall be entitled to the benefit of this Act, unless he gives information of the copyright being secured, by causing to be inserted in the several copies of every edition published during the term secured, on the title page or the page immediately following, if it be a book
* * the following words that is to say: "Entered according

to Act of Parliament of Canada, in the year —, by A. B., in the office of the Minister of Agriculture ;" 3S Vic. ch. 58, (D.) In the plaintiff's edition of 1883, this notice appears in the proper place and in these words : "Entered according to the Act of Parliament, in the year one thousand eight hundred and eighty-three, by J. A. Gemmill, in the office of the Minister of Agriculture at Ottawa." The objection is, that it does not follow the form of the statute, because the words "of Canada," are omitted after "Parliament."

Now it is to be observed that the form of words given has no magical effect like the "Open Sesame" of the Arabian tale, no symbolical operation like the phrases used in the Act relating to short forms of conveyances and mortgages. The object of the provision is plain, and lies on the face of the section, viz.: to give notice of copyright, so that none of the public may copy the work in ignorance of the author's rights. It is also to be observed that a literal adherence to the form is not peremptorily prescribed, because the blank for the year has to be filled up according to the fact, and the letters "A.B." have to be exchanged for the name of the applicant. It is also clear that there is nothing misleading in the notice of entry as it stands—no fact wrongly stated,—no omission of any information that is material. It is common knowledge that only the Parliament of Canada can legislate with reference to copyright to be registered in the office of the Minister of Agriculture at Ottawa. The omission of the words, "of Canada," is, therefore, in my opinion, immaterial, because they are, if not surplusage, at least of such minute significance in this connection that the law will not notice the variance. The meaning of the form of words given in the book is substantially and effectively, if not literally and formally, the same as that found in the statute. That being so, I think the principles enunciated in the advice given by Mr. Justice Crowder on behalf of the judges to the House of Lords in the case of *Earl of Mountcashell v. Viscount O'Neil* (1872), 5 H.L. Cas. 937, are pertinent to this case, and to the effect that forms, though literally prescribed by the Legislature, may be varied

according to reason and common sense, so long as the material matters provided for are correctly given. To the like effect is the judgment of a majority of the judges in the very recent case of *Ex parte Stanford, in re Barber*, 34 W.R. 507 (April, 1886.)

I may refer to some kindred cases which support my conclusions to a greater or lesser extent. In *Thorp v. Browne* (1867), L.R. 2 H.L. 220, the question was, as to whether the statute was complied with which in the registration of judgments to form a charge on land requires the description of the name and place of abode of the debtor to be given. Lord Chelmsford, L.C., said at p. 232: "We have to look to what the object and intention of the Legislature were in requiring that there should be these particulars. * * It was clearly for the purpose of identification. It was not that there should be an exact description of the very place where he was residing, so that any person might resort to him there, and ascertain particulars. It was for the purpose of distinguishing him from all other persons, and leaving no doubt whatever as to the identity of the person against whom the judgment which was to be charged upon the lands had been obtained." Lord Colonsay said, at p. 236: "I am very decidedly of opinion that when a statute requires a particular thing to be done * * it is necessary that the statute should be complied with in the way that is there pointed out, and that equivalents cannot be accepted. But there is a great difference between the entire omission of the statement and the question whether the statement is sufficient for the accomplishment of the purpose of the statute. Omission of statement, or error of statement, is very different from vagueness of statement."

The same question as to registration of judgments arose in *Davies v. Kennedy* (1840), Ir. R. 3 Eq. 31, and the Master of the Rolls said, at p. 69, following the line of Lord Colonsay's observations: "When a statute like this directs certain matters to be stated in a document, although the Court may be satisfied that the object for which any particular statement is required might be equally well attained in some other way, it cannot speculate on that, or inquire into the object intended, with any view of

allowing an equivalent. But it may and ought to inquire into the object intended with another view, viz., to ascertain whether what is stated is or is not what the Act requires." He says again, at p. 69: "The tendency of the more recent decisions is to discourage subtle criticisms and trifling objections, which found more favour in early discussions than they would now receive." In *Re Hewer, ex parte Kahen* (1882), L.R. 21 Ch.D. 871, the question arose whether the statute as to Bills of Sale which requires that a "true copy" of the instrument should be registered, had been complied with. An omission was made of the words "on the third day of each month" in the clause as to the manner of payment. Bacon, C.J., said, at p. 875, overruling the objection: "In what respect is it an untrue copy? A true copy does not necessarily mean an exact copy. * * The Act does not require it to be an absolutely exact copy, but that it shall be so true that nobody reading it can by any possibility misunderstand it." "This," he goes on to say, at p. 876, "is in my opinion a sufficiently true copy, and nobody can say that there is anything false in the copy, and it cannot mislead any one who reads it."

The provisions of our statutes as to notice of entry are taken from United States legislation, and one would naturally desire that the construction given to this and kindred clauses by our courts should not be at variance with the judicial construction put upon the Act of Congress. While the earlier authorities cited by Mr. Cassels indicate that a punctual adherence to form is requisite, no case goes so far as to support his present contention. The later decisions are in accord with the views which I have taken of this case. In the comparatively old case (1848) of *Baker v. Taylor*, 2 Blatch. (C.C.U.S.) 82, it was held that the insertion of the wrong year (1847 for 1846) in the notice of entry was a fatal objection to the copyright, whereas in the decision of 1881, in *Myers v. Callaghan*, 10 Bissel (C.C.U.S.) 139, a like mistake in the notice (1866 for 1867) was deemed unimportant. This decision goes much beyond what it is necessary to hold in order to support the plaintiff's copyright, because that was an error in what seems to me an important particular and one which

might have a tendency to mislead. It was, however, approved of as laying down the correct principle in cases of slight error by a very eminent Judge (Blatchford) in *Donnelley v. Ivers* (1882), 20 Blatch. (C.C.U.S.) 381.

In *Myers v. Callaghan*, 10 Bissell (C.C.U.S.), Drummond J., uses language at p. 146 which I desire to quote and to adopt as pertinent to the case of the plaintiff: "In *Wheaton v. Peters* (1834), 8 Peters 991, the Supreme Court decided there must be a strict compliance with the provisions of law. I do not understand that the Court has laid down the rule with such unbending rigour as seems to be implied in *Baker v. Taylor* (1848), 2 Blatchf. (C.C.U.S.) 82. Undoubtedly a majority of the court in the case of *Wheaton v. Peters* held that the law must be complied with, but they do not say that if there shall be a slip in any trifling particular, therefore the author is deprived of all right to the product of his brain and of his hand. Conceding that it is a right which must exist under the law, the question is, whether, if that is substantially and in good faith complied with, it is not sufficient? It seems to me that it is. * * * I am not inclined to agree with the strict construction which has been placed on the Acts of Congress by some of the Courts. It seems to me on the contrary, that these various provisions should have a liberal construction in order to give effect to what may be considered the inherent right of the author to his own work." An English authority going in the same direction as *Myers v. Callaghan*, is *Lover v. Davidson* (1856), 1 C.B.N.S. 182.

I have not overlooked the provisions in the 20th section of the Act 38 Vict. ch. 88 (D.), relating to *clerical errors* in any instrument drawn in the office of the Minister being curable, which may reflect disastrously upon errors in papers prepared by the applicants. But this does not necessarily follow, for clerical errors may be in material as well as immaterial facts, and may be important or unimportant.

Inhibiting the use by the defendants of the parts first pub-

lished in the plaintiff's edition of 1883, will so substantially interfere with the whole of the defendant's publication of 1885, that it is not necessary to prosecute the inquiry further as to whether there is copyright in the parts of the plaintiff's book which were published in the editions of 1874 and 1881. That would raise a somewhat nice as well as difficult question which has not been presented in the pleadings, or adverted to in the argument, involving the construction and effect of the 9th and 26th sections of the present Act and parts of the earlier statutes.

Judgment will be for the plaintiff, limited to an injunction (as he waived other remedies at the hearing), with costs.

From this judgment the defendant appealed and the Court of Appeal affirmed the decision as it stood. Then the defendant brought the case to this Court and the appeal was heard before STRONG, FOURNIER, HENRY, TASCHEREAU and GWYNNE, JJ., on the 18th and 19th of November, 1887.

W. Cassels, Q.C., and Walker, for the appellant.

Arnoldi, for the respondent.

During the argument, the following among other cases, were cited and commented on: *Pike v. Nicholas* (1870), 15 Chy. 251; *Cary v. Kearsley* (1803), 4 Esp. 168; *Black v. Murray*, 9 Sess. Cas. 3rd ser. 353; *Thomas v. Turner* (1886), 33 Ch. D. 292; *Langlois v. Vincent* (1875), 18 L.C.J. 160; *Morris v. Wright* (1870), L.R. 5 Chy. 279; *Morris v. Ashbee* (1868), L.R. 7 Eq. 34; *Keely v. Morris* (1866), L.R. 1 Eq. 697; *Beckford v. Hood* (1798), 7 T.R. 620.

December 20th, 1887, the judgment for the Court was delivered by GWYNNE, J. The decree made in this cause not only restrains the defendant from selling the book published by him and known as *The Parliamentary Directory and Statistical Guide* of 1885, but also from publishing and selling any further edition thereof, or containing matter copied or pirated from the books of the plaintiff, known as *The Canadian Parliamentary Companion*

for the years 1862, 1874, 1877, 1878, 1879, 1880, 1881, or 1883 ; of all of which works, except the last, the plaintiff is now proprietor by assignment from the publishers thereof, and from publishing or selling any book containing any portions, passages or extracts taken or colorably altered from the said plaintiff's books or any edition thereof in the preparation of or for the purpose of assisting in the preparation of any future edition of the defendant's said book, or any other book. The learned Chancellor of Ontario, before whom the case was tried, having made a very careful comparison of the new matter appearing in the plaintiff's *Canadian Parliamentary Companion* "of 1883," with the defendant's book of 1885, and having come to the conclusion that much in the latter book had been copied and pirated from the plaintiff's book of 1883, made no comparison between the defendant's book and the *Canadian Parliamentary Companion*, published in the said years prior to 1883, of which, and of the right of the authors thereof therein, whatever those rights were, the plaintiff is the assignee. The learned Chancellor says in the judgment : Inhibiting the use by the defendant of the parts first published in the plaintiff's edition of 1883, will so substantially interfere with the whole of the defendant's publication of 1885, that it is not necessary to prosecute the enquiry further, as to whether there is copyright in the parts of the plaintiff's book which were published in the editions of 1874 to 1881.

The defendant appealed from the above decree to the Court of Appeal for Ontario on various grounds of objection, which have been reviewed before us, that Court having dismissed his appeal. The question before us must be limited to an enquiry as to the piracy of matter contained in the plaintiff's *Canadian Parliamentary Companion* of 1883 ; for assuming the previous books published in the years mentioned in the decree to have been registered as required by the Copyright Act in force in those respective years, still the defendant contends that if there be any matter contained in his book which can be found also in the books published in the years prior to 1883, of which the plaintiff is the

assignee, such matter was obtained by the defendant and the authors of those respective books from common sources, some of those sources having been, as is admitted, books previously published by the authors whose rights the plaintiff has purchased as regards the years mentioned in the decree, but which previous books such authors had not registered as required by the Copyright Act, and in which, therefore, they had acquired no copyright. This branch of the defence not having been entered into and adjudicated on by the learned Chancellor the decree should not have dealt with it as if it had been entered into and adjudicated on against the defendant. In works of this nature, where so much may be taken from common sources and where much of the information given, if given correctly, must be given in the same words we must be careful not to restrict the right of the defendant to publish a work similar in its nature to that of the plaintiff if, in truth, he obtains the information from common, independent sources open to all, and does not to save himself labor, merely copy from the plaintiff's book that which has been the result of his skill, diligence and literary attainments. We must be careful not to put manacles upon industry, intelligence and skill in compiling works of this nature.

The parts which the learned Chancellor has found, and, as I think, correctly found to have been copied by the defendant from the plaintiff's *Canadian Parliamentary Companion* of 1883, consists of short biographical sketches of some of the members of the Parliament of Canada. It must, I think, be admitted that the defendant set about the compiling of his work in a perfectly legitimate manner by addressing circulars to each member of Parliament, requesting him to furnish a short sketch of his life for publication in the defendant's work. If all the gentlemen who received these circulars had answered them by writing in their own language, short sketches of their lives and had sent them to the defendant for publication in his book, he would have had as much right to have published these sketches in the language in which they were sent to him, or in an abridgement thereof prepared by himself, as the plaintiff had to publish like

sketches furnished to him, although the language in which both sketches might be expressed should be very similar ; but unfortunately for the defendant, it appears that several of the gentlemen who had received the defendant's circular replied to the effect that they had already supplied such a sketch to the plaintiff for publication and which was published in his book. The defendant conceiving this sufficient authority to entitle him to take from the plaintiff's book the biographical sketches of such gentlemen as so referred him to the plaintiff's work, did copy them from the plaintiff's work, and thus, ignorantly perhaps but not the less actually, was guilty of the piracy of which the plaintiff has accused him. To the extent of the matter so copied the plaintiff has established his right to have an injunction.

In view of the nature of the respective works of the plaintiff and defendant the plaintiff will obtain all the protection he is entitled to if the decree should be, and I think it should be, in the form of the order for injunction in *Lewis v. Fullerton* (1839), 2 Beav. 14 ; and which was followed in *Kelly v. Morris* (1865), L.R 1 Eq. 167 ; namely, " The Court doth order and "adjudge that the defendant, etc. (as in decree), be and he is " hereby restrained and enjoined from further printing, publishing, selling or otherwise disposing of any copy or copies of " a book called ' *The Parliamentary Directory and Statistical " Guide,*' 1885, containing any article or articles, passage or passages, copied, taken or colorably altered from a book called " *The Canadian Parliamentary Companion,* 1883," published by the plaintiff.

Upon the point as to the alleged defective entry in the plaintiff's book of the information required by the statute to be given of his copyright being reserved, by reason of the omission of the words "of Canada" after the words "of the Parliament," I am of opinion that there is nothing in this objection. The object of the insertion of the entry is to give information to the world that the work is copyrighted, and that by reference to the office of the Minister of Agriculture the precise date from which such copyright runs may be ascertained. The entry so published in the

plaintiff's book is sufficient for that purpose and, as I think, is sufficient independently of the enactment contained in sub-section 44 of sec. 7 of the Interpretation Act of 1886; but if the entry was defective, apart from that act, such defect is, in my opinion, removed by the above section. The references to the cases decided on the English Act have no application as they relate to a provision in the English Act not in our Act.

Neither is there anything in the objection that the copies deposited in the office of the Minister of Agriculture, under the provision of the statute in that behalf, contained the entry of information as to copyright being secured, which is required to be inserted in every copy of every edition of a copyrighted book published during the term secured. The clause requiring such deposit to be made merely requires that two copies of the author's book shall be deposited in the office of the Minister of Agriculture, etc. Now the insertion of the entry in the copies supplied to the office of the Minister of Agriculture, cannot deprive them of their character of being the book of the author who is desirous of securing his copyright. The entry in copies supplied to the Minister shows that the work is printed and ready for publication, but the point sought to be established is, that it proves that the work was published before the copyright was secured and so the copyright was lost. This may perhaps be said to be an ingenious but to be rather a very fallacious argument. Our judgment, I think, should be that the decree varied as above be affirmed with costs to be paid the plaintiff, and the appellant must pay the costs of the appeal, as he has failed on the material points. The decree being so varied, the appeal will be dismissed with costs.

Walker & McLean, solicitors for the appellants.

Ferguson & Gemmill, solicitors for respondents.

Notes:

NOTICE OF COPYRIGHT.

The notice to be printed on the title-page or on the page immediately following is designed to give notice to the public so

that none may copy the work in ignorance of the author's or proprietor's rights. Literal adherence to the form is not prescribed nor is it necessary.

English books frequently contain no notice, this not being required under the English Act. There the entry is made at Stationers' Hall in London, and the public must inform itself of the existence of the copyright at its own trouble and expense. But the Act giving copyright in engravings and prints requires that the date of the first publication shall be engraved together with the name of the proprietor on each plate, and printed on every print: 8 Geo. II. ch. 13, sec. 1.

In the United States, the U.S. Rev. Statutes, sec. 4962, as amended by the Act of June 18, 1874, set out a form of words similar to that in the Canadian Act, and to be placed in a like position in the book, viz.: "Entered according to the Act of Congress in the year — by A. B., in the office of the Librarian, at Washington;" or, optionally, the word "Copyright," together with the year the copyright was entered, and the name of the party by whom it was taken out, thus: "Copyright, 18—, by A. B." It has been held in the U.S. Courts that a substantial compliance with this provision is sufficient: *Snow v. Mast* (1895), 65 Fed. Rep. 995; *Myers v. Callaghan* (1868), 40 Bliss. (U.S.) 139. A copyright notice in the words "Entered according to Act of Congress in the year 1878 by H. A. J." was, however, held insufficient because the words "in the office of the Librarian of Congress at Washington" were omitted: *Jackson v. Walkie* (1886), 29 Fed. Rep. 15. It was said, however, that this notice would have been sufficient if it had contained the word "Copyright:" *Hefel v. Whitely Land Co.* (1893), 54 Fed. Rep. 179. In one case where the short form was used, thus: "Copyright '94. By B. L. Snow," the abbreviated form of the date was considered sufficient: *Snow v. Mast (ante)*; *Bolles v. Outing Co.* (1899), 45 U.S. App. 449.

Where the applicant makes a deliberate misstatement in the date or allows a mistake in date to remain, the copyright may be lost. Thus, where 1847 was the date in the notice, while the title was deposited in 1846, and there was evidence to shew the plaintiff's knowledge of the error before publication, it was held that these facts deprived plaintiffs of their copyright: *Baker v. Taylor* (1848), 2 Blatch. (U.S.) 82. In a later case, where the notice was dated 1866, when in fact the book was not deposited till 1867, the copyright was held not invalidated, because no one, except

the owner of the copyright, could be damnified by the error, and on this ground the preceding case was distinguished: *Myers v. Callaghan* (1868), 10 Bliss. (U.S.) 139.

COMMON SOURCES OF INFORMATION.

The right of copyright is an exclusive right of reproducing and multiplying the whole or any part of an original literary or artistic work. Copyright creates no monopoly in the subject matter. All human events are equally open to all who wish to add to or improve the materials already collected by others making an original work: *Per Erskine, L.C.*, in *Mathewson v. Stockdale* (1806), 12 Ves. p. 273. A work may be produced identically the same as the protected work provided the author goes to the common sources of information and does not merely copy the protected work. He must, however, do the work of research and compilation for himself. He may, however, make a "fair use" of former copyright works. In Stephen's Digest, "Report of Copyright Commission," 1878, p. lxx., "fair use" is summarized as follows:—

- (a). Using the information or ideas without copying or imitating the words of a copyright book so as to produce what is substantially a copy.
- (b). Making extracts (even if they are not acknowledged as such) appearing under all the circumstances of the case reasonable in quality, number and length, regard being had to the objects for which the extracts are made and to the subjects to which they relate.
- (c). Using one book on a given subject as a guide to authorities afterwards independently consulted by the author.
- (d). Using one book on a given subject for the purpose of checking the result independently arrived at by the author.

Thus it is no infringement to take the general scheme or idea of another book or the theories therein. It is the expression of these that is protected. In *Jarrold v. Houlston* (1857), 3 K. & J. 708, the question whether a book in the form of questions and answers giving information respecting the common phenomena of nature infringed a prior book, Dr. Brewer's "Guide to Science," of the same general plan and purpose, was answered in the negative. In *Mawman v. Tegg* (1826), 2 Russ. 385, the contest arose

between the proprietors of two encyclopedias, the later one containing verbatim copies of articles in the former. Lord Eldon, L.C., in giving judgment, said: "You are not merely to look at what is published in the one work being part of the other work, but you are to consider, whether the matter alleged to have been copied has, upon the whole, been used in such a manner as to shew that the party meant to give to the public what might fairly be called a new work; or whether, on the other hand, in robbing the former author of so much of his work, he acted *animo furandi*." Lindley, L.J., in *Lamb v. Evans*, [1893] 1 Ch. at p. 224, said: "It is just like the case of a man who publishes a map of a particular country: another may publish a map of the same country exactly like it if he make his map from original materials; but the first can restrain the other from copying his map, which is a totally different thing." In *Pike v. Nicolas*, where two rival historical essays on "The Origin of the English Nation" were disputed over, James, V.C., said: "There is no monopoly in the main theory of the plaintiff or in the theories and speculations by which he has supported it, nor even in the use of the published results of his own observations:" *Ibid*, (1869), L.R. 5 Ch. at p. 260.

Every author must do his own work. "Any man is entitled to write and publish a topographical dictionary and to avail himself of the labours of all former writers whose works are not subject to copyright, and of all public sources of information; but whilst all are entitled to resort to common sources of information, none are entitled to save themselves trouble and expense by availing themselves for their own profit of other men's works still subject to copyright and entitled to protection." *Per* Lord Langdale, M.R., in *Lewis v. Fullarton* (1839), 2 Beav. 6. In *Kelly v. Morris* (1866), L.R. 1 Eq. 697, Page-Wood, V.C., remarked: "In the case of a dictionary, map, guide-book, or directory, when there are certain common objects of information which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done." And added that the defendant could not take one line of the plaintiff's directory for the purpose of saving himself labour and trouble in getting information. The new work must be the result of the legitimate application of independent personal labour.

Where two authors, A. and B., treat of the same subject, each being merely a compiler from various other original works and

common sources, it is a fair use of A.'s work if B. examines it for the purpose of seeing what works, unprotected by copyright, were referred to by A., and B. may then himself refer to such unprotected works and take therefrom whatever may be suggested by A.'s book: *Jarrold v. Houlston* (1857), 3 K. & J. 708. But it is a piratical use of A.'s work if B. takes the matter therein borrowed from authorities open to all the world, in order to save his own labour and expense of consulting the original word: *Ibid.*

The whole question is ably summed up in the United States case of *Emerson v. Davies* (1845), 3 Story at p. 793: "The clear result of the authorities in cases of this nature is, that the true test of piracy or not is to ascertain whether the defendant has in fact used the plan, arrangement and illustrations of the plaintiff as the model of his own book, with colourable alterations and variations only to conceal the use thereof, or whether his work is the result of his own labour, skill and the use of common materials open to all men, and the resemblances are either accidental, or arising from the nature of the subject."

[IN THE HIGH COURT OF JUSTICE FOR ONTARIO.]

GROSSMAN ET AL. V. CANADA CYCLE CO.

Copyright—Infringement—Newspaper—First Publication.

A paper printed and published in the United States and mailed there to subscribers both in that country and in England, cannot be considered to be first published, or even simultaneously published, in England, so as to come within the provisions of the Imperial Act, 5 & 6 Vict. ch. 45, requiring first publication in the United Kingdom to entitle the publishers to British copyright.

This action was tried at Toronto on the 16th September, 1902, before BRITTON, J., without a jury. The facts appear in the judgment.

C. D. Scott, for the plaintiffs.

E. B. Ryckman and *C. W. Kerr*, for the defendants.

December 29th. BRITTON, J. :—The action is for the infringement of the alleged copyright of the plaintiffs in a journal called the "Cycling Gazette," and in an article entitled "The Booster's Club" published in that gazette.

The article was written for the plaintiffs by one Charles W. Mears, was paid for by the plaintiffs, and was published by them at Cleveland, Ohio, in the issue of the "Cycling Gazette" dated the 18th October, 1900, and on the first page of that issue was printed the following notice: "Copyright applied for 1900, by Emil Grossman & Bro. All rights reserved."

The plaintiffs claim copyright, and say that on the 29th August, 1901, their copyright in the "Cycling Gazette," and in its issue of 18th October, 1900, and in this article intitled "The Booster's Club," was duly registered at Stationers' Hall, pursuant to the Imperial Act 5 & 6 Vict. ch. 45. This registration was for the purpose of bringing the present action, as required by sec. 24 of the last mentioned Act. At the time of registration the "Cycling Gazette" was published at New York.

The defendants published the article in question on the 23rd March, 1901, at Toronto, in a paper called "The Assistant Manager"—a paper not issued regularly but only to the trade and to agents in England.

The defendants deny the registration of the alleged copyright, deny that the article is subject to copyright as against the defendants, and say that, as the plaintiffs are not British subjects, and as they reside outside the British dominions, the Imperial Act 5 & 6 Vict. ch. 45, does not confer any copyright upon the plaintiffs as alleged.

The defendants further say that this paper, "The Assistant Manager," was issued gratis; and that in good faith this article was published therein; and that its publication ceased in the spring of 1901; that the plaintiffs sustained no damage by the defendants' publication, but to cover any technical infringement, if any, and without admitting any liability, they pay into Court \$1.

Upon the evidence it is difficult to see that the plaintiffs have sustained any damage by reason of what is complained of, and, as the action is wholly for damages, it might be disposed of without considering whether the plaintiffs have copyright as alleged or not, or whether there has been infringement, so as to give the plaintiffs a right of action.

If this journal of plaintiffs comes under the definition of "book" as given in 5 & 6 Vict. ch. 45, sec. 2, then the plaintiffs are out of Court, because of the enactment of 7 & 8 Vict. ch. 12, secs. 19 and 20, which Act restricts copyright in any book "first published out of Her Majesty's dominions" to such right as a person may have become entitled to under this last mentioned Act.

The plaintiffs have brought their action on the assumption that 7 & 8 Vict. ch. 12 does not apply, and they seek to recover under 5 & 6 Vict. ch. 45.

The "Cycling Gazette" is within the wording of secs. 18 & 19 of the last mentioned Act. It has been held that sec. 24 does not apply to cases within secs. 18 & 19, so any objection to form

or particulars of registration at Stationers' Hall is not open to defendants : see *Mayhew v. Maxwell* (1860), 1 J. & H. 312 ; *Cox v. Land and Water Journal Co.* (1869), L.R. 9 Eq. 324.

If sec. 24 does not apply to cases within secs. 18 and 19, then sec. 16 does not, so the statement of defence is sufficient to let in any matter of defence disclosed by the evidence : see *Coote v. Judd* (1883), 23 Ch. D. 727.

To entitle plaintiffs to British copyright, there must be first publication of the paper containing the article in question in the United Kingdom.

This the plaintiffs have failed to establish. It is not in dispute that the "Gazette" containing the article was actually printed and published in Cleveland, Ohio, on the 18th October, 1900.

The only publication by plaintiffs in the United Kingdom was by posting numbers to subscribers in England, and particularly by posting a certain number of copies to W. H. Boffey, the agent of plaintiffs, whose address is given as 44 Fleet Street, London, E.C., and he is described in the registration as first publisher.

It is contended by plaintiffs that the publication at Cleveland, in the United States, and at London, England, was simultaneous because publication must be considered to date from the time of depositing the numbers of the "Gazette" in the post office at Cleveland.

Even if it be assumed that Mr. Boffey and the others in England received the "Gazette" in due course by post, subscribers in the United States would be in possession of their copies days in advance. This is not at all a question of how far, as a matter of contract or for any purpose, the post office department of either country can be considered agent for the persons to whom papers are addressed; it is purely a question of "first publication in England," or, at least, simultaneous publication in England and the United States; and I am of opinion that a paper printed and published in the United States, and mailed there to

subscribers both in that country and England, cannot be considered to be first published in England.

Judgment for the defendants.

Notes:

FIRST PUBLICATION.

It was decided in *Routledge v. Low* (1868), L.R. 3 H.L. 100, that under 5 & 6 Vict. ch. 45, the first publication of a book must, to secure British copyright to the author, be made in the United Kingdom. It was also decided that word "author" is used in the Act without limitation or restriction, and is therefore equally applicable to foreigners as to British subjects. Thus when British copyright is once obtained it extends, under sec. 29, over every part of the British Dominions. The protection of the statute is given to every author who first publishes in the United Kingdom, wheresoever he may then be resident or of whatever state, British or foreign, he may be the subject—*Per* Lord Cairns, L.C., and Lord Westbury. *Ibid.* See also Scrutton, Copyright, 4th ed., pp. 230-1.

In the earlier case of *Jeffreys v. Boosey* (1854), 4 H.L.C. 815, it had been held that if at the time of first publication a foreign author is not in England, he is not protected by the statute. This was a decision of the House of Lords after having obtained the opinions of nine judges. It was based on the Copyright Act of Anne (8 Anne ch. 19), and the *ratio decidendi* proceeded mainly on the wording of the preamble of that statute. That statute having now been repealed, the decision is now not a binding authority in the exposition of the later statute of 1842. cf. Lords Cairns and Westbury, *Routledge v. Low* (*ante*), at pp. 111 and 118.

Whether or not the opinions expressed in the later case are correct, the opinion of Lord Colonsay (L.R. 3 H.L. p. 120) is instructive. He said: "I can easily see that there is very little benefit to be gained to British authors by refusing to extend the protection of copyright in the manner suggested (*i.e.*, to non-resident foreigners), because nothing can be more shadowy than a distinction depending on the circumstances of a few hours' or a few days' residence within some part of the widely extended dominions of Her Majesty."

See also *Boosey v. Purday* (1849), 4 Ex. 145; *Chappell v. Purday* (1845), 14 M. & W. 303; *Cocks v. Purday* (1848), 5 C.B.

860, as to necessity for first publication being in the United Kingdom.

Since the International Act of 1886, however, first publication anywhere within the British Dominions, by either a British subject or a foreigner, will equally secure copyright: 49 & 50 Viet. ch. 33, sec. 8 (1), and *Routledge v. Low* (*ante*). If a book is published simultaneously within and without the dominions it is sufficient: *Cocks v. Purday* (1848), 5 C.B. 860; *Buxton v. James* (1851), 5 DeG. & S. 80. Publication a day later than publication abroad would probably be fatal; but if on the same day, even though an hour or two later, it would be deemed simultaneous. Where a serial is being published simultaneously, in the United States and England, some parts may lose their copyright by too hasty publication in the States, but this would not deprive the whole serial of copyright if the other parts were "first published" within the British dominions: *Reid v. Maxwell* (1886), 2 T.L.R. 790. Cotton, L.J., *ibid.*, p. 791, said: "No case has decided that an English author who is clearly entitled as such to the benefit of the (Copyright) Act (of 1842) has been deprived of his right on the ground that some one abroad has, by his authority, published some part of his work there before it was published here."

It is a matter of indifference where the manuscript is written: *Buxton v. James* (1851), 5 DeG. & S. 80; but the printing as well as the publishing must take place in Canada: R.S.C. ch. 62, sec. 5; though the type need not be set here: *Froude v. Parrish*, *infra*, p. 317.

If a book is first published outside of British dominions there will be no copyright in it except under the International Statutes: 7 & 8 Viet. ch. 12, sec. 19. The countries whose works are protected in His Majesty's dominions are as follows:—Germany, Belgium, Spain, France, Hayti, Italy, Switzerland, Tunis, Monaco, Luxembourg, Japan (under the Berne Convention, 1887, and additional Act of Paris, 1896), Norway (under the Berne Convention, 1887, only), and Austria-Hungary (under a separate convention, April 24th, 1893). Section 19 of 7 & 8 Viet. ch. 12 (The International Copyright Act), enacting that authors of works first published in foreign countries are not entitled to copyright except under that Act, has been held to apply to publication in all foreign countries and not only to those with which an international convention is in existence: *Boucicault v. Delafield* (1863), 1 H. & M. 597; *Boucicault v. Chatterton* (1876), 5 Ch.D. 267; and, also, to apply to the works of a British subject as well as to those of a foreigner: *ibid*; *Ex parte Dobson* (1892), 12 N.Z.L.R. 171.

[IN THE HIGH COURT OF JUSTICE FOR ONTARIO.]

ANGLO-CANADIAN MUSIC PUBLISHERS ASSOCIATION (LIMITED)

v.

WINNIFRITH BROTHERS.

Copyright—Infringement—English Domicile of Claimant—Right to Benefit of Statute—Knowledge of Existence of Copyright.

The plaintiffs, a company incorporated in England with the object of securing Canadian copyright in musical compositions and of acquiring the protection of the Canadian Copyright Act of 1875, sought to restrain the defendants from importing and selling in Canada a collection of songs containing the songs the copyright in which was claimed by the plaintiffs:—

Held, that neither the fact that the plaintiffs were domiciled out of Canada nor that the defendants were ignorant of the existence of the plaintiffs' copyright was a defence to the plaintiffs' action.

Though it appeared that the defendants had acted innocently, had discontinued the infringement, and had expressed regret, yet, as they had contested the plaintiffs' rights in court, costs of the action were given to plaintiffs.

The affidavit of plaintiffs' manager, stating the incorporation of the plaintiffs in Canada and the obtaining of the copyright of the songs in question, being in no wise controverted, was held sufficient evidence of the copyright for the purpose of the application.

This was a motion for an injunction to restrain the defendants from importing from the United States, and selling or offering for sale in Canada, certain musical compositions, the copyright of which for Canada was claimed by the plaintiffs.

December 20, 1887.

Bain, Q.C., for the plaintiffs.

H. Cameron, Q.C., for the defendants.

January 3rd, 1888. STREET, J.—The plaintiffs are a company called The Anglo-Canadian Music Publishers Association, (Limited), incorporated under the English Companies' Acts, with the object of securing Canadian copyright in musical compositions, and to acquire the protection of the Canadian Copyright Act of 1875; their registered office is in London, England, and their Canadian office and place of business is at Toronto.

The affidavit of Mr. Howe, the plaintiffs' manager in Canada, states these facts; and further states that the plaintiffs are the proprietors for the Dominion of Canada of the copyright in the seven songs mentioned in the schedule in his affidavit; and that the copyright in each case was obtained by him at the dates mentioned in the schedule.

This is the only evidence as to the copyright; but it is in no way controverted in the evidence of the defendants; and I think it is clearly sufficient for the purposes of an application of this nature.

The infringement complained of is, that the defendants have imported from the United States, and sold in Canada certain musical books called "The Franklin Square Song Collection," which, amongst a large number of other songs set to music, contain the songs, the copyright in which is claimed by the plaintiffs; and Mr. Howe states his belief that the defendants will continue to import and sell these songs in "The Franklin Square Song Collection," unless restrained by injunction; and that it is of vital importance to the plaintiffs' business, and in fact the only condition upon which it can exist, that their copyrights should be protected, and all infringements prohibited; that the defendants have been made aware, by means of a former action in respect of a different musical composition, of the nature of the plaintiffs' business; and that this action was begun promptly after he became aware of the infringement.

The defendants do not dispute in their affidavits the fact that the plaintiffs are entitled to the copyright in these songs, nor the fact that they imported and sold the books in question, nor that they contained these songs; but they say that they have been for years importing the Franklin Square Song Book before the dates of the plaintiffs' copyrights: that they were not aware of the existence of the copyright; and that they would have discontinued the importation had they been made aware of it: that the number imported has been small, and their profit on the sales

of it trifling; and that the Franklin Square Song Book is being sold by many other booksellers in Toronto.

Mr. Harold Winnifrith, one of the defendants, was cross-examined upon his affidavit, and denied having acquired or possessed any knowledge of the nature of the plaintiffs' business in the former action referred to. He further stated that upon being served with papers in this action, he had gone to Mr. Howe, and expressed his regret at having infringed the plaintiffs' right; and further, that after becoming aware of the plaintiffs' rights, he determined to sell no more of the publication complained of.

At the hearing of the motion, the counsel for the defendants objected that the proof of the plaintiffs being entitled to copyright in these songs was insufficient: that the plaintiffs were not domiciled in Canada, but in England, where the registered office of the company is situated; and were not, under the 4th section, entitled to the benefit of the Act; and that by the 32nd section it was made necessary that the defendants should be shown to have imported the publications complained of, with knowledge of the plaintiffs' rights, before they could be made liable in an action.

It was further contended on the part of the defendants, that the acts done by them were done innocently: that the injury to the plaintiffs was trifling; that the importation was stopped upon notice of the plaintiff's rights; and that, as they were willing to have ceased the importation without an action, they should, at all events, not be charged with costs.

After argument upon the question of the sufficiency of the proof of the copyright, the defendants' counsel agreed to be bound by the opinion I expressed, that the proof was sufficient for the purposes of this motion, and both parties consented that the motion should be treated as a motion for judgment; but the defendants' counsel continued to rely upon his other objections; and judgment was reserved upon them.

I cannot see the force of the objection that the plaintiffs'

domicile is not in Canada but in England. If they are not the authors, but the assignees of the authors of the musical compositions in question, then there appears to be no restriction whatever upon their right to obtain copyright, so far as domicile or citizenship is concerned. In other words, a British or Canadian author, or the citizen of any country having a copyright treaty with the United Kingdom, may assign to a foreigner his right to obtain copyright, and the rights of the foreign assignee will be protected. If the plaintiffs are to be treated as the authors of the compositions, then they are domiciled in London, England, where their head office is ; and that is certainly a part of the British possessions within the meaning of the Act. In either case the plaintiffs are entitled to the sole and exclusive right of publishing and vending the works in question in Canada.

It does not appear to be necessary under the Act that the defendants should be shown to have imported for sale the books containing the infringements, *with knowledge of the plaintiffs' rights*, in order to entitle the plaintiffs to succeed, either in a motion of this nature, or in an action to recover penalties, which this is not. The absence of such knowledge on the part of the defendants ought certainly in most cases of either nature to be an important factor in determining the question of costs, and the amount of the penalty to be imposed in an action for penalties, but would not disentitle the plaintiffs to an injunction. I must, therefore, hold against the defendants upon their second objection.

The defendants appear to have innocently imported, in small quantities only, the songs in question, bound up with a large number of other songs in the Franklin Square Song Book, and this action was brought without steps being taken by the plaintiffs to ascertain whether an undertaking could not be obtained from the defendants to abstain from further infringement.

Upon being made aware of the infringement by the service of the writ, one of the defendants called upon the plaintiffs and expressed his regret for what had been done. He does not ap-

pear, indeed, in any way to have offered to undertake not to continue the infringement; but if he had simply appeared in Court upon the motion, admitted the plaintiffs' right, and consented to an injunction, I should most certainly have refused any costs to the plaintiffs. But he has contested the plaintiffs' rights in Court; and he has thus, to a certain extent, justified the course they have taken.

I think, under all the circumstances, that if the plaintiffs agree to accept five dollars in lieu of all claims to damages, they should have final judgment for an injunction in the terms asked for by their notice of motion, with five dollars for their damages and their costs of the action, including those of the motion; but if they prefer an enquiry as to damages, they are entitled to a final judgment for an injunction with costs and a reference; but in that event without any costs of the reference.

Judgment accordingly.

Notes:

PROOF OF COPYRIGHT.

The evidence of the copyright allowed sufficient in this case was of a kind that would not pass muster in a hard fought case. Here there was no real questioning of the fact of the copyright having been secured. It would therefore be impolitic to rely on this case where there arises a real dispute as to the registration and ownership of a copyright. A certificate of registration certified by the proper officer is the proper evidence of copyright: *Black v. Imperial Book Co.*, *ante*, p. 252. This will be received in evidence, without further proof and without production of the originals: R.S.C. ch. 62, sec. 26, and see *Hildesheimer & Faulkner v. Dunn & Co.* (1891), 64 L.T. 452.

The certificate is, however, only *prima facie* proof of the copyright which may be rebutted by other evidence as of an assignment: *Hildesheimer & Faulkner v. Dunn & Co.* (*ante*); *Troitzsch v. Rees* (1887), W.N. 150, 3 T.L.R. 773; *Boosey v. Davidson* (1846), 13 Q.B. 257; *Hazlitt v. Templeman* (1866), 13 L.T.N.S. 593.

Under the International Copyright Act, 1886, an extract from

a register of copyright in books kept under the authority of the government of a British possession, purporting to be certified as a true copy by the officer keeping it, and authenticated by the public seal of the British possession, or by the official seal, or the signature of the governor of a British possession or of a colonial secretary, or of some secretary or minister administering a department of the government of a British possession shall be admissible in evidence of the contents of the register: 49 & 50 Vict. ch. 33, sec. 7.

[IN THE HIGH COURT OF JUSTICE FOR ONTARIO.]

FROWDE v. PARRISH.

Copyright—Right to, in a Compilation—English Domicile of Claimant—Printing from Stereotype Plates—Importation of Foreign Reprints—Right to Restrain.

The plaintiff was a publisher in England, and had employed certain persons to compile for him the book in question, paying them for their services. By his agent in Canada, he applied for and obtained copyright under the Canadian Act.

Held, he was entitled to copyright as proprietor of the book, being "assignee," or perhaps "legal representative," of the author.

English domicile is not a bar to obtaining benefit of the Canadian Copyright Act.

Anglo-Canadian Publishers Assn. (Ltd.) v. Winnifrith (1888), 15 O.R. 164, 167, followed.

Printing from stereotype plates brought to Canada from England is a sufficient "printing" within the meaning of the Act, though no typographical work is done in the preparation of the copies.

American reprints of the plaintiff's copyright book, added as an appendix to American reprints of the Bible, imported into Canada, constitute an invasion of the plaintiff's rights.

This was an action tried at the non-jury sittings at Toronto on the 6th of April, 1896.

The action was for an infringement of an alleged copyright of the plaintiff, in which he claimed an injunction and damages.

J. H. Macdonald, for the plaintiff.

T. W. Howard, for the defendants.

April 18th, 1896. *Boyd, C.* :—

It is admitted that the book in question, "Helps to the Study of the Bible," was compiled for the plaintiff by persons

employed for valuable consideration for that purpose by him. That arrangement, by virtue of sec. 16 of the Copyright Act, R.S.C. ch. 62, works a transfer of the right to obtain copyright if no reserve is made by the compilers or authors of the compilation. The person for whom the literary work is done, then, is entitled to the proprietorship of the copyright as "assignee," or, perhaps, "legal representative" of the author. See secs. 1 and 14 and 15 of the Act. Actual payment is not required to be proved under our Act; *Richardson v. Gilbert* (1851), 1 Sim. N.S. 336.

The agent in Canada of the English proprietor, the present plaintiff, made application for and obtained copyright for the plaintiff as such proprietor on the 8th September, 1890. I do not follow the objection that the application might not be made under the 4th section of the Act, because the proprietor was resident in England. England is a part of the British possessions, and though by recent English legislation the term "British possessions" is after December 31st, 1889, to be construed as exclusive of the United Kingdom (see Interpretation Act, 1889, sec. 18, sub-sec. 2), yet in the earlier Copyright Acts, from which this is derived, the term "British Dominions" (which is synonymous with "British possessions") is declared to mean and include all parts of the United Kingdom of Great Britain and Ireland (5 & 6 Vict. ch. 45, sec. 2). see *Low v. Routledge* (1864), L.R. 1 Ch. 45, which case also shews that the most extended construction is to be given to the word "author" in these Acts.

I agree with the view expressed on this point by Street, J., in *Anglo-Canadian Publishers Assn. (Ltd.) v. Winniffrith* (1888), 15 O.R. 164, 167.

The plaintiff continues to print and publish his book in Canada from stereotype plates. That is a sufficient "printing" within the meaning of the Act, though no typographical work is done in the preparation of the copies.

No defence is raised on the ground that the plaintiff's copyright is invalid because of the expiry of the English copyright

of this book. For this reason I suppose no evidence has been given on this head, as to the date of the English copyright.

The defendants bring in American reprints of the plaintiff's copyright book, which are added as an appendix to American reprints of the Bible. This importation is an invasion of the plaintiff's rights. "Importation" is specially mentioned as a violation of the Act in sec. 30, where penalties are imposed.

The defendants were not aware of the existence of the plaintiff's copyright till the 27th September, 1895. The action is on the 11th October, 1895. Sales have been made by the defendant for four or five years before this and also after action. The parties wish me to settle damages if I find in favor of the copyright. I fix the sum at \$40 (unless either party asks a reference); and the plaintiff should get costs.

That an action may be brought for injunction and damages recovered in case of importation appears from *Cooper v. Whittingham* (1880), 15 Ch. D. 501, and *Tennyson v. Forrester* (1871), 43 Scottish Jurist 278, quoted in Copinger's Law of Copyright, 3rd ed. p. 247.

(NOTE:—The appeal of the defendants from the above judgment was, at the conclusion of the argument, dismissed with costs, the Court of Appeal agreeing with the judgment below; 23 A.R. 728.)

Notes:

WHO IS THE OWNER OF THE COPYRIGHT?

Primâ facie the author is the owner of the copyright: R.S.C. ch. 62, sec. 4. The word author is not defined in our Act, and difficulties may arise (and have arisen in England) as to who is the author of a particular book within the meaning of the Act. The rule seems to be that, if the literary matter is composed by those who make the manuscript, the author is the one from whom comes the general conception and design, and that although there may be much detail at the hands of subordinates, he is the author of the entirety and may sue for infringement: *Scott v. Stanford* (1867), L.R. 3 Eq. 718; *Mottage v. Jackson* (1838), 11 Q.B.D. 627; *Stauard v. Harrison* (1871), 24 L.T.N.S. 570; *Barfield v. Nicholson* (1824), 2 L.J. Ch. 90 at p. 102. In *Hatton v. Kean* (1859), 7 C.B.N.S. 268, the defendant had arranged certain scenery, music, dancing, etc., and employed artists and authors to aid him in carrying his design into effect. Amongst others,

the plaintiff was employed to compose and arrange the orchestral accompaniments. The Court of Common Pleas held that the defendant was the author of the entire production. Erle, C.J., said:—"I am of opinion that the music so composed by the direction and under the superintendence of the defendant, and as part of the general plan of the spectacle, must, as between him and the plaintiff, become the property of the defendant, and that consequently the defendant has violated no right of the plaintiff in causing it to be represented in the manner alleged": *Ibid.*, p. 280. In a similar case, *Wallerstein v. Herbert* (1867), 16 L.T.N.S. 453, Cockburn, C.J., said:—"Looking at the nature of this composition, it is clear that it became a part and parcel of the drama, and was not an independent composition." The case of *Hatton v. Kean* appears in view of the remarks of Kekewich, J., in *Petty v. Taylor*, [1897] 1 Ch. at p. 475, to have gone to the extreme limit. He said:—"It is not at all an uncommon thing for two persons jointly to publish a book, one supplying the letter press, the other the illustrations. I cannot see my way to saying that in such a case the man who is the author of the letter press becomes the author of the book, including the illustrations, so as to protect those illustrations."

In *Shepard v. Conquest* (1856), 17 C.B. 427, it was laid down that the suggestion of a subject without any share in the design or execution of the work, cannot constitute the person suggesting the author of the work carried out by his employee to whom the suggestion was made.

Joint authorship of a book is found in the production of a work by joint labour in prosecution of a preconceived joint design. If a piece were written by A. and B. jointly in prosecution of a preconceived joint design, the two might be said to be the co-authors of the whole, despite that different portions were respectively the sole productions of either: *Levy v. Butler* (1871), L.R. 6 C.P. 523. In that case, Keating, J., said:—"I entirely agree with my brother Byles that, though it may not be necessary that each should contribute the same amount of labour, there must be a joint labouring in furtherance of a common design."

Walter v. Lane, [1900] A.C. 539, upset prevailing ideas as to what constituted an author. It had been thought the author must be the one that actually designs and composes the literary matter. But that case demonstrated that the author is the first producer of literary matter in "book" form. (See notes on *Walter v. Lane* in note on *Common Law Rights*, *supra*, p. 157).

The recent case of *Aflalo v. Lawrence & Bullen, Limited* ([1903] 1 Ch. 318, C.A.), confirming the judgment of Joyce, J. ([1902] 1 Ch. 264), is interesting as dealing with the rights of contributors to encyclopædias. A. agreed with publishers of an encyclopædia that he would act as editor at a fixed fee, for which he was also to write seven thousand words of special articles and other unsigned articles. The publishers were to bear all the cost of the work. A. employed C., at the request of the publishers, to write certain other articles at a fixed sum per thousand words. There was no express provision as to the proprietorship of the copyright in the articles in either case. All the articles were written, and A. and C. were registered as proprietors of the copyright in those which they had respectively written. Under these circumstances the Court of Appeal held (Vaughan Williams, L.J., dissenting), that the articles constituted a "book" within sec. 2 of the Copyright Act, 1842, and that the authors were entitled to copyright in their compositions, there being nothing in the circumstances of the case to shew that the publishers had acquired copyright therein, and to an injunction restraining publication without their consent. Romer, L.J., and Stirling, L.J., held that a publisher of an encyclopædia in order to shew that he has acquired copyright in such contributions under sec. 18 of the Copyright Act, 1842, must establish, first, employment of the author; second, that the articles were written on the terms that the copyright should belong to the publisher; and, third, that the articles were paid for by the publisher.

Section 18 of the English Copyright Act, 1842, is an elaborate statement of the rights of author and publisher in regard to articles in encyclopædias, reviews, magazines, periodicals, etc. The most important features are the requirements (1) that in order to vest the copyright in such articles in the publisher, the author must have been employed on the terms that the copyright shall belong to the publisher, and (2) that the articles must be paid for. The section in the Canadian Act dealing with the same subject is sec. 16 (R.S.C. ch. 62). It enacts that whenever the author of a literary, etc., work . . . has *executed* the same for another person, or has sold the same to another person for due consideration, such author shall *not* be entitled to the copyright . . . unless a *reserve of the privilege is especially made* by the author or artist *in a deed duly executed*. Thus the positions of the author here and in England are completely reversed. There the onus is on the publisher to shew his acquisition of the copy-

right. Here the author has to fight for his right. He is the one put to the proof. When he has received his pay ("due consideration") his rights are gone unless he uses part of his pay to obtain a deed reserving them. A verbal reservation would be unavailing. It must be obvious that such a provision is extremely unfair to the author. It is unlikely that one out of a hundred know of the stringent requirements of the law set out in this section, and an unscrupulous publisher, if there be any, would have little or no difficulty in arranging matters to his own liking. How probable it is that the author would be content, even if he insisted so far, with a written agreement merely without the absolutely necessary sealing and delivering.

The author must have executed the work "for another person," and actual payment need not be proved under our Act—*vide* *Boyd, C.*, in *Frowde v. Parrish*, quoting *Richardson v. Gilbert* (1851), 1 Sim. N.S. 336.

The Canadian Act is much more favourable to the employer than the English Act. The 18th section of 5 & 6 Vict. ch. 45, requires that the work must be done and the author employed "on the terms that the copyright therein shall belong to such proprietors." If there be no specific agreement, or if the terms cannot be implied from the nature of the employment and the surrounding circumstances, the copyright will remain in the author: *Sweet v. Benning* (1855), 16 C.B. 459; *Trade Auxiliary v. Middlesborough* (1889), 40 Ch. D. 425; *Walter v. Howe* (1881), 17 Ch. 708; *Johnson v. Newnes*, [1894] 3 Ch. 663; *Aflalo v. Lawrence*, [1902] 1 Ch. 264. On the other hand, the author in Canada is required to actively protect his own interests, and "unless a reserve of privilege (of copyright) is specially made by the author or artist in a deed duly executed," he loses his rights. Further, no reference is made to any actual payment in the section, the words being "has executed the same for another person." The consideration may be of any valuable kind.

[IN THE HIGH COURT OF JUSTICE FOR ONTARIO.]

LANCEFIELD V. THE ANGLO-CANADIAN MUSIC PUBLISHING
ASSOCIATION (LIMITED).

Copyright — Penalties — Printing Copies of Canadian Copyright Work Abroad—Stating thereon Existence of Canadian Copyright—Copyright Act, 1875, sections 33, 5, 6, and 13.

Section 33 of the Copyright Act, 1875, R.S.C. ch. 62, does not apply where the owner of the Canadian copyright in a musical composition has the same printed abroad and impresses on copies used in Canada a notification of the existence of such copyright.

The plaintiff claimed \$300 under section 33 of the Copyright Act, R.S.C. ch. 62, as a penalty recoverable from the defendants. The facts are stated in the judgment.

The action was argued on admissions of facts at Toronto, on April 25th, 1895.

G. Lynch-Staunton, for the plaintiff.

Bicknell, and *H. D. Hulme*, for the defendants.

April 29th, 1895. BOYD, C. :—

This is an action for penalties under sec. 33 of the Copyright Act, R.S.C. ch. 62. The question between the parties is within a very narrow compass. The question is whether the penalties of sec. 33 of the Copyright Act are incurred, if upon copies of a musical composition which is the subject of Canadian copyright words asserting the existence of such copyright are impressed thereon—such copies being published only and not also printed in Canada. The defendants hold Canadian copyright in respect of the two musical pieces in dispute; they have had copies printed in Leipzig and in London—have imported these and publish them in Canada, with the notification thereon of Canadian copyright. The action does not attack the right to import, and there is nothing before me to shew that the importation is illegal—if such a point be

material. Merely "printing" is not of itself "publication." To obtain in the first instance copyright both printing and publishing are essential conditions precedent (sub-secs. 5, 6 and 13). It is not expressly declared that the continuance of the privilege of copyright depends upon the printing, as well as the publication of the composition in Canada. That may be inferred from certain provisions in the Act; and it may be that such importations as these are not protected by the Act; but these are not now matters for adjudication. The protection and fostering of native industry would favor such a construction, but that is not the only thing to be considered, especially in dealing with the penal clauses of this statute.

And the main difficulty arises in dealing with this penalty clause. It is directed against one who has not lawfully acquired the copyright of the work—but the defendant is not in that position—he has Canadian copyright in the compositions. Then it provides a penalty in case one not so qualified, impresses on imported copies, words purporting to assert the existence of Canadian copyright—rather implying that if so qualified by the possession of copyright he may impress upon imported copies the fact of such copyright being in existence.

To give effect to the contention of the plaintiff one would need to have some such enactment as this; "Every person who has lawfully acquired the copyright, etc., who imports into Canada printed copies of the work and impresses thereon words purporting to express the existence of Canadian copyright in relation thereto shall incur a penalty of, etc."

I have, therefore, to dismiss the action with costs.

(7) PRACTICE UNDER THE CANADIAN ACT—PLEADING.

[IN THE SUPERIOR COURT FOR QUEBEC.]

ANGLO-CANADIAN MUSIC PUBLISHING ASSOCIATION

v.

J. N. DUPUIS.

*Infringement of Copyrights—Musical Composition—Authorship—
Inscription in Law.*

Held, that a company alleging itself to be the registered owner and proprietor of certain Canadian copyrights, covering certain musical compositions, may answer allegations going on to say that it is not the author, or legal representative of the authors of the musical compositions, by saying that the British proprietors of the copyrights assigned the same to it, plaintiff, and that it gave legal notice of such assignment to the Minister of Agriculture before registration in Canada.

F. S. McLennan, K.C., attorney for plaintiff.

Beaudin, Cardinal, Loranger & St. Germain, attorneys for defendant.

Montreal, May 7th, 1903. SIR M. TAIT, A.C.J. :—

The Court having heard the parties by the inscription in law of defendant to parag. 2, 3, and 6 of the plaintiff's answer to defendant's plea ; having examined the proceedings and deliberated :—

Whereas plaintiff alleges that it is the registered owner and proprietor of certain Canadian copyrights, covering certain musical compositions mentioned in its declaration, and that it has given due and legal notice of said copyrights, according to law, and that they have been duly registered and are good and valid and in force and effect in the Dominion of Canada ;

Whereas defendant by his defence does not claim that the allegations of plaintiff's declaration are insufficient in law to maintain the conclusions thereof, but denies that plaintiff is

such proprietor, and alleges that it is not the author of said musical compositions nor the legal representative of the authors thereof and that there is nothing in plaintiff's declaration to shew how plaintiff became proprietor, whether by assignment or otherwise of said musical compositions ;

Whereas plaintiff in the paragraph inscribed against in its answer to said plea, alleges that the British proprietors of said copyrights assigned the same and all their rights thereto in writing to plaintiff, and that plaintiff gave due and legal notice of said British copyrights and of the assignment thereof, to the Minister of Agriculture, before registration in Canada, and that the assignment to plaintiff from such British proprietors of said copyrights, who had duly acquired the same from the respective authors of said compositions, did not require to be recorded in the office of the minister of agriculture before plaintiff registered said compositions in Canada ;

Considering that the allegations of the said answer are not a departure from, or inconsistent with the allegation of plaintiff's declaration that it is the proprietor of said Canadian copyrights, but that said allegations are merely for the purpose of answering defendant's plea, by shewing how and in what manner plaintiff became such proprietor ;

Considering that said inscription in law is unfounded :—
Doth dismiss the same, with costs.

[IN THE SUPERIOR COURT FOR QUEBEC.]

TREMBLAY V. THE QUEBEC PRINTING CO.

Qui Tam Action—Copyright—Penalties—Amendment—Practice.

QUEBEC, June 10th, 1899.

In an action for penalties under the Copyright Act, ANDREWS, J., held that the Crown must be joined as a plaintiff, otherwise the action will be dismissed on an exception to the form.

An amendment adding the Crown as co-plaintiff will be allowed if the conclusions justify it.

Notes:

IN *Ashdown v. Lavigne* (1892), 2 Que. 36, an action was brought to recover penalties under sec. 32 of the Copyright Act, R.S.C. ch. 62, which provides for the recovery of penalties for infringement of copyright in prints, charts, music, photographs, etc. It was held that it must be alleged that the defendant was in possession of the number of copies for which the infringement is claimed, as the penalty consists of so much for each copy found in the possession of the defendant and not for each copy sold. It will be noted that the forfeiture clause of the said section omits "chart" and "photograph" from the enumeration of the articles for the possession of which forfeiture is imposed. This omission would seem to render the decision in *Ashdown v. Lavigne* inapplicable where the contest is over "charts" or "photographs." It might, perhaps, be argued that "map" would include "chart;" a marine chart would seem to be readily classified as a "map," being similar in its essential features. In England, "charts" are included under the definition of "book" (5 & 6 Vict. ch. 45, sec. 2). As to "photographs," no provision for forfeiture of any sum in any event is made, the plaintiff being confined to his action for damages and the delivery up of the plates of the photographs.

COSTS.

[IN THE HIGH COURT OF JUSTICE FOR ONTARIO.]

ANGLO-CANADIAN MUSIC PUBLISHING ASSOCIATION

v.

SOMERVILLE.

*Costs—Infringement of Copyright—Consent Judgment—Damages—
Amount of—Reference—Offer—Payment into Court.*

Where judgment was pronounced by consent declaring that the defendant had infringed the plaintiffs' copyright, restraining him from continuing to infringe, and directing a reference to ascertain the damages sustained by reason of the infringement, and the Master found that the damages were only \$6.70, and also reported specially that the plaintiffs were aware before action that the defendant was willing to hand over all copies of and to stop selling or giving away the publications in question, but the plaintiffs demanded \$100 compensation, and that after action the defendant offered to pay \$25 for damages and costs and to deliver up any of the publications on hand and to give an undertaking that there would be no further infringement, but the plaintiffs did not accept the offer:—

Held, that the plaintiffs were entitled to the costs of the action; and also to the costs of the reference, the defendant not having, when consenting to judgment, offered to pay a fixed sum for damages and to pay it into Court.

This was an action for the infringement of a copyright. The plaintiffs' motion for an interim injunction was turned into a motion for judgment, and judgment was pronounced upon consent declaring that the defendant had infringed the plaintiffs' copyright, restraining him from continuing to so infringe, and referring it to the Master in Ordinary to ascertain and state what damage, if any, the plaintiffs had sustained by reason of the infringement by the defendant of the copyright, and reserving further directions and costs.

The Master found that the damage amounted to \$6.70, and reported specially as follows:—(1) That the plaintiffs were aware prior to the issue of the writ of summons in this action that the defendant was willing to hand over to the plaintiffs all copies of, and to stop selling or giving away, the songs in question, but the plaintiffs demanded an adequate compensation

which they fixed at \$100. (2) That after being served with the writ of summons the defendant offered to pay to the plaintiffs the sum of \$25 for damages and costs, and also offered to deliver up any of the songs on hand and to give any undertaking required that there would not be any further infringement, but the plaintiffs did not accept the offer, but offered to take \$50 for damages and costs.

On the 14th March, 1900, *Laing*, for the plaintiffs moved before ARMOUR, C.J., in the Weekly Court, for judgment in favour of the plaintiffs against the defendant for the amount found due by the Master for damages and for the costs of the action.

Roaf, O.C., for the defendant, shewed cause and contended that on the special findings of the Master the plaintiffs were not entitled to costs, or to the costs of the reference, or to the full costs of all the proceedings.

Judgment was delivered on the same day.

ARMOUR, C.J.—I think the plaintiffs are entitled to judgment for the amount found by the Master and the costs of the action and of the reference.

The costs of the action he is clearly entitled to, as the following decisions shew : *Cooper v. Whittingham* (1880), 15 Ch. D. 501 ; *Upmann v. Forester* (1883), 24 Ch. D. 231 ; *Wittman v. Oppenheim* (1884), 27 Ch. D. 260.

And in order to protect himself as to the costs of the reference, the defendant should, when appearing on the motion for the injunction and consenting to the judgment, have offered to pay a fixed sum for damages and to pay it into Court, and upon his doing so the Court might have directed a reference upon the terms that if the Master found such sum sufficient to answer the damages the plaintiffs should pay the costs of the reference.

Notes:

COSTS.

A person whose copyright has been infringed is not bound to rest satisfied with the promise of the defendant not to commit any further infringement, but he has a right to have an injunction and is entitled to the costs of such: *Geary v. Norton* (1846), 1 DeG. & S. 9; *Losh v. Hague* (1837), 1 Webs. 200; but where the action is brought to enforce a bare legal right, such as an action to restrain the infringement of a very small part of the plaintiff's copyright, the Court will not, as a matter of course, order the defendant to pay the costs of the action: *Walter v. Steinkopff*, [1892] 3 Ch. 489; 67 L.T. 184; *American Tobacco Co. v. Guest*, [1892] 1 Ch. 630.

If the defendant do not offer to submit to the injunction and pay all costs up to that time: *Potts v. Levy* (1854), 2 Drew 272; or, if, although he offer to submit to the injunction, he refuse to pay the costs or to give plaintiff any of the other relief to which he is entitled, the plaintiff is entitled to bring the suit to hearing and will have costs thereof: *Fradella v. Weller* (1831), 2 R. & M. 247; *Geary v. Norton* (*ante*); *Colburn v. Simms* (1843), 2 Hare 561; *Jamieson v. Teague* (1857), 3 Jur. N.S. 1206; *Chappell v. Davidson* (1855), 2 K. & J. 123. *Contra*, where defendant submits to the injunction with costs and agrees to give plaintiff all other proper relief: *Millington v. Fox* (1838), 3 My. & C. 352; *Colburn v. Simms* (*ante*); *Harvey v. Ferguson* (1864), 15 Ir. Ch. 277; *Hudson v. Bennett* (1866), 12 Jur. N.S. 519.

The tender of costs must include all costs of suit up to time when tender is made: *Fradella v. Weller*, *ante*; *Geary v. Norton*, *ante*; *Jamieson v. Teague*, *ante*; *Burgess v. Hill* (1858), 26 Beav. 244; *Moet v. Conston* (1864), 33 Beav. 578; *Schlesinger v. Turner* (1890), 63 L.T. 764. Short of this the offer may be evidence of good faith, but is not such an offer as to interfere with the ordinary course with respect to costs: *Schlesinger v. Turner*, *ante*.

A *bona fide* offer from the defendant before suit to give the plaintiff all the relief to which he is entitled and which he ultimately obtains by the suit may be ground for depriving him of the costs of it: *Millington v. Fox*, *ante*; *Colburn v. Simms*, *ante*; *Chappelle v. Davidson*, *ante*; but in *Edelsten v. Edelsten* (1863), 1 DeG. J. & S. at p. 203, it was said that negotiations antecedent to the suit could not be taken notice of except in the case of bad

faith, unless they amounted to a release or binding agreement with respect to the cause of action. But where a legal right of action has been invaded, the plaintiff need not apply to defendant before suit: *Burgess v. Hill*, *ante*; *Walter v. Steinkopff* (1892), 8 T.L.R. 633; [1892] 3 Ch. 489.

Where the plaintiff's title to his copyright is disputed he is entitled to the costs he incurs in establishing it: *Kelly v. Hooper* (1841), 1 Y. & Coll. C.C. 197.

No costs have been awarded to either party where the defendant though clearly guilty of an infringement has acted in good faith: *Maxwell v. Somerton* (1874), 30 L.T. 11. But generally ignorance of copyright is no defence, especially in Canada, where the notice of copyright is for all to see: *ante*, p. 315. A plaintiff will not be allowed to make his action simply a means of making money; *Wall v. Taylor* (1883), 11 Q.B.D. 102. No costs will be given to a plaintiff where he has unduly acquiesced in the defendant's conduct: *Maxwell v. Somerton* (1874), 30 L.T. 11; 22 W.R. 313; *Allen v. Lyon*, *ante*, p. 289. If the plaintiff has increased the expenses by raising unnecessary issues on which he has failed, the costs may be apportioned or disallowed: *Metzler v. Wood* (1878), 8 Ch. D. 606; *Kelly v. Hodge* (1873), 29 L.T. 387. A defendant, although successful, may lose his costs or part of them if he has acted in such a way as was not fair and right as between man and man: *Per* Lord Romilly, M.R., in *Cobbett v. Woodward* (1872), L.R. 14 Eq. at p. 414; Hall, V.-C., in *Maple v. Junior Army and Navy Stores* (1882), 21 Ch. D. at p. 373; or if there be some right of action in the plaintiff: *Allen v. Lyon*, *ante*, p. 289. So, where the successful defendant has brought the action on himself by indiscreet or improper conduct: *Pike v. Nicolas* (1869), L.R. 5 Ch. 251; *Cobbett v. Woodward* (1872), L.R. 14 Eq. 407.

PARTICULARS.

[IN THE HIGH COURT OF JUSTICE FOR ONTARIO.]

LIDDELL ET AL. V. COPP-CLARK CO. ET AL.

Copyright in Book—Registration—Infringement—Particulars.

In an action for infringement of copyright in a book, the statement of claim alleged that the plaintiffs were the proprietors of a subsisting copyright duly registered, and further alleged that the defendants printed for sale a large number of copies of another book, a part whereof was an infringement of the plaintiffs' copyright:—

Held, that the defendants were entitled to particulars shewing the date of registration of the plaintiffs' copyright, and shewing what part of the defendants' book infringed the plaintiffs' right.

Succet v. Maugham (1840), 11 Sim. 51, not followed.

Mawman v. Tegg (1826), 2 Russ. 385, 390, and *Page v. Wisden* (1869), 20 L.T.N.S. 435, followed.

Motion by the defendants for particulars under the statement of claim, heard by the Master in Chambers, on the 17th December, 1900.

J. B. Holden, for the defendant company.

C. A. Moss, for the other defendants.

John Greer, for the plaintiffs.

December 26th, 1900.

THE MASTER IN CHAMBERS.—An action for infringement of the plaintiffs' copyright in a book entitled "A School History of Rome," etc.

In their statement of claim the plaintiffs allege in the 2nd paragraph that they are the proprietors of a subsisting copyright duly registered, without mentioning the date of registration, and in the 3rd paragraph they state that the defendants printed for sale a large number of copies of a book entitled "High School History of Greece and Rome," a part whereof entitled "History of Rome" is an infringement of the plaintiffs' copyright.

The defendants demanded particulars of the date of registration, and also in what respects the part entitled "History of Rome" is an infringement of the plaintiffs' alleged copyright. This demand not being complied with, the defendants now apply for an order for the particulars demanded. Counsel for the plaintiffs oppose the application on the ground that they are not bound by the practice to give the same: *Sweet v. Maughan* (1840), 11 Sim. 51. That was a case where a bill was filed and an injunction moved for, and the Vice-Chancellor said: "As long as I remember the Court, it never has been thought necessary for a party who complains that his copyright has been infringed, to specify, either in his bill or his affidavit, the parts of the defendant's work which he thinks have been pirated from his work; but it has been always considered sufficient to allege, generally, that the defendant's work contains several passages which have been pirated from the plaintiff's work; and to verify the rival works by affidavit. Then, when the injunction has been moved for, the two works have been brought into Court, and the counsel have pointed out to the Court the passages which they rely upon as showing the piracy."

But the practice in equity seems to have been different from that followed at law.

In the 2nd ed. of the American and English Encyclopedia of Pleading and Practice, under "Copyright," it is stated: "NECESSARY ALLEGATIONS—IN GENERAL.—In a suit for infringement, the bill, declaration, or complaint must contain allegations sufficient to show title in the complainant and to clearly define the infringement for which redress is sought:" and several cases are referred to, such as *Cary v. Kearsley* (1803), 4 Esp. 168, 6 R.R. 846; *Mawman v. Tegg* (1826), 2 Russ. 385, 390; and others. This last reference would indicate that the practice followed in the later authority of *Sweet v. Maughan* was only applicable to cases in equity, but that where an action at law was brought the plaintiff was required, one month before the defendant was required to plead, to deliver to the defendant a statement of such part or parts of the books claimed to be copies of, or colourably

altered only from, the plaintiff's books: see the order made in that suit at p. 403.

I would also refer to the remarks of Vice-Chancellor Malins in delivering judgment in *Page v. Wisden* (1869), 20 L.T.N.S. 435.

In my opinion, the defendants are entitled to such a statement or such particulars as were ordered in *Mawman v. Tegg*. This will not only save expense and limit the issue as mentioned by Vice-Chancellor Malins in *Page v. Wisden*, but will prevent surprise at the trial.

I scarcely think that it was seriously argued by the plaintiffs' counsel that the date of the registration need not be given. All the cases on that point are clear that it must be given.

An order for particulars will be granted; costs in the cause.

Notes:**PARTICULARS.**

In *Cary v. Kearsley* (1803), 4 Esp. 168, Lord Ellenborough said that he thought that proof of errors transmitted into the defendant's book, an itinerary or road book, would not support the declaration for a general printing and pirating of the plaintiff's work. The defendant was authorized to use a work published as that of the plaintiff's was, to make extracts from it into any original work of his own; and mistaking names and descriptions, and taking certain detached parts, was but using in a proper manner an inaccurate directory. It was necessary to go farther.

Here the plaintiff, in proving piracy, called a witness who had compared the two books and had found a general correspondence in the names of certain places and distances (the books were road books), and who proved several mistakes and errors in the plaintiff's book to be copied verbatim into defendants' work.

In *Mawman v. Tegg* (1826), 2 Russ. 385, on hearing a motion for an injunction by the plaintiffs, Lord Chancellor Eldon said: "Shall I then grant the injunction before answer? or shall I give leave to the defendant to make an affidavit with respect to the extent to which the articles of the Encyclopædia Metropolitana have been copied in his publication? The plaintiffs cannot know

to what extent the copying has been carried, unless they examine the whole work. But the defendant can state exactly how much they copied and what parts they copied and can supply the Court with the knowledge of how the fact really stands without leaving it to be collected from inferences more or less strong." The minutes of the order finally made as drawn up by the Lord Chancellor were, in part, as follows (p. 403): "The plaintiffs . . . to signify whether they will elect to proceed before the master in order that he may ascertain what part or parts of the books or any of them are copies, etc.; or whether they will, one month before the defendant is required to plead, deliver to the defendant a statement of such part or parts of the said books."

The head note to *Page v. Wisden* (1869), 17 W.R. 483, reads: Although copyright may be claimed in part only of a book, the whole of which is registered, the part in which copyright is claimed should be distinguished in the bill, otherwise the costs unnecessarily incurred must be borne by the plaintiff. This embodies fully the remarks of Vice-Chancellor Malins on the point, referred to by the Master in Chambers in *Liddell v. Copp-Clark*. But as the case was dismissed on other grounds, no order for particulars was made.

In *Kelly v. Wyman* (1869), 17 W.R. 399, it was held that the plaintiff is entitled to a discovery of the sources from which the defendant's book has been compiled. The interrogatory which the defendant refused to answer was one requiring him to set out the names of all the canvassers employed by him in every part of England, the name of the place to which each was sent, and the time he spent there, the bill having charged that the number of persons so employed was insufficient, and that they had, in fact, made very few inquiries. James, V.-C., said: "If I charge you with having taken information from any book, and you derived your information from original resources, I have a right to know what those original resources were."

In *Chicago Music Co. v. I. W. Butler Paper Co.* (1884), 17 Fed. Rep. 758, it was said that the declaration in a suit to recover for infringement must set out in detail a substantial compliance with the various requirements of the copyright laws. The plaintiff must show that he has taken the steps required by law, e.g., how he became proprietor of the copyright, who was the author if he is not, how he came into the author's rights, etc.

See also *Redfield v. Middleton* (1860), 7 Bosw. (N.Y.) 649;

Black v. Allen (1890), 42 Fed. Rep. 618; *Rooney v. Kelley* (1861), 14 Ir. C.L.R. 158.

The bill, declaration or complaint must contain allegations which amount to an assertion of authorship in terms sufficiently explicit and full to establish a clear title in the plaintiff: *Atwill v. Ferrett* (1846), 2 Blatch. (U.S.) 39; *Falk v. Schumacher* (1891), 48 Fed. Rep. 222; *Henderson v. Tompkins* (1894), 60 Fed. Rep. 758.

[IN THE COURT OF QUEEN'S BENCH FOR QUEBEC.]

BEAUCHEMIN V. CADIEUX.*

Copyright—Historical, Biographical and Geographical Dictionary—Nomenclature—Common Sources—Piracy—Animus Furandi—Modes of Proof—Law Governing Copyright in Quebec.

In an action for infringement of copyright in a dictionary, the un rebutted evidence shewed that the publication complained of employed the same nomenclature, treated of almost all its subjects in the exact words used in the dictionary first published, and repeated a number of errors occurring in the prior work.

Held, WHITE, J., dissenting, that these resemblances being supported by proof of fraudulent intent, made out proof of piracy.

Judgment of Taschereau, J., reversed.

Though a work contains only material which is open to the world to use, yet originality in the arrangement and treatment will confer the right to protection.

Where there is a divergence between the English and French law in relation to copyright, the former should be preferred.

THE appellants, Messrs. C. O. Beauchemin et fils, were the proprietors, duly registered, of a historical, biographical and geographical dictionary, devoted especially to Canada, published as a supplement to Larousse's dictionary. In 1894, the respondents, Messrs. Cadieux and Derome, published a Canadian historical, biographical and geographical dictionary, in the form of a supplement to a dictionary composed by Mgr. Paul Guérin and Mr. Bovier-Lapierre.

The appellants, claiming that the respondent's dictionary was a piratical copy of their dictionary, entered an action against the respondents, praying that they be enjoined to cease the publishing and the selling of their dictionary; that the respondents be condemned to render them an account of the number of copies that they had printed, published and sold, and that they had still remaining in their possession; and that the copies still re-

*[NOTE.—This case was unavoidably omitted from the "Copyright Number" of the C. L. R. (Vol. II., Part II.) owing to the fact that the judgments in the Quebec Court, which had to be translated from the French, were not received in time for publication. The decision of the Supreme Court of Canada will be found at p. 170 of Vol. II., Part II. of the C. L. R.—Ed.]

maining in the respondents' possession, be confiscated for the benefit of appellants; that the respondents be condemned to pay appellants the price of the copies sold; that they be further condemned to pay them the sum of \$10,000 damages.

The respondents denied the piracy and pleaded that the two dictionaries were conceived and prepared according to the ordinary and recognized method for works of that kind, and that the matter contained in the two works which appeared similar, had been public property for a long time, and was not susceptible of private ownership.

To establish the piracy, the appellants produced lists of articles, some copied *verbatim*, others almost *verbatim*, lists of errors common to both works, references reproduced and other articles in which they claimed to find signs of piracy. To this proof the respondents opposed a report by Mr. Leblond de Brumath, indicating sources from which the author of respondents' dictionary could have taken his articles. By way of rebuttal the appellants produced a report of Mr. Louis Frechette, criticising that of Mr. Leblond de Brumath. Neither the appellants nor the respondents examined the author of respondents' dictionary.

The appellants' action was dismissed in the Superior Court on the 30th December, 1899, by Taschereau, J.

From this judgment the plaintiffs appealed to the Court of Queen's Bench. The argument was heard before a Court composed of SIR ALEXANDER LACOSTE, C.J., BOSSÉ, BLANCHET, HALL, J.J., and WHITE, J., *ad hoc*.

H. Gérin-Lajoie, for the appellants.

Gustave Lamothe, Q.C., for the respondents.

The following references were made:—Drone, Copyright, pp. 152, 154, 156, 199-202, 205-208, 400, 401, 408, 409, 430, 466; Copinger, Copyright, 3rd ed., pp. 184, note (a), pp. 135-140, 389; Shortt, Law of Literature and Art, pp. 191, 193, 194; Pandectes Françaises, *sub voce Copyright*, numbers 645-656, 742, 762, 853 *et*

seq., 860-864, 872, 977 *et seq.*, 1114-1119, 1125, 1126 and 1129; *Sirey*, 1866, 2, 228; *Kelly v. Morris* (1866), 1 Eq. 697; *Maple v. The Junior Army and Navy Stores* (1882), 47 L.T. 589; *Collis v. Cater* (1898), 78 L.T. 613; *Lamb v. Evans*, [1893] 1 Ch. 218; *Spiers v. Brown* (1858), 6 W.R. 352, and *Jarrold v. Houlston* (1857), 3 K. & J. 708, remarks of Sir W. Page-Wood; *Garland v. Gemmill* (1887), 14 S.C.R. 321, 2 C.L.R. 292; *Hotten v. Arthur* (1863), 3 H. & M. 603; *Mawman v. Tegg* (1826), 2 Russ. 385, at p. 394; *Roworth v. Wilkes* (1807), 1 Camp. 99; *Gyles v. Wilcox* (1740), 2 Atk. 142; *Truster v. Murray* (1789), 1 East 363n; *Scott v. Stanford* (1867), L.R. 3 Eq. 724; *Pike v. Nicolas* (1869), L.R. 5 Ch. 251.

December 27th, 1900. WHITE, J.:—

This is an action taken under section 30, cap. 62, R.S.C., which provides that every person who, after the interim registration of the title of any book, according to this Act, and within the term herein limited, prints, publishes, or reprints or republishes any copy of such book without the consent of the person lawfully entitled to the copyright thereof, first had and obtained by assignment, shall forfeit every copy of such book to the person then lawfully entitled to the copyright thereof; and shall forfeit and pay for every such copy which is found in his possession, either being printed, published, imported or exposed for sale, contrary to the provisions of this Act, such sum, not exceeding one dollar, and not less than ten cents, as the Court determines, which forfeiture shall be enforceable or recoverable in any Court of competent jurisdiction; and a moiety of such sum shall belong to Her Majesty for the public uses of Canada, and the other moiety shall belong to the lawful owner of such copyright.

The declaration alleges that the plaintiffs are the owners of the copyright of a certain book printed by them in 1893, under the title of the "New Historical, Geographical, Biographical and Mythological Dictionary, Illustrated"; that as owners of said copyright they have, since 1893, printed and published the said

book, and are entitled to the exclusive privilege of printing, publishing and selling the said dictionary; that about the end of the year 1894, the defendant printed, published and sold a certain other dictionary, under the title of the "New Universal Illustrated Dictionary," with a supplement, separately paged and entitled the "New Illustrated Universal Dictionary Supplement for Canada," which supplement was and is a copy (counterfeit) of plaintiffs' dictionary, with some changes in phraseology, made for the purpose of disguising its being copied, but that it is made on the same plan, and treats substantially upon the same subjects; that this publication of the defendants is an infringement upon the rights of the plaintiffs, who have suffered damages therefrom to the extent of \$10,000, which they claim from the defendants. Plaintiffs further ask that defendants be enjoined from selling their said dictionary with the supplement by them printed and published in 1894; that such copies as remain in the hands of the defendants be confiscated for the benefit of the plaintiffs; that the defendants be condemned to render an account to the plaintiffs of the total number of copies which they have printed, published and sold, as well as those still in their possession; and that the defendants shall be further condemned to pay to the plaintiffs the cost price of such copies as may be by the account rendered, established as having been sold.

The defendants contest the action, denying that their work is a counterfeit of the plaintiffs', and pleading that the two dictionaries have been made and compiled according to the *ordinary method* known for such works, and that the matter contained in the two books, and which appear to bear resemblance, was, long before the publication of either, known and given to the public, and was not susceptible of becoming private property.

The judgment of the Superior Court (Taschereau, J.), rendered on the 30th of December last, maintained defendants' pretensions and dismissed the plaintiffs' action.

In the consideration of this case, there are two main questions to be considered.

1st. Have the plaintiffs a valid copyright conferring upon them the exclusive privilege of printing and publishing the contents of their dictionary?

2nd. If so, have the defendants infringed upon the plaintiffs' rights, and by their trespass, caused them damage?

Only in the event of answering both questions affirmatively would it become necessary to examine into the extent of the damage, or the form and scope of the judgment to which plaintiffs would be entitled.

At any rate, the two main questions should be firstly considered.

It might appear, on first examination of the judgment rendered that the case was disposed of and the action dismissed upon the first ground, that plaintiffs had no valid copyright, all the subject matters composing their dictionary being public property, previous to its publication. This, however, would be an error, as the judgment does not so hold. It rather disposes of the case upon the insufficiency of plaintiffs' proof as to defendants having wrongfully appropriated plaintiffs' labours of compilation.

The judgment expressly declares in one of the "considerants," that it appears *from the proof*, as well as from an examination and comparison of the two works, that, under an alphabetical arrangement, *both* are nothing more than works of abridged compilation of facts, dates and statistics, previously belonging to the public, in the domain of history, geography and biography; that in the preparation of each recourse was had to sources open and available to everybody, such as ancient dictionaries, historical works, illustrations, geographical atlases and treatises, and previous biographies; that the defendants' dictionary is in general more detailed than the plaintiffs' and contains more important information; that, while it is true certain phrases and passages in defendants' appear to have been borrowed from plaintiffs', it is nevertheless an accepted doctrine, established by jurisprudence, that the mere reproduction of a few lines or passages, resulting from similarity of subjects treated, is an essential right of public domain, and does not give rise to an action

for counterfeiting, unless such reproduction exists to *such an extent* as to constitute guilty appropriation; that any presumption of guilty appropriation in this case is *rebutted by the proof*; that in the more lengthy and important articles of defendants' work, in which there are corresponding articles in plaintiffs', the additional information furnished by defendants' establishes that the latter, in utilizing the same sources of information, extracted from them more fully, and made their work more complete.

From this it is evident that the case has been disposed of on the second point, and mainly upon the question of insufficiency of plaintiffs' evidence of guilty appropriation. The judgment, therefore, is not in conflict with the decision rendered in 1887 by the Supreme Court in *Garland v. Gemmill* (14 S.C.R. 321), and in which the Supreme Court adopted the ruling and followed the decision rendered in 1866 by Vice-Chancellor Wood in the case of *Kelly v. Morris* (reported in the first volume of the "Equity" cases, p. 697), a case in which the owner and publisher of the "Post Office London Directory" obtained an injunction restraining the publication of the "Imperial Directory of London," on the ground that the latter was a mere piracy of the plaintiffs' work.

In these cases cited, it was held that the compiler of a directory or guide book, containing information common to all, which must of necessity be identical in all cases, if correctly given, is not entitled to spare himself the labour and expense of original enquiry, but in adopting and republishing the information contained in previous works on the same subject, he must obtain and work out the information independently for himself; and the only legitimate use which he can make of previous works is to use them for the purpose of verifying the correctness of his own results. But in these cases, it was held that any works of this nature where so much may be taken by different publishers from common sources, and the information given must be in the same words, the Courts will be careful not to restrict the right of one publisher to publish a work similar to that of another, if he obtains the information from common sources, and does not, to

save himself labour, simply copy from the work of the other, that which has been the result of the latter's skill and diligence.

Both of these cases recognize the right of a compiler to the exclusive enjoyment and benefit, under copyright, of his labour and diligence in compilation, although there is, strictly speaking, no original literary creation in his work; but they also admit that the very same work of compilation, may, in spite of the copyright, be performed by another, who devotes to it the same labour, skill and diligence in searching and extracting information on the same subjects, from previous original sources.

The judgment of the Superior Court in this case follows the same rules. The same law is laid down in this case as in the others. Although the decisions are different, they all turn upon questions of evidence. In the cases of *Garland v. Gemmill*, and *Kelly v. Morris*, the evidence was sufficient to satisfy the tribunal that, on the part of the defendants, there had been guilty appropriation. In the present case, the judgment of the Court is against the plaintiffs on the evidence. The question before this Court, therefore, is largely, if not altogether, that of ascertaining whether the Court below, has erred in its appreciation of the evidence.

Of course in such an action the *onus probandi* is necessarily upon the plaintiffs. Plaintiffs in this case have contented themselves with producing copies of the two works and by circumstantial evidence extracted from them. They have offered no direct proof of copying or piracy. They examined Mr. Derome, one of the defendants, for the purpose apparently of obtaining direct proof. All that they are able, however, to obtain from him, is that he does not know and does not believe that defendants' dictionary was copied from the plaintiffs. He tells us that it was compiled for them, in 1883, by Mr. A. Martin, a *littérateur* previously connected with the newspaper *l'Etendard*, and who, from his previous occupation and general knowledge of history, biography, and geography, was considered to be a competent person to take charge of such a work. He states that the work was prepared between January and October, 1883, and

published in 1884, and he states that Mr. Martin was instructed to consult original sources, such as Lovell's Gazetteer, histories of Canada by Ferland, Garneau, Benjamin Sulte, Bibaud and others, and was strictly enjoined not to make use of plaintiffs' dictionary.

He states that defendants had 5,000 copies printed in Europe in 1884.

Of course there is in this no evidence of guilty appropriation. Plaintiffs have not examined Mr. Martin, resting upon the circumstantial evidence, which they consider sufficient to make out their case.

It is suggested that the dictionaries are alone sufficient, that a careful examination of them alone will shew such similarity as to convince the Court, that the second has been copied from the first.

This is as much as to say that if we find the second just like first, we are bound to conclude that it was copied.

But the authorities held, as a matter of law, that the second may be similar to the first, if it has been taken from the original sources. The proof required, in such a case as the present, is rather of a negative character, that the second has not been taken from original sources. Of course this proof could be made affirmatively if plaintiffs could obtain the direct evidence that the second had been copied, by the author or compiler, from the first. If they cannot get the affirmative, they are relying upon the circumstantial evidence, to prove the negative. In this case the comparison of the two works does not shew that they are *exactly* alike, and the circumstantial evidence, afforded by the extracts and tableaux, A, B, C, D, E 1, E 2, F, G, and H, shews nothing more.

Circumstantial evidence to be valuable, should be such as to exclude any other theory, than that which it is intended to establish, or at least make it appear so probable, that no other theory can reasonably be excepted.

In this case, the fact sought to be established, is of the nature of fraud, it is literary piracy, and should be established, if not

beyond any reasonable doubt, at least with reasonable certainty. The examination of the experts in this case is of great assistance, to the Court, and is indeed of great value—that of Mr. Louis Féchetle on behalf of the plaintiffs and of Professor Leblond on behalf of defendants, both men of high literary attainments.

The plaintiffs at their *enquête* furnished these extracts, with certain evidence tending to shew correspondence between the two dictionaries, and laid great stress upon a list of passages containing errors in the first, which likewise appear in the second.

The defendants, in their *enquête*, have examined but one witness, Professor Leblond, whose evidence and report is made for the purpose of setting aside and rebutting any presumption, which might arise from the circumstantial evidence of correspondence and similitude. His examination of these extracts is exceedingly able and clear.

The extracts, filed by the plaintiffs at their *enquête*, exhibits A, B, C, D, E 1, E 2, F, G, and H, are taken from those portions of the two dictionaries, which correspond, or nearly so, or bear such a resemblance as might give rise to suspicion of copying.

The defendants, in their *enquête*, contented themselves with an examination and criticism by the witness, Professor Leblond, who makes a most satisfactory explanation of nearly the whole of them, satisfactory, at least, in so far as shewing that they *may* have been taken from original sources, many of them from the same sources from which plaintiffs' work has been taken, and some of them from other sources—sufficiently satisfactory, at least, to prove that the appearance of corresponding articles in the defendants' work does not, by any means, necessarily prove that they were copied from the plaintiffs.

As to nearly every instance in the extract of errors, the evidence of Mr. Leblond, establishes that these errors exist also in the original sources, or may otherwise be explained or accounted for.

In rebuttal, the plaintiffs obtain a report from Mr. Louis Féchetle in criticism of the evidence and report of Professor

Leblond. Mr. Fréchet says of Mr. Leblond's work (page 58, line 20) :

"Mr. Leblond de Brumath replies to this that all the details might have been taken from other sources; and he cites a very great number of works from which the defendants *might* have taken their information which forms the matter of the articles attacked.

"*It is very evident* that the defendants *might* have taken the information that they have taken from the dictionary of plaintiffs, from other sources when the latter themselves found it in works which were public property."

He says: "Mr. Leblond replies to plaintiffs' evidence, that these details *might* have been taken from places other than the plaintiffs' work, and he cites a great number of works, from which the defendants *might* have taken the information, which forms the matter of the articles attacked, and he adds that it is *very evident*, that the defendants *might* have taken this information from other sources, because the plaintiffs themselves have found the same information in other works, which were in the public domain."

In Mr. Fréchet's opinion, it is not at all satisfactory, merely proving that they *might* have taken from other sources; but Mr. Fréchet overlooks the point that that, substantially, is the very kind of proof the plaintiffs made; that is, that the defendants *might have taken, might have copied* the information from the plaintiffs' work. Their evidence was not direct, but merely circumstantial. They seem to think that the similarity is *so* direct and *so* frequent, of it might having been done, that it amounts to proof that *has* been done. But, after all, the evidence is nothing more than circumstantial. It is certainly not direct; and the only evidence it was necessary for the defendants to adduce, was evidence of the same character to destroy that of plaintiffs; and to shew that, however plausible or probable the circumstantial evidence might make the fact appear to be, yet it was not conclusive, because the same circumstances would also point to a conclusion, the very opposite of that which plaintiffs desire to

establish—proof that the defendants' information *may equally* have been taken from other sources. Mr. Fréchette's own language shews this. He says, "that it is *very evident*, that defendants *might* have taken their information from other sources."

If that is *very evident*, then plaintiffs' circumstantial evidence has been rendered abortive, and so inconclusive that no judgment could be based upon it.

It is true, that there are two or three instances, such as "White Harbour," which would indicate that in the course of the preparation of the defendants' work, or before its final completion, the plaintiffs' work had been examined; but these unexplained instances are *so few* and unimportant they would not warrant, or justify so broad a finding as wholesale piracy of plaintiffs' rights.

As I view it, the question involves altogether a question of the appreciation of the evidence submitted. The Court below could not find that it was so conclusive as to warrant a judgment, maintaining plaintiffs' action, nor can I find, upon examination of it, that the Court below has erred in its finding.

SIR A. LACOSTE, C.J.:—In according a copyright the law does not intend to vouch for the literary merit of a book. What it wishes to protect is the work itself, the workmanship, the labour of the author, so that no other may possess himself of it in order to unfairly compete against him. Let us see why the protection does not extend solely to works of genius, science and art, but also to mere compilations of matters and of facts taken from the *public domain* (common sources), such as dictionaries and directories. The law does not prohibit the making of similar compilations, provided they be the result of the labour of the author and not the copy of those that are protected.

It is the original work of the author which is protected and not that which he has taken from the public domain (common sources). Thus in a directory, the names, occupations, addresses, are public property, but the compilation of these names accompanied by other information, presupposes a work of research, of information taken at the home of each person, and whoever

would copy the first directory in place of imposing upon himself this labour would be guilty of piracy.

In a language dictionary, the nomenclature is public property, it can be copied from a dictionary already published; the work of the author is in the intrinsic form which he gives to his dictionary, in the definitions, in the examples, in the choice, the grouping of facts under each name.

Finally to discern whether there has been a piracy, it would be well to take note of the intention of the copyright and to distinguish that which forms part of the public property at the time of the publication.

Piracy consists in copying the work protected by law, and in possessing oneself of the labour of the author and in reproducing it in order to enter into unfair competition with him. It is not necessary that there should be a servile copy, but the two works ought to resemble each other sufficiently so that it might be said that the work of the first is reproduced in the second. To copy a substantial, an important part of a work suffices to give to the reproduction the character of a *délit*. When the reproduction is sufficient to cause a prejudice, there is an unlawful copying.

The material fact of piracy is susceptible of all kinds of proof. The resemblance is an element of proof which is met with in all cases. In certain cases it alone may be sufficient, to convince the Judge, as for example in the production of a poem, romance, or original literary work; in other cases, it is but a presumption more or less strong according to circumstances. One understands, for example, that two compilations of facts, statistics, etc., drawn from the same sources, must resemble one another very much.

But the resemblance is not the sole element of proof. The piracy can be proved directly, or again, it can be proved by facts or circumstances which, in themselves do not establish the copying, but establish the presumption more easily. The *animus furandi* when discovered to lie at the door of the accused creates one of these presumptions; and once proved it convicts

the author of bad faith and gives to his case an unfavourable colour.

In all cases, the Judge should be convinced that the defendant has possessed himself of plaintiffs' work, and has copied it in place of taking from the common sources.

Agreeably to the character of the proof the delinquent will sometimes be convicted in cases where the resemblance will be much less striking than in others where an acquittal would be the result.

It is the application of the hereinabove rules that we ought to make to the facts of the case.

The two dictionaries in question are works of the same kind which naturally ought to resemble each other. The nomenclature is practically the same. Mr. de Brumath, the respondents' expert declares: "The first dictionary having been really well done, no modification had to be made to the second as to the nomenclature." He has no very precise opinion on the right of an author to its nomenclature; he lays down very well the means of making a new one of it "in taking for its foundation a very complete history such as that of Garneau, books of biography, atlases, Lovell's dictionary," but, adds he, "that is supposing that a work does not exist yet, because I believe one has the right to help oneself from a dictionary already made . . . one can help oneself from the first as to source and as to nomenclature." I have no doubt that the respondents have adopted the nomenclature of appellants' dictionary. Can they do it? I do not believe it.

One of the respondents, Mr. Derome, tells us that the appellants' work is the first of the kind that has been published. It was certainly the most complete that had been given to the public up to that time. The appellants had to make the choice of names, persons, places, events, which should figure in their dictionary. They then manufactured a nomenclature which was not to be found in any other work. It is not like a language dictionary of which the nomenclature is in the public domain (public property).

The nomenclature of the appellants' dictionary is protected because it is the work of the appellants taken from the public domain. It is an important part of their work of which the copy constitutes a piracy.

The resemblance extends also to the manner in which each subject is treated. The choice of facts and events in each article is almost the same, and the way of expressing them is often identical, and very often with transpositions and changes which make me believe that Mr. Martin had appellants' dictionary under his eyes when he wrote that of the respondents'.

Without doubt, as the learned Judge remarked who rendered the judgment in the Superior Court, the simple reproduction of scattered lines or passages, resulting from the similarity of subjects treated especially in abridged works, does not constitute in itself an offence of piracy, but the multiplicity of these productions as well as a pronounced identity of words, facts, phraseology, lead us to believe that there exists a very close relationship between the two dictionaries, and that the second proceeds from the first.

Unquestionably the second is in a sense an improvement on the first in the same way as a second edition of a work is an improvement on the first, but these improvements do not efface *le délit*. In a sense they aggravate it in rendering the second work more useful, more complete and more attractive, and consequently more prejudicial to appellants' work. But more than that we find convincing proof of the intention to copy in the reproduction of errors and references which are to be found in appellants' work. The respondents' able expert wishes to make us believe that these errors and references are met with in works which are public property. It is possible, but it is wholly improbable that the author had taken them from there.

His evidence tends to establish that Mr. Martin could have made a dictionary, had he wished, without copying that of the appellants, which these last admit, but it does not prove that Martin drew from the sources which the witness cites. We have

not been able to consult many works, which are open to the public, and which have been mentioned to us, but if one takes the evidence of Mr. de Brumath, the wording, in a great number of cases, does not resemble the authorities which he cites. The least one can say is, that the whole of the evidence and documents produced make *prima facie* proof of the material fact of voluntary and consequently unlawful piracy of the appellants' work. It was easy for the respondents to destroy this proof by tendering the evidence of Mr. Martin, who was then living and residing in Montreal, and in making him produce his manuscript. They preferred the evidence of an expert. Should we not presume that they feared to put the work of the author of their dictionary before the Court, and is not their conduct of a nature to convince us of the *délit* which has been committed to the prejudice of the appellants?

We come then to the firm conclusion that there has been a piracy.

We consequently prohibit the respondents from putting on sale and from selling their dictionary, and we condemn them to render an account of the copies that they have already sold.

We send back the record to the Superior Court to be finally adjudicated upon on the other conclusions.

After the rendering of the account the Court will be in a better position to determine the amount of damages.

BLANCHET, J.:—The appellants are the proprietors, duly registered (R.S.C. ch. 62), of a book entitled "New Illustrated Historical, Geographical, and Mythological Dictionary," which they published about 1885, as a supplement to Larousse's "French Dictionary."

Several times since then they have re-edited this work, the first of the kind in Canada, and their cost of collaboration, composition and printing amounts to a considerable sum.

In 1894 the respondents also published a dictionary entitled, "New Universal Illustrated Dictionary," printed originally at Paris by Mgr. Paul Guérin, and in which they have intercalated

a supplement for Canada, which contains, saving certain modifications, the same information as that of the appellants.

These latter allege that this supplement of the respondents is a piracy and a copy of that which they themselves have published; that it is made according to the same method and contains almost the same nomenclature of subjects; that the greatest part of the articles which it includes are either veiled imitations of extracts, or textual copies of their own articles, and that it reproduces with the same persistency the inaccuracies as well as the references which are to be found in the first, and they consequently claim \$10,000 damages.

They demand also that the respondents render them an account shewing the number of dictionaries that they have sold, the price therefor that they have obtained, and pray besides that they be ordered to cease from publishing and from selling their book, and that the copies not sold be confiscated for their profit.

The respondents deny the piracy and the plagiarism. They plead that the two dictionaries were conceived and executed in accordance with the ordinary method adopted for works of this nature, and that the matters contained in the two works and which appear similar were public property long previous to their publication, and consequently were not susceptible of private ownership.

The Superior Court has maintained this plea, saying "that the proof and examination of the two works shewed that both were works of mere compilation of facts, dates, and statistics belonging to the public for a long time; that in their preparation recourse had been had to common sources, accessible to all, such as previous works of the same kind; that respondents' dictionary is more detailed than that of the appellants, and contains important information not to be found in the latter; that it is true that certain phrases and short passages of the respondents' dictionary appear to have been borrowed from appellants' dictionary, but that the doctrine and jurisprudence are that the simple reproduction of scattered lines and passages, resulting from the

similarity of the subjects treated and not culpable borrowings, form part of the public property and cannot give rise to the civil action for piracy; that in the long and important articles of the respondents' dictionary, in which extracts appear to have been made from corresponding articles of appellants' dictionary, additional information, not contained in appellants' dictionary, is given to the public, which shews that the respondents, in using the same sources of information as the appellants for the subject matter of the same articles, have drawn therefrom more abundantly and have made a more complete work; that other apparent borrowings, in other articles less important and exceedingly short, are under the form of simple data of statistics, history, or geography, and cannot be laid against respondents, seeing that in an abridged dictionary, these data are such that it is impossible to express them in many ways, and that the analogies, as well as the similarities, either of disposition or of words, are inevitable in such matters, and are not the signs of piracy; that by law the respondents can legally take from plaintiffs' dictionary, as from other previous works, for their own publication the necessary information, data, and statistics, already public property, and that they have not done so in this case in an unlawful and culpable manner; that the passages that the appellants claim to have been eneroached upon are a very trifling portion of the whole of the book which is their property, and is lost in reality in the mass of the two works; that even supposing that there could have been simple literary plagiarism, there could not have been any knowledge to constitute culpable piracy giving rise to the civil action, when the borrowings bear neither on the whole nor on the essential and distinct portions of the work put under contribution, but only on some very short and scattered passages, or criticized similarities inherent in the nature and the object of the works; that the borrowings and similarities with which respondents are reproached are of such a nature and of such a category as not to be able to give rise to the appellants' action."

The appellants demand that this judgment be reversed, and they submit that we ought, in order to decide if there is a piracy, as the Superior Court has done, to consult the English law which, according to them, is more favourable to them than the French law.

The respondents have expressed no preference for either.

To resolve the question it will be necessary to examine the nature and the extent of the right of the author to the book which he has composed and offered for sale, and to establish if this right is anterior and superior to the positive law which grants a temporary protection, or if it ought to be limited to the privilege that this concedes to him for encouragement and recompense.

Thousands of volumes have been written on this grave subject upon which the authors and publicists are divided even to this day, but this interesting controversy can have only one practical result, from the point of view which occupies us, because it is judicially recognized that if the right of the author is derived from natural law, the law which consecrates it ought to be interpreted liberally, whilst if it is in reality only a privilege, the law which establishes it ought to be interpreted strictly.

It suffices to say on this point that it has always been admitted, in England and the United States that, before publication, the author has a right of absolute ownership in his work, that he can protect it like all other ordinary property. It was also recognized for a long time that this right continues to subsist after the publication and independent of the privilege accorded by law, but the contrary opinion has however finally prevailed, and the Courts of the two countries have, for quite a long time, unanimously recognized that the right of the author is limited to the privilege granted him by statute: 4 Burr. 2303; *Drone on Copyright*, pp. 8 and following; *Jeffreys v. Boosey* (1854), 4 H.L. Cases 815; *Caird v. Sime* (1887), L.R. 12 App. 326; Alb. L.J. 291; *Beckford v. Hood* (1798), 7 T.R. 620; *Reade v. Conquest* (1861), 9 C.B.N.S. 763.

This doctrine appears to me most rational and logical, because the writer who offers for sale an artistic, scientific or literary

work, evidently consents to give the fruit of his work and labour to the public for a compensation which he fixes himself, and this offer, once accepted and executed by the two parties, forms a perfect and irrevocable contract, and it results necessarily from it that an author cannot, in such case, invoke any other right except that granted him by statute, and as this last was promulgated by the Federal Parliament, which alone has exclusive jurisdiction on copyrights (B.N.A.A. sec. 92, sub-sec. 23), and being a reproduction of the dispositions of a statute of the United Kingdom, it follows that it should be given the same interpretation here that the Courts have given it there in the country where it originated, and, in case of divergence with the French law, the English jurisprudence ought to prevail in preference to the other.

The second question which is submitted to us is whether the appellants' work is susceptible of private ownership.

The affirmative does not seem to me to be susceptible of doubt.

It is true that the dictionary of the appellants contains information on history, geography and biography, or as the judgment declares, a compilation of facts, dates and statistics belonging for a long time to the public, but this collection and this compilation is not the result of a purely mechanical process. They have, on the contrary, an important particular, that is that the appellants have given them a new and original form, different and easy to distinguish from that of the works from which they could have drawn.

In effect, if the work of their compositors has first consisted only in choosing the subjects which ought to be treated, in classifying them in alphabetical order and in grouping afterwards a certain number of facts, events and dates under each of the titles, it would be necessary to devote a great deal of time and work to co-ordinate this mass of references and information and to give them the turn and style suitable to a biographical, geographical and historical dictionary, where the most striking acts, things and facts should be related and described succinctly and in a

general way, in a manner to interest the reader and to appeal to his understanding.

The appellants hold that the form in which they have clothed and adorned the different materials contained in their dictionary constitutes a work of authorship, and that if they have not discovered the sources of their articles, they are nevertheless the owners of the wording that they have given to them and which constitutes a distinct and individual work, susceptible of private ownership.

The authors and jurisprudence are unanimous in recognizing this distinction.

Drone, on Copyright, p. 152:

"The doctrine is well settled in England and the United States that existing materials selected from common sources, and arranged and combined in an original and useful form, become a proper subject of copyright. This is equally true whether the compilation consists wholly of selected matter, or of such matter combined with original composition; and, in either case, it is immaterial whether the materials are obtained from published or unpublished sources, or whether the selections are used bodily, or their substance is given in the language of the compiler. Such works are often the result of industry, learning and good judgment, and are useful and valuable contributions to knowledge. They are entitled to and will receive the same protection extended to productions wholly original."

And on p. 154: "It is no objection to the copyright in a compilation that the compiler is not the author of its component parts. Selecting, arranging and combining existing materials in a useful form is recognized by the law as an act of authorship and creating a title to exclusive ownership."—*Idem*, pp. 156, 199, 201 and 202.

Copinger, on Copyright, p. 389:—"The law does not require that the subject of a book should be new, but that the method of treating should have some degree of originality about it. Copyright may be claimed by an author of a book who has taken existing materials from sources common to all writers, and given

them an application unknown before. For, in making the selection, arrangement and combination, he has exercised skill and discretion, and in producing thereby something that is new and useful, he is entitled to the exclusive enjoyment of his production."

Short, Law of Literature, p. 191; *Alexander v. MacKenzie* (1847), 19 Scotch Cases 758.

In the case of *Lamb v. Evans*, ([1893] 1 Ch. 218; 62 L.J. Ch. 404), it was held "that the publisher of a directory consisting of advertisements furnished by tradesmen, but classified by him under headings denoting the different trades, had no copyright in the advertisements, but had a copyright in the headings."

In the case of *Kelly v. Morris* (1866), L.R. 1 Eq. 697, it has been held "that the compiler of a directory or guide-book containing information derived from sources common to all . . . is not entitled to spare himself the labour and expense of original enquiry by adopting and republishing the information contained in previous works on the same subject, . . . and the only legitimate use he can make of them is for the purpose of verifying the correctness of his results."

Pouillet, Copyright, No. 27:—"The publication of a directory containing the classification of the inhabitants of a city, by streets and numbers, does not constitute an invention or conception susceptible of an exclusive right of literary ownership, . . . but an annual can enjoy the protection due to literary ownership, if its plan and dispositions present a character of originality."

The same thing has been held as to albums and illustrated catalogues, although they be published for a purely industrial purpose. Sirey, 88, 2, 20.

"The right of ownership in question is not limited to entirely original creations. It extends equally to those of which the elements, although borrowed from public property, have been chosen with discernment, and disposed in a special and appropriate order with intelligence to a subject more or less general." Sirey, 88, 2, 20.

Pandectes Françaises, *sub voce* Copyright, No. 853:—"One allows to authors of compilations on all occasions the rights consolidated by the laws on literary ownership, it being well understood at all times that they have proved initiative and originality. Their rights, besides, bear on the general dispositions or details which have been created by them, and not on the whole of the matter in the work." Sirey, 45, 1, 177; 53, 1, 545; 70, 1, 228; Ruben de Couder, Copyright, No. 76; Renouard, vol. 2, p. 97; Pouillet, No. 22.

Pandectes Françaises, No. 862:—"Dictionaries, almost always arranged alphabetically, leave however plenty of room for the personal work of the author. A biographical or scientific dictionary, being the occasion, under each heading for a true piece of literature, or science, offer the same opportunities to the author to shew his intellectual qualities."

No. 863:—"The Court of Cassation recently applied these principles in deciding that the exclusive ownership of the author should be limited to the order of and the work done on the materials, to the choice of examples and situations, in a word, to the parts which bear the stamp of personal work."

It remains for us now to examine the principal question, namely, if respondents' dictionary is a piratical copy of the appellants'.

It is a question of fact (Sirey, 94, 1, 283), and the rules laid down on this point by the authors, and the jurisprudence in England, United States and France are nearly uniform, and are wanting neither in clearness nor precision.

Pandectes Françaises, *sub voce*, Copyright, No. 664:—"Piracy relates to the property of authors, that which is theft relates to ordinary property. . . . The result is that all reproductions of a work, whether partial or wholly, encroaching on the right of the author, constitute a piracy."

The damage is not an essential element of this *délit*, because it is sufficient for the author to shew that this right has been ignored (Sirey, 67, 1, 69), and from the moment that the viola-

tion of ownership is certain, one need not concern oneself with whether he who is culpable acted in good or in bad faith.

Pandectes, Nos. 664 and 681:—"Plagiarism which consists in borrowing more or less considerably from a work already published, takes the character of piracy only in so far as the borrowings are important and notable and the borrowed part forms an essential portion, either of the work of the complainant or of the accused." Sirey, 54, 1, 765; 55, 1, 392.

Pouillet, Copyright, No. 507:—"It would be dangerous to restrict oneself to looking for the number or the importance of the borrowings; it is to their quality and to their nature that regard must be had."

It has been held that an extract of 500 lines out of 25,000 constitutes a piracy, although no serious resemblance was to be met with either in the character of the work, the general plan, or in the divisions. Sirey, 91, 2, 143.

The extracts made by the authors of the Dictionary of Conversation from Michaud's Universal Biography, both considerable works, were declared piracy, despite the fact that the borrowed articles amounted to only one hundred and two, and those which had been modified in part to sixty-three. Sirey, 47, 1, 765; 53, 1, 545; 55, 1, 392; 55, 2, 50.

In the United States:—

"The question of piracy, in all cases, is whether a material and substantial part of a prior work has been taken.

"While it is impossible to lay down any definite rules as to the extent of borrowing which is required to constitute a piracy, it may be said that it certainly is not necessary, to constitute an invasion of copyright, that the whole or even a large portion, of a work be copied. If so much is taken that the value of the original is sensibly diminished, or the labours of the original author are substantially and to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy."

In the case of *West Publishing Co. v. Lawyers Co-operative Publishing Co.* (1896), 79 Fed. Rep. 756, Lacombe, J., said:—

“It is not the law that a copyright syllabus can be infringed only by a reproduction of its original language. It is the unfair appropriation of the labour of the original compiler that constitutes the offence. Identity of language will often prove that the offence was committed, but it is not the sole proof; and when the offence is proved, relief will be afforded, irrespective of any similarity of language. For example, if, in a case like this, defendant’s editors should one and all testify that they made up their digest from complainant’s syllabi, so as to save the time and trouble necessarily involved in an independent examination of each opinion, there can be no doubt that such digest would be held to infringe, although the work were so cleverly done that no identity of language could be found in a single paragraph.”

In the case of *Callaghan v. Myers* (1888), 128 U.S. 617, the question of infringement was between two judicial reports of which the first was protected as to a part only—the headings and the judgments.

The Court said:—“It is true that in each volume, perhaps in the majority of cases, there is the appearance of independent labour performed by them, without regard to the volumes of Mr. Freeman; but yet, in every volume, it is also apparent that Mr. Freeman’s volumes were used; in some instances words and sentences copied without change, in others changed only in form; and the conclusion is irresistible that for a large portion of the work performed on behalf of defendants, the editors did not resort to original sources of information, but obtained that information from the volumes of Mr. Freeman.”

The following decisions, rendered in England, are not less explicit:—

“A subsequent writer may make a fair and legitimate use of a prior publication, but he may not copy or imitate it to such an extent as to damage the property of the author in his copyright.” Vice-Chancellor Wood in *Scott v. Stanford* (1867), L.R. 3 Eq. 708.

“Even if a work otherwise piratical be in some respects an improvement on the original work, it is still an infringement.” *Idem*.

“I am not aware that one man has the right to abridge the works of another.” Vice-Chancellor Bruce in *Dickens v. Lee* (1844), 8 Jurist, 183.

“In the case of a dictionary, map, guide-book, or directory, where there are certain common objects of information which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done. In case of a road-book, he must count the milestones for himself, in the case of a map of a newly discovered island . . . he must go through the whole process of triangulation, etc.” Vice-Chancellor Wood in *Kelly v. Morris* (1866), L.R. 1 Eq. 697.

In the case of *Bramwell v. Halcomb* ((1836), 3 Myl. & C. 711), Lord Cottenham said:—

“When it comes to a question of quantity, it must be very vague. One writer might take all the vital part of another’s book, though it might be but a small proportion of the book in quantity. It is not only quantity, but value that is always looked to.”

In the case of *Garland v. Gemmill*, the Supreme Court of Canada decided that the fact of copying certain biographies contained in Morgan’s Parliamentary Companion, and the inserting of them, even with the permission of the persons who formed the subject thereof in a similar work published subsequently, constituted an infringement: 14 S.C.R. 321.

These precedents and authorities clearly establish, at least in the case now occupying our attention, that if the appellants could not prevent the respondents from helping themselves to the matter that they have used, either for a different work, or for a work of the same kind, these latter can no more appropriate to themselves the form that the first have given to these common matters and possess themselves of their publication which is their exclusive property; that if, in the publication of an historical,

geographical, biographical and mythological dictionary, the adoption of the same alphabetical form, of the same titles and the use of the same methods in the treatment of the same subjects are not always considered as an infringement, they can serve nevertheless to establish, especially by shewing the frequent resemblance of texts, that the second work is only, in whole or in part, the production or the copy of the first; that to constitute the piracy, it is not necessary for the second author to copy textually and in entirety the original work of the first, but it is enough that the extracts be sufficiently numerous and important to establish that there has been intentional and repeated appropriation of the work of the other, and that if the identical nature of the subjects treated can give occasion to resemblances, in the two texts, these resemblances, which can be easily explained when they are few and limited to names of persons and places, to dates and statistics, or to ordinary information reduced in a succinct manner, become on the contrary the irresistible proof of an evident piracy, when they are repeated often enough to cause the whole idea of accident or hazard to disappear.

The appellants say that the infringement with which respondents are charged, is clearly shewn by the comparison of similar extracts from the two dictionaries, and to render it more evident, they have produced at the same time a book containing a great number of these extracts to which they have drawn attention, by underlining with red ink the passages claimed to have been copied in whole or in part, and they have, in addition, tendered the evidence of an expert witness, Mr. Valois, who has produced nine lists for examination, and containing, according to his opinion:

1. Articles copied textually;
2. Articles copied almost textually;
3. Scattered articles being extracts or imitations;
4. References reproduced;
5. Errors or inaccuracies also reproduced;
6. Digressions;
7. Judicial districts of the Province of Quebec, with remarks:

8. Populations indicated arbitrarily;

9. Articles in which the word "environ" is employed.

Two distinguished men of letters, Mr. Leblond de Brumath for the respondents, and Mr. Louis Fréchet for the appellants, have made, each for his side, a critical study of the two works, from the point of view of the prosecution and of the defence.

These observations are ingenious and interesting, but unfortunately, they have no probatory force, because they are in reality only pleadings and not evidence.

Mr. de Brumath has undertaken especially to shew that the respondents could have found the subjects and facts contained in their supplement elsewhere than in appellants' dictionary. This admits of no contestation, but does not resolve the question that we have to decide.

As to Mr. Fréchet, he has undertaken to establish, by arguments that lack neither force nor originality, that the counterfeit alleged is not only visible but palpable.

Mr. Justice White is of opinion that the appellants not having made any direct and positive proof in support of their allegation of counterfeiting, the comparison of the two works made by Mr. Valois, and his study of their extracts, is not sufficient to establish the alleged offence; because, according to him, resemblance only between the two books would not suffice to shew that the second was copied from the first. And as the piracy is a fraud which ought to be established beyond all doubt, the presumptions invoked as resulting from the examination of the two works are not sufficient, in his opinion, to justify the maintaining of the action.

The principles that govern the proof in matters of counterfeiting are the same in all countries.

According to our Code, art. 1025, it can be made by writing, by witness or by presumptions.

Pandectes Françaises, *sub voce* Copyright, No. 768:—

"The question of knowing whether or not there has been an infringement results from the examination of the two words infringed and infringing, from their analysis and their comparison;

the examination and verification of the differences or similitudes which can exist between them and which are of a nature to establish the *délit* or set it aside, are entirely limited to the study of these two works, and the appreciation of the piracy in regard to them is a question of fact. . . .” Sirey, 20, 1, 257; 45, 1, 765; 70, 1, 80; Pouillet, No. 470; Ruben de Couder, Copyright, No. 384.

Am. & Eng. Encycl., Copyright, p. 595:—“Mere resemblance between two works does not necessarily shew that the one is a piracy of the other.” (And in note 3 is added: “especially if the statement is familiar and brief.”) “Identity of contents, arrangement and combination is, however, strong evidence that the second book was borrowed from the first, because it is highly improbable that the two authors would express their thoughts and sentiments in the same language throughout a book or treatise of any considerable size, or adopt the same arrangement or combination in their publication.

“The similarity between the alleged infringement and the work of which it is claimed to be a piracy should be shewn by introducing both works in evidence, and not by the testimony of a person who has examined both works.

“The fact that two works, one of which is claimed to be a piracy of the other, contain common errors, is competent evidence to shew an unfair use of the earlier work.”

The examination of the two dictionaries and the comparison of the texts pointed out by Mr. Valois have convinced the majority of this Court that their similitude cannot be the result of accident, nor the necessary and inevitable consequence of the identity of the subjects therein treated.

It is easy to understand that the names of men and places, the description of a territory, its population, its industries, its wealth, its products and other statistics of the same kind can sometimes be expressed by different writers in more or less similar terms, and it is possible that these resemblances might not be always sufficient by themselves to establish the counterfeit.

But it seems reasonable to us also to conclude that if, in a work such as respondents', composed of more than 3,000 different subjects, one finds some hundreds of articles often containing many lines reproducing textually the wording of corresponding articles of that of the appellants, some hundreds of others differing therefrom by a transposition only or by the omission or addition of some words, certain other scattered textual extracts which must have been taken from the appellants' work, it becomes evident that the accident or the identity of the subjects suffices no longer to explain a resemblance so phenomenal and which can have but one cause—the systematic appropriation of appellants' work.

It is a matter of indifference that the articles thus copied or imitated happen to be longer or more complete in the respondents' book than in the appellants', or that the first happens to be larger and more useful than the second, because the appellants cannot be put under contribution despite themselves for the benefit of the public and still less for the particular advantage of the respondents.

The reading and comparison of the articles thus indicated by the appellants, and which it would take too long to point out in detail, shew in an irresistible manner—at least in the opinion of the majority of the Court—the piracy committed by the respondents; because it is absolutely impossible, as a judgment previously cited affirms, that two writers separately and successively treating of a certain number of identical subjects should also express themselves frequently in the same terms as is established by the proof in the present case.

If a doubt could exist, two additional reasons would cause it to vanish. In effect the errors or inaccuracies which are to be found in rather considerable numbers in the dictionary of the appellants have been textually reproduced in that of the respondents, and it is the same in regard to references from one subject to another, which have also been faithfully copied, to the number of about one hundred and fifty.

These two evident and undeniable facts, are considered by text-writers and the Courts, as one of the most convincing proofs of infringement.

It is needless to add that the respondents cannot here invoke the excuse of common sources, because we are face to face with the evident appropriation of one part of the appellants' work which can be attributed to no others than themselves, and which belongs as exclusively to them as their wording.

In every case the proof made by the appellants is sufficient to place the respondents under the obligation of explaining how their work has been done, either by the production of their manuscript or by the evidence of him who has written it and was present at the trial. They have done neither the one nor the other. They confined themselves to establishing by Mr. de Brumath that there was, apart from the appellants' dictionary, a great number of other sources from which they might have drawn their materials. But this proof is not sufficient to destroy that of the appellants, and Mr. de Brumath has also been forced to admit that more than fifty of the incriminated articles resemble none of the sources indicated by him which shews by the evidence that the assertion contained in respondents' plea that the writer has not consulted the appellants' dictionary is absolutely unmaintainable.

The appellants' action ought consequently to be maintained.

Appeal allowed, WHITE, J., dissenting.

P. B. Mignault, C.R., solicitor for the appellants.

H. Gérin-Lajoie, counsel.

Geoffrion, Geoffrion, Roy & Cusson, solicitors for the respondents.

Gustave Lamothe, C.R., counsel.

[IN THE HIGH COURT OF JUSTICE FOR ONTARIO.]
(DIVISIONAL COURT.)

NOLAN

v.

THE OCEAN ACCIDENT AND GUARANTEE CORPORATION,
LIMITED.

*Insurance—Life Insurance—Condition Precedent to Liability on Policy—
Arbitration before Award—Validity of—Ouster of Jurisdiction of
Court.*

Upon the face of a policy of life insurance, the contract to pay was made subject to the conditions endorsed upon it as conditions precedent; and the 15th of such conditions provided, in the event of any difference arising between the parties, for obtaining the award of a mutual person as a condition precedent to liability to pay any claim under the policy and to the enforcement of it:—

Held, therefore, that the liability being upon the award and policy and not upon the latter alone, no action lay on the policy, nor did the amount payable under it become due until the award had been made under the condition.

Held, further, that the condition was not in contravention of section 80 of the Ontario Insurance Act, ch. 203 R.S.O. 1897.

Spurrier v. La Cloche, [1902] A.C. 446, followed.

This was an appeal by the plaintiff from a judgment of Meredith, J., reversing an order of the Master in Chambers, refusing to stay proceedings in the action under the circumstances set out in his judgment, where the facts are fully stated.

The motion was argued in Chambers on the 14th November, 1902, before Mr. Winchester, the Master in Chambers.

H. Cassels, K.C., for the motion.

S. Alfred Jones, contra.

November 27, 1902. THE MASTER IN CHAMBERS:—This is an action brought by the beneficiary named in a policy of insurance issued by the defendant corporation on the life of the late Dennis Nolan for \$1,000, the loss in event of death being payable to his mother, the plaintiff herein.

It appears that the policy was issued on or about the 11th day of August, 1901, insuring the assured for one year from the

30th July, 1901. The accident from which, it is alleged, the assured subsequently died, took place on the 15th of March, 1902. He died on the 8th June, 1902.

The policy provides as follows: "It is witnessed that if the assured shall, during the period above mentioned, sustain any bodily injury by accident from an outward, external and visible means or cause happening to the assured, and if the assured shall die solely from the effects of such accident, and independently of other causes, within ninety days after the happening thereof, the corporation shall pay to Mary Nolan, mother, or to the legal representatives or assigns of the assured, the sum of one thousand dollars after proof satisfactory to the directors of the corporation for the time being of the cause of the death of the assured shall have been given."

The defendant corporation, denying all liability and refusing to recognize in any way the claim of the plaintiff herein under the said policy, or acknowledge in any way the right of the plaintiff to make any demand upon them, and through their solicitors before action brought, in addition to the above statements, stated: "If Mary Nolan takes action, every defence that is open to the company will be made;" and in a subsequent letter, written before the writ of summons was issued, the solicitors of the corporation wrote to the plaintiff's solicitors as follows: "We have now heard from our clients in reference to the question of accepting service of a writ on their behalf. We are not authorized to do so. Our clients point out that if Mrs. Nolan has any claim against them, which they deny, they are entitled to have the matter dealt with by arbitration, and they will object to suit being brought if a writ is issued."

On the 6th October, 1902, the plaintiff issued her writ of summons herein, which was duly served upon the defendant corporation, who, after appearing thereto, apply for an order staying all proceedings herein forever "on the ground that the plaintiff is not entitled to maintain this action, inasmuch as there has been no award under condition No. 15 of the conditions of

assurance incorporated in the contract upon which the action is brought, and that the provisions of said condition No. 15 have not been complied with."

In support of the application the affidavit of the general manager of the defendant corporation is read, in which he states:

"4. The defendants have in no way waived their rights under the condition of assurance numbered 15, indorsed upon the policy sued on, and claim the right to have the matters in difference between the plaintiff and the defendants referred to arbitration as by said clause provided.

"5. The defendants were at the time when this action was commenced, and still remain, ready and willing to do all things necessary to the proper conduct of the arbitration.

"6. The only claim, if any, that the plaintiff in this action can make against the defendants is under and by virtue of the defendants' contract with Dennis Nolan, deceased, of which contract the said exhibit "B" is, I believe, a true copy."

The condition numbered 15 referred to in the above affidavit reads as follows:—

"15. Upon any difference arising between the corporation and the assured or any claimant under this policy, as to the meaning or extent of the contract thereby made, the amount of any claim thereunder, or the fulfilment of the conditions thereof, or any question, matter or thing concerning or arising out of this assurance; it is a condition of this policy which the assured, by acceptance thereof, agrees to abide by, notwithstanding any law to the contrary; that every such difference shall be referred to the arbitration and decision of a neutral person; each party to pay his or their own costs of the reference and a moiety of the costs of the award; and the decision of the arbitrator shall be final and binding on all parties, and shall be conclusive evidence of the amount payable in respect of the said claim; and this condition shall be deemed and taken to be an agreement to

refer as aforesaid, and if the accident shall happen to the assured while proceeding to or while in Europe, then under the provisions of the English Arbitration Act, 1889, except so far as is hereby provided as to costs and otherwise. And it is hereby expressly stipulated and declared, that the obtaining of an award by such arbitrator shall be a condition precedent to the liability or obligation of the corporation to pay or satisfy any claim, under this policy in respect of which any such difference may have arisen, and to the enforcement of any such claim."

The above condition was made a part of the policy by the following proviso contained in the policy, viz.: "Provided, also, that compliance with the stipulations indorsed hereon is a condition precedent to the right to recover on this policy, and that the proposal and declaration of the assured form the basis and are part of this contract, which is to be deemed to be executed by both parties at the head offices, in Montreal, of the corporation."

The application for the stay is made under R.S.O. 1897, ch. 62, sec. 6, which provides as follows:—

"6. If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or a Judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

For the defendants the cases of *Guerin v. The Manchester Fire Assurance Co.* (1898), 29 S.C.R. 139, and *McInnes v.*

Western Assurance Co. (1870), 5 P.R. 242, (1871), 30 U.C.R. 580, were cited. These actions were on policies of insurance against fire, and it was held that under the conditions no action was maintainable until an award fixing the amount of the claim in the first case, and the loss or damage in the second case, had been made.

For the plaintiff it is contended, that there is no submission signed by both parties, as required by R.S.O. 1897, ch. 62, secs. 2, 6. With reference to this objection, I would refer to *Baker v. Yorkshire Fire and Life Assurance Co.* (1892), 1 Q.B. 144.

It is further contended by the plaintiff that the condition in question ousts the jurisdiction of the Court, and therefore is void as contrary to public policy, and citing in support of this contention *Caledonian R.W. Co. v. Greenock & Wemyss Bay R.W. Co.* (1874), L.R. 2 H.L. Sc. 347; *Dawson v. Lord Otho Fitzgerald* (1876), 1 Ex. D. 257; and *Collins v. Locke* (1879), 4 App. Cas. 674.

The leading case on the question is *Scott v. Avery* (1856), 5 H.L.C. 811, where Lord Chancellor Cranworth illustrates the distinction between a covenant preventing an action being brought until an award has been made, and one which attempts to oust the jurisdiction and prevent any action being brought. At p. 848 he says: "If I covenant with A. to do particular acts, and it is also covenanted between us that any question that may arise as to the breach of the covenants shall be referred to arbitration, that latter covenant does not prevent the covenantee from bringing an action. A right of action has accrued, and it would be against the policy of the law to give effect to an agreement that such a right should not be enforced through the medium of the ordinary tribunals. But if I covenant with A.B. that if I do, or omit to do a certain act, then I will pay to him such a sum as J.S. shall award as the amount of damage sustained by him, then, until J.S. has made his award, and I have omitted to pay the sum awarded, my covenant has not been broken, and no right of action has arisen." See also the judg-

ments of Lord Justice Brett and Kelly, C.B., in *Edwards v. The Aberayron Mutual Ship Insurance Society* (1876), 1 Q.B.D. 563, at pp. 586 and 597.

At p. 596 Lord Justice Brett says: "The true limitation of *Scott v. Avery*, 5 H.L.C. 811, seems to me to be that which was expressed in it, and which, as I have pointed out, has so often been expressed about it, that if parties to a contract agree to a stipulation in it, which imposes, as a condition precedent to the maintenance of a suit or action for a breach of it, the settling by arbitration the amount of damage, or the time of paying it, or any matters of that kind, which do not go to the root of the action, *i.e.*, which do not prevent any action at all from being maintained, such stipulation prevents any action being maintained until the particular facts have been settled by arbitration; but a stipulation in a contract, which in terms would submit every dispute arising on the contract to arbitration, and so prevent the suffering or complaining party from maintaining any suit or action at all in respect of any breach of the contract, does not prevent an action from being maintained; it gives at most a right of action for not submitting to arbitration, and for damages, probably nominal. And the rule is founded on public policy."

These cases have also been followed in the United States Courts: *Reed v. Washington Fire and Marine Insurance Co.* (1885), 138 Mass. 572, at p. 575, and cases cited: *Badenfield v. Massachusetts Mutual Accident Association* (1891), 154 Mass. 77, at p. 82; *Whitney v. National Masonic Accident Association* (1893), 52 Minn. 378.

In delivering the judgment of the Court in the last case Judge Dickinson said at p. 385: "It has long been the settled rule of law that if, in a contract creating a definite legal obligation (*e.g.*, to pay a certain sum of money on a specified contingency), there is embodied an agreement that the rights or obligations of the parties shall be determined by arbitration, and

that no action shall be maintained on the contract, such an agreement is not legally effectual to bar such an action: *Gasser v. Sun Fire Office*, 42 Minn. 315, 317 (44 N.W. Rep. 252); *Edwards v. Aberayron Mut. S. Ins. Soc.*, 1 Q.B. Div. 563, 578, *et seq.*, and cases cited; . . . In *Scott v. Avery*, 5 H.L.C. 811, and particularly in the opinion of Lord Campbell, is language which seems to be opposed to the rule as it had theretofore been established. But it is apparent from the later case of *Edwards v. Aberayron Mut. S. Ins. Soc.*, *supra*, that the majority of the Court in the Exchequer chamber did not regard that case as overruling former decisions. The rule is so well settled, and so generally recognized, that it is needless to consider the various reasons which have been assigned for it."

In my opinion the above decisions apply to the facts of this case, and I, therefore, hold that the plaintiff is entitled to proceed with this action, notwithstanding condition 15 indorsed on the policy of insurance herein. The motion will, therefore, be refused, with costs in the cause to the plaintiff.

From this judgment the defendants appealed to a Judge in Chambers, and the appeal was argued on 23rd January, 1903, before MEREDITH, J.

H. Cassels, K.C., for the appeal.

S. Alfred Jones, contra.

February 3, 1903. MEREDITH, J.:—The rule applicable to this case is well settled: the difficulty is in applying it.

The jurisdiction of the Court cannot be ousted as to a cause of action which has arisen: but where no cause of action has arisen there is no jurisdiction.

In the circumstances of this case, if liability to pay has arisen, no words of the parties, or of either of them, can prevent the Court giving relief; but if no liability to pay arises until after award, the action is premature.

Less is gained by seeking to follow the reasoning of any one Judge against that of any other, expressed in the case of *Scott*

v. *Avery*, 5 H.L.C. 811, or in any other case, than by looking at what was actually decided in the case, and for the results which, according to binding authority, flow from the decision in *Scott v. Avery*.

Upon the face of the policy, the contract to pay is made subject to the conditions indorsed upon it, as conditions precedent; and, in the fifteenth of such conditions, it is provided that the obtaining of an award, as therein provided, shall be a condition precedent to liability to pay any claim under the policy, and to the enforcement of it. In other words, the liability is upon the award and policy, not upon the latter alone.

These words of the Lord Chancellor, used in giving judgment in the House of Lords in the case of *The Caledonian Insurance Co. v. Gilmour*, [1893] A.C. 85, are pertinent:—

“The question is not whether, where a contract creates an obligation to pay a sum of money it is a good answer to an action to recover it that disputes have arisen as to the liability to pay the sum, and that the contract provides for the reference of such difference to arbitration, but whether where the only obligation created is to pay a sum ascertained in a particular manner, where, in other words, such ascertainment is made a condition precedent to the obligation to pay, the Courts can enforce an obligation without reference to such ascertainment? If they could do so they would not be enforcing the contract made by the parties, but one of a different nature.”

And the case of *Spurrier v. La Cloche*, [1902] A.C. 446, to which the Master was not referred, is quite in point in the applicant's favour, and is a decision of our ultimate tribunal.

The claim in each of these cases happened to be one for indemnity—upon a fire in surance policy—but that is immaterial, the principle applies whatever the nature of the action; the Court cannot enforce an immature claim.

Under the Arbitration Act, R.S.O. 1897, ch. 62, the Court has power to further the plaintiff's claim effectually, if the defendants fail, or unduly delay, to comply with the terms of the

contract; but it has no power to compel payment before reference and award, contrary to the contract, upon which the obligation to pay does not arise until after reference and award.

The application is not one made to the discretion of the Court under the sixth section of the Arbitration Act, but is one based upon a denial of any right of action in the plaintiff.

The logical result is that the action being premature, ought to be dismissed, but that is not asked; and can better be done, and all questions of costs better dealt with, after the award, having regard, among other things, to the condition requiring legal proceedings to be commenced within one year.

There is no question of fact in dispute; the one question is that which has been considered—a question of law plainly arising upon the policy; and neither party desiring to go to trial to have it there considered, it may as well, therefore, be determined upon this summary motion.

There is nothing in the point that the plaintiff is not one of the contracting parties; she is suing upon the policy, and if she can recover at all, it must be upon the contract contained in it.

Appeal allowed; and proceedings stayed, and costs reserved until after award, but with liberty to apply meanwhile if necessary.

From this judgment the plaintiffs appealed, and the appeal was argued on 10th February, 1903, before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., STREET, and BRITTON, JJ.

S. Alfred Jones, for the appeal.

H. Cassels, K.C., contra.

The following authorities were referred to: *Re Berryman* (1897), 17 P.R. 573; *Mason v. The Massachusetts Benefit Life Association* (1892), 30 O.R. 716; *Gillie v. Young* (1901), 1 O.L.R. 368; *Mingeaud v. Parker* (1892), 19 A.R. 290; *Scott v. Avery*, 5 H.L.C. 811; *Horton v. Sayer* (1859), 4 H. & N. 643, at p. 651; *Edwards v. The Aberayron Mutual Ship Insurance Society*, 1 Q.B.D. 563, at p. 596; *Spurrier v. La Cloche*, [1902]

A.C. 446; *The Austrian Lloyd Steamship Co. v. Gresham Life Assurance Society* (1903), 19 Times L.R. 155; *Willesford v. Watson* (1873), L.R. 8 Ch. 473; *Employers' Liability Assurance Corporation v. Taylor* (1898), 29 S.C.R. 104, at p. 107; *Guerin v. The Manchester Fire Assurance Co.* (1898), *ib.*, at pp. 151, 152; *McInnes v. Western Assurance Co.* (1874), 5 P.R. 242; 30 U.C.R. 580; *Tredwen v. Holman* (1862), 1 H. & C. 72.

March 28, 1903. The judgment of the Court was delivered by STREET, J.—I agree with the judgment of my brother Meredith that the present case is governed by the decision of the Privy Council in *Spurrier v. La Cloche*, [1902] A.C. 446, and no action lies, nor does the amount payable under the policy become due, until the determination of the arbitrator to be appointed under the agreement to refer, contained in condition No. 15.

That is an agreement to refer under the 6th section of ch. 62 R.S.O. 1897, although the plaintiff has not signed it; she cannot claim under the policy without assenting to its terms: *Baker v. The Yorkshire Fire and Life Insurance Co.* (1891), 92 L.T. 111.

Condition 15 does not appear to be in contravention of sec. 80 of ch. 203 R.S.O. 1897. It is not a condition which necessarily extends the time of payment beyond sixty days after proofs of the claim have been furnished, for it may well be that the amount may be ascertained within the period mentioned.

In my opinion the appeal should be dismissed with costs.

Notes:

(1) In view of this decision which applies to life insurance the principles of fire insurance law settled with regard to this question of arbitration, such cases as *Guerin v. Manchester Fire, etc., Co.* (1898), 29 S.C.R. 139, (a case that followed *Scott v. Avery* (1853), 5 H.L.C. 811); *McInnes v. Western* (1871), 30 U.C.R. 580; *Trainor v. Phoenix* (1891), 8 Times L.R. 37; *Kenworthy v. Queen* (1892), 8 Times L.R. 211; *Lantalum v. Anchor* (1882), 22 N.B. 14; *Dawson v. Fitzgerald* (1876), 1 Ex. D. 257; are to be considered as binding authorities though the learned Mas-

ter in Chambers thought otherwise. In *Guérin v. Manchester*, Sir Henry Strong, C.J., said: "This principle applies not merely to cases where the amount of damages is to be ascertained by an arbitrator, but also to cases where it is made a condition precedent that the question of liability should first be determined by arbitration."

(2) The case of *Spurrier v. La Cloche*, [1902] A.C. 446, was a fire insurance case. The respondent sued the appellants as agents of the Sun Fire Office to recover £1,000, the amount of a fire policy dated January 4th, 1897, effected by the respondent on his collection of foreign stamps.

The policy contained a condition whereby it was expressly agreed and declared to be a condition precedent to the liability of the company for any claim under the policy that the claim should, if not admitted, be referred to arbitration, and that the claimant should have no right of action against the company except for the amount of the claim if admitted, or the amount, if any, awarded by the award. This condition was not complied with before action brought and on the appeal of the defendants, Spurrier and another, the Privy Council declared that no action could be brought upon the policy until the amount had been settled by arbitration according to the condition.

Lord Lindley, in delivering the judgment of their Lordships, said: "If a contract is so framed as to give no cause of action unless a certain condition is performed, no question arises as to ousting the jurisdiction of the Court. It was by not observing the difference between no cause of action and a defence which assumes a cause of action, but is based on the incompetence of a particular Court to enforce it, that the Court of Exchequer went wrong in *Scott v. Avery* ((1853), 5 H.L.C. 811). The oversight was pointed out and corrected in the Exchequer Chamber (8 Ex. 487), and again in the House of Lords. Maule, J., put the matter in the true light in the Exchequer Chamber; he there said (8 Ex. p. 499): 'There is no decision which prevents two persons from agreeing that a sum of money shall be payable on a contingency; but they cannot legally agree that when it is payable no action shall be maintained for it.'"

(3) Mr. May (Insurance, 4th ed., 1900), says at page 1161, *et seq.*, "A general agreement to refer will not be specifically enforced, though encouraged by the Courts, which will enforce an award fairly made. While it is perfectly well settled that any

agreement that contemplates the exclusion of an aggrieved party from a suit at law is invalid, there seems to be no doubt that any agreement as to the mode of adjustment or of settling the amount of loss or the time for paying it, or any particulars of that nature which do not go to the root of the action, but are preliminary thereto or in aid thereof is valid. A distinction is made between an agreement to refer every matter in dispute to arbitration, and one to pay such sum as the damage shall be found by a third party to amount to, which latter operates to reduce the policy from a contract to pay the amount of damage absolutely, and to substitute the arbitrator for the jury to ascertain its amount: *Scott v. Avery* (1853), 5 H.L.C. 811."

[JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.]

KENT and others, LIQUIDATORS OF LA BANQUE VILLE-
MARIE, PLAINTIFFS.

AND

LA COMMUNAUTÉ DES SOEURS DE CHARITÉ DE LA PROVI-
DENCE and others, DEFENDANTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE
PROVINCE OF QUEBEC.

(APPEAL SIDE.)

Company—Winding-up of—The Winding-up Act, 1886 (D.), secs. 15 and 31—Restricted Power of Liquidators of Bank to Sue in their Own Names—Civil Procedure Code, secs. 516 and 521—Power to Amend by Adding Bank as Plaintiffs.

Under The Winding-up Act, 1886 (D.), secs. 15 and 31, a company in liquidation retains its corporate powers, including the power to sue, although such powers must be exercised through the liquidator under the authority of the Court. The liquidator must sue in his own name, or in that of the company, according to the nature of the action: in his own name where he acts as representative of creditors and contributories; in that of the company to recover either its debts or its property.

Where liquidators sued in their own name to recover a debt due to the company:—

Held, that the error was one of form, which the Court had power to give leave to amend under secs. 516 and 521 of the Code of Civil Procedure. The defendant having admitted the debt and pleaded set-off, and not having excepted to the form of the action, leave to amend should have been given in the sound exercise of judicial discretion.

Appeal from a decree of the above Court (February 25, 1902) affirming a decree of the Superior Court of Montreal, (April 1, 1901) dismissing the appellants' action.

That action was brought by the liquidators of the Ville-Marie Bank, using their individual names, but alleging their official capacity, and claiming \$20,000 with interest. To this the respondents pleaded payment by set-off, alleging that they had at the bank offered to pay the amount in part by means of cheques drawn upon deposits actually due by the bank; and as to the balance by cash then duly tendered.

After trial of the case judgment was reserved on February 4, 1900, by Pagnuelo, J.

No suggestion had been made, by pleading or in argument or from the bench, as to the form of the action or the capacity and right of the appellants to sue in their character of liquidators of the bank.

But at a later date Pagnuelo, J., ordered a rehearing on the question, which had occurred to him meanwhile, of the right of the appellants to bring the action in their own names as liquidators. The appellants thereupon moved for leave, if necessary, to amend the proceedings; and that motion came on together with the rehearing.

Eventually both motion and action were dismissed on the following grounds:—

“Considering that the Winding-Up Act declares (sec. 15) that the corporate state and all the corporate powers of the Company shall continue until all the affairs of the company are wound up, and (sec. 31 (a)) that the liquidator may with the approval of the Court sue in his own name as liquidator or in the name of the company, as the case may be; that the present action appertains to the bank and not to the liquidators as representing the creditors, and ought to be taken in the name of the company; that no person can plead with the name of another, and that corporations plead in their corporate name (Art. 81, C.P.C.); and that in consequence the plaintiffs, who are only liquidators and administrators of the bank for the purposes of the liquidation have not the capacity to bring this action in their names as liquidators; the action of the plaintiffs as liquidators is dismissed, reserving to the bank its right to protect itself, but without costs, seeing that the question was not, as it ought to have been, raised *in limine*.”

This judgment was affirmed in appeal, Laeoste, C.J., ruling as follows:—

“It has been argued that the appellants, as bearers of the note, were authorized to sue in their own names. They do not

sue as holders of the note, but as liquidators and administrators. It is for the benefit of the bank that they have brought the action, and it appears from their allegations that it is the bank which is holder, and that they have only the custody of the note (Canadian Winding-Up Act, sec. 3).

"The appellants being without capacity to proceed in law under the circumstances, the Court could not sustain their action any more than it could have sustained the action of an ordinary agent who had sued in his own name and for account of his principal to recover a debt belonging to the latter: this would be to violate the rule that one cannot plead by or for another. The appellants applied to amend their proceedings in such wise as to make the bank a party to the action. This application was according to sound law rejected.

"Our Code of procedure does not authorize the Court to substitute one party for another by an amendment of the proceedings. This would be to substitute one action for another.

"Art. 522, C.P.C., forbids the allowance of an amendment which would change the nature of the demand; *a fortiori* when it concerns the action itself. Besides, how could one who has not capacity to bring the action have the capacity to amend it for the benefit of another who is not a party? The appeal should be dismissed."

Blake, K.C., and Charbonneau, K.C., for the appellants, contended (1) that the action was well brought by the liquidators in their own name as the holders of the note sued upon; (2) that if not, the Court had the power and under the circumstances it was their duty to allow the amendment, joining the bank as a party. Upon the first point they referred to the Winding-Up Act (R.S.C., ch. 129), secs. 15 (2), 19, 20, 25, 29-31, 33-6, 40, 47, 53, 60, 61. The appellants acted in pursuance of an order of Court obtained by them as liquidators and authorizing them to sue. They also referred to the 2nd article of Art. 81 of the Civil Procedure Code, submitting that the bank had not the free exercise of its rights; that its corporate powers were only continued

for the purposes of liquidation, and could no longer be exercised by the bank and its directors, but only by the liquidators acting with the sanction of the Court. Upon the order of liquidation the note sued upon vested in the liquidators, who alone had power to sue on it. Upon the second point they contended that, if the objection were valid, it ought to have been taken as a preliminary point. Instead of doing so, the respondents had waived it by pleading set-off and paying into Court the balance alleged to be due. Besides, ample power to amend was given under the Civil Procedure Code, Arts. 516, 518 and 521, and on the plainest principles of justice should have been exercised. Reference was made to *Porteous v. Reynar* (1887), 13 App. Cas. 120.

Haldane, K.C., and *Lamothe, K.C.*, for the respondents, contended that the Courts below were right in refusing to substitute the name of the bank as plaintiff for those of the liquidators. The rules of procedure that "a person cannot use the name of another to plead except the Crown," and that "corporations plead in their corporate name," have their origin in the old French law, were adopted under the legislative union of the provinces of Upper and Lower Canada, and have been constantly recognized and acted on by our Courts. Art. 81 of the Civil Procedure Code is an expressly prohibitive law. The bank was bound to sue in its corporate name; the liquidator is merely an executive officer, and not an assignee of the effects of the insolvent bank; see sec. 30 of the Winding-Up Act. The prohibition applies whenever the liquidator wishes to exercise as against third parties the rights of the company itself; though it is otherwise where he acts as an officer. The Court had no power to derogate from the express law contained in Art 81 of the Procedure Code. The prohibition there contained is without exception. The order made was equitable, since it reserved to the bank the right to sue in its own name, and the liquidators were not condemned to any costs. The bank could thereupon assert its rights, and the Courts would have avoided exercising in an unprecedented way a discretion to allow the liquidators to disregard an

established rule of procedure. There is no reported case where the discretionary order asked in this case has been made.

Counsel for the appellants were not heard in reply.

March 20, 1903. The judgment of their Lordships was delivered by

LORD DAVEY :—The action out of which this appeal has arisen was commenced on November 29, 1899, by the appellants, Ambrose L. Kent, and two others, in their character (qualité) of liquidators of the Bank Ville-Marie, against the respondents, La Communauté des Soeurs de Charité de la Providence, to recover the sum of \$20,000 alleged to be owing by the respondents to the bank on a promissory note. The Bank Ville-Marie was and is a corporation having power to sue, and it formerly carried on business in Montreal and other places, but on August 10, 1899, the bank was ordered to be wound up under the provisions of the Canadian Winding-Up Act of 1886 (Revised Statutes of Canada, ch. 129), and the appellants were duly appointed the liquidators thereof.

By an order of the Superior Court of September 26, 1899, the liquidators were authorized to sue (amongst other persons) the respondents for the before-mentioned sum of \$20,000.

By their defence the respondents admitted the debt claimed, but alleged that it was extinguished by compensation or set-off, except as to a small balance which they offered to pay. They did not by their defence or at the bar in the course of the trial take any exception to the form of the action, and, as their Lordships were informed, no objection was suggested from the bank during the trial to the right of the liquidators to maintain the action in its present form. Pagnuelo, J., by whom the action was tried, reserved judgment, and it appears to have then occurred to him that the action should have been in the name of the bank itself, and he accordingly ordered the case to be set down again for argument on that point. The appellants thereupon moved for leave to amend the summons and declaration by add-

ing after their own description the words "et pour et au nom de la dite Banque Ville-Marie et la dite Banque Ville-Marie en autant que besoin et aux fins des présents," the bank submitting to be bound by the evidence already taken on either side. The learned Judge dismissed the motion, and also dismissed the action, but without costs, holding that the liquidators were "sans qualité" to bring the action in their own name. This judgment was affirmed on both points by the Court of King's Bench on February 25, 1902, and the present appeal is from the judgment of the latter Court.

The first point made by the appellants was that the liquidators were entitled to sue in their own names as liquidators. The relevant article of the Code of Civil Procedure is Art. 81, which is in the following terms:—

"A person cannot use the name of another to plead except the Crown through its recognized officers.

"Tutors, curators, and others representing persons who have not the free exercise of their rights plead in their own name in their respective qualities.

"Corporations plead in their corporate name."

It was argued that by the winding-up the corporation was deprived of the free exercise of its rights, and the case therefore fell within the second clause of this article. In order to test the validity of this argument the Canadian Winding-Up Act, 1886, should be referred to. By sec. 15 of that Act it is provided that the company from the time of the making of the winding-up order shall cease to carry on its business except in as far as is, in the opinion of the liquidator, required for the beneficial winding-up thereof, and transfers of shares and any alteration in the status of the members of the company after the commencement of the winding-up shall be void, but the corporate state and all the corporate powers of the company shall continue until the affairs of the company are wound up. And by sec. 31 the liquidator is empowered, with the approval of the Court and upon certain notices to creditors and others (amongst other things) to bring

or defend any action, suit, or prosecution, or other legal proceeding, civil or criminal, in his own name as liquidator, or in the name or on behalf of the company, as the case may be. The company therefore retains its corporate powers, including the power to sue, although such powers must be exercised through the liquidator under the authority of the Court. The words which have been quoted from the 31st section do not, in the opinion of their Lordships, confer upon the liquidator or the Court a discretion as to the mode in which he shall sue, but enable him to bring the action either in his own name or in that of the company as may be appropriate to the particular action. The office of the liquidator has in fact a double aspect. On the one hand he wields the powers of the company, and on the other hand he is the representative for some purposes of the creditors and contributories. There are therefore many cases in which he may sue in his own name as, *e.g.*, to impeach some act or deed of the company before winding-up which is made voidable in the interest of the creditors and contributories. But their Lordships think that wherever the object of the action is to recover a debt, or to recover or protect property the title to which is in the company, the action should be brought in the name of the company.

It was suggested that the liquidators were in fact the holders of these promissory notes, and as such were entitled to sue upon them in their own name. But the declaration is framed on the theory that the bank, and not the liquidators, are the holders of the notes, and leave to amend for the purpose of raising this point was asked for. The next question is whether leave to amend should have been given. The powers of amending pleadings are contained in ch. 23 of the Civil Procedure Code. The learned Judges in the Court of King's Bench seem to have thought that the language of the sections contained in this chapter was insufficient to authorize the amendment sought by the appellants. But it was not denied by learned counsel for the respondents at their Lordships' bar that the power was sufficient for the purpose, and it was argued only that it was a discretionary power.

and their Lordships should not overrule the discretion exercised by the Court below. In the opinion of their Lordships the powers of amendment given by the Code are full and ample, and the Court had power under sec. 516 to give leave to amend the summons or declaration in any way the Court might think proper. Indeed, it may be doubted whether the defect in the present case was really more than an irregularity of form which might have been cured by amendment by the Judge *mero motu* under sec. 518. The substance of the action was to recover a debt alleged to be due to the company in liquidation which the liquidators were the only proper persons to receive and give a discharge for. No defence was available against the company which was not equally available against the liquidators, and the parties were content to fight the case out with the liquidators, who were their real opponents, and the case was in fact fought out with the liquidators without any exception to their right to sue, and was ripe for judgment. It is impossible to say that the proposed amendment changes the nature of the demand or can in any way cause a prejudice to the respondents. In short, the liquidators are *domini litis*, and it was not improper to make them plaintiffs, but they ought to have joined with themselves the company: or, in other words, the liquidators had the right to sue, but sued in the wrong form. It would seem, therefore, that art. 521 of the Code is applicable to the case. Their Lordships would always hesitate before interfering with the exercise of a discretion by the Court below, but in the present case the learned Judges seem to have proceeded on an erroneous construction of the Code. Their Lordships will only add that their decision will not be a precedent for substituting one plaintiff for another in other circumstances, and no such injustice as the Chief Justice apprehended need be feared. All they decide is that the proposed amendment could, and in the particular circumstances of this case ought to, have been allowed in the sound exercise of a judicial discretion.

Their Lordships were asked to hear the case upon its merits: but it is not the practice of this Board to sit as a Court of first instance. No judgment has been delivered by the Court below.

and they could not, without injustice to the parties, take that course, and give a decision from which there would be no appeal.

Their Lordships will, therefore, humbly advise His Majesty that the judgments of the Superior Court dated April 1, 1901, and of the Court of King's Bench dated February 25, 1902, be reversed, except as far as the judgment of the Superior Court dismissed the intervention with costs, and instead thereof it be ordered that the plaintiffs in the action be at liberty to amend their writ of summons and declaration and all necessary documents in the cause in the manner asked for by their notice of motion dated March 29, 1901, on the *Bank Ville-Marie* by its liquidators submitting to be bound by all the proceedings in the action up to and including the trial and to the admission of all the evidence properly given on one side or the other, and not requiring any further trial, and that on such amendment being made the action be referred back to the Superior Court for judgment. There will be no costs of the appeal to the Court of King's Bench or of this appeal. The costs of the action will of course be disposed of by the Superior Court, but the costs of the motion for leave to amend, which was an indulgence, should be paid by the appellants.

S. V. Blake, solicitor for appellants.

Ingle, Holmes & Sons, solicitors for respondents.

[JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.]

KENSINGTON LAND COMPANY, and others, DEFENDANTS.

AND

CANADA INDUSTRIAL COMPANY, PLAINTIFFS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE
PROVINCE OF QUEBEC.
(APPEAL SIDE).*Civil Code of Lower Canada, Art. 1092—Cause of Action—Insolvency of Debtor.*

Under Art. 1092 of the Civil Code of Lower Canada, an action to recover the balance of purchase money of land may be brought although the time for payment has not arrived when the debtor has become insolvent or has diminished the value of the security.

Appeal from a decree of the above Court (May 29, 1901) affirming a decree of the Superior Court at Montreal (March 9, 1900).

On September 3, 1898, the respondents commenced an hypothecary action against the appellants, the Kensington Land Company, under the circumstances stated in their Lordships' judgment, claiming that (by reason of the Company having diminished the respondents' security in and over certain lands, namely, lots 155 and 163, in the parish of Notre Dame de Graces, in their possession, and by reason of the Company being insolvent) the said lands should be declared to be charged with and hypothecated for the payment of \$16,379.17 with interest, and that in default of payment the lands should be sold by auction. The sum of \$16,379.17 was made up as follows: \$15,893.34 balance of purchase price of the said lands; \$395.83 interest on the same from April 1 to September 3, 1898; and \$150 paid to the widow Leduc.

The appellant company by their plea denied that there were any moneys due or that they were insolvent, and alleged that the action was unfounded.

After replication and on June 14, 1899, the appellants Buller and three others (these latter being the liquidators of the company) intervened in the action. They alleged that by reason of an offer made by Buller on March 22, 1898, for the acquisition of the entire assets of the appellant company, which offer was duly accepted by the shareholders, but the carrying out of which had been unduly and improperly delayed, they were entitled to the property and assets of the appellant company, and that the respondents' action was unfounded and unjustly and illegally interfered with the interveners' rights, and should be dismissed with costs. The respondents denied these allegations, and alleged that they had always been ready to withdraw the action provided the interveners would pay all claims, interests, and costs which were past due in such a way as to keep priority of hypothec to the respondents, and not to get parties to pay for the appellant company with subrogation, and that unless and until the interveners paid or deposited whatever might be due to the respondents in capital, interest, and costs, they had no right to ask the dismissal of the hypothecary action.

The judgment of Lemieux, J., which was affirmed by the Court of King's Bench, was, so far as material, as follows:—

“The object of the Kensington Company was to sub-divide the property acquired from the Canada Company into a larger number of lots, and to resell such lots for building purposes. The object in view of the appellant company was a common and lawful speculation. The beginning was unsuccessful, and the enterprise has been discouraging. After a few years of stagnation the company was, even before January, 1898, unable to meet its daily requirements, to pay the running accounts, the municipal taxes, and the interest on the mortgages, so much so that some of the directors have in numerous cases made advances out of their own private money to satisfy those sundry claims, the total of such advances amounting at times to \$3,000.

“The investigating committee addressed a circular letter to the shareholders informing them that the company was in im-

mediate need of (1) about \$4,500 to pay the current accounts; (2) about \$1,100 to meet the interest maturing on April 1, 1898; (3) about \$16,062.27 for mortgages and interest thereon maturing on October 1, 1898, besides the current expenses of the company. In all \$21,662.27. The circular added that the resources of the company to meet these liabilities consisted of (1) about \$600 expected to be collected for interest on April 1, 1898; (2) perhaps \$5,000 on October 1, 1898; but that even supposing all these expectations were fulfilled, there would be on October 1, 1898, a deficit of \$5,000 on the present outstanding and near future debts, and \$11,000 based upon the mortgage due on October 1, 1898.

"Nobody answered the appeal of the committee. The evident decay of the affairs of the Kensington Company was the cause that not a single one of the directors, nor of the shareholders, would dream of making any more personal sacrifices in the way of more advances in money or additional instalments on their shares in order to relieve the situation. Consequently, on February 24, 1898, the directors resolved to place the company in liquidation. . . . When the company was placed in liquidation it had ceased making its payments, and it could not meet its obligations. Being a joint stock company, and, consequently, a commercial company, in the sense of Art. 1864, Civil Code, it had become bankrupt before March 9, 1898, and it has been bankrupt up to September 3, 1898 (date of the commencement of the action), and is still bankrupt. . . . A voluminous enquete has been made relating to the real value—that is, the value which could be realized on the immovables of the Kensington Company.

"The respondents' witnesses, nearly all disinterested and competent to give evidence on that point, have declared that those immovables considered as a farm or as building lots had lost from one-half to three-fourths of their value; the effect of which would be to endanger and place in peril the hypothecary claim of the respondents; for taking as a basis of the value of this property the price obtained by the deed of sale of 1893—

namely, \$88,000—that property, if it has really lost one-half of its value, as has been proved, would realize at the utmost \$44,000, whilst the hypothecary claims set out in the deed of 1893, and admitted by the appellant company, amount to the sum of \$58,833.34, leaving a deficit of over \$14,000; and, consequently, the claim of the respondents is without security or guarantee for the greatest part. The defendant company attempted to displace the evidence of the Canada Company, and to prove that the property had not been depreciated. This proof has not the character of precision and lucidity which the plaintiffs' proof has.

“This claim of Buller is one of the most convincing proofs of the great diminution in value and depreciation of the property, for he buys without assuming any personal liability, without being liable for the simple contract debts of the company, but only with the pretended obligation of being liable only hypothecarily.

“That cession, if made as stated by Buller, would possess neither the characteristics nor the worth of a sale, for no price was stipulated as is essentially required for a sale. It would only amount to an agreement by which an owner would have bound himself to deliver his property to a third party, the latter binding himself to nothing outside of taking possession of the property and allowing the hypothecary creditors to direct their suits against him, and allowing the sale of the property to be executed against him, the creditors to be paid out of the proceeds of the sale only.

“A very significant fact as regards the value of the property is that not a single offer has been made to the appellant company for the purchase of these lots. . . .”

Haldane, K.C., and Brosseau, K.C., for the appellants, after contending that upon the evidence there was no balance of purchase price due to the respondents, and that in any event there was nothing payable in respect thereof at the date of action brought, submitted that Art. 1092 of the Civil Code had no application to a case like the present, where there is no personal

liability on the part of the holder of the land subject to hypothec. That article is comprised in ch. 7 of the Code headed "Of different kinds of Obligations," and only applies where there is a debtor who is personally liable for the debt. Besides, the owner of a mere hypothecary charge upon land cannot be affected by the bankruptcy or insolvency of the owner of the land, seeing that the charge remains unaffected by it. And, assuming that Art. 1092 applied, it was contended that on the evidence there was neither bankruptcy nor insolvency of the appellant company at the date of action, nor had there been any depreciation in the value of the property hypothecated which would be fairly ascribed to the acts of the appellant company. It should be ascribed to general causes or to acts of the company which come within the contemplation of all parties at the time of the sale.

Loehnis and Geoffrion, for the respondents, contended that the Courts below were right in concurrently finding that there was a balance due by the appellant company of \$16,379 with interest at the date when the action was brought; that the appellant company had diminished the value of the respondents' security, and was insolvent. They relied upon Art. 1092 of the Civil Code.

Haldane, K.C., replied.

March 28, 1903. The judgment of their Lordships was delivered by the Lord Chancellor. This is an appeal from a judgment of the Court of King's Bench for the Province of Quebec, affirming two judgments of the Superior Court for the province.

The litigants are two companies—the appellant company is a building company, and the respondent company is a mining company. The appeal arises out of a sale of certain land made by the respondent company to the appellant company. The second judgment is against the liquidators of the building company, who intervened in the action.

The action was brought by the respondent company on September 3, 1898, and the intervention was on June 14, 1899.

The facts, so far as they are material to this appeal, appear to be that on September 13, 1893, the respondent company sold to the appellant company through one Bland certain property, part of which was subject to a life-rent payable to a widow named Ledue.

\$15,833.34 balance of the purchase money was payable in ten years from October 1, 1893, with interest from that date at the rate of 5½ per cent. per annum, payable half-yearly, and the vendor reserved all rights to secure payment of the balance and the interest thereon.

On December 15, 1893, Bland conveyed his purchase to the appellant company, on whose behalf he had purchased.

The action was brought by the respondent company for the balance of the purchase money, and in respect of half a year's annuity, part of the charge upon the land which it had paid to Mme. Ledue, to which the respondent company was duly subrogated.

The action was brought, although the time for payment had not arrived, under Art. 1092 of the Civil Code of Lower Canada, which permits the bringing of such an action when the debtor has become insolvent, or when he has diminished the value of the security.

The two allegations involved in the right to bring the action were contested by the appellant company as matters of fact, namely, the allegations that the appellant company had diminished the value of the security and that they were insolvent. A considerable body of evidence was given upon the subject, and both the Courts have found the two propositions to be proved.

Their Lordships see no reason whatever for differing from the conclusion in this respect found by both Courts after a lengthened investigation of the facts.

This disposes of the plea, which in substance amounts to the allegation that the action was brought prematurely and before the balance alleged could be demanded.

But the appellants further allege as a defence that the price which on the face of the contract of sale was \$110,000 was only \$88,000. Lemieux, J., has investigated the facts in relation to this plea, and they appear to be that the figures in the deed of sale were incorrectly given in two respects; the price was \$88,000 and not \$110,000.00, and the money paid was not \$50,000 but \$28,000. This appears to have been done by the syndicate who were forming the appellant company under the instructions of Bland, to enable \$22,000 to be added in terms to the price to be divided among themselves.

To the respondent company it made no difference whatever. Their balance was in either cases the same, namely, \$60,000.

Neither the respondent company nor any of its agents had anything to do with the matter, and from 1894, when the settlement was arrived at and every detail of the circumstances was known to the appellant company, no attempt was made to set aside the sale or to obtain any redress, but the contract was adhered to and acted upon, and it is much too late to set it up now as an answer to an action on a balance, which is the true balance due upon the contract, even if it could ever have been made available for any such purpose.

The account given by those responsible for the augmentation of the figures was that it was to prevent the extra expense of several deeds and the difficulty of adjusting the claims of the syndicate among themselves.

A number of persons engaged in this operation appear to have had differences with the appellant company and with each other upon this very question of misrepresentation of the amount, and in some form of arbitration the differences were adjusted between the members who were shareholders and the syndicate by the surrender of some of the shares and the payment of the costs of the proceedings.

With respect to the intervention of Buller and others long after the commencement of the principal suit, it is unnecessary to say more than that the learned Judge who tried the cause

found, upon what their Lordships are of opinion was ample evidence to justify such a finding, that the intervention was merely a colourable proceeding for delay. No money was forthcoming for the payment of anything. The learned Judge held that the offer itself was not *bona fide*, and the only object of the intervention was to embarrass and delay the creditors of the company.

Under these circumstances their Lordships will humbly advise His Majesty that this appeal ought to be dismissed. The appellants will pay the costs of the appeal.

Solicitors for appellants: *Simpson & Co.*

Solicitors for respondents: *Bompas, Bischoff, Dodgson, Coxe & Bompas.*

[IN THE SUPREME COURT OF BRITISH COLUMBIA.]

IN RE UNITED CANNERIES OF BRITISH COLUMBIA, LIMITED.

Winding-up—Petition by Shareholder—Insolvency—R.S.C. ch. 129, sec. 5 (c) and 62-63 Vict. ch. 43, sec. 4.

By section 5 (c) of the Winding-up Act (Dominion), a company is deemed insolvent "if it exhibits a statement shewing its inability to meet its liabilities:—

Held, that the inability to meet liabilities means liabilities to creditors as distinguished from liabilities to shareholders.

On the hearing of a petition based on such a statement, the statement must be accepted as correct.

Remarks as to company balance sheets.

Petition to wind up a company. The facts appear fully in the judgment.

Wilson, K.C., for petitioners.

Joseph Martin, K.C., contra.

1st April, 1903.

IRVING, J.:—This is the hearing of a petition filed, under section 8 of chapter 129, as amended in 1899, Cap. 43, sec. 4, by certain shareholders for a winding-up order on the ground that the Company is insolvent. The insolvency is to be inferred from the Company "having exhibited a statement shewing its inability to meet its liabilities," R.S.C. 1886, ch. 129, sec. 5 (c).

The Company was incorporated under the Companies Act, 1897, and Amending Acts, in November, 1899, with a nominal capital of \$500,000, of which \$255,000 is paid up.

In March, 1903, the statement relied on by the petitioners, was exhibited. It purports to be a balance sheet as at 31st December, 1902. The liabilities to creditors are stated at \$176,498.79; in addition to that liability there is also \$255,000 subscribed capital.

The assets are scheduled in the balance sheet \$386,152.10, the difference between the two totals some \$45,000 odd being shewn on the credit side of the balance sheet as the loss in 1900 and 1902, after deducting the profit in 1901.

Mr. Wilson contends that he is at liberty to shew that the balance sheet is incorrect, in that it over values the assets and under estimates the liabilities. I am of opinion that when a petition is filed under sub-section (c) the statement must be accepted as correct. If a person desires to petition on any other ground, wherein the statement would be used as evidence such other ground should be specified.

It was suggested in argument that sub-section (d) of section 5 might be brought into play, by reason of the charges of over valuation made in the petition, but I think not, *secundum allegata et probata* being the rule.

The statement clearly shews that the gross assets fall some \$45,544.69 short of the total liabilities to the public and shareholders. In other words, if the assets were taken to meet the liabilities to the creditors, the shareholders would have only \$209,455.31 against the \$255,000 subscribed by them.

During the argument the form of this balance sheet received some criticism from counsel for the petitioners, but after studying it for some time, I am inclined to think that it is framed so as to be what a balance sheet should be. A balance sheet is not necessarily a statement of liabilities and assets with the present market value of each item. That is the popular idea of a balance sheet, but it is not correct.

The debit side which should be headed "Capital and Liabilities" includes the capital of the company as abstracted from the ledger, the liabilities to creditors, also any reserve, and any surplus brought from the revenue of profit and loss, shewing the amount available for dividends. The credit side of a balance sheet must, as this does, shew in addition to the assets (using that word in its ordinary sense) an entry for work in progress or expenditure in advance of next season's work. In order to give full information to shareholders, there must also be shewn on the same side the result of a loss (if any) on the trading. The deficiency in this case is \$45,544.69 and properly appears on the credit side of the balance sheet; but it certainly is not an asset

on property available to satisfy a debt. Whenever this deficiency item appears on the credit side, no dividend can be paid to the subscribers out of revenue.

Now, is every company which puts forward a statement showing that it has been trading at a loss to be regarded as "exhibiting a statement that it is unable to meet its liabilities" so as to amount to a declaration of insolvency within the meaning of section 5 of the Winding Up Act? I do not think that is the idea of the statute.

Sub-section (c), of section 5, for the convenience of creditors, declared that the exhibition by a Company of a statement of inability to meet liabilities should be deemed an act of insolvency; the liabilities there referred to mean in my opinion, liabilities to creditors and did not in any way refer to liabilities to shareholders. In my opinion, in 1899, when Parliament conferred on the shareholders, the power to petition (1899, ch. 43, sec. 4), it did not intend that the word "liabilities" in sub-section (c) should have any more extended meaning than that which it then had by virtue of the Act of 1886, or that in 1899, the test of insolvency should be measured by liability to shareholders and creditors instead of by its liability to creditors.

But apart from that, the making of a winding-up order on the petition of a shareholder is a matter of discretion. In view of the fact that by section 5, of the Provincial Statute, 1898, ch. 14, sec. 5, of the Companies Winding Up Act, 1898, there is a provision to make an order for winding up in case the Court is of opinion that it is just and equitable that the company should be wound up. I think a Judge should be very slow to order a speculative company to be wound up on the ground mentioned in sub-section (c) of the Dominion Act, ch. 129, at the instance of a shareholder, especially a cannery company, at this season of the year.

But I rest my decision on the ground that the inability to meet liabilities in sub-section (c) means liabilities to *creditors* as distinguished from liabilities to *shareholders*.

Petition will be refused with costs.

[IN THE HIGH COURT OF JUSTICE FOR ONTARIO.]
(DIVISIONAL COURT.)

MATTHEWS & Co. v. MARSH.

*Promissory Note—Accommodation Maker—Renewal Note Obtained by
Fraud—Right to Sue on Original Note.*

The defendant joined in a note for the accommodation of one M., his co-maker, in favour of plaintiffs, who knew that the defendant was a surety only. When it came due, M. gave a renewal note to plaintiffs, with signatures to it purporting to be those of himself and the defendant. Thereupon the plaintiffs gave up to M. the original note marked "paid." M. died insolvent, and the plaintiffs, failing to get the amount of the note from his estate, brought action against the present defendant on the renewal note. The defendant having denied signing the renewal, the plaintiffs were allowed to amend and to claim on the original note:—

Held, that the renewal note being a forgery, so far as the defendant's signature was concerned, and the plaintiffs having been thus induced by the fraud of M., the primary debtor, to give up to him the original note, the plaintiffs had still a right to recover in equity.

Irwin v. Freeman (1867), 13 Gr. 465, and *McIntyre v. McGregor* (1900), 21 C.L.T. 25, followed.

APPEAL to the Divisional Court by the defendant from a judgment of the 3rd division court of Muskoka in favour of the plaintiffs upon a promissory note for \$130 and interest, dated April 4th, 1899, made by the defendant and one McDonald in favour of the plaintiffs, payable two months after date.

It appeared that the defendant had made the note for the accommodation of McDonald, in favour of the plaintiffs, who knew that the defendant was a surety only. When it came due McDonald desired to renew it, and a renewal note was given him by the plaintiffs to be signed, and he returned it to the plaintiffs in due course, with signatures to it purporting to be those of himself and the defendant. Thereupon the plaintiffs gave up to McDonald the original note stamped "paid:" the renewal note is date June 6th, 1899, and is for \$132.60 with interest, and is in other respects similar to the original.

McDonald died insolvent on July 19th, 1900. The plaintiffs tried to get the amount of the note from his estate but failed, and then brought the present action against Marsh upon the note of June 6th, 1899.

The action was tried on January 15th, 1902, before His Honour Judge Mahaffy and a jury, and a verdict was given for the plaintiffs for the note and interest, \$153, although defendant swore he never signed it. A new trial was granted upon the defendant's application, and the action was tried before a jury again, and resulted in a verdict for the defendant. A new trial was again granted on the plaintiffs' application, and the case came down a third time, on May 14th, 1902, for trial before a jury. The learned Judge allowed the plaintiffs to claim in the alternative upon the note of June 6th, 1899, on which the action was brought, or upon the original note of April 4th, 1899, and the claim was amended accordingly. No objection was taken to the charge of the learned Judge, and a verdict was returned by the jury in favour of the plaintiffs upon the original note. The defendant again applied for a new trial, and this being refused he appealed to the Divisional Court upon the following, amongst other, grounds :—

1. That the learned Judge had no jurisdiction to allow the plaintiffs to amend their claim or to claim upon one note as an alternative to the other.

2. That the books of the deceased McDonald were improperly admitted as evidence.

3. That the learned Judge should have nonsuited the plaintiff upon the ground that he had given time to McDonald, and dealt with the security to the plaintiff's detriment.

The appeal was argued on January 14th, 1903, before STREET and BRITTON, JJ.

R. D. Gunn, K.C., for the defendant.

C. E. Hewson, K.C., for the plaintiff.

March 21, 1903. STREET, J. [after stating the facts as above] :—The plaintiff's claim was within the jurisdiction of the division court, and the fact that he claimed it as alternative to another claim which was also within the jurisdiction, did not take it be-

yond the jurisdiction. There was also undoubted right in the Judge below to amend the plaintiff's claim under Rule 4 of the division courts.

I see no ground for interfering, upon the facts before us, with the verdict of the jury, or with the action of the Judge in submitting the case to the jury. The defendant was admittedly liable originally to the plaintiffs upon the note of April 4th, 1899. If the plaintiffs were induced by the fraud of McDonald to give him up that note in exchange for another upon which the defendant's signature was forged, the cases shew that the plaintiffs' remedy upon the original note remains in equity, even though it may have been cancelled and given up: *Irwin v. Freeman*, 13 Gr. 465; *McIntyre v. McGregor*, 21 C.L.T. 25.

The jury might well come to the conclusion that this fraud had been committed by McDonald on the plaintiffs, and that the plaintiffs were therefore entitled to recover upon the original note. We are not told exactly the terms of the charge of the learned Judge to the jury, but as no objection was taken to it by the counsel for the defendant, we may assume that the case was fairly left to them.

I think that the witness McConachie was entitled to look at his entries, or those made under his direction, in McDonald's books to refresh his memory, and that the entries in the books to which he referred were properly before the Court.

The decision of the Divisional Court in *McIntyre v. McGregor*, above referred to, requires us to hold that the renewal of the original note without the defendant's consent is no answer to a claim against the defendant upon the original note where the renewal was obtained by fraud.

The appeal must, therefore, be dismissed; but as the learned Judge below has, we think, been very liberal to the plaintiff in his allowance of costs, we make no order as to the costs of the present appeal.

BRITTON, J.:—(1) The claim in the division court, as amended, comes strictly within R.S.O. 1897, ch. 60, sec. 72, subsec. (d).

(2) I agree that the learned district court Judge had power to amend.

(3) No objection was made to the Judge's charge, and there is evidence to warrant the finding of the jury.

(4) It cannot be successfully urged that a renewal obtained by fraud or forgery is such a settlement of the claim, or is giving time so as to bar plaintiff's recovery upon original note.

As the plaintiff succeeded only upon the amended claim, and failed as to the note upon which action was originally brought, and in reference to which former trials were had, and as in the result below the defendant has been saddled with large costs, the appeal should be dismissed without costs.

Notes:—

RENEWAL OBTAINED BY FRAUD.

Besides the point noticed in the head note, two other points, one as to the jurisdiction of a Division Court Judge to amend the plaintiffs' claim allowing them to claim on the original note, the other, a point of evidence, as to right of a witness to refer to entries in the books of the primary debtor (M.), made by him or under his direction, to refresh his memory, were decided in this case. The first involved a construction of Rule 4 of the Division Courts under R.S.O. ch. 60 (*vide* Bicknell & Seager, Division Courts Act, 2nd ed), and it was held that the Judge of the Division Court had the jurisdiction to allow the amendment made. The second was also decided affirmatively, *i.e.*, that the witness had the right to refresh his memory under the circumstances set out. As these points are not strictly within the scope of these reports they are not noted in the head note to the case.

In *Irwin v. Freeman* (13 Gr. 465), A. gave B. and C. a note signed by himself which they discounted; when it matured B. and C. delivered to the holder, by way of renewal, a note purporting to be made by A., like the other note, and which such holder on

that faith accepted, and he delivered up the old note. It being afterwards alleged that the renewal was not signed by A., but by another person of the same name unknown to the holder and resident in a foreign country, it was held by Vankoughnet, C., and Mowat, V.-C., that A. could not take advantage of this fraud; that his liability in respect of the note still existed in equity and that the holder could sue within six years from the discovery of the fraud. Mowat, V.-C., said (*ibid.*, p. 471): "*Scholefield v. Templer* (1859), 4 DeG. & J. 433, is an express authority for this view (that the surety cannot avail himself of another's fraud." There the defendant *Templer* was party to two promissory notes and a bill of exchange as surety for one *Bell*. The holder of the notes and bill accepted from *Bell*, the principal debtor, a fictitious mortgage which the creditor believed to be genuine, and relying thereon he released the surety and erased his name from the securities. The object of the suit was to set up again the surety's liability; and the Vice-Chancellor, in pronouncing judgment for the plaintiff, said: "This case is brought within the broad principle that no one can avail himself of fraud. As it was held in *Huguenin v. Basiley* (1807), 14 Ves. 273, that where once a fraud has been committed, not only is the person who has committed the fraud precluded from deriving any benefit from it, but every other person is so likewise, unless there has been some consideration moving from himself . . . when once a person seeks to derive any benefit from (the fraud), he becomes a party thereto."

In *McIntyre v. McGregor* (1900), 21 C.L.T. 25, the facts were that the defendant Robert McGregor was the maker along with one of the other defendants, his son, of a promissory note for the accommodation of the son; when the note matured, it was retired by means of a new note signed by the son and purporting to be signed by the father. The father's signature was a forgery. The original note was given up by the plaintiff to the son. It was argued for the appellant (the father) that the father being a surety, to the knowledge of the plaintiff, was discharged by reason of the extension of time allowed the principal debtor (the son) by means of the first and subsequent renewals, all of which were forgeries. Ferguson, J., said as to this: "What happened was, that a fraud was practised upon the creditor by giving him a forged note in lieu of the original note, and another forged note in lieu of that one. It is not shewn that there ever was a binding agreement made by the creditor for the extension of time to the

principal debtor. So far as appears, the rights and liabilities of the parties to the original note were at the commencement of this action just the same as they were when that note fell due."

See on the same principle *Goddard v. Carlisle* (1821), 9 Price 169; *Bowen v. Evans* (1846), 2 H.L.C. 259; *Russell v. Jackson* (1852), 10 Hare 212; *Topham v. Duke of Portland* (1863), 1 DeG. J. & S. 569, per Turner, L.J.

RENEWAL.

A renewal bill or note does not as a general rule discharge the original unless there is a special agreement to that effect. The renewal operates as a suspension of the original bill: *Kendrick v. Lomar* (1832), 2 Tyrw. 438. See also *Ex p. Barclay* (1802), 7 Ves. 597; *Bishop v. Rowe* (1815), 3 M. & Sel. 362; *Dillon v. Rimmer* (1822), 1 Bing. 100; *In re London and Birmingham Bank* (1865), 34 L.J. Ch. 418. If it is discharged or paid, so is the original. If not, the original liability survives. But by an agreement between the parties the original may be cancelled, e.g., if it is destroyed or handed over to the acceptor or maker. Recovery of judgment on the bill or note will also extinguish the original liability.

If a bill originally given upon an illegal consideration be renewed, the renewed bill is also void: *Chapman v. Black* (1819), 2 B. & A. 588; *Wynne v. Callander* (1826), 1 Russ. 293; *Preston v. Jackson* (1817), 2 Stark 237; unless the amount be reduced by excluding so much of the consideration for the original bill as was illegal: *ibid.*

Although the second bill for the principal sum should be paid, the plaintiff may recover interest due on the original bill at the time the second was given unless it appear that the second bill was intended to operate as a renewal or satisfaction of the whole of the former bill: *Lumley v. Musgrave* (1837), 4 Bing. N.C. 9; *Lumley v. Hudson*, *ibid.*, p. 15. If the second bill be discharged by an alteration an action may be brought on the first: *Slooman v. Cox* (1834), 1 C. M. & R. 471.

And where a bill or note is originally without any consideration and is given up, another bill between the same parties in substitution therefor is not to be supported on consideration of the original bill or note, and both are unenforceable between the immediate parties thereto, though it would be otherwise as re-

gards a holder in due course: *Southall v. Rigg* (1851), 11 C.B. 481; *Lee v. Zagury* (1817), 8 Taunt. 114; 19 R.R. 476.

If a bill be altered so that a man otherwise liable on it is discharged, he is not liable on a bill given in renewal of the altered bill unless he were actually told of the alteration at the time he gave the substituted bill, and in such a case means of knowledge is not equivalent to actual knowledge: *Bell v. Gardner* (1842), 11 L.J.C.P. 195.

[IN THE SUPREME COURT OF NEW BRUNSWICK.]

HALE V. THE PEOPLE'S BANK OF HALIFAX.

Partnership—Powers of Partner after Dissolution of Firm—Hypothecation of Lumber to Secure Advances—The Bank Act, 53 Vict., ch. 31—Sale of Lumber by Partner—Application of Proceeds—Payment of Other Indebtedness—Knowledge of Pledgee.

Notwithstanding a dissolution of a partnership, a partner, until at all events a receiver is appointed, has all the power and authority he had before the dissolution to complete contracts made during the partnership. Hence, where a firm of lumber operators hypothecated under the Bank Act their season's cut of lumber to a bank to secure future advances, and a member of the firm, without the knowledge of his co-partner, sold the lumber and applied part of the proceeds in paying a past indebtedness of the firm to the bank, and, with the consent of the bank, applied a portion of the remainder in paying other debts of the firm:—

Held, that he had power to do so, though the partnership had then been dissolved, and that his co-partner was not entitled to have the money so appropriated, charged in reduction of the secured indebtedness to the bank.

Bill for an injunction to restrain defendants, The People's Bank of Halifax and John G. Murehie, from selling or disposing of certain timber licenses, and for an accounting to the plaintiff by the bank and George A. Murehie, and for an accounting to the plaintiff by the firm of James Murehie & Sons. The facts fully appear in the judgment of the Court.

Argument was heard November 21, 1902.

L. A. Currey, K.C. (*W. C. H. Grimmer*, K.C., and *F. B. Carvell*, with him), for the defendants, renewed an objection mentioned at the close of the plaintiff's case, that the suit should have been brought by the receiver for the creditors of Hale & Murchie, and moved that the bill be dismissed on that ground. It is claimed by the plaintiff that the sum of \$27,000 paid to the bank on account of the old indebtedness was wrongfully appropriated, and to be fraudulent as against other creditors of the firm. If so, those creditors should be represented in the suit. The plaintiff does not represent them. The receiver should have brought the suit, and if he refused to do so, he should have been made a defendant. Payment cannot be made of the balance of the fund in Court after the bank is paid, except to the receiver, when made a party to the suit. The plaintiff therefore has no interest in the suit.

W. Pugsley, A.-G., and *G. W. Allen*, K.C., for the plaintiff:—

The motion proceeds upon a misapprehension of the nature of the suit. The controversy is one between partners, and involved in the question are the dealings of the firm with the defendant bank. To enable the receiver to bring the suit he should have a title to the fund in Court. But a receiver has nothing more than possession. He has no right to originate actions except by leave of the Court, and his title could be objected to did not the Court overrule the objection. See *Ireland v. Eade* (1844), 7 Beav. 55; *Parker v. Dunn* (1845), 8 Beav. 497; *Portman v. Mill* (1839), 8 L.J. Ch. 161; *Wrixon v. Vize* (1843), 5 Ir. Eq. Rep. 276. A receiver appointed *pendente lite*, leaves the title of parties in the same position as before the appointment. It is as yet uncertain what the assets and liabilities of Hale & Murchie are, and until that is known it cannot be said that the plaintiff has not an interest in the suit. If necessary the receiver could be added as a defendant. See 53 Viet. ch. 4, sec. 133.

Currey, K.C., in reply.

Question reserved.* Argument then proceeded upon the merits of the suit.

Pugsley, A.-G. (*Allen*, K.C., with him), for the plaintiff:—

The \$27,000 received by the bank should have been applied in reduction of the secured account. Otherwise the security will be applied in a way absolutely prohibited by law. Section 74 of The Bank Act, 53 Vict. ch. 31, provides that "the bank may lend money to any person engaged in business as a wholesale manufacturer of any goods, wares and merchandise, upon the security of the goods, wares and merchandise manufactured by him or procured for such manufacture." Then sec. 75, as amended by 63-64 Vict. ch. 26, sec. 18, enacts that "the bank shall not acquire or hold any warehouse receipt or bill of lading or security under the next preceding section to secure the payment of any bill, note or debt or liability, unless such bill, note or debt or liability is negotiated or contracted at the time of the acquisition thereof by the bank, or upon the written promise or agreement that such warehouse receipt or bill of lading or security would be given to the bank," etc. The words of the section are clear that security cannot be taken for a past indebtedness. *Murchie* as a co-partner with the plaintiff ordinarily might have authority to make the appropriation, though that is doubtful, but no such power would exist where the partners were in conflict, and the bank was aware of their differences. It is also submitted that the partnership was *ipso facto* dissolved by the transfer by *Murchie* to his brother of the firm's milling property. Of that act the bank had knowledge previous to the appropriation in question. A suit for winding up the affairs of the partnership had also been previously commenced by the plaintiff. The mill was the basis of the firm's business, and its transfer was inconsistent with the continuation of the business, and brought the business to an end. See *Lindley on Partnership*, 4th ed., 698; *Abel v. Sutton* (1800), 3 Esp. 108; *Cameron v. Stevenson* (1862),

* Judgment upon the merits being for the defendants, it became unnecessary for the Court to pronounce upon this point.

12 U.C.C.P. 389; 17 Amer. & Eng. Ency. of Law, 1st ed., 1100. The secured indebtedness to the bank should further be reduced by the amount received by James Murchie & Sons from lumber which came into their hands, hypothecated to the bank. Under an accounting by James Murchie & Sons they would be entitled to deduct all payments made by them to Hale & Murchie in assisting them to get out the lumber, leaving the balance to be applied on account of the bank's secured indebtedness. The fact that the bank permitted Hale & Murchie in previous dealings to make sales of hypothecated lumber free of the bank's control, relying upon them to appropriate the proceeds to the bank's account, does not authorize an abandonment by the bank of its security. The bank must be held to have consented that James Murchie & Sons should have the lumber. In so doing they were acting collusively with them and in fraud of the plaintiff and the unsecured creditors of Hale and Murchie. The lumber belonged to the bank and could not be parted with by it to the detriment of the bank's security. It would be most inequitable to allow George A. Murchie to appropriate behind the plaintiff's back the proceeds of lumber towards payment of an indebtedness due Murchie's own firm in violation of the agreement by Hale & Murchie with the bank. The evidence shews that \$17,000 paid by Murchie to James Murchie & Sons was from proceeds of lumber hypothecated to the bank sold to Dobell, Beckett & Co., and that this amount is in excess of any advances by James Murchie & Sons to Hale & Murchie.

L. A. Currey, K.C. (Grimmer, K.C., and Carvell, with him),
for the defendants:—

The \$27,000 was paid to the bank in payment of the firm's debt by a member of the firm having power for the purpose. It was also part of the agreement by the firm with the bank, in consideration of which it made fresh advances, that the old indebtedness should be retired. The right of Murchie to make the payment was not at an end. The firm was not dissolved; certainly the bank had no intelligence of it. Even if it were, it was proper

that its engagement should be kept. The payments made to James Murchie & Sons from proceeds of lumber hypothecated to the bank are unobjectionable. The Bank Act leaves a lumber operator free to dispose of hypothecated lumber in the ordinary way of his business, but accounting to the bank for the proceeds of its sale. No onus is cast upon the bank to take possession, unless it wishes to do so by reason of the security being overdue and in default, but until it does take possession the operator may pass a valid title.

[BARKER, J.:—I have knowledge of another case in which this bank was interested, in which it put forward a different view, and took action upon it.]

If the bank here intervened and took charge of the logs, it would have to account for their full market value to Hale & Murchie, but until it does so the firm could vest the property in the lumber in a purchaser. Section 78 of the Bank Act supports this view. The bank cannot intervene until after maturity of the notes for which the security is given. In the meantime the lumber operator has an unqualified power to sell.

[BARKER, J.:—If that is so, the security is of no value.]

We contend that is the meaning of the Act. Clarke stated in his evidence that the bank did not make advances on the security given under section 74, but in reliance upon the credit and good faith of the firm.

[BARKER, J.:—He meant by that, that the bank did not require an indorser.]

Pugsley, A.-G., in reply:—

Hypothecation under the Act vests a title to the goods in the bank, and a sale cannot be made of them, except on the consent, express or implied, of the bank. The bank here could and should have claimed the proceeds of the lumber handed to James Murchie & Sons, and their security must be debited with the amount.

The further question here is not whether George A. Murchie could appropriate the proceeds of the lumber in paying the debts of the firm, but whether he could divert it from the purpose for which it had been specifically pledged by Hale, acting for the firm.

January 20, 1903. BARKER, J.:—

In order to expedite the settlement of the questions in dispute in this suit the application to continue the interim injunction granted by Mr. Justice McLeod was by consent of parties turned into a hearing. The absence of the usual pleadings may account in some measure for the admission of evidence and discussion of questions which are really not relevant to the points involved in the suit. I allude more particularly to the claim put forward by the plaintiff that the firm of J. Murchie & Sons were partners in the firm of Hale & Murchie. There is a suit pending in this Court, instituted by the present plaintiff, for the winding up of the partnership of Hale & Murchie, and one of the questions there raised is this alleged partnership between the two firms, but all the questions involved in this suit may, I think, be determined altogether outside of the other question.

In 1889 the plaintiff and the defendant, George A. Murchie, by a verbal agreement, entered into partnership for the purpose of carrying on a milling and lumbering business under the name of Hale & Murchie. George A. Murchie was then and ever since has been a member of the firm of J. Murchie & Sons. Up to the fall of 1900 the plaintiff seems to have had the active management of the business, and, in order to carry it on, his firm, acting by him, had borrowed from the defendants, The People's Bank of Halifax, through its agency at Woodstock, such sums of money as were required from time to time for their lumbering operations. These advances so made each year were secured by an hypothecation, under the Bank Act, of the lumber cut during that season, and in the fall of 1900 the firm of Hale & Murchie were indebted to the bank in the sum of upwards of \$75,000, for which

they held as security a large quantity of manufactured lumber under contract of sale to Dobell, Beckett & Co., of Quebec, and ready for delivery, the price of which was, in round numbers, \$50,000. For some reason not disclosed in the evidence, the bank, on being applied to by the plaintiff in the fall of 1900 to make the usual advances for the coming season's operations, by its agent at Woodstock declined to do so, whereupon the plaintiff's partner, George A. Murchie, on behalf of the firm, and with the plaintiff's full concurrence, went to the head office of the bank at Halifax, in order, if possible, to make some arrangement, and the result of his application there was that the bank agreed to advance the firm for the operations of 1900-1901, up to \$91,000, upon the terms contained in a letter dated December 20th, 1900, from Mr. Clarke, the cashier of the bank, to George A. Murchie, and which is as follows:—

“HALIFAX, N.S., Dec. 20, 1900.

“*George A. Murchie, Esq., Calais, Me.:*

“Dear Sir,—The Board of Directors have considered the proposal made by you at your interview this morning, and have decided to make advances to the firm of Hale & Murchie for the present season, extending to 1st July next, upon the following terms: The amount of lumber to be cut is to be limited to thirteen million feet, and we will make advances at the rate of seven dollars per thousand feet (viz., \$5 for logging, \$1 for driving, and \$1 for browing), you to provide the money for the stumpage. As security for these advances we will require: (1) A lien upon all the logs cut, under the terms provided by our Bank Act and in accordance with usage; (2) an assignment to the bank of all timber leases at present held by the firm of Hale & Murchie, situated on the Tobique and elsewhere; (3) a personal guarantee bond to be given by yourself and John G. Murchie, covering the full amount of all advances made by the bank from this date to Messrs. Hale & Murchie. All these conditions must be fully complied with before any advances can be made. In addition we wish it to be understood that no indirect liabilities will be created in the shape of jobbers' time drafts and that obligations incurred at the bank

will have prompt personal attention. We wish it understood that the firm of Hale & Murchie is domiciled at Fredericton, and that the books and papers of the firm will be properly kept at that place and accessible to the bank, for the purpose of information at any time, and that no office or branch office will be permitted at any other place. In reference to present indebtedness of the firm to the bank, we accept the figures of your specification, showing that under your contract with Dobell, Beckett & Co., \$50,578.89 worth of lumber is ready for the latter firm's acceptance, and, according to Dobell, Beckett & Co.'s contract, that this will be settled for by note due not later than 4th February. We accept your assurance that either Mr. Hale or yourself will visit Quebec at a very early date to bring about this settlement. The balance of the debt we are willing to carry along, provided that at least one-half is repaid within a year, and your assurance on this point is sufficient for the directors. We require that the affairs of the firm generally will be closely supervised by you and that the financial part will have your particular personal attention. When you are in a position to transfer and complete the securities mentioned in this letter I will acquaint our manager at Woodstock with the particulars and will then have the funds made available to your firm. Should any further explanation be required I shall be pleased to furnish same. Any correspondence necessary to the completion of this understanding should be had with this office. After the account is once opened in accordance with the terms agreed upon, the matter will be in the hands of Mr. White, our manager at Woodstock.

"Wishing you the compliments of the season,

"I remain, yours faithfully,

"D. R. CLARKE, *Cashier.*"

It is not denied that this letter was shewn to the plaintiff, and that with a full knowledge of its contents he accepted its terms. A change was made by the consent of all parties, at the instance of John G. Murchie, that is to say, that the licenses, instead of being assigned by Hale & Murchie direct to the bank as a security for the advances, were to be assigned to him as a security against

loss on his guarantee bond, and the bank also agreed to extend the limit of the advances from \$91,000 to \$94,000. The plaintiff does not dispute the terms of this arrangement. In fact, he complained then, and still complains, of the stipulation that his partner was to assume the supervision of the financial affairs of the firm, which up to that time he had managed, and he subsequently made it a distinct ground for dissolving the partnership that his partner had, in violation of the terms of this letter, removed the books and papers of the firm from Fredericton to Calais. In accordance with the arrangement, the plaintiff and his partner, George A. Murchie, professing to act as the firm of Hale & Murchie, and John G. Murchie, entered into an agreement, dated January 14th, 1901, by which Hale & Murchie assigned to John G. Murchie a number of lumber licenses covering an area of some 300 square miles, and their interest in some other timber limits, as a security against loss on his guarantee to the bank for these advances, and any other liability to the bank which he might assume for Hale & Murchie. This agreement recites as follows: "Whereas the said firm of Hale & Murchie are receiving advances from The People's Bank of Halifax to the sum of about \$91,000 to enable them to carry on their lumber operations for the season of 1900-1901, and the said John G. Murchie has agreed to guarantee the said advances so made as aforesaid by The People's Bank of Halifax in the sum above stated." The licenses in question were in the name of the plaintiff and George A. Murchie, and it is not denied that they form a part of the partnership assets of Hale & Murchie. By above stated agreement it was expressly stipulated "that upon payment by said firm to said John G. Murchie of and for all amounts or sums assumed or guaranteed by him for said firm as aforesaid, or upon due and proper discharges, acquittances or releases thereof being obtained, then and thereupon the said John G. Murchie is to re-assign at once the said licenses and timber lands to the said Frederick H. Hale and George A. Murchie." John G. Murchie gave the bond to the bank as he had agreed, and as a security for its performance he assigned the Hale and Murchie timber licenses and limits, assigned to him, over to

the bank. The bank made the advances up to \$94,000. Hale & Murchie got out some thirteen millions of lumber, all of which was hypothecated to the bank, and all of which has been manufactured and disposed of. During the year 1901 Hale & Murchie paid to the bank on account of these advances \$30,000, so that irrespective of interest and one or two small sums which are to go in reduction of the amount, the balance, according to the bank's contention, due them by Hale & Murchie on account of the moneys so advanced is \$64,000, for which they hold, or at all events did hold, the lumber hypothecated, the timber licences and John G. Murchie's guarantee, as security, in addition to Hale & Murchie's personal obligation. So far there is no substantial difference between the parties. The plaintiff, however, says that this balance of \$64,000 is subject to a deduction of two sums; one an ascertained amount of \$27,745.23, and the other of an amount to be ascertained by an account asked for in this suit, and his contention is that these two sums would pay off the bank in full, or at all events that he was ready to pay any balance which might remain due, thus relieving John G. Murchie from liability on his guarantee, and the timber licenses and other securities held by the bank would then be assignable to Hale & Murchie by the terms of the assignment to John G. Murchie.

Taking these two contentions in their order, the facts of the first claim of the plaintiff are as follows: On the 6th February, 1901, a payment of \$50,000 was made by Hale & Murchie to the bank on account of the old indebtedness, that is, the 1899-1900 account, which left a balance of \$27,745.23. The \$50,000 is the amount due by Dobell, Beckett & Co., mentioned by Mr. Clarke in his letter to George A. Murchie of 20th December, 1900, and which he urges either Hale or Murchie to go to Quebec in order to have arranged. The balance was carried along by way of renewals until January, 1902, at which time it was represented by Hale & Murchie's promissory note, held by the bank, dated August 5, 1901, and maturing February 8, 1902. On the 7th January, 1902, that is, a month before this note fell due, George A. Murchie, acting on behalf of the firm of Hale & Murchie, paid the

bank \$23,171.30, and on the following day (January 8th, 1902) a further sum of \$3,987.50, both of which sums were paid on account of the balance of \$27,745.23, and were so credited by the bank on the note held by them. This appropriation of these two payments was made by the consent and agreement of George A. Murchie, acting for himself and partner, of the bank's manager, and of John G. Murchie, the guarantor. The \$23,171.30 was received from Dobell, Beckett & Co., in payment of lumber sold them by Hale & Murchie from the cut of 1900-1901, and the \$3,987.50 was the proceeds of a draft drawn by Hale & Murchie, by George A. Murchie, on J. Murchie & Sons, in favour of the bank. These payments were appropriated in the way I have mentioned without the plaintiff's knowledge in any way, and, as I think from the evidence, with a knowledge on the part of the bank that the money from Dobell, Beckett & Co. was the proceeds of lumber hypothecated to the bank of the 1900-1901 cut, and the plaintiff's contention, as to both of these claims, is that as the lumber got out that season was hypothecated to secure the advances for that season, it was a fraud upon him, or rather upon the unsecured creditors of Hale & Murchie, to utilize the moneys derived from its sale in payment of an indebtedness of another year altogether, and thus throw an additional burden on the securities. The bank, being unable to obtain payment of their indebtedness, and the original security upon the lumber having been exhausted by the manufacture and sale of the logs by Hale & Murchie, was proceeding to realize upon the timber licenses, when this bill was filed, upon which Mr. Justice McLeod granted an interim injunction staying the sale. The licenses have since been sold, by consent of all parties, at auction, and the proceeds—some \$72,000—have been paid into Court, to be dealt with as representing the licenses. The bill which was filed by the plaintiff against the bank and his co-partner, George A. Murchie, and the other members of the firm of J. Murchie & Sons, of whom John G. Murchie is one, alleges, among other things, that of the thirteen million feet of lumber cut during the season in question, about twelve hundred thousand were sold to D. Fraser & Sons at Fredericton, for which they paid an average price of \$10.50 per

thousand; that three and one-half millions were manufactured at Plaster Rock by the Tobique Manufacturing Co., about three-quarters of which were sold to Dobell, Beckett & Co., and that the remainder of this three and one-half million was shipped to J. Murchie & Sons; that about eight millions were manufactured at the Victoria Mills, a large portion of which was shipped also to J. Murchie & Sons. The bill also alleges that the thirteen millions, if sold at the market price, would realize \$140,000, much more than sufficient to pay the bank in full. The charge in the bill against George A. Murchie is that he sold a large portion of the lumber to Dobell, Beckett & Co., and did not, as he was bound to do, use the proceeds in reduction of the secured debt, and that he shipped large quantities of the lumber to J. Murchie & Sons, who have not accounted for it. The charge which the plaintiff makes against the bank is not only that they illegally and wrongfully credited the payments on the old note, as I have mentioned, but that they, in violation of their duty, and in fraud of the plaintiff, permitted George A. Murchie and J. Murchie & Sons to receive large portions of this lumber and the proceeds thereof, instead of having the same applied in payment of the advances. The 15th paragraph of the bill alleges that prior to making these advances, the bank and George A. Murchie entered into an agreement that George A. Murchie should have charge of the financial portions of the business of Hale & Murchie, in connection with the lumber and advances and the repayment thereof, and in consequence he, the plaintiff, was thereafter excluded by George A. Murchie and the bank from any management or control of the lumber, or the financial transactions connected therewith. The bill further alleges that the plaintiff was ready and willing to pay the bank the amount really due it, for which the licenses were held as security, and that it would be a great wrong, not only to him, but the unsecured creditors of Hale & Murchie, if the licenses were sold before the real indebtedness to the bank, for which they were held as a security, was ascertained. And the bill prayed for an injunction restraining the sale of the licenses until the amount due the bank in respect of the advances was ascer-

tained. Also an account from the bank of all moneys received on account of said advances, and also all moneys received by it as the proceeds of the lumber or any part thereof. Also an account from George A. Murchie of the lumber sold or disposed of by him; and also an account by J. Murchie & Sons of all the lumber received by them, of all sales made thereof, and the moneys received therefor and the disposition thereof.

As to the allegations in paragraph 15 of the bill, I am unable to see what bearing they have upon the case, unless they are put forward as an excuse for the plaintiff not knowing the nature or extent of his firm's business subsequent to the end of the year 1900, or as one of a series of acts by the bank and George A. Murchie, done to curtail the plaintiff's power as a partner for some purposes of their own. Whatever may have been intended, it seems to me that the evidence in no way sustains the allegations. The only evidence on the subject is the letter of Mr. Clarke of December 20th, in which the bank, as one of the conditions of making the advances, stipulates for a personal supervision by George A. Murchie of the financial affairs of his firm. The plaintiff had the option of refusing or accepting these terms and he chose to accept them. There is no evidence whatever of any attempt by the bank to exclude the plaintiff from the business management of his firm, even if they were in a position to do so, of which there is no evidence whatever. Neither can I find in the evidence anything to suggest that the transactions between the firm and the bank were in any way concealed from the plaintiff, or that either by enquiry of the bank or of George A. Murchie, or by an inspection of the books of his firm, he could not have obtained full information in reference to them.

As to the appropriation of the \$27,000, there is no dispute that the debt was owing by Hale & Murchie to the bank, and that it was the balance of the \$75,000 indebtedness existing from the 1899 transaction spoken of by Mr. Clarke in his letter. George A. Murchie and the bank justify this payment on two grounds. In the first place it was simply carrying out the terms of the let-

ter to which the plaintiff himself assented; and in the second place it was competent for Murchie to bind his partner by the payment, even without any express authority. In determining this question, it is, I think, immaterial whether the partnership had been dissolved or not, for in either case the authority to wind up its affairs and deal with its property remained in the partners, this Court not having at that time intervened by the appointment of a receiver. In *Butchart v. Dresser* (1853), 10 Hare 453, affirmed on appeal, 4 DeG., M. & G. 542, it is virtually laid down that, notwithstanding a dissolution, a partner, until at all events a receiver is appointed, has all the power and authority he had before the dissolution to complete contracts previously made, and in order to wind up the business.

In this case, on appeal, Turner, L.J., says: "The general law is clear, that a partnership, though dissolved, continues for the purpose of winding up its affairs. Each partner has, after, and notwithstanding the dissolution, full authority to receive and pay money on account of the partnership, and has the same authority to deal with the property of the partnership, for partnership purposes, as he had during the continuance of the partnership. This must necessarily be so. If it were not, at the instant of the dissolution, it would be necessary to apply to this Court for a receiver in every case, although the partners did not differ on any one item of the account." It is true that Hale & Murchie had a right to compel the bank to utilize the proceeds of the lumber in payment of the debt which it was pledged to secure; but that is a right which the parties interested may waive, and, in my opinion, had the partnership been existing, it would have been quite competent for George A. Murchie to do precisely what he did, quite apart from his assurance to the bank, and that he would have the same power after a dissolution, and before this Court had taken charge of the assets, by way of appointing a receiver. I confess, as a practical business matter, I cannot see from the standpoint of the plaintiff the force of his objection. There is no dispute as to the debt being due, and its payment enured to the benefit of both partners alike, and neither can get anything out of the partner-

ship assets until all the debts are paid in full. Apart from this, the plaintiff knew that his firm were under the assurance given by George A. Murchie, and adopted by himself, that during the year 1901, at least one-half of this old balance would be paid, and when this payment was made the year had passed and nothing had been paid. I do not at all think it was in the contemplation of the plaintiff or any one else that this balance was to be paid from funds other than those received from the sale of these logs cut in the season of 1900 and 1901. The evidence and all the circumstances point to an entirely different conclusion. Where was the money to come from if not from that source? It must be remembered that if, as the plaintiff affirms, these thirteen millions of lumber at current rates were worth \$140,000, and the evidence rather sustains that estimate, there was a margin of nearly \$50,000 over and above the bank's claim, which belonged to the firm. Who ever supposed that not a dollar of that sum was to be used until the bank had been paid off? Where was the money to come from to pay wages, stumpage, and all the other expenses incident to carrying on a large milling business such as Hale & Murchie were then carrying on, saying nothing of providing for such indebtedness as we all know firms of that kind not unusually carry from one year's transactions into another, of which this very \$27,000 is an illustration? I think the plaintiff has no ground and no reason for complaining of this payment or of its appropriation.

Coming now to the plaintiff's second contention, it would seem at first blush that this case is the simple one of a bill filed by the pledgor of two distinct and separate kinds of property seeking to secure the same debt, to restrain the pledgee from realizing or selling one kind or part of the whole property pledged, on the ground that from the remainder of it he had already realized, or ought to have realized, sufficient to discharge the indebtedness. The bill is in form a redemption bill. There is nothing in it, however, alleging any partnership between the two firms. That is involved in the other suit pending, and if the evidence sustains the plaintiff's view on that point, the whole account can be taken and

must be taken in that suit. The bank has no interest in the taking of a mere partnership account between these two firms. It is only because it is alleged here that the bank has wrongfully, and in fraud of the plaintiff, permitted J. Murchie & Sons to get this property, and for which they must account to the plaintiff, that any account can be asked here, because that is the only accounting by J. Murchie & Sons in which the bank has any interest. Neither has the bank any interest in a mere accounting between the members of the firm of Hale & Murchie *inter se*. It is only because of the allegation as to George A. Murchie's management of the firm's business for the benefit of the bank that any accounting can be claimed in this suit involving that question. The facts in evidence, I think, shew that this is not the ordinary case of mortgagor and mortgagee of chattels, which I have mentioned. It appears that from the formation of the plaintiff's firm in 1889 down to this last transaction in 1900, Hale & Murchie had carried on their financial matters principally with the defendant bank. The bank had from year to year made them the advances which they required for their lumbering operations, taking as security a lien on the lumber under the Bank Act. During all that time the plaintiff had the principal arrangement of the firm's business, and practically the entire management of its money matters. The disposal of the lumber and the management of the business was left entirely with Hale & Murchie, which, during that period, practically meant the plaintiff. They took charge of the property, manufactured it, sold it, and dealt with in every way—so far as I can gather from the evidence—so far as the outside world was concerned, as if they alone were interested in it. No doubt the bank was consulted from time to time and kept informed of the business matters and how they were likely to result, but they made contracts of sale, shipped and sold apparently to whom they chose, and collected all the proceeds. It was Mr. Hale or Mr. George A. Murchie, not any bank official, who, by the terms of Mr. Clarke's letter of December 20th, was to go to Quebec to secure and arrange the payment by Dobell, Beckett & Co. of the \$50,000 due by them, though the money really belonged to

the bank, and it represented lumber pledged to the bank and sold by the pledgors by their consent. The bank put forward that this is the only practical way of handling a security of this kind. That may be so. At all events that is the method by which Hale & Murchie and the bank dealt with them for all these years. After George A. Murchie took charge in 1900, precisely the same course of dealing was adopted. As in previous years, Hale & Murchie sold the lumber and should have accounted to the bank for the proceeds. In the one case the plaintiff was the active partner, while in the other George A. Murchie was the active partner. During all these years Hale & Murchie sold largely to J. Murchie & Sons. Their account between the two firms, as kept by them up to 1900, shews a yearly increasing balance against Hale & Murchie, except, I think, in one year. The balance in January, 1899, was \$121,977.46; a year later it was \$112,642.37; in 1901 it was \$120,874.49; and in January, 1902, it was a trifle over \$100,000. It is true that the plaintiff entirely denies the correctness of these figures, and states his belief that, on a proper accounting, the whole indebtedness would disappear. But even in that case the fact would still remain that the cash payments and advances by J. Murchie & Sons to Hale & Murchie were at least equal to the value of the lumber shipped to them.

Now in all this, wherein consists the fraud of which the plaintiff complains? Were he and the bank, for the ten years previous to 1901, dealing fraudulently as to George A. Murchie? If not, George A. Murchie and the bank were not dealing fraudulently as to the plaintiff in 1901. Upon what principle, then, can the plaintiff be heard to say to the bank, you cannot go on realizing your securities, because if you credit what you should have but for your default or neglect received, your debt would have been paid in full? The default or neglect was that of the plaintiff and his partner. They were under an obligation to pay the proceeds of these sales of lumber to the bank until the bank was paid. Instead of doing that, they used them in paying another creditor. As between these parties, Hale & Murchie cannot complain if the bank realizes on their securities; and if there is a dispute between

the plaintiff and J. Murchie & Sons, or between the plaintiff and his partner, George A. Murchie, the parties can settle it between themselves. The bank has no interest in these accounts unless their claim against Hale & Murchie, which they are seeking to realize from the securities, would be affected by the result; which, in my opinion, would not be the case. I can see no reason whatever why the bank, holding the security on the lumber and on the licenses for the one debt, should be debarred from realizing on the licenses for the one debt, should be debarred from realizing on the by the plaintiff and his partner. The bank could surely, at their instance, relinquish a part of their security, and if there was any fraud, or the bank did not relinquish, the plaintiff and his firm, having the benefit of the money, cannot complain.

The plaintiff's bill must be dismissed with costs, and out of the fund in Court the bank must be paid the amount due them for their advances, and it will be so ordered.

[IN THE SUPREME COURT OF BRITISH COLUMBIA.]

IN RE THE LENORA MOUNT SICKER COPPER MINING
COMPANY, LIMITED.

*Winding-up—Leave to Bring Action—Secured Creditors—Proving Claims—
R.S.C. 1886, ch. 129, secs. 62, et seq.*

A secured creditor has a right to apply for and obtain leave to bring an action to enforce his security. It is not optional for a secured creditor to either prove his claim in a winding up or else proceed with an action to enforce it, and if he does commence an action it is still compulsory on him to proceed before the liquidator under sections 63, *et seq.* of the Act.

Summons on behalf of John Bryden and Sir C. H. Tupper, for leave to commence a foreclosure action against the Company which on the 19th of November, 1902, was ordered to be wound up. The applicants were the joint holders of three different mortgages of the lands and assets of the Company and under which they entered into possession on the 28th of October, and were still in possession; they also held a chattel mortgage covering the personal property of the Company. The summons was argued before DRAKE, J.

Peters, K.C., for the summons.

Oliver, for the liquidator.

W. J. Taylor, K.C., *Bodwell*, K.C., and *Fell*, for unsecured creditors.

Belyea, K.C., for holders of mechanics' liens.

23rd December, 1902.

DRAKE, J.:—Mr. Peters asks on behalf of the mortgagees leave to commence an action of foreclosure under section 16 of the Winding Up Act, 1886. He contends that a mortgagee is entitled to exercise an option to come in under the Winding Up Act or not, but if he does not he then requires leave of the Court

to commence his action. He cited several English authorities in support of his proposition, but these cases when examined do not, in my opinion, apply to the Dominion Winding Up Act. They are founded on the express wording of section 12 of the Bankruptcy Act (Imperial), 1869: see *In re David Lloyd & Co.* (1877), 6 Ch. D. 339, followed in *In re Longendale Cotton Spinning Co.* (1878), 8 Ch. D. 150. I may here point out that section 63 of the Winding Up Act is almost identical with section 84 of the Insolvent Act of Canada, 1875. My attention has not been drawn to any authorities since 1875 which give an option to a secured creditor to enforce his securities without reference to sections 63 *et seq.* In my opinion, this section is compulsory on all secured creditors and there may be very good reasons adduced for its existence in the statutes, for instance, if the mortgaged property is of considerable value in excess of the amount for which it is pledged, it gives the liquidator an opportunity of realizing such surplus for the benefit of unsecured creditors. I, however, see no objection to the mortgagees proceeding with their proposed action. They have the power by summary petition under section 39, but as these claims may be disputed it is perhaps better to proceed in the usual way. The mortgagees, however, will as soon as the accounts are taken, proceed under section 63. The reason for this is that it has been held in the case of *Bell v. Ross* (1885), 11 A.R. 458, that under section 84 of the Bankruptcy and Insolvent Act if the assignee in bankruptcy assents to the retention of the security that the creditor thereby becomes a purchaser freed from the equity of redemption. Whether the same reasons will apply to section 63 is a matter for consideration. The order will go.

Order accordingly.

[IN THE HIGH COURT OF JUSTICE FOR ONTARIO.]
(MEREDITH, J.)

KRUG FURNITURE COMPANY V. BERLIN UNION OF
AMALGAMATED WOODWORKERS.

*Trade Union—Espionage by—Interference with Business—Inducing Breach
of Contract—Injunction—Pleading—Damages.*

The defendants were a local branch of a trade union, the members thereof, and the president of the whole trade union, who by means of threats, abusive language, intimidation, and a system of espionage, had induced employees of the plaintiffs to break their contracts of employment with them, prevented the plaintiffs from obtaining new men in their places, and had seriously interfered with the sale of the plaintiffs' goods:—

Held, that the plaintiffs were entitled to an injunction restraining the defendants from unlawfully besetting the plaintiffs' factory, and from all wrongful obstruction of, or interference with the plaintiffs in their business.

Held, further, that the defendants (including the president of the union, though a foreigner), were liable to the plaintiffs in damages for the loss incurred by the plaintiffs in their business due to the defendants' unlawful acts.

Held, also, that the defendants having, without objection, appeared and pleaded in an apparently corporate capacity, could not at the trial raise the objection that they were not a corporate body, and that therefore they could not be sued as such. Before the corporate capacity of a party, suing or being sued in such capacity, can be questioned, the fact of incorporation must be expressly denied.

This was an action brought by the plaintiffs, who are manufacturers of furniture doing business in the city of Berlin, Ontario, against the Berlin Union, No. 112, Amalgamated Woodworkers' International Union of America, certain members thereof and one D. D. Muleahy, for an injunction to restrain the defendants from interfering with the plaintiffs' workmen and from preventing workmen from entering into their employ, and also for damages for wrongfully and maliciously procuring the plaintiffs' workmen to break their contracts with the plaintiffs and to cease to work for them.

The judgment contains a sufficient statement of the facts.

The action was tried at Berlin on the 17th of March, 1903, before MEREDITH, J., and judgment was reserved.

E. E. A. Du Vernet, and *J. A. Scallen*, for the plaintiffs.
Mabee, K.C., and *E. P. Clement*, for the defendants.

April 2, 1903. MEREDITH, J. :—Every one who, without lawful justification or excuse, besets or watches the house, or other place, where any person resides, or works, or carries on business, with a view to compel such person to do, or abstain from doing anything he has a right to abstain from doing, or to do, is guilty of a crime, and liable to fine or imprisonment.

Every one who breaks any contract; or knowingly and for his own ends, without justification, procures any other person to break any contract, or any innkeeper to disregard his legal obligation to afford reasonable accommodation to any traveller, is guilty of a wrong, for which he is answerable in damages.

All persons who make use of a public highway, or any other place, to the sensible discomfort of any person in the ordinary enjoyment of his house, or place of business, or to the injury of his property, are, ordinarily, guilty of a wrong, for which they are answerable in damages, and, from the continuance of which, they may be restrained by injunction.

So, too, that which is now-a-days called boycotting is, in some of its forms, very obnoxious to the law.

That the defendants were guilty of that crime and of these wrongs is, upon the evidence, very plain. Indeed it is, to a certain extent, admitted by them in their consent to the interlocutory injunction made against them in this action; for injunctions are not consented to by, and do not go against, persons who have not done, and do not intend to do, any wrong: see *Quinn v. Leatham* [1901], A. C. 495; *Read v. Friendly Society of Operative Stonemasons*, [1902] 2 K.B. 88, and *J. Lyons & Sons v. Wilkins* [1899], 1 Ch. 255.

Because of some disagreement between the plaintiffs and that class of mechanics in their employment known as finishers, the woodworkers, another class of mechanics in the plaintiffs' employment, left it and began that which they term a "sympathetic strike." No way directly concerned in the differences

between the finishers and the plaintiffs, satisfied apparently, as their own business relationship with the plaintiffs; yet, in order to aid their fellow-workmen the finishers, the woodworkers, in almost a body, left the plaintiffs' employment.

That they had a right to do, so long as they broke no contract; and no complaint is made in that respect: what is complained of is the subsequent conduct of the defendants.

Their main purpose in striking was to compel the plaintiffs to accede to the demand of the finishers. Their plan to effect that purpose, to force the plaintiffs to submit, was to prevent other workmen taking the places of the strikers, and to constrain such of the plaintiffs' workmen as had not left to leave their employment, and to prevent the sale of the goods made by them, so that the plaintiffs would be put in the position that they must submit or close their factory—in other words, to force them to choose between submission and ruin as a manufacturing concern.

Whatever may be thought of this purpose from any other than a legal point of view, so long as the workmen resorted to lawful means only, to accomplish a lawful object, they were quite within their right, and entitled to, and would receive the prompt protection of the law, from unwarranted interference at any one's hands; but any unlawful object, or unlawful means adopted by them to obtain a lawful object, should meet with equally prompt prevention and punishment in the courts of law.

One of the first acts of the workmen who had struck, and of other members of the organized body to which they belonged, the defendants "The Berlin Union, No. 112, Amalgamated Woodworkers' International Union of America," was to organize watches, composed of a number of the men, who were detailed for certain hours, beginning with the arrival of the earliest train upon the railway and ending with the latest, to beset and watch, every day, all trains, and to exercise an espionage over all passengers and luggage arriving at the railway station with a view to intercepting any one who might have the appearance of, or whose luggage might have the appearance of

that of, a workman employed, or seeking employment, by the plaintiffs; and to beset and watch the plaintiffs' factory and premises, especially at such hours as the workmen were going to and from their work, for the purpose of preventing new workmen from entering the plaintiffs' employment, and of contraining their continuing workmen to leave such employment.

For over two months, and until after the interlocutory injunction order herein was made, this method of interference was combinedly and systematically kept up by a regular rotation of watches or detachments detailed for the purpose. The conduct of those who beset and watched the factory was often of an offensive and highly reprehensible character: the plaintiffs' workmen were insulted, obnoxious expressions and offensive noises were directed against them, and they were sometimes crowded off the sidewalk—conduct calculated to create a breach of peace by those who had the courage to resent it, and to intimidate and force from their employment those who had not; conduct which, upon the railway station, ought not to have been permitted by any well-conducted railway company; and conduct which, upon the public streets, ought to have been prevented by the peace officers of any well-conducted municipality.

It cannot be denied that such striking workmen as were employed by the day left without finishing their day's work, and that such of them as were employed upon piece work left without finishing their contracts (but, as before mentioned, no claim is now made in respect of these things); nor that at least one of the plaintiffs' new workmen was induced to break his contract by the defendants; nor that some of the defendants, detailed for that purpose, induced the innkeepers of the town to agree to disregard their legal obligation to afford reasonable accommodation to any traveller who might be coming to the town for the purpose of working for the plaintiffs: nor that there was an unlawful besetting and watching of the plaintiffs' factory. Indeed, there is no serious question upon the whole of the evidence

of the commission by the defendants of all the wrongs first before mentioned.

In regard to boycotting, that mainly relied upon and proved was the intimidation of persons who bought and sold the product of the plaintiffs' factory. The woodworkers and finishers unions asserted that, through some means, they were able to ascertain the destination of all furniture shipped by the plaintiffs, and their course has been to communicate with their friends at the place of destination with a view to the prevention of the purchase or sale of any of the plaintiffs' goods; and the result has, in one case at least, been an intimidation of the dealer to such an extent that he is afraid to disclose the facts except secretly. The defendants must be held to really intend that which is the plain effect of their actions—the injury of the plaintiffs by intimidation. No one is excused, by calling the weapons grass, when really throwing stones.

“A combination not to work is one thing, and is lawful. A combination to prevent others from working by annoying them if they do is a very different thing, and is *primâ facie* unlawful:” *per* Lord Lindley, in *Quinn v. Leatham* [1901], A.C. 495, at p. 583.

“*Primâ facie*, it is the privilege of a trader in a free country, in all matters not contrary to law, to regulate his own mode of carrying it on according to his own discretion and choice. If the law has in any manner regulated or restrained his mode of doing this, the law must be obeyed. But no power short of general law ought to restrain his free discretion:” *per* Alderson, B., in *Hilton v. Eckerstley* (1856), 6 E. & B. 47, at p. 74.

Two things seem to me very important throughout conflicts between employer and employed: (1) that all parties to the strife should know the law affecting it, and (2) that every person concerned should be unflinchingly kept within its bounds.

The defendants may be divided into three classes: (1) the organized body acting under the name of “The Berlin Union,

No. 112, Amalgamated Woodworkers' International Union of America," as a body, or all its members as a class; (2) the defendant Mulcahy, who is said to be the president of the whole body of the "Amalgamated Woodworkers' Union of America," of which the Berlin Union is but one branch; and (3) the other defendants, who are members, and some of them officers, of the smaller body, and were the more active of such members in the conduct of the strike.

The defendants, the organized body, contend, apparently now for the first time, that they are not an incorporated body, and that therefore the action should be dismissed as against them; but it seems to me to be too late to make any such point; it is but a technical objection, and one which ought not to be given effect to, to shield these defendants from wrongdoing, unless it can be insisted on as a matter of right. No encouragement should be given to an organized body to evade the consequences of its act by abstaining from obtaining corporate capacity or other legal existence; that is especially applicable to a large body such as these defendants, among other things having a common seal and a trade-mark, and carrying on, to a certain extent, the business of insurance against accident, and against loss by fire, among themselves. It is, as I have said, but a matter of form, for even if the organization have no legal existence as a body, it is not without the control of the law; all its members can be reached, and reached without difficulty, under our practice as it is by means of a class action. The application made at Chambers and renewed at the trial, for the purpose of so reaching these defendants ought to be given effect to, if necessary.

But effect ought not to be given to this objection, for these reasons: these defendants have, without objection, appeared, pleaded, and consented to the interlocutory order against them, by the name under which they are sued, and it is too late now to object. Besides this, the consolidated rules seem to me to require that the defence of *nil tiel corporation* shall be expressly

pleaded. Reading Rule 281 in connection with Rule 280, that ought to be the effect given to the former rule. The wording of the rule is peculiar, but its purpose must, as it seems to me, be to require an express denial of incorporation before the corporate capacity of a party, sued or suing in such, can be questioned. These defendants are sued as, and alleged in the pleadings to be a corporate body and, though challenged by the plaintiffs to do so, did not apply for leave to plead so as to raise that question, for fear, perhaps, that the leave might be granted only upon the terms of allowing the plaintiffs to amend also, by making the action a class action as against the members of the union. The plaintiffs were not bound to prove incorporation, and it cannot upon the whole of the evidence, be said that that was impossible; it may be, notwithstanding the statement contained in the "constitution" to the contrary, that they are an incorporated body, or at least registered under the Trade Unions Act. This objection is overruled: see R.S.C. 1886, ch. 131; *Duke of Bedford v. Ellis* [1901], A.C. 1, and *Taff Vale R.W. Co. v. Amalgamated Society of Railway Servants* [1901], A.C. 426.

As to the third class of defendants, they have, as I have said, been proved to have taken an active part in the wrongs which have been mentioned, and so are individually answerable for the injury done. All that was done, was the result of organized combined action on the part of the members of the union, under the leadership and encouragement of these individual defendants.

The remaining class of defendants comprises the defendant Mulcahy only. He was not one of the plaintiffs' workmen, nor a member of the local body, nor a resident of Berlin, but, indeed, is a foreigner. He was, however, the chief presiding officer of the whole organized body, and came to this country for the purpose of aiding, encouraging, and directing the operations of the striking workmen and their associates. He was present at their daily meetings, exhorting the strikers, and directing their plans and actions. He is answerable, and chiefly answerable, for the concerted acts of the strikers during the time he was with

them. It is no answer to the plaintiffs' claim to say, that he was a stranger here, and unacquainted with the laws of the land. Before undertaking, or encouraging, any act aimed at the injury of another, and especially any act likely to cause a breach of the peace, he ought first to have ascertained whether it was lawful or unlawful, rightful or wrongful. I find that this defendant was a party to the unlawful and wrongful acts which were committed by his co-defendants, and is answerable, with them, for the consequences.

The plaintiffs, in my opinion, are clearly entitled to a perpetual injunction, restraining the defendants from unlawfully besetting or watching the plaintiffs' factory, and from all wrongful obstruction of, or interference with, the plaintiffs in their trade and business.

But the plaintiffs seek also substantial damages, and have proved a very serious loss in their business through the action of the defendants. The evidence, however, is not sufficient to enable me to see clearly just how much of that loss was caused by the wrongs of the defendants, and how much by acts done within their rights. A reference to assess damages was not asked. The best I can do with this question is to assess damages against all the defendants, at \$100. That amount at least is clearly proven.

There remains the question of costs only to be dealt with. Costs as a general rule go to the successful party, and there is no reason for departing from that rule in this case. Indeed, the defendants by their conduct, in encouraging adjudged misconduct, by paying the fines of persons convicted of crimes in connection with the strike, have given additional cause for condemning them in costs.

The pronouncing of this judgment has been delayed at the request of counsel, made at the trial, to enable him to hand in any additional cases. The time given has now passed.

[IN THE HIGH COURT OF JUSTICE FOR ONTARIO.]

(DIVISIONAL COURT.)

SMALL V. HYTENRAUCH.

Parties—Representation of Classes—Rule 200—Members of Unincorporated Voluntary Association—Trades Unions—Local Organization—Members c.; Executive Committee—Ordinary Members Specially Interested—General Federation—Representation by President.*

Where a number of persons are bound together by a set of rules by which they are in the habit of considering themselves bound, annually elect an executive committee to act on behalf of the whole body of members; pay regular contributions to a treasurer for carrying out the purposes of the collective body, hold meetings at, which the majority of votes cast by the members present determines the action of the executive committee on behalf of the whole body; the executive committee or a majority of it (if all cannot be ascertained) may be joined under Rule 200 as defendants to represent the collective body or association in an action against such body or association.

But neither the executive committee of a local branch of a foreign general association or federation comprising other local branches domestic and foreign, said association or federation and said branches being constituted in a manner similar to that set out above, nor the president of such general association or federation, can be made parties as representing such foreign association and other local branches.

Judgment of FERGUSON, J., varied.

APPEAL by plaintiff from order of FERGUSON, J., in Chambers dismissing application by plaintiff for an order authorizing and directing the seven individual defendants (excluding defendant Weber) to defend the action on behalf of the London Musical Protective Association, and authorizing and directing them and Weber to defend the action on behalf of the American Federation of Musicians, and directing that all the members of the association and federation should be bound by any judgment that might be pronounced in the action in the same manner and to the same extent as if they were personally made parties to the action, and also amending the writ of summons and proceedings by setting forth that all the eight individual defendants are

* Rule 200 of the Rules of the Supreme Court of Judicature for Ontario reads as follows:—In an action where there are numerous parties having the same interest, one or more of such parties may sue or be sued, or may be authorized by the Court to defend, on behalf of, or for the benefit of, all parties so interested.

sued as well on their own behalf as on behalf of all the other members of the American Federation of Musicians.

There were four classes of defendants:—(1) Seven persons who were officers and leading members of the London Musical Protective Association, which was the local branch of the American Federation of Musicians, these seven being sued on behalf of themselves and all other members of the London Musical Protective Association. (2) The American Federation of Musicians. (3) The London Musical Protective Association. (4) Joseph Weber, the president of the federation, a resident of the State of Ohio.

The plaintiff was the lessee of an opera house in London, Ontario. One Evans had a contract with plaintiff during the season of 1901-2 to supply an orchestra for each performance at the opera house, at a fixed price. He and all the members of his orchestra were members of the London Musical Protective Association, and, as such, were also members of the American Federation of Musicians, which was the central organization of all the local musical protective associations in Canada and the United States.

After the season of 1901-2 the local association agreed to raise its rates, and Evans and his orchestra refused to re-engage with plaintiff at the old rate, but offered to re-engage at \$13.50 per night, which was the new rate. Thereupon plaintiff entered into an agreement in writing with one Cresswell, also a member of the local association, to engage him and his orchestra for the season of 1902-3 at the rate of \$13.50 per night, being the same rate as that at which Evans and his orchestra had offered to contract, and the rate authorized by the local union. Cresswell and his orchestra began to play at plaintiff's house, but some complaint was made in the interest of Evan's orchestra, and defendant Weber, as president of the federation, decided that the local organization should protect Evans by demanding that the members should not play for plaintiff until the wrong done Evans, for adhering to the price list, should be righted. This decision was made known to Cresswell, who refrained from playing for three

or four performances. After some discussion and hesitation, defendant Weber ordered one Carey, the executive officer of the 9th district of the federation, "to call out the Cresswell orchestra and to inform the members that no member of the American Federation of Labour shall play in Mr. Small's London theatre until Mr. Evans is reinstated."

On 5th December, 1902, an *ex parte* injunction was obtained by plaintiff in the present action, restraining defendants from persuading or ordering Cresswell and his orchestra not to perform at plaintiff's house, the action being for an injunction restraining defendants from doing any act to induce Cresswell and his orchestra to break their contract with plaintiff, and to restrain them from conspiring together for that purpose, and for damages. After the action was begun, the charter of the local association was, by direction of Weber, returned to the federation, and steps taken to wind up the association and form a new local association, with the object, it was said, of excluding Cresswell and the members of his orchestra.

The appeal from the order of FERGUSON, J., refusing to direct representation, etc., was heard by FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

J. H. Moss, for plaintiff.

J. G. O'Donoghue, for the individual defendants except Weber.

No one for the other parties.

July 18, 1903. STREET, J.:—Our Rule 200 provides that "in an action where there are numerous parties having the same interest, one or more of such parties may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all parties so interested." . . . The meaning attached to the Rule . . . has been . . . that the word 'parties' is equivalent to 'persons'"; *Smith v. Doyle*, 4 A.R. 471.

Temperton v. Russell, [1893] 1 Q.B. 435; *Duke of Bedford v.*

Ellis, [1901] A.C. 1, and *Taff Vale R.W. Co. v. Amalgamated Society of Railway Servants*, *ib.* 426, referred to. . . . It has been decided by a Divisional Court here in *Metallic Roofing Co. v. Local Union No. 30*, 5 O.L.R. 424, that the difference between the status of a trades union here and in England is such as to render the *Taff Vale Case* inapplicable here, and therefore that organizations such as the London Musical Protective Association cannot be sued under their collective name. It is evident, however, from the affidavits and examinations before us, that a number of persons, seven of whom are defendants in the present action, are bound together by a set of rules by which they are in the habit of considering themselves governed; that they annually elect officers, who are an executive committee or board to act on behalf of the whole body of members; that they have a treasurer, to whom they pay regular contributions for carrying out the purposes of the association; and that they hold meetings, at which the majority of votes cast by the members present determines the action of the executive committee on behalf of the whole body. . . . The persons made defendants as representing the London Musical Protective Association are the president, Hyttenrauch, and three other members of the executive committee, one of whom is the treasurer and was the acting secretary at the time the charter was returned, and three other members who appear to have taken a specially active part in the matters in question or to be specially interested in it. So far as the local body is concerned, which does not appear to comprise more than 60 persons, I am of opinion that the persons selected to represent it are properly qualified to do so; they form, in fact, as I understand the rules of the association, the majority of the persons elected by the members of the association to represent them as an executive committee, along with other members specially interested. I think it would have been better to have all the members of the executive committee joined as defendants, but there may have been difficulty in ascertaining their names; and the objection made by the defendants upon the argument was not based upon this ground,

but upon the broad principle that no representation was permissible in a case of this nature.

I am of opinion, therefore, that the case is brought within Rule 200 by the fact that the members of the London Musical Protective Association are a numerous body of persons who, with the exception of Cresswell and his orchestra, are acting in the same interest, through their executive committee, viz., to compel Cresswell to break his contract with plaintiff, in order that what they understand to be the principles of their organization may be sustained.

It is further asked, however, that these same defendants and the defendant Weber may be directed to defend on behalf of the American Federation of Musicians, which is the whole body in Canada and the United States, made up of the numerous local organizations, and comprising, it is said, many thousands of members both here and all over the United States. It is essentially a foreign body, having its headquarters at Cincinnati, Ohio, where its executive committee meet, although the members of its branches in Canada are *ipso facto* members of the federation. The persons who form the executive committee are few in number, and are the only persons whose acts affect local organizations in Canada, and in a proper case they might be made parties, if it should become necessary. But I do not think that a case has been made out justifying us in treating defendant Weber, who is the president, as sufficiently representing the whole of the local organizations, wherever situate, nor do I see the necessity for our making all the members of these associations parties to this action, which is what is asked for. In my opinion, therefore, this part of the order asked for should be refused, and only that part of it should be granted which directs that the individual defendants other than Weber may be sued and authorized to defend on behalf of all the members of the London Musical Protective Association other than Cresswell and the members of his orchestra.

The order of my brother Ferguson should, therefore, in my opinion, be varied to the extent necessary to carry these views

into effect; and, as the success has been divided, there should be no costs of the motion to him or of the present appeal.

FALCONBRIDGE, C.J., and BRITTON, J., concurred.

[NOTE.—In *Creswell v. Hyttenrauch*, decided July 18th, 1903, by the same Court that decided the above case, an exactly similar question was disposed of in exactly the same manner.—Ed.]

Notes:

TRADE UNIONS—THEIR CAPACITY TO SUE OR BE SUED.

The question of trade unionism is so vast and developing so rapidly as to give rise to considerable uneasy anticipation as to what the future will have in store not only for the employer but also for the long-suffering but helpless public which, no matter how the result affects the employer or employed, is invariably the sufferer in the disputes between capital and labor. It is felt, therefore, that a statement of the main points decided in the famous *Taff Vale Railway Case* and several recent Ontario cases as to the legal status of a Trade Union may be of value.

R.S.C., 1886, ch. 131, "The Trade Unions Act") is to all intents and purposes a transcript of the English Act of 1871. The definition of Trade Union is, however, not so wide as that in the English Act, which, as amended in 1876, covers combinations for regulating the relations not only between workmen and masters (as in the Dominion Act) but also between *workmen and workmen* and *masters and masters*. The result is that the English cases apply with equal force in this country, except where the decision is upon some technicality of the English Act. The sections dealt with in the *Taff Vale Case* (infra) are reproduced almost verbatim in the Dominion Statute.

The actual point decided in the *Taff Vale Case* (1901), A.C. 426, was that a trade union can be sued in its registered name. There was, however, a great deal said both in the arguments and in the judgments on other points. It seems to be made clear that in case a wrong has been committed by an officer or a servant of an unincorporated society in the course of their employment and within the general scope of their authority, the funds of the asso-

ciation may be reached directly by the plaintiff in a representative action, any trustees in whom these funds are vested being added as parties. Heretofore the individual offenders (who are of course liable in any case) have been treated as the only possible defendants.

The facts were simply these: A strike having arisen in August, 1900, among the appellants' (Taff Vale Ry. Company's) servants, in which Bell, the general secretary of the respondent society, and Holmes, the organizing secretary thereof, took part, the appellants brought an action against the respondent society in its registered name, and against Bell and Holmes, claiming an injunction and other relief. A summons for an interim injunction having been taken out by the plaintiffs and a notice of motion having been given by the respondents to strike out the name of the defendant society, Farwell, J., dismissed the respondent's application and granted an interim injunction and in so doing delivered the judgment that was ultimately upheld in the House of Lords.

Farwell, J. (*ibid* p. 427), set out the reasons for his decision in a convincing and forcible manner. He first stated the problems for solution (p. 427) thus:—

“What, according to the true construction of the Trade Union Acts, has the Legislature enabled the trade unions to do, and what, if any, liability does a trade union incur for wrongs done to others in the exercise of its authorized powers?” Then follows a summary of the Acts and a quotation of the opinion of Sir George Jessel, M.R., in *Rigby v. Connol* (1880), 14 Ch. D. 489, as to the objects and limitations of the Act as follows:—
“That Act, no doubt, was passed primarily with a view to preventing the officers of these societies from robbing them. . . . It was discovered that some of these men took advantage of the law which made these societies illegal, by appropriating their funds and money to their own use . . . another object was this: there was a great difficulty in suing and getting their property from third persons, and one object of the Act was to enable these societies to sue in respect of their property, and also to enable them to hold property, such as a house or an office, but it was not intended that the contracts entered into by the members of the society should be made legal contracts *inter se*, so that Courts of Justice should interfere to enforce them. If that had been intended, the result would have been this, that an agreement between a number of workmen once entered into,

compelling them to work in a particular manner, or to abstain from working in a particular manner, would have been enforceable according to law, and to a certain extent would have reduced some portion of the workmen to a condition something like serfdom and slavery." These limitations, however, the learned Judge then continues, do not affect the question of the status of the association to which such members belong. Though the common law knows only two entities who can sue or be sued—corporations and individuals—the Legislature is competent to create an association of individuals which is neither a corporation nor a partnership nor an individual, having a capacity for owning property and acting by agents, which capacity involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents. By the Trade Union Acts such an association has been legalized.

Now a Trade Union having the capacity to own property and to act by agents has two of the essential qualities of a corporation in respect of liability for tort, for a corporation can only act by its agents and can only be made to pay by means of its property. The principle on which corporations have been held liable in respect of wrongs committed by its servants or agents in the course of their service and for the benefit of the employer (*Mersey Docks Trustees v. Gibb* (1866), L.R. 1 H.L. 93) is as applicable to the case of a trade union as to that of a corporation. Otherwise the Legislature would have authorized the creation of numerous bodies of men capable of owning great wealth and of acting by agents with absolutely no responsibility for any wrongs they may do to others. There is nothing in the Acts to lead to such a conclusion, but rather there are sections pointing the other way: (see *infra*, Lord Lindley's remarks and sections there named). And it would require very clear and express words to induce the learned Judge to hold that the Legislature intended to legalize the existence of such irresponsible bodies with such wide capacity for evil. Further, the society can be sued in their registered name. The Acts complained of are the acts of the society being done by their agents in the course and management of a strike, which is one of the main objects of the society and is perfectly lawful. But the society is also responsible for the manner in which the strike is carried out and must answer for the wrongful conduct of their agents in connection therewith.

In the House of Lords, Lord Macnaghten dealt with the question of procedure in actions against trade unions. He said (*ibid* p. 438):—"I have no doubt whatever that a trade union, whether registered or unregistered, may be sued in a representative action if the persons selected as defendants be persons who, from their position, may be taken fairly to represent the body." He also thought that a trade union could be sued in its registered name:—"It is quite true that a registered trade union is not a corporation but it has a registered name and a registered office. The registered name is nothing more than a collective name for all the members. The registered office is the place where it carries on business. I see nothing contrary to principle, or contrary to the provisions of the Trade Union Acts in holding that a trade union may be so sued."

Lord Lindley, in dealing with the same question said (p. 443): "I have myself no doubt whatever that if a trade union could not be sued in this case in its registered name, some of its members (namely its executive committee) could be sued on behalf of themselves and the other members of the society and an injunction and judgment for damages could be obtained in a proper place in an action so framed. Further, it is in my opinion equally plain that if the trustees in whom the property of the society is legally vested were added as parties, an order could be made in the same action for the payment by them out of the funds of the society of all damages and costs for which the plaintiff might obtain judgment against the trade union." He then considered in detail the Acts of 1871 and 1876 and came to the conclusion that not only was there nothing in the Acts opposed to the right to sue a trade union in its registered name, but on the other hand there were various provisions (sections 7, 8, 9, 12, 14, 15, 16 and 19 of the Act of 1871, which correspond to secs. 7, 8, 9, 12, 15, 16, 17, 18 and 20 of the Dominion Statute, and secs. 15 of the Amending Act of 1876) supporting and establishing such a proposition with sufficient clearness.

Coming now to the Ontario cases, the first in point of time of decision is *The Metallic Roofing Company of Canada v. Local Union No. 30, etc., and others* (1903), 5 O.L.R. 424, which is a judgment of a Divisional Court, composed of MEREDITH, C. J.C.P., and MACLAREN, J.A., delivered on March 3rd, 1903. The Amalgamated Sheet Metal Workers' International Association

appealed from an order made by Meredith, J., dated the 19th February, 1903, dismissing an appeal by them from an order of the Master in Chambers, dated the same day, dismissing their motion to set aside the service of the writ of summons on them, which was, or was attempted to be, effected by serving a copy of the writ upon one F. H. Kennedy as their agent. The action was brought against the Berlin Local Union No. 30 of the Amalgamated Sheet Metal Workers' International Association, certain members thereof (whose names appear *infra*), and the appellants added as defendants pursuant to an order of the Master in Chambers, dated the 24th December, 1902. It appeared that the appellants, who were not sued as individuals, were neither a corporation, nor a partnership, nor an individual carrying on business in a name or style other than his own name and it was not shewn nor was it suggested upon the argument, that they had been given by the Legislature a capacity for owning property and acting by agents, such as in the *Taff Vale Case*, it was held that the Legislature had conferred upon the defendants in that case by reason of their registration under the Trade Union Act of 1871. As a matter of fact the defendants had not registered under the Trade Union Act of Canada. It was, therefore, held that the union being a purely voluntary association, having neither by statute nor common law the capacity to own property and to act by agents was not liable to be sued. In this way the *Taff Vale Case* was here distinguished. But it was added by Meredith, C.J., in delivering the judgment of the Court, that it was scarcely necessary to add that nothing that he had said was intended to imply or suggest that, if an actionable wrong had been done to the respondents by the appellants, relief might not be obtained in the way pointed out by Lord Maenaghten and Lord Lindley in the *Taff Vale Case* and as it was obtained in *Linaker v. Pilcher* (1901), L.T.N.S. 421, *i.e.*, by suing either the executive committee of the union as being representative of the union or the trustees of the union in their capacity as trustees of the property of the union. If in such a case judgment went against them as trustees, such judgment would bind the funds of the union and render them liable to satisfy the judgment.

In *Small v. The American Federation of Musicians* (5 O.L.R. p. 456, decided March 30th, 1903), the same point arose and the status of the defendants being exactly the same as that of the defendants in the *Metallic Roofing Case*, *i.e.*, neither individual

corporation nor quasi-corporation, a Divisional Court composed of FALCONBRIDGE, C.J.K.B., STREET, and BRITTON, J.J., followed the decision in the *Metallic Roofing Case* without comment.

The *Metallic Roofing Co.*, after this decision, moved before MACMAHON, J., for an order that the individual defendants named in the writ should, for the purpose of the action represent and be authorized to defend the action on behalf of and for the benefit of all other persons constituting the local union and the Amalgamated Sheet Metal Workers' International Association, and that all such other persons should be bound by the judgment and proceedings. The individual members of the local union, who were made defendants and served with process, were the President, at the commencement of the action; the Treasurer, the Financial Secretary, the Recording Secretary, the Corresponding Secretary, the President appointed in place of the first President, the First Vice-President of the Association, and two members of a committee appointed by the local union. The local union holds its charter from the association, which has its head office in Kansas City in the United States. The learned Judge, following *Small v. Hyttenrauch* (*supra*, p. 433) held (October 4th, 1903) that these persons were properly qualified to represent the other members of the local union, under Rule 200; but that that rule gave no power to order that the officers of the local union should represent the other persons constituting the association, which is a foreign power as aforesaid. The order, therefore, went making the individual defendants named representatives of the other members of the local union. An appeal from this order is now pending.

In the *Krug Furniture Case* (*ante* p. 425), there were three classes of defendants: (1) The Berlin Union, No. 112, Amalgamated Woodworkers' International Union of America, as a body or all its members as a class; (2) the defendant Muleahy, president of the whole body of the said union and (3) members and officers of the Berlin Union. The Berlin Union was not registered under the Trade Union Act and so was possessed of, or, rather, lacked, a legal status similarly as did the defendants in the *Metallic Roofing Company* and the *Small Cases*. The learned Judge, however, held that the Union could be sued *quâ* union despite its want of incorporation. This decision, apparently directly in conflict with the two last named judgments is to be distinguished in that the defendants

objected that they were not an incorporated body for the first time at the trial. The consolidated rules of Practice for Ontario were thought to require a defence of *nul tiel corporation* to be expressly pleaded. The defendants not only did not so plead but even distinctly refused to raise the question of corporation or no corporation when challenged to do so by the plaintiff "for fear, perhaps, that the leave might be granted only upon the terms of allowing the plaintiffs to amend also, by making the action a class action as against the members of the Union." The net result of this case as regards the point under discussion, is that a local Union being a purely voluntary association not registered under the Trade Union Act may be sued as such provided no objection is made to such a course; objection is properly made by expressly pleading the defence of *nul tiel corporation*.

To sum up :—

(1) *A Trade Union registered under the Trade Union Act of Canada R.S.C. 131*:—

(a) is a quasi-corporate body having the capacity to own property and to act by agents and as such may sue or be sued in its registered name: *Taff Vale Case*, [1901] A.C. 426;

(b) may also be sued through its executive committee or representative members: *Ibid*;

(c) a judgment recovered against such an association will bind its funds only when the trustees of the funds are joined: *Ibid.*, per Lord Lindley, p. 443;

(d) The remedy of an injunction lies against a trade union for the wrongful act of its servants and agents without the necessity of resorting to the device of a representative action.

(2) *A Trade Union Unregistered*:—

(a) is neither a corporation nor a quasi-corporation nor an individual nor a partnership or firm, has no capacity to own property or to act by agents, but is a purely voluntary association, and so cannot sue or be sued in its registered name *quâ* union: *Metallic Roofing Co. Case*; *Small Case*; but

(b) may be reached in an action against either (1) the executive committee or (2) representative members, or (3) the trustees of the Union funds: *Taff Vale Case*; *Metallic Roofing Case*; but neither the Executive Committee, representative members or the trustees of the funds of a local union which is a branch of a foreign federation or general association of similar local unions, nor the President of the federation or general asso-

ciation, can be joined as representing the federation or general association, under rule 200 of the Ontario Judicature Act Rules, which corresponds to Order 16, Rule 11 (English) : *Small v. Hyttenrauch*; and

(c) to reach the funds of such an association the trustees thereof must always be joined as co-defendants: *per* Lord Lindley in the *Taff Vale Case*;

(d) if no objection is made before trial, such an association may be sued in its registered name, and the proper way to object is to plead the defence of *nul tiel corporation*; *Krug Furniture Co. Case*.

(3) *The individual members, servants and officers of a trade union are liable for any unlawful acts that they may respectively commit in the course of their duty and employment within the general scope of their authority: Taff Vale Case; Krug Furniture Case; Metallic Roofing Co. Case.*

[IN THE COURT OF APPEAL FOR ONTARIO.]

IN RE EQUITABLE SAVINGS, LOAN & BUILDING ASSOCIATION.

Company—Winding-up—Voluntary Liquidation—Order for Dissolution—Subsequent Vacation and Discharge Thereof—Final Order—Nature of—Winding-up Act, R.S.O. 1897, ch. 222, secs. 27 and 41—Ontario Judicature Act, Rules 358 and 1216.

After proceedings had been taken by the directors and shareholders of a company under the Winding-up Act of Ontario, R.S.O. 1897, ch. 222, for the voluntary liquidation thereof, and an agreement entered into and partially carried out for the disposal of the assets of the company, an order was made by a county court Judge, on March 24th, 1902, upon the affidavit of one of the liquidators, setting out all the proceedings, that the company be dissolved. Subsequently, on April 7th, 1902, it was ordered by the same Judge that no action or other proceeding should be proceeded with or commenced against the company. On the 21st of June, 1902, an order was made vacating and discharging the two above orders.

Held, that the order of the 21st of June was a final order so as to be the subject of an appeal within the meaning of section 27 of the Winding-up Act, since it undid and put an end to the order of dissolution.

Held, however, (MACLENNAN, J.A., dissenting, on the ground that the learned Judge made the order of March 24th under a clear misapprehension of the facts) that the learned county Judge had no authority to make the order of the 21st of June, rescinding that of the 24th of March, as he had no more material before him when making it than he had when making the prior order, and there is no reason for saying that he was misled in making it or that any fact was suppressed. The proper way to have attacked the order of the 24th of March was by appeal not by an application to the Judge who made it to rescind it after it had been acted upon and become effective.

Quære, whether an appeal would lie from the refusal of a judge to make an order under section 41 of the Winding-up Act, R.S.O. 1897, ch. 222, dissolving a company.

THIS was an appeal by the liquidators of the above association from an order of the Junior Judge of the County of York, made on the 21st of June, 1902, whereby he vacated and discharged two orders previously made by him, the first made on the 24th of March, 1902, under section 41 of the Ontario Winding-Up Act, R.S.O., 1897, ch. 222, declaring the association dissolved; the second, made on the 7th of April, 1902, to the effect that no action or other proceeding should be commenced or proceeded with against the association, except by leave of the Court.

The appeal was argued on November 24th, 1902, before OSLER, MACLENNAN and GARROW, J.J.A.

A. B. Aylesworth, K.C., and A. M. Macdonell, for the liquidators.

G. F. Shepley, K.C., and C. D. Scott, for the respondents.

In the course of the argument the following references were made:—*In re Lyric Syndicate, Limited* (1900), 17 T.L.R. 162; *McNabb v. Oppenheimer* (1885), 11 P.R. 214; *Coxon v. Gorst*, [1891] 2 Ch. 73; *Larivière v. La Société Canadienne-Française de Construction* (1890), M.L.R. 6 Q.B. 464; Buckley on Joint Stock Companies, 7th ed., p. 359; R.S.O. 1897, ch. 222, sec. 13; *Cotton v. Imperial and Foreign Agency and Investment Corporation*, [1892] 3 Ch. 454, at p. 460; *Postlethwaite v. Port Philip etc., Co.* (1889), 43 Ch. D. 452, at p. 466; *City and County Investment Co.* (1870), 13 Ch. D. at p. 482; *Hesketh v. Ward* (1867), 17 C.P. 667; *Shaw v. Nickerson* (1850), 7 U.C.R. 544; *In re D. A. Jones Co.* (1892), 19 A.R. 63; *Partlo v. Todd* (1888), 17 S.C.R. 196; *Clinch v. Financial Corporation* (1868), L.R. 5 Eq. 450; *Re Financial Corporation*, [1866] W.N. 162; *In re Pinto Silver Mining Co.* (1878), 8 Ch. D. 273; *In re London and Caledonian Marine Insurance Co.* (1879), 11 Ch. D. 140.

April 14, 1903. OSLER, J.A.:—Proceedings were taken by the directors and shareholders of this company, under the Winding-up Act of Ontario, R.S.O. 1897, c. 222, by which it was placed in voluntary liquidation, with a view to its amalgamation with or the transfer of its assets to another company, called the Colonial Investment and Loan Company. An agreement, authorized by special resolution passed at a special general meeting of the company, was duly executed, and the terms of this agreement had been so far carried out by the transfer of the assets of the company, and arrangement for allotment to their shareholders of shares in the Colonial Company, as, in the opinion of the liquidators, to warrant an application to the

Court, *i.e.*, the county court, for an order for the dissolution of the company under section 41 of the Act. Such an application was accordingly made to the junior Judge of the county court of the county of York, on March 24th, 1902, supported by the affidavit of one of the liquidators, in which all the proceedings which had been theretofore taken, including the agreement between the two companies, were set forth, and the learned Judge thereupon made an order "that the Equitable Savings Loan and Building Association be, and the same is, dissolved."

It is stated in the reasons of appeal, and was assumed or not denied on the argument, that this order had been reported by the liquidators to the Provincial Secretary, as required by section 41, though I do not find this fact stated in any of the affidavits filed before the Judge in the subsequent proceedings now in question.

On April 7th an order was made by the Judge, on the application of the liquidators, that no action or other proceeding should be proceeded with, or commenced against the Equitable Loan Association, except with leave of the Court, and subject to such terms as the Court might impose.

It appeared that on March 24th, 1902, an action had been commenced and a writ served upon the liquidators of the company by one Riviere, for the purpose of setting aside all the proceedings leading to a transfer of the assets of the Equitable, and to restrain the liquidators from carrying out the agreement and completing the transfer.

Whether this writ had been served before the application for the order of March 24th, does not appear. The action seems to have been afterwards settled.

On April 17th notice of motion was given on behalf of certain other dissatisfied shareholders, of an application to be made to the Judge to set aside and vacate his orders of March 24th and April 7th.

The application was made accordingly, and judgment reserved thereon until June 21st, 1902, when an order was made vacating and discharging the two orders in question. In

his written judgment the learned Judge says that from the representations made to him, and the materials presented to him on the application for the order to dissolve the company, he was satisfied that there had been a full and complete winding-up of the affairs of the company, so as to warrant the issue of the orders, but that he is now satisfied that the orders were made prematurely, and ought to be set aside.

It does not appear that any statements or representations were made to the learned Judge, other than those set forth in the affidavit of the liquidator made on the application for the order to dissolve the company.

The liquidators now appeal from the order of June 21st, contending that the Judge of the county court had no jurisdiction to make it. Counsel for the dissatisfied shareholders support its validity, and attack the regularity and sufficiency of the order of March 24th and of the earlier proceedings. They also contend that the order of June 21st is not a final order, so as to be the subject of an appeal within the meaning of section 27 of the Winding-up Act, R.S.O. 1897, ch. 222.

I am of opinion that the order of June 21st is an appealable order. Section 27, sub-sec. 1, enacts that "any party who is dissatisfied with *any* order or decision of the Court in any proceeding under this Act, may appeal therefrom," and by sub-sec. (2) no such appeal shall be entertained unless the appellant has "within 8 days from the rendering of *such final* order or judgment," taken proceedings on the appeal, and given security that he will duly prosecute it. If an appeal is confined by this language to final orders, restricting the wide language of sub-sec. 1, we have no definition of what is essential to that quality. The final order is not contrasted, as in section 52 of the County Courts Act, with orders "merely interlocutory:" *McPherson v. Wilson* (1890), 13 P.R. 339; *Baby v. Ross* (1892), 14 P.R. 440.

In this case the learned Judge had made what appears to me to be a discretionary order, under section 41, dissolving the company. I am inclined to think that in a case of voluntary

liquidation he is not bound to make an order under that section, but may leave the liquidators to proceed under section 40.

It may be that no appeal would lie from his refusal to make such an order, though it is unnecessary to decide, and I do not decide, this. He did, however, make it, and the result was, if he had authority to do so, that the company was dissolved. Thereafter he assumed to make the order now in question, rescinding and vacating his former order. If he had authority to make that order, the status of the company was restored, and it appears to me that such an order is properly described as a final order, since it undid and put an end to the order of dissolution which, upon the facts, the learned Judge seems to have thought he had no authority to make. Upon the same state of facts, or in the exercise of his discretion, he would not or might not make a similar order in the future, and on these grounds the order of June 21st may properly, I think, be regarded as a final order, and therefore appealable: *In re D. A. Jones Co.*, 19 A.R. 63; *In re The Essex Centre Manufacturing Co.* (1890), 19 A. R. 125; *In re Haggert Brothers Manufacturing Co.* (1893), 20 A.R. 597. See also *Jenking v. Jenking* (1884), 11 A.R. 92-95.

The next question, and, in my opinion, the only other question on the appeal, is whether the learned Judge had authority to make the order of June 21st, rescinding that of March 24th. It appears to me, upon full consideration, that he had not. The order of March 24th was an appealable order, and any one of the shareholders might have appealed to this Court against it on any of the grounds on which it is now suggested that it is wrong. It is true that it was an *ex parte* order, and, under certain circumstances, a Judge who has made such an order may rescind it before it has been acted upon, as, for example, that it was obtained by fraud or misrepresentation, or by suppression of material facts. Many of the authorities are collected in the case of *McNabb v. Oppenheimer*, (1885) 11 P.R. 214, before the late Mr. Justice Rose. But in the case at bar, the facts and circumstances in which the learned county court

Judge acted as furnishing reasons for rescinding his order, were all set forth in the affidavit of the liquidator in support of the application for it, and the papers and documents referred to therein as exhibits. There is no reason for saying that the learned Judge was misled, or that any fact was suppressed. He merely took a different view of the facts from that which he now thinks he ought to have taken. He thinks the order of March 24th was premature, and his reasons for so thinking are the facts disclosed in the affidavit which was then before him. This only shews that the proper way to have attacked that order was by appeal, not by an application to the Judge who made it to rescind it after it had been acted upon and become effective. I am, therefore, of opinion that the order of June 21st, in so far as it attempts to vacate and discharge the order of March 24th, is one which the Judge had no authority to make, and that the appeal therefrom should be allowed: *Jenking v. Jenking, supra*. As regards the order of April 7th, if there were any authority to make it at that time, it was in its nature one which remained subject to be controlled or avoided by the Court—an order staying proceedings until further order—and, therefore, *valeat quantum*, I see no objection to an order discharging or setting it aside.

Whether an action will lie at the instance of the respondent shareholders, notwithstanding the order of March 24th, it is not for us now to decide, though I may say that I am not strongly impressed with the merits of their contention. It may be that the existence of the condition on which the Judge is authorized to make it will be found of more importance than it has been said to be in the case of a dissolution under the section of the Imperial Act, 1862, which corresponds with section 40 of our Act: Buckley on Joint Stock Companies' Act, 7th ed., pp. 359, 360.

I think that the appeal should be allowed with costs.

GARROW, J.A., concurred.

MACLENNAN, J.A.:—I am of opinion that the appeal fails.

I have carefully read and considered the affidavits, and the exhibits therein referred to, which were before the learned county Judge when he made the order of March 24th, 1902, and I think they were calculated to mislead him, and to induce him to make an order which ought not to have been made.

The affidavits and exhibits shew that the winding-up was to be effected by a sale of the association's assets to the company, in consideration of shares of the company to be issued to the shareholders of the association. That is an arrangement authorized by section 13 of the Winding-up Act, R.S.O. 1897, ch. 222; and it seems not to make any difference that the shareholders of the selling company are of the 'monthly payment,' or 'prepaid,' or 'permanent' class. Accordingly, the agreement provided that the company should issue shares to the shareholders of the association, according to the value of the respective holdings of the latter, with a special provision, in case of fractional allotments, for payment of a deficiency either in cash or by the application of future dividends.

The assets of the association were duly transferred and conveyed to the company; but when the order for dissolution was applied for, the shareholders of the association had not in fact received their allotments, although the amounts appear to have been ascertained. The proceedings appear to have been regular, so far as they went, but I think it could not be properly said that the affairs of the association had been completely wound up.

Now, Mr. Wardell's affidavit, after setting out the various proceedings which had been taken, concludes with this statement: "We have completely wound up the affairs of the said The Equitable Savings, Loan and Building Association, in accordance with the special resolutions hereinbefore referred to." That affidavit is concurred in by Mr. Taylor.* The application for the order was made *ex parte*, and the learned Judge says in his judgment now appealed against, that the materials before him set forth that "all the affairs of the

* Mr. Taylor was Mr. Wardell's co-liquidator.—REP.

Equitable Company had been duly wound up by the liquidators," and that "all things had been done by which the shareholders of the Equitable Company had been satisfied for their interest in the assets of the Equitable Company." He further says: "From the representations made to me on the application, and from the material presented to me, I was satisfied, on granting the orders, that there had been full and complete winding-up of the affairs of the Equitable Company so as to warrant the issue of these orders."

The fact being that the winding-up was not complete, inasmuch as the association's shareholders had not received their allotments, it is plain that the learned Judge made the orders under a clear misapprehension of the real state of affairs.

The order was made on March 24th, and the motion was made, with reasonable promptitude, on April 17th, to set it aside.

That it was an order which ought not to have been made is too clear to require demonstration, and if the learned Judge had power to set it aside, what he did was right.

It is said that he had no authority to do so, and that any party affected by it should have appealed.

It is not necessary to decide whether an appeal might have been brought, although that has been decided in the affirmative: *In re Allen* (1871), 31 U.C.R. 458. But I think it is clear that the learned Judge had the power to do what he did.

No rules of practice have been made, so far as we have been informed, under section 45, and there is no Insolvent Act in force in the Province, the rules under which would have been applicable under section 3 of section 45. It may be also that Con. Rule 358 cannot be held to be directly and expressly applicable, because Rule 1216, extending the Con. Rules to county courts, only in terms extends them to actions, while the present proceeding cannot be said to be an action nor to be included in the word *action* by any of the interpretation rules. But Con. Rule 3 provides that, as to all matters not provided for in the rules, the practice, as far as may be, shall be

regulated by analogy thereto. There being no express provision applicable in this case, the learned Judge was authorized and required to proceed by analogy to Rule 358, and to hear the motion which was made to him to set aside this *ex parte* order.

But even if there were no rule or analogy applicable to the case, I think the learned Judge would have been authorized by the well-established general practice of the Courts, independently of express rules. Such was the "course of the Court," as it was called, in Chancery: see 2 Daniell's Procedure, 5th ed., p. 1436; and the same was the practice at common law: see the cases collected by Harrison, C. J., in *Kidd v. O'Connor* (1878), 43 U.C.R. 193, 200.

In the present case, not only was the order granted by the learned Judge through misapprehension and in ignorance of material facts, but the order was wholly void. The authority for such an order is conferred by section 41 of the Act, which authorizes it to be made only "whenever the affairs of the company have been completely wound up." That was clearly not the state of the case, and the order was properly set aside.

[IN THE SUPERIOR COURT FOR QUEBEC.]

BELLEW

v.

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

Life Insurance—War Risks—Special Premium—When Earned—Recovery of, from Company.

A life insurance company, in consideration of the payment of a special annual premium, insured the lives of a certain number of men belonging to a military corps that was proceeding to engage in the late war in South Africa against risks of that war. An agent of the company procured the insurance and paid the ordinary and special war premiums to the company out of his own pocket to facilitate the issue of the policies. Before the military corps reached the scene of the hostilities, peace was declared. In an action by the agent to recover the special premiums paid by him:

Held, that the special premiums had not been earned by the company in view of the fact that the assured had not been exposed to the risks of war, and that, therefore, the plaintiff was entitled to recover back the amount thereof.

THIS was an action to recover certain special premiums paid to the defendant company by the plaintiff, their agent, on a number of policies effected by him on the lives of members of the Fourth Contingent. The insurance was effected before the contingent sailed for South Africa in 1902, and the premiums, ordinary and special, were paid by the agent personally to facilitate the issuing of the policies. The policies stated that "in consideration of written application therefor and of the payment of an annual extra premium, the assured had leave to engage in war in South Africa, any restrictions in the policy contract to the contrary notwithstanding." The ordinary policy contained the following provision: "Military or naval service in time of war without a permit are risks not assumed by the company."

The action was tried at Montreal.

June 24, 1903. MATHIEU, J.:—

The Court, having heard the parties by their counsel on the merits of this case, after having examined the proceedings, the exhibits and the admissions of the parties, and after having deliberated:

Considering that the plaintiff alleges in his declaration that he is an insurance agent; that at the beginning of April, 1902, when the United Kingdom of Great Britain and Ireland was at war with the Republic of the Transvaal and the Orange Free State, a military corps was organized in Canada under the superintendence of the Department of Militia and Defence, which corps, known as the "Fourth Contingent," was to proceed to South Africa to take part in the war; that about the 8th of April, 1902, the defendants instructed the plaintiff to go to Halifax and obtain insurance risks on the lives of the men composing this military corps which was waiting then their departure for South Africa; that about the 25th of April, 1902, the plaintiff, following the instructions of the defendants, went to Halifax and obtained insurance risks on the lives of 235 men to the amount of \$251,000, which risks were transmitted by the plaintiff to the defendants between the 25th of April and the 22nd of May, 1902, and were all accepted by the latter; that it was agreed that the plaintiff should obtain from each of the assured an order on the Canadian Department of Militia and Defence, requiring the department to transfer a certain part of their pay to the defendants to cover the amount of the annual premium due on the policy in favour of each soldier respectively, which the plaintiff obtained from the assured, and that the Department of Militia and Defence consented thereto; that a stipulation was contained in all of the policies so issued, reading as follows:—"It is understood and agreed in connection with policy No. —, for \$—, dated —, of Form 507A., and issued on the life of —, that in consideration of written application therefor and also of the payment of an annual extra premium of \$25.00 the assured has hereby consent to engage in military service in South Africa, in the army of

Great Britain, any restrictions in the policy contract to the contrary notwithstanding"; that the defendants having issued these policies, required the plaintiff to pay the amount of the premiums, ordinary and special, due on each policy, and that the plaintiff, in order to obtain the issue of these policies without delay, paid the premiums, ordinary and special, out of his own pocket, to the amount of \$13,129.40, divided as follows:—\$6,854.40 for ordinary premiums, and \$6,275.00 for special premiums; that the aforesaid military corps left Halifax for South Africa in three detachments, on the 8th, 16th and 23rd of May, 1902, respectively, to join the army of Great Britain and to engage in war as aforesaid; that on the 29th of May, 1902, there was a cessation of hostilities between the British army and the army of the Republic of the Transvaal and the Orange Free State, and that on the 1st of June last a treaty of peace was signed terminating the war; that the soldiers of the "Fourth Contingent" above mentioned arrived in South Africa only after the cessation of hostilities and the proclamation of peace, and that consequently they did not take part at any time in the military service in South Africa in the army of Great Britain and that at no time were they exposed to the risks and perils of war; that in consequence of this the special annual premium of \$25.00 a thousand has not been earned by the defendants, in view of the fact that the risk against which the members of the military corps were assured has not occurred, and that in consequence the defendants have not given any consideration for the special premium; that the Canadian Department of Militia and Defence has refused to pay any money on account of the special premium of \$25.00 on the order of the assured as before mentioned, and that the plaintiff has not been re-imbursed in the said sum of \$6,275.00; that the plaintiff, who has paid this extra premium for the assured, has the right to recover from the defendants the said sum of \$6,275.00, which he claims.

Considering that the defendants in their defence admit that before issuing the policies they required payment of the ordinary

premiums and the special premiums, in consideration of their permission to the assured to take part in the war, and say that they consented to issue the said policies in consideration of the payment of the ordinary premiums and of an additional premium of \$25.00 per thousand to cover the risk undertaken by the voyage to South Africa, the sojourn there and the return of the men; that the fact that the assured were permitted to go to South Africa augmented the risk, and that the extra premium charged on account of this risk was earned by the defendants, and that they are not obliged to return it.

Considering that the plaintiff in his reply denies that the additional premium of \$25.00 was intended to cover the risk incurred by the voyage to South Africa, the sojourn there and the return of the men.

Considering that it has been admitted by the parties that the military corps in question set out for South Africa from Halifax in three detachments on the 8th, 16th and 23rd of May, 1902; that on the 29th of May, 1902, there was a cessation of hostilities between the armies of Great Britain and the armies of the Republic of the Transvaal and the Orange Free State, and that on the 1st of June last a treaty of peace was entered into terminating the war; that the soldiers of the "Fourth Contingent" arrived in South Africa only after the cessation of hostilities and the proclamation of peace, and that they departed from South Africa to return to this country towards the 1st of July last.

Considering that it is proved that the policies of insurance issued by the defendants contained the following provision:—"Military or naval service in time of war without a permit are risks not assumed by the society at any time."

Considering that as an exception to this condition and in consideration of the payment of the said extra premium of \$25.00 a thousand, the defendants gave permission to the assured to engage in military service in the following terms:—"It is understood and agreed in connection with policy No. 127805 for \$1,000, dated May 12th, 1902, of Form 507A., and issued on the life of

———, that in consideration of written application therefor, and also the payment of an annual extra premium of \$25.00, the assured has hereby consent to engage in military service in South Africa in the army of Great Britain, any restrictions in the policy contract to the contrary notwithstanding."

Considering that by the condition aforesaid of the said policy the engaging in military service prohibited by the policy is for the time of war, and that evidently the permission which has been given applies also to the time of war.

Considering that when the assured arrived in South Africa they could not engage in war in the military service of Great Britain in the time of war, since there was no war.

Considering that the payment of the said extra premium turns out to have been made to the defendants without consideration, and they are bound to return the amount that they have received for the said premium.

Considering that the plaintiff has proved that he has himself paid this extra premium for the assured, and that his claim is well founded.

Dismisses the defence of the defendants and sustains the claim of the plaintiff and condemns the defendants to pay to the said plaintiff the said sum of \$6,275.00 with interest, to be computed from the 3rd of January last, the date of the bringing of this action, and costs.

[NOTE.—An appeal from the above decision has been taken and is now pending.—Ed.]

[IN THE SUPREME COURT OF BRITISH COLUMBIA.]

ELSON V. THE NORTH AMERICA LIFE ASSURANCE COMPANY.

Insurance, Life—Policy—"Signed, Sealed and Delivered"—When Complete—Insured Taking Hazardous Employment without Permission—Retention of Premium Paid after with Knowledge of Facts—Estoppel—Incontestable Clause.

Upon the acceptance of the premium therefor, the issuing by the president and managing director, and the forwarding for delivery to the insured, a policy of insurance is complete and binding as against the company from the date of execution though in fact it remains in the possession of the company or of its agent, unless there remains some act to be done by the other party to declare his adoption of it.

A life policy was subject to a condition making it void if the insured took a hazardous employment without the written permission of the president, vice-president, or managing director of the company. The assured did take such employment without the written permission of any of the officers named, but with the assent of the company's provincial agent, agent, and after the change of occupation paid a premium which was retained by the company, with knowledge of the change of occupation:—*Held*, that the company was estopped from taking advantage of the forfeiture clause.

Remarks as to the nature of incontestability clauses in insurance policies. Decision of MARTIN, J., reversed.

Appeal from the judgment of MARTIN, J., dismissing an action on a life policy by the mother of the insured, George William Elson, who was killed on the 30th of September, 1897, by the explosion of a locomotive boiler while engaged as a brakeman on the Canadian Pacific Railway. The amount of the insurance was \$1,000 and at the time the application for insurance was made Elson was a bandsaw setter.

The application for insurance was dated on the 18th of September, 1894. The receipt for the first premium was issued on the same day, a note (which was paid at maturity) being accepted in payment. The policy was issued on the 27th of September, 1894, and forwarded by mail to the Company's agent at Winnipeg, for transmission to Vancouver for the insured. The subsequent premiums were paid annually on the 28th of September, 1895, 20th September, 1896, and the 9th September, 1897; and the defendants retained all the premiums. In August, 1897, the insured, whose previous occupation was that of a bandsaw setter, became employed on the railway.

The policy contained *inter alia* the following clauses:

"After being in force three years, the only conditions which shall be binding upon the holder of this policy are that he shall make the payments hereon as herein provided that the provisions as to residence, travel, occupation, proofs after death and limitations of time for action or suit shall be observed. In all other respects, after the expiration of the said three years, the liability of the Company under this policy shall not be disputed.

"No provisions of this contract can be changed, waived or modified, or permit granted, except by a written agreement signed by the President, a Vice-President or the Managing Director of the Company," and the policy was indorsed with certain conditions—one of which was:

"If any statement made in the application and therein declared to be material to the contract be untrue; or if any premiums, note, cheque or other obligation given on account of a premium, be not paid when due; or if, without a permit, the insured engage as an occupation (1) in blasting, mining, submarine labour, the production of any explosive material, or in any naval or military service (except in the militia or volunteer corps in defence of Canada); or (2) engage in aerial or arctic voyages or in employment on a railroad, a steamboat or other vessel; or (3) reside elsewhere than in Canada, Newfoundland, Europe or the United States; or (4) between the 15th days of June and November in any year reside in any part of the United States south of the thirty-sixth degree of north latitude, or in Europe south of the forty-second degree, this policy shall be void, and all payments made upon it shall be forfeited to the Company."

At the trial before MARTIN, J., and a jury, the learned Judge being of the opinion that there was nothing to leave to the jury, discharged them and dismissed the action.

The plaintiff appealed and the appeal was argued at Vancouver in April, 1902, before HUNTER, C.J., WALKER and IRVING, J.J. The facts are fully set out in the judgment of the learned Chief Justice.

Duff, K.C., and *Cowan*, for the appellant.

Davis, K.C., for respondents.

21st April, 1902.

HUNTER, C.J.:—Action on a life policy by the mother of the insured, who was killed on September 30th, 1897, by the explosion of a locomotive while engaged as a brakeman on the Canadian Pacific Railroad.

The application for insurance is dated the 18th of September, 1894, and a receipt for the first premium was issued on the same day, the mode of payment being by note met at maturity. The policy was issued at Toronto on the 27th of September, 1894, and forwarded by mail to the company's agent at Winnipeg for transmission to Vancouver for delivery to the insured. The subsequent premiums were paid annually on the 28th of September, 1895, 20th September, 1896, and 29th September, 1897, and the Company although disputing the liability, have retained all the premiums. About five months before his death, the insured took employment on the railroad, which is one of the hazardous employments prohibited by the policy.

In June, 1897, Elson went to Faulkner, General Agent for the Province, and informed him of his change of occupation, and evidence was also tendered to shew that Faulkner about the same time had a conversation with Elson's father, in which he stated that the Company did not consider that the occupation was any more dangerous than the one in which Elson had been engaged—that is, of handsaw setter.

All evidence tendered as to this was ruled inadmissible, notwithstanding that it was pressed by the plaintiff's counsel both as evidence of notice to the company from the Provincial agent, and as evidence to go to the jury of an admission by the Company that it had waived the breach. In view of the fact that Mr. Davis, for the Company, got all this evidence ruled out, and steadily insisted that there were no facts in dispute, I am strongly inclined to think that we might take it as admitted that the statement was made by the agent as alleged, and that it would not be open to the Company to object to the Court drawing any inference of fact necessary for the disposal of the case instead of sending it to another jury; and if this is so, I think that the correct inferences to draw would be that knowledge of the

change of occupation must be imputed to the Company through Faulkner, that it had waived any breach of the policy thereby caused, and that it had, by him, acknowledged such waiver. But if the course taken by the Company at the trial does not amount to such admission, and to a consent that the Court should have power to draw all the inferences of fact necessary to dispose of the case, and a new trial would have to be ordered, then the Company should pay all the costs thrown away by reason of such trial being necessary. But I think that on the material before us it is not necessary to have a new trial, and that our judgment should be for the appellant.

In the first place, the estoppel arising from the conduct of the Company in retaining to this day the premium which it took after knowledge that the breach, if any, had occurred, is strong enough to prevent the Company from taking advantage of any condition in the policy with respect to the alleged breach: see *Wing v. Harvey* (1854), 5 De G. M. & G. 265; *Phoenix Life Insurance Co. v. Raddin* (1887), 120 U.S. 183; and this even assuming that the condition as regards notice affects the question, which I do not think is the case, as it is more reasonable to hold that this only prescribes the particular kind of notice emanating from the insured which is to affect the Company, than that it was intended to shield the Company from the consequences of knowledge gained through the medium of a general agent.

In the next place the Company is, I think, precluded from raising this question by the incontestable clause assuming that the policy came in force three years before Elson's death. There is no doubt that the obligation of the Company commenced under this policy on the 27th of September, 1894, the date of its delivery at Toronto. The premium had been accepted, and there is nothing in the contention that the policy was only an escrow until it got into the hands of the insured: *Xenos v. Wickham* (1866), L.R. 2 H.L. 296.

It was argued by Mr. Davis that the incontestable clause fell with the rest of the policy as it became void by the engagement in a prohibited occupation. If this were so, then any event which would within the three years avoid the policy if the incontestable clause were absent would avoid the policy in spite

of its presence: therefore it would practically be delusive surplusage; but in my opinion the object of the clause is to provide an automatic cutting off at the end of the *triennium* of all defences arising after the coming into force of the policy except such are as reserved in the clause itself. The origin and *raison d'être* of this kind of clause are fully explained in the judgment of Mr. Justice Sedgewick in *The Manufacturers Life Insurance Co. v. Anctil* (1897), 28 S.C.R. 103, and it is of the highest importance both to the companies and to the insured, as well as to those who deal in this class of security, that the protection which this clause is designed to afford should not be frittered away by casuistical decisions, even if such were open to us.

The appeal should be allowed with costs, and judgment given for the plaintiff for the amount of the policy with interest and costs.

WALKEM, J.:—I concur.

IRVING, J., dissented, being of the opinion that there should be a new trial.

Appeal allowed, Irving, J., dissenting.

Notes:

INCONTESTABILITY OF LIFE INSURANCE UNDER THE PROVISIONS OF THE POLICY.

An incontestable clause in a policy of life insurance prevents any defence from being made on any question covered by such clause. (1.) Thus where fraud was the defence: *Wright v. Mutual Benefit L. Association* (1890), 118 N.Y. 238; *Bates v. United L. I. A.* (1894), 68 Hun. 144; *Massachusetts Benefit L. A. v. Robinson* (1898), 42 L.R.A. 261. (2.) A false statement in the application: *Vetter v. Massachusetts* (1898), 29 App. Div. (N.Y.) 72; *Wood v. Dwarris* (1856), 11 Exch. 493 and compare *Wheelton v. Hardisty* (1857), 8 El. & Bl. 232. (3.) Suicides: *Goodwin v. Provident* (1896), 97 Iowa 226; *Mareck v. Mutual Reserve Fund L. A.* (1895), 62 Minn. 39; *Patterson v. Natural Premium, etc., Co.* (1899), 42 L.R.A. 253. But a defence was allowed despite such a clause: (1) Where the defence was that the policy was a wagering contract: *Manufacturers, etc., Co.*

v. *Auctil* (1897), 28 S.C.R. 103; *Clement v. New York* (1898), 42 L.R.A. 247, and (2) Where the clause did not apply because the time for its operation had not arrived: *People's v. Templeton* (1896), 16 Ind. App. 126; *Kelley v. Mutual* (1896), 75 Fed. Rep. 637.

1. *Where the defence is fraud or false statements by the assured.*

The defence that a policy was obtained by fraud or by false statements of the assured cannot be made in an action on a policy containing an incontestable clause, unless such defence is especially excepted from the operation of such clause by the terms of the policy.

In *Massachusetts v. Robinson* (1898), 42 L.R.A. 261 it was held that a defence based upon misrepresentations made by the assured in his application, whether fraudulent or not, was unavailable where the policy contained an incontestable clause, coming into force after three years on the payment of three full yearly premiums, which conditions had been fulfilled.

So, the defences of fraud in obtaining the insurance and lack of insurable interest in the beneficiary were held not available under a clause forbidding the raising of any question as to validity of the application or certificate of membership after expiration of two years from date of the certificate and during the life of the member named in the certificate: *Wright v. Mutual* (1890), 118 N.Y. 238.

A defence that material statements in the application were false in a case where the insured died more than two years after the date of the policy, and had paid his dues, was held unavailable under a clause providing "that after two years from the date hereof the only considerations that shall be binding upon the holder of this policy are that he shall pay the annual dues and assessments, etc., and that in all other respects, if this policy matures after the expiration of said two years, this policy shall be indisputable." *Bates v. United L. I. A.* (1894), 68 Hun. 144.

In *Vetter v. Massachusetts* (1898), 29 App. Div. (N.Y.) 72, false representations in an application held no defence where the policy provided that "if the necessary payments have been made to keep the policy in force, it shall, in the event of my death, be incontestable."

So material false statements in the application held not to be available as ground of defence where the company had issued a prospectus before the policy was entered into by which it was represented that all policies effected by them should be indisputable except in cases of fraud: *Wood v. Dwarris* (1856), 11 Exch. 493. In *Wheelton v. Hardisty* (1857), 8 El. & Bl. 232, where an action of covenant was brought on a policy, a plea that a declaration was untrue was met by a replication of an equitable estoppel by a prospectus undertaking that the policies should be incontestable except in case of fraud. On this issue the jury found for the plaintiff; but it was held that there was not sufficient evidence to warrant this finding. On appeal the Court expressed no opinion as to this part of the judgment below, but reversed the judgment below on other grounds.

But a provision in policy that it shall be incontestable for any cause except misstatement of age, "except as hereinbefore provided," will not preclude the insurer from relying on the warranties contained in the application which is part of the contract and the statements in which are made part of the policy: *Welch v. Union Cent. L.I. Co.* (1899), 50 L.R.A. 774.

2. Where the defence is suicide.

In policies having an incontestable clause the defence of suicide not available where sufficient time has elapsed to make the clause applicable. This is so held despite that the policy provided in another clause that suicide was not one of the risks assumed.

In *Patterson v. Natural Premium, etc., Co.* (1898), 42 L.R.A. 253, it was held that a policy was not avoided by suicide where the "suicide clause" was omitted, and an "incontestable clause" inserted, although the policy provided that death in consequence or in violation of law is not covered by the policy.

In *Marck v. Mutual Reserve Fund Life Association* (1895), 62 Minnesota 39, suicide was a risk not undertaken by the company in the policy as issued, but written in ink across the face of the policy and forming a part of it was the statement that the policy was incontestable from any cause after five years from the date of the indorsement except non-payment of dues and incorrect statement of age. Held the "incontestable clause" applied and the company was liable for the full amount of the policy.

In *Simpson v. Virginia Life Insurance Co.* (1894), 115 N.C. (U.S.) 393, an original policy of insurance contained in one clause restrictions against certain travel, occupation and residence and in another stipulated that if the insured should die by suicide the company should not be liable beyond the net value of the policy, to be ascertained by certain methods. Subsequently the company executed an agreement declaring that "all restrictions of travel, occupation and residence expressed in the original policy are hereby waived, and that said policy shall from this date be incontestable, and when the policy becomes a claim the amount of insurance shall be paid immediately upon approval of proof of death." The insured paid all premiums as they fell due and died by suicide. It was held in an action to recover the amount of the policy that by the new contract the policy was rendered "incontestable" for any cause except non-payment of premiums and fraud. But an insurance policy providing that self-destruction by the insured, whether sane or insane, within three years will avoid the policy, was avoided where the insured within three years committed suicide, whether the act was deliberately or hastily done with such intent: *Union Cent. L. Ins. Co. v. Hollowell* (1895), 14 Ind. App. 611.

3. *Where the defence is that the beneficiary has no interest in the life.*

This seems to be the only defence available under an incontestable clause.

In *Clement v. New York Life* (1898), 42 L.R.A. 247, it was held that the defence could be made that the transferees of a life insurance policy had no interest in the life of the assured, and were not *bona fide* holders, but procured it to be issued and transferred to them for a speculative and fraudulent purpose, although it provided that it should be incontestable after one year.

In *Manufacturers, etc., Co. v. Anctil*, (1897), 28 S.C.R. 103, affirmed [1899] A.C. 604, the defence that a policy was a wagering policy was sustained despite a condition that "after this policy has been in force one full year it will be indisputable on any ground whatever provided the premiums have been promptly paid and the age of the insured admitted." The Court said: "Private interests must give way to public interests. The stipulation itself is contrary to law and public order."

Because the incontestable clause did not apply at the time of the death the defence of no insurable interest was sustained in a suit on a certificate for death seven years after its date, where it provided that it would be incontestable "after one year from date as provided in the by-laws" and the by-laws provided that the certificate should be incontestable in case of all deaths occurring "within three years" from the date of the certificate: *People's v. Templeton* (1896), 16 Ind. App. 126.

[IN THE HIGH COURT OF JUSTICE FOR ONTARIO.]
(DIVISIONAL COURT.)

LINTS V. LINTS.

*Life Insurance—Friendly Society—Altering Beneficiary—Privileged Class
—Paramount Authority of Ontario Insurance Act—R.S.O. 1897, ch.
203, sec. 151.*

The designation of a beneficiary in an Ontario contract of insurance can be revoked, and the benefit diverted to another, only within the limits laid down by the Ontario Insurance Act, R.S.O. 1897, ch. 203, sec. 151, even though, in the instrument containing the original designation of the beneficiary, an unlimited power to revoke and divert, subject to the by-laws of the insurer, be expressly reserved, which by-laws sanction the diversion.

Held, therefore, that an attempted diversion of the benefit from a beneficiary of the privileged class to a beneficiary not within that class was invalid by reason of sub-section 3 of section 151 of the Act.

THIS was an appeal by the defendant from the judgment of FERGUSON, J., in favour of the plaintiff. The action was brought to determine the ownership of moneys paid into Court by the Independent Order of Foresters under a benefit certificate issued by them on February 27th, 1899, being, in fact, a policy of insurance upon the life of John Henry Lints for \$2,000. In the application for this benefit certificate, which was expressly made part of it, and was dated December 28th, 1898, the applicant, John Henry Lints, designated his mother, Sarah Lints, as his beneficiary, adding, however, the following qualification: "reserving to myself the power of revocation and substitution of other beneficiaries in accordance with the constitution and laws of the Order." By the terms of the certificate the benefit was payable at the death of John Henry Lints "to the widow or other beneficiary or trustee duly designated by the said Brother," John Henry Lints.

When this certificate was issued John Henry Lints was a married man, and his wife, the present plaintiff, Serena Lints, was living. He was, however, living apart from her at the time, she being in the county of Elgin and he in the Muskoka district.

On August 23rd, 1899, he went through a form of marriage at Muskoka with the defendant, Fanny Hawn, who was not aware that he was a married man, and he lived with her as his wife until the time of his death, which happened on March 8th, 1902.

On November 26th, 1900, after the second ceremony of marriage, he made an application under the rules of the order to the Supreme Court of the order for leave to change the beneficiary from his *mother*, Sarah Lints, to his *wife*, Fannie Lints. This application was certified to by the officers of the Local Court of the order in Muskoka and forwarded by them to the officers of the Supreme Court, and the change of beneficiary to Fannie Lints described as the wife of John Henry Lints, was duly certified by the Supreme Chief Ranger as having been made in accordance with the constitution and rules of the order, and the certificate was ordered to be attached to and declared to be a part of the benefit certificate.

After the death of John Henry Lints, his mother, Sarah Lints, assigned to the present plaintiff, Serena Lints, all her rights under the benefit certificate. The money was claimed both by Serena Lints and Fannie Hawn, the latter being the defendant, Fannie Lints, and making her claim in that name. The money claimed (\$2,000) was paid into the Court by the Independent Order of Foresters on October 1st, 1902, and the present action is brought to try the rights of the two claimants.

The appeal was argued on June 4th, 1903, before Falconbridge, C.J.K.B., and Street and Britton, JJ.

R. U. Macpherson, for the defendant.

J. J. Warren and *C. F. Maxwell*, for the plaintiff.

The following references were made in the course of the arguments: *In re Seyton*, *Seyton v. Satterthwaite* (1887), 34 Ch. D. 514; Porter on Insurance, 3rd ed., p. 352; Joyce on Insurance, §§ 731 and 740; *In re Browne's Policy*, *Browne v. Browne* [1903] 1 Ch. 190; *McKibbon v. Feeagan* (1894), 21 A.R. 87;

Hutchings v. Miner (1872), 46 N.Y. 456; R.S.O. 1897, ch. 203, sec. 151, sub-secs. 3 and 5; *Book v. Book* (1901), 1 O.L.R. 86; *Kreh v. Moses* (1892), 22 O.R. 307, especially at p. 309; *Fisher v. Fisher* (1898), 25 A.R. 108; *Gillie v. Young* (1901), 1 O.L.R. 368; *Re Harrison* (1900), 31 O.R. 314; *Mingaud v. Packer* (1892), 21 O.R. 267; 19 A.R. 290.

June 27th, 1903. The judgment of the Court was delivered by STREET, J. [after first stating the facts as above] :—It has been well established in this Province that the provision in our Insurance Act which restricts the substitution of one beneficiary under a policy for another overrides any larger powers of substitution contained in the by-laws of the society granting the policy: *Mingaud v. Packer*, 21 O.R. 267; in appeal, 19 A.R. 290.

In *Re Harrison*, 31 O.R. 314, it was further held that even where the original designation of a beneficiary was expressly declared to be subject to the by-laws of the society which in effect made the designation revocable, the power to revoke the designation and to divert the benefit to another could be exercised only within the limits laid down by the statute.

In the present case the original designation of the mother of the assured as the beneficiary was made by an instrument in writing in which an unlimited power to revoke and divert, subject to the by-laws of the society, was expressly reserved, and it is contended that this express reservation of the right to revoke on the face of the instrument itself distinguishes the case from those above referred to. The original beneficiary in the present case, the mother of the assured, belongs to the class called "privileged" beneficiaries. Sub-sec. 3 of sec. 151 of R.S.O., ch. 203, forbids the diversion of a benefit from a beneficiary of the privileged class to the beneficiary not belonging to that class; the by-laws of the Independent Order of Foresters, on the contrary, permit the diversion of a benefit to a person who is not within the class defined by the Act as privileged. The defendant here, to whom the defendant has sought to divert the benefit, although described as his wife, is not in reality his wife, and claims to take

as a "dependent"; a wife is within the privileged class; a dependent is not. The defendant, therefore, cannot take if the statute is to govern.

In my opinion the case is concluded by the rule laid down in *Re Harrison*, 31 O.R. 314.

The reservation on the face of the instrument by which the original designation was made, of the right to revoke the designation and divert the benefit to another, is no stronger as a matter of legal construction than where the original designation is declared on its face to be subject to by-laws which give the same rights. The statute has been declared to override the by-laws in the latter case, and it must, therefore, do so in the former. The attempt of the assured to divert the benefit from his mother to the defendant, who was not his wife, but merely a dependent, not within the privileged class, being contrary to the statute, availed nothing, and the mother was at the time of his death the only beneficiary. The plaintiff, as assignee of the rights of the mother, is therefore, entitled to the proceeds of the certificate now in Court.

The appeal must be dismissed with costs.

Notes:

RULES OF BENEVOLENT SOCIETIES REGARDING CHANGE OF BENEFICIARY.

The efficacy of the rules of a benevolent society in Ontario as controlling the insurance contract depends on two things, namely (1) convention, and (2) the effect on that convention of the Ontario Insurance Act. Where the question is one of the status of a member, or of the amount to which he becomes entitled, the assured is bound by his agreement to be governed by the rules; where the question is one of change of beneficiary, the Ontario Insurance Act governs if the rules are at variance therewith.

The rule last above-mentioned was first laid down in *Mingaud v. Packer* (1891), 21 O.R. 267; (1892), 19 A.R. 290. The facts there were: Arthur Mingaud, whose second wife, Christina

Mingeaud, was the plaintiff in the action, was insured in the Ancient Order of the United Workmen, a benefit society, incorporated under R.S.O. 1877, ch. 167, as amended by 41 Vict. ch. 8, sec. 18 (O.) (*now* R.S.O. 1897, ch. 211). On the 28th of January, 1888, after the death of his first wife, Annie, he obtained the cancellation of the existing certificate, and the issuing of a new one, by which the insurance money was made payable to his three children. After this he married the plaintiff, and on the 1st of June, 1889, at his request, a second change was made, and a new certificate was issued, making the insurance money payable to his second wife. He died on the 19th of November, 1889. The matter came on for trial in the form of an interpleader issue. The insurance money was claimed by the plaintiff, under the certificate of June, 1st, 1889; by the defendants under that of January 28th, 1888. Street, J. (with whom, in the Court of Appeal, Osler and Maclellan, J.J.A., agreed), held that the Benevolent Societies Act (R.S.O. 1877, ch. 167, as amended by 41 Vict. ch. 8, sec. 18 (O.), *now* 1897, ch. 211) must govern, and that by its provisions moneys which became payable under the rules of the society go to those entitled under those rules, and that, while by 51 Vict. ch. 22 (O.), the provisions of ch. 136, R.S.O. 1887, "an Act to secure to wives and children the benefit of life insurance," were applied to benevolent societies, it was not intended to restrict or interfere with any existing legal methods of dealing with policies. "It cannot be supposed," he remarked, at p. 269, "that the Legislature intended by simply applying the provisions of ch. 136 (R.S.O. 1887) to societies incorporated under ch. 172 (*now* 211), to sweep away the right of those societies of making rules providing for the application of moneys under their beneficiary certificates. These rights had been expressly conferred by statute, and they are not to be taken away except by express enactment. I find neither here; and, therefore, the right to make these rules must be taken to exist, and the person entitled under the rules of the society here in question to the money payable under the certificate in question, must be held entitled to it." The Divisional Court, Armour, C.J., and Falconbridge, J. (who were upheld, in the Court of Appeal, by Hagarty, C.J.O., and Burton, J.A.), held that the Ontario Insurance Act governed and modified and controlled the rules of the society so far as they were inconsistent with it. The Act, 51 Vict. ch. 22, applying the provisions of ch. 136, to benevolent societies, was passed on the 23rd March, 1888. By that Act "contract of insurance," "policy of insurance," and "policy," were made to

include beneficiary certificates. In the result the insurance moneys were held payable to the children, who were named in the certificate of 28th January, 1888, and who were, under R.S.O. 1887, ch. 136, beneficiaries under a trust, and not to the insured's second wife, in whose favour the insured had had the certificate of June 1st, 1889, issued, and who was not one in whose favour, under that Act, the trust could be altered.

The section in R.S.O. 1887, ch. 136, which applied, is section 5 (now to be found in the Ontario Insurance Act, R.S.O. 1897, ch. 203, section 159 (1)), and reads as follows:

In case of a policy of insurance effected by a married man on his life is expressed upon the face of it to be for the benefit of his wife, or of his wife and children, or any of them, or in case he has heretofore endorsed, or may hereafter endorse, or by any writing identifying the policy by its number, or otherwise, has made or may hereafter make a declaration that the policy is for the benefit of wife or of his wife and children, or any of them, the policy shall enure and be deemed a trust for the benefit of his wife, or for her separate use, and of his children, or any of them, according to the intent so expressed or declared, and so long as any object of the trust remains, the money payable under the policy shall not be subject to the control of the husband or his creditors, or form part of his estate when the sum secured by the policy becomes payable; but this shall not be held to interfere with any pledge of the policy to any person prior to such declaration.

The decision in *Mingaud v. Packer* was followed in *Neilson v. Trusts Corporation of Ontario* (1894), 24 O.R. 517. In October, 1886, an endowment certificate upon the life of T. H. D., a widower with one child, M. R. D., was issued by The Canadian Order of Foresters, a benefit society, the sum secured thereby being designated by a clause therein as payable to M. R. D. In February, 1888, the insured, having married again, indorsed on the certificate a writing revoking the original designation and directing payment to his wife, G. M. D. In November, 1890, his wife having died, he indorsed on the certificate a direction that payment should be made to his executors, administrators and assigns. He died in March, 1893, a widower, leaving two children, M. R. D. and G. B. D. him surviving. By his will, dated in July, 1888, he left all his estate to his children in equal shares. The defendants were appointed administrators with the will annexed of the estate. The question submitted for the opinion of

the Court was: How should the insurance money be distributed by the defendants under the endowment certificate and the indorsements thereon? MacMahon, J., held that there was no power in the deceased to revoke the direction in policy for the payment to his daughter, M. R. D., and to make a direction for payment to his then wife: R.S.O. 1887, ch. 136, sec. 5, and *Mingcaud v. Packer (ante)*. It was said, however, that by virtue of 53 Viet. ch. 39, T. II. D. might, when he made the indorsement of the 17th November, 1890, have transferred or limited the benefits of the policy in any proportion he wished, between his children. But, while he might vary, he could not destroy the trust created by the policy, and declare a new trust which would or might deprive his children (his wife being dead) of all benefit in the trust. The new trust being in favour of the executors, administrators and assigns of the deceased, the fund would be applicable to the payment of debts, and it might result that, after this done, there would be nothing remaining. The Act would thus be rendered nugatory.

In *Re Clark and Provincial Provident Institution (1895)*, 15 C.L.T. 239, Robertson, J., held that a by-law which charged upon the certificate issued by the benevolent society in question a debt due to the society by a member, not for assessments on the policy, could not be invoked to the detriment of a beneficiary. He said: "I think it contrary to the spirit of the Act (R.S.O. 1887, ch. 136) to authorize anything on the part of the assured which will subvert or interfere with the amount payable under the policy for the benefit of the wife and children. . . . If the assurers have the right to deduct this debt which the assured contracted with them, the assured could have incumbered the policy to the full amount thereof, thus frustrating the very object of the Act.

In *Re Harrison (1899)*, 31 O.R. 314, the certificate issued to John Harrison by the G. T. R. Insurance and Provident Society stated on its face that it was subject to the provisions of the by-laws, rules and regulations of the society. One of the by-laws provided for the payment of the insurance money to any person nominated by indorsement upon the certificate of membership, and, further, that such indorsement was subject to revocation . . . by a revocation in writing on a separate paper signed by the member in the presence of at least one subscribing witness. Harrison, by indorsement on the certificate, directed that all money accruing upon it should be paid to his wife upon his death; but subsequently by will directed that only

a portion of it should be paid to her, and the balance to his brothers and sisters. The will was brought to the notice of the society, and they acted upon it 'as a revocation in writing on a separate paper.'

This was the strongest case that had come before the Courts in favour of interests apart from those of the wife and children, and establishing the authority of the rules of the benevolent society as against the provisions of the Insurance Act, R.S.O. 1897, ch. 203, sec. 159.

Chancellor Boyd considered that the distinction between this case and *Mingaud v. Packer* (*ante*) was a tangible one. In the latter case the certificate under which the successful parties claimed was made payable to them *unconditionally* on its face, being thus expressed, "that the person insured was entitled to participate in the beneficiary fund of the order to the amount of \$2,000, which sum shall at his death be paid to his children." In the *Harrison Case* the certificate read "is entitled in his lifetime while such member to the benefits of the said society *under and subject to the by-laws, rules and regulations* thereof"; and "this certificate is issued upon the condition that the said member and his widow, etc. . . . are to be subject to the provisions of the *by-laws, rules and regulations* of the society." The learned Chancellor, therefore, thought that the distinction was sufficient "to cause the scale to turn in favour of the opinion expressed by the trial Judge (Street, J.), and by two of the Judges in Appeal (Osler and Maclellan, J.J.A.), that the rules of the society are so incorporated with the contract of insurance on its face that they remain operative by express convention, and so exclude the general terms of the statute." The Divisional Court, composed of the same Judges that decided *Mingaud v. Packer*, *i.e.*, Armour, C.J., and Falconbridge, J., however, considered the case just cited was conclusive in establishing that the insurance was subject to the provisions of the Ontario Insurance Act, R.S.O. 1897, ch. 203; and the by-laws and rules of the society, in so far as they were inconsistent with such provisions, were to be regarded as modified and controlled by them, and hence the attempted revocation of the endorsement in favour of the wife was a nullity.

The principle enunciated in the above cases received another exemplification in the recent case of *Gillie v. Young* (1901), 1 O.L.R. 368. There one William Young, who had taken out a certificate in the Catholic Order of Foresters, in which his brother, John Young, was named as the beneficiary, attempted by a will,

made a few days before his death, to divert the insurance money to Mary Ann Gillie, the wife of A. Gillie, one of the executors of the deceased and plaintiffs. The executors sought in this action a declaration of the rights of the parties as to the insurance money.

One of the by-laws of the Order provided that "no will shall be permitted to control the appointment or distribution of, or rights of any person to, any endowment payable by this Order."

Falconbridge, J., who rendered the trial judgment, thought the case depended upon the contract of membership. The endowment certificate was based on the application, which put the beneficiary under an obligation to observe the laws and regulations of the order. The object of the organization was to promote friendship, unity and true Catholic charity among its members. . . . Unity in associating together for mutual support, in sickness and death, and in making suitable provision for the widows, orphans and dependants of deceased members. It was not a contract of insurance, and so the money in question must go in the direction assigned to it by the rules of the Order, and the contract of the deceased member. He, therefore, gave judgment for the defendant. His decision was reversed by a Divisional Court composed of Boyd, C., and Ferguson, J. It was held that the Order was legally entitled to carry on the business of insurance in Ontario by virtue of 55 Viet. ch. 39, secs. 10, 22 (2) and 27 (O.) (Insurance Corporations Act), and R.S.O. 1897, ch. 203, sec. 60, and the measure of its liabilities and powers must be tested by the provisions of the Ontario Insurance Act (ch. 203); the certificate in question was a "contract of insurance" within the meaning of the last-mentioned Act; that the rules of the Order, so far as they were inconsistent with the provisions of the Act, were modified and controlled by such provisions; and, therefore, the benefits of the certificate passed by virtue of the will to the legatee, although the rules of the Order provided that no will should be permitted to control.

It is to be noted that in the *Gillie Case* the beneficiary was not a "preferred beneficiary" within the meaning of section 159 of The Ontario Insurance Act, as was the case in the preceding cases noted. The powers of revocation and re-apportionment, given by sections 158 and 160, might, therefore, if they existed under the circumstances of this case, be properly and legally exerted to take from the defendant the whole of the benefit.

See also note to *Cornwall v. Halifax*, 2 C.L.R., Part 1, at p. 85.

[IN THE COURT OF APPEAL FOR ONTARIO.]

BANQUE PROVINCIALE V. CHARBONNEAU.

Banks and banking—Liability of manager to bank—Alteration of promissory note—Negligence—Test of—Instructions disobeyed.

The manager of a branch bank was instructed to obtain a joint and several note from certain parties who were making the note as collateral security for advances by the bank to a partnership. Instead of so doing, he inadvertently accepted a joint note only. Subsequently having discovered the mistake, he, with the consent of some only of the makers, inserted the word "We" instead of "I" and before the word "promise" the words "jointly and severally." It appeared that neither the general manager of the bank nor its solicitor when consulted by the branch manager appreciated the fact that the alteration made vitiated the security. It also appeared that, before the alteration, it made no practical difference whether the note were joint and several or joint merely, two or perhaps three of the makers being perfectly good for all the money advanced. The bank, having failed in an action brought against the makers of the note, on the ground that the effect of the alteration was to discharge all the parties to the note from liability,* brought action against the manager to recover damages for his negligence.

Held, OSLER, J.A., dissenting, that the disregard of instructions by the manager was the cause of the loss to the bank, but it being equally true that but for the alteration there would have been no loss to the bank and the manager having reasonable grounds to believe that the alteration would be acquiesced in by the parties to the note and having moreover acted under the advice and with the cognizance of the plaintiffs' officials the manager was not liable in substantial damages for the consequences of his mistake.

Stafford v. Bell (1880), 6 A.R. 273, followed.
Judgment of MEREDITH, C.J., affirmed.

APPEAL by the plaintiffs from the judgment of Meredith, C.J.

The action was against the local manager at Ottawa of La Banque Provinciale to recover damages for his negligence in connection with a promissory note upon the security of which the bank lent five thousand dollars.

The Citizens' Exchange and Loan Agency discounted paper under that name with the plaintiffs to the amount of nearly \$5,000. As collateral security for the advances, a note for \$5,000 was given to the plaintiffs, made by E. C. Arnoldi, E. D. Arnoldi and H. L. Bowie, being the members of the said partnership, in

* See *Banque Provinciale v. Arnoldi*, [1901] 2 O.L.R. 624.

their individual names, and by W. Bowie, King Arnoldi, Kirby and St. Jacques. Subsequent to the signing of the note, the manager of the bank discovered that the note was a joint one merely, and not joint and several. He thereupon, with the acquiescence of two of the makers altered the note to read "joint and several." These words he subsequently struck out on the advice of the solicitor for the bank. This note fell due on the 10th of May, 1902, the debt of the Loan Agency to the plaintiffs being then \$4,800, and a new note for that sum, made by all the former makers except King Arnoldi, was given to the plaintiffs.

The action was tried at Ottawa Spring Non-Jury Sittings, 1902, before Meredith, C.J.

W. H. Barry, for plaintiffs.

W. D. Hogg, K.C., for defendant.

June 20th, 1902. MEREDITH, C.J.:—This is an action against a local manager of a bank to recover damages for his negligence in connection with a promissory note, upon the security of which the bank lent \$5,000 to a company.

It is clear, I think—the position taken by Mr. Barry—that the cause of the loss was the alteration of the note by the manager, with, as I find, the assent of two of the guarantors or the makers of the promissory note, Bowie and E. C. Arnoldi, he having made an alteration in the note by inserting the word "We" instead of "I," and, before the word "promise," "jointly and severally." It has been held, I understand, in an action brought against the makers of that note, that the effect of that alteration was to discharge all the parties to the note from liability, and, through the company being insolvent, practically, the bank has lost its money.

There is no doubt the manager was instructed to obtain a joint and several note; and the reason for that is probably to be found in what Mr. Barry has told me as to the law of the Province of Quebec—I do not know how that may be—that according to the law of the Province of Quebec it is a joint note, and

when judgment is obtained it is against the several makers for an aliquot part of the amount of the note according to the number of the makers or parties to it. So that if this were a promissory note in the Province of Quebec, it would be very important, in that view of the law, that the note should be joint and several. However, in this Province it made very little difference whether the note was joint or joint and several. Certainly it made absolutely no difference in this case; because all the makers were good, and two of them were perfectly good for all of the money that had been paid—perhaps three of the makers—if the alteration in the note had not been made. Therefore, from that act of disobedience of instructions, no damage accrued to the bank. They were in just as good a position, and could have recovered the amount of their claim just as well, as if the alteration had not been made.

I cannot find it was actionable negligence on the part of the manager to make that alteration in the circumstances in which it was made, although the alteration in law, as I have said, vitiated the security.

But even the general manager of the bank did not know that that was the law. He said, in giving his testimony, that he thought it would be wrong—it would be morally wrong, I suppose—to make the change without the assent of the party; but he had no conception apparently that the effect of it was to destroy the security.

Now, it does seem to me a most extraordinary thing that any board of directors in circumstances such as these, with their general manager ignorant of the effect of the act which was done by the defendant, should think that they were morally justified in bringing an action against a subordinate officer—that they can think they are justified in bringing it for the technical breach of the instructions in not getting a joint and several promissory note, when he got a note which for all practical purposes was absolutely as good as the note he was instructed to get. It passes my comprehension that any body of business men could feel that they were warranted in bringing an action against a subordinate

officer and seeking to make him pay for their loss in circumstances such as that. It is fortunate that the law does not permit them, in my view, to do what they desire to do by thus acting. I regret extremely that after what was said, after having become aware of the circumstances, and of the view of the law that was entertained by the Court, these gentlemen did not see their way to adopt the reasonable proposition that was assented to by Mr. Hogg, that the action should be dismissed without costs. I think it would have been very much more to their credit than the course they have taken. However, they are entitled to stand upon their strict rights; but, in giving them the utmost they are entitled to, I am doubtful that I should even go so far as I do—I am very much doubtful whether I ought not entirely to dismiss the action—whether, in respect of the alteration of the note, I should not dismiss the action upon the ground that the manager's negligence has not been proven.

I should have added that the solicitor of the bank was consulted with regard to the matter, and even he does not seem to have appreciated the position. And yet this unfortunate bank manager, in a subordinate position, is expected to know the law, and to be answerable for the consequences of his mistake arising from his not knowing the law.

However, though it may not make practically much difference I think the proper course will be that I should give judgment for nominal damages; and I therefore direct that judgment be entered for the plaintiffs for three cents, with costs on the appropriate scale, and with a set-off to the defendant.

From this judgment the plaintiffs appealed to the Court of Appeal. The appeal was argued before MOSS, C.J.O., OSLER, MACLENNAN, GARROW and MACLAREN, J.J.A.

Aylesworth, K.C., and Barry, for the appellants.

Hogg, K.C., for the respondents.

June 29th, 1903. MOSS, C.J.O. :—The action of the defendant in accepting a promissory note which was not joint and several

and did not bind the parties jointly and severally was undoubtedly a breach of the instructions which he received from his superiors. And if the plaintiff's loss had been occasioned by that act, the defendant would have to make good the amount. But the form of the note which he did take was sufficient to secure to the bank the liability of the parties in this province as effectively to all intents and purposes as if the note had been in the exact form called for by his instructions. And, therefore, no more than nominal damages to the plaintiffs resulted from that act or omission.

The next enquiry is, should the defendant be held liable for the consequences of his subsequent act? Because of his instructions, and probably also because he was more cognizant of the laws of Quebec than of Ontario, the defendant naturally attached importance to the note being expressed to be joint and several. And upon discovering that it was not in that precise form, it was to be expected that his mind would be directed to endeavouring to repair what he thought was a material objection.

It cannot be said that he had any intention of injuring or impairing the plaintiff's position, or that he was guilty of misconduct in that sense. His object was to do something which would improve the plaintiff's position if possible. The case is not one of intentional injury to his employers, but of an act done in good faith and with a purpose meritorious in itself.

The question is, did the defendant exercise such a reasonable degree of skill, care and diligence as was required of him under the circumstances, or did he show such a want of capacity or want of attention to the plaintiff's interests as to render him responsible for the loss which occurred. And that is a question to be determined upon the circumstances of the case, taking into consideration the plaintiffs' knowledge of the defendant's capacity and fitness for the position, their subsequent knowledge of what had been done, and their attitude with regard to it before the loss had actually occurred.

The defendant was of course bound to exercise reasonable care and diligence in looking after and protecting the plaintiffs'

property in his possession or under his control, including, of course, the promissory note which he had received for the plaintiffs upon the transaction in question. But the plaintiffs cannot expect their managers or cashiers to be infallible, or that they may never fall into an error of judgment, save at the peril of having to make good any loss occasioned by the mistake. Nothing higher would be required of the defendant in his position than reasonable skill and ordinary diligence, by which is understood such skill as is ordinarily exercised by persons of average capacity engaged in similar pursuits. A loss caused by an act or step which a banker of experience acting in similar circumstances might be liable to do or take is not a loss for which the bank can look for indemnity from the person whose error caused the difficulty.

In the present case the evidence shows that the defendant wrote the words "jointly and severally" into the note with the idea of making it conform to the intention of the parties and under the belief that all the parties to it would assent to the change and ratify it by their initials. Two of the parties to the note by their words and conduct led him to that conclusion, and it was not until after the words had been written that doubts were raised, and he was led to think that he had acted prematurely. Upon that he hesitated as to whether he should present the altered note to the other makers, and was led to conclude not to do so. His next proceeding was what any prudent person would adopt. He consulted the bank's solicitor and was advised by him that under the circumstances the validity of the note was not affected. This advice would of course tend to strengthen his conclusion not to endeavour to get the initials of the other makers to the alteration. The defendant afterwards informed the general manager of what had taken place. He did not take the position that the note was rendered invalid, and the only suggestion or direction he gave to the defendant was to see that the next note was in proper form. The opinion of the general manager and of the solicitor appeared to coincide, that no harm had been done by the writing on the note, and seemed to render it unneces-

sary for the defendant to take immediate action. The evidence as a whole seems to me to relieve the defendant from the charge of gross negligence which it was incumbent upon the plaintiffs to establish. He cannot be said to have been guilty of negligence in the sense that he acted in a manner in which no person in his position exercising ordinary care and judgment would have acted. Under the circumstances he had reasonable grounds for supposing that what he was doing would be implemented by the parties to the note, and his action after the difficulty arose was under the advice and with the cognizance of the plaintiffs' officials. That in the result his judgment proved to be wrong and his act prejudicial to the plaintiffs is not enough in my opinion to render him liable: *Stafford v. Bell* (1880), 31 C.P. 77; 6 A.R. 273.

I think the appeal should be dismissed.

GARROW, J.:—I agree.

OSLER, J.A.:—The defendant was the salaried manager of the Ottawa branch of the plaintiff bank. A partnership firm, styled the Citizens' Exchange and Loan Agency applied to him for a loan or credit of \$5,000, which, after some correspondence with the plaintiffs' head office, the defendant was authorized to grant on its being collaterally secured by the joint and several promissory notes of certain named persons. A note signed by these persons was handed to the defendant by a member of the firm, and a note of the firm at a shorter date was discounted and the money advanced to them thereon. By some oversight on the defendant's part the collateral note accepted by him, instead of being the joint and several note of the makers, in accordance with his express instructions, was their joint note only. Shortly afterwards the defendant became aware of his error and sent for two of the makers, one of whom was a member of the firm, and pointed out the mistake. The defendant said that either a new note should be obtained, or the erroneous one corrected.

According to the evidence at the trial these two makers "seemed to be satisfied" to adopt the latter course, and he there-

upon wrote in the words "jointly and severally," the "understanding" being that "we were to go round the makers and get them to initial" the alteration. That is "to get them to consent to it." Then Arnoldi said that he did not care about writing these people, *i.e.*, the other makers again, and the defendant inferred from the course of the conversation that they might refuse to initial the alteration and that it would be better for the bank that the note should remain as it was. Arnoldi said if you will keep the note like that I will make sure that the next note (the renewal) will be a joint and several one, better hold this note like that till it comes due and I will give you a note made properly. The defendant in consequence made no attempt to get the alteration initialed, and shortly afterwards took it to his solicitor, told him the facts, and asked what he should do. The latter advised him not to erase the added words, but to trace a line through them with his pen, which he accordingly did. When the time came to renew the note, a renewal was brought in the required form, which the defendant accepted without noticing that it had not been signed by one of the substantial parties, one King Arnoldi, and his signature never was in fact obtained to it. The bank was advised that the omission did not affect the liability of the other makers. An action was brought against all the makers of the first note, including King Arnoldi, and against those who were parties to the second note. By this time the alteration of the original note had been discovered by the sureties, and the result of the action so far as that note was concerned was that they were held to have been discharged by the alteration. The action also failed as to those sureties who had actually signed this second note on the ground that the bank had omitted to secure King Arnoldi as a party to it, and on the further ground that having been made in ignorance of the alteration of the first one, in consequence of which the sureties had been discharged, there was no consideration to them for making the second one.

The question is whether under these circumstances the plaintiffs have any ground of action against the defendant founded

upon his negligence in respect of any of these transactions. His first act of negligence was that of taking the original note in the form of a joint note only contrary to the plaintiffs' express instructions to accept only the joint and several note of the proposed makers. It is evident from the correspondence between the defendant and his superiors that the latter for some reason attached great importance to this point, and it cannot be denied that in taking the security in the form in which he had been told not to take it there was a negligent breach of his instructions. No costs or damage, however, were directly sustained by the plaintiffs in consequence of this. The joint note of the makers was for aught that has been shewn quite as useful as a security as one on which they were liable jointly and severally, and I therefore agree with the learned Chief Justice at the trial that inasmuch as the damage the plaintiff complained of did not flow from this act of negligence, nominal damages only are recoverable by them in respect of it. The further ground of negligence is the alteration by the defendant of the first note and his omission to have such alteration assented to and confirmed by the makers. To this their loss was no doubt directly attributable. It is unnecessary to comment upon the defendant's neglect to have the second note signed by all the makers, because even had he done so, the bank, having regard to one ground on which those who signed it were exonerated, namely, the alteration of the first note, would have been in no better position. Differing with some regret from my learned brethren, and with a natural distrust under the circumstances of my opinion, I cannot but think that the defendant ought to be held guilty, in respect of what I am now dealing with, of culpable negligence. He had applied for and had accepted for reward an important position in the plaintiffs' service. It was his duty to exercise in the performance of the business entrusted to him and in looking after and protecting his principals' property in his custody a reasonable degree of skill, care and diligence. Whether he was or was not fully alive to the possible consequences of his act and its effect, if not

assented to by all of the makers upon the plaintiffs' security, it was, upon the mildest view which can be taken by it, as a matter of practice of bankers, irregular, and to a person occupying his situation, its imprudence and danger ought to have been manifest upon the slightest reflection. A perfectly safe alternative was open to him as he knew of procuring a new note of all the parties. Instead of taking this course, he adopted the doubtful and hazardous one of altering or tampering with the existing security without the authority of the makers, incurring thereby the risk of its destruction if they refused to confirm what he had done. Then at the instance of one of the principal debtors, he made no attempt to obtain the consent of the other makers to the change. If the case turned upon this omission it may be that the advice he afterwards seems to have obtained might repel the charge of negligence as to it, but I fail to see how that advice, or the solicitor's opinion, whatever it may have been, as to the effect of the alteration, can relieve him of the imputation of negligence in fact, having regard to what I think were his duties in the situation he held in the bank's service, duties in this respect, as it seems to me, of the simplest and most obvious character. The facts are not in dispute, and it is open to this Court to draw therefrom an inference different from that which commended itself to the learned trial Judge. I do not think that any purpose would be served by a discussion of the authorities, the leading ones are referred to in *Stafford v. Bell* (1880), 31 C.P. pp. 85, 86; Bowstead on Agency, 2nd ed., sees. 45, 56, 57; Evans on Agency, 2nd ed., 282; Mechem on Agency, sees. 493, 494, 495, 500; *Williams v. McKay* (1885), 53 Am. Rep. 775, and the result which has been arrived at by the other members of the Court also rendered it needless to discuss the question of damages as to which *Selz v. Collins* (1893), 55 Mo. App. 55; *Whitney v. Merchants' Union Express Co.* (1870), 104 Mass. 152, and *First Nationale Bank of Trinidad v. First National Bank of Denver* (1878), 4 Dillon, U.S. Cir. Court Reports 290.

I think the appeal should be allowed.

MACLENNAN, J.A.:—But for the different opinion of my brother Osler, I should have had no hesitation in affirming this judgment; and having given the case very full consideration, I am still of that opinion.

I think the defendant was bound by law to bring to the discharge of his duties, the ordinary degree of skill and knowledge which would reasonably be expected from persons occupying his position: per Parks, B., and Jarvis, C.J., in *Jenkins v. Betham* (1854), 15 C.B. 185. The knowledge and skill of such persons vary. There is no school or college where fitness for such positions can be acquired, and it must be obtained by service in inferior positions, and by experience. One manager may be a person of long experience, and may have large and minute knowledge of his duties and of the laws relating to them, and another may be a person of recent appointment, new to its duties and responsibilities, without experience and without much knowledge of the law beyond what he has picked up in the inferior positions through which he has risen. The exigencies of banking business require the services of managers not only of the men of long experience, but also of the men of recent appointment. The defendant was a young man appointed and acting as manager for the first time, and his salary was \$1,000 a year, with aspirations to \$1,200. He had been appointed on the 19th February, 1898, and the acts of negligence complained of occurred less than nine months afterwards. These acts related to a promissory note of \$5,000, which was to be obtained as security for an advance to a partnership firm of which one E. C. Arnoldi was a member. The defendant's instructions from the head office were to procure a joint and several note from the parties who were offered as sureties. Unfortunately the note was drawn as a joint note merely, and not joint and several, was signed by all the parties, was brought to the defendant, who accepted it, and advanced the money upon it, without observing that it was not a joint and several note. This he discovered a few days afterwards, and sent for Mr. E. C. Arnoldi, and drew his attention to it. Mr. Arnoldi said the omission was an oversight, and that he had intended to

make it joint and several. Thereupon the words "jointly and severally" were inserted by the defendant with Mr. Arnoldi's concurrence, and it was arranged that they should go together to the other parties to get them to approve of the alteration. This was never done, Mr. Arnoldi and Mr. Bowie, the only other signers who were aware of the alteration, not caring to go round to get the approval of the others. Some days afterwards the manager struck his pen through the words which he had interlined on the advice of the bank's solicitor, whom he consulted, and who was of the opinion that the original validity of the note was not impaired. There is little, if any, evidence of the degree of skill and knowledge which could reasonably be expected from a new manager, such as the defendant, as to the effect of what he did, that is, the alteration of the note and the subsequent cancelling of the alteration; the opinion of the solicitor is some evidence, for as the bank's solicitor thought the alteration harmless, it would be quite unreasonable to expect the defendant to know that it was otherwise. Again, when the facts were made known and explained to the plaintiffs' general manager, it seems not to have occurred to him that the validity of the note had been impaired or destroyed, and the defendant could not be expected to have a greater degree of skill and knowledge than his superior officer possessed. It was a pure question of law whether what was done avoided the note. The plaintiffs brought an action upon it, and the question whether or not it had been invalidated was seriously argued both at the trial and on appeal in this Court, eminent counsel for the plaintiffs contending that its validity had not been impaired by the alteration: 2 Ont. L.R. 624.

Under these circumstances I think it would be too much to expect the defendant to possess such a knowledge of the law as would have prevented him from endeavouring to comply with his instructions by the means which he used for the purpose. It was also argued that the plaintiffs' loss was due to actual disobedience to instructions in taking a joint note instead of one which was joint and several. It is, of course, quite true that if that mistake had not been made, there would have been no occasion

to make the alteration, and so the disregard of instructions was the cause of the loss. But it is equally true that but for the alteration there would have been no loss. The liability on the joint note being quite as complete as upon a joint and several one. I think the judgment right on this point also, and that the appeal should be dismissed.

MACLAREN, J.A. :—Damages are claimed by the bank from its late local manager at Ottawa on two grounds:—(1) breach of instructions and negligence in accepting a joint note instead of a joint and several one; and (2) the subsequent alteration and consequent voidance of this note by inserting the words "jointly and severally." His liability on the first ground is not now questioned. Meredith, C.J., who tried the case without a jury found against him on this point; but as the joint note was, under the circumstances, quite as good as if it had been made joint and several, and the bank suffered no damage on this account, there is no good ground for disturbing the judgment of the trial Judge in awarding merely nominal damages.

The other ground of action raises a question of greater difficulty. By the alteration of the note by defendant, the bank lost the amount which it had advanced, less a small sum paid on account. The question to be decided is, Was this act of defendant actionable negligence? In order to answer this question the whole circumstances have to be taken into consideration and weighed.

In February, 1898, La Banque Jacques Cartier (now La Banque Provinciale) being about to open a branch in Ottawa, the position of local manager was offered to defendant, a young man, then a clerk in another bank in that city, and accepted by him at a salary of \$1,000 a year. No special representations as to his capacity or qualifications were made, but his local business connections appear to have been considered of consequence.

The breach of instructions in taking the joint note has already been dealt with. The other point which we are now considering, although in a certain sense having its origin in that breach, was not a legal or necessary consequence of it, and must, for the pur-

pose of determining his liability, be treated independently, and on its own merits.

It appears that when Charbonneau discovered the mistake as to the form of the note, he sent for the representatives of the firm which had borrowed the money from the bank. After some discussion it was agreed that the words "jointly and severally" should be inserted in the note, and the change initialled by all the makers. After he had written in the words with this object, it was represented to him that it was in the interest of the bank not to ask the parties to consent to the alteration at that time, but to await the maturity of the note and have the renewal made out in the proper form. Defendant then consulted the solicitor of the bank, who advised him to draw his pen through the added words, and that the note would then be all right. The facts were first made known to the general manager some weeks later when he visited the Ottawa office. He blamed the defendant for not observing his original instructions to get a joint and several note, and charged him to see that the renewal was in proper form. The general manager did not consider that the note had been injuriously affected by what had been done.

In seeking to determine defendant's liability we must first consider what was his obligation to the bank. This no doubt was to exercise reasonable skill, care and diligence in the discharge of his duties. While every one is presumed to know the law and *ignorantia legis neminem excusat*, it has been well said that there is no rule or maxim that every person must be taken to know the legal consequences of his acts. A high degree of skill is usually expected and required of those professional men who hold themselves out as being qualified in their several callings; yet even here the rule is subject to important limitations. In *Jenkins v. Betham* (1854), 15 C.B. 185, it is laid down by Jervis, C.J., that while a valuer of ecclesiastical property might properly be required to know the general rules applicable to the valuation of such property, yet he could not be expected to have a minute and accurate knowledge of the law. And in *Montriau v. Jefferies* (1825), 2 C. & P. at p. 116, where it was sought to hold an attorney liable for a legal blunder, Abbott, C.J., said: "No

attorney is bound to know all the law; God forbid that it should be imagined that an attorney, or a counsel, or even a Judge is bound to know all the law."

No doubt the knowledge of the law as to banking and as to bills and notes required of defendant would be much less than that of a professional man. And in applying to his case the rules and principles above laid down, a number of considerations arise and must be duly weighed. Defendant's age, his banking experience (which was known to the bank before his engagement), the ordinary duties of such a local manager, and also the particular circumstances under which he made the alteration in question must all be taken into account. The acquiescence in the proposed change by the interested parties present is also an element. So is the fact that every alteration in a note does not vitiate it. It is only when the alteration is material that such is the result. And it is often a nice question, and one respecting which the Courts themselves have not always been consistent, whether a particular alteration is material or not. Here it may fairly be said that it was a debatable question whether a contemplated legitimate alteration which was only partially carried out, and which was speedily undone so far as that could be accomplished, and which in that incomplete state was never sought to be enforced against any party to the note in reality made it void. The solicitor of the bank was of opinion that it did not, and this was also the opinion of the general manager. It is true that this alone might not excuse the defendant; but is it reasonable to require from him in his subordinate position a higher degree of legal knowledge or of skill than that possessed by the legal adviser of the bank or by his superior officer? The question of what was reasonable skill and care was a question of fact to be determined in view of all the circumstances of the case. The learned trial Judge who had all the parties before him, who saw and heard them, came to the conclusion that the bank had not made out a case of actionable negligence on this second ground. I do not see any sufficient grounds for disturbing his finding.

[IN THE SUPERIOR COURT OF QUEBEC.]

(COURT OF REVIEW.)

DENENBERG V. MENDELSON.

*Promissory note—Cession de biens (assignment for benefit of creditors)—
Waiver of protest by curator.*

The curator of an insolvent debtor who has assigned for the benefit of his creditors has no authority without the order of a Judge upon the advice of the creditors or inspectors to waive protest of a promissory note of which his debtor was the endorser. Such unauthorized action will extinguish the debtor's liability thereon.

THIS was an inscription in review of the judgment of CURRAN, J., herein pronounced the 30th of October, 1902. The action was to recover the balance due on a promissory note. The facts appear in the reasons for judgment of CURRAN, J., which follow:

The defendants have been sued upon a promissory note dated Montreal, 22nd August, 1901, payable on the first of January, 1902, at the Dominion Bank here, made by M. Mendelsohn, and endorsed by the other defendant, Moses Mendelsohn, for a balance due thereon of \$291.64. Moses Mendelsohn, the endorser, went into insolvency, and Alexander Desmarteau was appointed curator; the latter waived protest, the note having been filed with him when it became due.

Defendant, Moses Mendelsohn, met the action by two pleas, one an inscription in law, and the other a plea to the merits. Both issues were referred to the trial Court. Defendant contends that he owes plaintiff nothing under the note, inasmuch as he was not duly protested, as required by sec. 51 of the Bills of Exchange Act of 1890. Further, that it does not appear that the curator was in any way authorized to waive protest, and that no order of a Judge was obtained by him, upon advice of the creditors or the inspectors of the estate. He contends that his right of renunciation is purely personal to the endorser, that he never gave his authorization to the curator to waive protest on his behalf, and, as a consequence, he is discharged from all obligation to pay the note or any part of it.

The plaintiff replies that the curator was fully empowered in his quality to waive protest on defendant's behalf.

This is a question of considerable importance. In support of his contention the plaintiff cites the case of *Bontin v. Cantin* (1897), Q.R. 12 S.C. p. 186, in which we find the following statement:—"In the present case the curator had given a waiver of protest, which he had a right to give, it being a matter of pure administration." He also refers to the *Am. & Eng. Encyclopedia of Law*, 2nd ed., vol. 4, p. 454, but the quotation is against his pretension: "BY WHOM WAIVER MAY BE GIVEN—It has been stated as a general rule, that the act or declaration which is to operate as a waiver of demand, protest or notice, must be the act or declaration of the person entitled to take advantage of these formalities, since to permit the acts or statements of another to have this effect would be a solecism."

Other authorities have been cited by the plaintiff, but they do not seem to have any application to the point in contestation. The question at issue is: Had the curator a right to waive protest on behalf of the insolvent endorser? The scope of the curator's functions is defined, 1st, by article 870 of the Code of Procedure: "The curator takes possession of all the property mentioned in the statement, as well as of the debtor's books of account and titles of debt, and administers the property until it is sold or realized in the manner hereinafter mentioned. He has in like manner a right to receive, collect and recover any other property belonging to the debtor, which the latter has failed to include in his statement, except such as is by law exempt from seizure." 2nd, by article 877, C.P.C.: "The curator may, with the leave of the Judge, upon the advice of the creditors or inspectors, exercise all the rights of action of the debtor and all the actions possessed by the mass of the creditors."

It appears to the Court that the administration of the curator under article 870 is confined to that of the property, until it is sold or realized upon according to the rules laid down, whilst, under article 877, there is no room for doubt that he needs the leave of the Judge upon the advice of the creditors or inspectors.

The right to waive protest on behalf of the creditors generally, might, perhaps, be conceded to the curator, but the Court cannot find authority anywhere enabling him to waive on behalf of the insolvent debtor. This view is borne out by Girouard on Bills and Notes, under sec. 49 at p. 153, as follows:—"By the English Act, it is provided that, where the drawer or endorser is bankrupt or insolvent, notice may be given either to the party himself or to the trustee. But as there is no insolvency law in Canada, that provision was left out by the Canadian Parliament. Notice of dishonour, in such a case, should always be given to the party himself, and if a trustee be appointed to his estate under the provincial laws, it would be prudent to repeat it to the trustee."

By sec. 51 of the Bills of Exchange Act, the defendant to be held responsible under the note in question as an endorser, was entitled to a notarial protest. That right he admittedly did not waive, it is a right personal to himself, and whilst the curator to his estate has power to administer his property, under the terms of the articles cited, it cannot be contended validly that he has any right to deprive the defendant of any of the privileges conferred upon him by a special statutory enactment. The different articles of the C.P.C. all tend to establish that the curator is the representative of the mass of the creditors. He administers the estate in their interests. When the insolvent debtor has rights they are carefully safeguarded, and the curator is not allowed to tamper with them of his own motion. Thus we find in article 879 of the C.P.C., as regards the sale of immovables, the Judge may order how the same are to be sold, upon application made to him by the curator authorized by the inspectors or upon the petition of an hypothecary creditor "after notice to the debtor." The law foresees that the debtor may have something to say on his own behalf, and, therefore, it provides that he shall have notice. In the present instance, it is admitted that the insolvent debtor was in no way consulted as to the waiver of a protest without which his liability ceased. There was no order of any Judge, even if such order could avail for anything beyond the interest of the mass of the creditors, and under those circum-

stances it appears to this Court that the plaintiff has lost his recourse, and his action is dismissed with costs.

The appeal was held before SIR M. M. TAIT, A.C.J., TASCHEREAU and LORANGER, JJ.

Jacobs, Patterson and Garneau, for the appellants.

The plaintiffs have taken action against M. Mendelsohn and Moses Mendelsohn jointly and severally to recover the balance due upon a promissory note of which one of the defendants was the maker and the other the endorser. The latter had made an assignment of his property (*cession de ses biens*), and Alexandre Desmarteau, curator appointed by the Court, had waived the notarial protest to the note when it matured.

The two defendants appeared, but only the endorser, Moses Mendelsohn, pleaded to the action. He filed an *inscription en droit*, alleging that neither he nor a Judge of the Superior Court had authorized the curator to waive protest; that such waiver moreover was a right strictly personal; and that therefore the want of a valid protest discharged him from all liability.

The Superior Court (Curran, J.), on this ground, dismissed the action. It is against this judgment that we have inscribed in review.

We respectfully submit that the plaintiffs cannot be completely deprived of their right of action even assuming that the grounds relied upon in the decision of the Superior Court are well founded. Judgment should have been given in their favour against the defendant, M. Mendelsohn, who appeared, but did not file a plea. The failure to serve a protest on the endorser could not discharge the maker of the note. We submit, moreover, that the judgment dismissing the action as to the endorser, Moses Mendelsohn, should be reversed.

The parties admit that Desmarteau, curator, did not obtain an order from a Judge of the Superior Court authorizing him to waive the protest.

The Court has then to consider two questions: 1st, Can the waiver of protest be made by the curator of the insolvent estate of one who, were he solvent, would have the right to insist upon a protest? 2nd, In order to waive the protest, should the curator be first authorized by a Judge of the Superior Court?

1st. The law requires notice of protest to the endorser with the sole object of notifying him that payment of the note bearing his signature has been refused, and that the creditor will look to him for payment (see Daniels, *Negotiable Instruments*, vol. 2, par. 973). It follows that such demand should be made on the person who can be compelled to pay. But when a trader makes a judicial assignment of his property, and the Court has appointed a curator to his estate, it is the latter only who is charged with the administration of the insolvent's property; he alone who receives moneys due to the insolvent and pays the creditors their dividends. The bankrupt himself, under penalty of a penal condemnation, cannot receive any sum of money, nor can he make a payment to his creditors, since any payment so made would be preferential and consequently fraudulent. The insolvent then being unable either to receive payment or to pay, it follows that his creditors cannot look to him for payment of their debts, nor his debtors for discharge from their obligations. All should apply to the person whom the law has provided to represent the insolvent or to take his place, that is to say, to the curator.

The holder of a note endorsed by the insolvent should apply to the curator for payment, since the latter only has the right to make such payment, and if the curator refuses to pay, it is on him alone that the protest should be served, and it is he alone who may insist upon the protest or waive it.

A consistent jurisprudence establishes that a waiver of protest can be made by the agent or the mandatary of the endorser: See *Am. and Eng. Ency. of Law* (2nd ed.), *Vo. Bills and Notes*, p. 454. "Waiver by Agent," note 1, p. 455.

Whether such mandatary has been appointed by the insolvent himself or by a judgment of a competent Court is of no importance. The question is whether he is mandatary or not. It is

impossible to contend that the curator is not the representative of the insolvent. The main thing is that the insolvent is completely deprived of the right to administer his affairs, and that he has, moreover, the right to intervene in certain cases provided for by the law (Art. 879 C.P.).

Waiver of protest is, one author says, a right personal to the endorser which cannot be exercised by any other person. That would be true if such waiver effected the alienation of a right or of a title. But it is only a renunciation of the form, and not an abandonment of the substance. The curator may make this sacrifice of the form which is only an act of pure administration: See *Esnault*, "Faillites," vol. 1, p. 462, par. 297.

A waiver of protest is no more a personal right than the abandonment of an acquired prescription. Our Courts are unanimous in declaring that payment by the curator to the creditor interrupts the prescription for the benefit of the latter. *Carter v. McLean* (1901), Q.R. 20 S.C. 395 (Lemieux, J.); *Boulet v. Métyer*, judgment given 12th December, 1902.

In the case before the Court the curator, in order to save the insolvent the costs of a notarial protest, waived the same. He evidently did not do so in order to create a debt against him whom his business it was to represent, but for the purpose of avoiding one. See *Daniel*, *Negotiable Instruments*, vol. 2, par. 1002.

2nd. Can the curator waive the protest without the previous authority of the Court? Art. 870 of the Code of Procedure defines the powers of the curator, and Art. 877 enumerates the cases in which the advice of the inspectors and authority from the Judge are necessary. We will refer the Court to two recent and very exhaustive decisions treating of the powers of the curator under the new Code of Procedure: *Hains v. Vineberg* (1898), 1 Q.P.R., p. 426; *Gagnon v. Proulx* (1898), 1 Q.P.R., p. 154.

The conclusion which follows from these decisions is that authority from the Judge is only required for some act of proceeding which would incur costs and expenses proportionately large to the creditors of the insolvent. In the present case the curator in waiving the notarial protest has not incurred any costs, but

has avoided them. The protest of bills of exchange and the waiver of protests are moreover only acts of pure administration: See *Boutin v. Cantin* (1897), Q.R. 12 S.C., p. 186.

Demers and De Lorimer, for the respondents.

Who can abandon a right? Is it he to whom it belongs, or a third party? Who has the right to the protest? Moses Mendelsohn and not Alexandre Desmarteau.

The powers of the curator are defined by articles 870 and 877 of the Code of Procedure.

The administration of the curator, by virtue of Art. 870 is confined to the property of the debtor until the same may be sold and realized upon, while, under Art. 877, there is no doubt that he required the permission of the Judge upon the advice of the inspectors or creditors. If, under our law, the debtor was deprived of all rights, if all proceedings of his creditors against him were suspended, we could understand that it might be said that the curator is seized of all his rights. At all events, if the curator may, in certain cases, waive a protest for the creditors in general, his waiver should be approved by them and by the Court, and it will not bind the insolvent debtor. Such is the opinion of M. Girouard in his work on Bills and Notes, sec. 49, p. 153: "By the English Act it is provided that 'where the drawer or endorser is bankrupt or insolvent, notice may be given either to the party himself or to the trustee,' but as there is no insolvency law in Canada, that provision was left out by the Canadian Parliament. Notice of dishonour in such a case should always be given to the party himself, and if a trustee be appointed to his estate under the provincial law, it would be prudent to repeat it to the trustee."

M. Maclaren also considers this question, namely, at sec. 41, par. 2, sub-sec. (a), 2nd ed., p. 237: "The Act of 1890, reads: 'Where the drawee is dead or bankrupt,' following the Imperial Act. As there is no bankrupt law in Canada, the words were struck out in other places, but left in here by inadvertence. They were struck out by the amending Act of 1891. Where there has

been an assignment for the benefit of creditors or an abandonment of his estate by a debtor under a provincial Act, presentment should still be made to him."

Under section 49 of the Bills of Exchange Act, the same author says at p. 260:—"Sub-section 10 of the Imperial Act, allowing notice to be given to the trustee of a bankrupt, was omitted as being inapplicable to Canada, there being no bankrupt law here, and the Act not recognizing or taking notice of the provincial Acts relating to assignments for the benefit of creditors or the appointment of trustees or curators to the estate of those unable to pay their debts."

It appears, therefore, from these authorities, that in England, where there is a bankruptcy law, it is allowable to give notice of protest to the trustees, but such permission to give notice to the trustees has been intentionally struck out of our law, and we have now nothing more upon this point than section 49, sub-section (h), which says: If it is directed that notice of the refusal should be given to a party, it can be given either to the person himself or to his agent for this purpose. M. Maclaren says under this section, at p. 266: "The agent should be some person designated for that purpose by the party, or in charge or employed at his office or residence."

The law then, has been violated, and under section 55 of the Bills of Exchange Act, the endorser is discharged.

The defendant, who may be sued, has a right to the notice mentioned in section 49, and the curator has not. It would be a solecism to say that the curator could waive this notice so as to bind the defendant. Moreover, no article of the Code declares that the curator is seized of all the rights of the person who has made an assignment of his property; the one who has made such an assignment has abandoned his property, but has not abandoned his rights. Some of them, indeed, are formally recognized, as we find in Art. 879 of the Code of Procedure that the curator can only sell the immovables after notice to the debtor.

In the present case the endorser was not consulted. The protest to which he was entitled was waived and waived without any

authority. Article 55 declares that he is discharged under such circumstances. In England, the law upon this point is different, any suit against a bankrupt without permission of the Court being forbidden. (46 & 47 Vict. ch. 52, sec. 9 (Imp.)).

Montreal, March 10th, 1903. SIR M. M. TAIT, A.C.J., delivered the judgment of the Court.

The defendant, M. Mendelsohn, is the maker, and the other defendant, Moses Mendelsohn, is the endorser upon a promissory note dated August 22nd, 1901, and the prosecution is to recover a balance due on said note.

The endorser, Moses, contests the action, alleging that the note was never legally protested as required by section 51 of the Bills of Exchange Act.

It appears that prior to the above date Moses made a judicial abandonment of his property under the provisions of the Code of Civil Procedure, and that Mr. Alexander Desmarteau was appointed curator to such abandonment. The latter undertook to waive protest. The endorsement on the back of the note is: "To waive protest. Moses Mendelsohn per A. Desmarteau."

It is admitted by plaintiff that the curator did this without leave of a Judge of this Court, or without the advice of the creditors or inspectors.

The whole question in this case is to determine whether a curator, upon an abandonment of property under the Code of Procedure, can bind the insolvent by waiver of protest under such circumstances.

I am of opinion that he cannot do so, and I think, therefore, the judgment should be confirmed which dismissed the action as against Moses, the endorser.

The provisions of the Code of Procedure, relating to the abandonment of property, have been adopted for the mere purpose of taking possession of the assets, either of a debtor who has been arrested upon a *capias*, or of a trader who has ceased his payments, and of administering and distributing such assets among the creditors. No person can make such an abandonment except

upon a demand made upon him, unless he has been arrested upon a *caipias*. The effect of such an abandonment is to deprive the debtor of his property, and gives the creditors the right to have it sold and realized for the payment of their respective claims, and for that purpose the property is placed in the possession of the curator, who administers it until it is so sold or realized. With the leave of the Judge, upon the advice of the creditors or inspectors, the curator may exercise all the rights of action of the debtor, and all the actions possessed by the mass of the creditors—the whole with a view of collecting and getting in all the assets of the debtor.

The creditors, however, are not prevented by any provisions of the Act from taking legal proceedings against the debtor to recover judgment against him. There is nothing that allows him to plead his abandonment as a bar to their actions, neither can he obtain any discharge under these provisions, except to the extent of any dividend that the curator may pay out of the realization of his assets. The idea of the Legislature evidently was that the curator could make more for the creditors out of them than the trader himself could do, and consequently he is divested of them. After the abandonment seizures against the movable property of the debtor are suspended (Art. 871), but as the creditors may sue, he certainly has the right to defend himself and to avail himself of any defence that the law may give him. The curator is not the agent or representative of the trader who abandons, except that he is authorized to administer his property and exercise his actions for the recovery of the debts. He has no mandate or authority to waive protest on a note any more than he would have authority to confess judgment in an action brought against the debtor abandoning.

The learned Judge who rendered the judgment of first instance appears to have overlooked the fact that the case was inscribed as against both the defendants, whereas the judgment deals only with the judgment against Moses, the endorser, and does not give any judgment against the other defendant who did not contest.

The judgment does not dismiss the action as against the other defendant. It is still open for the plaintiff to inscribe for judgment against him.

Judgment is confirmed with costs.

[IN THE SUPERIOR COURT FOR QUEBEC.]

(BEFORE CURRAN, J.)

ANGLO-CANADIAN MUSIC PUBLISHERS' ASSOCIATION, LIMITED

V.

DUPUIS.

Copyright—Infringement—Musical compositions—Qui tam action—"Author"
—Assignment of foreign copyright—Registration of, necessity for—
Publication—Imperial copyright under 5 & 6 Vict. ch. 45, sec. 29—
Scope of—Foreign reprints—R.S.C. 1886, ch. 62, sec. 15.

Certificates of registration produced from the proper branch of the Department of Agriculture at Ottawa are *prima facie* evidence of due compliance with the requirements of the Copyright Act entitling the producing party to registration under the Act.

Section 15 of the Copyright Act applies to the assignments of Canadian, not of foreign copyright.

Anglo-Canadian Music Publishers' Association v. Shaw (infra), followed. It is only when the plaintiff is seeking the recovery of penalties, the moiety of which belong to the Crown, that he must institute a *qui tam* action. Unauthorized foreign circulation and publication is no bar to effectual copyright in Canada.

By virtue of 5 & 6 Vict. ch. 45, sec. 29, the importation of foreign reprints into Canada is illegal against the owner of the Imperial copyright in the imported works even though he has ineffectually attempted to secure Canadian copyright.

Morang v. Publishers' Syndicate (1900), 32 O.R. 393, followed.

THIS was an action to restrain the importation, sale and advertising of pirated copies or reprints of certain musical compositions in which the plaintiffs claimed the copyright, for damages, an account, and forfeiture of all copies of said compositions in the possession of the defendant.

The facts and pleadings sufficiently appear in the judgment.

MacLennan, K.C., and J. J. Meagher, for the plaintiffs.

Beaudin, K.C., and St. Germain, for the defendant.

November 13th, 1903. CURRAN, J.:—Plaintiff, by its petition and action, sets forth: That it is the owner and proprietor of registered copyrights for the Dominion of Canada of the following musical compositions: "Dorothy," "Daddy," "Alice, Where Art Thou?" "Love's Old Sweet Song," "Calvary," and "Fantasia upon Gounod's Faust." That defendant had been advertising and offering for sale and disposing of unauthorized and counterfeited copies of said musical compositions, American reprints, in his departmental store in the city of Montreal, without the knowledge or consent of plaintiff and against its will. This conduct on the part of defendant it alleges has caused great loss and damage to it. Plaintiff sets forth the dates of the registration of its copyright, and, in conclusion, asks that defendant be condemned to pay two thousand dollars damages; that he be enjoined to immediately cease, under all the penalties of the law, the importation, publication, sale and advertising of counterfeit copies or reprints of the above musical compositions. That then he be ordered to render an account, under oath, of the number of copies imported and sold, and of those now remaining in his possession; that these be declared forfeited for the benefit of plaintiff, and be declared his property.

Defendant pleads: That plaintiff is neither the author nor the representative of the authors of the musical compositions referred to. That it does not appear by the allegations of its declaration that it became proprietor thereof by assignment or otherwise. That in any case plaintiff could not acquire the rights of the authors or of any of them, because long prior to the registrations of plaintiff such compositions had become public property by reason of their widespread and general circulation. Further, that the Copyright Act had not been complied with by plaintiff. That no deed or deeds of assignment has been filed with the Minister of Agriculture, and none of the formalities required by law had been observed. Plaintiff answered this plea by stating that copyrights of these musical compositions had been granted in England, and that the British proprietors had, by assignment in writing, granted their rights to plaintiff throughout

the Dominion of Canada, and that due notice of the British copyright and of the assignment of the same had been given to the Minister of Agriculture before registration in Canada. Plaintiff alleges further that being a corporation, it could not be the author of any of the compositions; that no general circulation of said musical compositions took place in a manner to affect plaintiff's rights or to interfere with registration, and that the assignments to plaintiff from the British proprietors, who had duly acquired from the authors of the compositions, did not require to be recorded in the office of the Minister of Agriculture before plaintiff registered these compositions in Canada.

Plaintiff has brought its action under the Canadian Copyright Act, but it avails itself of the general law as well. It has a right to do so. It has produced its certificates of registration from the proper branch of the Department of the Minister of Agriculture at Ottawa. By law these certificates are *primâ facie* evidence that plaintiff has complied with all the requirements of the statute to entitle it to such registration. Yet defendant is not debarred from making proof to rebut such *primâ facie* evidence. The contention of defendant is that the plaintiff having failed to record with the Minister of Agriculture copies of its assignments, prior to or at the time of its registrations, the latter are invalid. This question has caused the court much hesitation. The statute is drawn in such a way as to create embarrassment, but a careful reading of section 15 of the Copyright Act, on Assignments and Renewals, will convince anyone that the provisions apply to the assignment of Canadian copyrights and not to assignment of rights of proprietorship in the composition as urged here. Then we have decisions on this point already, more particularly in the case of *The Anglo-Canadian Company v. Shaw*,* where Chancellor Boyd, at Toronto, held the contention of plaintiff to be correct. The Chief of the Department of Copyrights, Mr. Jackson, has testified that the same proceedings as those adopted with regard to the plaintiff's registrations, have

* [This unreported judgment will be found set out in the *Notes* to this case.—Ed.]

always been followed at the Department, and whilst this Court is not bound to accept the interpretation given by this officer, yet he is an expert of undoubted ability and experience, and his opinion is worthy of much consideration. The Court will follow the precedent established by Chancellor Boyd.

Again, the defendants claim that this should be a *qui tam* action. If the plaintiff were seeking the recovery of any of the penalties, the moiety of which belong to His Majesty the King, this contention would hold good, but by the conclusions of its action plaintiff claims, merely, what the law grants to the author or his representatives.

By the interlocutory judgment rendered in this cause the filing of the assignment by plaintiff with its answer to the defendant's plea has been maintained, and the case is now before this Court on the merits pure and simple. The assignments as regards "Dorothy," "Daddy," "Love's Old Sweet Song" and "Calvary," are in due form. There is no assignment as regards "Faust," and that of "Alice, Where Art Thou?" is clearly defective on its face. As to the musical compositions, four in number, for which the registration has been properly had at Ottawa, and assignments have been regularly filed before the Court, plaintiff is entitled to its remedy. There is no proof that any of these were in general circulation by and with the consent of the plaintiff or its auteurs. The fact that they were published in the United States prior to 1891 proves nothing, as, up to that time, the piracy of such compositions in that country could not be controlled. But even should we hold that plaintiff has no right as regards five of its copyrights in Canada, its claim to protection with reference to the piece entitled "Calvary," which it had registered at Stationers' Company, in England, prior to the institution of this action, would still exist.

By the Imperial Statute, 5 & 6 Vict. ch. 45, sec. 29, the copyright secured under its provision is extended to the United Kingdom and to every part of the British dominions. A most exhaustive review of the law, as it now stands, will be found in the judgment of Mr. Justice Robertson, in *Morang v. The Publishers*'

Syndicate, Limited (1900), 32 O.R. 393, in which all the arguments of counsel for the defence have been met and disposed of, regarding customs regulations, which now no longer exist, and the statute just mentioned is shown to be in full force. The Court also directs attention to the case of *Black v. Imperial Book Company*, Commercial Law Reports, Vol. 1, p. 417, Mr. Justice Street. Plaintiff has a clear right to protection in Canada against the importation of foreign reprints by the defendant. However, it is enacted that to entitle plaintiff to institute proceedings in the United Kingdom it would be incumbent upon him to establish that previous thereto registration of its proprietorship had been made in the registry of the Stationers' Company. And, as already stated, as regards the composition "Calvary," registration there had been made prior to the institution of this action.

The Court is of the opinion that as to the four musical compositions already mentioned, plaintiff has established his case, under the Canadian Copyright Act, and is entitled to his remedy. The proof of record shows that defendant acted in very good faith in this matter. There were not many copies of these musical compositions imported, and they were not all sold. So soon as defendant was notified of these proceedings, in order to keep within the law, he caused all the copies he then had in his store to be destroyed. It is not, therefore, necessary to order the issue of any injunction. The actual damage to plaintiff is very small, not exceeding five dollars. But plaintiff was justified in taking those proceedings for the four pieces mentioned, and judgment will be entered for five dollars damages and costs as of injunction proceedings.

The plaintiff's action was maintained by the following judgment:—

The Court having heard the parties at *enquete* and merits, examined the procedure and documents of record, and upon the whole maturely deliberated:—

Whereas, by petition to this Court of the twenty-seventh of March, 1903, the plaintiff set forth that it is the owner and proprietor of registered copyrights for the Dominion of Canada of the following musical compositions: "Dorothy," "Daddy," "Alice, Where Art Thou?" "Love's Old Sweet Song," "Calvary," and "Fantasia upon Gounod's Faust."

That the defendant had, during the said month of March, and previously thereto, been advertising and offering for sale, and selling, without the knowledge or consent of the plaintiff, in his departmental store, in the City of Montreal, unauthorized and counterfeited American reprints of said musical works, thus infringing upon plaintiff's copyrights; that such action, on the part of defendant, is the occasion of great loss and damage to plaintiff; and that the plaintiff, petitioner, is entitled to an interim injunction to restrain the defendant and others dependent upon him from continuing to perform said illegal acts.

Whereas, the plaintiff, by its declaration reiterated the allegations of said petition, fully setting forth the date of registration of its copyrights, in the different musical compositions referred to, and alleging that the illegal acts of the defendant have caused the plaintiff damage of \$2,000, and praying that defendant be enjoined to immediately cease, under all penalties of law, the importation, publication, sale and advertising of all counterfeit or unauthorized copies or reprints of said musical compositions; that the defendant be adjudged to render an account under oath of the number of unauthorized or counterfeit copies of the said musical compositions, imported and sold by him, of the number of copies now in his possession; that the whole be declared forfeited for the benefit of the plaintiff, and declared to be its property; and that the defendant be ordered to deliver over the same to the plaintiff, within a delay to be fixed by this Court; and, further, that the defendant be condemned to pay plaintiff said sum of two thousand dollars.

Whereas the defendant, as well for answer to the petition for interim injunction, as for plea to the action of plaintiff, set forth:—

That all the allegations of the plaintiff's petition and declaration are false; that the plaintiff is neither the author of the musical compositions referred to nor the representatives of such author or authors; that it does not appear by the allegations of the plaintiff that it became proprietor thereof, by assignment or otherwise; that in any case the plaintiff could not acquire the rights of the author or authors of such musical compositions, inasmuch as long prior to the registrations of the plaintiff said compositions had become public property by reason of their widespread and general circulation. Further, that the Copyright Act had not been complied with by the plaintiff; that the musical composition in question had not been registered in Canada; that no legal copy of the same had been deposited with the Minister of Agriculture as required by law; and that the words indicating registration had not been properly printed on the face of such composition.

Whereas, the plaintiff, for answer to the said pleas, alleged that copyright of the said musical compositions had been granted in England, and that the British proprietors had duly assigned, in writing, their rights to the plaintiff throughout the Dominion of Canada, prior to their registration in Canada, and that due notice of said British copyrights, and of the assignments of the same, was given to the Minister of Agriculture before registration in Canada; that the plaintiff is a corporation and could not be an author, and that the allegation of the plaintiff as proprietor of such compositions necessarily implies that such proprietorship exists in virtue of assignments, and that it was unnecessary to mention such assignments in the declaration, in view of the reference to the registration of said compositions, and the corresponding allegations; that the said musical compositions were not circulated in any manner to interfere with registration, and that the assignments to the plaintiff from the British proprietors of the said copyrights, who had duly acquired the same from the respective authors of said compositions, did not require to be recorded in the office of the Minister of Agriculture before plaintiff registered the same compositions in Canada.

Considering that the plaintiffs have brought this action, as well under the common law as under the provisions of the Canadian Copyright Act,

Considering that by the conclusions of its declaration, the plaintiff asks for no penalties in which His Majesty the King has any interest, or to which the Crown is entitled to a moiety of the penalty, and that consequently the contention of the defendant that the present action is illegal and irregular, and should have been in the nature of a *qui tam* action, is unfounded,

Considering the interlocutory judgment rendered in this cause maintaining the answer of the plaintiff to the plea of the defendant,

Considering that the plaintiff has complied with all the requirements of the Copyright Act, and that it has filed its assignments with its answer to the plea in this cause, as to four of the musical compositions, but that as to two, one of them "Alice, Where Art Thou?" the assignment is defective, while there is no assignment as to "Faust."

Considering that there has been no general publication of any of the said compositions, by and with the consent of the plaintiff, and that any publication in the United States could not be controlled by the said plaintiff.

Considering that by law the plaintiff was not bound to record its assignments in the office of the Minister of Agriculture at Ottawa.

Considering that under the Canadian Copyright Act no registration of musical compositions duly assigned need be made at Stationers' Company in England,

Considering that as to the musical compositions "Dorothy," "Daddy," "Love's Old Sweet Song" and "Calvary," the plaintiff is entitled to its remedy under the Canadian Copyright Act, and that as regards "Calvary" it is also entitled to protection under the Imperial Statute, 5 & 6 Vict. ch. 45, sec. 29, said composition having been registered at said Stationers' Company in England prior to the institution of this action.

Considering that as regards the musical compositions mentioned in the foregoing *considerant*, the plaintiff has established its legal rights, and have proved the material allegations of its declaration.

Considering that the defendant is proved to have ceased selling any of the copies of said songs illegally imported by him, and that he has destroyed all the copies remaining in his possession at the date of the institution of this action, so as to avoid controversy, and that there is therefore no necessity now for the ordering of any injunction against him,

Considering that the damages proved in this cause are of a small amount and do not exceed five dollars,

Doth consider the proceedings of the plaintiff as regards the musical compositions "Dorothy," "Daddy," "Love's Old Sweet Song" and "Calvary" well founded, doth condemn the defendant to pay the plaintiff the sum of five dollars and costs of proceedings in injunction distracts to the plaintiff's attorneys.

Notes:

For the interlocutory judgment mentioned in the above judgment, see Vol. 2, Commercial Law Reports, at p. 325.

For a note on the question of "Imperial Copyright," and the extension of 5 & 6 Viet. ch. 45, to Canada, see Vol. 2, Commercial Law Reports, at p. 253.

For a note on "Proof of Copyright," see Vol. 2, Commercial Law Reports, at p. 316.

The case of *Anglo-Canadian Music Publishers' Association v. Shaw*, followed by Mr. Justice Curran in the above case, is an unreported decision of Chancellor Boyd, delivered on the 1st November, 1886.

The action was to recover the penalty and forfeiture imposed by section 13 of the Copyright Act of 1875, now section 32, R.S. C. 1886, ch. 62, for illegally importing and selling foreign reprints. The plaintiffs were the proprietors by assignment of the subsisting copyrights for Canada in certain musical compositions. The defendant was a wholesale music publisher in the United

States, and had imported and sold copies and adaptations of the said musical compositions which had been printed and published in the States. The defence was that the assignments of the rights of the owners of the British copyrights had not been filed with the Minister of Agriculture before the obtaining of the Canadian Copyright; that section 9 of the Act of 1875 (now section 12 R.S.C. 1886, ch. 62) had not been complied with; that, at any rate, the British Copyright had expired before the alleged unlawful importing and selling; that the musical compositions in which the plaintiffs claimed copyright were songs, while the defendant had lawfully reprinted in and imported from the United States, paying the royalty under the Foreign Reprints Act (see Vol. 2, C.L.R., pp. 216 *et seq.*, 253), arrangements and transcriptions for the pianoforte of the said songs, with additions and variations, constituting in themselves works entitled to copyright, for which works, in fact, British copyrights had been granted and were subsisting at the time of the alleged unlawful importations.

The judgment of Boyd, C., follows:—

November 1st, 1886. BOYD, C.:—I am prepared to hold that the transcript published in the United States is an infringement of the Canadian copyright of the original air. Take, for example, the "Bird in Hand." First, it purports to be "On Roeckel's Popular Song." Then you have the very music of that song introduced. The very words of that song printed above in two or three cases. As far as the air is concerned, it is identical through pages; not in separate bars, broken up, but continuously. So far as the harmony is concerned, it is identical in substance. It may be that in the bass, while the harmony is substantially the same, it is broken up into different notes, as Mr. Fisher said, for the purpose of more convenient fingering, or for other artistic reasons. But the air is identical, there is the same bass substantially, and unless I am going to overrule the case of *D'Almaine v. Boosey* (1835), 1 Y. & C. 288, which was cited, it is plain that this is a piracy of the original. The case cited of *Wood v. Boosey* (1868), L.R. 3 Q.B. 223, is not at all in point here; because that was an adaptation or rendering of an orchestral score into a score for the pianoforte. It was adapting the various effects of brass and stringed instruments to be played upon the pianoforte, which it was thought was a matter perhaps of substantive invention. There was a modification or total change of the piece from stringed and wind instruments, adapting it to the single effect of

a pianoforte instead of the various effects of an orchestra. That is the plain difference in that case; and it does not interfere with the case in Young & Collyer, which was rendering the air into quadrilles, waltzes, and so forth, keeping the same air. It is the air which strikes the popular ear and makes the accompaniment pass current. We have here this air preserved, and it is merely an arrangement for the pianoforte. The original song was with a pianoforte accompaniment; and the only change made is to displace the words in part and arrange the music in a more flowing way, to play it on the piano, but preserving the same theme. So that if it were simply a question between the original and the American transcript introduced, I should have no doubt the latter should be enjoined.

If there were no statutes in question and this were simply a matter of copyright law, even if the American introducers had themselves procured this adaptation to be made, I should hold it to be an invasion. The question is, does the effect of the legislation imply the virtual right of the English copyright owners to claim royalties on the importation from the States so as to give the defendants a license which otherwise they might not have to introduce these pieces here? In other words, if the defendants introduce these pieces here and pay the duties, are they exempt from penalties in doing that?

I think the objection as to the authorship of the original compositions not being proved is displaced, because in the very documents produced by the defendants it is shown. In the papers produced from the custom house it appears that the proprietors there as stated, and assignments have been procured from them. So that if there was any flaw in the plaintiffs' case it has been supplemented by the evidence of the defendants. I think, however, that reasonable evidence has been given to show that the originators of these different pieces of compositions have assigned to Boosey & Co. and the other English proprietors, and that from them there have been proper assignments to these plaintiffs. I don't feel pressed by the objection in criticism of the Act, that in the one section it does not refer to assignees, but simply to legal representatives. The Act does give the right to the author to assign. It gives the right to the author to sell to another proprietor. And no one would conclude, unless compelled, that the word "author" in that section was limited to the person who originated the composition, and did not extend to the purchaser or the assignee. I shall hold that it applies to the assignee, and, there-

fore, the plaintiffs are within the meaning of the statute in this place.

I have adverted to the other point as to infringement. I have no doubt there is an infringement, if the matter is disembarassed from the effect of the statutes. I have heard all that can be said about the statute. There is no decision on the point, which is a new one. I think it would be giving an effect to these Acts contrary to what was intended to say that they protect the defendant. The Act does not contemplate an original copyright and a super-induced copyright by reason of adaptation to some additional purpose. That does not seem to be within the meaning of the Act. On referring to the construction given to the statute in the case of *Smiles v. Belford* (ante p. 216), it is plain that the moment a Canadian copyright is obtained, the person holding that has a perfect copyright. I don't think that any limited effect is to be given to it as contended. I think that the meaning of the statutes, both colonial and Imperial, was to give the holder of a Canadian copyright a perfect copyright, and to furnish him with means of protection at all points. I take it that the plaintiffs in this case are in precisely the same position as if the English holders, Boosey & Co., and the rest of them, had procured Canadian copyrights for these songs in this country. If they had done that, what would have been their position? Could it be said that people in the States, pirating a transcript and bringing it in here, if the English proprietors had had this song copyrighted here, could it be said that the effect of the legislation was to sanction the admission of the pirated copies on payment of the twelve and a half per cent. imposed at the Custom House? It would be said at once, "No; that is not the meaning of the Act." The legislation imposing the duty was a rough and ready way of giving protection under the circumstances. It was not adequate, but merely for the time being, imperfect at best. How could it be said in the circumstances I have put, that if a copyright of the song had been procured here by the holders, that a transcript could be brought in from the States in that way? It would be said: "No; you cannot bring it in under cover of that, if it is in contravention of the Canadian copyright." The moment a copyright of the original song is here you must get rid of the effect of that copyright, and if one-half of the transcript you bring in infringes upon that copyright, then as to that part you must be enjoined. It may be there is not the right of interference as to the whole. Probably not, as to the parts that do not

infringe. But so far as the music of the American publishers is an infringement of this song, for that part of it the plaintiffs are entitled to an injunction, and that, of course, eviscerates the whole. I feel that this is the result I must come to. The law was not intended to protect the American introducer in such a case as this. When copyright has been procured in Canada the foreigner has not only to deal with the subordinate English copyright of Boosey and others, but he has to deal with the proprietor of the song, who has obtained his copyright in this country; and any statutable or constructive connection between the English holders and the Americans cannot be allowed to prevail to the loss and disadvantage of these plaintiffs, who have purchased a right that no such connection between the other two can prejudice. I do not find that there is any such connection as to the greater part of these songs. As to two only the English proprietors of the adaptation appear to have put in their claim, but even if they had received their money I do not think that would support the defence in this case. The English holders of such subordinate copyright cannot lessen the rights of the Canadian holders of the original copyright by any expedient of that kind. I think that the rights of the Canadian holders remain in full force, and what was done in this case by the payment of duties simply relieves the American importers from being subject to any action on the part of Boosey and the other English proprietors. But the rights of the English holders are quite distinct from those of the Canadian holders; I think that under the law of this country they are entitled to the fullest protection, and under that belief I give the injunction and award the penalty.

[IN THE COURT OF APPEAL FOR ONTARIO.]

MIDLAND NAVIGATION CO. v. DOMINION ELEVATOR CO.

*Ship—Charter-party—Arrival of ship at place of loading—"Load"—
Meaning of—Measure of damages.*

C., representing the defendants, wired R., representing the plaintiffs, "to load Midland Queen last trip at Fort William, at four and one-half cents, to discharge at Georgian Bay or Goderich;" R. wired C.: "Playfair (plaintiffs' manager) confirms charter Queen, Fort William to Goderich, loading about December 2nd (1901), weather, ice, permitting, four and one-half cents bushel;" C. wired R.: "We confirm Midland Queen, four and one-half, Goderich, load Fort William on or before noon fifth December." The steamer reached Fort William on the 3rd of December, and left an hour before noon on the 5th of December, without the cargo. The steamer was obliged to leave, because the insurance would have expired if the return voyage had not then commenced. It appeared that, owing to a blockage of steamers at the elevator wharves, loading could not have been completed by noon of the 5th of December, though it could have been commenced.

Held, MACLENNAN, J.A., dissenting, that the defendants, having had before and at the time specified for loading, a sufficient quantity of grain in the elevators, which, upon the evidence, was the place of loading contemplated and agreed upon by both parties, to have furnished a full cargo if the vessel had come under the spouts of the elevators, they had performed their part of the contract and were not bound to provide or secure for the vessel an unimpeded access to the spouts in time to enable her to load there within the time specified, or failing that, to load her by some other means within the specified time.

Held, further, that the defendants having been released from their contract to deliver the grain at Goderich, having, later, sold some, if not all, of the grain at prices not shewn to have been less than the original selling price, and the damages being measured by the injury suffered by the cargo being left on the defendants' hands, nominal damages only should be allowed for the plaintiffs' breach of the contract.

Per MACLENNAN, J.A., dissenting, the true construction of the word "load" in the contract is that the defendants would complete the loading within the time limited therein.

Decision of MACMAHON, J., reversed.

THIS was an appeal from the decision of MacMahon, J., at the trial. The action was to recover \$4,950 for alleged breach by the defendants of an agreement to furnish the plaintiffs' steamer "Midland Queen" a cargo of grain to be carried from Fort William to Goderich. The defendants denied liability and counter claimed for \$7,500 damages for alleged breach of agreement to carry the cargo between the two places.

The facts sufficiently appear in the head note and the judgments.

MACMAHON, J., whose judgment was delivered on the 19th of September, 1902, in discussing the meaning of the words "load on or before noon 5th December," after referring to *Bowes v. Shand* (1877), 2 App. Cas. 455, continued:

"According to my reading of the contract in this case, the words in their natural sense have a definite meaning, which is, that the vessel was to be *completely* loaded by noon on the 5th December. "To ship" and "to load" are synonymous terms, and each means the completion of putting the cargo on board. See judgment of Lord Selborne in *Grant v. Coverdale* (1884), 9 App. Cas. at p. 475.

There was, however, evidence given on behalf of the plaintiffs, as to what is the meaning amongst shippers of "to load," that it means that the whole cargo is to be in the vessel at the time stated in the contract. Evidence was given on behalf of the defendants that the contract would be complied with if the charterer had commenced loading at the time named.

There is no provision in the contract for "lay days" and "demurrage days." When a fixed time is provided in the contract for loading a vessel, it is the duty of the charterer to load within that time, whatever may be the nature of the impediments which prevent him from performing it: *Postlethwaite v. Freeland* (1880), 5 App. Cas. 599; *Abbott on Shipping*, 5th Ed., p. 180, 14th Ed., pp. 394, 396; *Randall v. Lynch* (1809), 2 Camp. 352; *Budgett v. Binnington*, [1891] 1 Q.B. 35; *Davies v. McVeagh* (1879), 4 Ex. D. 265; *Tapscott v. Balfour* (1872), L.R. 8 C.P. 46; *Pyman v. Dreyfus* (1890), 24 Q.B.D. 152; *Scrutton on Charter-parties*, 4th Ed., p. 96; *Dahl v. Nelson* (1880), 6 App. Cas. 38."

The appeal was heard before MOSS, C.J.O., MACLENNAN, GARROW and McLAREN, J.J.A.

Aylesworth, K.C., and *C. A. Moss*, for the appellants.

Robinson, K.C., and *Hodgins*, K.C., for the respondents.

September 14, 1903. Moss, C.J.O. :—The plaintiffs' claim is that on or about the 23rd of November, 1901, the defendants chartered the plaintiffs' steamship "Midland Queen" to proceed to Fort William and take therefrom a full cargo of grain for the defendants to the Port of Goderich, the cargo to be loaded at Fort William on or before noon of the 5th December, 1901, and that in accordance with the charter the "Midland Queen" proceeded to Fort William and arrived there on the 3rd December, and was from her arrival until noon of the 5th December prepared and ready to receive the stipulated cargo, but the defendants neglected and refused to load the said cargo on or before the time agreed upon and she was compelled to leave Fort William light, whereby the plaintiffs lost the freight and suffered other damage.

The defendants deny these allegations and by way of counter-claim set up that in November and December, 1901, they were possessed of 102,000 bushels of wheat in store in the C.P.R. Company's elevators at Fort William, and according to mercantile usage and the plaintiffs' knowledge the only way of loading such wheat for shipment by water was into vessels lying alongside the elevators, the wheat being conveyed from the elevators to the vessels by spouts, the elevators being, as plaintiffs well knew, the only places at the port of Fort William from which grain can be loaded into vessels; that about the 25th November, 1901, the defendants chartered the "Midland Queen" from plaintiffs to proceed to Fort William to receive from the elevators and take to the port of Goderich 102,000 bushels of wheat, and it was a term of the contract that the vessel should arrive and be at the elevators ready to receive her cargo on or before noon of the 5th of December; that defendants were at all times ready and willing to load the said wheat on the vessel, but she did not proceed to or report at the said elevators to receive the said wheat on or before the said date or at any time; that the time named for the arrival of the vessel at the elevators was an essential part of the contract by reason of certain insurance stipulations, and that owing to the plaintiffs' breach of the contract,

the defendants were unable to ship the wheat and thereby suffered damages.

In reply and defence to the counterclaim the plaintiffs deny that the defendants had the wheat in store as alleged or that it was a term of the charter contract that the vessel should be at the elevators, but say that if it was, the defendants had not the wheat and could not have loaded the vessel if she had been at the elevators; that it was the duty of the defendants to have provided proper accommodation for the loading of the vessel at Fort William on or before noon of the 5th of December, but they failed to do so; that the vessel arrived within the port of Fort William early on the 3rd of December and promptly notified the defendants, but they did not provide her with a load, so that she was compelled to leave Fort William light on or just before noon of the 5th of December in order to retain her marine insurance.

Issue being joined, the action was tried by MACMAHON, J., without a jury.

As the case developed at the trial the controversy between the parties was reduced to the question of whether the defendants had performed their part of the contract by having, as it was shown that they had, before and at the time specified for loading, a sufficient quantity of grain in the elevators at Fort William to have furnished a full cargo if the vessel had come under the spouts, or whether they were bound to go further and provide or secure for the vessel an unimpeded access to the spouts in time to enable her to load there within the time specified or failing that to load her by some other means within the specified time. And this is the main question for decision in this appeal.

There is a further question whether if the defendants are liable at all, the damages awarded ought not to be reduced by the amount of the expense which would have been incurred by the vessel in carrying the cargo to Goderich.

In delivering judgment the learned trial Judge stated that these expenses should be deducted; but in settling the formal

judgment the question was referred to him and he directed that no reduction should be made.

The learned trial Judge found for the plaintiffs and directed judgment to be entered for the plaintiffs for the sum of \$4,590, being the amount of the freight which would have been earned if the vessel had received her cargo.

The main facts are scarcely, if at all, in dispute. Both parties set up and rely upon a contract contained in a number of telegrams and some letters passing between one A. F. Read, of Montreal, who was admittedly acting for the plaintiffs, and one G. R. Crowe, of Winnipeg, with regard to whose position some doubt has been raised, but whom the learned Judge has found to have been acting for the defendants.

Two of the telegrams upon which a great deal of the controversy turns are those of the 23rd of November, 1901, and are as follows:—

(1) Read to Crowe. "Playfair confirms charter 'Queen' Fort William to Goderich, loading about December 2nd, weather, ice permitting, four and a half cents bushel, confirm."

(2) Crowe to Read. "We confirm 'Midland Queen,' four and a half Goderich, load Fort William on or before noon 5th December."

Following these was a letter from Read to Crowe, dated November 23rd, stating as follows:—"Playfair wires confirming charter to you of steamer 'Queen' to load at Fort William before noon December 5th to Goderich at four and a half cents per bushel. Please say who she is to be loaded account of and to whom captain will apply for grain."

This letter which expressed the plaintiffs' understanding of the terms of the contract and their acceptance of them was received by Crowe and by him to be handed or read or the contents stated; to one Frederick Phillips, the defendants' general manager at Winnipeg, and was accepted without objection.

The plaintiffs' vessel sailed for Fort William on the 30th November and her departure was notified by Read and Playfair, the plaintiffs' manager, to Crowe at Winnipeg.

In the fall of 1901 there were at Fort William three working elevators, the property and under the control of the Canadian Pacific Railway Company, and beyond doubt fully answering the description of terminal warehouses within the definition of the Manitoba Grain Act 63-64 Vict., Ch. 39 (Dom.)

They were situate up stream three-quarters of a mile or more from the mouth of the river. The one nearest the mouth was known as Elevator C. About 200 feet further up was Elevator A and 1,000 or more feet further on was Elevator B. There was also a steel or tank elevator situate still further up stream, but this was not available in December, 1901.

There are no special berths for vessels, but along the north bank of the river is a long continuous dock with a line of posts to which the vessels may tie up. And by the established practice of the port all vessels except the Canadian Pacific Railway Company's passenger steamers are required to wait their turn and come up to the elevators in the order of their arrival in the river.

The only method of loading vessels with grain at Fort William was through the spouts of the elevators, and a vessel of the capacity of the "Midland Queen," *i.e.*, about 103,000 bushels, could be loaded in eight or nine hours from the time she came under the elevator spouts.

Upon the arrival of a vessel the captain reported to the person in charge of the elevators and without this person's leave the captain could not bring his vessel under the spouts of the elevator.

In the fall of 1901 the elevators were in charge of one Sellers, to whose orders the vessels were subject as regards the order and time of their coming to load.

The "Midland Queen" arrived and tied up along the bank of the river on the afternoon of Tuesday, the 3rd of December. At that time of the year, within a couple of days of the close of the season, there is always a number of vessels waiting their turn and there were eight vessels ahead of the plaintiffs' in course of being loaded or awaiting their turn at the elevators.

The plaintiffs' vessel was insured under two policies, in each of which was contained a warranty that she should not be engaged in navigation from December 5th, 1901, to April 1st, 1902, but in the event of her being on a voyage at noon on the 5th of December, 1901. (Chicago time) the policy was to continue until arrival at port of destination.

This was not made known to the defendants, but they were aware that the usual condition of insurance on hulls was to that effect. The defendants were covered by open policies on all shipments up to and inclusive of the 5th of December on vessels reporting at an elevator ready to load at or before 6 o'clock in the afternoon, but this was not known to the plaintiffs otherwise than as they may have been aware of the general conditions of insurance upon cargoes carried on the Upper Lakes.

It may not be very material to the real question between the parties, but upon the evidence it should be found that the captain of the plaintiffs' vessel reported to Sellers soon after his arrival. His account of this is circumstantial and is not overborne by Sellers' denial.

However, it seems clear that the vessel's position and priority in the line of arrived vessels was not prejudiced by Sellers' failure to remember the fact of being notified in the afternoon of the 3rd of December.

On the same afternoon Reese, the defendants' agent at Fort William, met the captain and had a conversation with him. Reese had been informed by the defendants that the vessel was to come to Fort William, but he knew nothing about the terms of the contract until he spoke with the captain.

They then discussed the probability of getting the vessel loaded by noon of the 5th. They were agreed that it was unlikely that it could be done in consequence of the number of vessels ahead, and Reese suggested that he would wire the defendants to see if they could not get the vessel loaded at Port Arthur. He despatched a telegram to the defendants saying, "Midland Queen' here. Big fleet ahead of her. Can you arrange load her at Port Arthur."

Then ensued some telegrams about seeing what could be done if rate was reduced, but it all came to nothing, for Phillips, the defendants' manager, was unable to arrange with the Canadian Pacific Railway Company to move wheat to Port Arthur or to get special arrangements for loading at the elevators.

On the morning of the 5th the vessel had in due course reached a place in the river where she was within about 300 feet of Elevator C. There was a vessel (the Rosedale) at the spouts and the plaintiffs' vessel was next in order for them.

It was supposed that the Rosedale would complete her loading about 9.30 in the morning. Before that time Sellers told the captain of the plaintiffs' vessel that they could not fully load her before noon, but proposed that she should come under the spouts and he would start her load before dinner so as to save the insurance and complete her that night. He knew that the vessels were hastening to get away before noon to save their insurance.

At first the captain seemed disposed to meet the suggestion, but finally on receipt by him of a telegram from the plaintiffs ordering him home he left for Collingwood shortly before eleven o'clock, it being apparent of course that she could not load before noon.

From the time of her arrival until her departure both parties appear to have been exerting themselves to the utmost to get the vessel loaded.

The plaintiffs claim that the failure to do so was due to the defendants' default.

The defendants on the other hand claim that they did everything that the contract required and had the cargo at the place of loading ready to be loaded into the vessel before the time named in the contract, and that the failure to do so was owing to the default of the plaintiffs in not having their vessel at the place of loading ready to take her cargo on board within the time specified in the contract.

The defendants' duty under the contract was to furnish a cargo of wheat at the place of loading agreed upon, and upon the evidence it is beyond question that the place of loading con-

templated and agreed upon by both parties was the elevators. There was no thought or intention in the minds of either of loading by any other means than through the elevator spouts. In fact there was no other method of loading grain at Fort William, and this was perfectly well understood by the parties at the time of making their agreement.

In the contract in question where the parties speak of Fort William they must be deemed to be speaking of the elevators as the defined place at which the loading was to take place and the proper way to read it is as if the words "at the usual place" were in the contract, for that is in effect what the parties contracted for.

The plaintiffs' contract, therefore, was to proceed to the usual place of loading and there receive the cargo and carry it to Goderich, the point of destination.

The defendants' contract was to have a cargo of grain at the elevators ready to deliver, so as to enable the loading to be completed within the time limit. A question has been made as to the time at which the loading was to be completed—whether the contract required that it should be completed at or before noon of the 5th of December or whether it called for more than that the loading should be commenced at or before that hour.

It must be taken that Crowe's telegram to Read of the 23rd November, "We confirm 'Midland Queen,' four and a half, Goderich load, Fort William on or before noon," was despatched on behalf of the defendants and that the language was theirs or was adopted by them. Read's letter of the same day shewed his understanding of that telegram and if the defendants' understanding was different it was their duty to have drawn attention to it and have the matter put right before it was acted upon.

The telegram and letter fairly read convey the meaning that the vessel was to get her load by noon, that is, that the defendants were to have the cargo at the elevators ready to deliver within such reasonable time before noon of the 5th as to enable the vessel to be loaded by that time. In that respect the defendants have made no default, for it is now beyond question that they

had the grain at the elevators and that the vessel could have been loaded in good time if she had come to them.

No liability as to loading attached to the defendants. The law in this respect appears to be as stated by Brett, L.J., in *Nelson v. Dahl* (1879), 12 Ch. D. at p. 582: "The primary right of the charterer as to loading under a charter-party in ordinary terms seems to me to be that he cannot be under any liability as to loading until the ship is at the place named in the charter-party, as to the place whence the carrying voyage is to begin and the ship is ready to load and he, the charterer, has notice of both these facts; when these conditions are fulfilled the liability of the charterer begins."

In the present case if the true construction of the contract is that the place of loading was the elevators then the vessel was never at the place named in the charter-party as the place whence the carrying voyage was to begin.

The plaintiffs, however, contend that not only were the defendants to have the cargo at the elevators ready to deliver within a reasonable time before the expiry of the time, but they were also bound to have and keep a clear road to the elevators so as to enable the vessel to reach the elevators in sufficient time to enable her to receive her load before the expiry of the limit.

It may be that if the elevators and the ways were the defendants' property that would have been their duty. They would certainly not be justified in keeping obstructions in the vessels' way. But to the knowledge of both parties the elevators were terminal warehouses not in any manner under the contract of the defendants, and all vessels arriving were subject to the custom or practice of the port by which they must load in turn, though even if the custom was not known to them it would make no difference.

In *Postlethwaite v. Freeland* (1880), 5 A.C. at p. 613, Lord Blackburn said, referring to a charter-party which contained a reference to the custom of the port: "I do not think that this alters the question as the express reference to the custom of the port of discharge is no more than would be implied. For I take

it that a charter-party in which there are stipulations as to loading or discharging cargo in a port is always to be construed as made with reference to the custom of the port of loading or discharge as the case may be. See *Hudson v. Ede* (1867), L.R. 2 Q.B. 566, though it was expressly found in that case that the ship-owner and his broker were not aware of the usage." Later on Lord Blackburn approved of the direction of Lord Coleridge to the jury that "custom" in the charter-party did not mean custom in the sense in which the word is sometimes used by lawyers, but meant a settled and established practice of the port.

The settled and established practice at Fort William in regard to loading vessels with grain is clearly shewn to be to load at the elevators in their turn. The defendants did nothing to cause any obstruction to the plaintiffs' vessel or to prevent her from reaching the elevators and being loaded according to the custom.

The principle that has been applied in regard to discharging, where, by the custom of the dock, the work was done by third parties independent of both the ship-owner and the charterer, as in *The Jaderen*, [1892] Pro. 351, ought in reason to be applicable to loading.

The plaintiffs having failed to shew that the defendants were in default are not entitled to succeed against them and their action should have been dismissed.

It follows that the plaintiffs having failed to perform their part of the contract are liable for the consequences of the breach unless they can excuse themselves on the ground of prevention by the other vessels. But they were aware when they made the contract of the chance of there being a block of vessels awaiting their turn for the last trip and must be regarded as having undertaken the chances resulting from that condition of affairs. Their insurance was liable to be ended unless they were on a voyage at noon on the 5th December and knowing that and the probability of a block at Fort William they should have made sure of the arrival of the vessel in time to enable her to load in time. And not having done so and having departed without a

cargo the defendants are entitled to such damages as they can shew to be such as may be considered to have fairly resulted from the breach of the contract and to have been in the contemplation of the parties.

The defendants make claim for loss of interest on the price of the cargo, for insurance, for extra freight and for depreciation in price.

They were relieved by McGaw, the purchaser, from the contract they had made to deliver the grain at Goderich and they were therefore not called upon to forward the grain by other means of conveyance at an increased rate and no charge on that account can be maintained. The damages are, therefore, to be measured by the injury suffered by the cargo being left on the defendants' hands: *Mayne*, 3rd edn, 259.

It appears that the price that was to be paid by McGaw was regulated by the price of Chicago May wheat, and although the defendants say there was a loss to them of profit by reason of such sale being given up, their manager, Mr. Phillips, was unable to put it into figures.

Besides, the defendants disposed of a considerable part, if not all, of the quantity to be carried, at the elevators or at Fort William not long after the plaintiffs' breach, at figures which Phillips rather vaguely puts at from three to four cents a bushel below the price on the 5th of December, but he furnishes no satisfactory data and on the evidence it is not possible to say that the price realized was not equal to the price to be ultimately paid at Goderich less the four and a half cents per bushel for freight.

The fact of the sales and that Mr. Phillips found it impossible to separate the grain intended for Goderich from the other grain in the elevators upon which he had to pay storage and insurance, reduce the claim for interest, storage and insurance to a small sum which does not appear to be capable of separation from the other claims and the amount of which is not stated.

On the whole, in view of the circumstances and the nature of the evidence on the question of damage the defendants should

be confined to nominal damages for breach of the contract, say fifty dollars.

The appeal is allowed, and the plaintiffs' action is dismissed with costs. There will be judgment for the defendants on their counter claim for fifty dollars damages with costs.

The plaintiffs must pay the costs of the appeal.

MACLENNAN, J.A., dissenting: I am of opinion that the judgment is right and should be affirmed.

The contract is found in the telegram from the defendants' agent, Crowe, of the 23rd of November: "We confirm 'Midland Queen,' four and a half, Goderich, load Fort William on or before noon 5th December."

The port of Fort William is the outlet of the River Kaministiquia, and is about 300 feet in width, extending from the lake up the river about a mile. There is a continuous line of wharves along the north-east shore for about a mile. There are three elevators, each about 350 feet in length, from which grain is loaded into vessels. They are erected upon the wharf about half a mile up the river, and designated respectively C, A and B, C being nearest to the lake, A next and B furthest up the stream. Between C and A there is an interval of about 250 feet, and between A and B an interval of from 1,000 to 1,200 feet.

Vessels are loaded by means of spouts from any or all of them, and a vessel may be loaded partly from each.

In the present case, Mr. Sellers, who was in charge of the elevators, says he could have loaded the plaintiffs' ship on the 5th of December with from 2,000 to 5,000 bushels from C, which would have emptied that elevator, and she would then have had to proceed to A, where she would *very likely* have got the remainder of her cargo of 102,000 bushels.

The plaintiffs' ship arrived at Fort William from Midland on the afternoon of the 3rd of December, and the learned Judge finds, and I think properly, that her arrival was immediately notified to the defendants' agent, and also to Mr. Sellers, who was in charge of the elevators.

There were, however, six other vessels in port before her, waiting to be loaded and the loading of which prevented the plaintiffs' ship from being loaded within the time named in the contract, the hour of noon on the 5th December. In consequence of this the plaintiffs' ship was obliged to sail without cargo, at the peril of her insurance expiring at noon on that day, in the event of her being in port, and not upon a voyage at that hour.

The contention of the defendants is that the plaintiffs' ship not having come under the spouts of the elevator in time to be loaded before noon, they had broken their part of the contract, by reason whereof, not only were they precluded from recovering damages from the defendants, but that they became liable to pay damages to the defendants, which they sue for by counter claim. The defendants also contend that by the true construction of the contract the word "load" used therein meant no more than commencing to load, which it is admitted, might have been commenced by the hour of noon. With regard to this last contention, I think it is too clear for argument and well settled by authority that "load" must be taken to mean the completion of the loading, and not merely the commencement.

As to the other contention it is said that it was not sufficient for the ship to arrive in port, and to make known her arrival there, but that she must have come to the very port where she was to receive her load. But it is apparent that this cannot be so. The plaintiffs did not, and could not, know in which of the elevators the defendants' grain was stored, nor from which of them she was to receive her cargo. That was information which had to be communicated to them by the defendants after arrival at the port.

It was also said that the plaintiffs were bound to arrive in such time that their ship would have such precedence over other ships that she would be certain to receive her turn and her cargo before noon. I am unable to put that construction upon the contract.

It may be conceded that the plaintiffs are affected by knowledge that the custom was that vessels were loaded in turn

according to the order of their arrival in port, with the exception of the steamers of the Canadian Pacific Railway Company, but there is no reference to that in the contract, and the time limit for loading expressed in the contract neither expresses nor implies any qualification by reason of that custom. In my opinion the true construction of the contract is, that, conceding the custom, the defendants would complete the loading within the time.

To construe it otherwise would mean that the plaintiffs were to be loaded by noon, only in the event of the elevator containing the defendants' grain being clear in sufficient time for that purpose, and if not that the defendants were not bound to load her at all.

I think the citations made by the learned trial Judge from the authorities establish that where the contract contains an unqualified time limit for loading on the part of the charterer and the ship has arrived at the port in sufficient time, the charterer is answerable for not loading within the time, whatever be the nature of the impediment which prevents him from performing it. I refer to the citations from *Postlethwaite v. Freeland* (1880), 5 App. Cas. 599, 618; *Randall v. East* (1809), 2 Camp. 352; *Budgett v. Binnington*, [1891] 1 Q.B. 35, 40; *Davies v. McVeagh* (1879), 4 Ex. D. 265; *Tapscott v. Balfour* (1872), L.R. 8, C.P. 46; *Pyman v. Dreyfus* (1890), 24 Q.B.D. 152.

It was argued that the cases of *Postlethwaite v. Freeland supra* and *Dahl v. Nelson* (1879), 6 App. Cas. 38, were favourable to the defendants. I do not think so. The contract in the first case was that the cargo was to be discharged "with all dispatch according to the custom of the port," and it was held that having been discharged with diligence, so far as the means available at the port enabled it to be done, the charterer was not liable for delay.

In *Dahl v. Nelson* the contract was to proceed to certain docks or as near thereto as she might safely get and be afloat. The dock was occupied and entrance was refused by the dock authorities. The ship was then taken as near as she could safely

get and unloaded by the master by means of lighters, and it was held he was warranted in so doing. There was no time limit to either of these cases and in my opinion they are no authority for the contention of the defendant.

Another circumstance which makes it clear that the plaintiffs could not know without information from the defendants, from which elevator or elevators they were to be loaded is this. The grain of different owners is not kept distinct in the elevators, but there are several different grades of grain and the grades are kept distinct. The plaintiffs could not know without information of what grade the defendants' grain consisted, whether all of one grade or of several different grades, any more than they could know in which of the elevators it was stored.

Upon the whole, I am of opinion that the plaintiffs were in no default; that the defendants were bound by the time limit in the contract and, having failed to load the plaintiffs' ship within that time, are liable for the loss suffered by the plaintiffs.

GARROW AND MACLAREN, J.J.A., concurred in the judgment of MOSS, C.J.O.

Appeal allowed, MACLENNAN, J.A., dissenting.

[Note.—An appeal by the plaintiffs from this decision is being taken to the Supreme Court of Canada. Ed.]

Notes:

DUTY OF CHARTERER AS TO LOADING AND DISCHARGING.

The result in the above case is decidedly unsatisfactory in view of the conflict of opinion manifested by the Judges. It is the first case reported on this subject in Ontario, and, as far as we have been able to learn, in the Dominion. An appeal to the Supreme Court is now pending. It is hoped that an authoritative pronouncement in that Court will set at rest the existing uncertainty.

The cases referred to by the learned Chief Justice were *Dahl v. Nelson* and *Postlethwaite v. Freeland*. The first contains an elaborate exposition of the rights and liabilities of the charterer and shipowner respectively in respect of lading and discharging (12 Appeal Cases, pp. 581 *et seq.*).

The charterparty in this case read in substance as follows: It was agreed that the steamship *Euxine*, belonging to the plaintiffs (Nelson & Co.), should proceed to *Soderhamm*, load a cargo of deal timber and "being so loaded, should proceed to *London, Surrey Commercial Docks, or so near thereunto as she may safely get*, and be always afloat, and deliver the same upon being paid freight, etc.," the cargo to be received at port of discharge as fast as steamer could deliver the same. The ship was brought to London by the plaintiffs and was refused admission to the dock in consequence of the crowded state of the docks. The defendants having made no other arrangement for unloading the ship, the plaintiffs ultimately unloaded the ship by lighters into the *S. C. Docks*.

Speaking of the rights and liabilities of the shipowner and charterer as to loading, Brett, L.J., said: "The first right of the shipowner is the right of placing his ship at the disposition of the charterer, so as to initiate the liability of the latter to take his part in the loading. In every case . . . it is a condition precedent to such right of the shipowner to place his ship at the disposition of the charterer for such purpose, that the ship should be at the place named in the charterparty as the place whence the carrying voyage is to begin, and that the ship should be ready to load. The place so named may give a description of a larger space as a port or dock, or it may be the description of a limited space . . . as a particular quay, . . . or quay berth. If the ship is not, when the charter is made, at the port or place where she is to load . . . the named place whence the carrying voyage is to begin . . . may describe a larger or more limited space. If it describes a larger space, as a port or dock, the shipowner may place his ship at the disposition of the charterer when the ship arrives at that named place, and . . . is ready to load, though she is not then in the particular part of the port or dock in which the particular cargo is to be loaded; but, in the absence of his right to place his ship only so near to the named place as she can safely get, he cannot place his ship at the disposition of the charterer so as to initiate the liability of the latter as to loading, until the ship is at the named place, or

the place which by custom is considered to be intended by the name."

"The primary right of the charterer as to the loading under a charterparty in ordinary terms seems to me to be that he cannot be under any liability as to loading until the ship is at the place named in the charterparty as the place whence the carrying voyage is to begin, and the ship is ready to load, and he, the charterer has notice of both these facts." Whenever in the charterparty it is agreed that a specified number of days shall be allowed for loading, this constitutes a stipulation on the part of the charterer that he will not detain the ship for the purpose of loading beyond the fixed period.

This is the principle laid down in *Ford v. Cotesworth* (1868), L.R. 4 Q.B. 127; 5 Q.B. 544. (In passing, it seems to result from this that "loading on or before" a limited time implies *completion* of the loading on or before that time.)

"The rights and liabilities of the charterer as to unloading" are said by the same learned Judge to be "very much the same as, though they are not identical with," his rights and liabilities as to loading. The main difference is that the shipowner is not bound to give notice of his arrival and readiness to discharge.

Reference was had by Brett, L.J., to *Randall v. Lynch* (1809), 2 Camp. 352, which is an authority, seemingly, for the plaintiffs' contention in the case now considered. The head note to that case reads: "If by reason of the crowded state of the London Docks, a ship is detained there, before she can be unloaded, a longer time than is allowed for that purpose by the terms of the charterparty, the freighter is liable for this detention to the owner of the ship." Lord Ellenborough said: "I am of opinion that the person who hires a vessel detains her, if, at the end of the stipulated time, he does not restore her to her owner. *He is responsible for all the varied vicissitudes which may prevent him from doing so.* When she was brought into the docks, all had been done which depended on the shipowner." In *Kell v. Anderson* (1842), 10 M. & W., at p. 502, the question being as to when the charterer's liability for demurrage commenced, it appeared that delay had been caused by the act of the defendant (charterer) in entering the vessel as metered vessel, in consequence of which she was detained by the harbour master. The Court held, however, that the defendant was not liable for the delay beyond the days of demurrage agreed on, and

that they were to be counted from the time of the arrival of the vessel at the place of discharge, according to the custom of the port. And *Brereton v. Chapman* (1831), 7 Bing. 559, decided that where a large port is named the vessel must have arrived, not merely at the entrance, or in the port, but *at the usual place* for discharging vessels.

In *Tapscott v. Balfour* (1872), L.R. 8 C.P. 46, it was agreed by charterparty that the plaintiffs' ship should proceed to any Liverpool or Birkenhead dock, as ordered by the defendants, and there load in "the usual and customary" manner a cargo of coals. The defendants directed that the ship should proceed to the *W. Dock* at Liverpool. Cargoes of coal are supplied at the docks at Liverpool through the agency of the agents of collieries, and are most usually loaded in the *W. Dock* from "tips," of which there are only two in the dock, and by the dock regulations no coal agent is permitted to have more than three vessels in the dock at a time. The ship was ready to go into the dock, but was not allowed to go into the dock for eight days, owing to the fact that the defendants' coal agents had three vessels already in the dock and two others ready to go in in turn. She was allowed in the dock after eight days, but did not come under the "tips" or spouts for some time, owing to the number of vessels ahead of her in turn. It was held that the lay-days—*i.e.*, the commencement of the charterer's liability—commenced at the time when the ship got into the *dock*, not at the time she came under the spouts. Bovill, C.J., said (at p. 52): "The rule is, that where a port is named . . . the lay days do not commence upon the arrival of the vessel in the port, but upon her arrival at the usual place of loading in the port, *not the actual berth at which she loads*, but the dock or roadstead where the loading usually takes place. If, when she arrives there, the place is so crowded that she cannot load, the loss must fall upon the charterer; the ship owner has done all he was required to do when he has taken his vessel to the usual place of loading in the port."

The learned Judge went on to say that where a particular dock is named, the parties must be taken to know the regulations affecting such dock. If by such regulations access to the dock might be delayed, the loss must fall on the shipowner, but when any loss results from the *state* of the docks, this must be borne by the charterer. It might be *quarred* here whether the occupancy of the spouts at the Fort William dock in the case before us was not such a state causing loss to the charterer, as was re-

ferred to by Chief Justice Bovill. If this is denied, then the "Midland Queen" must be considered to have been chartered, not to "load (at) Fort William," but to "load at the elevator spouts at Fort William." This construction would go far beyond the express provisions of the contract, and read into it a meaning that seems to be exceptional. Even if the "Midland Queen's" contract contained the words "at the usual place," or, as in the *Tapscott Case*, "in the usual and customary manner," these words would not, if Lord Denman is right, "import the consideration that the loading (could) be done only at a particular spot in the dock, and there (could) be no liability (for demurrage) till the vessel (reached) that spot." In *Tharsis v. Morel*, [1891] 2 Q.B. 650, Lord Esher, M.R., referring to *Tapscott v. Balfour*, said: "I think the decision was quite right." See also *Murphy v. Coffin* (1883), 12 Q.B.D. 87.

In *Ashcroft v. Crow Orchard Colliery Co.* (1874), L.R. 9 Q.B. 540, by the charterparty the master of the plaintiff's vessel engaged to receive on board and load a cargo of coal at the port of Liverpool, "to be loaded with the usual despatch of the port." The facts as to the detention were almost identical with those in *Tapscott v. Balfour*. It was held that the contract was absolutely binding on the defendants to load with the usual despatch of the port, and, as the vessel has not been so loaded, the defendants were liable to pay for the delay. In dealing with the contract the Court said: "The words are, not that the vessel is to be 'loaded in turn according to the charterer's books or engagements,' or to be loaded 'next after a particular vessel, or in any prescribed order'; but 'to be loaded with the usual despatch of the port.'" Discussing this condition, "We are of opinion that it goes further and covers the whole period from the time when the vessel at the port is placed at the disposal of the charterer there in a condition to receive her cargo. . . . The question is whether the vessel is at his (charterer's) disposal, and whether the detention is his act. If so, the contract is broken as much in the one case as in the other."

The distinction between "place of loading" as distinguished from "spot of loading," adverted to in *Tapscott v. Balfour*, was dwelt on by Bramwell, L.J., in *Davies v. McVeagh* (1879), L.R. 4 Ex., at p. 268: "When a ship is to take on board cargo at a specified place of loading, the responsibility rests, not with her owner, but with the charterer, if the specified berth is not in a fit state to receive her upon her arrival. . . . I think it may

be laid down that a vessel has reached the place of loading, as distinguished from the spot of loading, when she has entered that port from which her voyage is to commence. . . . suppose the defendants' vessel had been lying in the Mersey, and that her captain had given notice to the plaintiff that he was ready to enter the dock and ready to take on board the cargo: I do not think that it would have been open to the plaintiff as charterer to contend that the vessel was not at the place of loading, that she was not in a proper position."

In *Postlethwaite v. Freeland* (1880), 5 A.C. 599, Lord Selborne, L.C., said, at p. 608: "There is no doubt that the duty of providing and making proper use of sufficient means for the discharge of cargo, when a ship which has been chartered arrives at its destination and is ready to discharge, lies (generally) upon the charterer. If by the terms of the charterparty, he has agreed to discharge it within a fixed period of time, that is an absolute and unconditional engagement, for the performance of which he is answerable, whatever be the nature of the impediments which prevent him from performing it." And the same principle, it is submitted, applies to loading. Lord Hatherley, in the same case, at p. 611, said: "The cases shew that when a specified time is named, either in words or by necessary implication, the party who has contracted to unload a ship within that time must bear the loss occasioned by any excess of time, although the delay was not occasioned by any default on his part." Lord Blackburn, from whose judgment, at p. 613, Moss, C.J.O., quotes, cites with approval at p. 618, an extract from Abbott on Shipping, 5th ed., p. 180, in which these words occur: "And where the time is thus expressly ascertained and limited by the terms of the contract, the merchant will be liable to an action for damages if the thing be not done within the time, although this may not be attributable to any fault or omission on his part, *for he has engaged that it shall be done.*" The italics are the author's. His Lordship, however, confined himself in his judgment to the case where no time limit is expressed for the doing of the thing, considering only cases where the contract contained words "to be discharged with all despatch according to the custom of the port," or the like. At the close of his remarks (p. 622), referring to *Ashcroft v. Crow Orchard Colliery Co.* (1874), L.R. 9 Q.B. 540, Lord Blackburn said: "By the charterparty the vessel was to load in the docks: 'to be loaded with the usual despatch of the port.' The facts were that the defendants acted as their own coal agents,

and had at the time thirteen ships which had priority of the plaintiff's; and the ship was, in consequence, kept outside the dock for thirty days after it was at the disposal of the defendants, but before the dock company would admit it. The decision of the Court was that the contract was to load with the usual despatch, and that this self-imposed inability on the part of the charterers to do so was no defence, even if the plaintiffs had known of it, which in fact they did not. I think this, which is probably right, has no bearing on the present case." And, it is submitted that, with equal truth, it may be said that *Postlethwaite v. Freeland* has no bearing on *Midland Navigation Co. v. Dominion Elevator Co.*

Budgett v. Binnington, [1891] 1 Q.B. 35, is another case bearing out the contention of the plaintiffs in the case under consideration. There the number of lay-days for unloading and demurrage were fixed. By the custom of the port of discharge, a cargo such as the one to be unloaded was discharged by the joint act of the shipowner and consignees. A strike among the employees of the ship and of the consignees delayed the work and it was not resumed till some days after the expiration of the lay-days. It was held by the Court of Appeal that as the number of lay-days was fixed, the consignees were liable to pay demurrage, despite the inability of the shipowners, owing to the strike, to do their part in the unloading.

In a case where the contract was "to proceed to Odessa and load," it was said that this was satisfied by her arrival in the outer harbour at Odessa: *Pyman Bros. v. Dreyfus* (1889), 24 Q.B.D. 152, at p. 156.

In conclusion it is submitted that the net result of the cases, where the time for loading is limited by the contract, is that the liability of the shipowner in regard to loading ceases when he has brought his ship to the *place*, as distinguished from the *spot*, of loading, port or dock, in a fit state to receive the cargo and has notified the charterer; that the charterer's liability then arises and continues until the loading is completed; that the charterer is bound to surmount all impediments in the way of the loading and is responsible for any delay, however caused.

"TO LOAD."

"To load on or before a certain date" is an expression about which one might think doubt could not arise. It is well with regard to words or phrases which are not sufficiently understood,

or with regard to words which have a special or technical meaning, to have it made clear what usage exists, if any, through which such words or phrases have acquired any special or peculiar force. But the meaning of the phrase in question would appear to be sufficiently understood by this time in commerce. To an ordinary business man, the expression means "to complete the work before the day named, on that day, but not after it." In *Bowes v. Shand* (1877), 2 A.C. 455, where the expression "shipped during the months of March and April" was considered, the conclusion arrived at by the House of Lords was that the shipping must *begin, continue* and be *completed* during those two months and no others. Thus a beginning made in February was not a compliance with this part of the contract. Lord Hatherley, at p. 477, said: "All the witnesses, uniformly . . . state distinctly that which the Judge, Justice Brett, at last put to one of these witnesses, 'What you mean to say is that March is March and April is April.' This is pretty much the case, and one could hardly put in a clearer point of view one's own opinion that in reality the contract is simple and easy to be construed, and that "March" in the contract does mean March, and that "April" does mean April, and that the loading "during the months of March and April" does mean a loading during those months."

In *Grant v. Coverdale* (1884), 9 A.C., at p. 475 *et seq.*, Lord Selborne, L.C., discusses the meaning of the word to "load," and comes to the conclusion that it means that which the owner of the boat has to do after the charterer has conveyed the cargo to the place of loading, and has it ready there to be put on board. Lord Bramwell, speaking of the owner's duty, defines loading as the "actual putting on board of the cargo," *ib.* p. 478.

Lord Esher, M.R., in *Stephens v. Hardy* (1887), 57 L.J.Q.B. 203, considered that "to load" meant to actually put the cargo on board, not to have it in preparation or readiness for placing on the ship.

DIGEST.

ACTION.

For Damages at Common Law for Infringement of Copyright.]

—See COPYRIGHT, I.

For Penalty.—See QUI TAM ACTION; COPYRIGHT, I, II(1), VI(6)(7), VII(2).

APPEAL.

Quare, whether an appeal would lie from the refusal of a Judge to make an order under sec. 41 of the Winding-up Act, R.S.O. 1897, ch. 222.

In re Equitable Savings, Loan and Building Association, 446.

ARBITRATION AND AWARD.

1. *Company*—*Matter “Arising in the Course of the Reference”*—*Questions of Law.*—An agreement between two companies provided that there should be referred to arbitration any dispute, disagreement or difference of opinion arising between the parties to it, in regard to, *inter alia*, “the meaning or construction of the agreement” or “of the mutual obligations of the parties,” or “of any other act, matter or thing relating to or concerning the carrying out

of the true spirit, intention and meaning” of the agreement. The agreement further provided that one company should provide the other with a certain amount of cordwood, to be carbonized into charcoal, the maximum amount of which to be delivered per month was 85,000 bushels. Disputes arose between the parties and the arbitrators were asked to pass on the question of damages for alleged short delivery of charcoal. One of the parties applied under sec. 41 of the Arbitration Act, R.S.O. 1897, ch. 62, for a direction to the arbitrators to state a special case as to what was the true construction of the contract as to the amount of charcoal called for per month:—

Held, that this was a question of law “arising in the course of the reference” within the meaning of the said section, and a special case might properly be directed as to it, which might well include the two other questions in controversy, though, had they been the only matters in dispute, no case should be directed as to them.

Nor is a party to a reference entitled *ex debito justitiæ* to have a direction given whenever a question of law has arisen in

the course of a reference. This rests in the discretion of the court.

The fact that arbitrators are specially qualified to decide a question of law is not sufficient to preclude a party to a reference from obtaining a direction.

Different considerations apply to the exercise of the discretion to give leave to revoke a submission from those which are to be applied in exercising the discretion to direct the arbitrators to state a case under the provisions of sec. 41 of R.S.O. 1897, ch. 62.

Rathbun Company, Ltd. v. Standard Chemical Co., 110.

2. *Franchise and Rights, Valuation of.*—See COMPANY, 2.

3. See INSURANCE, LIFE, 4.

ART.

Works of Fine Art—Copyright in.—See COPYRIGHT, I, III.

AUTHOR.

Rights of to Publication.—See COPYRIGHT, *passim*.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See BANKRUPTCY AND INSOLVENCY.

BALANCE SHEET.

Of Company—How Constituted.—See COMPANY, 5.

BANK MANAGER.

Liability of to Bank—Test of Negligence of.—See BANKS AND BANKING, 2.

BANKRUPTCY AND INSOLVENCY.

1. *Assignment for Benefit of Creditors—Accruing Payments to Annuitant—Right to Rank—R.S.O. 1897, ch. 147, secs. 20, 21.*—An insolvent, E.R.P., assigned to the defendant for the benefit of his creditors pursuant to R.S.O. 1897, ch. 147. E.R.P. had before the assignment covenanted with plaintiffs to pay to J.R. \$100 per quarter on the first day of each quarter during her natural life:—

Held, that the growing payments were in the nature of contingent debts and not provable for their present value under ch. 147.

Grant v. West (1896), 23 A.R. 533; *Mail Printing Co. v. Clarkson* (1898), 25 A.R. 1, followed.

Such claims are not subject to attachment under the garnishee provisions of the English Judicature Act and Rules, as accruing debts. *Webb v. Stenton*

(1883), 11 Q.B.D. 518, disapproving of *In re Cowans' Estate* (1880), 14 Ch. D. 658.

Carswell v. Langley, 47.

2. *Fraudulent Preference—Trust Assignment Made to a Creditor—Pressure—Creditor's Knowledge of the Debtor's Insolvency—Assignments Act, R.S.M. ch. 7, sec. 33—63 & 64 Vict. (M.), ch. 3, sec. 1.*—An assignment under the Assignments Act, R.S.M. ch. 7, need not be in the language given by section 3 of the Act, which contains merely a general form of words; and an assignment which, after reciting the assignor's insolvency and his agreement to assign, purports to grant and assign all the property of the assignor, real and personal, is good by virtue of section 2 of the Act.

When an assignment under the Act is made to a creditor, the assignee may bring an action to set aside a fraudulent preference without showing that the benefit of the assignment has been accepted by or that it has been communicated to any other creditor. *Mackinnon v. Stewart* (1850), 1 Sim. N.S. 76; *Siggers v. Evans* (1855), 5 E. & B. 367, followed.

A mortgage given to a creditor to secure his claim at a time when the debtor knew he was insolvent may be set aside as a fraudulent preference, although it has been obtained by pressure,

and was given without any desire on the part of the debtor to prefer the mortgagee, if he knew or should have known that that result would follow.

It is not necessary to show notice to the transferee of the debtor's insolvent condition, and, in any case, notice will be imputed to him that he has such knowledge of the debtor's circumstances as would lead any ordinary man of business to conclude that the debtor was unable to pay his debts in full. *National Bank of Australasia v. Morris*, [1892] A.C. 287, and *Stephens v. McArthur* (1890), 6 Man. 496, followed.

Schwartz v. Winkler, 51.

3. *Fraudulent Preference—Doctrine of Pressure—Motive of Debtor in Giving Security—Assignments Act, R.S.M. ch. 7, sec. 33—63 & 64 Vict. (M.), ch. 3, sec. 1.*—Where in giving a chattel mortgage covering all the debtor's assets, it appeared that the desire and motive in the mind of the debtor was to make an arrangement for continuing his business, and to avoid insolvency, the defendant having induced him to give it by promise of assistance, although the defendant, a creditor, was placed in a more advantageous position than others:—

Held (Richards, J., dissentiente), that under section 33 of the Assignments Act, R.S.M. ch.

7, as amended by 63 & 64 Vict. (M.), ch. 3, sec. 1, there must still be the intent on the part of the debtor to prefer the particular creditor in order to set aside the impeached conveyance.

The presumption arising under the Act being only *prima facie*, may be rebutted by evidence, and the court may consider the proved facts as to the actual intent.

Held, also, the court need not determine whether the preferred creditor was acting *bonâ fide* or really looked for a continuance of the business through an arrangement with other creditors, as it was only the mental attitude of the debtor that should be considered.

Codville v. Fraser, 64.

4. *Insolvency of Debtor—Civil Code of Lower Canada, Art. 1092—Cause of Action.*—Under Art. 1092 of the Civil Code of Lower Canada, an action to recover the balance of purchase money of land may be brought, although the time for payment has not arrived when the debtor has become insolvent or has diminished the value of the security.

Kensington Land Co. v. Canada Industrial Co., 388.

5. *Cession de Biens—Promissory Note Made by Insolvent—Waiver of Protest by Curator—*

Effect of.]—See PROMISSORY NOTE, 2.

BANKS AND BANKING.

1. *Cheques Drawn to Fictitious Payees—Fraud of Insurance Agent—Payment by Bank—Right of Company to Recover Amount so Paid.*—N. was an assistant superintendent of a branch of the plaintiff company and had sole control of its business. He sent in a number of applications, all of which, with the exception of five, were fictitious, the names of the supposed applicants being forged. Policies were issued in due course. The cheques in question were issued to pay the supposed claims of the several persons in whose favor they were drawn, who were thought to have died. The claim papers were prepared and forwarded by N. It was usual after a claim had been passed to send N. a cheque for the amount of it, payable to the claimant or his order, N. to deliver the cheque to the proper person and obtain a discharge of the claim under the policy. Each of the cheques was endorsed with the name of the payee, and most of them had been certified by N., and were paid in good faith through the Ottawa branch of the plaintiffs, to whom or how did not appear, the amounts thereof being charged to the com-

pany's account. The endorsements had all been forged by N.:—

Held, that the company, being affected by what was done by N., could not dispute the right of the bank to pay the cheques and charge it with the amounts so paid.

London Life Insurance Company v. Molsons Bank, 97.

2. *Liability of Manager to Bank—Alteration of Promissory Note—Negligence—Test of—Instructions Disobeyed.*] — The manager of a branch bank was instructed to obtain a joint and several note from certain parties who were making the note as collateral security for advances by the bank to a partnership. Instead of so doing, he inadvertently accepted a joint note only. Subsequently, having discovered the mistake, he, with the consent of some only of the makers, inserted the word "We" instead of "I," and before the word "promise" the words "jointly and severally." It appeared that neither the general manager of the bank, nor its solicitor, when consulted by the branch manager appreciated the fact that the alteration made vitiated the security. It also appeared that, before the alteration, it made no practical difference whether the note were joint and several, or joint merely, two, or

perhaps three, of the makers being perfectly good for all the money advanced. The bank, having failed in an action brought against the makers of the note, on the ground that the effect of the alteration was to discharge all the parties to the note from liability, brought action against the manager to recover damages for his negligence:—

Held, Osler, J.A., dissenting, that the disregard of instructions by the manager was the cause of loss to the bank, but it being equally true that but for the alteration there would have been no loss to the bank, and the manager having reasonable grounds to believe that the alteration would be acquiesced in by the parties to the note, and having, moreover, acted under the advice and with the cognizance of the plaintiffs' officials, the manager was not liable in substantial damages for the consequences of his mistake.

Stafford v. Bell (1880), 6 A. R. 273, followed.

Judgment of Meredith, C.J., affirmed.

Banque Provinciale v. Charbonneau, 478.

3. *See* PARTNERSHIP, 1.

BENEVOLENT SOCIETY.

See INSURANCE, LIFE, 2, 3.

BILLS AND NOTES.

See PROMISSORY NOTE.

BOOKS.

Copyright in.]—See COPYRIGHT, II.

CASES.

Anglo-Canadian v. Shaw, ante, p. 511, followed.]—See COPYRIGHT, VI(7).

Anglo-Canadian v. Winnifrith (1888), 15 O.R. 164, followed.]—See COPYRIGHT, VI(5).

Cerri v. Ancient Order of Foresters (1897), 28 O.R. 111, followed.]—See INSURANCE, LIFE, 1.

Cowan's Estate, In re (1880), 14 Ch. D. 658, disapproved.]—See BANKRUPTCY AND INSOLVENCY, 1.

Dicks v. Yates (1880), 50 L.J. Ch. 809, followed.]—See COPYRIGHT, V.

Grant v. West (1896), 23 A.R. 533, followed.]—See BANKRUPTCY AND INSOLVENCY, 1.

Hargrove v. Royal Templars of Temperance (1901), 2 O.L.R. 126, followed.]—See INSURANCE, LIFE, 1.

Hearle v. Greenbank (1749), 1 Ves. Sr. 307, followed.]—See INSURANCE, LIFE, 2.

Liverpool General Brokers' Association v. Commercial Press

Telegram Bureaux, [1897] 2 Q. B. 1, followed.]—See COPYRIGHT, IV(2).

Mackinnon v. Stewart (1850), 1 Sim. N.S. 76, followed.]—See BANKRUPTCY AND INSOLVENCY, 2.

Mail Printing Co. v. Clarkson (1898), 25 A.R. 1, followed.]—See BANKRUPTCY AND INSOLVENCY, 1.

Mawman v. Tegg (1826), 2 Russ. 385, followed.]—See COPYRIGHT, VII(4).

Morang v. Publishers' Syndicate (1900), 32 O.R. 393, followed.]—See COPYRIGHT VI(7).

Murphy v. Bury (1895), 24 S.C.E. 668, doubted.]—See DEBTOR AND CREDITOR.

National Bank of Australasia v. Morris, [1892] A.C. 287, followed.]—See BANKRUPTCY AND INSOLVENCY, 2.

Page v. Wisden (1869), 20 L. T.N.S. 435, followed.]—See COPYRIGHT, VII(4).

Siggers v. Evans (1855), 5 E. & B. 367, followed.]—See BANKRUPTCY AND INSOLVENCY, 2.

Spurrier v. La Cloche, [1902] A.C. 446, followed.]—See INSURANCE, LIFE, 4.

Stafford v. Bell (1880), 6 A.R. 273, followed.]—See BANKS AND BANKING, 2.

Stephens v. McArthur (1890), 6 Man. 496, followed.]—See BANKRUPTCY AND INSOLVENCY, 2.

Sweet v. Maughan (1840), 11 Sim. 51, not followed.]—*See* COPYRIGHT, VII(4).

Taylor v. Caldwell (1863), 3 B. & S. 826, distinguished.]—*See* CONTRACT, 1.

Webb v. Stenton (1883), 11 Q. B.D. 518, applied.]—*See* BANKRUPTCY AND INSOLVENCY, 1.

Weldon v. Dicks (1878), 10 Ch. D. 247, followed.]—*See* COPYRIGHT, IV(2).

Wood v. Boosey (1867), L.R. 2 Q.B. 340, not followed.]—*See* COPYRIGHT, IV(2).

CESSION DE BIENS.

See BANKRUPTCY AND INSOLVENCY, 5; PROMISSORY NOTE, 2.

CIVIL CODE.

Articles 516, 521.]—*See* COMPANY, 8.

Article 1092.]—*See* BANKRUPTCY AND INSOLVENCY, 4.

Articles 1570, 1571.]—*See* DEBTOR AND CREDITOR, 1.

CHARTER-PARTY.

See SHIPPING.

CHEQUE.

Drawn to Fictitious Payee.]—*See* BANKS AND BANKING, 1.

COMPANY.

1. *Mining—Directors—Majority—Power to sell whole property—Irregularity—Rights of minority—Shareholders—Shares held in Trust.*]—A mining company incorporated under the Ontario Companies Act, R.S.O. 1897, ch. 191, and the Ontario Mining Companies Act, R.S.O. ch. 197, may sell all the land owned by the company, provided the sale is made in good faith, and with the consent of the majority of the shareholders, and, even though irregularities in the proceedings occur and improper motives govern the majority, the sale cannot be attacked by a dissentient minority of the shareholders.

But a sale proposed to be made at a time of the year when inspection of the property is impracticable or impossible, or when the property is not in fit condition for inspection by intending purchasers may be restrained by injunction.

Ritchie v. Vermilion Mining Co. 19.

2. *Franchise—Sale of Gas Works to Municipal Corporation—Arbitration as to Price—Ten per cent. Addition—“Works, Plant, Appliances and Property”—Rule of Ejusdem Generis.*]—By an agreement between the parties, the corporation of Kingston and the com-

pany, the former was to have the option of purchasing and acquiring all the works, plant, appliances and property of the company upon giving to the company one year's notice of their intention previous to the expiration of the period of the contract, at a price to be fixed by arbitration under the Municipal Act. The arbitrators in ascertaining the price, did not include anything for the earning power or franchise and rights of the company, nor did they allow ten per cent. addition to the price as upon expropriation under R.S.O. (1887), ch. 164, sec. 99.

Held, that they were right in so doing.

Decision of Lount, J., affirmed.

City of Kingston and Kingston Light, etc., Co. 86.

3. *Agreement to Refer to Arbitration—Matters Arising in the Course of the Reference.*—See ARBITRATION AND AWARD, 1.

4. *Winding up—Transfer of Stock—Power of Attorney—Payment to Directors.*—A company under the mistaken belief that there was no unallotted stock which could issue to applicants, authorized an agent, Stark, to obtain powers of attorney from persons desirous of becoming shareholders. This power of attorney made the attorney the appointor's agent "for me and in my name and

on my behalf to receive from the vendor a transfer of . . . shares of the capital stock of the Publishers' Syndicate, Limited, purchased by me from him, at the sum of \$., and to sign on the books of the company my name to the acceptance of the transfer of the said shares, etc.'" This agent obtained powers of attorney from a number of persons. All of these paid for and received certificates for the amount of the shares specified in their powers. Some time later, C., who was a director and officer of the company, seeing the powers of attorney and knowing that no transfer had been made thereunder, filled in opposite the names of the various appointors transfers of his stock from him to them and procured the agent as their attorney to accept transfers and caused the agent to be paid by the company \$60 for alleged commission.

Held, that neither the transfer of stock made by P. nor the \$60 payment could be supported and that P. must be placed upon the list of contributories.

At a meeting of the directors soon after the incorporation of the company when the directors were the only shareholders, \$300 was voted to P. for alleged services as director. The resolution was contained in the minutes read at the annual meeting next following, which were confirmed

in the ordinary way. It appeared that no profits had been made at this time and, according to the books, nothing had been paid in by any person on account of his stock.

Held, that the payment must be returned as being a gratuity which should be authorized by by-law and as being made out of capital and not of assets properly divisible among the shareholders.

Publishers' Syndicate, re, Paton's Case 133.

5. *Winding-up — Petition by Shareholder — Insolvency—R.S. C. ch. 129, sec. 5 (c) and 62-63 Vict. ch. 43, sec. 4.*—By sec. 5 (c) of the Winding-up Act (Dominion), a company is deemed insolvent "if it exhibits a statement shewing its inability to meet its liabilities.

Held, that the inability to meet liabilities means liabilities to creditors as distinguished from liabilities to shareholders.

On the hearing of a petition based on such a statement, the statement must be accepted as correct.

Remarks as to company balance sheets.

In re United Canneries, etc., Limited 396.

6. *Winding-up—Leave to bring Action—Secured Creditors—Proving Claims—R.S.C. 1886, ch. 129, secs. 62, et seq.*—A se-

cured creditor has a right to apply for and obtain leave to bring an action to enforce his security.

It is not optional for a secured creditor to either prove his claim in a winding up or else proceed with an action to enforce it, and if he does commence an action it is still compulsory on him to proceed before the liquidator under secs. 63 *et seq.* of the Act.

In re Lenora Mount Sicker Copper Mining Co. 423.

7. *Winding-up — Voluntary Liquidation—Order for Dissolution—Subsequent Vacation and Discharge Thereof—Final Order—Nature of—Winding-up Act, R.S.O. 1897, ch. 222, secs. 27 and 41—Ontario Judicature Act, Rules 358 and 1216.*—After proceedings had been taken by the directors and shareholders of a company under the Winding-up Act of Ontario, R.S.O. 1897, ch. 222, for the voluntary liquidation thereof, and an agreement entered into and partially carried out for the disposal of the assets of the company, an order was made by a County Court Judge, on March 24th, 1902, upon the affidavit of one of the liquidators, setting out all the proceedings, that the company be dissolved. Subsequently, on April 7th, 1902, it was ordered by the same Judge that no action or other proceeding should be proceeded with or commenced against the company. On the

21st of June, 1902, an order was made vacating and discharging the two above orders.

Held, that the order of the 21st of June was a final order so as to be the subject of an appeal within the meaning of sec. 27 of the Winding-up Act, since it undid and put an end to the order of dissolution.

Held, however, (MacLennan, J.A., dissenting, on the ground that the learned Judge made the order of March 24th under a clear misapprehension of the facts) that the learned County Judge had no authority to make the order of the 21st of June, rescinding that of the 24th of March, as he had no more material before him when making it than he had when making the prior order, and there is no reason for saying that he was misled in making it or that any fact was suppressed. The proper way to have attacked the order of the 24th of March was by appeal not by an application to the Judge who made it to rescind it after it had been acted upon and become effective.

Quare, whether an appeal would lie from the refusal of a Judge to make an order under sec. 41 of the Winding-up Act, R.S.O. 1897, ch. 222, dissolving a company.

In re Equitable Savings, Loan and Building Association 446.

8. *Winding-up of—The Winding-up Act, 1886 (D.), secs. 15 and 31—Restricted Power of Liquidators of Bank to Sue in their Own Names—Civil Procedure Code, secs. 516 and 521—Power to Amend by Adding Bank as Plaintiffs.*—Under The Winding-up Act, 1886 (D.), secs. 15 and 31, a company in liquidation retains its corporate powers, including the power to sue, although such powers must be exercised through the liquidator under the authority of the Court. The liquidator must sue in his own name, or in that of the company, according to the nature of the action: in his own name where he acts as representative of creditors and contributories; in that of the company to recover either its debts or its property.

Where liquidators sued in their own name to recover a debt due to the company.

Held, that the error was one of form, which the Court had power to give leave to amend under secs. 516 and 521 of the Code of Civil Procedure. The defendant having admitted the debt and pleaded set-off, and not having excepted to the form of the action, leave to amend should have been given in the sound exercise of judicial discretion.

Kent v. La Communauté des Socurs, etc. 379.

CONTRACT.

1. *Supply of Electric Power—Continued Existence of Property—Implied Warranty—Impossibility of Performance.*]—Where there was an agreement to supply electric power at a certain rate per annum to be used in the business of the consumers as millers and for no other purpose, and the mill, which was on the premises of the consumers at the time of the agreement, was destroyed.

Held, that the agreement was not terminated by the latter event and the consumer was under obligation to take and pay for the electric current agreed to be supplied.

Taylor v. Caldwell (1863), 3 B. & S. 826, distinguished.

Ontario Electric Light and Power Co. v. Baxter & Galloway Co., Ltd. 125.

2. *Breach of Induced by Trade Union.*]—See TRADE UNION.

3. See SALE OF GOODS.

COPYRIGHT.

- I. COMMON LAW RIGHTS.
- II. COPYRIGHT IN BOOKS.
- III. ARTISTIC OR FINE ART COPYRIGHT.
- IV. IMPERIAL COPYRIGHT.
- V. DRAMATIC AND MUSICAL COPYRIGHT.

- VI. INTERPRETATION OF CANADIAN COPYRIGHT ACT.
- VII. PRACTICE UNDER THE CANADIAN ACT.

I. COMMON LAW RIGHTS.

Action at Common Law—Artistic Property—Measure of Damages.]—*Per* Andrews, J., in the Superior Court:—

An action of damages will lie at common law for invasion of property in artistic works, and is not taken away by the Copyright Act giving an action for penalty.

The affixing of his signature by a sculptor to a bust made by him is sufficient proof, under the statute, of notification of his privilege as author.

The certificate of registration of a copyright is *primâ facie* evidence that the requirements of the law, previous to its issuing, have been complied with.

The assignee of a copyright may recover for infringements made before the registration of the assignment, but after the registration of the copyright.

Per the Court of Queen's Bench—reversing Andrews, J., on this point—Where there is clear proof of the counterfeiting of a copyright, the damages will not be measured by the price realized through the sale of the

counterfeit, but vindicative damages will be allowed.

Bernard v. Bertoni 153.

II. COPYRIGHT IN BOOKS.

(1) *Author and Legal Representative — Works Becoming Public Property by Long User — Scope of the Copyright Act — Penalties — R.S.C. ch. 62, secs. 30, 4, and 17.*—Only the author or the legal representative of the author of a work can avail himself of the provisions of the Copyright Act. And neither the author nor his legal representative can maintain an action for penalties under the Copyright Act where the registration of the work under the Act has not been made until after the publication of several editions of the work.

So where *Le Grand Catéchisme de Quebec* had been in public use for nearly 175 years without copyright having been applied for, it was held that the work was no longer susceptible of being made private property, and the plaintiff, who had acquired his title in the book by sale to him by the Archbishop of Quebec, had no ground to maintain an action for penalties against the defendant, who had published an edition of the work.

Langlois v. Vincent 164.

(2) *Infringement — Evidence — Textual Copy.*—In an action for infringement of copyright in

a dictionary, the unrebutted evidence shewed that the publication complained of treated of almost all its subjects in the exact words used in the dictionary first published, and repeated a great number of errors that occurred in the plaintiff's work.

Held, affirming the judgment appealed from, that the evidence made out a *prima facie* case of piracy against the defendants which justified the conclusion that they had infringed the copyright.

Cadicux v. Beauchemin 170.

(3) *Railway Ticket — Subject of Copyright — Principle of Copyright Legislation — Failure to Deposit Copy.*—Section 5 of the Con. Stat. C., ch. 81, which required an author to deposit a copy of his work in the library of the Legislative Assembly of Canada, being merely directory, the neglect of the author of a work to do so, did not incapacitate him from proceeding for an infringement thereof.

The object and principle underlying the legislation from Queen Anne's time to the present is to protect, advance and encourage learning and art; and not, unless it be casually and indirectly, to promote or assist progress in mechanical or industrial appliances or inventions, and accordingly a railway conductor's duplex ticket is not the subject of copyright.

Griffin v. Kingston and Pembroke Ry. Co. 172.

(4) *Circulars*—"Forms" and "Blanks"—*Books and Literary Compositions under the Copyright Act—Copyright Act, R.S. C., sec. 4, as amended by 52 Vict. ch. 29, sec. 1 (D.).*—The purely commercial or business character of a composition or compilation does not oust the right to protection if time, labour, and experience have been devoted to its production.

The plaintiff had obtained copyright in respect of four productions used in connection with his School for Stammerers, and called (1) "Applicant's Blank," containing questions to be answered by applicants for entrance; (2) "Information for Stammerers," an advertising circular; (3) "Entrance Memorandum," being an agreement to be signed by applicant; and (4) "Entrance Agreement," which was like No. 3, but of a more extended character.

Held, that the plaintiff had copyright in these publications, and was entitled to protection in respect thereto.

Griffin v. Kingston and Pembroke Ry. Co. (1889), p. 172, *supra*, dissented from.

Church v. Linton 176.

(5) *Historical, Biographical and Geographical Dictionary—Nomenclature—Common Sources*

—*Piracy—Animus Furandi—Modes of Proof—Law Governing Copyright in Quebec.*—In an action for infringement of copyright in a dictionary, the un rebutted evidence shewed that the publication complained of employed the same nomenclature, treated of almost all its subjects in the exact words used in the dictionary first published, and repeated a number of errors occurring in the prior work.

Held, White, J., dissenting, that these resemblances being supported by proof of fraudulent intent, made out proof of piracy.

Judgment of Taschereau, J., reversed.

Though a work contains only material which is open to the world to use, yet originality in the arrangement and treatment will confer the right to protection.

Where there is a divergence between the English and French law in relation to copyright, the former should be preferred.

Beauchemin v. Cadieux 337.

III. ARTISTIC OR FINE ART COPYRIGHT.

(1) *Works of Fine Art*—"What we Have we Hold"—*Application of Imperial Act to Canada—25-26 Vict. ch. 68 (Imp.).*—The Imperial Act, 25-

26 Vict. ch. 68, an Act for amending the law relating to Copyright in Works of Fine Art, does not extend to the Colonies, and, therefore, copyright thereunder is confined to the United Kingdom.

Graves v. Gorrie 186.

IV. IMPERIAL COPYRIGHT.

(1) 38 Vict. ch. 88 (D.)—5 & 6 Vict. ch. 45 (Imp.)—*Held*, affirming the judgment of Proudfoot, V.-C. (23 Grant 590), that it is not necessary for the author of a book, who has duly copyrighted the work in England, under 5 & 6 Vict. ch. 45, to copyright it in Canada under the Copyright Act of 1875, with a view of restraining a reprint of it there; but if he desires to prevent the importation into Canada of printed copies from a foreign country, he must copyright the book in Canada.

Quære, as to the admissibility, with a view to the construction of a statute, of the language used by the Secretary of State for the Colonies in introducing it in Parliament.

Smiles v. Belford 216.

(2) *Books—Infringement*—5 & 6 Vict. ch. 45 (Imp.)—*Application to Colonies—Importation of Foreign Reprints—Assignment of Ownership—Necessity for Registration Thereof—Right*

to Maintain Action.]—Section 17 of the Imperial Act to amend the Copyright Act, 5 & 6 Vict. ch. 45, prohibiting the importation of foreign reprints of a British copyright book by any person, not being the proprietor of the copyright or some person authorized by him, is now in force in Canada.

Therefore, where the defendants had imported from the United States of America into Canada, and exposed for sale, copies of a book written by Francis Parkman, known as "A Half Century of Conflict," the ownership and copyright of which had, after the death of the author, who had died owning and being entitled to the said copyright, been assigned and transferred to the plaintiffs by the persons entitled thereto, it was *held* that the plaintiffs were entitled to prohibit the importation of foreign reprints into Canada.

Held, however, that sec. 24 of 5 & 6 Vict. ch. 45 (Imp.), requiring the proprietor of copyright in any book to make an entry of such book in the book of registry of the Stationers' Company before any action may be brought by such proprietor in respect of any infringement of such copyright, not having been complied with by the plaintiffs, they were not entitled to maintain the action, the word

"proprietor" in said sec. 24 meaning the person who is the present owner of the work.

Dictum of Cockburn, L.C.J., in *Wood v. Boosey* (1867), L.R. 2 Q.B. 340, not followed.

Weldon v. Dicks (1878), 10 Ch. D. 247, and *Liverpool General Brokers' Association v. Commercial Press Telegram Bureau*, [1897] 2 Q.B. 1, followed.

Morang v. Publishers' Syndicate 232.

(3) *Effect of Priorities—Importation of Copyright Works—The Copyright Act, R.S.C. ch. 62, secs. 6 and 4.* [Where there is prior British copyright, and thereafter Canadian copyright is obtained by production of the work, that local copyright is subject to be invaded by the importation of lawful British reprints. But where the Canadian copyright is first, then monopoly is secured from all outside importations. (See, however, Copyright Act of 1900 in subjoined Appendix).

The possessor of a prior Canadian copyright is secured completely against all interference to the territorial extent of all the Dominion of Canada, even as against English reproductions or copies made under a subsequent British copyright.

Anglo-Canadian v. Suckling 245.

(4) *Encyclopaedia—Prima facie Proof of Proprietorship—Entry at Stationer's Hall—License to Print and Sell—Foreign Reprints—Notice to Commissioners of Customs—Imperial Acts in Force in Canada—Imp. 39-40 Vict. ch. 36, sec. 152—Imp. 5-6 Vict. ch. 45, secs. 17, 18, 19.*—The defendants, the Imperial Book Company, imported into Canada large numbers of an American reprint of the plaintiffs' encyclopaedia, which plaintiffs maintained was an infringement of their copyright. They had registered the publication pursuant to 11th section of the Copyright Act of 1842, and produced and gave in evidence a certificate of the entry.

Held, the production of the certificate was all that was necessary to make out a *prima facie* proprietorship in the copyright of an encyclopaedia under secs. 18 and 19.

Held, also, that sec. 152 of the Imperial Customs Law Consolidation Act, 1876, 39-40 Vict. ch. 36, which requires notice to be given to the Commissioners of Customs of copyright and of the date of its expiration, is not in force in Canada, despite that, in Part IV. of the appendix to vol. III. of the Revised Statutes of Ontario, 1897, a statement to the contrary appears.

Seemle, such a notice would be invalidated by an erroneous

statement of the date of the expiration of the copyright.

The plaintiffs, in consideration of a large sum of money, by an agreement in writing, gave certain other persons the exclusive right to print and sell the publication in question for a period terminating four years before the expiration of the plaintiffs' copyright, and agreed to deliver to them the plates used in the publishing, and not to publish or announce a new edition until the expiration of such period. The other parties agreed to sell only at certain prices, not to alter the text of the book, and on the expiration of the period mentioned, to deliver up any unsold copies and all the plates used in printing them. The plaintiffs expressly reserved the copyright to themselves.

Held, the agreement must be construed as a license merely and not as an assignment, and need not be registered pursuant to sec. 19 of 5-6 Vict. ch. 45 (Imp.).

Black v. Imperial Book Co. 252.

V. DRAMATIC AND MUSICAL COPYRIGHT.

Sole Right of Dramatic Representation — Infringement — Imperial Acts — Evidence — Examination for Discovery — Admissi-

bility thereof as Evidence Against Co-Defendants.] — Section 16 of the Imperial Copyright Act, 1842 (5 & 6 Vict. ch. 45), provides that the defendant in pleading shall give to the plaintiff a notice in writing of any objections on which he means to rely on the trial of the action. Section 26 allows the pleading of the general issue.

Held (Richardson, J.), that sec. 16 is complied with if the objections intended to be relied on are taken in the statement of defence. *Dicks v. Yates* (1880), 50 L.J. Ch. 809; 18 Ch. D. 76; 44 L.T. 660, followed.

Where, under Rule 201 of the Judicature Ordinance, 1898, a party to the action has been orally examined before trial, Rule 224, which allows any party to use in evidence any part of the examination so taken of the opposite parties, does not limit the effect of such evidence, or provide that it may only be put in as against the party examined, and, therefore, any part of such examination is admissible as evidence against opposite parties other than the one actually examined, provided they had an opportunity to cross-examine the party actually examined.

At the trial of an action against the officers and members of the committee of management of an unincorporated society for infringement of plaintiff's sole

right of dramatic representation of an opera, plaintiff put in as evidence parts of the examination for discovery of B., one of the defendants, the secretary-treasurer of the society. All the defendants were represented by the same advocate, who had attended such examination on behalf of all the defendants, and cross-examined the witness.

Held, that the testimony given on such examination was admissible as evidence against all the defendants as well as against B. himself.

Plaintiff proved that the opera in question, and an assignment to him of the sole right of dramatic representation thereof, had been duly registered at Stationers' Hall. On said examination B. testified that he knew the opera in question, and that the performances complained of were meant to be performances of this opera. He also identified one of the programmes used on the occasions in question, and what he thought to be a poster advertising the performances. Both programme and poster designated the opera by its registered name, and specified the author and composer thereof. L. also testified at the trial that he knew the opera in question, which he had seen and heard performed many times; that he had been present at one of the performances complained of, and

that what had been performed on such occasion was the opera in question.

Held, that this was sufficient proof of the identity of what was performed by defendants with the opera in question, and consequently of the infringement.

Per Wetmore, J.—Objection to secondary evidence of the contents of a written document must be distinctly stated when it is offered, and if not objected to it is received, and is entitled to its proper weight, and the weight to be attached to it will depend upon the circumstances of each case.

Each programme of an entertainment is an original document, not a mere copy.

Per McGuire, J.—The rule excluding oral testimony of a witness of the contents of a written document which he had read was not applicable to the present case. What was sought to be proved was not the contents of any book or document, but the resemblance or identity of two performances, partly verbal, partly musical, and partly made up of dramatic action, gesture, and facial expression.

Sufficiency and admissibility of evidence of resemblance or identity of the performance or of copy with original discussed.

Judgment of Richardson, J., reversed.

Carte v. Dennis 256.

VI. INTERPRETATION OF THE CANADIAN COPYRIGHT ACT.

(1) *License to Publish—Writing—Injunction.*]—To create a perfect right under the Copyright Act, R.S.C. ch. 62, sec. 30, there should be an assignment in writing of the license to print and publish; but, without any writing, there may be such conduct on the part of the owner in consenting to and encouraging the infringement alleged as will disentitle him to an injunction.

Allen v. Lyon 289.

(2) *Infringement of—Sources of Information—Statutory Form of Notice of—Decree, Form of—R.S.C. ch. 62, secs. 12 and 33.*]—The publishers of a work containing biographical sketches cannot copy them from a copyrighted work, even where he has applied to the subjects of such sketches, and been referred to the copyrighted work therefor.

In works of this nature, where so much may be taken by different publishers from common sources, and the information given must be in the same words, the Court will be careful not to restrict the right of one publisher to publish a work similar to that of another, if he obtains the information from common sources and does not, to save himself from labour, merely copy from the work of the other that which

has been the result of the latter's skill and diligence.

The notice of copyright to be inserted in the title-page of a copyrighted book is sufficient if it substantially follows the form given in the statute. Therefore the omission of the words "of Canada" is not a fatal defect; and, even if a defect, such defect is removed by sec. 7, sub-sec. 44. of the Interpretation Act (R.S.C. ch. 1).

Depositing in the office of the Minister of Agriculture copies of a book containing notice of copyright before the copyright has been granted does not invalidate the same when granted.

Garland v. Gemmill 292.

(3) *Infringement—Newspaper—First Publication.*]—A paper printed and published in the United States and mailed there to subscribers both in that country and in England, cannot be considered to be first published, or even simultaneously published, in England, so as to come within the provisions of the Imperial Act, 5 & 6 Viet. ch. 45, requiring first publication in the United Kingdom to entitle the publishers to British copyright.

Grossman v. Canada Cycle Co. 307.

(4) *Infringement—English Domicile of Claimant—Right to Benefit of Statute—Knowledge of Existence of Copyright.*]—

The plaintiffs, a company incorporated in England with the object of securing Canadian copyright in musical compositions and of acquiring the protection of the Canadian Copyright Act of 1875, sought to restrain the defendants from importing and selling in Canada a collection of songs containing the songs the copyright in which was claimed by the plaintiffs.

Held, that neither the fact that the plaintiffs were domiciled out of Canada nor that the defendants were ignorant of the existence of the plaintiffs' copyright was a defence to the plaintiffs' action.

Though it appeared that the defendants had acted innocently, had discontinued the infringement, and had expressed regret, yet, as they had contested the plaintiffs' rights in Court, costs of the action were given to plaintiffs.

The affidavit of plaintiffs' manager, stating the incorporation of the plaintiffs in Canada and the obtaining of the copyright of the songs in question, being in no wise controverted, was held sufficient evidence of the copyright for the purpose of the application.

Anglo-Canadian v. Winniffrith 312.

(5) *Right to, in a Compilation—English Domicile of Claimant*

—*Printing from Stereotype Plates—Importation of Foreign Reprints—Right to Restrain.*]

The plaintiff was a publisher in England, and had employed certain persons to compile for him the book in question, paying them for their services. By his agent in Canada, he applied for and obtained copyright under the Canadian Act.

Held, he was entitled to copyright as proprietor of the book, being "assignee," or perhaps "legal representative," of the author.

English domicile is not a bar to obtaining benefit of the Canadian Copyright Act.

Anglo-Canadian Publishers' Assn. (Ltd.) v. Winniffrith (1888), 15 O.R. 164, 167, followed.

Printing from stereotype plates brought to Canada from England is a sufficient "printing" within the meaning of the Act, though no typographical work is done in the preparation of the copies.

American reprints of the plaintiff's copyright book, added as an appendix to American reprints of the Bible, imported into Canada, constitute an invasion of the plaintiff's rights.

Froude v. Parrish 317.

(6) *Penalties—Printing Copies of Canadian Copyright Work Abroad—Stating thereon Exist-*

ence of Canadian Copyright—Copyright Act, 1875, secs. 33, 5, 6 and 13.]—Section 33 of the Copyright Act, 1875, R.S.C. ch. 62, does not apply where the owner of the Canadian copyright in a musical composition has the same printed abroad and impresses on copies used in Canada a notification of the existence of such copyright.

Lancefield v. Anglo-Canadian 323.

(7) *Infringement—Musical Compositions—Qui tam action—“Author”—Assignment of Foreign Copyright—Registration of, Necessity for—Publication—Imperial Copyright under 5 & 6 Vict. ch. 45, sec. 29—Scope of—Foreign Reprints—R.S.C. 1886, ch. 62, sec. 15.]—Certificates of registration produced from the proper branch of the Department of Agriculture at Ottawa are *primâ facie* evidence of due compliance with the requirements of the Copyright Act entitling the producing party to registration under the Act.*

Section 15 of the Copyright Act applies to the assignments of Canadian, not of foreign copyright.

Anglo-Canadian Music Publishers' Association v. Shaw (infra), followed.

It is only when the plaintiff is seeking the recovery of penalties, the moiety of which belong

to the Crown, that he must institute a *qui tam* action.

Unauthorized foreign circulation and publication is no bar to effectual copyright in Canada.

By virtue of 5 & 6 Vict. ch. 45, sec. 29, the importation of foreign reprints into Canada is illegal against the owner of the Imperial copyright in the imported works even though he has ineffectually attempted to secure Canadian copyright.

Morang v. Publishers' Syndicate (1900), 32 O.R. 393, followed.

Anglo-Canadian v. Dupuis 503.

VII. PRACTICE UNDER THE CANADIAN ACT.

(1) *Infringement—Pleading—Musical Composition—Authorship—Inscription in Law.]—Held*, that a company alleging itself to be the registered owner and proprietor of certain Canadian copyrights, covering certain musical compositions, may answer allegations going on to say that it is not the author, or legal representative of the authors of the musical compositions, by saying that the British proprietors of the copyrights assigned the same to it, plaintiff, and that it gave legal notice of such assignment to the Minister

of Agriculture before registration in Canada.

Anglo-Canadian v. Dupuis, 325.

(2) *Qui Tam Action—Penalties—Amendment—Practice.*]

Tremblay v. Quebec Printing Co. 327.

(3) *Costs—Infringement—Consent Judgment—Damages—Amount of—Reference—Offer—Payment into Court.*]—Where judgment was pronounced by consent declaring that the defendant had infringed the plaintiffs' copyright, restraining him from continuing to infringe, and directing a reference to ascertain the damages sustained by reason of the infringement, and the Master found that the damages were only \$6.70, and also reported specially that the plaintiffs were aware before action that the defendant was willing to hand over all copies of and to stop selling or giving away the publications in question, but the plaintiffs demanded \$100 compensation, and that after action the defendant offered to pay \$25 for damages and costs and to deliver up any of the publications on hand and to give an undertaking that there would be no further infringement, but the plaintiffs did not accept the offer.

Held, that the plaintiffs were entitled to the costs of the ac-

tion; and also to the costs of the reference, the defendant not having, when consenting to judgment, offered to pay a fixed sum for damages and to pay it into Court.

Anglo-Canadian v. Somerville 328.

(4) *Registration—Infringement—Particulars.*]—In an action for infringement of copyright in a book, the statement of claim alleged that the plaintiffs were the proprietors of a subsisting copyright duly registered, and further alleged that the defendants printed for sale a large number of copies of another book, a part whereof was an infringement of the plaintiffs' copyright.

Held, that the defendants were entitled to particulars shewing the date of registration of the plaintiffs' copyright, and shewing what part of the defendants' book infringed the plaintiffs' right.

Sweet v. Maugham (1840), 11 Sim. 51, not followed.

Mawman v. Tegg (1826), 2 Russ. 385, 390, and *Page v. Wisden* (1869), 20 L.T.N.S. 435, followed.

Liddell v. Copp-Clark 332.

CORPORATION.

See TRADE UNION, 1, 2.

See COMPANY.

DAMAGES.

Measure of—Consequential.]—See SALE OF GOODS, 1; COPYRIGHT, I; SHIPPING.

DEBTOR AND CREDITOR.

1. *Law of Lower Canada—Transfer of Debt—Civil Code, Arts. 1570 and 1571—Construction—Signification to Debtor of Transfer of Debt—Transfer of Rights under an Insurance Policy.*]—Under Arts. 1570 and 1571 of the Civil Code of Lower Canada, signification to the debtor of the transfer of his debt need not be by a notarial act.

Quare, whether the debtor is a "third person" within the meaning of the latter section, against whom signification is necessary in order to perfect possession.

The institution of an action against the debtor to recover the debt is of itself a sufficient signification of the act of sale of the debt.

Murphy v. Bury (1895), 24 S. C.R. 668, doubted.

Bank of Toronto v. St. Lawrence Fire Insurance Company, 42.

DICTIONARY.

Copyright in—Action for Infringement.]—See COPYRIGHT, II(2).

DIRECTORS.

Power to Sell Assets of Company.]—See COMPANY, 1.
Payment to.]—See COMPANY, 4.

DISCOVERY.

Examination for—Admissibility as Evidence at Trial.]—See COPYRIGHT, V.

DOMICILE.

Foreign—Effect of on Claim to Copyright.]—See COPYRIGHT, VI(4)(5).

DRAMA AND MUSIC.

See COPYRIGHT, V.

DRAMATIC REPRESENTATION

See COPYRIGHT, V.

ENCYCLOPAEDIA.

Copyright in—Infringement.]—See COPYRIGHT, IV(4).

ESPIONAGE.

By Trade Union—Interference with Business—Inducing Breach of Contract.]—See TRADE UNION, 1.

ESTOPPEL.

See INSURANCE, LIFE, 6.

EVIDENCE.

1. *Examination for Discovery Admissibility Thereof as Evidence Against Co-defendants.*—See COPYRIGHT, V.

2. *In Copyright Action.*]—See COPYRIGHT, II(2).

3. *New Trial Ordered to Allow New Evidence to be Put In.*]—See INSURANCE, LIFE, 1.

FEDERATION.

See TRADE UNION, 1, 2.

FINAL ORDER.

Nature of.]—See COMPANY, 7.

FOREIGN REPRINTS.

See COPYRIGHT, IV(1)(2)(3)(4), VI(5)(7).

FORMS AND BLANKS.

Copyright in.]—See COPYRIGHT, II(4).

FRANCHISE.

Of Company—Valuation of.—See COMPANY, 2.

FRAUD.

Payment of Cheque Obtained by.]—See BANKS AND BANKING, 1.

FRAUDULENT PREFERENCES.

See BANKRUPTCY AND INSOLVENCY.

FRIENDLY SOCIETIES.

See BENEVOLENT SOCIETY.

HYPOTHECATION.

Of Lumber to Secure Advances—Bank Act, 53 Vict. (D.) ch. 31.]—See PARTNERSHIP, 1.

INJUNCTION.

Against Trade Union—When Granted.]—See TRADE UNION, 1.
For Infringement—Right to When Lost.]—See COPYRIGHT, VI(1).

INSURANCE, FIRE.

Transfer of Rights Under Policy.]—See DEBTOR AND CREDITOR, 1.

INSURANCE, LIFE.

1. *Application—Misrepresentation as to Age and Health—Effect of—Evidence—Onus—Bonâ*

Fides.—Where in an application for insurance it was erroneously stated that the applicant was forty-one years of age when he was really forty-four:—

Held, that, evidence was admissible to show that the statement was made in good faith and without intention to deceive.

Cerri v. Ancient Order of Foresters (1897), 28 O.R. 111; 25 O.R. 22-23, and *Hargrove v. Royal Templars of Temperance* (1901), 2 O.L.R. 126 followed.

Where a statement as to age is found to be material and untrue, it lies upon the person seeking to uphold the contract to make proof that the statement was made *bonâ fide* and without intention to deceive.

A new trial ordered to allow plaintiff to bring in evidence of good faith.

Dillon v. Mutual Reserve Fund Life, 10.

2. *Benevolent Society—Certificate—Effect of Will on Insurance Money—“Legal Heirs Designated by Will”—Election—R.S.O. 1887, ch. 136, secs. 5, 6, 7 and 10.*]—Where a testatrix, who had obtained a certificate of insurance in a benevolent society and had declared “her legal heirs as designated by her will” to be the beneficiaries thereunder, devised the life insurance money to pay certain debts:—

Held, this disposition was inoperative, as being repugnant to

the statute under which the insurance arose: R.S.O. 1887, ch. 136, secs. 5 and 10, and that the insurance moneys should go to the “legal heirs” designated in the will.

Held, also, that the children of the testatrix were not bound to elect between the benefits specifically devised to them and the insurance money, as the direction was nugatory and the will should be read as if the invalid clauses were expunged.

Hearle v. Greenbank (1749), 1 Ves. Sr., at p. 307, followed.

Griffith v. Howes, 15.

3. *Beneficiary not Named in Policy—Policy not in Accord with Application—Mutual Mistake—Right to Proceeds—Act for Benefit of Wives and Children—58 Vict. (N.B.), ch. 25.*]—C. applied for insurance, the policy to be payable in event of death to his wife, but the company, in accordance with its rules, issued a policy payable on its face to the personal representatives, though in fact in such circumstances it would pay the proceeds only to the beneficiary named in the application. C. was unaware of this at the time of his death:—

Held (Davis and Mills, JJ., dissenting), that the wife was entitled to the proceeds of the policy as against the representatives of the estate.

Per Sedgewick, J., The New Brunswick Act, 58 Vict. ch. 25, for securing to wives and children the benefit of life insurance, applies to accident insurance as well as to straight life insurance.

Cornwall v. Halifax Banking Company, 76.

4. *Condition Precedent to Liability on Policy—Arbitration Before Award—Validity of—Ouster of Jurisdiction of Court.*—Upon the face of a policy of life insurance, the contract to pay was made subject to the conditions endorsed upon it as conditions precedent; and the 15th of such conditions provided, in the event of any difference arising between the parties, for obtaining the award of a mutual person as a condition precedent to liability to pay any claim under the policy and to the enforcement of it:—

Held, therefore, that the liability being upon the award and policy and not upon the latter alone, no action lay on the policy, nor did the amount payable under it become due until the award had been made under the condition.

Held, further, that the condition was not in contravention of section 80 of the Ontario Insurance Act, R.S.O. 1897, ch. 203.

Spurrier v. La Cloche, [1902] A.C. 446, followed.

Nolan v. Ocean Accident and Guarantee Co., 367.

5. *War Risks—Special Premium—When Earned—Recovery of from Company.*—A life insurance company, in consideration of the payment of a special annual premium, insured the lives of a certain number of men belonging to a military corps that was proceeding to engage in the late war in South Africa against risks of that war. An agent of the company procured the insurance and paid the ordinary and special war premiums to the company out of his own pocket to facilitate the issue of the policies. Before the military corps reached the scene of the hostilities, peace was declared. In an action by the agent to recover the special premiums paid by him:—

Held, that the special premiums had not been earned by the company in view of the fact that the assured had not been exposed to the risks of war, and that, therefore, the plaintiff was entitled to recover back the amount thereof.

Bellew v. Provident Savings Life, 455.

6. *Policy—“Signed, Sealed and Delivered”—When Complete—Insured Taking Hazardous Employment Without Permission—Retention of Premium Paid After with Knowledge of*

Facts — Estoppel.]—Upon the acceptance of the premium therefor, the issuing by the president and managing director, and the forwarding for delivery to the insured, a policy of insurance is complete and binding as against the company from the date of execution, though in fact it remains in the possession of the company or of its agent, unless there remains some act to be done by the other party to declare his adoption of it.

A life policy was subject to a condition making it void if the insured took a hazardous employment without the written permission of the president, vice-president or managing director of the company. The assured did take such employment without the written permission of any of the officers named, but with the assent of the company's provincial agent, and after the change of occupation, paid a premium which was retained by the company, with knowledge of the change of occupation:—

Held, that the company was estopped from taking advantage of the forfeiture clause.

Decision of MARTIN, J., reversed.

Elson v. North American Life Assurance Co., 460.

7. *Incontestable Clause in Policy — Effect of.*]—See INSURANCE, LIFE, 6, *ante*.

8. *Friendly Society—Altering Beneficiary—Privileged Class—Paramount Authority of Ontario Insurance Act—R.S.O. 1897, ch. 203, sec. 151.*]—The designation of a beneficiary in an Ontario contract of insurance can be revoked, and the benefit diverted to another, only within the limits laid down by the Ontario Insurance Act, R.S.O. 1897, ch. 203, sec. 151, even though, in the instrument containing the original designation of the beneficiary, an unlimited power to revoke and divert, subject to the by-laws of the insurer, be expressly reserved, which by-laws sanction the diversion:—

Held, therefore, that an attempted diversion of the benefit from a beneficiary of the privileged class to a beneficiary not within that class was invalid by reason of sub-section 3 of section 151 of the Act.

Lints v. Lints, 469.

INTENT TO PREFER.

Necessity for in Impeached Conveyance to Creditor.]—See BANKRUPTCY AND INSOLVENCY, 3.

JURISDICTION.

Of the Court—Ouster of by Condition in Insurance Policy.]—See INSURANCE, LIFE, 4.

KNOWLEDGE.

Of Insolvency of Transferor in Fraudulent Conveyance—Necessity for.—See BANKRUPTCY AND INSOLVENCY, 2.

LIEN.

Mechanic's—Action—Practice—Affidavit Verifying Statement of Claim—Particulars of Residence of Plaintiff.—In the case of an action under the Mechanics' and Wage Earners' Lien Act, R.S.O. 1897, ch. 153, the affidavit verifying the statement of claim required by sec. 31(2) may be made by the plaintiff's solicitor as agent.

The plaintiffs were day laborers who did work for the defendants on a railway in an unorganized district, and it was set forth in the statement of claim that they resided in that district; the name and address of the plaintiffs' solicitor was also stated therein:—

Held, that it was not necessary to give more precise particulars of the places of residence of the plaintiffs.

Crerar v. C. P. R., 107.

MINING COMPANY.

Powers of.—See COMPANY, 1.

MINORITY.

Rights of Dissident Shareholders.—See COMPANY, 1.

MISREPRESENTATION.

As to Age and Health in Application for Insurance.—See INSURANCE, LIFE, 1.

MISTAKE.

Mutual—Effect of.—See INSURANCE, LIFE, 3.

MORTGAGE.

Right of Mortgagee of the Lands of a Limited Company in a Winding-up.—See COMPANY, 7.

NEGLIGENCE.

Liability of Bank Manager for—Test of—Alteration of Promissory Note—Instructions Disobeyed.—See BANKS AND BANKING, 2.

NEWSPAPER.

Foreign—Copyright in—How Got.—See COPYRIGHT, VI(3).

NOTICE.

In Fraudulent Transaction—When Imputed to Creditor.]—See BANKRUPTCY AND INSOLVENCY, 2.

PARTNERSHIP.

Powers of Partner After Dissolution of Firm—Hypothecation of Lumber to Secure Advances—The Bank Act, 53 Vict. ch. 31—Sale of Lumber by Partner—Application of Proceeds—Payment of Other Indebtedness—Knowledge of Pledgee.]—Notwithstanding a dissolution of a partnership, a partner, until at all events a receiver is appointed, has all the power and authority he had before the dissolution to complete contracts made during the partnership.

Hence, where a firm of lumber operators hypothecated under the Bank Act their season's cut of lumber to a bank to secure future advances, and a member of the firm, without the knowledge of his co-partner, sold the lumber and applied part of the proceeds in paying a past indebtedness of the firm to the bank, and, with the consent of the bank, applied a portion of the remainder in paying other debts of the firm:—

Held, that he had power to do so, though the partnership had then been dissolved, and that his

co-partner was not entitled to have the money so appropriated charged in reduction of the secured indebtedness to the bank.

Hale v. People's Bank, 405.

PAYEE.

Fictitious and Non-existing—Cheque Drawn to.]—See BANKS AND BANKING, 1.

PAYMENT INTO COURT.

See COPYRIGHT, VII(3).

PENALTIES.

Actions for.]—See COPYRIGHT, I, II(1), VI(6)(7), VII(2).

PIRACY.

See COPYRIGHT, *passim*.

PLEADING.

Action Against Trade Union—Corporate Capacity, Denial of—When to be Made.]—See TRADE UNION, 1.

Copyright Action.]—See COPYRIGHT, V, VII(1).

PRACTICE AND PROCEDURE.

Parties in Trade Union Action—Representation of Classes—

Ont. Jud. Act, Rule 200.]—See TRADE UNION, 2.

Particulars—Mechanics' Lien Action.]—See LIEN.

Costs in Copyright Action.]—See COPYRIGHT, VII(3).

Particulars, When Ordered.]—See COPYRIGHT, VII(4).

Order for Dissolution in Winding-up Proceedings—Final Order—Nature of.]—See COMPANY, 8.

PRESSURE.

Mortgage Obtained by, May Be Set Aside.]—See BANKRUPTCY AND INSOLVENCY, 2.

Doctrine of.]—See BANKRUPTCY AND INSOLVENCY, 3.

PRINCIPAL AND AGENT.

Fraud of Agent—Principal Affected by.]—See BANKS AND BANKING, 1.

PROMISSORY NOTE.

1. *Alteration—Effect of—Liability of Person Altering to Payee.*]—See BANKS AND BANKING, 2.

2. *Cession de Biens (Assignment for Benefit of Creditors)—Waiver of Protest by Curator.*]—The curator of an insolvent debtor who has assigned for the benefit of his creditors has no

authority without the order of a Judge upon the advice of the creditors or inspectors to waive protest of a promissory note of which his debtor was the endorser. Such unauthorized action will extinguish the debtor's liability thereon.

Deuenberg v. Mendelsohn, 493.

PROTEST.

Waiver of by Curator—Effect.]—See PROMISSORY NOTE, 2.

PUBLICI JURIS.

Publications Become.]—See COPYRIGHT, I.

QUASI-CORPORATION.

See TRADE UNION, 1, 2.

QUI TAM ACTION.

See COPYRIGHT, VI(6)(7), VII(2).

RAILWAY TICKET.

Copyright in.]—See COPYRIGHT, II(3).

REFERENCE.

Agreement to refer to arbitration—Matters Arising in Course of.—See ARBITRATION AND AWARD, 1.

RULES OF PRACTICE.

Ontario Judicature Act, 358, 1216.]—See COMPANY, 8.

Manitoba Judicature Ordinance, 1898, 201, 224.]—See COPYRIGHT, 5.

SALE OF GOODS.

Warranty—Absolute—Breach of—Latent Defect—“Burglar-proof”—“Reasonable Protection Against Burglars”—*Measure of Damages—Consequential Damages.*—During negotiations for the sale of a vault door between the defendants, safe makers, and the plaintiffs, a private banker, the former wrote enclosing cuts from their sample book of three vault doors called Nos. 67, 68, and 69: the two latter were “fire and burglar proof vault doors.” No. 67 was called “fire proof vault door with chilled steel lining.” and was described as being “made with a lining of chilled steel covering the entire surface of outer door.” In a former letter No. 67 had been described as “protected by hardened drill-proof plate.” The plaintiff replied to this, “Would No. 67

furnish a fair protection against burglars?” To which the answer was “No. 67 door gives both fire and burglar proof protection.” The plaintiff purchased the door on these representations and some months later it was blown open by burglars:—

Held, that, on a true construction of the correspondence, no absolute warranty or insurance against burglary had been given by the defendants, but that they did warrant (1) a fair, *i.e.*, a reasonable protection against burglars, and, also, that (2) the entire surface of the door was protected by hardened drill-proof plate composed of chilled steel.

Held, further, that as the door was not lined with chilled steel, and, hence, not burglar proof to any extent as capable of being drilled by an ordinary hand drill, all the warranties had been broken, but that the loss of the money contained in the vault was not a natural consequence of the defects in the vault door, and the proper measure of damages was the price paid for the door.

Denison v. Taylor, 1.

SHAREHOLDERS.

1. See COMPANY, 1.
2. *Petition by for Winding-up.*—See COMPANY, 5.

SHIPPING.

Charter-party — Arrival of Ship at Place of Loading—“Load” — Meaning of—Measure of Damages.]—C., representing the defendants, wired R., representing the plaintiffs, “to load Midland Queen last trip at Fort William, at four and one-half cents, to discharge at Georgian Bay or Goderich”; R. wired C.: “Playfair (plaintiffs’ manager) confirms charter Queen, Fort William to Goderich, loading about December 2nd (1901), weather, ice, permitting, four and one-half cents bushel”; C. wired R.: “We confirm Midland Queen, four and one-half, Goderich, load Fort William on or before noon fifth December.” The steamer reached Fort William on the 3rd of December, and left an hour before noon on the 5th of December, without the cargo. The steamer was obliged to leave, because the insurance would have expired if the return voyage had not then commenced. It appeared that, owing to a blockage of steamers at the elevator wharves, loading could not have been completed by noon of the 5th of December, though it could have been commenced:—

Held, MacLennan, J.A., dissenting, that the defendants, having had before and at the time specified for loading, a sufficient quantity of grain in the eleva-

tors, which, upon the evidence, was the place of loading contemplated and agreed upon by both parties, to have furnished a full cargo if the vessel had come under the spouts of the elevators, they had performed their part of the contract and were not bound to provide or secure for the vessel an unimpeded access to the spouts in time to enable her to load there within the time specified, or, failing that, to load her by some other means within the specified time.

Held, further, that the defendants having been released from their contract to deliver the grain at Goderich, having, later, sold some, if not all, of the grain at prices not shewn to have been less than the original selling price, and the damages being measured by the injury suffered by the cargo being left on the defendants’ hands, nominal damages only should be allowed for the plaintiffs’ breach of the contract.

Per MacLennan, J.A., dissenting, the true construction of the word “load” in the contract is that the defendants would complete the loading within the time limited therein.

Decision of MacMahon, J., reversed.

Midland Navigation Co. v. Dominion Elevator Co., 516.

STATUTES.

5 & 6 *Vict. (Imp.) ch. 45.*—*See* COPYRIGHT, IV(3), IV(1).

5 & 6 *Vict. (Imp.) ch. 45, secs. 11, 17, 18, 19.*—*See* COPYRIGHT, IV(4).

5 & 6 *Vict. (Imp.) ch. 45, secs. 16, 26.*—*See* COPYRIGHT, V.

5 & 6 *Vict. (Imp.) ch. 45, sec. 29.*—*See* COPYRIGHT, VI(7).

5 & 6 *Vict. (Imp.) ch. 45, secs. 17, 24.*—*See* COPYRIGHT, IV(2).

25 & 26 *Vict. (Imp.) ch. 68.*—*See* COPYRIGHT, III(1).

38 *Vict. (D.) ch. 88.*—*See* COPYRIGHT, IV(1).

39 & 40 *Vict. (Imp.) ch. 36, sec. 152.*—*See* COPYRIGHT, IV(4).

53 *Vict. (D.) ch. 31.*—*See* PARTNERSHIP, 1.

58 *Vict. (New B.) ch. 25.*—*See* INSURANCE, LIFE, 3.

62 & 63 *Vict. (D.) ch. 43, sec. 4.*—*See* COMPANY, 5.

63 & 64 *Vict. (Man.) ch. 3, sec. 1.*—*See* BANKRUPTCY AND INSOLVENCY, 2, 3.

R.S.C. 1886, ch. 1, sec. 7 (44).—*See* COPYRIGHT, VI(2).

R.S.C. 1886, ch. 62, sec. 4.—*See* COPYRIGHT, II(4).

R.S.C. 1886, ch. 62, secs. 4, 6.—*See* COPYRIGHT, IV(3).

R.S.C. 1886, ch. 62, secs. 4, 17, 30.—*See* COPYRIGHT, II(1).

R.S.C. 1886, ch. 62, secs. 12 and 33.—*See* COPYRIGHT, VI(2).

R.S.C. 1886, ch. 62, sec. 15.—*See* COPYRIGHT, VI(7).

R.S.C. 1886, ch. 62, sec. 30.—*See* COPYRIGHT, VI(1).

R.S.C. 1886, ch. 129, sec. 5.—*See* COMPANY, 5.

R.S.C. 1886, ch. 129, secs. 15 and 31.—*See* COMPANY, 8.

R.S.C. 1886, ch. 129, secs. 62 et seq.—*See* COMPANY, 6.

R.S.M., ch. 7, sec. 33.—*See* BANKRUPTCY AND INSOLVENCY, 2, 3.

R.S.O. 1887, ch. 124, sec. 8.—*See* BANKRUPTCY AND INSOLVENCY, 2.

R.S.O. 1887, ch. 136, secs. 5 and 10.—*See* INSURANCE, LIFE, 2.

R.S.O. 1887, ch. 164, sec. 99.—*See* COMPANY, 2.

R.S.O. 1897, ch. 62, sec. 41.—*See* ARBITRATION AND AWARD, 1.

R.S.O. 1897, ch. 147, secs. 20 and 21.—*See* BANKRUPTCY AND INSOLVENCY, 1.

R.S.O. 1897, ch. 153, sec. 31 (2).—*See* LIEN, 1.

R.S.O. 1897, ch. 203, sec. 80.—*See* INSURANCE, LIFE, 4.

R.S.O. 1897, ch. 203, sec. 149 (1).—*See* INSURANCE, LIFE, 1.

R.S.O. 1897, ch. 203, sec. 151.—*See* INSURANCE, LIFE, 8.

R.S.O. 1897, ch. 222, secs. 27 and 41.—*See* COMPANY, 7.

STOCK.

Transfer of—Power of Attorney to.]—See COMPANY, 4.

TRADE UNION.

1. *Espionage by—Interference With Business—Inducing Breach of Contract—Injunction—Pleading—Damages.*]—The defendants were a local branch of a trade union, the members thereof, and the president of the whole trade union, who, by means of threats, abusive language, intimidation, and a system of espionage, had induced employees of the plaintiffs to break their contracts of employment with them, prevented the plaintiffs from obtaining new men in their places, and had seriously interfered with the sale of the plaintiffs' goods:—

Held, that the plaintiffs were entitled to an injunction restraining the defendants from unlawfully besetting the plaintiffs' factory, and from all wrongful obstruction of, or interference with the plaintiffs in their business.

Held, further, that the defendants (including the president of the union, though a foreigner), were liable to the plaintiffs in damages for the loss incurred by the plaintiffs in their business due to the defendants' unlawful acts.

Held, also, that the defendants having, without objection, appeared and pleaded in an apparently corporate capacity, could not at the trial raise the objection that they were not a corporate body, and that therefore they could not be sued as such. Before the corporate capacity of a party, suing or being sued in such capacity, can be questioned, the fact of incorporation must be expressly denied.

Krug Furniture Co. v. Berlin Union of Woodworkers, 425.

2. *Parties—Representation of Classes—Rule 200—Members of Unincorporated Voluntary Association—Trades Unions—Local Organization—Members of Executive Committee—Ordinary Members Specially Interested—General Federation—Representation by President.*]—Where a number of persons are bound together by a set of rules by which they are in the habit of considering themselves bound, annually elect an executive committee to act on behalf of the whole body of members; pay regular contributions to a treasurer for carrying out the purposes of the collective body, hold meetings at which the majority of votes cast by the members present determines the action of the executive committee on behalf of the whole body; the executive committee or a majority of it (if all cannot be ascertained) may be joined

under Rule 200 as defendants to represent the collective body or association in an action against such body or association.

But neither the executive committee of a local branch of a foreign general association or federation comprising other local branches domestic and foreign, said association or federation and said branches being constituted in a manner similar to that set out above, nor the president of such general association or federation, can be made parties as representing such foreign association and other local branches.

Judgment of Ferguson, J., varied.

Small v. Hyttenrauch, 433.

WARRANTY.

Implied.]—See CONTRACT, 1.

Breach of.]—See SALE OF GOODS, 1.

WAR RISKS.

Insurance of—Special Premium—When Earned.]—See INSURANCE, LIFE, 5.

WIFE.

Act for Benefit of Wives and Children.]—See INSURANCE, LIFE, 3.

WILL.

Effect of on Insurance Money.]—See INSURANCE, LIFE, 2.

WORDS AND PHRASES.

“Burglar-proof.”]—See SALE OF GOODS, 1.

“Load.”]—See SHIPPING.

“Signed, Sealed and Delivered.”]—See INSURANCE, LIFE, 6.

