Dominion Law Reports

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COMPRISING EVERY CASE REPORTED IN THE COURTS OF EVERY PROVINCE, AND ALSO ALL THE CASES DECIDED IN THE SUPREME COURT OF CANADA, EXCHEQUER COURT, THE RAILWAY COMMISSION, AND THE CANADIAN CASES APPEALED TO THE PRIVY COUNCIL

ANNOTATED

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VOL. 61

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DOMINION LAW REPORTS

WILSON v. E. & N. R. CO.; E. & N. R. CO. v. DUNLOP.

Judicial Committee of the Privy Council, Viscount Haldane, Viscount Cave, Lord Carson, Duff, J., and Sir Robert Stout.
November 18, 1921.

Constitutional Law (§IA—20)—Provincial Railways—Dominion Enactment Declaring it to be for General Advantage of Canada—Subsequent Provincial Legislation Affecting—Validity.

Upon the passing by the Parliament of Canada of the Act of 1905, ch. 90, declaring the Esquimalt and Nanaimo Railway to be a work for the general advantage of Canada, the Legislature of the Province of British Columbia ceased to possess the authority theretofore vested in it under Nos. 10 and 13 of sec. 92 of the B.N.A. Act to deprive the railway company of its legal title to any of the subjects actually forming part of the "railway" so declared to be "a work for the general advantage of Canada" and to vest that title in another, but lands acquired by the railway company as a subsidy granted for the purpose of aiding in the construction of the railway and not held by the company as part of its "railway," are not withdrawn from the legislative jurisdiction of the Province in relation to property and civil rights.

Constitutional Law (§IA—20)—Provincial Railways—Dominion Patent under—Subsequent Disallowance of Act—Effect of on Patent Issued.

By sec. 56 of the B.N.A. Act a power of disallowance in respect of Dominion Acts is vested in the Queen in Council, and by sec. 90 the provisions of sec. 56 are, inter alia, made applicable to statutes passed by Provincial Legislatures, the Governor-General in Council being substituted as disallowing authority for the Queen in Council, and the period of two years mentioned in sec. 56 being reduced to one year. Their Lordships held that the words in the section "shall annul the act from and after the day of such signification" disclosed with sufficient clearness an intention that at all events as to private rights completely constituted and founded upon transactions entirely past and closed the disallowance of a provincial statute was inoperative, and therefore where a patent to lands had issued under the Vancouver Island Settlers' Rights Act of 1904 and the amending Act of 1917, the subsequent disallowance of the Act of 1917 was inoperative in regard to the patent issued.

Constitutional Law (§IG—140)—Crown Patent to Land—Proof of Occupation and Improvement — Functions and Powers of Lieutenant-Governor in Council.

The Vancouver Island Settlers' Rights Act, B.C. Statutes 1904, ch. 54, requires that before the authority to issue a Crown grant under sec. 3 is acted upon the Lieutenant-Governor in Council shall decide the question whether or not there is "reasonable proof" of "improvement" or occupation and of intention to reside. Their Lordships held that the function of the Lieutenant-Governor in Council in deciding upon such questions is judicial in the sense that he must preserve a judicial temper and perform his duties conscientiously with a proper feeling of responsibility, but he is not bound to govern himself by the rules of procedure regulating proceedings in a Court of Justice, and is not bound by the technical rules of law touching the reception of hearsay evidence.

Imp.
P.C.
WILSON
v.
E. & N. R. Co.:
E. & N. R. Co.
v.
DUNLOP.

APPEALS from the judgment of the British Columbia Court of Appeal (1921), 59 D.L.R. 577. Dunlop appeal dismissed; Wilson appeal allowed.

The judgment of the Board was delivered by

Duff, J.:—This is an appeal from the judgment of the Court of Appeal of British Columbia of February 3, 1921, 59 D.L.R. 577, affirming the judgment of the trial Judge, Gregory, J. (1920), 54 D.L.R. 584, in favour of the respondent company in which their Lordships have to consider the effect of the Vancouver Island Settlers' Rights Act of 1904 (B.C.), ch. 54, and the amending Act of 1917 (B.C.), ch. 71, that was subsequently disallowed, as well as the effect of that disallowance upon the rights of the grantees under Crown grants issued by authority of those enactments.

Two actions were brought by the respondent company to establish its title to certain lands comprised in a grant to the appellants professedly made under the authority of the statutes mentioned.

A history of the legislation and other public and private proceedings and transactions affecting more or less directly the land whose title is in controversy would be a rather voluminous one, but it is unnecessary now to enter into that history in detail. Admittedly, these lands are situated in a considerable district in Vancouver Island known as the Esquimalt and Nanaimo Railway Belt; a tract of land granted by a provincial statute to the Dominion Government in execution of the terms of an arrangement arrived at in the year 1883 in settlement of disputes between the two governments, and in turn by the Dominion Government, pursuant to the same arrangement, granted to the Esquimalt and Nanaimo Railway Co. (the respondent company) as a subsidy in aid of the construction of a line of railway (the Esquimalt and Nanaimo Railway) in Vancouver Island. But for the legislation of 1904 and 1917 the respondent company's title would be indisputable.

In 1904 the Vancouver Island Settlers' Rights Act was passed by the Legislature of British Columbia, ch. 54; the relevant provisions of it being these:—

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

(a) "Railway Land Belt" shall mean the lands described by section 3 of chapter 14 of 47 Victoria, being "An Act relating to the Island Railway, the Graving Dock, and Railway Lands of the Province."

(b) "Settler" shall mean a person who, prior to the passing of the said Act, occupied or improved lands situate within the said railway land belt, with the bona fide intention of living thereon."

Section 3. "Upon application being made to the Lieutenant-Governor in Council, within twelve months from the coming into force of this Act, showing that any settler occupied or improved land within the said railway land belt prior to the enactment of chapter 14 of 47 Victoria, with the bona fide intention of living on said land, accompanied by reasonable proof of such occupation or improvement and intention, a Crown grant of the fee simple in such land shall be issued to him, or his legal representative, free of charge and in accordance with the provisions of the Land Act in force at the time when said land was first so occupied or improved by said settler."

By a judgment of this Board in McGregor v. The Esquimalt and Nanaimo Railway Company, [1907] A.C. 462, it was decided that a grant under the statute of 1904 had the effect, as to the lands comprised in the grant, of displacing the title of the railway company and vesting a title in fee simple in the grantee. The time limit of 12 months fixed, by sec. 3 of the statute of 1904, was extended by a statute of 1917 to September 1 of that year.

On July 5, 1917, the appellants, Wilson and McKenzie, as executors of Joseph Ganner, deceased, applied under the Act of 1917 for a Crown grant of the lands in dispute alleging that Ganner in his lifetime and before December 19, 1883, the relevant date mentioned in sec. 3 of the Act of 1904, had improved these lands with a bona fide intention of living thereon; this allegation being supported by statutory declarations of the executors and others. The late Joseph Ganner had already in his lifetime received a conveyance of these lands, "less the right of way for the railway," by deed reserving to the company the right to take timber for railway purposes, "rights of way for their railway" and the right to enter and to take such land as might be required for stations and workshops and excepting all minerals including coal; and subsequently, pursuant to this application on February 15, 1918, a Crown grant was issued purporting to convey to Wilson and McKenzie, as executors of Ganner, a title in fee simple to the land applied for, subject only to certain exceptions and reservations in favour of the Crown. On May 30, 1918, the Governor-General by an Order in Council disallowed the Act of 1917.

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The Court of Appeal, 59 D.L.R. 577, with the exception of McPhillips, J., who dissented, concurred with the trial Judge, Gregory, J., 54 D.L.R. 584, in holding, though not precisely upon the same grounds, that the authority vested in the Lieutenant-Governor in Council by the statutes of 1904 and 1917, was subject to certain conditions that had not been observed in the proceedings resulting in the issue of the grant, which they decided was consequently invalid. The questions which thus engaged the attention of the Courts below will require discussion, but, in the meantime, it is more convenient to deal with the points arising in consequence of the fact that in the year 1905 that is to say, after the passing of the Act of 1904, but before the passing of the Act of 1917, the "railway" of the respondent company was, by an Act of Parliament of Canada (ch. 90 sec. 1), declared to be "a work for the general advantage of Canada"; the word "railway" in this statute signifying by force of sec. 2 sub-sec. 21 of the Dominion Railway Act (R.S.C. 1906, ch. 37):—

"Any railway which the company has authority to construct or operate, and . . . all branches, sidings, stations, depots, wharfs, rolling stock, equipment, stores, property, real or personal, and works connected therewith, and also any railway bridge, tunnel, or other structure which the company is authorised to construct."

Upon the passing of the Act of 1905, in virtue of the enactments of sec. 91 (29) and sec. 92 (10) of the B.N.A. Act, the "railway" of the respondent company passed within the exclusive legislative jurisdiction of the Parliament of Canada and, accordingly, their Lordships think the Legislature of the Province ceased to possess the authority theretofore vested in it under No. 10 of sec. 92 and No. 13 of the same section of the B.N.A. Act, to deprive the railway company of its legal title to any of the subjects actually forming part of the "railway" so declared to be "a work for the general advantage of Canada," and to vest that title in another. It does not follow, however, that lands acquired by the railway company as a subsidy granted for the purpose of aiding in the construction of the railway and not held by the company as part of its "railway" or of its undertaking as a railway company were withdrawn from the legislative jurisdiction of the province in relation to "property and civil rights"; and, in their Lordships' opinion, that authority

was, notwithstanding the enactment of the Dominion Act of 1905, still exercisable in relation to such subjects.

On the other hand, as their Lordships have already noticed, the railway company was, by virtue of the stipulations contained in the conveyance to Ganner, the owner of certain rights (to take timber for railway purposes, rights of way for the railway, to take land for stations and workshops), which rights, it cannot be denied, were held by the company as part of its railway undertaking. Whether or not they were actually part of the "work," that is to say of the "railway" declared to be "a work for the general advantage of Canada," these rights were so identified with the railway undertaking as to justify the most serious doubts whether they could legally be swept away or impaired by provincial legislation. And it was with entire propriety that Mr. Taylor, as counsel for the appellants, agreed that all lands and all such rights as ought to be considered as part of the railway undertaking, should be treated as excluded from the operation of the grant.

Indeed, the real controversy seems to concern the coal only, and as regards the coal it appears to have been so dealt with that it would be impossible to regard it as any longer a part of the railway undertaking, though in respect of the working of it, in so far as such working may affect the railway, all parties are of course under the control of the Board of Railway Commissioners.

The question that was principally discussed before their Lordships' Board was that presented by the contention of the respondent company concerning the effect of the disallowance of the Act of 1917, by which it is argued the grants already made to the appellants are nullified. In relation to this question the pertinent sections of the B.N.A. Act are secs. 56 and 90. By the first of these a power of disallowance in respect of Dominion Acts is vested in the Queen in Council; by sec. 90 the provisions of sec. 56 are, inter alia, made applicable to statutes passed by the Provincial Legislatures, the Governor-General in Council being substituted as disallowing authority for the Queen in Council, and the period of 2 years named in sec. 56 being reduced to one year. Textually, sec. 56 is as follows:—

"Where the Governor-General assents to a Bill in the Queen's name, he shall by the first convenient opportunity send an authentic copy of the Act to one of Her Majesty's Principal Secretaries of State, and if the Queen in Council

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within two years after receipt thereof by the Secretary of State thinks fit to disallow the Act such disallowance (with a certificate of the Secretary of State on the day on which the Act was received by him) being signified by the Governor-General, by Speech or Message to each of the Houses of Parliament or by Proclamation, shall annul the Act from and after the day of such signification."

For the purposes of the present appeal the point under examination turns, as their Lordships think, upon the effect to be ascribed to the words "shall annul the Act from and after the day of such signification."

Cases may no doubt arise giving place for controversy touching the application of this phrase, but their Lordships think that the language itself discloses with sufficient clearness an intention that, at all events as to private rights completely constituted and founded upon transactions entirely past and closed, the disallowance of a provincial statute shall be inoperative.

It is important in construing such a provision to consider the probable tendency of any proposed construction in relation to its effect upon the working of the constitutional system set up by the B.N.A. Act, and from this point of view the construction advocated by the respondents is open to two objections of not a little weight. If private rights that have been fully constituted under provincial legislation are swept away by disallowance—which may take place at any time up to the expiration of a year after the enactment of the legislation—then provincial legislation may obviously become a subject of a considerable degree of doubt as to its ultimate operation and effect. This uncertainty would, of course, be much limited in its practical incidence by recognised constitutional conventions restricting the classes of cases in which disallowance is permissible; but it is indisputable that in point of law the authority is unrestricted, and under conceivable conditions the uncertainty touching the fate of provincial enactments might be productive of some degree of general inconvenience. Another objection of some practical importance lies in the probability that under the proposed construction, the Dominion Government when considering the advisability of disallowing a provincial enactment in circumstances making the exercise of the power proper and desirable on general grounds, would encounter embarrassments (otherwise not likely to arise)

by reason of apprehensions as to the consequences of its action upon the rights and interests of private individuals.

It was urged by counsel for the respondent company that these considerations have no relevancy in the present controversy, since (it is argued) by force of sec. 104 of the Land Registry Act, R.S.B.C. 1911, ch. 127, the Crown grant upon which the appellants' right is founded could not vest a title or any interest in the lands comprised in the grant until the grant had been registered in the proper Land Registry Office; and that, admittedly, registration had not in fact taken place at the time the Act was disallowed.

The appellants (to advert briefly to the facts), having applied for the registration of their title, were met with the objection that a lis pendens having been filed in the action out of which this appeal arises (and in another action which has since been dismissed), the title ought not to be registered until the lis pendens had been removed. To this objection the Registrar gave effect, and his decision, which had been reversed by the Court of Appeal, was, on appeal to His Majesty in Council, eventually sustained.

Their Lordships have now to decide whether or not the actions in respect of which the lis pendens was filed should be dismissed and the lis pendens vacated. And their Lordships having for the reasons now given, some of which are yet to be explained, come to the conclusion that the actions are not well founded, it follows that the appellants had, when they applied for registration, a completely constituted right to register their title; though the exercise of that right was, in consequence of the proceedings taken by the respondent company, suspended pending the determination of the questions which the company itself had raised. Their Lordships entertain no doubt that such a right is one of the class of rights intended to be protected by sec. 56 of the B.N.A. Act.

It should not, however, be assumed that their Lordships are in accord with the contention that sec. 104 of the Land Registry Act applied either to grants of a special character, such as those authorised by the legislation of 1904 and 1917, or to ordinary Crown grants issued under the authority of the Land Acts. On these points their Lordships express no opinion.

The last point for consideration arises in consequence of the contention of the respondent company (to which the

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Court of Appeal, 59 D.L.R. 577, gave effect) that the powers of the Lieutenant-Governor in Council under the legislation of 1904 and 1917 were not validly exercised, inasmuch as certain conditions, some expressly, others impliedly, attached to those powers were not observed.

The statute of 1904 no doubt requires that before the authority to issue a Crown grant under sec. 3 is acted upon, the Lieutenant-Governor in Council shall decide the question whether or not there is "reasonable proof" of "improvement" or "occupation" and of intention to reside; and their Lordships consider that the function of the Lieutenant-Governor in Council in deciding upon such questions is judicial in the sense that he must, to adapt the language of Lord Moulton in Arlidge's case, [1915] A.C. 120, at p. 150, "preserve a judicial temper" and perform his duties "conscientiously with a proper feeling of responsibility" in view of the fact that a decision in favour of the applicant must result in the transfer to the applicant of property to which, but for the statute and but for the production of the necessary proof, the respondent company (or its successors in title) would have possessed an unassailable right; and it may be assumed for the purposes of this appeal that a grant issued in consequence of a decision arrived at through proceedings wanting in these characteristics would be impeachable by the respondent company (or its successors), as issued without authority or in abuse of the authority which the statute creates.

There are two grounds upon which this contention is supported.

First it is said that the respondents were denied an adequate opportunity of shewing that the essential allegations made on the application were not well founded in fact, and second that in the material produced there was no "reasonable proof" of those allegations.

The second of these grounds is that upon which the judgment of the majority of the Court of Appeal, 59 D.L.R. 577, proceeded. The judgment of the Chief Justice with whom Galliher, J., concurred, contains a searching examination of the evidence adduced, leading him to the conclusion that no such "reasonable proof" was before the Lieutenant-Governor in Council. The reasons of the Chief Justice are cogent reasons in support of the conclusion that the allegations of the appellants' petition were not supported by complete evidence; but their Lordships do not think that this, if

established to the satisfaction of the Court of Appeal, was necessarily conclusive in favour of the respondent company.

Whether or not the proof advanced was "reasonable proof" was a question of fact for the designated tribunal, and the decision by the Lieutenant-Governor in Council in the affirmative could not be questioned in any Court so long, at all events, as it was not demonstrated that there was no "proof" before him which, acting judicially, he could regard as reasonably sufficient.

This the majority of the Court of Appeal has held to be shewn. But the Chief Justice, at all events, who examined the evidence in detail, and Galliher, J. (who concurred with him), proceeded largely upon the view that, generally, the deponents seem to speak without personal knowledge of the facts to which they depose, and such statements he seems to put aside entirely as valueless if not altogether incompetent. Their Lordships think the Lieutenant-Governor in Council was not bound by the technical rules of British Columbia law touching the reception of hearsay evidence, and they think there was nothing necessarily incompatible with the judicial character of the inquiry in the fact that such evidence was received. Ganner, as already mentioned, did in fact acquire the surface rights in 1885; and the proof includes formal depositions by the executors and others to the effect that Ganner "squatted" on the land in question in 1883 with the intention of residing thereon, and that he was in that year engaged in improving it, as well as a statement by his son that he, with others, personally assisted in working on this land preparatory to "clearing" it in that year. While appreciating both the relevancy and the force of the comments made upon this evidence in the Court below, their Lordships are constrained to think that there was some evidence in support of the application, and that there is no adequate reason for holding that this evidence might not be properly considered to be reasonably convincing.

Similar considerations apply to two other criticisms upon the course taken by the Lieutenant-Governor in Council, those, namely, touching the refusal to direct the production of the deponents for cross-examination, and the refusal to grant an adjournment for the purpose of enabling the company to adduce evidence in opposition to the application.

The respondents were given the fullest opportunity to

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present before the Lieutenant-Governor in Council everything they might desire to urge against the view that the depositions produced in themselves constituted "reasonable proof," and they had the fullest opportunity also of supporting their contention that the depositions alone, in the absence of cross-examination, ought not to be considered sufficient, and that further time should be allowed to enable them to prepare their case. The appointed authority for dealing with the matter, it must be remembered, was the Executive Government of the Province directly answerable to the Legislature, and their Lordships agree without hesitation with the majority of the Court of Appeal in holding as they explicitly decided upon the same facts in Dunlop's case, that the Lieutenant-Governor in Council was not bound to govern himself by the rules of procedure regulating proceedings in a court of justice.

It cannot be suggested that he proceeded without any regard to the rights of the respondents and the procedure followed must be presumed, in the absence of some conclusive reason to the contrary, to have been adopted in exercise of his discretion under the statute as a proper mode of discharging the duty entrusted to him. His decisions taken in the exercise of that discretion are, in their Lordships' opinion, final and not reviewable in legal proceedings.

On these grounds their Lordships consider that the appeal in substance succeeds. The respondent company is, however, for the reasons mentioned, entitled to a declaration that the Crown grant does not operate to take away or to prejudice the company's title to its right of way as at present established, or to its rights under the deed of conveyance to Ganner of 1890, already mentioned, to take timber and to use the surface for railway purposes. As no contention in respect of these rights of the company appears to have been seriously pressed in the Courts below it may be assumed that they are of little or no practical value; and their Lordships, therefore, think that the respondent company's success upon this minor point should not affect the question of costs. For these reasons their Lordships think that the appeal should be allowed with costs here and of the appeal to the Court of Appeal and the actions dismissed with costs throughout, and subject to the declaration above mentioned, that the cross appeal should be dis-

missed with costs. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

E. & N.R. CO. v. DUNLOP.

This appeal arises out of two actions brought by the appellant company to establish its title to certain lands granted to the respondent, Elizabeth Dunlop, under the authority of the Vancouver Island Settlers' Rights Act of 1904, ch. 54, and the amending Act of 1917 (B.C.), ch. 71; and presents the same questions of law as those already decided in Wilson and McKenzie's appeals, ante p. 1, and was argued with it. Indeed the only circumstances in which the appeal presents any point of difference is this: that in the present case the majority of the Court of Appeal (1921), 59 D.L.R. 577, considered there was "reasonable proof" of improvement and residence within the meaning of the statute of 1904, and that consequently the ground upon which they held the appellant company entitled to succeed in Wilson and McKenzies' case failed and they therefore dismissed the action with costs. The decision of this appeal is governed by the reasons given in Wilson and McKenzies' case, and their Lordships will therefore advise His Majesty that the appeal should be dismissed with costs, subject to a variation of the judgment in the sense of the variation directed in the last-mentioned appeals.

Appeal dismissed.

LEIPPI v FREY.

Saskatchewan King's Bench, Bigelow, J. April 18, 1921.

Interpleader (§III—30)—Judgment against Husband — Land transferred to Wife—Transfer a Sham to defeat Creditors—Seizure under Execution on Judgment—Right of Wife to set up Transfer, as Entitling her to Crop Seized.

A fraudulent transfer of land from the husband to the wife, made after judgment has been obtained against the husband, and which is evidently a mere sham and never intended to be a real transfer, does not give the wife any right to the crop grown on the land as against a judgment creditor under an execution and seizure under the judgment. Fraud may be charged in an interpleader issue.

[Cotton v. Boyd (1915), 24 D.L.R. 896, 8 S.L.R. 229, distinguished; Stewart v. Bank of Ottawa (1897), 3 Terr. L.R. 447, followed. See Annotation on the Law of Interpleader, 32 D.L.R. 263.]

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INTERPLEADER issue to determine the ownership of a quantity of grain seized under a writ of execution, by the sheriff of the Judicial District of Saskatchewan.

J. E. Doerr, for plaintiff; J. Feinstein, for claimant.

Bigelow, J.:—This is an interpleader issue in which the plaintiff affirms and the claimant denies that the wheat and oats grown upon the south-west quarter of sect. 6 in tp. 33, and the wheat grown on the north-west quarter of sect. 31 in tp. 32, all in range 24, west of the 2nd meridian in the Province of Saskatchewan, and seized in execution by the sheriff of the Judicial District of Saskatoon under a writ of execution issued out of the Court of King's Bench, Judicial District of Regina, directed to the said sheriff for execution of a judgment of that Court recovered by the said Jacob Leippi in the above actions at his suit against Carl Frey and Freidrich Frey, were at the time of the said seizure the property of the said Jacob Leippi as against the said Mrs. Katie Frey.

The claimant is the wife of the execution debtor. They were married April 22, 1919. Plaintiff's judgment was recovered some time before that, but he made no active attempt to collect it until he wrote a letter demanding payment which came to the notice of the execution debtor on February 10, 1920. On February 11, 1920, the execution debtor transferred to the claimant the south-west quarter of 6-33-24 W. 2nd, and later transferred to the claimant his interest in the other land which was held under an agreement of sale. The crop in question was grown on this land.

There was considerable argument before me as to the burden of proof. The claimant and execution debtor and his family were living on the south-west quarter at the time of the seizure. The grain was no more in the actual possession of the execution debtor than the claimant, and the grain, not being in the possession of the execution debtor at the time of the seizure, the onus is on the plaintiff to establish that it belonged to the debtor. Skagen v. Smith & Balkwell (1920), 53 D.L.R. 245, 13 S.L.R. 306.

The plaintiff claims that the transfer was fraudulent and a sham, and therefore the land is still that of the execution debtor and the crop grown on the land would be his. No evidence was offered by the claimant who seemed to rest her case on the fact that she is the owner of the real estate and therefore claims that the crop would be hers. But the plaintiff put in evidence parts of the examination for dis-

covery of the claimant, from which it would appear that she claims she loaned $780 or $800 to the execution debtor, and he transferred this land and chattels to the value of $10,000 in all to her as security. There is no corroboration of her evidence that she never had any money or that the loan was made. I am very suspicious of her evidence, and I have no hesitation in holding that the transfer was fraudulent and a mere sham, and I think it was given for the express purpose of defeating the plaintiff's execution, as the transfer was made the next day after the execution debtor knew that the plaintiff was going to press him for payment. But that would not necessarily mean that the crop belonged to the execution debtor. In Cotton v. Boyd (1915), 24 D.L.R. 896, 8 S.L.R. 229, Newlands, J., quotes with approval Kilbride v. Cameron (1867), 17 U.C.C.P. 373, where it was held that crops grown upon land transferred in fraud of creditors which were grown at the sole expense of the fraudulent transferee belonged to him and could not be seized as the goods of the vendor. See also Massey-Harris v. Moore (1905), 6 Terr. L.R. 75.

In Cotton v. Boyd & Massey-Harris v. Moore it was found that the crops belonged to the transferee, that he had furnished the seed and sown and harvested the crop in one case and in the other he purchased the seed grain, hired and paid for the help, and paid for the twine and binding. In the case at Bar there is no such evidence. The operations on the farm went on after the transfer the same as they did before, and the seed grain for the crop in question was purchased by the execution debtor who gave his note to the bank for the same.

The claimant contends that the mere fact that she is the registered owner of the land is sufficient to give her the crop. The cases cited by the claimant do not support any such proposition. In fact, there are many cases the other way. In Stewart v. The Bank of Ottawa (1897), 3 Terr. L.R. 447, it was held by Wetmore, C.J., that a lease was a mere sham devised to defeat creditors, and therefore the crop was liable to seizure under the execution. See also Waterous Engine Works Co. v. Wells, etc. (1911), 4 S.L.R., 48. In John Deere Plow Co. v. Knudston (1915), 9 W.W.R. 574, Elwood, J., held that the transfer of land was fraudulent and made for the purpose of defrauding creditors and that it was a mere sham, never intended to be a real transfer, and that, therefore, the lease, while in fact made by

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the wife, was in reality made by her for the husband on property of the husband and that the husband was entitled in reality to the rent.

The case of Crawford v. Emerson-Brantingham, a judgment of Elwood, J., not reported, relied on by the claimant, is not authority for the proposition advanced by the claimant. It is a similar decision to Cotton v. Boyd, supra.

Even if this transfer were not fraudulent I am of the opinion that the transaction between the husband and wife, looking at it from the most favourable aspect from the claimant's standpoint, was only a mortgage and the crop grown on the land would belong to the husband.

I therefore find that the grain in question is the property of the plaintiff as against the claimant.

Claimant also raised the question of exemptions, but that point does not enter into this case as the execution debtor is not a party to these proceedings.

Plaintiff will have his costs on the K.B. low scale.

Judgment accordingly.

MYERS v. MITCHELL.

Nova Scotia Supreme Court, Russell, Longley and Mellish, JJ. April 16, 1921.

Easements (§IIC—29)—Way of necessity—Road well Defined and in long use at time of Crown Grant—Construction of Grant—Intention of Parties—Right of Successor in Title to Use.

If at the time a Crown grant of a back lot inaccessible by land from the highway, without passing over lands granted to one or more other grantees, there was a well-defined road or way which had long been used as necessary for the purpose of gaining access to the back lot, it will be taken to have been the intention of all the parties to the grant that it was to continue to be used as it had been formerly, and a successor in title to the back lot is entitled to use this right of way as a way of necessity in order to reach the public highway.

[Pinnington v. Galland (1853), 9 Exch. 1, 161 E.R. 1; Davies v. Sears (1869), L.R. 7 Eq. 427, applied. See Annotation. The Easement of Way, How Arising or Lost, 45 D.L.R. 144.]

APPEAL by plaintiff from the judgment of Ritchie, E.J., in an action claiming damages for trespass to land and an injunction restraining further acts of trespass. The Judge in the judgment appealed from found on the evidence that defendant was entitled to a right of way by prescription and that the alleged trespass consisted of a user of said right of way. Affirmed.

J. A. Sedgwick and W. C. McDonald, for appellant.
L. A. Forsyth, for respondent.
The judgment of the Court was delivered by

Mellish, J.:—This is an action for trespass to the lands of plaintiff by defendant.

Both plaintiff and defendant derive their title to the respective lots of land owned by them through a grant from the Crown dated October 25, 1904. By that grant the plaintiff's father, J. T. Myers, acquired Lots D. and E. marked on the plan annexed to the grant. The plaintiff claims as heir to his father in possession of Lot E upon which the alleged trespasses were committed. By the grant Lots F. and G. on said plan were allotted to I. S. Myers, the plaintiff's uncle, and the defendant holds Lot G. by conveyance from said Isaac S. Myers, dated October, 1908. Defendant seeks to justify the alleged acts of trespass upon the grounds that the same were committed as necessary to the assertion of his lawful right to use a right of way over Lot E. as appurtenant to the dominant tenement Lot G. and obtained by long user. The evidence in my opinion does not establish this. Defendant, however, further contends that he is entitled to use this right of way as a way of necessity over the plaintiff's lands in order to reach the public highway, and that the grant must be so construed as impliedly conferring upon the grantee of Lot G., the right to use this way which was in fact in existence when the grant was made.

Not without hesitation I have come to the conclusion that this contention must prevail. The original settler on the lands comprising all these lots appears to have been W. Myers, grandfather of the plaintiff. Four of his sons and the heirs of a deceased son, William, obtained the grant in question, and the division seems to have been made on the basis that each son would have 1-5 or 14 acres. In looking at the grant and the plan annexed thereto, it will be seen that each of the living sons got one or more front lots on the public highway and a detached back lot inaccessible by land from the highway without passing over lands granted to one or more of the other grantees. The heirs of W. Myers, Jr., appear alone to have their land granted in one block through which the highway passes. These conditions were presumably known to all the grantees and I think it conformable to law and the intention of the parties as indicated from the circumstances and from their

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conduct that there was impliedly reserved in the grant such ways over the front lots as would be necessary to give the grantees of the back lots reasonable access to the public highway. The road or way in question had then long been used as necessary for the purpose of gaining access to the back lots including the defendant's. As to that part on which the alleged trespasses were committed this road was for a long time well defined and must I think be taken to have been intended by all the parties to the grant to be thereafter used as it had formerly been done. In my opinion the plaintiff had no right to close it, at least to the exclusion of its user by the defendant. Before the grant I do not think the occupants could be regarded as mere trespassers. They were perhaps tenants at sufferance but could not, I think, be treated as mere trespassers under the Crown Land Act, 1910 (N.S.), ch. 4, at least without notice. This circumstance may be immaterial, but I think it perhaps helps the construction of the grant if conditions as they existed were known, as they presumably were, to the Crown authorities when the grant was made—as they were certainly known to the grantees. Pinnington v. Galland (1853), 8 Exch. 1, 161 E.R. 1; Davies v. Sears (1869), L.R. 7 Eq. 427.

The appeal will be dismissed with costs.

Appeal dismissed.

LANSTON MONOTYPE MACHINE CO. v. NORTHERN PUBLISHING CO. LTD.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, J.A., McKay, J. August 5, 1921.

Sale (§IIID—75)—Conditional — Of Goods — Vendor's Lien Unregistered—Sub-purchaser in good Faith for Value—Sub-purchaser having Knowledge of Lien—Conditional Sales Act R.S.S. 1920, ch. 201, sec. 2.

A purchaser in good faith for valuable consideration obtains title to the chattel which was the subject of the sale although he has notice that a former vendor has a vendor's lien against the chattel, if such lien is not registered as required by the Conditional Sales Act, R.S.S. 1920, ch. 201, which provides that the seller shall not be permitted to set up a right of property or right of possession under the unregistered lien as against such purchaser. A purchaser in good faith means a real purchaser as distinguished from a collusive one.

[Ferrie v. Meikle (1915), 23 D.L.R. 269, followed.]

APPEAL by the plaintiff from the judgment at the trial in an action to recover possession of a chattel on which the plaintiffs had an unregistered lien. Affirmed.

F. L. Bastedo, for appellant.

P. E. Mackenzie, K.C., for respondent.

Haultain, C.J.S.:—The facts of this case bring it, in my opinion, squarely within the decision in Ferrie v. Meikle (1915), 23 D.L.R. 269, 8 S.L.R. 161, and I can add nothing to the reasons given by Brown, C.J., K.B., for following and applying that case.

The appeal should be dismissed with costs.

Lamont, J.A.:—The facts in this case are as follows. In March, 1915, the plaintiffs made a conditional sale of a monotype plant to the Phoenix Publishing Co., in Saskatoon. On June 17, 1918, D. A. McNiven, acting for the persons who subsequently became incorporated as the defendant company, purchased certain assets of the Phoenix Publishing Co. for $15,000. These assets were valued at $40,000, but against them were liens amounting to $23,355. In addition to the liens the Phoenix Co. owed some $77,000. Prior to his purchasing the assets, McNiven had obtained a statement of the liens against the plant and machinery of the Phoenix Co., and this statement shewed that the plaintiff company had a lien of $4,500. McNiven caused a search to be made and discovered that the plaintiffs' lien had not been registered. In purchasing McNiven did not agree to become liable for any lien except on one of $7,000 on the Hoe press. The understanding, if what took place could be called an understanding, which he had with the Phoenix Co., seems to have been that the other lien holders would be entitled to whatever rights the law gave them. That if the persons for whom he was acting wanted to retain the machinery covered by these liens, they would have to arrange with the lien holders for their retention or submit to their renewal if the liens gave the lien holders the right to remove the machinery covered by them respectively. The defendant company was formed, with McNiven as its president, and the assets of the Phoenix Co. purchased by McNiven were transferred to it. The plaintiffs demanded the balance due upon their monotype machine from the defendants, who refused to pay it and refused to permit the plaintiffs to remove the plant or take possession thereof. The plaintiffs then brought this action demanding possession.

The defence rests upon the allegation that the defendants were purchasers in good faith for valuable consideration.

The Act respecting Lien Notes, R.S.S. 1920, ch. 201, provides that:

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LANSTON MONOTYPE MACHINE CO. v. NORTHERN PUBLISHING CO.

"Whenever on a sale or bailment of goods of the value of $15 or over it is agreed, provided or conditioned that the right of property or right of possession in whole or in part shall remain in the seller or bailor notwithstanding that the actual possession of the goods passes to the buyer or bailee, the seller or bailor shall not be permitted to set up any such right of property or right of possession as against any purchaser or mortgagee of or from the buyer or bailee of such goods in good faith for valuable consideration..... unless such scale.....is in writing.....and registered as hereinafter provided."

The question is: Were the defendants purchasers in good faith. Through their agent McNiven, they knew the plaintiffs had a lien on the machinery. McNiven did not read the plaintiffs' conditional sale contract, but, in my opinion, he must be presumed to have known that the lien reserved to the plaintiffs the property in the plant until the same had been paid for. In Manks v. Whiteley, [1912] 1 Ch. 735, Fletcher-Moulton, L.J., whose dissenting judgment was subsequently upheld by the House of Lords, said at p. 758: "If therefore he (the purchaser) learns from the memorials in the register that deeds exist affecting the property, he is bound to take the reasonable precaution of ascertaining what those deeds contain."

The defendants, through their agent, therefore knew not only that the plaintiffs had a lien upon the monotype plant, but also that the property therein was vested in the plaintiffs and not in the Phoenix Co. That is, they knew that all the Phoenix Co. had to sell was the right of possession to the plaintiffs' machinery and a right to become owners of the property therein upon payment of the lien. Knowing these things, could they purchase from the Phoenix Co. property which they knew the Phoenix Co. did not own and then claim to be purchasers thereof in good faith?

If I were deciding this case in the first instance, and unrestrained by authority, I would unhesitatingly say "No," for to my mind "good faith" means honesty of purpose and intention. I am, however, faced with the decision of the Court en banc in Ferrie v. Meikle, 23 D.L.R. 269, 8 S.L.R. 161, wherein it was held that a purchaser in good faith means a real purchaser as distinguished from a collusive one, and that the purchaser of an article who buys knowing of the existence of a prior unregistered lien on the

same article is still a purchaser in good faith, if his purchase is not a sham one.

By that decision I think I am bound, and must therefore hold that the appeal should be dismissed.

McKay, J., concurs with Haultain, C.J.S.

Appeal dismissed.

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RUR. MUN. OF FERTILE VALLEY v. UNION CASUALTY CO.

RURAL MUNICIPALITY OF FERTILE VALLEY v. UNION CASUALTY CO. ET AL.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. August 5, 1921.

Bonds (§IIB—18)—Municipal employee—Company Guaranteeing Indemnity Against Theft of Embezzlement—Questions Submitted to Reeve—Wilful Misrepresentation in Answers—Liability of Company.

A Guarantee Company which contracts to insure a municipality against loss by reason of theft or embezzlement committed by an employee while in its employ, is entitled to the same degree of faith and full disclosure by the employer as is the case in contracts of life or fire insurance, and any wilful misrepresentation on the part of employer will relieve the company from liability under the contract.

[Condogianis v. Guardian Ass'ce Co. [1921] 2 A.C. 125, followed.]

P. M. Anderson, K.C., for appellant.

P. E. MacKenzie, K.C., for respondent.

The judgment of the Court was delivered by

Turgeon, J.A.:—On February 1, 1917, the defendant Best was appointed secretary-treasurer of the plaintiff municipality. On February 15 a bond was executed by the Western Canada Accident and Guarantee Co., the predecessors in interest of the defendant company, whereby the Guarantee Co. agreed to indemnify the plaintiff to the extent of $5,000 against any pecuniary loss they might sustain by reason of any theft or embezzlement which might be committed by the defendant Best while in their employ. This guarantee bond was made to run until January 18, 1918, and from year to year after that date upon the payment of the premium by the plaintiffs, and subject to certain other conditions. In order to induce the Guarantee Co. to execute this bond of indemnity, certain statements were furnished to the company by the plaintiffs respecting Best and the duties of his office, and it was agreed that such of these statements as were material to the contract should form the basis thereof between the parties.

The bond was renewed for one year from January 18, 1918, and again for one year from January 18, 1919. Best

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was dismissed from office by the plaintiffs on June 3, 1919, for misconduct. It was subsequently discovered that he had embezzled large sums of money from the plaintiffs, and the defendant company was called upon to make good his default according to the conditions of the bond. This the company refused to do, whereupon this action was brought by the plaintiffs.

The company relies on several grounds of defence, but I find it necessary to deal with one only, and on this ground I think it is entitled to succeed.

Upon the occasion of the renewal of the bond for the year beginning January 18, 1919, a statement in the form of certain questions and answers was furnished to the company by the reeve of the plaintiff municipality, and it was expressly provided in the statement that the answers to the questions contained therein would form the basis of the renewal of the bond. This statement is dated January 14, 1919, and contains, among others, the following questions and answers:—"2. Does he perform his duties to your satisfaction? Yes. 3. Are his habits regular and sober? Yes. 6. Have you ever had any cause to complain of his conduct while employed by you? No. 7. When were his books last checked and audited, and up to what date? November, 1918. 8. Were all things found correct? Yes."

There can be no doubt whatever from the evidence that all these answers were untrue to the knowledge of the reeve, who furnished them. They all deal with matters of material importance in a contract of this nature, and, forming as they do the basis of the contract, I am of opinion that the plaintiffs are precluded from setting up any claim under the contract against the company.

It is hardly necessary for me to review the evidence on the points involved. It was elicited almost entirely from the reeve himself and there is really very little conflict about it. In March, 1918, the auditors of the municipality made a report concerning Best's work to the reeve and councillors, which disclosed such an unsatisfactory state of affairs that the reeve waited upon Best and asked him for his resignation. Best's dismissal upon this occasion seems to have been averted merely by reason of certain influences which he brought to bear in his favour, and out of the consideration the reeve and councillors had for his wife and family. No steps appear to have been taken after this inci-

dent by the reeve or anybody else to supervise Best's work and his habits up to the time that application was made for the second renewal of the bond. In the face of this the reeve declares to the company on January 14, 1919, when applying for a renewal of the bond, that Best's duties have always been performed satisfactorily and that there had never been any cause to complain of his conduct. As to questions 7 and 8, the fact really is that there never was an audit of Best's books which found things to be correct. On each occasion the condition of his books and records called forth the strongest protests from the auditors.

The only answer which the plaintiffs seem able to make to the facts which confront them upon this branch of the case is, that, whatever Best's faults may have been, they had never discovered any act of dishonesty on his part and had no suspicion of his integrity. They seemed to assume that, so long as he was not actually caught stealing, they could represent him to the Guarantee Co. as being a well-conducted, satisfactory employee, who had given no cause for complaint, and that, upon an audit taking place, his books and records could be reported as being "correct" in all respects, provided no defalcation had been discovered. Such a position is, of course, untenable. It goes without saying that no municipal council would keep a treasurer in its employ who had been caught stealing, still less would it be expected to apply to a Guarantee Co. to bond such a man. To contend that the questions and answers contained in the statement addressed themselves to any such matters is palpably absurd. Every man is presumed to be honest. The fact that a person is employed by a municipal council to act as its treasurer is abundant proof that everybody considers him to be honest. But when his employers apply to a third party to insure them against his possible lapse from honesty, the party applied to is entitled to call for whatever information he thinks he should have before he will assume the risk. And when the insurer asks: "Does he perform his duties to your satisfaction?" or "Have you had any cause to complain of his conduct?" it cannot be argued that these questions can be answered with a "no," so long as the person in question has never been found guilty of embezzlement. No reasonable person could possibly construe the questions in this manner.

Under the circumstances I am of opinion that Best's real position was wilfully misrepresented to the defendant com-

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pany when it agreed to renew his bond; that this renewal was made upon the strength of these representations, and that the company's defence is well-founded. Contracts insuring the honesty of an employee call for the same degree of good faith and full disclosure by the employer as is the case in contracts of life or fire insurance, and parties applying for this insurance may be called to strictest account for statements made by them inducing the contract.

As to the effect of questions and answers in proposals of this nature, I may refer to Condogianis v. Guardian Assurance Co., [1921] 2 A.C. 125.

The appeal should be dismissed with costs.

Appeal dismissed.

McINTOSH v. McKAY

Nova Scotia Supreme Court, Russell and Longley, JJ., Ritchie E.J. April 9, 1921.

Appeal (§VIIM—536) — Trespass — Establishment of Boundary line—Contradictory Evidence—Finding of Trial Judge—Interference by Appellate Court.

Where the trial Judge who has heard and seen the witnesses has on contradictory evidence, made a finding of fact as to the position of a boundary line between two properties, an Appellate Court will not interfere with such finding where it is not shewn that the trial Judge was clearly in error.

APPEAL from the judgment of Mellish, J., in favour of plaintiff in an action claiming damages for trespass to land and an injunction to restrain defendant from committing further acts of trespass. Affirmed.

J. McG. Stewart, for appellant.

R. H. Graham, K.C., for respondent.

Russell, J.:—There is a considerable amount of evidence in this case tending to shew the line claimed by the defendant was blazed out 30 or 40 years ago, and if so it must seemingly have been blazed as the division line between the properties now claimed by the plaintiff and the defendant. This line by which defendant claims is now marked by a wire fence and Sutherland, a witness for plaintiff, speaks of a blaze in a fir tree on the line of the wire fence which indicated 35 rings and says that there are other trees but he does not particularise as to the blazes on them or the apparent dates. Ellis, a surveyor called for the defendant, says that along the wire fence there was a well-blazed line-tree on an average of 25 or 30 feet apart and he would judge the blazes to be between 40 and 45

years old. This statement is somewhat weakened on cross-examination by the admission that he only opened one of the blazes which was the one produced in Court. Another witness, Smart, speaks of blazes seen along the line of the wire fence. "Some were fairly old and some new." He had only seen these when a boy and it does not appear that he took any particular notice of them. McKay, recalled, makes it clear that the blaze taken from the wire fence line and produced in Court was 37 years old. But the wire fence is of quite recent date, and, except where the blazes are distinctly spoken of as of an earlier date, I should think it probable that there might be new blazes cut out at the time the fence was staked on the trees as sworn to by one of the witnesses. In defendant's favour it must also be conceded that the evidence as to blazed trees along the line by which the plaintiff claims is very scanty, but that may be due to the fact that old trees once blazed may have been cut away.

Under these circumstances I should have had some doubt as to the true line of division, were it not for the clear finding of the trial Judge, that "the line claimed by the plaintiff was the line fixed by the surveyor James Simon Fraser in 1885 or thereabouts when he was employed by the defendant's predecessor in title to establish the line," and also that "it is the line which was taken to be the boundary by the defendant's predecessor Rood, or at least by his contractor Fraser." The trial Judge has advantages in endeavouring to ascertain the facts so much greater than those of a Judge sitting in review, with obscure blue prints on which it is difficult to make out the lettering, and perplexing conflicts in the evidence, that I should be somewhat slow to reverse his decision on such a question as that presented in this case. One of the most convincing reasons to my mind that this presents against the line by which the defendant claims is the fact that it does not make the angle with a well recognised north and south intersecting line which the true line of division should make. The angle is more acute.

There is a piece of evidence to the effect that this wire fence line if produced westerly beyond the north and south line just referred to will come to a tree blazed in such a way as to present what ought to be satisfactory evidence that it was meant to indicate a corner. But there is some mystery about this. The north and south line referred to

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seems to be one of the best established lines in the whole neighbourhood and it is difficult to understand why anybody should have chosen a point clearly to the westward of this line to indicate the direction of a line which terminates at this well-recognised north and south line, the western boundary common to the properties of plaintiff and defendant. The corner blaze referred to can have no significance for us here except as a point in the disputed line. The surveyor who located it for that purpose must have been mistaken as to the location of the western well-defined line referred to and I would suspect that he might be more easily mistaken about the line here in dispute.

While the evidence presents difficulties to my mind such as I have referred to they are not of such a nature or of sufficient strength to shake my conviction that the trial Judge has arrived at the proper conclusion and my opinion must therefore be that the appeal should be dismissed with costs.

Longley, J:—This was a long and troublesome case. I have read over the entire evidence and have reached the same conclusion as the Judge who tried the cause. If there is anything proved at all it is that the regular red line has been upheld and shewn to be the line that was made 35 or 40 years ago. One could multiply the evidence that is offered in support of that, but the evidence of the defendants is inconsistent and does not shew any regular line. The wire fence was erected there after the trespass had been committed and many of the blazes on the wire fence were put up two years ago with the fence. Where they were not put up with the fence it was shewn that they were the result of a former survey 35 or 40 years ago, which was found to be wrong and which the surveyor shews was wrong, and that he went and finally located the red line. The evidence seems to be rather overwhelming on the side of the plaintiff. At all events the Judge has believed the plaintiff's witnesses and has awarded judgment, and I see no reason whatever for interfering.

Ritchie, E.J.:—The trial Judge who saw and heard the witnesses has made a finding that the plaintiff's northern line is indicated on the plan P-4 by the heavy red line and on the ground by stakes set up by surveyor Sutherland.

The case is not without difficulties but after giving it the

best consideration of which I am capable I am far from being convinced that the trial Judge is in error.

I would therefore dismiss the appeal with costs.

Appeal dismissed.

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WAWRYK v. A. E. McKENZIE Co.

WAWRYK v. THE A. E. McKENZIE CO.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. August 5, 1921.

Sale (§IIC—35)—By Sample—Sample Taken from Bulk Delivered—Presumption that Bulk and Sample Correspond.

Where a sample of grain is taken from a quantity in bulk and it is established that the identical grain from which the sample is taken was delivered, a presumption arises that the bulk delivered and the sample correspond and the onus is shifted to the purchaser, who has refused delivery "owing to inferior quality" to shew that notwithstanding the fact that the bulk from which the sample was taken was delivered, all the grain delivered was not of a quality equal to the sample.

[Braithwaite v. Foreign Hardwood Co. [1905] 2 K.B. 543; Greer v. Dennison (1911), 21 Man. L.R. 46 referred to.]

APPEAL by plaintiff from the judgment at the trial dismissing an action, brought to recover damages for breach of contract in refusing to accept a quantity of grain sold to the defendant. Reversed.

L. McK. Robinson and J. G. Banks, for appellant.

J. H. Leach, K.C., and W. P. Cumming, for respondent.

The judgment of the Court was delivered by

Lamont, J.A.:—On September 9, 1919, the defendants through their representative, F. C. Thompson, entered into two contracts in writing with the plaintiff. The first was for the sale by the plaintiff of "2000 bushels or one small car" of Victory oats at 89c. per bushel f.o.b. Kamsack, the other was for the sale of "3000 bushels or one large car" at the same price. Both contracts under the heading of "quantity" had the words "sample submitted," and under the heading of "bulk or stacked" was the word "bulk." These contracts were on one of the forms used by the defendants. The plaintiff, who was hauling oats to Kamsack, met Thompson on the road. Thompson looked at the grain the plaintiff had in his wagon and asked him to remain in town until he went to the plaintiff's farm and looked at the oats he had there. The plaintiff has over 8000 bushels of oats in 4 piles on the farm. Thompson returned to town, and told the plaintiff that he had been to his farm and had seen his oats and he wanted to make a deal for them at once. After some discussion they went to the bank and

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the contracts in question were drawn up and signed by the plaintiff and by Thompson for the defendants. Thompson then told the plaintiff to deliver the oats covered by the contracts to the elevator of the Bawlf Elevator Co. The plaintiff delivered at that elevator enough oats to fill two cars. Two cars were filled and consigned to the defendants, who refused to accept them, claiming that the oats were of inferior quality. On the defendants' refusal to accept the two car loads of oats, the plaintiff sold them to the Western Canada Flour Mills, Ltd., to whom he requested the defendants to forward the bills of lading. One car contained 2351 bushels net, and the other 1,755 bushels. The plaintiff received for the oats $3,120.56, which he testified was the best price he could get; but out of this he had to pay $55 demurrage charge, leaving him a net return of $3,065.56 on the 2 cars. He then sued the defendants for damages for breach of contract. At the close of the plaintiff's case the action was dismissed, on the ground that the plaintiff had not established that the oats he delivered were up to the sample. From this judgment the plaintiff now appeals.

The plaintiff at the trial testified that the oats he delivered at the elevator all came from the 4 piles on his farm which Thompson told him he had seen. It was for the sale of a portion of the oats in these piles that the parties were contracting. There was absolutely no evidence that Thompson ever took a sample of these oats, or, if he did, that he ever forwarded it to the defendants at Brandon. The only evidence appearing in the appeal book that the oats were not of proper quality appears in the examination of McKenzie, put in by the plaintiff, where he testified that he rejected the 2 cars shipped "owing to inferior quality." He does not say that they were inferior to sample. He does not say that any sample was taken or submitted to him. The plaintiff testified that he did not know whether or not Thompson took a sample. Under these circumstances, I very much doubt if the sale could be said to be a sale by sample, notwithstanding that the contract contains the words "sample submitted." To constitute a sale by sample, in the legal sense of that term, it must, in my opinion, appear that the parties contracted with reference to a sample, and with a mutual understanding that the sample furnished a description (in this case) of the quality of the oats and that the bulk must conform to the sample.

In Drummond v. Van Ingen (1887), 12 App. Cas. 284, at

p. 297, Lord Macnaghten, said:—"After all, the office of a sample is to present to the eye the real meaning and intention of the parties with regard to the subject matter of the contract which, owing to the imperfection of language, it may be difficult or impossible to express in words. The sample speaks for itself."

Here no sample was produced, and, so far as the evidence discloses, there was no mention of a sample in the discussion between the plaintiff and Thompson. Further, Thompson had inspected the bulk. But assuming that by signing a contract form containing the words "sample submitted" the parties must be held to have contemplated that a sample should be taken and that the bulk should correspond thereto, I am of opinion that the plaintiff prima facie established that the oats delivered were equal to the sample. The only sample which, under the circumstances, the parties could have in contemplation was a sample of the grain then threshed and in piles on the plaintiff's farm, and if the sample was a portion of the grain constituting these piles, the sample and the grain in the piles must correspond. The plaintiff established that the oats delivered were from these piles. Where a sample is taken from a quantity in bulk and it is established that the identical grain from which the sample is taken was delivered, a presumption, in my opinion, arises that the bulk delivered and the sample correspond, and the onus is shifted to the defendant to shew this, notwithstanding the fact that the bulk from which the sample was taken was delivered, all the grain delivered was not of a quality equal to the sample. This onus the defendants did not attempt to discharge. I am therefore of opinion that the plaintiff on the evidence was entitled to judgment.

The appeal should be allowed with costs, the judgment dismissing the action set aside, and judgment entered for the plaintiff, with costs, for the difference between what he actually received and what he would have received had the defendants performed their contract. Braithwaite v. Foreign Hardwood Co., (1905) 2 K.B. 543; Greer v. Dennison (1911), 21 Man. L.R. 46.

This amount I compute at $609.31.

Appeal allowed.

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ISLAND AMUSEMENT CO. v. PARKER & KIPPEN.

ISLAND AMUSEMENT CO. LTD. v. PARKER & KIPPEN AND PRICE.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. March 19, 1920.

Interpleader (§III—30)—Laws Declaratory Act R.S.B.C. 1911, ch. 133, sec. 2 (24)—Party Seeking Protection of—Necessity of Proving Bona Fides of Sale—Appeal from Judgment of Trial Judge—Evidence Warranting Reversal.

Before a purchaser can invoke the protection of sec. 2 (24) of the Laws Declaratory Act, R.S.B.C. 1911, ch. 133, he must prove that the goods were acquired by him, bona fide and for valuable consideration and where there are circumstances which justified the trial Judge in coming to the conclusion that the sale was not bona fide or where the trial Judge is not shewn to be "clearly wrong" in coming to such conclusion his judgment will not be disturbed.

APPEAL by defendants Parker & Kippen from the decision of Gregory, J., of April 22, 1919, on an interpleader issue. The plaintiff company having obtained judgment against one Quagliotti, execution was issued on June 27, 1918. The goods in question were seized under the execution on July 22 and 25 and August 22. On July 6 the defendants claimed that they purchased the goods in question from Quagliotti for $400, there being a cash payment of $300, and the balance of $100 was paid on July 13, the defendants claiming that they had no knowledge of the execution, although the sheriff has seized goods other than those in dispute under the execution and had advertised them for sale in the Colonist and Times newspapers of July 3 and 3 following issues. The defendants, who were junk dealers paid $400 for goods upon which a valuation of nearly $2,000 was placed by the plaintiff's witnesses, and the trial Judge held the burden was on Parker (the defendant who made the sale) to shew the sale to him was a bona-fide one, and he concluded from the evidence he had not satisfied that burden and that it was a reasonable supposition that he had seen the advertisement above referred to.

F. C. Elliott, for appellants.

C. L. Harrison, for respondent.

Macdonald, C.J.A.:—I would dismiss the appeal. I concur in the reasons of my brother Galliher.

Martin, J.A.:—There are circumstances here, in my opinion, which would justify the Judge in coming to the conclusion that the sale was not a bone-fide one under sec. 2, sub-sec. (24) of the Laws Declaratory Act, R.S.B.C. 1911, ch. 133, apart, in this case, from the question of notice, which question, however may become involved with that

of bona-fides, as pointed out in Murgatroyd v. Wright, [1907] 2 K.B. 333, which is a decision of some, though not full, assistance, because of differences in the form and language of the statute there under consideration (sec. 26 of the Sale of Goods Act, 1893 (Imp.) 71). I am of opinion that before the purchaser can invoke the protection of said sub-sec. 24 he must prove that "such goods [were] acquired by [him] bona-fide and for a valuable consideration," and in this case I am unable to say (as I must say before I can disturb his finding) that the Judge is "clearly wrong" in his view on the conflicting evidence, with certain suspicious circumstances, that the purchaser had acted bona-fide, even though a "valuable consideration" had passed; and so the appeal should be dismissed.

Galliher, J.A.:—At the hearing I entertained some doubt as to the correctness of the judgment appealed from, but on reading the evidence in full I am not prepared to say the Judge came to a wrong conclusion. Outside the fact that dealers such as Parker & Kippen might reasonably be supposed to keep in touch with auction sales and sheriffs' sales, and to watch for advertisements as to such in the local newspapers, the Judge below has discredited Parker's evidence and I cannot say he had not some reason to do so, contradictory in some respects as it is.

There is further a rather significant piece of evidence given by Parker to the effect that some 2 or 3 days prior to his purchase from Quagliotti on July 6, he went down to Quagliotti's place where the goods in question were stored and made out a list of them. This would be during the time there was a notice running in the Victoria "Colonist" and "Times" advertising a sale by the sheriff, under fi. fa., of certain goods of Quagliotti's. Now Parker had previously stated in evidence that he had not for 6 months discussed purchasing goods from Quagliotti, and it certainly looks peculiar that he should at this particular time, when the notice of sale was running, go down, make an inventory of these goods, and consider a purchase in so short a time.

I am afraid I cannot, under all the circumstances, say that the Judge erred in concluding that there was no bona-fide purchase without notice of the existence of the fi. fa.

McPhillips, J.A. (dissenting):—In my opinion, the appeal should succeed. With great respect for the trial Judge, it was an error to have held, if it was so held, that "the burden

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ISLAND AMUSEMENT CO. v. PARKER & KIPPEN.

of proof" was on the appellants. The judgment is an oral one, and I can quite believe that some mistake occurred in the taking down of what the Judge said. The Judge referred to Murgatroyd v. Wright, [1907] 2 K.B. 333 at p. 339, and there it was held (it being the case of a bill of sale), per Phillimore, J., at pp. 752-3, that

"He has to prove that he acquired the title to the goods in good faith and for valuable consideration after the goods had been bound by the writ and before the seizure. If he does so prove, the burden is then shifted, and the execution creditor must prove that the holder of the bill of sale had notice of the writ of execution. Really that portion of the section seems hardly necessary, because if the bill of sale holder had notice he could hardly be acquiring the title to the goods in good faith."

Now, apart from all other considerations in the present case, it must be at first remembered that the appellants were the plaintiffs in the issue, the respondent being the defendant. It is settled practice that in such case the onus is on the respondent. The Judge would not appear to have been impressed by the evidence of one of the appellants, Parker. As to that, I cannot see that anything was said, or took place, by which Parker's evidence in so far as it is essential in the case can be reasonably questioned. His statement that he had a bill of sale, coming from a layman, is understandable when we see that he had in mind a certain writing that he might be well entitled to think amounted to a bill of sale. However, all the requisite facts in law to entitle the appellants to succeed can be said to be admitted facts, as I read the evidence.

The appellants purchased the goods for valuable consideration which in amount, as I view it, was a good price for the goods, and it was not established that the appellants had notice of the writ of execution. He was in possession of the goods in his own warehouse, and the purchase was one in the ordinary course of trade. It would be perilous, and against the safe carrying on of business, if upon the facts of this case the sale was not effective in law. The policy of the law is that as against a sale made for value there must be shewn, not inferred, a plain contravention of the express terms of the statute, that is, the execution creditor (here the respondent) must make out its case, or the sale stands.

The actual consideration of the goods, which would not

appear to have any ready sale value, being goods long in use and goods that a junk dealer would only purchase, was $400, which sum was fully paid, and nothing in the price imports any want of good faith in the purchase made. The receipt given by the judgment debtor for $300 of the purchase-price reads as follows:—

"Received from John Parker the sum of $300, three hundred dollars, on act. of price of junk and goods in my buildings and yard premises known as 507-509 Cormorant St. and 1525 and 1527 Blanchard St. Balance to be paid on removal of goods. Total amount to be $400."

The essential fact in the present case was to establish actual notice to the appellants of the outstanding writ of execution, otherwise the title to the goods was unaffected and complete. That there were means of knowledge is idle argument and ineffective in law, and rightly so, otherwise wherever any goods are offered for sale it would mean that the purchaser must say to the vendor, I am ready and willing to buy your goods, but I must first search the office of the sheriff and see to it that there is no outstanding execution against your goods. This would be an intolerable condition of things, and one that Parliament has so far not created, and the Courts should not legislate—it is not their province. The Court's sole and only duty is to apply the law to the facts and accord the remedy, if remedy there be. If it should be that the arm of the law falls short of reaching the challenged transaction, it follows that it is not a challengeable transaction and not one against the law.

It is reasonable and is in accord with the genius of the people that possession of personal property should import the ownership thereof; further, the easy and effective transfer thereof from hand to hand should be permissible and all that should stand in the way of perpetuating this policy should be intractable law and without that the ownership and possession of personal property should be held to be inviolable. In the present case there has been invasion of that proprietary right. I would allow the appeal, the appellants to have their costs throughout.

Eberts, J.A., would dismiss the appeal.

Appeal dismissed.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJA. August 5, 1921.

Damages (§IIIE—142a)—Enticing Away of Wife—Measure of Compensation—Malice—Exemplary or Punitive.

Exemplary or punitive damages will not be allowed against a defendant for enticing away the plaintiff's wife unless it has been done maliciously to humiliate and bring dishonour and trouble upon him, and not for the sole purpose of gratifying the improper desires of the defendant.

Evidence (§XII.I—999) — Criminal Conversation — Evidence of Wealth of Defendant—Admissibility of.

In actions for criminal conversation, evidence may be given of the defendant's wealth if the defendant made use of his superior financial position to corrupt the wife. This evidence is admissible not in order to ascertain what damages the defendant should be made to pay, but to show that the value of the wife to the husband must have been all the greater and his loss consequently all the heavier if it required special inducements of this sort on the part of the defendant to bring about the seduction, and also to show that the defendant had the means to make his inducements good.

[Butterworth v. Butterworth [1920] P. 126, 89 L.J. (P.D.) 151, followed.]

APPEAL by the defendant from the trial judgment in an action for damages for criminal conversation with the plaintiff's wife and for enticing the wife away. Affirmed.

C. E. Gregory, K.C., for appellant.

G. A. Cruise, for respondent.

The judgment of the Court was delivered by

Turgeon, J.A.:—In this action the appeal is based mainly upon the grounds that the trial Judge wrongfully admitted certain evidence and misdirected the jury, and that, as a result, excessive damages were awarded to the respondent.

There were two causes of action in the claim brought by the respondent against the appellant: one for criminal conversation with the respondent's wife and one for enticing the wife away. The jury found against the respondent upon the question of criminal conversation, so that any errors that may have occurred in the trial Judge's charge to the jury upon that branch of the case cannot have prejudiced the appellant directly. It is objected that the Judge allowed the appellant to be cross-examined in order to shew that he is a man of wealth, and that in his charge to the jury he instructed them that they might consider the appellant's financial position, so as to decide what compensation he ought to pay the respondent. It is true that he did admit this evidence and that he did direct the jury in the manner

complained of, and I am of opinion that, while the evidence was properly admitted, his direction upon this point, taking the form it did, was a misdirection. In actions for criminal conversation evidence may be given of the defendant's wealth if the defendant made use of his superior financial position to corrupt the wife. This evidence is admissible, not in order to ascertain what damages the defendant should be made to pay, as was stated by the trial Judge, but rather to shew, in the first place, that the value of the wife to the husband must have been all the greater and, consequently, his loss all the heavier, if it required special inducements of this sort on the part of the defendant to bring about the seduction, and, in the second place, that the defendant had the means to make his inducements good. This matter is dealt with at length by McCardie, J., in the English case of Butterworth v. Butterworth, etc., [1920] P. 126, 89 L.J. (P.D.) 151, where all the leading authorities are gone into exhaustively and the principle governing cases of this nature are carefully set out.

Now, in the case before us, the respondent testified to having overheard the conversation which took place between his wife and the appellant on the occasion when he found them together in Saskatoon and concealed himself in the room in order to hear and observe what passed between them. He said that he heard the appellant tell the wife that he would give her anything she wanted, that she could buy herself the best coat she fancied and he would pay for it, and that if her husband objected to her having a nice fur coat he would take her away to the United States. There was also evidence given of previous offers which the appellant made to the wife to take her to the United States. The respondent and his wife were in modest circumstances. The appellant was over 60 years of age at the time of these occurrences, and the jury, no doubt, might have found from all this that he was using his superior wealth to facilitate the attainment of his ends, and it became pertinent to inquire whether he really possessed the means to fulfil his promises. I think, therefore, that the evidence regarding his financial position was properly admitted. If the Judge misdirected upon this evidence, as I think he did, the portion of his charge in which the misdirection occurred had reference only to the question of criminal conversation upon which the jury found in favour of the appellant.

But did this misdirection injure the appellant indirectly

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by being given in such a manner that the jury might have assumed that they could take the appellant's financial position into consideration in assessing the damages on the charge of enticing the wife away? Even if such evidence were inadmissible and such direction improper upon this branch of the case, and there seems to be some doubt upon this point, I do not think that the appellant has any just ground of complaint. Reading the charge as a whole, I am satisfied that the trial Judge made the distinction reasonably clear to the jury.

Then upon the claim for enticing the wife away, the following words are objected to as constituting a misdirection:—"And the plaintiff might also recover in such action for the injury done to his feelings and character, and for the disgrace and humiliation brought upon him."

The cause of action which a man has against one who entices away his wife is of the same class as that which arises when a servant is enticed away. These actions survive now mainly for the purpose of punishing seducers. Our own cases of Marson v. Coulter (1910), 3 S.L.R. 485, and Walters v. Moon (1919), 50 D.L.R. 336, 12 S.L.R. 459, deal at length with the nature and the incidents of these actions. I have no doubt that a husband may recover for the injury to his feelings and the mental suffering to which the wrong has put him, and I do not think that the above expressions in the trial Judge's charge are inaccurate, at least to the extent of constituting a substantial misdirection.

Complaint is also made of the fact that the trial Judge used the following language:—"I have further to tell you that you will not, under this branch of the case, give to the plaintiff any punitive or exemplary damages, unless you come to the conclusion that there was malice. By malice I mean this, if the defendant did this out of some ill-will towards the plaintiff, that would be maliciously, then you can punish him by way of damages, you can give what is called punitive or exemplary damages, but it is only in that case. If you find that the defendant did it maliciously, that you can give the plaintiff such damages, punitive or exemplary damages. In the absence of malice, you must try to figure out what he is entitled to, what I have already told you, leaving out the question of punitive or exemplary damages."

The remarks which the trial Judge makes in this statement regarding exemplary damages in the case of malice

being found to exist, are, I think, substantially correct. Evans v. Walton (1867), L.R. 2 C.P. 615, 36 L.J. (C.P.) 307. The objection probably is directed to the fact that he did not tell the jury, in brief, that there was no evidence of malice upon the appellant's part in this case; that the appellant if he acted wrongly at all did so in order to gratify his own improper desires and not in order to humiliate the respondent and to bring dishonour and trouble upon him. Strictly speaking, there may be a misdirection in this statement, but, in view of the restrictive and cautious language which the trial Judge used and of the amount of the damages awarded by the jury, there is not, in my opinion, sufficient ground for a new trial in any event.

The jury have fixed the damages at $2,000. In my opinion there was sufficient evidence upon which they could find that the enticing away occurred. Having found this, they must likewise have been satisfied, in view of the evidence, that the appellant's object was to debauch the wife, an object which he very nearly attained, which in fact he did attain in the moral sense as he had gained her consent to the act of adultery and the pair were prevented from accomplishing their purpose only by the timely intervention of the respondent. In these actions juries are allowed considerable latitude in assessing damages, and, having regard to the circumstances of this case, I do not think their award can be deemed excessive.

Appeal dismissed.

BRAWLEY v. WATERBURY.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., McKeown, C.J., K.B.D., and Grimmer, J. April 22, 1921.

Auction (§I—4)— Sale of Land—Payment of Deposit—Condition of Sale—Failure of Purchaser to Complete Purchase—Recovery Back of Deposit.

A purchaser of property at a public auction who deposits a percentage of the purchase-price as a guarantee of the performance of the contract of purchase, and signs a bidding paper containing the terms and conditions of the sale in which he agrees to forfeit the deposit if he fails to complete the purchase, cannot recover back the deposit if it is through his fault that the purchase was not completed and he has not been misled by statements of the auctioneer or vendor.

MOTION by plaintiff to set aside verdict for defendant and enter a verdict for plaintiff, or for a new trial. Affirmed.

M. B. Innes, for plaintiff.

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K. A. Wilson, contra.

The judgment of the Court was delivered by

Grimmer, J.:—This action was brought for the return of $100 paid by the plaintiff, the present appellant, as a deposit on account of the purchase by him at public auction on April 26, 1919, of leasehold premises with buildings thereon, situate on Chesley St. in the city of St. John. It was tried before Chandler, J., without a jury, at the St. John Sittings in June last, and on July 13 judgment was by him entered for the defendant with costs, and a verdict was also entered for the defendant without costs on his counterclaim for damages for failure of the plaintiff to complete his purchase.

The only question raised by the appeal is whether the appellant is entitled to recover from the respondent the said deposit of $100 under the contract of sale entered into by him with the respondent. The premises in question were advertised for sale at public auction in a newspaper published in the city of St. John on April 26, 1918, as follows:—

"Leasehold Property—2½ storey house with store; also small two family house in rear No. 165 Chesley Street, by auction. I am instructed to sell at Chubb's Corner on Saturday morning, the 26th instant (daylight) valuable leasehold property situate at above address. A splendid opportunity for investment. F. L. Potts, Auctioneer."

At the time and place appointed the plaintiff attended and the described premises were duly offered for sale by the auctioneer Potts acting for the defendant, who it is alleged announced that the tenants occupying the property were subject to removal in 30 days, the tenants being monthly tenants. The plaintiff thereupon bid the sum of $1,000 for the property, and the same was sold to him as being the highest bidder and soon afterwards he executed the following bidding paper:—

"Saint John, N.B., April 26th, 1919.

Terms and conditions of sale of above advertised leasehold property. The above property is sold upon the following terms and conditions, the purchaser to pay $100 of the purchase price to the auctioneer F. L. Potts at the time of the property being knocked down to him and signing this bidding paper. Balance on surrender of the deed in about fifteen days at the office of F. L. Potts, 96 Germain Street. Should the purchaser fail to comply the deposit made by him shall be forfeited and the owner will have leave to sell

again at public auction or private sale without notice to the purchaser. Taxes all paid up to December 31st, 1918. Rents, ground rent, etc., proportionate up to May 1st, 1919. Upon the above terms and conditions I bid the sum of $1,000 for the above advertised property.

(Signed) Frank C. Brawley."

and paid the auctioneer the sum of $100, being 10% of the purchase-price as a deposit to guarantee the performance of the contract of purchase. The defendant claims he afterwards learned the tenants of the property were not monthly tenants, that their tenancies could not be terminated upon monthly notices, and he refused to complete the purchase and brought this suit to recover the deposit he had made. The defendant counterclaimed for damages sustained by him by reason of the refusal of the plaintiff to complete the purchase as already stated. The Judge based his judgment chiefly upon the ground that the plaintiff did not shew any defect in the title to the premises sold, or that the sale became abortive through any neglect or default on the part of the defendant, which he was required to prove, in order to succeed, and that therefore the question of the monthly tenancy of the property was not very material. The Judge was also of the opinion that the plaintiff could not succeed as he was mistaken in his action and could not maintain a suit for the return of the deposit paid by him for the reasons set forth in his statement of claim. This I take it refers to the fact that the action is not for a rescission of the contract of purchase, and therefore in its present form is not maintainable. Exception is taken to the judgment on the ground of error on the part of the Judge in deciding that the question of the monthly tenancies was not material. Second, that the appellant was mistaken in his action and could not maintain an action for the return of the deposit paid by him, for the reasons set forth in his statement of claim. Third, that the appellant was not entitled to a return of his deposit even though the respondent could not have succeeded with an action for specific performance against the appellant. The plaintiff claims the return of the deposit for two reasons, viz., that the defendant made a material misrepresentation in respect of the property, by reason whereof the appellant was misled and induced to enter into the agreement and that as the defendant could not have succeeded in a suit for specific

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performance against the plaintiff, the deposit must be returned.

In respect to the exceptions, and particularly exception one, I am of the opinion the plaintiff must fail in that he has not succeeded in proving his allegation that the statement of the auctioneer was not correct, and that the tenancies were yearly and not monthly. The trial Judge declares he is not at all sure that the tenants in occupation of the premises at the time of the sale were not monthly tenants, that the question was not cleared up at the trial, and that the plaintiff did not satisfy him that the statement made by the auctioneer was incorrect.

Referring to the evidence, it appears at p. 47 et seq. that the defendant had owned the property 10 or 11 years, taking possession thereof in the month of March or April, 1910 or 1911. That he then made arrangements with all the tenants as to their rent after ascertaining their several names and the rents respectively paid by them, and having had previous experience told and impressed upon each one of them individually that they must pay their rents at the end of each month; that they could move out upon giving him 30 days' notice and that he would have the same privilege and could remove them by giving a like notice. He further on reiterates his statement, and adds "I have not any tenants but what is monthly tenants" and being asked if so far as he was concerned he rented the premises by the month right through, replied "Yes, and in many instances payable in advance." The defendant also positively affirms he gave explicit instructions to his agent that no yearly renting would be allowed. I am unable to find anything in the cross-examination or in the evidence of other witnesses which contradicts this positive evidence of the defendant, and as the same course of dealing with the rentals on the property had been followed by the defendant for 10 years or during all the time he was the owner thereof, his statement is to me conclusive and I have no hesitation in finding the plaintiff has entirely failed to prove his allegation in respect to the statement of the auctioneer as to the tenancies of the property being incorrect, and with all due respect I could not have come to the conclusion as did the trial Judge that I was not satisfied in respect to the statement made by the auctioneer. In view also of the bidding paper executed by the plaintiff immediately after the sale, when all the facts and matters of special interest were fresh in

his mind, and he would naturally be charged with and acute in looking out for and protecting his interests, and while apparently all the details of the purchase are fully set out in this paper which is the contract between the parties, and no reference whatever is made to the matter of tenancies, monthly or otherwise, I am unable to find that the plaintiff had been, as he claims, misled or was induced to enter into the contract by reason of the statement made by the auctioneer, but am of the opinion he entered into the same with a full knowledge of what he was doing and taking the full responsibility therefor, but that for some further reason than is disclosed decided against completing the bargain and took the means provided in this suit of attempting to have his deposit returned. His reliance for success upon the fact that the statement made by the auctioneer was the inducement to him to enter into the contract, and when the statement proved to be untrue there was a material misrepresentation which entitled him to a return of his deposit, entirely fails under my finding that the evidence establishes the correctness of the statement and the manner in which the tenants had been dealt with to remove them from possession. The deposit was given as a security for the performance of the contract. The appellant cannot recover that deposit if it was through his default the transaction was not completed, and under the circumstances as I have detailed them I cannot doubt that it must be regarded as a contract uncompleted through the fault of the appellant. The full and complete answer to the action is that the vendor was perfectly willing and ready to convey to the appellant the premises and the title thereto, which he bought and approved and declared himself willing to take, and the contract only went off because he afterwards asserted he had entered into it by misrepresentation of the defendant, which to my mind he utterly failed to prove. I venture very much to doubt whether under the conditions described if the vendor had brought an action for specific performance to compel the appellant to complete the purchase and pay the residue of the purchase-money he could have successfully resisted such a suit on the ground he advanced, certainly not on that of a defect in the title. If then that be the case it seems to me it would be out of all reason to suppose he could recover the deposit on the ground that the contract had come to an end not through his default but through that of the vendor, when the circumstances

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were such that he could have compelled him specifically to perform the contract. I do not, however, think it necessary to determine this point at present, because for the reasons I have stated it seems to me the appellant was in default, that the contract went off owing to his default, and under such circumstances he cannot recover the deposit.

The appeal will be dismissed with costs.

Appeal dismissed.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. August 5, 1921.

Powers (§II—5)—Power of Attorney—Wife to Husband—Transfer by Donee of Power to Himself—Validity.

A power of attorney given by a wife to her husband, authorizing him to sell and absolutely dispose of the lands of the wife and for her and in her name to execute transfers thereof does not authorize the husband to transfer the properties to himself and the Registrar is not justified in accepting such transfer which will be set aside unless the Court would under the circumstances, if the properties were still registered in the wife's name be justified in directing a transfer to the husband or in directing that the wife hold the properties as trustee for the husband.

[Re Land Registry Act and Shaw (1915), 24 D.L.R. 429, referred to.]

Fraudulent Conveyances (§VI—30)—Property Purchased by Husband—Conveyance Taken in Name of Wife to Protect it From Creditors—Satisfaction of Judgment—Right of Husband to Re-conveyance to Him.

Where a husband purchases property and has the conveyance taken in the name of his wife, the presumption is that he intended to make a gift by way of advancement to her. This presumption may be rebutted by shewing that the husband is the beneficial owner and that the titles were placed in the wife's name for a legitimate purpose, but where the husband in order to rebut the presumption of advancement is obliged to disclose that the properties were placed in the name of the wife of the purpose of protecting them from pursuit by judgment creditors the Court will not assist him to get rid of the consequences of his fraudulent act.

[Gascoigne v. Gascoigne, [1918] 1 K.B. 223; Scheureman v. Scheureman (1916), 28 D.L.R. 223, 52 Can. S.C.R. 625 followed.]

APPEAL by plaintiff from the judgment at the trial of an action brought by a wife to have transfers of certain properties, which her husband had transferred to himself under a power of attorney given to him by her, set aside. Reversed.

R. Hartney and B. P. Boyce, for appellant.

P. E. Mackenzie, K.C., and J. Feinstein, for respondent.

The judgment of the Court was delivered by

Lamont, J.A.:—On August 16, 1920, the defendant, under a power of attorney which he held from the plaintiff, his wife, transferred to himself certain properties in the City of Saskatoon of which his wife was the registered owner. To have these transfers set aside and the properties revested in her, the plaintiff has brought this action.

The plaintiff and defendant were married in 1902. The defendant at that time carried on a plumbing and heating business in Halifax, where he remained until 1907, when he came to Saskatoon; leaving behind certain unpaid obligations. At Saskatoon he went into the plumbing and heating business with one Cornish. This business continued until 1908, when the defendant withdrew and a partnership was entered into between plaintiff and Cornish, under the name of "Elford & Cornish." The defendant managed the plaintiff's share of the business until 1913, when the partnership came to an end. For some time the partnership did a flourishing business, and it is admitted that almost all of the monies with which the properties in question were purchased came from the profits of the partnership. All the properties, with two exceptions, were purchased in the name of the plaintiff. The reason for this, the defendant says, was to protect him from certain judgments against him existing in Halifax. But while these properties were purchased in the name of the plaintiff, the defendant contends that he was the beneficial owner and that he was merely doing business in the name of his wife. The plaintiff, on the other hand, states that, while her husband conducted all the business transactions, it was understood between them that these properties were hers. With two exception (Lots 23 and 24), the title to these properties remained in the plaintiff until their transfer by the defendant to himself on August 16, 1920. The title to Lots 23 and 24 stood in the name of the defendant from July 11 until May, 1915, when they were transferred to his wife. I may point out that about the time the defendant became the registered owner of these lots he had settled the judgments existing against him in Halifax. In September, 1916, the plaintiff transferred these lots to her sister, Matzina Bedanchat. The defendant says that the reason he transferred these lots to his wife, and the reason she transferred them to her sister, was because the Northern Crown

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Bank was threatening to sue him and the firm of Elford & Cornish. The bank did sue, and obtained judgment against the defendant for a large sum of money, but the firm was held not liable. (See (1917) 34 D.L.R. 280, 10 S.L.R. 96.) After the firm was held not liable in that action, the plaintiff's sister re-transferred Lots 23 and 24 to the plaintiff, and they remained in her name until August 16, 1920.

The power of attorney under which the defendant transferred these properties to himself authorised him to sell and absolutely dispose of all the lands of his wife, and for her and in her name to execute transfers thereof. The trial Judge held that his power of attorney did not authorise the defendant to transfer the properties to himself, and that the Registrar should not have accepted the transfers, but that as the defendant was now the registered owner and as he was, in the opinion of the trial Judge, also the beneficial owner, and the plaintiff was well aware of the defendant's fraudulent scheme of taking the titles in her name to protect the properties from his creditors, the Court could not assist her; and he dismissed her action with costs. The plaintiff now appeals.

I agree with the conclusion of the trial Judge that the power of attorney did not authorise the defendant to transfer the properties in question to himself. In Re Land Registry Act and Shaw (1915), 24 D.L.R. 429, 22 B.C.R. 116. The transfers were therefore invalid and the defendant acquired no interest in the lands under them. His acquiring title under a power of attorney which he knew, or must be held to have known, did not authorise him to transfer the properties to himself, and his attempt to hold on to these titles as against his wife, cannot, in my opinion, be considered otherwise than mala fide. The transfers must therefore be set aside, unless the Court, under the circumstances would, if the properties were still registered in the plaintiff's name, direct a transfer of the same from her to the defendant, or direct that she hold them as trustee for him.

The question then is: Could the defendant, while the properties were still registered in the name of the plaintiff, have succeeded in an action to have her declared a trustee for him? I am very clearly of opinion that he could not. Where a husband purchases property and has the conveyance taken in the name of his wife, the presumption is that he intended to make a gift by way of an advancement to

her. This presumption is a rebuttable one. It may be rebutted by shewing that the husband is the beneficial owner and that the titles had been placed in his wife's name for some legitimate purpose. But where, in order to rebut the presumption of advancement, the husband is obliged to disclose that the properties were placed in the name of his wife for the purpose of protecting them from pursuit by his judgment creditor, he is not entitled to the assistance of the Court to get rid of the consequences of his own fraudulent act. A man who is obliged to set up his own fraud as a basis for the granting of the equitable relief of a declaration of trust, cannot hope to succeed in a Court of Equity.

In Gascoigne v. Gascoigne, [1918] 1 K.B. 223, the head note, which briefly sums up the judgment of the Court, is as follows:—

"A husband took a lease of land in his wife's name and built a house upon it with his own money. He used his wife's name in the transaction with her knowledge and connivance because he was in debt and was desirous of protecting the property from his creditors. In an action by him against his wife for a declaration that she held the property as trustee for him:—

Held, that he could not be allowed to set up his own fraudulent design as rebutting the presumption that the conveyance was intended as a gift to her, and that she was entitled to retain the property for her own use notwithstanding that she was a party to the fraud."

The same point came up for determination in Scheuerman v. Scheuerman (1916), 28 D.L.R. 223, 52 Can. S.C.R. 625, where it was held that the Court should not grant relief to a husband against the consequences of his unlawful attempt to delay and hinder his creditor, although the illegal purpose had not been carried out. In his judgment, Fitzpatrick, C.J., said, at p. 224:—"I am prepared to hold that a plaintiff is not entitled to come into Court and ask to be relieved of the consequences of his actions done with intent to violate the law, and that though they did not and even could not succeed in such purpose."

These authorities shew that, assuming it to have been established that the defendant was the beneficial owner of all the properties in question, the Court would not, under the circumstances, declare the plaintiff to be a trustee for him.

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In my opinion, however, it was not established that he was the beneficial owner. The evidence shews that these properties were paid for out of the profits of the business of Elford & Cornish. The plaintiff and not the defendant is the partner in that firm, and the profits were, therefore, hers. In the action brought by the Northern Crown Bank, the defendant was examined for discovery and in his examination he testified that he was not a member of the firm of Elford & Cornish and that he never had been a member. He said that he was just an employee of the firm, and that he received a salary. Had he stated on that occasion, as he states now, that he was in reality the partner doing business in his wife's name, and that the properties standing in her name were in reality his, the properties in question would have been available to satisfy the bank's judgment. In view of the fact that under the partnership agreement his wife was the "Elford" of the firm of Elford & Cornish, and in view of the defendant's sworn statement that he was not and never had been a partner in that firm, I do not see how he can now be heard to say that, as between himself and his wife, the statements in the partnership agreement and his own testimony in his examination for discovery were absolutely false, and that himself and not his wife had the beneficial ownership in these properties.

In my opinion the appeal should be allowed with costs; the judgment dismissing the action set aside, and judgment entered for the plaintiff setting aside the transfers and the certificates of title based thereon, and vesting the title of the properties in question in the plaintiff.

Appeal allowed.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, J.A., and Taylor, J. August 5, 1921.

Divorce and Separation (§IV—40)—Petition by Husband — Wife Guilty of Adultery—Husband by Neglect and Cruelty Conducing to Offence—Refusal of Court to Grant—Discretion of Court—Appeal.

The Court is not bound to grant a petition for divorce on the ground of adultery on the part of the wife, if it finds that the husband has by his neglect and cruelty and unlawful turning of the wife out of his home conduced to the adultery, and where the trial Judge has exercised his discretion in dismissing the petition, and it cannot be said that he was clearly wrong in doing so, an Appellate Court will not interfere.

[See Annotation, Divorce Law in Canada, 48 D.L.R. 7.]

APPEAL by the petitioner from a judgment of the King's Bench, refusing to grant a petition for divorce, on account of the adultery of the wife, the petitioner by his neglect and cruelty having conduced to the adultery. Affirmed.

H. C. Pope, for appellant.

J. C. Martin, for the Attorney-General.

Haultain, C.J.S., concurs with Lamont, J.A.

Lamont, J.A.:—On November 29, 1917, Peter Keslering married his wife after only 3 weeks acquaintance, the reason given to her father being that he had to appear before the Military Service Tribunal and desired to do so as a married man. After the marriage they went to live with his father, where they remained 7 months. Keslering had a homestead and pre-emption near his father's, but there was no house on the land, only a shack that had been used as a granary. Keslering's people apparently did not take kindly to his wife, and they made her life anything but enviable. After a few months Keslering appears to have become tired of his wife, for, instead of protecting her from the vindictive attacks of his people, he took part against her and told her that he did not want her any more. He took her to town to the priest and asked him to divorce them. When he found this could not be done, he returned home; but his people soon told his wife that she had to get out or she would be thrown out, and she says that Keslering himself drove her away. She went to her father's. A short time afterwards she saw her husband and told him that "if he would not take her back she would see a magistrate." He told her to go ahead. On June 18, 1918, she laid an information against her husband under the Deserted Wives Maintenance Act, 1911 (Sask.), ch. 14, charging him with having "unlawfully turned her out." To this charge the accused pleaded guilty, and offered to erect a house on the farm for them to live in together as man and wife. The wife was anxious to live with her husband, and was even willing to live in the old shack if he would clean it up. The magistrate made an order that he should have a house ready for occupation by July 15. Keslering did not make any attempt to erect a house. The respondent, however, induced him to bring her furniture to the shack, which was dirty and filthy and overrun with mice. When she wanted to clean it up he refused to let her, saying it was good enough for her. She lived in the shack some 3 weeks, but Keslering would neither take his meals with her nor sleep with her, and told

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her that he would not. He ate and slept part of the time at his father's and part of the time in an old granary on the place. He adopted, as the trial Judge has found, "every method in the way of cruelty and almost desertion for the purpose, apparently, of making her life miserable and driving her away." The Judge also found a clear intention on his part to get rid of his wife if at all possible. When she had been in the shack some 3 weeks, Keslering told her to bring her bed to the granary. She did so. In the night he got up from his own bed and came to hers, threw the blankets over her face and tried to choke her. She got away, left the place and went to a neighbour's, reaching there between 1 and 2 o'clock in the morning. Next day she returned to her father's. In August she applied to the magistrate for an order for her maintenance, and an order was made that he pay her $20 per month, which he paid for some months. When she went to her father's she took with her $500, which sum had been given to her by her father on her marriage. In December she entered into a written confract to work for a neighbour, Wensyl Neverka, the co-respondent herein, for one year at $20 per month. Apparently she was to be his housekeeper. He had living with him his two little children and his old father and mother. The respondent's father knew Neverka and thought it would be a good place for her to work. Very shortly after she entered into the agreement Keslering was made aware of it, and he knew she was working for Neverka because he saw them driving together. The fact that they were driving together caused him to think that proper relations would not be maintained between them. He wrote for advice with the idea of obtaining a divorce. What he calculated might happen did happen. The respondent committed adultery with Neverka. Keslering after he had evidence of that fact petitioned the Court for a divorce. The trial Judge made an order nisi, but directed the Local Registrar to send the pleadings and papers to the Attorney-General so that he might intervene if he thought such a course advisable.

The Attorney-General did intervene. The issue was tried by Brown, C.J.K.B., who held that the conduct of the petitioner had conduced to the adultery of his wife, and he therefore set aside the order nisi and dismissed the petition. From that judgment this appeal is brought.

In 16 Hals., at p. 493, the rule laid down is as follows:—

"In a petition for dissolution of marriage the court is not bound to pronounce a decree, if it finds that the petitioner has been guilty of such wilful neglect, or misconduct, as has conduced to the adultery charged; but, though it may do so in its discretion, it will refuse relief if the husband, although he intended no wrong, saw danger and recklessly allowed his wife to remain exposed to it."

In Baylis v. Baylis et al (1867), L.R. 1 P. & D. 394, the head-note in part reads as follows:—

"A husband having married a woman of loose character, with whom he had previously cohabited, separated from her against her will shortly after the marriage, and sent her to live by herself in a place where she would be accessible to temptation, and where she was guilty of adultery. There was no evidence that there was any reasonable cause for the separation. The Court was of opinion that this was conduct conducing to her adultery, and dismissed the petition."

In giving judgment, the Judge in Ordinary said, at p. 397:—

"But, on the other hand, a husband is at all times bound to accord to his wife the protection of his name, his home, and his society, and is certainly not the less so in cases where the previous life of his wife renders her peculiarly accessible to temptation. No man is justified in turning his wife from his house without reasonable cause, and then claiming a divorce on account of the misconduct to which he has by so doing conduced. . . . and yet he sent his wife away from him, and, much against her will, removed her, without friend or society, to a place in which of all others she would be accessible to temptation, and further, though she had given him no reason to suspect her of infidelity, immediately set a watch upon her actions.

It is hardly to be doubted that he both expected and hoped that she might commit herself. What is this but, in the words of the statute, 'conduct conducing to the adultery'?"

This language, in my opinion, is very appropriate to the facts in the present case.

See also Starbuck v. Starbuck (1889), 59 L.J. (P.) 20.

In Dixon's Divorce Law and Practice the law is stated to be as follows, at pp. 67, 68:—

"A husband cannot neglect and throw aside his wife, and afterwards, if she is unfaithful to him, obtain a divorce on the ground of her infidelity. If he has left her without a reasonable excuse, he cannot resist an answer setting up

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desertion. 'If chastity be the duty of the wife, protection is no less that of the husband. The wife has a right to the comfort and support of her husband's society, the security of his home and name, and his protection as far as circumstances permit. If he fall short of this, he is not wholly blameless if she fall, and, though not justifying her fall, he has so far compromised himself as to forfeit his claim for a divorce.'"

Although in the case at Bar the respondent had ample money for all her necessities, these authorities shew that the petitioner, by throwing his wife aside and by his wilful neglect of her and his refusal to continue to act the part of a husband to her, forfeited his right, in the discretion of the Court, to a divorce on the ground of her subsequent infidelity. The trial Judge in dismissing his petition exercised the discretion of the Court against him, and, in my opinion, it cannot be said that in so doing the Judge was wrong.

The appeal should, therefore, be dismissed with costs.

Taylor, J.: — I agree with the judgment of Lamont, J.A.

Appeal dismissed.

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British Columbia County Court, Cayley, J. January 24, 1920.

1. **Contracts (§IID—170)—Lease of Bar Premises—Property Included.**

A lease of "all and singular the ground floor consisting of the bar premises immediately west of the hotel lobby . . . and the beer cellars connected with the said bar, and bar fixtures . . . . . ." held not to include a vestibule between the bar and the street where there was space for a cigar stand and a boot black stand, there being no rule established as to its being included by custom and the bar premises having a separate entrance on the street.

2. **Landlord and Tenant (§IIIE—117)—Notice to Quit—Monthly Tenancy—Sufficiency—Reasonable Length of Time.**

In the absence of a statutory requirement as to the length of notice for the termination of a tenancy from month to month only a reasonable notice is necessary.

[Burgoyne v. Mallett (1912), 5 D.L.R. 62, followed.]

APPLICATION under the Landlord and Tenant Act, R.S.B.C. 1911, ch. 126, to evict the tenants from the premises, 445 Pender St. West, Vancouver, B.C. The tenants, under lease expiring on January 10, 1920, occupied a portion of the premises described in the lease as the ground floor

consisting of the bar premises immediately west of the hotel lobby of the Balfour Hotel on Pender St. West, Vancouver, B.C., being No. 445 Pender St. W., and the beer cellars connected with the bar, and the bar fixtures. Immediately inside the entrance to the bar from the street there is a space for a cigar stand and boot-black stand, which had not been used as such during the tenancy until the boot-black stand was rented by the landlord on November 20, 1919, to a boot-black. On December 17, 1919, the landlord notified the tenants that a new lease would not be entered into, as the landlord proposed to run the bar premises herself, and further notified the tenants that the premises must be vacated on or before January 10, 1920. The tenants refused to vacate, and these proceedings are brought for eviction.

R. L. Maitland and W. S. Lane, for the application.
A. D. Taylor, K.C., and A. J. Kappelle, for the tenant.

Cayley, Co. Ct. J.:—This is an application by the landlord, under the Landlord and Tenant Act, for possession of demised premises. On July 10, 1918, Samuel D. Bliss leased to Charles E. Fraser and Albert I. Shaw, "All and singular the ground floor consisting of the bar premises immediately to the west of the hotel lobby of the Balfour Hotel on Pender Street West, Vancouver, British Columbia, being numbered 445 Pender Street West, and the beer cellars connected with the said bar and bar fixtures" for one year and 6 months from July 10, 1918, for the yearly rent of $1,020, payable as to the sum of $56.70 on July 10, 1918, and thereafter the sum of $85 on the first day of each and every month during the said term.

Sibbella Davis is the assignee from Samuel D. Bliss of all the right, title and interest in the said lease. The assignment to Mrs. Davis is dated November 6, 1919, and notice of the assignment was given to Fraser and Shaw first verbally, and then in writing by letter, dated December 17, 1919. This letter was afterwards relied upon by counsel for Mrs. Davis as constituting a written notice to quit, if such notice was required, and says as follows:—
"Dear Sirs:—

"Lease dated the 10th day of January, 1918, given by Samuel D. Bliss to you was transferred on the 6th of November last to Mrs. Sibbella Davis. Mrs. Davis has interviewed us with respect to an interview which you had with

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her as to extending the lease for a further period of time after it expired on the 10th of January, 1920.

"We have been asked to formally notify you that a new lease will not be entered into by Mrs. Davis inasmuch as Mrs. Davis proposes to run the bar premises herself after the expiration of your lease.

Mrs. Davis mentioned in her interview with us that you were under a misapprehension with respect to giving notice. As the lease provides for a stated term of one year and six months, it is not necessary to give any notice to you. You will therefore definitely understand that the premises must be vacated on or before twelve o'clock p.m. of the 10th January, 1920,—this entails the removal of your stock before that time.

This letter will be made use of in claiming punitive damages if you deliberately disregard it."

Under the terms of the above lease the term expired on January 10, 1920, at 12 o'clock midnight, but the tenants having refused to give up possession the formal demand for possession was delivered to the tenants on January 12, 1920. This demand is as follows:—"I, Sibbella Davis, of the City of Vancouver, in the County of Vancouver, in the Province of British Columbia, your landlord under and by virtue of an assignment of lease dated the 6th of November, 1919, which lease was entered into on the 10th day of July, 1918, between Samuel D. Bliss and yourselves, do hereby and require you forthwith to go out of possession and to deliver up to me possession of the premises demised to you, which premises I now own and which you have been permitted to occupy and hold the right of occupation under and by virtue of the said lease, dated the 10th day of July, 1918, and which lease and right of occupation have been determined and have expired by the effluxion of time.

Dated at Vancouver, B.C., this 12th day of January, A.D. 1920."

The ground on which the demand to deliver up possession was refused is set out in a letter written to Mrs. Davis by the tenants' solicitor on December 19, 1919, and is as follows:—

"Dear Sirs,

Messrs. Fraser and Shaw have handed me your letter to them of the 17th instant for attention. In reply I suggest that your client has failed to inform you that she has broken the lease under which my clients hold, by taking

possession of a part of the premises demised to them. This being a fact I have advised my clients that they are now on a monthly basis and if my advice is followed my clients will not vacate without a legal thirty days' notice."

The premises demised are, as the lease states, "the bar premises immediately to the west of the hotel lobby." The hotel lobby opens on to the street and the bar premises have a separate entrance on to the street, but in front of the bar premises proper there is a large vestibule measuring 11 x 24 ft. and W. W. Walsh, who is the owner of the premises and who had the hotel constructed, stated that the vestibule was constructed for the purpose of being used as a boot-black place and cigar-stand. Walsh stated that the vestibule was used for these purposes until conditions changed during the war, and that such vestibule used to rent $75 for the cigar stand and $30 a month for the boot-black. Bliss during his tenancy had not rented the vestibule to any person, but Mrs. Davis, on November 10, 1919, rented the vestibule for a boot-black stand. The tenants did not protest but paid their rent as usual, under the terms of the lease, on December 1 and January 1, but on December 19, it was set up by Mr. Kappelle for the tenants, in the above letter, that Mrs. Davis had broken the lease by taking possession of part of the demised premises and it was now contended by counsel that by renting the vestibule to the boot-black on November 10 (the boot-black took possession on November 18) the lease, under which the tenants had held, was abrogated and a new tenancy from month to month created and that the tenants were entitled to one month's notice to quit.

The first question that arises is, whether the vestibule came within the wording of the original lease. The landlord, Walsh, gave evidence as above, and Masters, secretary of the Vancouver Hotel, gave evidence that "as a rule, if I rented the bar, the landlord would have the privilege of renting the vestibule — that is the custom." For the tenants, Reeves, real-estate broker, thought it would depend upon the wording of the lease. Harvey of the St. Regis Hotel said that he was the lessee of the bar and cafe and considers he owns the front, but as the front was an open place 40 ft. x 5 ft., I do not consider this was any evidence as to the vestibule. The same applies to Anderson of the Inverary Cafe. This place in front of the entrance is 25 ft. x 3 or 4 ft. I do not consider this to be of

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the nature of a vestibule. Looking at the wording of the lease itself, I consider it an open question as to whether the words "ground floor consisting of the bar premises" would include the vestibule. The arguments for and against appear to me equally balanced. On the one hand, the vestibule was constructed to be used apart from the bar premises. On the other hand it had not been used for separate purposes until Mrs. Davis let it on November 10. Any advantage the tenants might derive from this fact is discounted by Walsh's evidence that it had not been so used, because war conditions made it unprofitable. In my view, however, it was necessary for the tenants, who were setting up a claim to be entitled to a new lease from month to month, to establish affirmatively that, under the terms of the lease, they were entitled to the vestibule. I hold that they have not been able to establish this.

It was contended by counsel for the tenants that eviction from part of the premises demised to them, coupled with the acceptance of the rent thereafter by the landlord, created a new tenancy, and they relied upon the case of Carey v. Bostwick, etc. (1853), 10 U.C.Q.B. 156, as authority to this effect. It may be that I have erroneously interpreted the terms of the lease and that the case might be sent back to me to settle definitely whether the vestibule was included in the lease of not, so that I may as well consider the legal argument that followed on the assumption by counsel for the tenants that the vestibule was included in the lease. I think then that Carey v. Bostwick is not an authority for the proposition that an eviction of the tenant from part of the premises demised determines the tenancy. Such an eviction suspends the rent and prevents the landlord from distraining, but I do not think it determines anything else. Coleman v. Reddick (1876), 25 U.C.C.P. 579, decided that such an eviction would not authorise the tenant to abandon the residue of the premises, which, if the eviction determined the tenancy he would be entitled to do. It is evident that both landlord and tenant continued to pay and receive rent after the alleged eviction on the day provided for, and under the term contained, in the original lease. Counsel contends, however, that the old lease was determined and a new tenancy created by operation of law and without the consent or knowledge of the parties, which does not seem to me tenable.

Again, assuming that a new tenancy from month to

month was created, as was contended by counsel, what is the law regarding notice to quit? Mr. Kappelle's letter states that in a monthly tenancy the tenant is entitled to thirty days' notice. The letter written on December 17 seems to shew that the tenants had conversations with Mrs. Davis with respect to extending the lease, so that they were aware before December 17, but how long before is not apparent, but Mrs. Davis's evidence is that Fraser came to her on November 7 and asked for a renewal of the lease after January 10 and that she refused. On December 7 again Fraser had a talk with her about the lease and finally on December 17 followed the letter cited above. I take it that the tenants knew far more than a month beforehand that the lease would not be renewed, and if these conversations and the letter referred to constitute a notice to quit, which I think they do, that they had had reasonable notice. I see no authority for the proposition that in a monthly tenancy a month's notice to quit is to be given. All that the authorities amount to is that a month's notice is sufficient. In Jones v. Mills (1861), 10 C.B. (N.S.) 788, 142 E.R. 664, Erle, C.J., says at pp. 796-7:—"It has been laid down that a weekly or a monthly holding does not require a week's or a month's notice to determine it, unless there be some special agreement or some custom."

Willes, J., at p. 799 says:—"To say as a matter of law, that a week's notice is necessary, is a proposition I am not prepared to assent to."

This, of course, was with reference to weekly tenancies where the Judge thought that half a week's notice was sufficient.

Byles, J., at p. 800, says:—"There is some authority for saying that a week's notice is not necessary; but there is no authority defining what notice is necessary." This also referred to weekly tenancies. Woodfall's Landlord and Tenant, 19th ed., at p. 404, says:—"Where the tenancy is otherwise than yearly, and there is no local custom or stipulation as to notice, it is very doubtful what notice to quit is necessary."

I take it that this is the present state of the law on the subject and that 30 days' notice is not necessary, but that the notice required should be a reasonable notice. This was decided in our own County Court by Grant, Co. Ct. J., in a case in which I appeared for the defendant, Burgoyne v. Mallett (1912), 5 D.L.R. 62; where the decision was that

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only a reasonable notice of the intention to terminate the tenancy is necessary. No local custom was contended for by counsel nor any evidence produced of custom, and I think that, taking the letter of December 17 as notice to quit (apart from the previous conversations), that letter was sufficient notice. It must be remembered that there is no statutory provision as in Nova Scotia and New Brunswick.

For these reasons and for the reason that I do not hold there was any eviction established, the tenants must be ordered to deliver up possession to the landlord.

Application granted.

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Nova Scotia Supreme Court, Harris, C.J. July 3, 1919.

Dower (§II—36)—Right of Widow for Damages for Detention of—Statute of Merton—R.S.N.S. 1900 ch. 169.

A widow is entitled in Nova Scotia to recover damages for detention of her dower, although the husband was not seized of the property at the time of his death, it having been sold under execution in his lifetime. The Statute of Merton (20 Henry III ch. 1) is not in force in the Province, and the right was not taken away by the 1900 revision of the statutes.

[Review of Legislation and authorities.]

ACTION by a widow to recover damages for detention of her dower, the husband not having been seized of the property at the time of his death. Judgment for plaintiff.

J. B. Kenny, K.C., for plaintiff.

James A. McDonald, K.C., for defendant.

Harris, C.J.:—The question raised in this case is whether the plaintiff, a widow, can recover damages for detention of her dower, her husband not having been seized of the property at the time of his death. A judgment had been recovered against the husband and the property sold under execution in his lifetime to the defendant. The husband died on December 4, 1915. The widow served a written demand for her dower on April 20, 1916, which was not complied with. Defendant admits plaintiff's right to recover her dower, but denies her right to damages for the detention. The argument of Mr. McDonald, K.C., counsel for the defendant, is that at common law damages could not be recovered for detention of dower, and that the English Statute of 20 Henry III, 1235, ch. 1, usually referred to as the Statute of Merton, only gave an action for damages for detention where the husband was seized at the time of his

death and a number of Ontario cases decided before the Legislature of that Province had dealt with the question were cited to shew that no recovery could be had under the Statute of Merton unless the husband died seized of the property. That undoubtedly was the law of England; Jones v. Jones (1832), 2 C. & J. 601, 149 E.R. 253. Incidentally it may be mentioned that the Statute of Merton was expressly repealed in England by the Law Revision and Civil Procedure Act, 1881, ch. 59, but the law had previously been changed and is now regulated there by the Dower Act, 1833, ch. 105.

It was argued that the statutes of this Province did not give a right of action and that the Statute of Merton governs. I think this is not so.

The Statutes of Nova Scotia (other than ch. 114 and 169 of the Revised Statutes 1900) were not referred to on the argument but I have since traced the law down from 1768 to the present time. It appears that in 1768 (8 Geo. III., ch. 8, at p. 141) our Legislature dealt with the matter and enacted by sec. 2 of that Act:—

"II. And be it further enacted, that upon judgment being given for any woman to recover her dower, if any estate of houses and lands, and other hereditaments, which were her husband's, reasonable damage shall also be assigned to her from the time of the demand made, and a writ of seizin shall be directed to the Provost Marshal or his deputy, in manner and form following, that is to say:

(here follows form of writ)

And where no damages shall be awarded, the writ to run only for seizin and costs of suit."

In revision 1 of the statutes (1851), ch. 138, sec. 3 reads as follows:—"Upon judgment being given for the widow reasonable damages shall be assigned to her from the time of the demand made."

This provision is repeated word for word in ch. 138 of 2nd series (1859), ch. 138 of 3rd series (1864), ch. 101 of 4th series (1873), and ch. 121 of 5th series (1884).

There was a Dower Act passed in 1898, ch 23, and section 21 of that Act expressly reserved and continued in force the provisions of ch. 121 of the Revised Statutes, 5th series.

There is no doubt that all the statutes to which I have referred gave a widow the right to damages for detention of her dower whether the husband died seized or not. There is no restriction such as is contained in the old Statute of

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Merton. The difficulty—if there is a difficulty—is that when the statutes were consolidated in 1900 the provision expressly giving a right of action which had existed for more than 130 years was omitted. In construing the present Act we must have regard to the previous law and the history of the legislation upon the subject. The matter is not, in my opinion, complicated by the Statute of Merton, which is not in force here as our Legislature has dealt with the subject. Uniacke v. Dickson (1848), 1 James R., 287 (2 N.S.R.). That being so, the question narrows itself down to this; either a widow has an action for damages for detention of her dower under our law regardless of whether or not her husband was seized at the time of his death, or she has no such action under any circumstances.

In Uniacke v. Dickson, Halliburton, C.J., at p. 292, said:—

"The Supreme Court has generally considered that when the local legislature has legislated upon any particular subject, relative to which English statutes had previously existed, that the colonial courts are to be guided by the provincial and not the English statutes in deciding questions upon such subjects."

It therefore seems that the Statute of Merton is out of the case and if the Statutes of Nova Scotia do not give a right of action then we are bound under the common law to say that there is in this Province no right of action for damages for detention of dower under any circumstances whatever.

It is important to state this clearly because in interpreting the two Acts respecting dower now in force we have to reach a conclusion as to whether or not the Legislature in 1900 intended to take away the right of action which had existed in this Province for so many years. If such an intention existed it goes without saying that it ought to have been clearly expressed. I must confess that I am quite unable to see why sec. 4 of ch. 121 of the Revised Statutes (1884), 5th series, was not incorporated in the Statutes of 1900, and it really seems as if its omission must have been purely accidental because other sections in the present Act clearly recognise the right of action. The alternative is that the Legislature considered that certain new sections then inserted for the first time in the Act made the law perfectly clear and continued the right of action, and that it was therefore unnecessary to re-enact sec. 4 of ch. 121 of the Revised Statutes, 5th series.

Whatever may be the true explanation as to this matter, the legislative intention to continue the right of action I think is obvious to anyone reading the present Act. There is not only no declaration of an intention to effect so radical a change in the law but, on the other hand, there are sections of the Act expressly recognising the right of the widow to damages for detention—sections which would be meaningless and senseless if the right did not exist.

I quote secs. 3, 7, 9 and 12 of ch. 169 of the Revised Statutes, 1900, all of which are new:—

"3. If the plaintiff claims damages for the detention of her dower, the indorsement shall contain a statement that the plaintiff claims damages for detention of her dower from a day to be stated.

7. If the plaintiff claims damages for detention of dower, neither the entry of a judgment of seizin nor the taking of proceedings for the assignment of dower thereunder, shall prevent her from proceeding with the action for the recovery of such damages.

9 (1). A judgment for the recovery of dower, whether with or without costs or damages, may be enforced by a writ of seizin directed to the sheriff of the county in which the land lies. (2) The writ of seizin shall set forth the land out of which the plaintiff is to recover dower.

12. In estimating damages for the detention of dower on the yearly value of the land, for the purpose of fixing a yearly sum of money in lieu of an assignment of dower by metes and bounds, the value of permanent improvements made after the alienation of the land by the husband, or after the death of the husband, shall not be taken into account; but the damages, or yearly value, shall be estimated upon the state of the property at the time of such alienation or death, allowing for the general rise, if any, in the price and value of the land in the particular locality."

The form of the writ of seizin and damages prescribed by the Act, after dealing with seizin of the land, proceeds:—

"We command you also, that of the goods or chattels of the said A.B. within your precinct, you cause to be paid and satisfied unto the said C.D. at the value thereof in money, the sum of ..... for damages awarded her by our said court for her being held and kept out of her dower, and for costs expended on this suit, with ..... more for this writ; and thereof also to satisfy yourself your own fees."

I am clearly of opinion that the right of action in this

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case was not taken away by the Legislature when the statutes were revised in 1900 and damages can be recovered from the time of the demand.

There remains the question as to the amount of these damages. The period down to the present time is 3 years, 2 months and 15 days.

After a careful consideration of the evidence as to the rental value of the property (and making proper deductions for taxes, insurance, etc.) I fix the damages to which plaintiff is entitled at $320. I do not allow interest on the amount as there seems to be no authority for so doing under the circumstances in evidence in this case.

The plaintiff will also have the costs of the action down to the present time and a judgment of seizin.

Judgment accordingly.

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Saskatchewan King's Bench, Maclean, J. October 10, 1921.

Schools (§IV—77)—Approval of School Site—Approval Undisturbed—Application for and Approval of Second Site—Validity.

The fact that a municipal council has given its approval to a certain school site does not mean that that site shall always continue to be the school site for the district, and the council may, before any step is taken to erect the school or to acquire the site chosen, consider a new application for another site and the council may give its approval of the second site, although no appeal has been taken from the council's approval of the first site. A certificate of approval by the council of the second site as provided by the School Act R.S.S. 1920, ch. 110 is sufficient authority to the trustee to proceed with the erection of the school building on the second site chosen.

APPLICATION for an injunction restraining the defendants from proceeding with the erection of a school building on a certain proposed site. Application refused.

F. W. Turnbull, for plaintiff.

H. E. Sampson, K.C., for defendant.

Maclean, J.:—This is an application for an injunction restraining the defendants from proceeding with the erection of a school building on a certain proposed site. There are two sites in question and may be designated as "the old site," and "the Jamieson site."

In the spring of the present year the trustees of the school district in question took certain proceedings to select a new school site. The proceedings complied with the provisions made in that behalf in the School Act, ch. 110, R.S.S.,

1920, and the council of the municipality in which the school district is situate approved of the Jamieson site. An appeal was lodged within the prescribed time to a Board of Arbitrators, but before the Board was fully constituted it was discovered that the application for the Board was not signed by the requisite number of resident ratepayers. Consequently the approval of the Jamieson site by the municipal council remained undisturbed. No certificate of approval was issued by the municipal council, nor asked for by any of the parties interested. A short time thereafter, and before the defendants had taken any step towards erecting the new school building or acquiring the said Jamieson site, proceedings for the determination of a school site were again commenced, and in due course the approval of the municipal council again asked for, and this time the municipal council approved of the old site.

It appears that in each case the municipal council endeavoured to act in accordance with what they considered the opinion of the majority of ratepayers, but, in the first instance, no distinction was made between "resident" and "non-resident" ratepayers, and, in the second instance, apparently the opinion of the majority of the resident ratepayers was taken into consideration.

The plaintiff obtained an interim injunction restraining the defendants from proceeding with the erection of a new school building on the old site, and contends that the defendants are bound by the approval of the municipal council in the first instance, and that the Jamieson site is now the only site which the defendants can consider for the purpose of erecting a new building.

The plaintiff contends that as no appeal was taken from the decision of the council in respect to the Jamieson site the council cannot properly give its approval of another site. The fact that the municipal council gave its approval to a certain site cannot possibly mean that that site shall always continue the school site for the district. Had the second application not been made for a period of 2 or 3 years it could scarcely be contended that the council could not regard the application as a new application to be considered on its merits and totally distinct from any prior application. The statute prescribes no time limit for which any particular site chosen is to remain the school site. On the contrary, the general intention of the Act is that the wishes of a majority of the persons benefiting by the school

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shall be the controlling element in determining the affairs of the school district.

The defendants made a second application to the municipal council totally distinct, separate from the first application, and the council gave its approval of the old site. The fact that only a few weeks intervened between both applications cannot possibly affect the regularity or irregularity of the proceedings. No appeal was taken from the council's approval of the old site. In fact, it is clear that no such appeal could be taken, for such appeal could only be taken upon petition of a majority of the resident ratepayers, and a majority of the resident ratepayers had already signified that preference for the old site.

Affidavits were filed by both parties shewing the merits of the respective sites, and establishing that either one is preferable to the other. On this application however I take it that I do not have to pass upon the merits of the two sites and that I am concerned wholly with the regularity of the proceedings taken by the defendants and by the municipal council.

I hold that the second proceedings were regular and that the municipal council in considering the second application were not bound in any way by the decision or approval it had given in respect to the first application. After the approval of the old site by the council a certificate of approval as provided for by the Act was asked for and issued by the council. This is sufficient authority to the defendants to proceed with their affairs in respect to the old site to erect a building thereon.

The plaintiff's application is refused.

On the hearing before me, it was suggested that in case I should come to the conclusion to which I have come, a short time should be allowed before dissolving the interim injunction in order that the plaintiff might consider what further steps if any he should take in the matter. In view of that, I fix Saturday the 15th inst. as the time on which the existing interim injunction shall expire.

Costs to the defendant.

Application refused.

GRACE AND CO. LTD. v. PERRAS.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 20, 1921.

Contracts (§IE—95)—Verbal Commercial Negotiation—Letter Purporting to Embody Terms—Failure to Repudiate—Circumstances Establishing Contract.

When one of the two parties to a verbal commercial negotiation immediately thereafter writes a letter to the other purporting to state the terms of a contract arrived at between them, the presumption or inference, that the failure of the latter to repudiate such contract within a reasonable time imports an assent to it and affords conclusive evidence that the contract in fact exists in the terms stated, is one of fact and where the circumstance preclude the inference of assent that might otherwise be drawn from the silence, the contract will not be held to have been established.

APPEAL by plaintiff from the judgment of the Court of King's Bench (1920), 31 Que. K.B. 382, in an action for damages for breach of a contract to sell and deliver a certain quantity of goods. Affirmed.

H. N. Chauvin, K.C., for appellant.

E. Lafontaine, for respondent.

Idington, J.:—I do not think I can add anything useful to what has been said in the Courts below.

Without affirming all that has been so expressed I agree in the result and conclude that having regard to the entire evidence there was no such contract established as contended for by the appellant.

I, therefore, think the appeal should be dismissed with costs.

Duff, J.:—The questions on this appeal are questions of fact. I can see no adequate ground for differing from the conclusion of the Court below, (1920), 31 Que. K.B. 362.

Anglin, J.:—I cannot accept the appellant's contention that as a matter of law wherever one of two parties to a verbal commercial negotiation immediately thereafter writes a letter to the other purporting to state the terms of a contract arrived at between them the failure of the latter to repudiate such contract within a reasonable time imports an assent to it and affords conclusive evidence that the contract in fact exists in the terms stated. There may no doubt be,—perhaps in the majority of such cases there are,—circumstances which warrant that inference from the silence of the recipient of the letter. If followed by action on the part of the sender thereby induced, a case of estoppel may arise. But the presumption or inference is one of fact and the circumstances may be such that it should not, often cannot, be drawn.

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The Courts below have so regarded this case; and so far am I from being convinced that their views of it was erroneous that I incline to agree with it. The evidence of the two parties to the oral negotiations is in accord that a contract was made but is in direct conflict as to the quantity of goods agreed to be furnished to the plaintiff by the defendant. The circumstances that the defendant had expressly instructed his agent to make no sale that he had not arranged a purchase to cover and that the agent had arranged such a purchase for the precise quantity which he says he agreed to sell to the plaintiff tend to corroborate his version of the result of the negotiations. Taken with the fact that the plaintiff's letter appears never to have come to the personal notice of the defendant these circumstances go far to preclude the inference of assent that might otherwise have been drawn from the defendant's silence.

The plaintiff in my opinion has not established the contract on which he sues. The appeal therefore fails.

Brodeur, J.:—The plaintiff-appellant, Grace and Co. alleges that the defendant-respondent, Perras, bound himself in May, 1919, to sell and deliver to him 5,400 half cow skins. Defendant denies the existence of the contract and alleges, moreover, that he only undertook to deliver 1,200 and that he fulfilled his obligation. Article 1235 C.C. (Que.) declares that in commercial matters exceeding $50 no action can be maintained against a party without a writing signed by him in the case of a sale of goods, unless the purchaser has accepted or received part of the goods.

In the present case, there has been delivery, but was this delivery made in execution of a contract for 5,400 articles or for only 1,200. On this last point the evidence is contradictory.

I am inclined to believe that plaintiff's contention is well founded, that the contract between the parties did indeed contemplate a delivery of 5,400 skins, seeing that plaintiff's letter, dated May 13, addressed to defendant's firm, explicitly stated "We herewith beg to confirm our verbal purchase from you of 450 dozen sides" and this letter was never answered in writing. On the other hand, the silence of a person to whom a declaration is made of the existence of a contract does not imply consent or an obligation on his part as a general rule. His failure to answer is not in itself equivalent to a refusal. For consent and for an obligation,

a positive fact is required. Baudry-Lacantinerie, Obligations, Vol. 1, No. 44.

At No. 515 of the same treatise, however, the author goes on to say that acceptance may in certain cases be deduced from silence, and relates certain decisions in commercial matters where the absence of a reply to a letter written "in connection with business under discussion must be considered as equivalent to consent." He declares, however, that the doctrine of the Courts is too absolute.

In the present case plaintiff at the end of his letter called for confirmation of the contract which he alleged to exist. There was all the more reason for such a request as plaintiff knew that he had dealt with a subordinate and that defendant himself in a previous case, and to the knowledge of his firm, had refused to confirm the act of an employee.

The alleged confirmation of the contract was never effected. On his return from a journey, defendant definitely repudiated the contract.

Moreover, the verbal evidence is contradictory and the trial Judge had the advantage of seeing the witnesses, and, therefore, was in a better position than ourselves to judge of their truthfulness. He came to the conclusion that the contract between the parties only covered 1,200 skins.

Under these circumstances we cannot consider that the defendant Perras bound himself to deliver to the plaintiff the quantity of skins alleged.

The judgment dismissing his action must, therefore, be confirmed with costs.

Mignault, J.:—This case comes to this Court with the findings of facts of the trial Judge unanimously concurred in by the Court of King's Bench, 31 Que. K.B. 382, and the dispute being as to the quantity of sides of chrome patent cow hides which were sold by the respondent to the appellant, is certainly a question of fact. So far as the matter rested on the testimony of Osborne (the plaintiff's representative) on the one hand and of Hubbell (the defendant's employee) and the defendant himself on the other, the trial Judge accepted the statements of the latter. And, assuming that under art. 1235 C.C. (Que.) the contract could be proved by parol evidence in view of the deliveries which the appellant claims were referable to the larger contract, the respondent to the smaller one, there would be no difficulty whatever had not the appellant written to the respondent the letter of May 13, 1919, purporting to confirm a contract

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of sale of 450 dozen sides, which letter was received by Hubbell who never answered it, but is shewn not to have come to the knowledge of the respondent who was then absent from Montreal.

The value of this letter is, of course, merely as evidence of a contract which the trial Judge on the testimony found had not been entered into: It is noteworthy that the appellant has suffered no prejudice by reason of the failure of a reply to its letter, for during the previous month it had committed itself to a Paris firm to which it had undertaken to sell 500 dozen sides, and no action on its part was induced by the respondent's silence. On this phase of the case, Greenshields, J., suggested at p. 384 (31 Que. K.B.) that if it was the duty of the respondent to answer this letter, and if his failure to do so induced the appellant to do something which would not otherwise have been done and which resulted in damages, an action might lie, and if an action on these grounds were brought "It may be that the respondent would be estopped in his defence upon the principle 'that where a man has kept silent when he ought to have spoken, he will not be permitted to speak when he ought to keep silent.'"

I have no doubt whatever that Greenshields, J., will fully agree with me when I venture to observe that the doctrine of estoppel as it exists in England and the common law provinces of the Dominion is no part of the law of the Province of Quebec. This however does not mean that in many cases where a person is held to be estopped in England, he would not be held liable in the Province of Quebec. Article 1730 of the Civil Code is an example of what, in England, is referable to the principle of estoppel, and where a person has by his representation induced another to alter his position to his prejudice, liability, in Quebec, could be predicated under arts. 1053 et seq. of the Civil Code. Whether such liability could be relied on as a defence to an action, in order to avoid what has been called a "circuit d'actions" [circle of actions], is a proposition which, were it necessary to discuss it here, could no doubt be supported on the authority of Pothier. May I merely add, with all due deference, that the use of such a word as "estoppel," coming as it does from another system of law, should be avoided in Quebec cases as possibly involving the recognition of a doctrine which, as it exists to-day, is not a part of the law administered in the Province of Quebec.

In this case my opinion is, under the circumstances disclosed by the evidence, that the appellant could not create a contract by its letter affirming that a contract had been entered into, that the failure of an answer, under the same circumstances, cannot serve as evidence of a non-existing contract, and while I would certainly not say that under no circumstances the neglect to answer a letter cannot give rise to liability or serve as a tacit admission, my opinion is that in the present case Hubbell's failure to answer the appellant's letter cannot be used as evidence that the respondent entered into a contract which the trial Judge, on the evidence, finds was never made.

The opinions of the Judges in the Court of King's Bench are so satisfactory to me that I respectfully express my concurrence therein.

The appeal should be dismissed with costs.

Appeal dismissed.

BLAIR v. GRAND ORANGE LODGE.

New Brunswick Supreme Court, Chancery Division, Hazen, C.J. September 12, 1921.

Associations (§IIB—10)—Expulsion from Membership—Necessity of Following Strictly the Rules and Regulations Governing—Property Interest of Member Giving Court Right to Interfere.

Expulsion or suspension from societies such as the Orange Lodge, social clubs or other organized clubs is calculated to place a stigma upon the character and standing of the person so punished and to effect his standing in the community in which he lives, and, therefore, it is of the utmost importance that provisions which are made for the proper trial of charges against him should be carried out literally and strictly in accordance with their tenor, and where such provisions have not been carried out the Court will set aside the order of expulsion or suspension. Where an order or society has property a member has a proprietary interest in it which he is deprived of so long as he remains expelled or suspended from membership, and this proprietary right is sufficient to give the Court jurisdiction to interfere with respect to the expulsion or suspension of such member.

[Young v. Ladies' Imperial Club Ltd., [1920] 2 K.B. 523, 89 L.J. (K.B.) 563; Cohen v. Congregation of Hazen Avenue Synagogue (1920), 47 N.B.R. 400, followed.]

ACTION by a member of the Grand Orange Lodge for an injunction restraining the defendant from preventing the plaintiff from enjoying the rights and privileges of membership in the corporation and its subordinate lodges. Suspension declared improper and injunction granted.

F. R. Taylor, K.C., and G. Earle Logan, for plaintiff.

S. B. Bustin, and S. W. Palmer, for defendant.

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Hazen, C. J.:—This case grew out of a resolution that was passed by the defendant regarding a memorial committee to establish an orphanage. Some funds had been voted by the association towards a local orphanage, and the plaintiff contended that this was done in violation of the terms of the resolution, and he laid a charge against the officers of the Grand Orange Lodge, alleging misuse of the funds and subsequently commenced a suit to restrain them from further expenditure, which suit was dismissed.

It appears from the report of the 77th annual session of the Grand Lodge which was held in Woodstock on April 20, 21 and 22, 1920, that the charge was referred to a committee to investigate and make a report, but by a subsequent resolution at the same meeting a motion to reconsider this resolution was carried, and there is nothing on the records to shew that the committee ever did anything in the way of investigating the charge that had been made. At the same meeting a vote of censure was passed against the plaintiff. Nothing further appears to have been done in regard to this matter at the meeting in 1920, but at the meeting of the Grand Lodge held at Moncton in April of the following year a report was read from the Grand Auditors as follows:—

"There is one item of expenditure which your Auditors would like to draw the attention of this Right Worshipful Grand Lodge to, namely the amount paid for barristers' fees in connection with the defence of your Executive on account of action brought against them by Bro. George A. Blair. While their counsel, Hon. J. B. M. Baxter, did not intend to charge anything for their defence, he considered it would be advisable to do so, then the Brethren could see what expense they were put to by Blair's unwise and spiteful action, which is without precedent in connection with our Association. In order to prevent the occurrence of things of this kind in the future and teach him a lesson, for we consider that the said George A. Blair is responsible for this expenditure, we would recommend that the said George A. Blair be suspended from membership in this Association until such time as this Grand Lodge is reimbursed this amount, $150.00, with interest at the rate of 6 per cent., and then to be reinstated only on application to this Grand Lodge during annual session, by ball ballot."

And after the report was read it was moved, seconded and carried that the auditors have leave to withdraw the

recommendation regarding the plaintiff. A resolution was then moved and carried which after reciting the facts—"resolved that Brother George A. Blair be and is hereby suspended from membership in this Association for three years," and when this resolution was adopted by a majority vote of those present, though no names were recorded, the plaintiff was escorted from the lodge room by the proper officer.

The plaintiff has been a member and past master of Eldon Orange Lodge No. 2, in the city of St. John, a subordinate lodge of the defendant, and as such was entitled to attend and vote at the meetings and sessions of the Grand Lodge, and was also an honorary member of the same. He now asks for a decree to the effect that his suspension from the Grand Lodge was improper, not being in accordance with its constitution and bylaws, and that he is entitled, notwithstanding the resolution, to enjoy the privileges of membership, and for an injunction restraining the defendant from preventing him from enjoying such privileges and benefits in the Grand Lodge and its subordinate lodges, in which he would have a right of membership. It was contended by counsel for the defendant that the punishment was a very trivial one and not such as should be interfered with by the Courts. A perusal, however, of the Constitution and Bylaws of the Loyal Orange Association of British America which were put in evidence, convinces me that such is not the case. It is provided by R. 200 that indefinite suspension shall not be imposed except for non-payment of dues, and that definite suspension shall not be imposed for a longer time than 3 years nor for a less period than 3 months. It also appears by R. 171 that a sentence of expulsion could not be imposed for the offence which the defendant was alleged to have committed. Suspension for 3 years was, therefore, the extreme penalty which could be imposed. Section 181 provides that if a past master be suspended for non-payment of dues and fails to restore himself to good standing within 2 years thereafter his rank of past master shall thereupon be forfeited; and in the case of suspension for any other cause such loss of rank shall also occur at the expiration of 2 years from the date of such suspension, provided reinstatement be not obtained in the meantime. The plaintiff, as I have stated, was a past master in a subordinate lodge, which gave him a right to sit and take part in the proceedings of the Grand Lodge, and it appears, therefore, from the rule I have just cited that at the end of 2 years

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from the date of the suspension his rank as past master would be forfeited provided he did not obtain reinstatement before that date. I cannot, therefore, concur in the view of the counsel for the defendant that the punishment meted out was of such a trivial nature that the Court should decline to consider Mr. Blair's application. The rules laid down by the Grand Lodge for the disciplining of its members are of a fairly definite character. Section 183, under the heading "Trials" provides as follows:—"Except for non-payment of dues or complaints when investigated no member shall be suspended or expelled for any cause until after due trial and conviction," and sec. 191 provides:—"If after investigation a complaint is found to be frivolous and vexatious, the Lodge may fine or suspend the complainant without further trial."

In my opinion, the latter section cannot be held to apply to the present case, for as I have before pointed out no investigation was made by the Grand Lodge into the charges which the plaintiff had made. Therefore, I think that this case comes under the provision of sec. 183, which states that:—"No member shall be suspended or expelled for any cause until after due trial and conviction."

The question then arises was there a trial and conviction in this case before the resolution suspending the plaintiff was passed? Section 182 provides as follows:—

"182. Any member against whom a charge has been preferred shall receive from the recording secretary immediate notice thereof in writing together with a copy of the charge and also eight days' notice in writing of the trial. If the party complained of or complaining deems it necessary he may require the Master of the Lodge in which the charge has been made to summon the attendance of any member, whether connected with a primary lodge or not as a witness, and if such member does not attend he shall be proceeded against for violation of his obligation,—if in connection he shall be tried by the lodge to which he belongs, but if not in connection he shall be tried by the lodge whose summons he has disregarded."

Section 194 provides:—"At the trial of a brother the evidence shall be taken in writing and subscribed by the witnesses," and the following section is to the effect that the committee which investigates a charge shall submit the evidence taken, and their written finding and recommendation thereon, and the same shall become effective on being approved by a majority of the lodge.

Now in the case under consideration there was no trial as provided for by secs. 181 and 183. The plaintiff did not receive from the recording secretary notice thereof in writing, nor did he receive eight days' notice in writing of the trial. The object of the eight days' notice is obvious and is in accordance with the principles of British law and justice, for it gives a party charged the opportunity of knowing what the accusation against him is and of preparing for his defence, and is a very proper provision to have inserted in the rules. At the time of trial, the evidence shall be taken in writing and subscribed to by the witnesses, and then the evidence shall be submitted together with the written finding and recommendation thereon, and be subject to the approval of the members of the lodge. These are all very wise and proper provisions, and the decisions of the Courts are in the cases of societies such as the Orange Lodge, social clubs and others that such rules and rules of a similar character shall be followed with the most absolute strictness. The reason for this is I think clear, for expulsion or suspension from an organization of the importance of the defendant or from an organized club is calculated to place a stigma upon the character and standing of the person who is so punished, and to affect his standing in the community in which he lives, and therefore it is of the utmost importance that provisions which are made for the proper trial of charges against him should be carried out literally and strictly in accordance with their tenor.

In this case it was not contended by witnesses for the defendant that there had been a trial in the sense that that word is used in the sections which I have quoted. As a matter of fact Sulis the Secretary of the Grand Lodge stated that the plaintiff had not been tried, but seemed to rely upon the fact that although no notice was given, no evidence taken and none subscribed to by witnesses, and though no committee investigated the charge and submitted evidence as required by R. 195, and every provision of the constitution regarding trials was apparently disregarded, the resolution of suspension was effective because it was passed at a meeting of the Grand Lodge when Blair was present. It is impossible for me to take this view of the case, and I do not think it can possibly be sustained. The secretary says the charge was investigated in open lodge, while the Grand Lodge was in session, but at the same time he admits that the first intimation that the plaintiff would have would be the resolution as submitted.

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My finding, therefore, on this branch of the question will be that the rules laid down by the Grand Lodge for a trial of a person charged as Blair was have not been complied with or carried out in scarcely any particular, and that the proceedings were in practically all respects irregular.

It was strongly contended by counsel for the defendant that Blair before coming to this Court should have exhausted all the remedies in the tribunal of which he was a member, and that under the constitution he had a right to appeal from any decision which the Grand Lodge of New Brunswick might have made, to the Grand Lodge of British America. I am not disposed nor do I think it necessary to question this contention as a matter of law, but I cannot see how in this case the plaintiff had any remedy within the order itself or how he could have appealed to a higher tribunal of the Orange Order. The only right to appeal that I can find is given under sec. 197, which provides:—"In all cases where a trial has been had either party shall have the right to appeal to the next highest lodge and so on to the Grand Lodge."

"In this case, and under the language of this section, I fail to see how an appeal could lie. It is only provided that such right shall exist "where a trial has been had," and in this case no trial has taken place. Had Blair been tried after the necessary notice, and the other formalities complied with it might have been open to him to take an appeal to the Grand Lodge of British America under the provisions of this section. No trial having taken place he cannot do so, and therefore, it cannot be said that he has not exhausted all the remedies within the Order itself.

Very many cases were cited to me by counsel on both sides, who showed most commendable industry in the preparation of their case. There are only a few, however, to which I will refer. In this Court about a year ago in the case of Cohen v. The Congregation of Hazen Avenue Synagogue (1920), 47 N.B.R. 400, White, J., decided that a resolution passed by the defendant corporation at a special meeting suspending for life the plaintiff from membership in it on account of his misconduct at its meeting should be set aside, as the notice calling the meeting did not set out the charges against the plaintiff so as to afford him an opportunity of reply thereto, but merely stated that it was called to consider his conduct at a previous meeting. In this case, the association had adopted a series of by-laws which were printed and distributed among the members. One

section provided that if any member was guilty of a certain offence, such an offence as that with which Cohen was charged, and it should be reported to the board of directors, he should be called upon to appear before them to answer to the charge. And another provides that any member creating a disturbance or acting in any way unbecoming a gentleman at a meeting of the congregation or the board of directors should be subject to fine, and in case the offence in question should be exceptionally severe, the congregation should have the right to expel the guilty party at once, but that this, however, could only be done at a meeting of the charter members. White, J., found that the evidence shewed that the plaintiff was not only guilty of gross misconduct at the meeting prior to that at which the resolution suspending him for life was passed, but at several previous meetings he had been guilty of disorderly conduct. He held, however, that the notice calling the meeting which stated it was for the purpose of considering Cohen's conduct at the previous meeting was not sufficient, and that the charge against him should have been fully set out so as to have given him an opportunity to reply thereto, and set aside the order of suspension.

Another case of recent date was that of Young v. Ladies' Imperial Club, Ltd., [1920] 2 K.B. 523, 89 L.J. (K.B.) 563, in which judgment was given by the Court of Appeal (Lord Sterndale, M.R., Warrington, L.J., Scrutton, L.J.) on March 10, 1920, and as it has only recently been reported, it no doubt escaped the observation of counsel. In that case the plaintiff, Mrs. A. M. Young, was elected a member of the defendant Club in 1912. In May, 1918, the secretary wrote recommending her to resign, but the plaintiff did not do so and in June, 1918, the defendants by letter refused to accept the subscription for the current year, and informed her that her membership in the Club had ceased. The plaintiff thereupon brought an action claiming an injunction restraining the members from suspending her from membership, and for a declaration that she was still a member of the Club. Rule 42 of the Club was as follows (see p. 527):—

"If the conduct of any member shall in the opinion of the Executive Committee be injurious to the character and interests of the Club, the Committee shall have the power at once to suspend such member from the use of the Club, and to recommend her to resign. If such member shall not resign within a month after notice of such recommendation

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has been given to her the Committee shall erase her name from the list of members and the person whose name is so erased shall cease to be a member of the Club. Provided that no member can be so suspended or recommended to resign unless a resolution to that effect shall have been passed by a majority of at least two-thirds of the members of the Committee actually present at a meeting specially convened for the purpose."

In accordance with this rule, a special meeting of the Club had been called previous to the expulsion of the member, but notice was not given to one of its members, the Duchess of Abercorn, who was not present at the meeting at which the plaintiff was expelled. It appeared in evidence that the reason this member of the committee had not been notified was that owing to the pressure of other duties she had some time before proposed to be relieved of her obligation to attend meetings of the committee, but had consented to remain a member, telling the committee, however, that she would be unable to attend the meetings and in fact she had not done so. The decision of those members who were present was a unanimous one. It appeared further that the agenda paper of the meeting had stated that the meeting was to consider the matter of a dispute between the plaintiff and another lady, but had not indicated that the question of the expulsion of a member was to be dealt with. It was held that in convening the committee of a Club to consider a matter affecting the rights of a member, all members of the committee must be summoned to the meeting; the only possible exception being the case of a member not within summonable distance and too far away to communicate with the committee in time, or so seriously ill that attendance was impossible and that a resolution of the committee for expulsion of a member would be invalid if that requirement was not fulfilled.

This case is in line with other cases where the question of expulsion or suspension of members from societies and clubs is dealt with, and I feel it unnecessary to lengthen my judgment by referring to them fully. If the expulsion of a member should be set aside because one member of the committee had not been summoned to a meeting for the reasons given, when the decision of the rest of the members was unanimous, can it be said that a simple resolution suspending a member from membership in a society, such suspension practically amounting to expulsion, should be allowed to stand when the many provisions for the safe-

guarding of the members' rights at a trial have been absolutely disregarded, and no trial has in fact been held.

It was argued, following a long line of cases, that this Court had no authority to deal with the matter, as there was no property involved in the case. The evidence of Sulis, the grand secretary, shewed that the lodge dealt with large sums of money, and that it owned a valuable building on Germain St. in this city. I think the authorities are clear that where an order has property, a member has a proprietary interest in it, and if the Orange Order were dissolved, apart from the funds that are designated for charities, the members would be entitled to an interest in its assets. The same point was raised and dealt with by my brother White in Cohen v. Congregation of Hazen Ave. Synagogue, 47 N.B.R. 400, wherein it was claimed that the matters complained of were purely ecclesiastical, not affecting any right of the defendant in or to the right of possession of church property, and that, therefore, the Court would not interfere or take jurisdiction with respect thereto. White, J., says at pp. 403, 404:—

"Although I mention this last objection I do not think it necessary to discuss it. It was proven at the hearing that the defendant is the owner of real estate and other property situate in the city of Saint John. As the plaintiff is one of the charter members referred to in the constitution and by-laws of the defendant he would under the provisions of such constitution and by-laws, as a member of the defendant corporation, have a material interest in the defendant's property. This he is deprived of or is unable to enjoy so long as he remains expelled or suspended from membership in the defendant congregation."

I entirely agree with this conclusion, and mutatis mutandis the language will apply to the contention in the present case.

I have abstained from making any finding upon the merits of the controversy between the plaintiff and defendant, and from expressing any opinion with regard to the propriety or otherwise of the plaintiff's conduct. In view of the opinion which I have formed with regard to the case, I have not thought it desirable to do so, but to deal with the matter entirely from the legal standpoint. Even if I had thought it wise it would have been difficult to do so with the evidence that was before me.

I therefore find that the suspension of the plaintiff from the Grand Orange Lodge of New Brunswick was improper

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and not in accordance with the constitution and laws governing the defendant; that the resolution was improperly passed and of no effect and should be set aside, and that the plaintiff is entitled to the privileges of membership in the corporation and its subordinate lodges. An injunction will be granted restraining the defendant from preventing the plaintiff enjoying such rights and privileges, and the plaintiff will have his costs of this suit.

Judgment accordingly.

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Manitoba Court of Appeal, Perdue, C.J.M., Fullerton and Dennistoun, JJ.A. July 4, 1921.

Damages (§IIIL—275)—Motor Car Standing at Curb of Street—Street Car Leaving Track and Running Into It—Accident Caused by Defective Axle—Defect Not Discoverable by Inspection—Liability of Railway Company.

A street railway company is not liable in damages for injuries caused to a motor car standing against the curb of the street, which is damaged by the street car leaving the rails and running into it owing to the breaking of one of the front axles caused by a concealed defect, which is not discoverable by a careful inspection and which is not known to the company at the time of the accident. The railway company would only be liable in case of gross negligence, such as operating a car which it knew or ought to have known to have a defective axle, and to be dangerous to the persons or property of others on the highway.

[Moffatt v. Bateman (1869), L.R. 3 P.C. 115; Doyle v. Wragg (1857), 1 F. & F. 7, followed; Phalen v. Grand Trunk Pacific R. Co. (1913), 12 D.L.R. 347; (1915), 23 D.L.R. 90, referred to.]

APPEAL by defendant from the trial judgment in an action to recover damages for injury to a motor car, caused by the defendant's car leaving the rails and running into it. Reversed.

R. D. Guy, for appellant.

H. V. Hudson, for respondent.

Perdue, C.J.M.:—A motor car standing at the curb on Main street in this city was struck and injured by a street car belonging to defendants which left the rails owing to the breaking of an axle and ran into the motor car. The plaintiffs paid the owner's loss, obtained an assignment of his claim and now bring this action to recover the amount from the defendants.

The evidence shewed that the accident was caused by the breaking of one of the axles of the front truck of the car. The break occurred just inside the wheel. The wheel is fixed

rigidly on the axle, the axle revolves and causes the wheel to revolve with it. The gear by which the axle is turned is close up against the car wheel. It was impossible to discover by visual examination any defect that might arise in the portion of the axle covered by the wheel. The cause of the break was crystallisation of the steel which probably developed while the axle was in use. The accident was caused by a concealed defect which, as the evidence shews, would not have been discovered by the most careful inspection. The condition of the axle inside the wheel could not be ascertained by the ordinary test for fractures.

The plaintiffs in proving their case relied on the maxim, res ipsa loquitur. The defendants did not ask for a nonsuit and put in their evidence. It is not necessary to discuss whether the plaintiffs had made a primâ-facie case or not. The evidence is all in and I will consider the case with the whole evidence before the Court.

The plaintiffs relied on the principles on which this Court decided Pyne v. C.P.R. (1918), 43 D.L.R. 625, 29 Man. L.R. 139, 23 C.R.C. 281, affirmed by the Privy Council (1919), 48 D.L.R. 243. That was a case of injury to a passenger caused by the car in which he was travelling being derailed by the breaking of an equalising bar which caught in the rail at a switch. The degree of care and skill which the law imposes on a carrier of passengers for the safe carriage of his passengers is much higher than is demanded of him, when meeting or passing a mere traveller on the highway. There is a duty cast upon a carrier of passengers to exercise all due care and to carry safely as far as reasonable care and forethought can attain that end: 4 Hals. 47; Readhead v. Midland R. Co. (1869), L.R. 4 Q.B. 379, 38 L.J. (Q.B.) 169; Scott v. London & St. Katherine Docks Co. (1865), 3 H. & C. 596, 159 E.R. 665, 13 L.T. 148; Pyne v. C.P.R., 43 D.L.R. 625. But the duty which he owes to a stranger or to the stranger's property on the highway stands upon a much lower plane. The question of a man's responsibility for negligence depends largely upon the duty he owed to the person charging him with the negligence. This question is discussed by Lord Esher, M.R. in Le Lievre v. Gould; [1893] 1 Q.B. 491, 62 L.J. (Q.B.) 353. I quote the following from his judgment at p. 497:—

"The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. What duty is there when there is

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no relation between the parties by contract? A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them. . . If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property.

For instance, if a man is driving along a road, it is his duty not to do that which may injure another person whom he meets on the road, or to his horse or his carriage."

Now this duty towards the person or property of another met on the highway cannot be higher than that due to a person who is offered a seat in a carriage by the driver of it. In such case the driver would, in the event of an accident only be liable if he was guilty of gross negligence: Moffatt v. Bateman (1869), L.R. 3 P.C. 115, 22 L.T. 140. In giving the judgment in that case Lord Chelmsford said at pp. 121, 122:—

"The respondent was not obliged to go with the appellant, but might have found his way to Willis' Station in some other manner, and the case amounts to no more than this, that the respondent having agreed to paper the rooms at the station, the appellant offered to drive him there, which imposed no higher duty upon him than in the case suggested during the argument, of a person offering another a seat in a carriage which he is driving, who certainly if liable at all for an accident afterwards occurring, could only be so for negligence of a gross description."

Doyle v. Wragg (1857), 1 F. & F. 7, was a case very much like the one at Bar. It was an action against the defendant, as owner of a coach, for so carelessly managing it and allowing it to be used in such unsafe condition that one of the wheels came off, whereby it fell upon the plaintiff who was then lawfully passing it upon the highway. It was shewn in evidence that the cause of the accident was the breaking of the axle-tree. Willes, J., held that the breaking of the axle-tree was not evidence of negligence even if the driver was the owner of the vehicle.

The defect which caused the accident in the present case was, as I have stated, a concealed defect not discoverable by the most careful inspection. The defendants, therefore, were not guilty of negligence in running the car. On the authorities they would be liable to the plaintiff for the injury complained of only in case of gross negligence, such as operating a car which they knew, or ought to have known, to have a defective axle and to be dangerous to the

persons or property of others on the highway.

The appeal should be allowed with costs and the action dismissed with costs. A counsel fee should be allowed to the defendants in the County Court of the same amount as that allowed to the plaintiffs by the trial Judge.

Fullerton, J.A.:—I concur in the result.

Dennistoun, J.A.:—A street car operated by the defendant company left the rails and injured a motor car which was standing near the curb on a street in the city of Winnipeg. The plaintiff company, as insurers, paid the damages, and took an assignment of the owner's claim. They have brought this action and the trial Judge has given judgment in their favour against the railway company.

The street railway company appeal upon the ground that there is no evidence of negligence on their part, and I think they are entitled to succeed.

It appears clearly from the plaintiff's case that the accident was caused by the breaking of a steel axle, whereby a wheel dropped from the street car which left the rails in consequence, and swinging round upon the highway, collided with the motor car.

The plaintiff relies upon the maxim res ipsa loquitur and is, I think, justified in so doing. When street cars leave the rails and collide with vehicles which are lawfully upon the roadside, the onus is upon the railway company to shew an absence of negligence on their part, for the happening of such an event is more consistent with the existence of negligence than with the absence of it.

Beven on Negligence, at p. 118 says:—"the mere occurrence of an injury is sufficient to raise a primâ facie case:"

(*a*) When the injurious agency is under the management of the defendant;

(*b*) When the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care."

The railway company adopt the plaintiff's version of the cause of the accident—the breaking of the axle—and accept the onus. It appears by uncontradicted evidence that the steel axle broke close to the wheel by reason of what is called "crystallisation" of the steel itself, and that by no reasonable system of inspection could the defect have been discovered by the defendants.

The axle had been in use for 5 years and shewed no sign of defect. Experience has demonstrated that axles of this

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type may be relied on to run safely 500,000 miles, and measured by that standard, the axle in question was good for a further period of 5 years.

Old wheels are removed and new wheels are substituted under hydraulic pressure at regular intervals of time. When this is done, the axles are carefully examined for superficial cracks, but no test is made for crystallisation, and the evidence does not disclose any practical method of making periodic tests for this insidious and progressive chemical process which renders the steel brittle and liable to break without giving any external indication that deterioration is at work.

The trucks of which the axle forms a part were said to be the best and most widely used type known to railway officials. They are of a standard pattern and sold by a specific name—Brill 27 G. 1 Truck.

It was argued on behalf of the plaintiff that the defendant company should have called evidence to shew that this axle was tested satisfactorily at the time it was made, and that their failure to do so did not relieve them from responsibility for defects which may have existed from the time the steel was forged.

The defendants make two answers to this contention.

They point to the fact that the axle was in use for 5 years and had run about 200,000 miles, which goes to shew that it was sound when purchased. It is well established that lack of inspection is not of itself evidence of negligence. There must, in addition, be reasonable evidence that inspection would have revealed the defect if made. Phalen v. G.T.P. R. Co. (1913), 12 D.L.R. 347, 23 Man. L.R. 435, 16 C.R.C. 152; (1915), 23 D.L.R. 90, 18 C.R.C. 233, 51 Can. S.C.R. 113.

Secondly, the defendants point out that this is not a case in which liability as carriers of passengers is involved. In such cases there is a duty cast upon the carrier to exercise a high degree of care to carry safely. Readhead v. Midland R. Co., L.R. 4 Q.B. 379, Pyne v. C.P.R., 43 D.L.R. 625.

In the case at Bar there is required only that degree of care which one user of the highway owes to another, keeping in mind the character and type of vehicle used. That being so, the defendants have satisfied the onus which is upon them oy shewing that they were using the best type of axle procurable, and it was not incumbent upon them to assume responsibility for latent defects which were unknown and undiscoverable. They were not insurers nor

were they responsible in this case for anything but their own negligence.

The trial Judge thought there was evidence of "unskilful operation of the car," but with respect I am unable to draw that inference from the record. There is nothing upon which to base such an inference except the position of the street car after the accident. It travelled but a short distance after it left the rails and turned partially round. That is not of itself sufficient to establish excessive speed or negligence in the working of the brakes, or power control.

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

Appeal allowed.

FREEBURG v. FARMERS EXCHANGE BANKERS AND WEYBURN SECURITY BANK.

Saskatchewan King's Bench, Bigelow, J. June 29, 1921.

Subrogation (§VIII—35)—Payment of Arrears of Taxes by One of Two Registered Owners—Right to Contribution—Priority Over Right of Mortgagee of Co-owner's Interest—Special Lien Enforcement.

The plaintiff and defendant are the registered owners of land. The plaintiff paid taxes in arrears to redeem the land from a tax sale, and subsequent taxes. The Court held that the plaintiff was entitled to contribution from the defendant for its share, and to a declaration that he had a special lien upon the land in question, such lien to have priority over a mortgage on the defendant's interest, and to an order for sale to enforce the lien, if the amount was not paid.

[See Annotation, Subrogation, 7 D.L.R. 168.]

ACTION claiming contribution for the amount paid by the plaintiff to redeem certain land from sale for taxes and an order for the sale of the defendant's interest in the land in priority to the other defendant's mortgage.

E. Collins, for plaintiff.

M. A. Miller, for defendant, The Weyburn Security Bank.

Bigelow, J.:—The plaintiff and the defendant Farmers' Exchange Bankers are the registered owners of a quarter section of land. The plaintiff paid $260.58 to redeem the land from a tax sale, and $79.25 subsequent taxes. The plaintiff now claims contribution from the defendant the Farmers' Exchange Bankers and an order for sale for the interest of the said defendant in said land in priority to the mortgage of the defendant the Weyburn Security Bank, which mortgage covers only the interests of the Farmers' Exchange Bankers in said land. The plaintiff claims she should be subrogated to the rights of the municipality.

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Section 298 of the Rural Municipality Act, R.S.S. 1920, ch. 89, provides:—"Overdue taxes may be recovered by suit as a debt due to the municipality." And sec. 293 provides:—"The taxes accruing upon or in respect of any land in the municipality shall be a special lien upon such land having priority over any claim, lien, privilege, or incumbrance thereon except claims of the Crown."

Mr. Miller's objection is that taxes are not a debt and there should not be subrogation on that account. I do not think that the authorities cited by Mr. Miller apply, as the Rural Municipality Act provides that overdue taxes may be recovered by suit as a debt.

The plaintiff will have judgment as claimed against the Farmers' Exchange Bankers for half of the amount paid; viz.: $169.91, and default costs, and, as against the defendant, the Weyburn Security Bank, a declaration that the plaintiff has a special lien upon the interest of the defendant the Farmers' Exchange Bankers upon the land in question, and that such lien have priority over the mortgage of the Weyburn Security Bank, and that the plaintiff is entitled to an order for sale to pay such claim. If the amount is not paid within three months the plaintiff may apply for an order for sale to enforce the lien. The defendant, the Weyburn Security Bank will pay plaintiff's costs.

Judgment accordingly.

JAMIESON v. JAMIESON.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. April 8, 1921.

Partnership (§VI—25)—Father and Son in Partnership—Death of Father—Will Authorizing Son to Renew Partnership with Estate—Widow to be Paid Share of Profits—No Profits Owing to Crop Failures—Application by Widow for Administration and Declaration—Acquiescence of All Parties to Taking Accounts and Winding Up the Partnership—Partnership Ordinance C.O. 1911, ch. 94.

A testator, at the time of his death was carrying on farming operations in partnership with his son the defendant. Under the will the testator appointed the son and two sons-in-law executors of his will, by which he devised and bequeathed all his property to his executors in trust (a) during the life time of the widow "to pay over to her my estate's share of the net profits derived from the operations of the Bandnath stock farm" (b) at her death to convey to the defendant the west half of the section on which the buildings were stated to be situated upon condition of his releasing his interest in the other half and also paying off half of the mortgage indebtedness and (c) then to sell the east half and his share of the chattel property and divide the proceeds among his children, the defendant being excluded. The Court held that the part-

nership as it then stood was dissolved by the death under sec. 35 of the Partnership Act, but that the terms of the will authorised the defendant to renew the partnership with the estate in place of the testator and on the same general terms, but as all parties had acquiesced in taking the accounts for the purpose of winding up the partnership, the effective dissolution took place not at the death but at the time the order was made, which being acquiesced in was the same as a dissolution by mutual consent and therefore the circumstances under which sec. 44 of the Partnership Ordinance could operate did not exist and the widow had a right to have the profits according to the direction of the will which was adopted and acted on by the defendant.

An application to sell the whole of the section for the purpose of paying the debts of the partnership was dismissed on the ground that the Court was not concerned with the rights of creditors beyond the right of one partner to see that they were paid. If it should happen that the creditors' claims could not be met without resort to the west half of the section an application could be made later.

APPEAL from a judgment setting aside the Master's report as to an allowance of interest, on an application for the appointment of an administrator and a declaration that a partnership was dissolved by the death of deceased, and a winding-up including a charging of the defendant with the profits of the partnership.

C. A. Wright, for plaintiff.

G. F. Auxier, for defendant.

The judgment of the Court was delivered by

Harvey, C.J.:—The plaintiff is the mother of the defendant and is a widow. The administrator with will annexed of her deceased husband was during the course of the action, added as a party plaintiff. At the time of his death the husband and the defendant, his son were carrying on farming operations in partnership, the management being entirely in the control of the defendant. The partnership property consisted of sect. 31-37-15 W. 4th, and some live stock and other chattel property. The land was owned in equal interests by the partners but in the chattel property the father had a two-thirds interest.

While the partnership was subsisting the father died in 1917 having left a will under which he appointed defendant and two sons-in-law his executors. By the will he devised and bequeathed all his property to his executors in trust:—A. During the lifetime of the plaintiff "to pay over to her my estate's share of the net profits derived from the operations of the Bandnath stock farm. . . . ." B. At her death to convey to the defendant the west half of the section on which the buildings were stated to be situated upon condi-

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tion of his releasing his interest in the other half and also paying off half of the mortgage indebtedness, and C. Then to sell the east half and his share of the chattel property and divide the proceeds among his children, the defendant being excluded.

In 1917 and 1918 the defendant carried on operation as theretofore but there were crop failures and no profits. In 1919, the prospects were better but in August of that year this action was begun by the widow against the son, there being no other parties at that time, but the plaintiff had a relinquishment and assignment of all interest in the estate from most of the children of deceased. The will had not been proved up to that time by reason of inadvertence, as appears by statement of counsel.

The action asked for the appointment of an administrator, a declaration that the partnership was dissolved by the death of deceased and a winding-up including a charging of the defendant with the profits, or if not ordered to account for the profits with interest.

There was also a claim for relief under the Married Women's Relief Act, 1910 (Alta.) 2nd sess. ch. 18, but as is apparent the proceedings were not so constituted as to make it possible to deal with this question.

It was declared that the partnership was dissolved by the death of deceased as provided by sec. 35 of the Partnership Ordinance C.O. 1911 ch. 94. And it seems to have been considered a necessary consequence that there should be an order for winding up the business. In my view, that was an error. No doubt the partnership as it then stood was dissolved by the death, but the terms of the will authorised the defendant to renew the partnership with the estate standing in place of the testator, on the same general terms.

All parties however acquiesced in the taking of the accounts for the purpose of winding up the partnership and in the taking of the accounts the plaintiff, the widow, and the administrator filed a claim of election to take interest in lieu of profits relying on sec. 44 of the Partnership Ordinance C.O.N.W.T. 1915 ch. 94.

Having regard to what I have said, my opinion is that the effective dissolution took place not at the death but at the time the order was made, which being acquiesced in was the same as a dissolution by mutual consent and, therefore, the circumstances under which sec. 44 could operate do not exist, and the right of the plaintiff is to have the profits

according to the direction of the will which was adopted and acted on by the defendant.

I would, therefore, agree with the trial Judge who set aside the Master's report in the matter of the allowance of interest, on substantially though not formally the grounds I have stated. This is the only question in the appeal and I would, therefore, dismiss the appeal with costs, but it will be necessary for the matter to go back to the Master to consider and ascertain the profits. Inasmuch as it was agreed by counsel before the trial Judge that there were no profits for the years 1917 and 1918 there would appear to be no need of considering anything prior to the year 1919.

There is a further question, however.

An application to sell the whole of the section the property of the partnership for the purpose of paying the debts of the partnership was made to a single Judge, and by consent consolidated with the appeal without being dealt with by him. The defendant resists the application. He is ready to release all interest in the east half as provided by the will but wishes to retain for himself the west half as intended by the will. He expresses his willingness and readiness to meet his share of the debts of the partnership.

In my opinion, under these circumstances no order should be made as asked for at the present time. We are not now concerned with the rights of the creditors beyond the right of one partner to see that they are paid. As between the partners, each must bear his own share of the debts. If it should happen that the creditors' claims could not be met without resort to the west half of the section and an application were made on this behalf the case would have to be considered from a different aspect. But as between the two parties to this controversy who by their acts and the judgment have elected to anticipate the time provided by the will, for distribution of the assets, I see no reason why the terms of the will should be disregarded any further than is necessary to protect persons who are not beneficiaries under the will.

I would, therefore, at this stage, refuse the application to sell as far as it applies to the west half of the section. There is no opposition to the sale of the remainder of the assets so the order may go to that extent if desired.

No additional costs before us apparently have been incurred by the addition of this matter and it is therefore unnecessary to give any direction as to costs except that as

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to the application to the Judge the costs should be costs in the winding up proceedings.

Appeal dismissed.

EDGINGTON v. JONES ET AL.

Saskatchewan King's Bench, Embury, J. June 18, 1921.

Sale (§IIIC—70)—Of Farm Machinery—Failure of Vendor to Deliver or Post Copy of Agreement—Agreement Not Binding on the Purchaser—Farm Implement Act R.S.S. 1920, ch. 128, sec. 19.

An agreement to purchase farm machinery, which comes under the Farm Implement Act R.S.S. 1920, ch. 128, does not become binding upon the purchaser, where no copy of the contract has been delivered or posted to the purchaser in accordance with sec. 19 of the Act.

[See Annotation, Sale of Goods; Representations, Conditions and Warranties, 58 D.L.R. 188.]

ACTION for return of money paid on the purchase-price of a traction engine, return of notes, cancellation of the contract and damages.

A. E. Cairns, for plaintiff; J. C. Secord, for defendants.

Embury, J.:—The plaintiff purchased from the defendants, the Jones Tractor & Implement Co., Ltd., a traction engine by agreement in writing conforming to Form "A" under the Farm Implement Act, R.S.S., 1920, ch. 128. The plaintiff claims the return of the money paid, return of notes, cancellation of the contract and damages.

It is evidence that the machine was one which had been used by defendant company for demonstration purposes in their business as implement vendors, and the plaintiff urges that the machine was not new, but a second-hand or rebuilt one as contemplated by secs. 14, 16 and 17 of the Farm Implements Act. I am not however prepared to hold on the evidence that the machine is a second-hand one within the meaning of the Act. and there is no evidence which would bring it within the class described as "rebuilt."

It is also urged by plaintiff that no copy of the contract was furnished him as provided by sec. 19 of the Act, and the weight of evidence is in favour of this contention. Section 19 of the Farm Implement Act provides that the contract is not binding on the purchaser until the copy is delivered or posted.

Also the evidence shews that the engine did not satisfy the warranty as to working properly and that the defendant company did not make it work properly. The plaintiff's use of the machine, in my opinion, was not such as to give rise to the presumption that he had accepted the

machine prior to his repudiation of the contract by letter of his solicitor dated July 24, 1920.

I cannot find on the evidence that the plaintiff suffered any damages, certainly not within the contemplation of the parties. It is in evidence that plaintiff did not give the notice of rejection provided for by Form "A," para. 2, within the proper time.

It is not necessary to deal at length with the issues which arise. No copy of the contract having been delivered or posted the agreement to purchase never became binding on the purchaser. Even if acceptance by the purchaser, would operate as a completion of the purchase, and do away with the necessity of compliance with sec. 19 (and as to this I express no opinion), still the fact is that there was not, on the evidence, an acceptance of the machine.

The plaintiff is entitled to judgment for the recovery of the moneys paid as claimed for, including principal and interest which I think is properly allowed at 7% per annum, and to the return of his notes, and cancellation of the contract and his costs. The defendant is entitled to possession of the engine.

There is no liability proved against the defendant H. A. Jones and as against him the action will be dismissed with costs.

The defendant company counterclaimed against the plaintiff and his wife Beda Edgington for the balance due on the price of the tractor. But for reasons which necessarily follow from the findings above set out, the counterclaim will be dismissed with costs.

Action dismissed.

DUGGAN v. MURRAY.

Quebec Superior Court, Bruneau, J. January 28, 1921.

Reformation of Instruments (§I—1)—Documents Filed as Exhibits in a Case—Power of Court to Modify or Change.

The Court has no power to authorise modifications or changes to be made to documents filed as exhibits in a case.

MOTION by plaintiff that the attorney of record in the case be authorized to rectify an exhibit filed. Motion refused.

C. M. Cotton, for plaintiff.

Gouin, Lemieux & Parent, for defendant.

The Court:—

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Whereas the plaintiff's motion alleges:—

"Whereas the plaintiff is suing defendant in the present action for the sum of $1,000, which defendant agreed to repay plaintiff under the agreement Ex. P-1 signed between the defendant and one Charles M. Cotton; it is alleged in para. 9 that in becoming a party to the said agreement, plaintiff's Ex. No. 1, the said Charles M. Cotton was acting solely as the agent of the plaintiff herein to the knowledge of the said defendant, the said sum of $1,000 mentioned in the said agreement having been paid by the plaintiff herein by his accepted cheque payable to the order of the defendant; it is alleged in para. 10 that it appears in and by the said plaintiff's Ex. No. 1, that the said Charles M. Cotton has transferred to the plaintiff herein all his right, title and interest in and to the said contract, plaintiff's exhibit no. 1, and has the right to demand the refund of the said sum of $1,000; the attorney for plaintiff in the present case who signed the declaration herein is the same person who signed plaintiff's Ex. 1 and that to the knowledge of the defendant; by oversight no transfer of the rights of the said Charles M. Cotton under the agreement plaintiff's Ex. 1 filed herein, to the plaintiff herein was made on the said exhibit as alleged in the declaration herein, before the declaration and exhibit were returned into Court; it appears that the failure to endorse the said transfer on the said exhibit is due to oversight;

Wherefore motion by and on behalf of the plaintiff that the said Charles M. Cotton, attorney of record in the present case, be authorised to sign a transfer of his rights in the said Ex. P-1 on the said exhibit in the following terms:

"Montreal, December 18th, 1920."

"For value received, I, the undersigned, Charles M. Cotton, hereby assign, transfer and make over unto Thomas J. Duggan, of the City and District of Montreal, agent, all my rights, claims and demands in, to and arising out of the within and foregoing agreement."

The whole under such terms and conditions as this Honourable Court may order";

Considering that the authorisation asked for by said motion would have the effect to change the title alleged by the plaintiff in support of his demand; that the object of the said motion is not to amend the plaintiff's declaration, but to give him a new and different title; that this Court has no power by any articles of the Civil Code or by the Code of Civil Procedure to grant such a demand; that the

plaintiff's motion is unfounded in law; doth dismiss the plaintiff's motion with costs.

Motion dismissed.

MUNICIPAL DISTRICT OF BOW ISLAND v. WERTZ.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. April 29, 1921.

Judges (§IV—40)—Jurisdiction of Judge of Supreme Court to Set Aside Direction of Another Judge of Co-ordinate Jurisdiction.

Where a Judge of the Supreme Court of Alberta has directed the taxing officer, on a taxation of the costs of an action to allow as costs a reasonable sum for accountant's fees in making an audit before action and the taxing officer has allowed the amount of the account rendered, a Judge of co-ordinate jurisdiction cannot on an appeal from the taxing officer on this allowance, disallow the whole item on the ground that it could not be allowed as costs, as this is in reality a setting aside of the direction of the other Judge which he has no jurisdiction to do.

2. Costs (§II—45)—Fees of Accountant in Making an Audit as a Result of Which Action is Commenced—Cannot be Included as Costs of Action.

Accountant's fees for making an audit of the books of a municipality as a result of which an action is begun against a former secretary-treasurer for an accounting and payment over of the amount found due from him to the district, cannot be allowed as costs of the action under sub-rule (2) of Rule 16 (Alta.) relating to costs.

APPEAL by plaintiff from the decision of McCarthy, J., and appeal by the defendant from the judgment of Walsh, J., in respect to the allowance of an accountant's fees as costs, and also in respect of an allowance of an amount for commissions on taxes collected by the bailiff of the plaintiff.

W. Beattie, for appellant.

H. P. O. Savary, K.C., for respondent.

The judgment of the Court was delivered by

Harvey, C.J.:—The defendant was the secretary-treasurer of the plaintiff for several years. After he ceased to be so the plaintiff caused an audit to be made of his accounts and in consequence of the result of the audit, this action was begun against him for an accounting and payment over of the amount found due from him to the district. A reference was held before Jackson, Co. Ct. J., who, after taking evidence, found the defendant liable to the plaintiff in the sum of $274.83. On the application to Walsh, J., for judgment on the report he made some slight alterations and added a sum of $494.98 and gave judgment against the defendant for $759.83. He also directed the taxing officer on the taxa-

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tion of the costs to allow as costs a reasonable sum for accountant's fees in making the audit before action. The account rendered for this was $300, and the taxing officer allowed it at that amount. An appeal from the taxing officer on this allowance was taken to McCarthy, J., who disallowed the whole item on the ground that it could not be allowed as costs.

The plaintiff has appealed from the decision of McCarthy, J., and the defendant has appealed from the judgment of Walsh, J., in respect of the allowance of $494.98 and the allowance of the accountant's fees as costs.

Dealing first with the appeal from McCarthy, J., it seems to me quite clear that it must be allowed because his decision was in reality a setting aside of the direction of Walsh, J., which he had no jurisdiction to do. The appeal from the taxing officer to him should be dismissed with costs.

Then on the appeal from Walsh, J., as to the allowance of these fees as costs, I am of opinion that the view of McCarthy, J., is correct and that they cannot properly be included in the term "costs" under the rule. Walsh, J., thought they could come under the inclusion of sub-rule (2) of R. 16 relating to costs, which says costs may include "the reasonable charges of accountants, engineers, or other experts for investigations and inquiries made for the purpose of giving evidence or assisting in the conduct of the proceedings," but the affidavit of the plaintiff's secretary states "that this action was commenced by the plaintiff against the defendant as the result of the said investigation," clearly establishing that the inquiry was not made for the purpose of giving evidence or assisting in the proceedings, since until the inquiry was completed it was not determined that there would be any proceeding and any evidence. If in the result it had appeared that there was no liability on the part of the defendant there would have been no action.

If the rule had not said simply "made" but had added "useful" or taken advantage of "for the purpose, etc." it would have included this inquiry, but no doubt it was thought that costs of proceedings should be limited to something really part of the proceedings.

Mr. Savary states that he asked that the allowance be made either as damages or as costs and if it cannot be allowed as costs that it now be allowed as damages. No such claim was made apparently until the very end of the case, and I would, hesitate to allow it as damages under such circumstances and I may add that, though not having care-

fully considered it, my impression is that it would in any event be too remote to be allowed as damages.

The other point of appeal is as to the item of $494.98. This was the amount of commissions at the rate of 10% on taxes collected by a bailiff of the plaintiff. There had been an arrangement by which 10% commission was authorised by the council in favour of two persons but this was revoked and a new resolution was passed authorizing one of these persons to act as bailiff and colect the different taxes. The referee finds that the council did not intend that he should be paid 10% commission but that the defendant being of a contrary opinion, and intending to carry out the will of the council had made an agreement with him that he was to be paid such commission and refuses to hold him liable to pay the plaintiff the amount of such commission. On this, however, the trial Judge took the opposite view of liability. I frankly confess myself unable to see on what ground liability to pay these moneys can be ascribed to the defendant. If the contract authorising the payment was invalid as not authorised by the council, the money might perhaps be recovered from the bailiff who had received it but why the defendant, who had innocently acted on an honest misinterpretation of the council's intention, should be held liable I cannot see.

Mr. Savary argues that the accounts shew that a portion of this at least was paid by the defendant to the bailiff and that much payment being directly contrary to a provision of the statute, he should be held liable at least to that extent. I cannot find any satisfactory evidence on which to base a finding such as Mr. Savary contends for and I do find an explicit denial by the defendant that he paid the bailiff any commissions, all of which he says the bailiff retained. I think, therefore, the appeal should be allowed as to this item and the amount of the judgment should be reduced accordingly.

The result of this will be that the judgment will be for $264.85 and costs and that it being within the lower jurisdiction of the District Court, the costs should be taxed according to column 1. I think, however, that under the circumstances, they should not be reduced by the operation of R. 27 which should not apply and also that there should be no set off in favour of the defendant.

As regards the costs of appeal, each party has won his appeal but the appeal of the plaintiff from the judgment of McCarthy, J., is much simpler than the other and did not

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involve the preparation of the appeal book. The one should be set off against the other but to avoid the difficulties of the division of the work, I think justice will be fairly done by directing that the costs of the defendant's appeal as a whole be taxed to the defendant and that the total fees be then divided by two, and the result allowed as the net amount of fees allowable to him after the set off. If the plaintiff had any disbursements in connection with its appeal they may be set off against the defendant's costs. In the final result the defendant's costs of appeal will be set off against the plaintiff's judgment and costs.

Judgment accordingly.

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Nova Scotia Supreme Court, Russell, J., Ritchie, E.J., and Mellish, J. April 21, 1921.

Contracts (§IIA—128)—Purchase of Artificial Leg—Guarantee—Re-adjustment Required Owing to Shrinkage of Stump—Refusal of Purchaser to go to Vendor's Place of Business Unless All Expenses Paid—Oral Agreement That He Would Go When Contract Was Made—Plaintiff's Refusal to Go Unreasonable—Dismissal of Action.

The plaintiff purchased an artificial leg from the defendants under the following guarantee, "we hereby agree to construct the above described limb or appliance for. . . .and to make it of the best material, and we do hereby guarantee that it will not chafe or injure the stump in any way and will be a perfect fit in all ways. We also guarantee to keep the. . . .in repair for . . . . years from date of contract free of charge providing the . . . . . is given fair usage and is returned to us promptly and prepaid as soon as any defects appear. We further agree to make any fittings or changes to the socket or corset, made necessary by shrinkage of the stump, free of charge at any time within . . . . years." After a certain length of time the limb required refitting, owing to shrinkage of the stump, and the plaintiff refused to go to Hantsport for this purpose unless all his expenses from New Waterford were paid by the defendant; it was admitted that the plaintiff was told at the time that he would have to go to Hantsport for readjustment. The Court held, reversing the trial Judge, that it was perfectly reasonable that he should do so and that the course taken by the plaintiff was not justified and was not reasonable and was not in the contemplation of the parties when the contract was made, and that he could not recover.

APPEAL from the judgment of Finlayson, Co.Ct.J., in favour of plaintiff in an action brought against the defendant company in an action to recover the sum of $150 paid to the defendant for an artificial leg and for damages for loss of work in consequence of the alleged defective construction of the limb supplied.

S. A. Chesley, K.C., for appellant.

D. A. Cameron, K.C., for respondent.

Russell, J., agrees with Ritchie, E.J.

Ritchie, E.J.:—The defendants are manufacturers of artificial arms and legs carrying on business at Hantsport. The plaintiff purchased an artificial leg from the defendants; he alleges that it turned out to be useless for the purpose for which it was intended and he claims damages. The objection which the plaintiff had to the leg was that it did not fit. I think it is clear that the difficulty with the leg was caused by a shrinkage of the stump. The plaintiff admits that it was satisfactory and fitted properly when he received it. The leg was constructed under the following guarantee:

"We hereby agree to construct the above described limb or appliance for M——— and to make it of best material, and we do hereby guarantee that it will not chafe or injure the stump in any way and will be a perfect fit in all ways. We also guarantee to keep the ..... in repair for ..... years from date of contract free of charge providing the ..... is given fair usage and is returned to us promptly and prepaid as soon as any defects appear. We further agree to make any fittings or changes to the socket or corset, made necessary by shrinkage of the stump, free of charge at any time within ..... years.

"For growing persons we agree to do all lengthening and enlarging free of charge for ..... years.

"I have read the above contract and find same satisfactory and I hereby agree to the same."

The question is, was the plaintiff required to go to Hantsport to have the leg adjusted and fitted.

The County Court Judge has held that this would be an unreasonable requirement.

I quote from the judgment: "It is true that plaintiff admits that defendants told him that he would have to go to Hantsport, perhaps in a year's time, to have the limb readjusted. There was no written contract between the parties and I cannot find that this requirement of going to Hantsport for readjustment was made a part of the contract. I am of opinion that this requirement of going to Hantsport before the defendant would attempt to remedy the defects existing in the limb was unreasonable."

With great respect I am unable to agree with the trial Judge.

Apart from the fact that the plaintiff was told at the

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time that he would have to go to Hantsport for readjustment, it seems to me that it is perfectly reasonable that he should do so, and where the trouble arises from shrinkage of the stump I doubt if satisfactory readjustment could be made without the presence of the plaintiff at the place where the work was being done. The defendant company pointed this out in their letter of May 28.

In that letter the defendants say:—"We explained that the stump had shrunken and the remedy was padding and advised you to send the leg or let Mr. Lorenzo come with it. If you send the leg we have to guess how much padding to put on, but if he comes himself, we can make a perfect fit."

In the letter of defendant company to the plaintiff's solicitors of November 12, it was intimated again that the better way was for the plaintiff to come to Hantsport, but he was given the alternative of sending the limb with "full and proper instructions."

This alternative the plaintiff did not accept and his solicitors replied as follows:—

"Dear Sirs:—

"We are instructed to say to you that if you pay Otto Lorenzo his transportation both ways from New Waterford to Hantsport, and all his expenses when in Hantsport, and fit him with a good and sufficient artificial limb free of costs, that Mr. Lorenzo will be satisfied. With anything short of that he will not be satisfied but he will bring action for damages.

"If you do not care to accept his proposition kindly name solicitor to accept service of writ.

"Yours very truly,

"LANGILLE AND SMITH."

I think the position taken is not justified and to my mind it is not reasonable. The course suggested was not in the contemplation of the parties when the contract was made because the plaintiff was told he would have to come to Hantsport for readjustment of the limb.

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

Mellish, J.:—I agree in allowing the appeal and dismissing the action.

Appeal allowed; action dismissed.

PALMER SCHOOL AND INFIRMARY OF CHIROPRACTIC v. CITY OF EDMONTON ET AL.

Alberta Supreme Court, Hyndman, J. April, 1921.

Libel and Slander (§IIIA—96)—Chiropractors and Physicians—Differences Between, Matters of Public Interest—Necessity of Proving Actual Malice in Defamatory Article by One Against the Other.

Differences between the medical profession and the chiropractors must be regarded as a public question and statements made by one as against the other of them, whilst not absolutely privileged, are matters of public interest and come under the heading of matters "qualifiedly privileged" and actual or real malice must be proved in an action for a defamatory article written by one against the other.

ACTION to recover damages for an alleged defamatory article written by the defendants against the plaintiff. Dismissed.

H. C. Macdonald, for plaintiff.

F. Ford, K.C., and J. C. McDonald, for defendants Parks and College of Physicians and Surgeons.

J. C. F. Bown, K.C., for City of Edmonton.

Hyndman, J.:—The merits or demerits of the science, philosophy or art of chiropractic is not in issue in this action except incidentally as regards the question of privilege, and it is not necessary for me to analyse its various principles and methods. It is sufficient to say that it is claimed to have been discovered (by accident) by one Dr. D. D. Palmer as a healing art along lines different from and largely in opposition to the generally accepted science of medicine upon which the professions and practices of the members of the College of Physicians and Surgeons of this Province are based.

The College of Physicians and Surgeons is a provincially incorporated body and, I think, must be looked upon as, at least a "quasi-public" institution not brought into existence exclusively for the protection of its members in their professional capacity, but also indirectly as a safeguard to the health and welfare of the people of the Province generally. In effect, the rights which have been conferred upon the college were granted on a condition that they should exist not only for their advancement and protection, but in addition and very largely for the reason that the general health and welfare of the public would also be advanced and protected thereby.

This being the case, I do not think there can be much doubt but that the differences between the medical profession and the chiropractors must be regarded as a public

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question, and statements made by one as against the other of them, whilst not absolutely privileged, are matters of public interest and come under the heading of matters "qualifiedly privileged." If I am correct in what I have said, then admitting for argument's sake the defamatory nature of the article complained of, actual or real malice must be proved, and the burden of proof of such actual or real malice is shifted to the shoulders of the plaintiff.

The only evidence of malice, apart from the circumstances of the article complained of not being in strict accordance with the facts, is that of the defendant Parks in his examination for discovery as against himself only and of Dr. J. S. Wright as an officer of the College of Physicians and Surgeons. As to the defendant the City of Edmonton there is no evidence whatsoever beyond the fact of defamation.

A review of Dr. Parks' examination, whilst disclosing perhaps that he may not have exercised the greatest care, or even as much as he might reasonably be expected to in acquiring information on the subject, does not, in my opinion, under the circumstances amount to such recklessness as to warrant the conclusion that he was actuated by real or express malice. In order to arrive at that conclusion, in my opinion, more definite and positive testimony must be forthcoming.

There is no evidence whatsoever of real malice on the part of the other two defendants.

Assuming the correctness of my foregoing conclusions with regard to the question of qualified privilege, then the necessary result must be that the action be dismissed as against all the defendants.

As to the article in question being defamatory, I think I am bound to find as a fact on the evidence that it is not in strict accordance with the facts as sworn to by the witness Palmer whose evidence is not contradicted. Circumstances were such, however, that I think it would have been more advisable that the plaintiff, rather than instituting this action, should have refuted such incorrect statements or at least after acquainting the defendants with the exact facts, had then requested a retraction or statements disclosing the source of their information and the reasons for the publication of the impugned article. Had this course been resorted to and the defendants then refused to take any action towards rectifying any erroneous impression which may have resulted from the publication of their article, I think, perhaps the result here would have been different.

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Taking everything into consideration, I think it a proper case in which all parties should pay their own costs.

Judgment accordingly.

REID & KEAST v. A. E. McKENZIE CO. LTD.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. August 5, 1921.

Principal and Agent (§IIA—5)—Agent provided with Contract Forms—Agent Apparently Having Full Authority—Verbal Restrictions Placed on Authority—Agent Exceeding Restricted Authority—Liability of Principal.

A principal who provides his agent with forms of contract to be entered into with prospective vendors and which on their face give the agent full authority to act for the principal, cannot by verbally imposing conditions and limitations on the authority of the agent, escape liability for acts done by him in excess of the imposed restrictions as regards contracts made with persons who have no notice of such restrictions.

APPEAL by plaintiff from the judgment at the trial dismissing an action for damages for breach of contract. Reversed.

W. B. O'Regan, for appellants.

J. Hillyard Leech, K.C., and W. P. Cumming, for respondents.

The judgment of the Court was delivered by

Lamont, J.A.:—On August 30, 1919, the defendants' representative, one Thompson, entered into the following contract with the plaintiffs:—

"I hereby sell to A. E. McKenzie Co. Ltd., Seed Merchants, Brandon, Man., stock as per description and terms herein recited:

Variety: Orloff Oats grown on braking.
Quality: Sample submitted.
Quantity: 4,000 Bus.
Price: 88c. F.O.B. Hassan.
Dockage: 1½%.
Shipment: On or before September 30, 1919.
Bulk or Sacked: Bulk.

Accepted.

A. E. McKenzie Co. Ltd. Reid & Keast
'F. C. Thompson' Per 'H. Reid,'
Purchaser. Seller.

A similar contract was entered into for 2,500 bushels of Victory oats. Two car loads of Orloff oats, containing 4,044.62 bushels and one car of Victory oats, containing

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1,970 bushels, were placed on the track at Hassan. These the defendants refused to accept, on the ground that the sample forwarded by Thompson shewed a percentage of wild oats, which rendered the grain unfit for their purposes, and they had not contracted for oats of this class. On the refusal of the defendants to accept the grain, the plaintiffs sold the Orloff oats to James Richardson & Sons for $2,720. The car of Victory oats they sold to the defendants for $1,618.95. These prices were the best they could obtain. There was evidence that the price of oats declined from September 1 to September 15. The plaintiffs then brought this action for the difference between the amount received by them for the oats and the contract price. The defendants disputed liability on the ground that Thompson had authority to make contracts for them only on condition that they approved of the samples, which he was to forward. Thompson testified that when the contract was executed he told the plaintiffs that the contracts were to be operative only if the defendants were satisfied with the samples. The plaintiffs testified that he made no such statement. The trial Judge held as follows:—"I find as fact that between Thompson and the plaintiffs there was a concluded contract but unfortunately I am led to hold that Thompson had not the authority of the firm to form though he did form a concluded contract, so the action must be dismissed with costs."

This finding of the trial Judge shews that he accepted the testimony of the plaintiffs that nothing was said about the contract becoming operative only in case the defendants approved of the samples. A perusal of the evidence satisfies me that he was right in so doing. The question then is: Did Thompson have authority to sign the contracts on behalf of the defendants, or was he, as the plaintiffs allege in the alternative in their pleadings, held out by the defendants to have such authority?

The defendants admit that they sent him out armed with the forms of the contracts actually entered into. They admit also that he had authority to get the plaintiffs to sign these contracts, and that he had authority to sign them on behalf of the defendants, subject to this: that he must stipulate that the contracts were not to come into effect until the company had approved of the samples. He represented to the plaintiffs that he had authority to enter into these contracts on behalf of the defendants. As evi-

dence of that authority he produced the contract forms. He did not mention, as the trial Judge has found, the limitations on his authority which had been verbally given to him, but which did not appear on the forms. The principles applicable to this case are, in my opinion, summed up in 1 Hals. at pp. 201, 202, as follows:—

"429. Where a person has by words or conduct held out another person, or enabled another person to hold himself out, as having authority to act on his behalf, he is bound, as regards third parties, by the acts of such other person to the same extent as he would have been bound if such other person had in fact had the authority which he was held out as having.

431. Where a principal, in conferring authority upon his agent to act on his behalf, imposes conditions or limitations on its exercise, no act done by the agent in excess of the conditional or limited authority is binding on the principal as regards such persons as have or ought to have notice of such excess of authority.

But, in the absence of notice, the principal cannot, by any instructions to his agent, escape liability for acts done by the agent which fall within the apparent scope of his authority."

The arming of the agent with the defendants' contract forms and the sending him out to have these forms executed by the plaintiffs was, in my opinion, a clear holding out by the defendants that he had their authority to make the contracts. The defendants were, therefore, bound by the contract entered into by Thompson, as the plaintiffs had no notice of the limitations which had been placed upon his authority.

The defendants having entered into a binding contract repudiated it without just cause. Repudiation on their part gave the plaintiffs the right to accept the repudiation and put an end to the contract. That they did so is established by the fact that they sold the Orloff oats to Richardson & Sons and the Victory oats to the defendants at the then market price, which was considerably lower than the contract price. This acceptance by the plaintiffs of the defendants' repudiation put an end to the contracts for all purposes except that of bringing an action for the damages sustained in consequence of such repudiation.

Johnstone v. Milling (1886), 16 Q.B.D. 460; Lodder v. Slowey, [1904] A.C. 442.

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Under the Sale of Goods Act, R.S.B.C. 1911, ch. 203, the measure of damages in a case like the present is the estimated loss directly and naturally resulting in the ordinary course of events from the buyers' breach of the contract.

In Braithwaite v. Foreign Hardwood Co., [1905] 2 K.B. 543, the plaintiff sold to the defendant a certain quantity of rosewood. The defendant wrongfully refused to accept delivery of the consignments on their arrival and repudiated the contract. It was held that he was entitled to damages based upon the difference between the contract price and the price at which it had been sold by him as against the contract.

In Greer v. Dennison (1911), 21 Man. L.R. 46, the purchasers of an article refused to accept it when delivery was tendered. The seller then sold at public auction which was reasonably advertised and of which notice had been given to the purchasers. In an action for damages for breach of contract, the Court of Appeal held that the plaintiff was entitled to recover the difference between the contract price and the net amount realised.

It was argued that the plaintiffs, by making a new contract for the sale of the Victory oats to the defendants, must be held to have discharged the former contract in so far as these oats are concerned. In my opinion that does not follow. Parties to a contract may discharge the same any time before breach, by a new agreement relative to the same subject matter. But in order that the new agreement shall have that effect, the parties must have intended that it should be substituted for the former contract, either in whole or in part. Here, there was no new agreement before the breach, nor can it be said that the parties when they did make the new agreement in respect of the Victory oats contemplated that it should be a discharge of the contract made by Thompson, for at that time the defendants contended that they had not made any such contract.

The appeal should, therefore, be allowed with costs; the judgment below set aside, and judgment entered for the plaintiffs, with costs, for the amount claimed: $952.97.

Appeal allowed.

PETERSON v. VANCOUVER GAS CO. LTD. AND KEILLOR.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. March 19, 1920.

Discovery and Inspection (§IV—20)—Prosecution for Theft of Gas —Acquittal of Accused—Action for Malicious Prosecution —

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PETERSON
v.
VANCOUVER GAS CO.

Examination for Discovery—Refusal of Witness to Answer Questions as to Reasonable and Probable Cause—When Witness May Refuse to Answer—Public Policy—Questions Calculated to Discourage the Giving of Information Leading to the Investigation and Punishment of Crime.

The plaintiff having been acquitted on a charge of stealing gas brought an action for malicious prosecution, and the witness, an officer of the company on examination for discovery refuseed to answer questions as to reasonable and probable cause. On an application to strike out the defence because of such refusal the Court held that in the absence of special circumstances it would not order such questions to be answered on the ground of public policy. The Court of Appeal reversing this decision in part, held that the proper test was, were the questions such as to discourage the giving of information leading to the investigation and punishment of crime and the rule against disclosing its source must prevail where the inquiries are directed to persons and the information is from persons; where however the witness has examined the locus in quo and from his own observations informed himself as to the facts bearing on the guilt or innocence of the accused the rule is inapplicable.

[Maass v. Gas Light and Coke Co. [1911] 2 K.B. 543; Humphrey v. Archibald (1893), 20 A.R. (Ont.) 267, referred to.]

APPEAL from an order of Murphy, J., of September 29, 1919, dismissing the plaintiff's application to strike out the defence by reason of the refusal of the defendant Keillor to answer questions submitted to him on behalf of the plaintiff on his examination both personally and as an officer of the defendant company. The action was for damages for false arrest and imprisonment and malicious prosecution, the defendant having preferred a charge on May 30, 1919, that the plaintiff, on May 29, stole gas, the property of the defendant company, and a second charge was preferred on June 4, that on May 30 he stole gas. On the first charge a warrant was issued and the plaintiff was arrested and imprisoned. Both charges were dismissed by the magistrate. On the examination of the defendant Keillor for discovery, on advice of counsel, he refused to answer any question disclosing the facts and circumstances upon which he preferred the charge. Inter alia the defendant refused to answer the following questions:—

"Was it you who gave Carper instructions to go to the home in question on the night of the 29th of May? Was Carper at that time your superior or inferior officer? What instructions did you give Carper with regard to the matters in question? What is Carper's position with the defendant company? Did you make any inquiries from Mrs. Tewson with regard to the action in question before swearing out

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the information against Peterson? Did you make any inquiries from Mrs. Tewson after swearing out the information? When did you first see Mrs. Tewson with regard to the matters in question?"

The judgment appealed from is as follows:—

Murphy, J.:—In so far as the questions which defendant refused to answer were directed to the point of reasonable or probable cause, it seems clear, as in authority of Maass v. Gas Light and Coke Co., [1911] 2 K.B. 543, that in the absence of special circumstances, the Court will not order such questions to be answered on discovery. The principle of the decision is equally applicable to discovery by way of examination as by way of interrogatories, for it is based on the ground of public policy. The case of Humphrey v. Archibald (1893), 20 A.R. (Ont.) 267, a decision on the discovery by examination made, holds definitely that the name of informant, whose information led to the prosecution, cannot be asked on discovery examination. No special circumstances were shewn to exist here. I did not carefully consider each question, and it may be that some of them should be answered. If so, the matter may be spoken to again, but answers to all questions directed to reasonable and probable cause were properly refused in this case, no special circumstances having been shewn.

J. A. MacInnes, for appellant.

McPhillips, K.C., for respondents.

Macdonald, C.J.A.:—This is an appeal from an order of Murphy, J., dismissing an application to strike out the statement of defence because of the refusal of the defendant Keillor to answer questions on examination viva voce for discovery. He was being examined as a defendant and also as an officer of the defendant company.

The action is for malicious prosecution of the plaintiff at the instance of the witness acting as such officer, for the theft of gas. The refusal to answer the questions was based on the principles affirmed by the Court of Appeal in Maass v. Gas Light and Coke Co., [1911] 2 K.B. 443.

Before entering into the subject as to whether any of the questions fall within the class of questions which English Courts have not compelled a party to whom interrogatories had been exhibited to answer, I wish to make some observations upon the argument advanced by counsel for the defendants, that owing to the difference between our Rules of Court and English rules, the English cases are inapplicable

here. Our rules provide for interrogatories as do the English rules, but are supplemented by rules, not found there, permitting viva voce examination of parties for discovery. Under the latter, one party may compel his adversary to attend before an examiner and "testify in the same manner, upon the same terms and subject to the same rules of examination as a witness," and it is also provided that "any one examined orally under these rules shall be subject to cross-examination and re-examination; and the examination, cross-examination and re-examination shall be conducted as nearly as may be as at trial." These rules may in some respects be wider and in others narrower than the English rules respecting interrogatories, but they do not, in my opinion, interfere any more than do the English rules with the inherent power of the Court to exclude evidence on grounds of public policy.

The objections to answering the questions are founded on the grounds referred to by Cozens-Hardy, L.J., in his reasons, concurred in by the majority of the Court, in the above mentioned case, and as I understand them as therein stated, and by reference to other authorities on the subject, they are grounds of public policy.

I am inclined to think that the following observations of the Lord Justice have been given in the argument of plaintiff's counsel too wide a meaning. "'What information,' 'what steps,' 'what grounds,' 'what precautions,' 'what enquiries,' necessarily involve the source of the information and the appellant's counsel admitted that this was the object of the interrogatory."

Now, I think the real test is, were the questions such as to trench in the policy aforesaid, that is to say, were they calculated to discourage the giving of information leading to the investigation and punishment of crime? The words "information" and "inquiry" are not necessarily confined in their meaning to inquiries made and information obtained from persons. One may inquire into circumstances and inform oneself by personal inspection of things, and the disclosure of these sources of information may have no tendency whatever to hamper the administration of justice. If, however, the enquiries are directed to persons, and information is from persons, the rule against disclosing its sources must prevail, but, in my opinion, that rule is inapplicable when, for instance, the witness had examined the locus in quo and from his own observations had informed himself

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as to the facts bearing on the guilt or innocence of the accused.

I apprehend that Cozens-Hardy, L.J., when he used the expressions aforesaid, had in mind inquiries and information of the first-mentioned character only. That is confirmed by what he himself has said in his reaons, where he points out that the interrogatory could not be useful, or indeed, fairly answered without in effect disclosing names, and this language, I take it, is also applicable in the particular circumstance of that case to the other expressions set out above, namely, "What steps, what grounds, what precautions."

We have this advantage, however, that our viva voce rules give greater elasticity than do the English rules. Under ours the enquiry may be carried on up to the point at which it becomes apparent that the questions are directed to disclosures which it is against the policy of the law to compel an answer, and may then be stopped.

I think a true understanding of the ground of objection to questions of the character under consideration will clear away much of the uncertainty which has existed as to the bounds within which questions of this sort should be kept. These bounds are, in my opinion, the same, whether the questions are asked by way of interrogatory, by way of discovery viva voce or at the trial. In either case the decision will be influenced by the nature of the case, and the rule excluding questions contrary to public policy will only be relaxed under special circumstances. Coming, then, to the particular questions under review, I cannot see fault in any of them up to and inclusive of question 59. With respect to these, so far as counsel has proceeded, he has not shewn an intention to elicit information of an objectionable character. Questions 60, 61, 62 and 63, however, tend I think to trench indirectly upon the rule which I have endeavoured to explain, and questions 64, 65 and 66 clearly violate it. Questions 67, 68, 69 and 72 are not directed to sources of information, but to the motives which actuated the defendant in instituting the prosecution. These questions, I think, should be answered. Questions 74 and 75 should be answered, short of disclosing the identity of the persons giving the information aimed at.

The result is that all the questions objected to, with the exception of questions 60 to 66, both inclusive, should be

answered. The witness must attend at his own expense before the examiner and answer these questions, and the defendant should pay the costs here and below of his refusal, except such as relate to the questions lastly above mentioned, the costs relating to which must be paid by the plaintiff.

Martin, J.A., would allow the appeal.

Galliher, J.A.: — I am in agreement with Macdonald, C.J.A., with the one exception, that in my view questions 60, 61, 62 and 63 are proper questions to be answered.

McPhillips, J.A.: — I agree with the judgment of my brother Martin as to the law that governs in respect to examinations for discovery where the question of public policy arises, and with the reasons for judgment enunciating the principles.

I, however, reserve giving opinion as to the relevancy of or right to put and have answered any of the questions. Without itemising, it may be well stated that some of the questions are not permissible, but as the trial Judge refrained from dealing with the questions specifically, I do not consider that this Court is called upon to do so.

Further, as a matter of practice where questions are objected to, the party proceeding to obtain an order compelling the answering thereof should put the questions in a concrete form not embarrassed by anything that has gone before in the examination, so that the question of context does not arise, admitting of the questions being considered apart from all other parts of the examination. In my opinion, the appeal being necessary, it must be allowed, but the examination will be proceeded with de novo.

Appeal allowed in part.

MORRISON v. HEMING.

Saskatchewan King's Bench, Macdonald, J. April, 1921.

Courts (§IA—2)—Inherent Power to Stay Action which must Fail.

The Court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or in abuse of its process and to stay an action which cannot succeed.

APPEAL by plaintiff from an order of the Master in Chambers striking out the plaintiff's statement of claim. Affirmed.

P. H. Gordon, for plaintiff; H. Ward, for defendant.

Macdonald, J.:—This is an appeal by the plaintiff from

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an order of the Master in Chambers striking out the plaintiff's statement of claim.

The statement of claim alleges in para. (1) thereof that the defendant by indenture under seal dated July 2, 1913, covenanted with the plaintiff that he would pay to the plaintiff the sum of $4,800, together with interest thereon at the rate of 7% per annum in the manner and at the times set forth in the statement of claim.

In para. 2 it is alleged that by the terms of the agreement or covenant referred to, the defendant did covenant that he should and would well and truly pay or cause to be paid to the plaintiff, his heirs, executors, administrators or assigns the said sum of money together with interest thereon at the rate of 7% per annum on the days and times and in the manner referred to in para. (1), and also that he should and would pay and discharge all taxes, special rates and assessments that might be levied or imposed "on the said land" or any improvement thereon, by legislative, municipal, school or other lawful authority, from and after the date thereof.

Paragraph (3) alleges default in the payment of said sums, and para. (4) that there is due and owing on account of the said covenant the sum of $3,356.99 for which plaintiff claims judgment.

Defendant has made an affidavit that under an agreement in writing dated June 3, 1913, he agreed to purchase certain lands, specified, from the plaintiff; that it was a term of said agreement that upon payment of the principal sum and interest the plaintiff would convey and assure or cause to be conveyed or assured to defendant the said lands by good and sufficient transfer under the Land Titles Act, R.S.S. 1920, ch. 67, subject only to the conditions and reservations expressed in the original grant from the Crown and free and clear of all liens, charges and incumbrances except such as shall have been made by the defendant. Defendant deposes that said agreement is the only agreement entered into between the plaintiff and defendant.

The allegations contained in said affidavit are not controverted and I will therefore assume the same to be true. In fact, there is in the statement of claim itself a suggestion that the agreement referred to therein is one respecting land. In para. (2) it is stated that defendant covenanted to pay all taxes that might be levied or imposed "on the said land" though that is the first place where the word "land" occurs in the statement of claim.

Apart from all rules and orders the Court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or in abuse of its process and this jurisdiction is in no way affected or diminished by R. 220 or 221 of the Rules of Court which correspond to Rr. 3 and 4 of O. 25 of English Rules. On the contrary, the inherent jurisdiction is a most valuable adjunct to the powers conferred on the Court by the rules, for under the rules the question before the Court is practically concluded by what appears on the pleadings: No affidavits or other documents are admissible to inform the Court as to any extraneous fact.

But when application is made to the inherent jurisdiction of the Court all the facts should be gone into and affidavits as to the facts are admissible. Willis v. Earl Howe, [1893] 2 Ch. D. 545, at pp. 551-554; Vinson v. The Prior Fibres Consolidated Ltd., [1906] W.N. 209. See Annual Practice (1919), at p. 421.

The Court has inherent jurisdiction to stay an action which must fail. Chatterton v. Secretary of State, etc., [1895] 2 Q.B. 189; Salaman v. Secretary of State in Council of India, [1906] 1 K.B. 613; Huxley v. Wootton (1912), 29 T.L.R. 132; Lawrence v. Lord Norreys (1888), 39 Ch. D. 213; (1890), 15 App. Cas. 210.

In this case if the plaintiff proved only the facts alleged in the statement of claim then as it would be disclosed by the agreement in question that the same was one for the purchase of land and contained the terms set forth in the affidavit of the defendant the action would fail as there is no allegation of the possession of title by the plaintiff or his readiness to convey which are material facts that go to the root of the action and must be pleaded. Landes v. Kusch (1915), 24 D.L.R. 136, 8 S.L.R. 32.

Accordingly the action should not be allowed to proceed in its present form. The Master in striking out the statement of claim herein gave leave to amend and in my opinion his judgment is right and should not be interfered with.

Appeal dismissed with costs.

Appeal dismissed.

WATERMAN v. WATERMAN.

Saskatchewan King's Bench, Macdonald, J. June 27, 1921.

Alteration of Instruments (§IIB—11)—Agreement for Exchange of Farms—Agreement Undated when Signed—Date Afterwards Written in —Words "Charge Interest 8%" Written at Foot of Instrument—Effect on Validity of Instrument.

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Writing in the date at the top of an agreement for the exchange of lands and buildings by one of the parties after the agreement has been signed, held not to invalidate it, and the words "charge interest 8%" written at the foot of the agreement held to be merely a reminder to the person making the memo and not to affect the validity of the agreement.

Auction (§1—4)—Sale of Land—Payment of Deposit—Conditions of Sale—Failure of Purchaser to Complete Purchase—Recovery back of Deposit.

A purchaser of property at a public auction who deposits a percentage of the purchase-price as a guarantee of the performance of the contract of purchase, and signs a bidding paper, containing the terms and conditions of the sale in which he agrees to forfeit the deposit if he fails to complete the purchase, cannot recover back the deposit if it is through his fault that the purchase was not completed, and he has not been misled by statements of the auctioneer or vendor.

ACTION to recover a sum of money alleged to be due under an agreement for exchange of lands. Judgment for plaintiff.

E. J. Brooksmith, for plaintiff.

P. H. Gordon and P. McLellan, for defendants.

Macdonald, J.:—For some 10 years up to the spring or early summer of 1917 the plaintiff and the defendant Paul Waterman were working their farms in partnership, and, according to the plaintiff, on March 22, 1917, and, according to the defendant, about June 1, 1917, the plaintiff and said defendant agreed to dissolve partnership, and to divide equally between them the farm implements and machinery. At that time the plaintiff was the registered owner of the north east quarter of sect. 25, tp. 6, r. 6, and the defendant Ida Waterman (who is the wife of her co-defendant) was the owner (under an agreement to purchase) of the south west quarter of the same section. Up to the time of the dissolution of partnership, the plaintiff was living with the defendants in a house on the land owned by the plaintiff, there being no buildings on the land owned by the defendant Ida Waterman.

At the time of the dissolution of the partnership, it was agreed that the plaintiff should convey to the defendant Ida Waterman the said north east quarter of sect. 25 owned by him, and that the defendant Ida Waterman should transfer to the plaintiff the south west quarter of the said section, to which, however, she did not then have title.

The plaintiff had been apparently helping the defendants in purchasing the said south west quarter by advancing part of the purchase-price, and, in connection with the exchange of lands aforesaid, it was further agreed that the defend-

ants should pay to the plaintiff one half the cost of the buildings on the said north east quarter and the amount advanced or to be advanced by the plaintiff towards the purchase of the south west quarter. One half of the cost of the buildings on said land amounted to $940, and the amount advanced or to be advanced by the plaintiff, including, however, apparently the instalment of purchase-price falling due the following fall, amounted to $739.93. This included an amount of $331.25 to be paid by the plaintiff in the following fall.

The only memorandum of agreement drawn up at the time reads as follows:—

Agreement.

In exchange of land between Ida May Waterman and Edgar Waterman on S.W. quarter of 25 section, Range 6, Township 6, and N.E. quarter of 25 section, Township 6, range 6. Buildings $940.00, land $739.93; total $1,679.93. ½ land debt $331.25. Balance owing $1,348.68 to be paid when possible, in full or part payment.

Witness:—

Edgar Waterman, Ida M. Waterman, Paul Waterman.

The present action is to recover the said sum of $1,348.68.

It will be observed that the memorandum is not dated. The plaintiff contends that the agreement was made and the memorandum drawn up on March 22, 1917. The defendants contend that the agreement was made and the memorandum entered into about June 1, 1917, and that while the lands were exchanged it was agreed that for said season of 1917 the plaintiff should take the crop off the north east quarter of sect. 25 formerly owned by him, and that the defendants should take the crop off the south west quarter formerly owned by them. On the other hand, the plaintiff says that after the agreement—which, he says, was made in March—he entered into possession of the south west quarter, and the defendants entered into possession of the north east quarter; that he seeded the south west quarter, paying for the seed, and the defendant seeded the north east quarter, though it is admitted that the defendant and Paul Waterman helped each other in putting in the crops on the respective quarter sections, and that there was no agreement that they should each take the crop off the lands theretofore owned and occupied by them.

The plaintiff did take the crop off the south west quarter, and the defendants off the north east quarter. The crop on

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the south west quarter realised about $1,306 more than the crop on the north east quarter, and the defendants claim that this amount should be credited as against the amount claimed by the plaintiff.

It further appears that on the copy of the so-called agreement above recited given to the plaintiff, he put at the head thereof "March 22, 1917," and at the foot thereof "charge interest 8%," and the defendants contend that the agreement has become null and void by reason of such alteration.

I am however of opinion that such alteration did not render the memorandum null and void.

So far as the date is concerned, I find in 10 Hals., p. 415, para. 745, the following:—"An alteration made in a deed after its execution in some particular which is not material does not in any way affect the validity of the deed and this is equally the case whether the alteration were made by a stranger or by a party to the deed. Thus the date of a deed may well be filled in after the execution for a deed takes effect from the date of execution and is quite good although it be undated."

The same rules appear to be applicable to the alteration of instruments under hand that are not deeds. 10 Hals., p. 431 et seq.

So far as the other alteration, namely, the writing at the foot thereof of the words "charge interest 8%," I am clearly of the opinion that properly speaking this is not an alteration in the instrument at all, but a mere memorandum or notation made by the plaintiff as a reminder to himself. Had the words been "with interest at 8%," the question would be an entirely different one, but, it seems to me clear on the face of it that the notation in question is not intended, and could not be taken to have been intended to alter the document at all.

The defendants further contend that inasmuch as the agreement is that the balance owing is to be paid when possible it is not an agreement to pay the sum at any time and creates no debt, or, in any event, the same is not yet due, and in support thereof, the defendants quote In ex parte Tootell (1798), 4 Ves. 372, 31 E.R. 189. There the document reads as follows:—"I hereby promise to pay to Richard Tootell £50 at such a period of time that my circumstances will admit without detriment to myself or family and not to be distressed upon any account whatsoever

until such time that my circumstances will be as above described."

The Lord Chancellor says as follows:—

"Upon a promissory note to pay when the drawer shall be in good circumstances the Court of Common Pleas thought no action could be brought. I confess I was of opinion that it was an absolute promise; but the Court was moved upon it; and they held, that an action did not lie without proving that he was in good circumstances. There was no such proof given; nor do I see how it is possible in an action to prove that a man is in good corcumstances. I take the case to amount to this, that it is no promissory note."

The plaintiff refers to the decision in Hydraulic Engineering Co. v. McHaffie (1878), 4 Q.B.D. 670. There a company undertook to manufacture and deliver "a gun," being a portion of the pile driving machine "as soon as possible," and the Court of Appeal affirmed the judgment of Field, J., that the words meant "within a reasonable time."

Whichever of the above two views may be taken as the proper construction of the memorandum in question, I am of opinion that the said defence cannot prevail. If the words mean "within a reasonable time," then certainly the debt is now due, but even according to the decision in Re Tootell the amount in question is now overdue if at any time before action it was possible for the defendants to pay the same. It is in evidence that after the execution of the said document in 1917 the defendants mortgaged certain lands for some $3,000, and, according to the defence the amount was repayable in 30 years. Yet, though not legally called upon to do so, the defendants have paid off the said mortgage and obtained a discharge thereof. It is therefore patent that it was possible for the defendants to pay the amount claimed in this action.

With respect to the defence that the defendants were entitled to the crop on the south west quarter for the year 1917 and should therefore be credited with the excess in value of the crop on said land over that on the north east quarter, I am also of the opinion that this defence cannot prevail. In view of all the circumstances of the case,—taking into consideration the evidence of Mr. Christie given in support of the plaintiff's contention,—the conduct of the parties themselves in going into possession of the lands which they respectively obtained in exchange,—in the plaintiff paying for the seed to be sown on the south west quarter

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(a fact testified to by him and not denied by the defendants), I am of opinion that the plaintiff's contention is the correct one, and that the agreement in question was entered into on March 22, 1917, and that it was the intention of the parties that the exchange should take place on and from said date, which intention was afterwards carried out.

The amount claimed herein is $1,348.68. As I understand the evidence — though it is not very clear on that point—this sum includes $331 that the plaintiff was to pay on the south west quarter in the fall of 1917. He, however, admittedly paid only $220, so that there should be taken off $111 from the amount claimed.

There will therefore be judgment for the plaintiff for $1,237.68 and costs.

Judgment accordingly.

RE LAZAR.

Quebec Superior Court in Bankruptcy, Delisle, Registrar
January 31, 1921.

Bankruptcy (§IV—39)—Conditional Sale of Goods—Vendor retaining Right of Property in Goods until Payment of Purchase Price—Failure to make Deferred Payments—Authorised Assignment under Bankruptcy Act. Goods in Possession of Authorised Trustee—Right of Vendor to Recover Possession.

By a contract in writing the petitioner sold to the purchaser certain machinery, a portion only of the purchase price being paid at the time of sale and promissory notes being taken for the balance. It was agreed between the parties that in case of insolvency or bankruptcy of the purchaser or in case of default in making the deferred payments according to the terms of the agreement, the notes would become due and payable and the petitioner be entitled to take possession of the machinery and terminate the contract, the title to and right of property in said machinery to remain in the petitioner until the purchase price was fully paid. The notes were unpaid, and the machinery went into the possession of an authorised trustee as forming part of the estate of the assignor, under the Bankruptcy Act. The Court held that the petitioner was entitled under the provisions of the deed to take back possession of and remove the machinery as its own property and to terminate the agreement, and ordered the authorised trustee to hand over the machinery to the petitioner.

[See Annotations; Bankruptcy Act, 1920, 53 D.L.R. 135; Bankruptcy Act Amendment Act, 1921, 59 D.L.R. 1.]

PETITION by a vendor of goods under a conditional sale contract for possession of the goods from the authorised trustee under the Bankruptcy Act. Petition granted.

The petition of Canadian Linotype Limited contained the following allegations, verified by affidavit:—

(1) By contract under private writing entitled "Conditional Sale" executed on May 17, 1920, herewith filed as plaintiff's Ex. P-1, said petitioner has transferred unto Milhail Sibarium of Montreal, therein described as doing business under the firm name and style of Dominion Printing & Engraving Company, the following property, to wit: "One (1) two-letter linotype machine, model S. No. 26733, also the following extra supplies: two (2) fonts of Russian two-letter matrices, three hundred and forty-eight (348) accent matrices, thirty-six (36) mold liners (22 recessed, 14 regular), one (1) supplemental keyboard and one (1) motor. (2) Said conditional sale was made in consideration of the sum of $4,293.92, payable $860 cash and the balance in instalments as set forth in 46 promissory notes delivered to the petitioner as follows:—45 notes for $75 each and one note for $58.92 payable respectively on the 20th of each and every month for 46 successive months beginning in the month of August, 1920, with interest at 6% per annum. (3) It was agreed in said deed that in case of the insolvency or bankruptcy of said purchaser or in case he should assign, transfer or part with the possession of said machinery or any part thereof, or in case there should be default of payment of any of the said notes according to the terms thereof, all of said notes would be at the option of the petitioner become at once due and payable, and said petitioner would be entitled to take possession of said machinery, its belongings and accessories by process of law or it might enter the premises in which the said machinery might be and without process of law take possession of and remove said machinery and thereupon terminate such agreement the whole as more fully appears by said deed; (4) It was agreed in the said deed that all title to and right of property in said machine, its belongings and accessories would remain vested in your petitioner until full and complete payment of said purchase-price; (5) None of said notes above referred to have been paid to the petitioner and in particular said purchaser has made default to pay the notes which have matured on the 20th day of each of the months of August, September, October, November, December, 1920, and January, 1921, for $75 each; (6) Said machinery is in the possession of said trustee as forming part of the estate of said authorised assignor and is in the premises formerly occupied by said authorised assignor which have now been taken possession

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of by said trustee; (7) Your petitioner is entitled to take back possession of and remove said machinery as its own property and to terminate said agreement, the whole under the provisions of said deed; (8) Your petitioner hereby offers to return said notes above referred to upon being put in possession of said machinery which 46 notes with descriptive list annexed it herewith deposited for such purpose as petitioner's Ex. "B."

Delisle (Registrar) on the consent of J. G. Duhamel authorised trustee, granted the petition, and made an order declaring that the petitioner is entitled to take back possession of and remove said movable property and machinery above described in para. 1, as its own property, and that the trustee hand over on demand unto the petitioner said movable property and machinery, the petitioner being bound to pay its proportion of conservatory costs and guardianship since the assignment into the hands of the authorised trustee, the whole with costs against said estate.

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British Columbia Court of Appeal. Macdonald, C.J.A., Galliher, McPhillips, and Eberts, JJ.A. March 19, 1920.

Assignments for Creditors (§II—5)—Right of Assignee to bring Action for Debt due to Assignor—No action by Assignee—Action by Assignor for Recovery of Debt—No Reassignment by Assignee at time Action Brought—Disclaimer by Assignee not pleaded in Action—Right of Assignor to bring Action.

Upon making an assignment for the benefit of creditors, the person making the assignment divests himself of his right to sue for the price of goods which he has sold and delivered previous to the assignment, the right of action vesting in the assignee from the date of the assignment, and such assignee cannot make a disclaimer of the debt without the consent of the creditors. In any case the disclaimer not having been pleaded the assignor cannot succeed in an action to recover the amount of the debt brought by him.

[See Annotations, Bankruptcy Act of Canada, 1920, 53 D.L.R. 135; Bankruptcy Act Amendment Act, 1921, 59 D.L.R. 1.]

APPEAL by plaintiff from the decision of Gregory, J., of June 24, 1919, in an action to recover the value of certain logs sold and delivered by the plaintiff to the defendant. The plaintiff, after delivering the logs, assigned for the benefit of his creditors on December 27, 1918. The assignee took no action to recover the purchase-price of the logs, and on February 24, 1919, the defendant brought this action. The reassignment, although alleged by the plaintiff to have been made on February 20, was not made until the following

month, notice of which was not given the defendant. The trial Judge dismissed the action.

Mayers, for appellant.

D. S. Tait, for respondent.

Macdonald, C.J.A.:—The assignment for the benefit of the plaintiff's creditors was in accordance with the Creditors' Trust Deeds Act, R.S.B.C. 1911, ch. 13, and while the plaintiff alleges in his statement of claim that the assignee did not accept the trust, yet the evidence fails to bear this out. The cause of action herein, therefore, vested in the assignee on December 27, 1918, the date of the assignment. On that date the plaintiff wholly divested himself of his right to sue for the recovery of moneys in question in this action. Nevertheless, he commenced this action on February 24, 1919, alleging that the debt sued on had been reassigned to him on the 20th of the same month. This reassignment was in fact not executed until March following, and counsel for the plaintiff frankly admitted at our Bar that he could not rely on it, but that he did rely on what purports to be a disclaimer by the assignee of this debt made on January 17, 1919, and therefore before the issue of the writ.

There are, in my opinion, fatal impediments in the plaintiff's way. The disclaimer was not pleaded; the assignee had no power to disclaim without a breach of his trust, he having signed this document without even consulting the creditors or inspectors. Even if the subject matter of the disclaimer falls within sec. 54 of the said Act, which I do not think it does, the conditions therein imposed were not complied with.

It was argued for the defendant that the disclaimer, if effectual, released it from liability to the plaintiff as well as to the assignee, but I do not find it necessary to consider this argument.

Application was made on behalf of plaintiff, at the trial, to add the assignee as a party plaintiff, but the Judge held that this would prejudice the defendant, and with the exercise of his discretion I see no sufficient grounds for interference.

The appeal should therefore be dismissed.

Galliher, J.A.:—It is clear, on the plaintiff's own evidence, that at the time he brought the action he had no reassignment of the debt in question from Sing, the assignee of the estate. Counsel for the plaintiff, during the trial,

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when this fact developed, asked leave to amend by adding Sing as a party plaintiff. After considerable discussion the trial Judge refused the application and dismissed the action, without prejudice to the plaintiff bringing a new action. The plaintiff appealed. The appellant urged before us that the assignee for the creditors had made a verbal disclaimer of the debt in question. This, I take it, could not be done without the assent of the creditors, and the evidence falls short of establishing any such consent.

In New Westminster Brewery v. Hannah [1877], W.N. 35, the Court of Appeal held that where the plaintiff had no interest in the matter he could not be allowed by the amendment to introduce new plaintiffs and make an entirely new case. This can hardly be said to be the case at Bar, but the trial Judge, with the parties before him and during the progress of the case, seemed inclined to grant the application, Mr Tait, for the defendant, being allowed to plead certain pleas not on the record, and which were not considered necessary as the case stood. To certain of these proposed pleas the plaintiff's counsel objected, and the trial Judge seems to have concluded that to allow the amendment under the rule, without leave to the defendant to plead anew as fully as they might be advised, would be to embarrass and prejudice the defendant.

I do not think, under these circumstances, this Court should interfere, and would dismiss the appeal.

McPhillips, J.A.:—I am of the opinion that the appeal should be dismissed.

Eberts, J.A., would dismiss the appeal.

Appeal dismissed.

MILLER-MORSE HARDWARE CO. v. DOMINION FIRE INSURANCE CO. et al

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon JJ.A., August 5, 1921.

1. **Insurance (§IIIE—75)—Policies Covering Stock-in-Trade and Fixtures—Fraud of Insured in Furnishing Particulars—Claim of Assignee of Policy Vitiated by—Saskatchewan Insurance Act R.S.S. 1920 ch. 84, sec. 82, Conditions 19, 20 and 21.**

The "Above particulars" referred to in Condition 21 of the statutory conditions in sec. 82, of the Saskatchewan Insurance Act R.S.S. 1920, ch. 84, which provides that "any fraud or false statement in any statutory declaration in relation to any of the above particulars shall vitiate the claim of the person making the declaration" include an account of the loss to be verified by statutory declaration containing all the particulars which the nature of the claim will permit, and where such an account furnished by and verified by the insured is false and

fraudulent it vitiates the policy not only as regards any interest of the insured but also as regards any right or claim of an assignee, it being immaterial whether the assignment was made before or after the false statements were furnished.

[Miller-Morse Hardware v. Mills National Ins. Co. and London Mutual Fire Ins. Co. (1920), 56 D.L.R. 738, reversed.]

2. **Insurance (§IIIF—140)—Two Policies in same Company, One on Goods and One on Building—Vitiation of Goods' Policy Because of False Statements—Policy on Building Not Affected by.**

Where an insurer has two policies in an insurance company, one on the goods and one on the building, each of these policies constitutes a separate contract between the parties, and false statements, which vitiate the policy on the goods, do not prevent the insured or his assignee from recovering under the policy on the building as to which there were no false statements, although if all the property were covered by one policy there being only one contract, fraud as one particular would vitiate the whole contract.

[Harris v. Waterloo Mutual Fire Ins. Co. (1886), 10 O.R. 718 followed.]

APPEAL by defendants from a judgment of Embury, J., (1920), 56 D.L.R. 738, 14 S.L.R. 30, in an action to recover the amounts due on certain policies of insurance. Reversed.

P. M. Anderson, K.C., for appellants.

J. F. Frame, K.C., for respondent.

The judgment of the Court was delivered by

Turgeon, J.A.:—In 1916, Mary Stockhammer, carrying on business as a retail merchant at Khedive under the firm name of "Khedive Trading Company," obtained from the defendant companies 4 fire insurance policies; one from each of the defendants to cover loss upon her stock-in-trade and shop fixtures, and an additional policy from the defendant Dominion Fire Insurance Co., covering the shop-building. On January 1, 1917, the building and its contents were destroyed by fire. On January 9 Mary Stockhammer assigned these 4 policies and all her rights thereunder to the plaintiff company. The defendants were notified of the fire and of the assignment to the plaintiffs. On January 12 the Dominion Fire Insurance Co. wrote to the plaintiffs, stating that they were not interested in the matter as their policies had been cancelled before the fire. As to this contention, I may say briefly that I agree with the trial Judge, Embury, J. (1920), 56 D.L.R. 738, 14 S.L.R. 30, that these policies were not cancelled but were in force at the time of the fire. On March 6, a firm of solicitors in Winnipeg wrote to each of the defendants on behalf of Mary Stockhammer, enclosing

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proofs of loss supported by her statutory declaration. This was done in compliance with the requirements of sec. 82 of the Saskatchewan Insurance Act, 1913 (Sask.), ch. 37, as amended by 1914, ch. 17. On May 28, 1917, these actions were commenced.

Several grounds are advanced by the insurers by way of defence, but in the view I take of the case it will be necessary to deal with two only; the one applying to all the defendants, and the other to the Dominion Fire Insurance Co. alone.

Section 82 of the Act contains the statutory conditions which form part of the contract between the parties. Conditions 18, 19 and 20 deal with the proof of loss to be furnished to the insurer, and Condition 23 provides that the loss shall be payable 60 days after the completion of such proof, unless a shorter period is fixed by the contract. Condition 21, which is relied upon by the defendants in this case, is as follows:—"21. Any fraud or false statement in any statutory declaration, in relation to any of the above particulars shall vitiate the claim of the person making the declaration."

The "above particulars" include an account of the loss to be verified by statutory declaration containing all the particulars which the nature of the case will permit. It is alleged that the account furnished to the defendants by Mary Stockhammer and verified by her is false and fraudulent, and that, consequently, the defendants are released from liability under their policies.

The trial Judge enumerates various items which he says are improper, and which amount to $1,054.24, and he then proceeds to state, at p. 739 (56 D.L.R.):—

"These are by no means minor mis-statements, and the effect of them is materially and improperly to increase the plaintiff's claim. Indeed, with regard to them it is impossible to come to the conclusion that they could have been made otherwise than in utter disregard of the actual facts. Such a claim or proof of loss if made by the assignee (plaintiff) would have vitiated the policy."

I have examined the evidence carefully, and, while I am mindful of the fact that a finding of fraud and perjury, such as is involved here, should be based only upon the strongest evidence and not presumed from the mere existence of an excessive claim, I am nevertheless convinced that fraud does exist in this case. In addition to the amount of the

items specified by the trial Judge, I am satisfied from a perusal of the evidence that the figure given as the value of the stock destroyed was a gross over-valuation, and that it was not given in ignorance or by mistake or through mere carelessness, but deliberately, with the intent to get much more money from the defendants than the loss warranted.

While I agree with the trial Judge in his finding of fraud, I must state, with respect, that I differ from him as to the effect of this fraud upon the rights of the parties to these actions. In my opinion the fraud of the insured vitiates the claim of the assignees (the plaintiffs). Upon this point the trial Judge held, and it was argued on behalf of the plaintiffs before us, that the meaning of Condition 21 is that a fraud of this sort vitiates only the claim of the person who actually makes the declaration, whatever that claim may be, but that the plaintiffs, having obtained an assignment of these policies before the false statement was made, are not affected by it. I cannot agree with this contention. The particulars of the loss were furnished in order that the plaintiff's right to sue might be created in accordance with Condition 23. No other proofs of loss were furnished than those of the insured herself. If we consider her as acting for herself, Mary Stockhammer's interest lay in having the insurance monies paid over to the plaintiffs, who were her creditors, in order that her indebtedness to them and to her other creditors might thereby be paid off or reduced; and her fraud will prevent her attaining this object. If we consider her as acting for the plaintiffs in making this statement, then, I take it, they are bound by her fraud, she being their agent for the purpose. The assignment took place after the fire. It can make no difference, in my opinion, once the fire had taken place, whether she sent in her false statement first and then assigned, or reversed the order of things and assigned before making the statement. In either case the result would be the same. Again, to consider the matter from another and a narrower point of view, it might be said that the plaintiffs at the time they commenced these actions had no other statements of loss to rely upon in order to shew compliance with Condition 23 than those fraudulent statements, and they put them in evidence as part of their case. They surely cannot be heard to argue now that, although false, these statements are a sufficient compliance with the condition to give them the right to sue.

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MILLER-MORSE HARDWARE v. DOMINION FIRE INSURANCE Co.

Some confusion, no doubt, arises from the wording of Condition 21, which says that the fraud "shall vitiate the claim of the person making the declaration." This confusion will, however, be removed if the language of the preceding condition (No. 20) is carefully examined. Number 20 says:—"Any person entitled to make a claim under this policy shall . . . give notice . . . furnish a statutory declaration . . . produce books of account," etc.

But conceivably different persons may be entitled to make a claim under the same policy; in fact this is often the case. One of such persons cannot rely upon a notice given by another claimant, nor, of course, can his rights be tainted by another claimant's fraud. But, on the other hand, each such person must be affected by the statement put in on his own behalf, whether made by himself or by an agent. To hold otherwise would be to defeat the object of the condition. Many "persons" can act only by agent, as, for instance, companies and municipal corporations. If Condition 21 were to be read as strictly as is urged here, it would be totally inapplicable to them.

The plaintiffs, in reply to this defence of fraudulent proof of loss set up by the defendants, contend that, in any event, the Dominion Fire Insurance Co. is precluded from having recourse to it, because that company denied the existence of any contract at the time of the fire and repudiated all liability under their two policies. It is true that these defendants did take that attitude. It is also true that an insurance company may, by repudiating its contract entirely, absolve the insured from complying with conditions which otherwise would be conditions precedent to his right to sue. It remains to be determined whether the plaintiffs, under the facts of this case, are entitled to proceed with their action and recover the amount actually lost by the insured regardless of the fraudulent claim set up by her. Several cases have been cited to us, and they all deserve the most careful scrutiny. Jureidini v. National British and Irish Millers' Ins. Co., [1915] A.C. 499, 84 L.J. (K.B.) 640, was decided by the House of Lords in 1914. In that case the policy provided in that in the event of loss by fire occurring and the parties being unable to agree as to the amount of the damage, recourse should be had to arbitration in order to have the amount ascertained, and that no action would lie until such

amount had been so ascertained. A fire occurred, the insured made a claim under his policy and the company denied all liability whatsoever, on the ground that the insurer had set fire to the premises himself. It was held that that attitude of the company relieved the insured from any obligation under the arbitration clause, because such obligation could only arise where a difference existed between the parties as to the amount of the loss or damage, a situation which, in the circumstances, did not exist at all. Some of the other cases are, I think, more in point; as, for instance, Caldwell v. Stadacona Fire Ins. Co. (1882), 11 Can. S.C.R. 212, and Beury v. Canada National Fire Ins. Co. (1917), 35 D.L.R. 790, 38 O.L.R. 596,* and go so far as to state that a notice of total repudiation by the company will dispense with the necessity of proofs of loss being furnished. All these cases, however, go no further than to establish the rule that the conduct of the defendant will, in certain circumstances, entitle the plaintiff to omit the performance of what would otherwise be a condition precedent to his right to sue. In the case at Bar the plaintiffs took a different attitude. They did not rely upon the defendants' repudiation and abstain from furnishing proofs of loss; they waived that right (if, indeed, they had it, a matter I do not think it necessary to determine) and put in a fraudulent statement, which the Act says must vitiate their claim. They must therefore abide by the result which the statute provides.

There remains one question to be disposed of. Mary Stockhammer had two policies with the Dominion Fire Insurance Co., one on the goods for $3,000, and one on the building for $1,600. The proof of loss put in by her covers all the property, real and personal, included in both policies. The claim in the goods policy is defeated by her false statement, but does it follow that the claim for the insurance on the building is also vitiated? I think not. Each of these policies constitutes a separate contract between the parties. There is no suggestion of any false statement regarding the building, and I do not think the insured or her assignees have lost the right to claim under that policy. It would be different if all the property was covered by one policy, because in that case there would be only one contract, and fraud in one particular would vitiate the contract altogether. Harris v. Waterloo Mutual Fire Ins. Co. (1886), 10 O.R. 718.

*Affirmed 37 D.L.R. 105, 39 O.L.R. 343.

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I would, therefore, allow the appeal with costs. The plaintiffs' actions should be dismissed with costs, excepting their action against the Dominion Fire Insurance Co. In so far as that action is concerned, the plaintiffs succeed upon their claim based on the policy on the building, and they should have judgment for whatever amount may be found upon a reference to the Local Registrar to be due to them. The costs of this action may be spoken to after the reference is had.

Appeal allowed.

AITKEN v. CURRIE.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. August 5, 1921.

Sale (§IV—91)—Of Tractor by Farmer—Statutory Requirements—Farm Implement Act, R.S.S. 1920 ch. 128—Application of Act.

A dealer in agricultural implements in the United States who is also engaged in farming in that country and also in Saskatchewan, who brings two tractors into the Province which he sells, is a vendor within the meaning of the Farm Implement Act R.S.S. 1920 ch. 128, and although it was not the intention of the Legislature that a farmer holding an auction sale of his implements or making an isolated sale of one of his implements, should be required to furnish the lists required by the Act, the Act does require the contract for the sale of a large implement to be in writing and in the form prescribed by the Act and a contract which does not comply with the Act, must be held to be invalid.

[Robinson v. Burgeson (1918), 11 S.L.R. 229; and Boyce v. Jolly (1920), 55 D.L.R. 714 disapproved.]

APPEAL by plaintiff from the judgment at the trial of an action brought to recover the amount of three lien notes given on the sale of a second hand tractor and plows. Affirmed.

L. McK. Robinson, for appellant.

P. H. Gordon, for respondents.

Haultain, C.J.S.:—This action was brought for the amount of three lien notes given by the defendants to the plaintiff on the sale of a second hand tractor and plows. The action was defended on two grounds. 1. That there had been a breach of warranties given by the plaintiff on the sale of the implements, and 2. That the transaction came within the provisions of the Farm Implement Act, R.S.S. 1920, ch. 128, and there was no contract in writing as required by that Act.

On the trial of the action the trial Judge found that certain warranties had been given, and that there had

been breaches of warranties resulting in damages sufficient to extinguish the plaintiff's claim. The plaintiff now appeals.

The evidence on the first ground of defence was conflicting, but, in my opinion, there is quite sufficient evidence to support the judgment on that ground.

As to the second ground of defence: The evidence discloses that the plaintiff, who is a dealer in agricultural implements in the United States, is also engaged in farming in that country, as well as in this Province. He brought 4 tractors with him from the United States into this Province, two of which (including the tractor in question) he has since sold. The others he uses in connection with his farming operations, and he admits in his evidence that he did not need 4 tractors for that purpose. It was contended on behalf of the plaintiff that under the facts of the case the Farm Implement Act did not apply to the transaction, and the cases of Robinson v. Burgeson (1918), 11 S.L.R. 229, and Boyce v. Jolly (1920), 55 D.L.R. 714, 14 S.L.R. 16, were cited in support of that contention. Those cases decided that the Act in question only applies to dealers in implements and not to a farmer making an isolated sale of a second hand implement.

I would say, in the first place, that the reasons for decision in these cases do not apply to the facts of this case. In my opinion the plaintiff was a "vendor" as defined by the Act, that is, "a person selling implements on his own account." The plaintiff is a dealer in implements in the United States, and obviously brought at least two tractors into this Province for the purpose of sale. I will go further and say, with great deference, that the Act applies generally to the sale of all implements in Saskatchewan, as is specifically enacted by sec. 4. Section 5 does not apply to a person making an "isolated" sale of an implement, and secs. 7, 8, 10 and 11 do not apply to retail dealers who are not manufacturers. Section 12 does not, in my opinion, only apply to sales made by a restricted class of persons. It states clearly and without any qualification that no contract for the sale of any large implement shall be valid and no action taken in any Court for the recovery of the whole or part of the purchase-price of any such implement or of damages for any breach of any such contract unless the contract is in writing and in the prescribed form "A," and signed by the parties thereto. This section does not apply

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to the transaction under consideration, but I refer to it for the purpose of illustrating what, in my opinion, is the scope and object of the Act. Section 14 enacts that "when second hand implements are sold upon credit the contract for the sale of the same shall be in writing in form C."

Section 15 makes secs. 17, 18 and 19 apply only to the sale of "large implements,' which would include both new and second hand large implements.

The imperative terms of sec. 14 and a consideration of the provisions of secs. 17, 18 and 19, in my opinion invalidate any contract not made in writing in the prescribed form.

It may be noticed that sec. 13, which says that contracts for the sale of small implements shall be in writing in the prescribed form "B," expressly provides that non-compliance with those provisions shall not invalidate the contract. Section 14, which applies to this case, has no such saving provision.

There does not seem to me to be any difference between the sale of a second hand implement by a farmer and a sale by any one else, whether a dealer or not. This case with its mass of conflicting evidence as to terms of verbal warranties, affords a very good example of the evil which the Act, in my opinion, was expressly intended to obviate.

I would, therefore, dismiss the appeal with costs.

Lamont, J.A.:—This appeal is brought from a judgment in favour of the defendants in an action to recover on 3 lien notes for $400, given by the defendants to the plaintiff on the sale of an outfit consisting of a second-hand gas tractor and certain plows. To the plaintiff's claim two defences were set up: (1) That the plaintiff had given certain warranties with the tractor and that it had failed to fulfill those warranties, and (2) that the plaintiff was a vendor under the Farm Implement Act and had not entered into a contract in writing as required by the Act. The trial Judge found that the warranties alleged had been given and that the tractor had not fulfilled any of them, and he allowed the defendants as damages in extinction of the price the full amount of the notes sued for. From that judgment the plaintiff appeals.

In my opinion there was evidence which, if believed by the trial Judge, justified his findings that the warranties had been given and that the tractor had not fulfilled them. It is, however, unnecessary to consider this point further,

in view of the conclusion at which I have arrived on the second of the above defences.

Under the Farm Implement Act, a traction engine of any kind, having a capacity of at least 5 h.p. for the production of power upon farms, comes within what is described as a "large implement."

Section 12 of the Act reads as follows:—"12. No contract for the sale of any large implement shall be valid and no action shall be taken in any court for the recovery of the whole or part of the purchase price of any such implement or of damages for any breach of any such contract unless the said contract is in writing, and in form A, and signed by the parties thereto."

And sec. 14 reads:—"When second hand implements are sold upon credit the contract for the sale of the same shall be in writing in form C."

The tractor in question in this case was a second hand one, and was sold on credit and the contract was not in writing in form C. of the Act. The only writing evidencing the contract was that contained in the lien notes. The contract not being in writing in the form required by the Act is, therefore, under the above sections, invalid, and no action can be brought thereon for the purchase price.

It was, however, contended on behalf of the plaintiff that the Farm Implement Act applied only to dealers in implements and not to a farmer making an isolated sale of a second-hand engine, and the following authorities were cited in support thereof: Robinson v. Burgeson, 11 S.L.R. 229; Boyce v. Jolly, 55 D.L.R. 714.

With great deference to the Judges by whom these cases were decided, I am of opinion that the language of the sections above quoted is too clear and too explicit to permit of their being interpreted in the manner in which they have been in these cases. Section 12 says, "No contract for the sale of any large implement shall be valid." It does not say, "No contract for the sale of any large implement made by an implement dealer shall be valid," as these cases would seem to hold. Furthermore, sec. 3 of the Act says, "This Act shall apply to the sale of all implements in Saskatchewan."

It was argued that, as "vendor" means any person or company selling or offering for sale implements on his or its own account, and as all vendors are required to file with the Minister of Agriculture a list of large implements

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which they have for sale with a description of each, the retail price, terms of credit and rate of interest charged, it could not have been contemplated by the Legislature that a farmer making a sale of his second hand tractor should be obliged to comply with these requirements.

I quite agree that it was not the intention of the Legislature that a farmer making an isolated sale of an implement, or holding an auction sale of all his implements, should be required under penalty to furnish the lists as required by sec. 5, and in my opinion the language of the Act does not require him to do so. It will be observed that to be a "vendor" a person must be selling or offering for sale "implements." A perusal of the sections imposing obligations on vendors to furnish lists, shews that the class of persons upon whom these obligations are imposed is the class whose business, or a part of whose business, it is to sell implements. These sections are not aimed at a farmer holding an auction sale or selling off his old implement to a neighbouring farmer. But while the Act only requires those whose business or a part of whose business is selling or offering for sale implements, to file with the Minister the lists required by secs. 5, 7, and 8, when it comes to making a contract for the sale of a large implement the Act does require the contract to be in writing and in the form prescribed. In this respect secs. 12 and 14 admit of no exceptions, save those set out in the Act. The reason for this seems to me to be quite clear. The Act was passed largely for the protection of purchasers. One of the objects of the Act was to insure in some cases that certain warranties would be given, and in all cases that the warranties given should be given in writing. The Act was intended to prevent just what has taken place in this case, namely, a judicial inquiry to ascertain if certain warranties had been given. It is just as important to a purchaser to have the warranties given set out in writing where he buys from a farmer making an isolated sale, as where he buys from a manufacturer making several sales a week. The contract in this case not complying with the Act, must be held to be invalid. No action can therefore be maintained upon it for the purchase-price.

The appeal, in my opinion, should be dismissed with costs.

Turgeon, J.A.:—I agree with the conclusion arrived at by my brother Lamont in this case. It seems clear to me that the Farm Implement Act applies to the sale of all

implements which come within the meaning of the term "implement" as defined by the Act. Section 3 says so expressly, and secs. 12 and 14 are equally explicit and comprehensive. The result must be that no contract for any such sale which does not comply with the Act can form the basis of an action either by the seller or the buyer.

In my opinion there is no ground for the confusion which seems to exist on account of the fact that all vendors who sell implements or offer implements for sale have certain obligations cast upon them by the Act, such as the duty to file lists of their goods, statements shewing the selling price of their repairs, etc. The sections of the Act which create these obligations make it reasonably clear that they are intended for those who carry on the business of implement selling. But where those provisions of the Act which refer to the retail sale of an implement are considered, it is apparent that no distinction of persons is intended, but that all contracts are affected by them.

I agree, therefore, that the appeal should be dismissed with costs.

Appeal dismissed.

RE WEST END CO-OPERATIVE SOCIETY; EX PARTE PARIS.

Ontario Supreme Court in Bankruptcy, Orde, J. June 7, 1921.

Bankruptcy (§III—25)—Landlord and Tenant—Proviso in Lease for Three Months' Accelerated Rent in Case of Bankruptcy—Disclaimer of Lease by Trustee—Right of Landlord to Rank as General Creditor for—Right not Affected by Fact of Renting to Third Person Before end of Three Months' Period.

Where an indenture of lease for a term of years contains a proviso that if the lessees should take the benefit of any Act that might be in force for bankruptcy or insolvent debtors "the then current succeeding three months' rent" should immediately become due and payable and the term become forfeited and void, and the acts of the trustee amount to a disclaimer of the lease, the landlord is entitled to rank as a general creditor in respect of the three months' accelerated rent, but any dividend payable in respect thereof should be reduced by the amount paid by the trustee for occupation. The claim of the landlord is not affected by the fact that he has rented a portion of the premises to a third party before the expiration of the three months and so collects rent from two persons for a portion of that period.

[See Annotations, Bankruptcy Act, 1920, 53 D.L.R. 135; Bankruptcy Act Amendment Act, 1921, 59 D.L.R. 1.]

APPEAL from the refusal of the trustee to collocate for dividend a landlord's claim for accelerated rent for a three months' period following the authorised assignment.

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RE WEST END CO-OPERATIVE SOCIETY; EX PARTE PARIS.

G. S. Hodgson, for Paris.

L. B. Campbell, for authorised trustee.

Orde, J.:—This is an appeal by Michael Paris of Sault Ste. Marie from the disallowance by the authorised trustee of his claim for accelerated rent.

The debtors made an authorised assignment under the Bankruptcy Act, 1919 (Can.), ch. 36, on January 27, 1921. There were then tenants of the property in question under an indenture of lease from Paris, dated June 11, 1919, for a term of 3 years and 4 months from July 1, 1919, that is until November 1, 1922, at a monthly rental of $175 payable monthly in advance. The lease contained a proviso that if the lessees should take the benefit of any Act that might be in force for bankrupt or insolvent debtors "the then current succeeding three months' rent" should immediately become due and payable and the term become forfeited and void. The expression "current succeeding three months' rent" is possibly slightly inconsistent and ambiguous. In the lease the words "The then current.... rent" are printed and the words "succeeding three months' rent" are written in. The "current" is really meaningless.

The demised premises consisted of a shop with a basement and an upper storey. The trustee did not remove the goods of the insolvent company but remained in possession until February 21, 1921, when he sold the stock-in-trade, furniture and fixtures to a purchaser who, by a new agreement with the landlord, took possession of the ground floor and basement, and on the same day the trustee gave up possession of the demised premises to the landlord. The landlord's claim is for three months' accelerated rent at $175 or $525 in all. There was apparently no claim for any rent in arrears and as the rent was payable in advance on the first day of each month, I assume that the rent had been duly paid to January 31, 1921. The trustee is of course bound to pay occupation rent during the period between January 27 and February 21, 1921, under sub-sec. (3) of sec. 52, and if anything is payable to the landlord by way of accelerated rent such payment will be credited against the liability for occupation rent under sub-sec. 4. But the trustee rests his objection to the claim for any accelerated rent beyond February 21, 1921, the date when he gave up the demised premises to the landlord, upon the ground that the landlord had procured another tenant for a part of the building at a rental proportionately higher than

that which was payable under the old lease; that he has suffered no loss or damage as a result of the surrender but, on the contrary, has gained considerable advantage therefrom, and that if the estate is obliged to pay any accelerated rent, the landlord will be collecting rent from two persons for the greater part of the 3 months' period.

It was also urged that what had taken place on February 21, constituted such an acceptance of the surrender of the demised premises to the landlord as to deprive or estop him from claiming any further rental thereunder. But whatever might be the effect of such an arrangement as constituting a surrender under ordinary circumstances, it cannot have any such effect in a case like this. The trustee was entitled to elect either to retain the demised premises for the unexpired term, or to disclaim the lease under sub-sec. (5) of sec. 52 (53 D.L.R., p. 181). He might elect to do either within one month from the date of the assignment, but failure to elect within the month to retain the lease was equivalent under sub-sec. (5) to a disclaimer. The sub-section requires that an election to retain shall be by notice in writing, but apparently an election during the month to disclaim need not be in writing. What the trustee did in the present case cannot be treated as a formal surrender by the tenant and an acceptance thereof by the landlord as generally understood, but as a disclaimer under sub-sec. (5) and so not in any way affecting the landlord's rights under the lease by virtue of the insolvency. To hold otherwise would be simply creating a trap for the landlord. What else could he do under the circumstances but take the keys from the trustees.

Upon the main objection I cannot see that it is of any consequence what the landlord does with the demised premises after he enters into possession. The so-called accelerated rent is not in reality a rental payable in respect of the three months following the bankruptcy. It is a further sum "equivalent to three months' rent," payable in respect of the demised term by reason of its sudden termination. It is doubtless primarily designed to compensate the landlord for the possible vacancy consequent upon the loss of his tenant. In many cases, this compensation may be wholly inadequate, but his claim is nevertheless limited by the Act. If, in some particular case, he is fortunate enough to get another tenant, is he to be called to account to the trustee for the possible advantage he may have

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gained? If so, it would be necessary to wait until the end of the term, no matter how long it might be, for the new tenant might himself become insolvent. The obligation to pay the accelerated rent arises from the covenant of the lessee and is not referable to any particular occupancy. The Bankruptcy Act limits the amount which the landlord may claim under any such covenant to a sum not exceeding an amount equal to 3 months' rent, and deprives the landlord of any preference in respect thereof. He is obliged under sub-sec. (2) of sec. 52 to rank therefor as an ordinary creditor.

Mr. Hodgson further contended that sub-sec. (4) of sec. 52 (53 D.L.R. p. 184), which provides that any payment of accelerated rent shall be credited to the occupation of the trustee, only applies in cases where the trustee elects to occupy for the balance of the term and not to rental payable in respect of a partial occupancy under sub-sec. (3). That this cannot be the case however is made clear when it is realised that if the trustee elects to retain the premises for the unexpired term and consequently to pay the full rental reserved by the lease, there would be no accelerated rent to pay. The landlord would get his full rental for the full term of the lease. So that it is only in cases of occupancy for part of the term that sub-sec. (4) is applicable.

The appeal from the decision of the trustee will be allowed and Paris will be declared entitled to rank as a general creditor for $525, in respect of the 3 months' accelerated rent, but any dividend payable in respect thereof will be reduced by the amount already paid by the trustee for occupation rent; and Paris will also be entitled to his costs upon this appeal out of the estate.

Appeal allowed.

McKINNON v. COAST TIMBER & TRADING CO. LTD.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin and Galliher, JJ.A. June 7, 1921.

Contracts (§IID—185)—For Services—To Locate and cruise Timber Limits—Interest free from Carrying Charges—Construction.

Under a certain agreement the plaintiff was to locate and cruise certain timber limits for defendants and to receive therefor certain money considerations for salary, expenses and hire of boat, and in addition a three-tenths net interest in each timber limit so cruised and accepted by the defendants, and by a further provision the defendants were to pay the carrying charges for preserving the licenses issued for the limits and the plaintiff was to receive his interest free from these. The Court held

that the defendants' contention that they were to advance these monies and when sales were made the monies advanced were to be deducted before plaintiff received his three-tenth share, could not be upheld and that the plaintiff held a three-tenth interest in the limits freed from all carrying charges.

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APPEAL from the judgment of Murphy, J., in an action on an agreement by which plaintiff was to locate and cruise certain timber limits. Affirmed.

E. C. Mayers, for appellant.

A. D. Taylor, K.C., for respondent.

Macdonald, C.J.A.:—I would dismiss the appeal.

Martin, J.A., would dismiss the appeal.

Galliher, J.A.:—I would dismiss the appeal.

As I interpret the agreement it is shortly this:—

McKinnon is to locate and cruise certain timber limits for defendants and to receive therefor certain money considerations for salary, expenses and hire of boat (which is not disputed) and in addition a 3-10 net interest in all claims so cruised and accepted by the defendants.

The word "net" has given rise to considerable discussion, but as I view it to have left it out entirely would have made no difference.

Now by the further provision in the agreement by which the defendants were to pay what I shall call the carrying charges for preserving the licenses issued for the limits, the plaintiff received his interest free from those. The defendants' contention is that they were to advance these monies and when sales were made these monies advanced were to be deducted before the plaintiff received his 3-10 share.

It is to be noted that the words in the agreement are: "A 3-10th interest in each timber limit."

To adopt defendants' contention you would have to amplify those words to mean in the net proceeds of each timber limit. The words are plain and in my opinion cannot be so extended. The short result is that the plaintiff held a 3-10 interest in the limits freed from any carrying charges.

There were three or four transactions by which certain of the claims were sold and in each transaction (save one) the plaintiff was paid his full 3-10 share of the proceeds without any deductions. In the excepted case a compromise was arrived at as the plaintiff puts it, as an act of grace on his part when less than the 3-10 was accepted by him

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but that compromise was in no way as far as the evidence goes, brought about by any reference to or inclusion in, of any of the carrying charges or charges of any kind.

As the Judge below has put it, the parties have interpreted this clause of the agreement by their own acts.

A question might arise as to whether commissions paid for sales of the limits should not be shared proportionately, of which there is no mention in the agreement, but here again the amounts that have been paid the plaintiff on the several transactions take no account of and make no deductions for commissions, and the point does not seem to me to be properly covered in the pleadings.

Appeal dismissed.

NATIONAL TRUST CO. LTD., v. McLEOD.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. August 5, 1921.

Master and Servant (§IIA—65)—Gravel pit—Inexperienced Workman sent to load Gravel—Duty of Master to Investigate Conditions and take Reasonable Precautions for Safety.

A master who sends an inexperienced servant to dig gravel from a gravel pit is bound to take all reasonable precautions for his safety. It is no defence to say that he did not actually know of any danger, it is his duty to his servant to investigate the condition of the pit and take the necessary precautions before he sends the servant to dig the gravel.

[Smith v. Baker & Sons, [1891] A.C. 325; Marney v. Scott [1899] 1 Q.B. 986, followed.]

APPEAL by defendant from the judgment at the trial awarding damages in an action brought under the Fatal Accidents Act, Sask. Stats. 1920, ch. 29, repealing R.S.S. 1920, ch. 62.

T. A. Lynd, for appellant.

F. F. MacDermid, for respondent.

Haultain, C.J.S.:—I agree with the conclusions arrived at by the trial Judge in this case, and would therefore dismiss this appeal with costs.

The evidence clearly establishes that Wood, a man without any previous experience, was employed by the defendant for the purpose of drawing gravel from a pit over which the defendant had control for that purpose. Work of this sort is accompanied by a certain amount of danger, especially at the time in question and under the conditions existing at that time. No inspection of the gravel pit was made by the defendant, and no man, competent or otherwise, was put in charge of the work. Wood was simply instructed to

draw gravel from the pit. The defendant admits that by removing the surface much of the danger would have been obviated, but says that that would have been too expensive a process. There is no evidence to shew that Wood had any knowledge or notice of the dangerous nature of the work. The defendant was under a legal obligation to Wood to use reasonable care to avoid damage from danger which he knew to exist. The trial Judge has found on the evidence quite properly, in my opinion, that the damage to Wood was the result of lack of that reasonable care on the part of the defendant.

I would therefore dismiss the appeal with costs.

Lamont, J.A., concurs with Turgeon, J.A.

Turgeon, J.A.:—This action is brought under the Fatal Accidents Act, Sask. Stats. 1920, ch. 29. The appellant is and has been for a period of about 12 years a building contractor, and in the course of his business he acquired, from time to time, from the owners of gravel-pits the right to draw gravel from such pits for use in his construction work. Upon the occasion in question in this case, in December, 1919, the appellant had acquired in this manner the privilege of drawing gravel from a pit known as "the Latrice Pit," and he hired the deceased Wood and several others, as teamsters, to proceed to the pit, load their wagons with gravel and fetch the loads back to Saskatoon. The teamsters were instructed on behalf of the appellant to take the gravel from those parts of the pit where it could be had with the least difficulty. No foreman was set over the men, nobody was placed in charge of the pit, no inspection was made, and no precautions of any sort taken to ensure safety. The appellant had not made use of the Latrice pit since 1914, he had no knowledge at all of its condition, and did not go to see it until after the accident which caused the deceased's death. He says that he had never had an accident of this sort happen before in the course of his 12 years' experience, and never thought of the possibility of it happening upon this occasion. On the morning of December 1, 1919, the deceased and the other teamsters set out to draw the first loads from the pit. The deceased appears to have had no experience in digging gravel, but he had dug sand on several occasions. The other teamsters were men of many years' experience, and several of them, who gave evidence, testified that they had no idea of the possibility of danger, and there is no evidence to shew that the de-

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ceased had any knowledge of such danger. The wall of the pit was approximately perpendicular and about 8 feet high. While the men were digging at the bottom of this wall, a split occurred, the wall gave way, and the top fell upon and killed the deceased.

The trial Judge, who tried the case without a jury, found that the work was of a highly dangerous character and that the appellant had failed to take proper measures to ensure the safety of his workmen. He gave judgment against him for the sum of $6,000 and costs.

In my opinion this verdict should not be disturbed. There was certainly evidence from which the trial Judge could find, as he did find, that the work was of a dangerous character. It is true that the appellant and the other teamsters say that they did not consider it dangerous, but they seem to have founded their belief upon the fact that they had never had a similar accident happen to them. Nevertheless the wall of the pit did give way in this case, so, of course, the danger was there, although they did not realise it. In so far as the appellant is concerned, he is not absolved from liability because he had not thought of the possibility of danger. The walls of pits and other excavations do sometimes cave in, especially when they are being dug into (as happened in this case), and, consequently, there always is the possibility of danger. Whether or not that danger is imminent in any particular case, and how, if at all, it can be guarded against, is a matter which can best be determined by an inspection by competent persons. I think it was the appellant's duty here to have the condition of the pit examined and the necessary precautions taken before he sent the deceased to dig the gravel.

According to the evidence of Robert Thompson, a civil engineer and a man of practical experience in the working of gravel pits, the work which the deceased was sent to do in the month of December was, at that particular time of the year, dangerous work. Thompson says in the course of his evidence:—

"Q. Now, do you think this taking out of gravel when it is frozen—what do you say of that? A. I would say it is a dangerous proceeding. Q. You would say it was a dangerous proceeding? A. Yes. Q. I see. A. Yes. Even if there is a number of intelligent men I would say it was a dangerous proceeding. Q. What do you say for a man who

didn't know anything about it? A. I would say extremely dangerous, yes."

He then goes on to describe what safeguards might have been taken to protect the workmen. He says the top soil should have been removed so that the gravel would be free, and that if this top soil was not removed the men should have been warned, at least, of the danger of it falling in upon them. There can be no doubt, in my opinion, as to the duty of an employer in circumstances of this sort. In the case of Smith v. Baker & Sons, [1891] A.C. 325, 60 L.J. (Q.B.) 683, Lord Watson makes the following observation, at p. 353:—

"It does not appear to me to admit of dispute that, at common law, a master who employs a servant in work of a dangerous character is bound to take all reasonable precautions for the workman's safety. The rule has been so often laid down in this House by Lord Cranworth and other noble and learned Lords, that it is needless to quote authorities in support of it."

And it is no defence for the appellant to say that he did not actually know of the danger. He ought to have known, and, in all probability, he would have known if he had taken the trouble to investigate as his duty to his servant required him to do. Marney v. Scott, [1899] 1 Q.B. 986, 68 L.J. (Q.B.) 736.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed.

RE PRIMA SKIRT CO., LTD.; THOMPSON'S CLAIM.

Quebec Superior Court, Panneton, J., February 14, 1921.

Bankruptcy (§IV—39)—Sale of Goods to Insolvent—Goods in Possession of Trustee—Right of Creditor to Rescind Sale and Recover Goods.

Under art. 1543 of the Quebec Civil Code, the sale of movable property is liable to be rescinded within 30 days of the delivery for non-payment of the price, without it being stipulated in the sale, and such right of rescission cannot under any circumstances be destroyed by the insolvency of the debtor, the trustee having no more proprietary rights in the movable than the insolvent. This right is also given under the Bankruptcy Act when the goods are in the possession of the trustee and the petition is served within 30 days from the delivery of the goods to the insolvent.

[See Annotations, Bankruptcy Act, 1920, 53 D.L.R. 135; Bankruptcy Act Amendment Act, 59 D.L.R. 1.]

PETITION by a creditor company to have returned to it

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goods sold and delivered to an insolvent company debtor. Petition granted.

Panneton, J.:—Petitioner the Thompson Lace & Veiling Co., Ltd., claims by their petition, which was afterwards amended, to have returned to it by the trustees Finlayson & Gardiner the goods mentioned in the two invoices annexed to said petition, alleging that they were sold and delivered to the insolvent company debtor, that it has not been paid for, and that the said petition is made within 30 days of the delivery of said goods to the said insolvent and petitioner prays that the sale of said goods be rescinded.

The trustees contest said petition alleging that petitioner is not entitled under the Bankruptcy Act, 1919 (Can.), ch. 36, to have said goods returned to it nor to have the said sale rescinded and further that said goods were not and are not in its possession the same having been cut and made into dresses and disposed of.

It is proved by the witness Mrs. Stein, who knew more about the goods in question than Leibovitch, the manager of the company, that nearly all the goods claimed by petitioner the Thompson Lace & Veiling Co., Ltd., were on the premises of the insolvent company when the said petition was served on the insolvent company and on the trustees Finlayson & Gardiner.

At the time of said service of the goods mentioned in the invoice of November 10, instead of 33 yards of black silk there were only 23 yards, and instead of 10 yards of flouncing at $9.60 there were only 8 yards; that of the goods mentioned in the invoice of November 11, the 3 persons appointed by the Court during the trial of the cause returned that they identified item D2403, 3 yards of trimming item D3159, 5⅛ yards of trimming, item D3406, 1½ yards of trimming, all of which said goods were undisputedly on the premises of the insolvent and in the possession of the trustee of the date of the said service of the petition.

The trustee Gardiner examined as a witness, swears that all the goods, of which he took possession in his quality are still in his possession. By the inventory taken by said trustees of said goods with the assistance of Mrs. Stein, the balance of the invoice of goods of November 11 is sworn to by her to have been there at the date of said inventory and though she is contradicted by Leibovitch, it is evident from his own admission of the limited knowledge of the goods in question that she knew more about them than he knew himself as most of these goods belonged to

her department if not all and that under the circumstance I give more faith to her evidence than to his, not being interested and being no more in the employ of the insolvent.

Petitioners are entitled under sub-sec. 1 of sec. 6 of the Bankruptcy Act to claim said goods which were in the possession of the trustees when the petition was served within the legal delays of 30 days, from the delivery of said goods to the insolvents.

As has been held already in the insolvent case of Rosenzweig (56 D.L.R. 101) that under the provisions of art. 1543 of C.C. (1920), (Que.) a sale of movable property is liable to be rescinded within 30 days of the delivery for non-payment of the price, that said sale with such legal condition attached to it does not render the purchaser absolute owner, and that since the decision in said case the judgment of the Court of Appeal has been reported in the case of La Compagnie Equitable D'Assurance Mutuelle Contre Le Feu v. Boulanger (1919), 29 Que. K.B. 515, which judgment holds that an immovable sold with right of rescission of the sale for non-payment at the price does not confer an absolute title to it to the purchaser.

Without that clause the sale of an immovable cannot be rescinded for non-payment of the price (art. 1536 C.C. (Que.)), but that with regard to the sale of movables the law by said art. 1543 affixes such condition without it being stipulated in the sale, and therefore the title to the movable purchased is incomplete in one case as well as in the other.

Said right of rescission under any circumstances cannot be destroyed by the insolvency of the debtor, the trustees having no more proprietary rights in said movable than the insolvent had, otherwise the insolvency Act would render perfect a deficient title.

Petitioner has proved the principal allegations of its petition.

The Court orders the trustees Finlayson & Gardiner to deliver to petitioner the Thompson Lace & Veiling Co., Ltd., the following goods bought by the insolvent from said petitioner to wit: 23 yards of black silk, 8 yards of flouncing, referred to in the invoice of November 10, 1920, and 3 yards of trimming No. D3229, 6 yards of trimming No. D3223, 3 yards of trimming No. D2403, 9⅛ yards of trimming No. D3139, 3 yards of trimming No. D3136, 17

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yards of trimming No. D3406, 23⅛ yards of trimming No. D7805, 17⅞ yards of trimming No. D2710, 4 11/16 yards of trimming No. D3435, 10 yards of trimming No. D2106, mentioned in the invoice of November 11, 1920, both invoices attached to the petition of said petitioner, with costs.

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British Columbia Court of Appeal, Macdonald, C.J.A., Martin and McPhillips, JJ.A. August 2, 1921.

Automobiles (§IIIB—205)—Motor Vehicles Act, R.S.B.C. 1911, ch. 169—Persons Entrusted with Possession—Violation of Act—Civil Liability of Owner—

The liability imposed by sec. 33 of the Motor Vehicles Act, R.S.B.C. 1911, ch. 169, which provides that "The owner of a motor for which a license is issued .....shall be held responsible for any violation of this Act, or of any regulations provided by order of the Lieutenant-Governor in Council by any person entrusted with possession of such motor" is for penalties for violation of the provisions of the Act and does not include civil responsibility for damages for injuries done by one to another on a public highway.

[Johnson v. Mosher (1919), 50 D.L.R. 321 applied; Ontario legislation and cases distinguished. See Annotation, Law of Motor Vehicles, 39 D.L.R. 4, also Harbour v. Nash, (1921), 60 D.L.R. 232.]

APPEAL by defendant from the judgment of Morrison, J., of December 4, 1920. Reversed.

Wood for appellant; G. Roy Long for respondent.

Macdonald, C.J.A.:—If I am right in my construction of sec. 33 of the Motor Vehicles Act, R.S.B.C. 1911, ch. 169, the appellant must succeed. The section reads:—

"The owner of a motor for which a license is issued under this Act, shall be held responsible for any violation of this Act, or of any regulations provided by Order of the Lieutenant-Governor in Council by any person entrusted with possession of such motor."

The section is the same as one which was in force in Ontario in 1908 and which is still in force with some amendments, except that the Ontario section does not contain the words "by any person entrusted with the possession of such motor."

In Mattei v. Gillies (1908), 16 O.L.R. 558, Boyd, C., delivering the judgment of the Divisional Court said at p. 563, speaking of "responsibility" under the Ontario Statute, 1906, ch. 46, "That would cover responsibility in

regard to fines and penalties imposed by the Act and may it not also civil responsibility for damages?"

He then refers to sec. 14 of the Ontario Act which enacts that "No such fine or imprisonment shall be a bar to recovery of damages by the injured party before a Court of competent jurisdiction," and proceeds, at pp. 563, 564, "The collocation of the sections suggests that a liberal reading is to be given to the 'responsibility' clause—as is indeed the general canon to be observed in the interpretation of the revised and other statutes."

In Smith v. Brenner (1908), 12 O.W.R. 9, Riddell, J., expressed the opinion that the section imposed upon the owner civil liability in damages, even if the driver were not his servant but a friend to whom he had loaned the car. In Verral v. Dominion Automobile Co. (1911), 24 O.L.R. 551, Boyd, C., delivering the judgment of the Divisional Court again construed the said section as imposing civil liability. He referred to an amendment of the Act, which provided that in the event of the employer, of a person driving a motor for hire, being present in the vehicle at the time of the offence, he as well as the driver should be liable to conviction. The Court appears to have considered that this amendment was an aid to the interpretation of the responsibility clause.

In Hirshman v. Beal (1916), 32 D.L.R. 680, 38 O.L.R. 40, the Appellate Division had before them the section as re-enacted in 1914. Meredith, C.J.C.P., said that the interpretation put upon the section had assuredly gone to the widest extent possible. None of the Judges however, questioned the soundness of these interpretations.

In the Province of Alberta the like section received opposite interpretations in the lower Court. Thereafter it was radically amended and the Court of Appeal basing its judgment upon the amended section held that it did not impose civil liability.

As I have already indicated we have in our statute no indiciae of the intention of the Legislature other than is contained in the section itself and is shewn by the absence in the statute of any reference to civil liability.

In Ontario the Courts thought they had such indiciae in the other sections above noticed. In addition thereto there was a section in the Ontario statute which placed the onus of proof on the owner or driver, "when loss or damage" is incurred by any person, shewing that the Ontario Legisla-

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ture intended the Act to embrace a wider field than that covered by our statute.

The responsibility imposed by sec. 33 is for the violation of the Act, not I think, for the consequences of its violation such as civil injury to another. If the construction contended for by the respondent to be the true one, the common law right of the owner is taken away and it is a sound and well-established canon of construction of statutes that such a right is not to be held to be taken away except by express words or necessary intendment. The Legislature was dealing with a subject quite apart from the rights of persons as between themselves for damages for injuries done by one to the other on public highways. The Act was passed, I think, for the protection of the public and for the punishment by fine or imprisonment of those who violate its provisions. There is nothing in the Act from beginning to end to suggest that the rights of individuals in civil actions were to be disturbed. I therefore think that sec. 33 appears in the Act only in furtherance of the general scheme to punish by fine or imprisonment those who offend against its provisions.

I would therefore allow the appeal.

Martin, J.A., would dismiss the appeal.

McPhillips, J.A.:—This appeal involves the construction of the Motor Traffic Regulation Act, R.S.B.C., 1911, ch. 169. That Act has now been superseded by the Motor Vehicles Act, ch. 62 of the Statutes of 1920 (B.C.). However the liability has to be determined under the previous Act, in any case it would not appear that there is any very material change in the legislation.

It has been held in the Province of Ontario that the Motor Vehicles Act, 1909 (Ont.), ch. 81, has imposed a liability beyond that existing at common law in respect of accidents occurring in the operation of motor vehicles on highways. It is clear, however, that all of the Judges who passed upon the point were of the opinion that the legislation was in its terms such that the intention of the Legislature was clearly apparent and that it was the intention to extend the liability beyond that which would obtain at common law. It is to be noted however, that the British Columbia legislation is not in complete uniformity with that of the Province of Ontario, in fact, there are some very striking differences and when this is considered, it cannot be a safe course to follow the decisions founded

upon different though somewhat analogous legislation. In this connection it is instructive to remember what Lord Parmoor said in The Corporation of the City of London v. Associated Newspapers, Ltd., [1915] A.C. 674, at p. 704:— "I do not think that cases decided on other Acts have much bearing on the construction of the Acts or sections on which the present case depends."

It is true that the section upon which it is contended that there is liability, namely, sec. 33, is in its terms similar to sec. 19 of the Ontario Act with the added provisions in the British Columbia section of liability where any person is entrusted with the possession of a motor. It is however, to be observed that there is no section in the British Columbia Act similar to sec. 18 of the Ontario Act, which reads as follows:—

"18. When any loss or damage is incurred or sustained by any person by a motor vehicle, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver of such vehicle."

This reference to "loss or damage" would appear to indicate that in Ontario the scope of the Act was intended to extend beyond merely prosecutions under the Act. On the other hand, in British Columbia, without entering into detail of the matter, the whole legislation imports that the liability is confined to the responsibility imposed by the express terms of the Act itself, and that seems to me to be incontrovertible. By way of illustration I would draw attention to the heading placed over secs. 41 to 46 inclusive (ch. 169, R.S.B.C. 1911), "Information and Evidence," and the sections deal with the description of the offence, the burden of proof, etc., and it is to be observed commences with the words: "In any prosecutions under this Act." It is plain, therefore, that the evidence called for and the burden of proof generally is wholly directed to prosecutions under the Act which would repel any conclusion that there was any intention whatever to impose liability other than the penalties provided for in the Act. Unquestionably the Court should not invade the province of the Legislature and the Court admittedly should not legislate, that being beyond the province of the Court. If the Legislature intended to impose any liability in excess of that existing at common law, it is reasonable that that

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should be found in apt words imposing liability and those apt words are absent in the legislation.

In Mattei v. Gillies (1908), 16 O.L.R. 558, being a judgment in appeal. Boyd, C., in dealing with the question of responsibility, said at p. 563:—"That would cover responsibility in regard to fines and penalties imposed by the Act and may it not also civil responsibility for damages? Section 12 which precedes this section as to responsibility, incorporates the provisions of the Act relating to Travelling on Public Highways, one section of which, sec. 14, is important in this relation. That declares:—'That no such fine or imprisonment shall be a bar to recovery of damages by the injured party before a Court of competent jurisdiction.'"

We have no legislation of a similar character and it may be said that the decisions in the Province of Ontario are based upon a promise that is absent with us.

It would also refer to the case of Johnson v. Mosher (1919), 50 D.L.R. 321, where Harvey, C.J., giving the judgment of the Court, which was to the effect that no responsibility beyond liability for penalties under the Alberta Act exists in that Province, it would appear that theretofore the Ontario decisions had been followed in Alberta. The state of the Statute Law in Alberta differs from that of British Columbia but the ratio decidendi of the decision is analogous to the view which I have expressed in considering this appeal; that is the legislation in the Province of Ontario is so different in character to the legislation that we have in this Province that the authorities so much relied upon by the respondent cannot be of any assistance in the determination of this appeal. It therefore follows that, in my opinion, the British Columbia legislation in its whole purview confines the responsibility to the penalties imposed by the Act. See Atkinson v. Newcastle, etc., Waterworks Co. (1877), 2 Ex. D. 441; Groves v. Wimborne (Lord), [1898] 2 Q.B. 402, at p. 407.

I would therefore allow the appeal.

Appeal allowed.

PERRIN v. VANCOUVER DRIVE-YOURSELF AUTO LIVERY.

British Columbia Court of Appeal, Martin, Galliher, McPhillips and Eberts, JJ.A. August 2, 1921.

Wood, for appellant.

F. T. Congdon K. C., for respondent.

Martin, J.A. would dismiss the appeal.

Galliher, J.A:—Without approving or disapproving of the Ontario and Alberta cases cited to us, and which may be distinguishible under the respective Acts governing them, I am clearly of the opinion that our Act creates no civil liability which did not before exist.

As the defendant clearly is not liable at common law, it follows that the appeal must be allowed.

McPhillips, J.A.:—My reasons for judgment in Boyer v. Moilett, ante p. 136, are determinative of this appeal. It follows therefore that in my opinion, the appeal should be allowed.

Eberts, J.A. would allow the appeal.

Appeal allowed.

RE PROGRESSIVE FARMERS CO., LTD.

Alberta Supreme Court in Bankruptcy, Ives, J., April 25, 1921.

Bankruptcy (§I—4)—Petition in—Receiving Order—Return of Petition—Interim Order and Notice—Assignment by Debtor under the Act—Validity—Bankruptcy Act sec. 4 (6).

Five creditors presented a petition in bankruptcy and asked for the appointment of the Canadian Credit Men's Trust Association Ltd. as trustee and the Judge in Bankruptcy later the same morning made an order appointing the Canadian Credit Men's Trust Association, Ltd., interim receivers of the estate. Later the same day the debtor made an assignment for the general benefit of its creditors, under the Bankruptcy Act to James A. MacKinnon, an authorised trustee. The petition, interim order and notice of hearing were served the same evening shortly after the making of the authorised assignment. Upon the hearing of the petition the Judge in Bankruptcy, following Re Croteau and Clark Co. (1920), 55 D.L.R. 359, held that the petition ought to be granted and made a receiving order appointing the Canadian Credit Men's Trust Ass'n, Ltd., trustees of the estate, and ordered the assignment to James A. MacKinnon withdrawn.

[See Annotations, Bankruptcy Act, 1920, 53 D.L.R. 135; Bankruptcy Act Amendment Act, 1921, 59 D.L.R. 1.]

PETITION by creditors and the trustee under an interim receiving order that a receiving order be granted and their nominee confirmed in its position as trustee.

Petition granted.

The facts of the case are as follows:—

Five creditors of Progressive Farmers' Co. Ltd. namely, Robinson Little & Co. Ltd; Ames, Holden, McCready, Ltd; Campbell, Wilson & Horne, Ltd.; Finnie & Murray, Ltd.; and the A.L. Johnston Shoe Co, Ltd; presented a petition in bankruptcy on April 16, 1921, at 11 o'clock, a. m., and asked for the appointment of the Canadian Credit Men's Trust Ass'n, Ltd. as trustees. At 11.30 the same morning

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Hyndman J., Judge in Bankruptcy, made an order appointing the Canadian Credit Men's Trust Ass'n, Ltd., interim receivers of the estate. Later in the same day, the debtor made an assignment for the general benefit of its creditors, under the Bankruptcy Act, 1919 (Can.), ch. 36 to James A. MacKinnon, an authorised trustee.

The petition, interim order and notice of hearing returnable on April 25, 1921, were served the same evening, shortly after the making of the authorised assignment. Both trustees immediately claimed possession of the estate, but the sheriff, who had already seized certain assets of the debtor, namely, the contents of certain mercantile stores, refused to give possession to either until April 20, 1921, on which date he gave up possession to the Canadian Credit Men's Trust Ass'n, Ltd., under the interim order, and this trustee remained in possession until the hearing.

On the hearing of the petition, counsel for the trustee under the assignment took a preliminary objection, and claimed that under sec. 9 a debtor could make an assignment at any time before the making of a receiving order, and that, as no receiving order had been made, the assignment was good and valid, and the trustee thereunder ought not to be ousted. In this he was supported by counsel for the debtor, the Royal Bank of Canada, and the Holden National Co., creditors. It was urged on behalf of the petitioning creditors and the trustee under the interim receiving order that a receiving order ought to be granted as asked by the petitioning creditors and their nominee confirmed in its position as trustee, as the trustee under the assignment did not shew any grounds under sec. 4, (6) as to why the prayer in the petition ought not to be granted, and further, relying on the judgment of Orde, J. in Re Croteau and Clark Co. (1920), 55 D.L.R. 413, 48 O.L.R. 359, the provisions of sec. 9 of the Act did not justify any such practice as attempted by the debtor in making the assignment at the time it did.

G. H. Van Allen and W. E. Simpson, for the petitioning and nine other creditors, and for the Canadian Credit Men's Trust Ass'n.

J. E. Wallbridge, K.C., for James A. MacKinnon.

Alex. Stuart, K.C., for the Holden National Co.

J. A. McCaffry, for the Royal Bank of Canada.

A. H. Barnard, for the debtor.

Ives, J. (Acting Judge in bankruptcy) held, following

Re Croteau and Clark Co., Ltd., 55 D.L.R. 413, 48 O.L.R. 359, that the petition ought to be granted, and thereupon made a receiving order appointing the Canadian Credit Men's Trust Ass'n, Ltd., trustees of the estate, and ordered the assignment to James A. MacKinnon to be withdrawn.

Petition granted.

USHER v. BARNES.

New Brunswick Supreme Court, Chancery Division, Hazen, C.J. October 11, 1921.

Gift (§I—7)—Money Deposited in Bank—Joint Account of Husband and Wife—Withdrawal by Third Person on Authority of Wife—Intention of Parties—Rights and Liabilities.

Where moneys have been deposited in a bank by a person to the joint account of himself and another, the question of who is entitled to the money as between the parties is not governed by any general principle applicable to questions of this kind, but in every case it is a question of intention to be gathered from the special facts and circumstances and the family relations or otherwise of the parties, the same as in cases where it is sought to decide who has the right to money so deposited after the death of one of the parties in whose name the joint deposit was made.

[Shortill v. Grannan (1920), 55 D.L.R. 416, 47 N.B.R. 463, applied.]

ACTION by husband to recover certain moneys deposited by him to the joint account of himself and his wife, and which were withdrawn from the bank by a third party on authority of the wife. Judgment for plaintiff.

D. Mullin, K.C., for plaintiff, J. A. Barry, for defendant.

Hazen, C.J.:—On March 20, 1913, the plaintiff opened an account in the savings department of the bank of Nova Scotia at St. John, and deposited therein the sum of $450 to the credit of himself and his wife Mary Jane Usher, payable to either or the survivor. On June 8, 1920, when the sum of $515.85 stood to the credit of the account, interest in the meantime having been added and some small amounts having been drawn by the plaintiff, Mary Jane Usher, by means of her niece, the defendant, withdrew the whole amount, and the defendant took possession of the same. The plaintiff claims a declaration that the sum so on deposit on June 8, 1920, was and is his property, and a decree ordering and directing the defendant to pay over to him the said sum of $515.85 with interest thereon, together with the costs of this action. The plaintiff also alleges in his statement of claim that the defendant induced his wife by means of misrepresentation and fraud to sign an auth-

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ority to her to withdraw the money from the bank, and that his wife was under the misapprehension that she was only giving authority to her niece, the defendant to withdraw a small amount.

I may say at the outset that from the evidence before me, I cannot come to the conclusion that the defendant acted fraudulently or that she misrepresented the matter in any way to Mrs. Usher, and as a matter of fact it seems to me she acted throughout, honestly and in good faith. After the plaintiff had deposited the money on March 20, 1913, to the joint credit of himself or wife, payable to either or the survivor he took the deposit book home with him and gave it to his wife, and it was kept with other bank-books which belonged to him, and he and his wife had access to it at any time.

There are many cases, a number in our own Province, in which claims have arisen with regard to the right of survivorship when moneys have been deposited in joint account under circumstances similar to those involved in the present case, but I can find no case in which the question has arisen before the death of one of the parties to whose credit the moneys were so deposited and in which the question of survivorship does not arise. It seems to me, however that in this case the principles which are involved are very largely the same as those that would be involved in a case where it is sought to decide who has the right to the money after the death of one of the parties in whose name the joint deposit has been made, and I would point out that in the case of Shortill v. Grannan (1920), 55 D.L.R. 416, 47 N.B.R. 463, about a year ago, in the course of judgment I quoted at p. 419, the words of Davies, C.J. in the Daly Case (1907), 39 Can. S.C.R. 122 as follows:—

"A large number of cases, Irish and American were cited at Bar, to which I have referred. There is no general governing principle applicable to questions of the kind I am now considering. In every case it is a question of intention to be gathered from the special facts and circumstances and the family relations or otherwise of the parties."

I think that that principle applies in this case, and that it is my duty, speaking as a Judge of first instance, to determine what the intention of the plaintiff was at the time when he made this deposit in the bank, and that I must come to a conclusion having regard to the special facts and circumstances of the present case and the relations of the parties to one another.

Before discussing the reasons given by the plaintiff for making the deposit in the way he did, I may say it was claimed by him on the trial that the money which he deposited was his own, and that he had received it under the will of Anne Leckie, an aunt of his wife. On the other hand it is clear that Mrs. Usher believed that the money which was received from the sale of a piece of property was hers, and that she had a right to it irrespective of her husband. From the documentary evidence it appears that one Gertrude Ferson by her last will and testament devised unto Anne Leckie and her sister Eliza Dunlop certain lands and premises situate in the city of St. John, and Anne Leckie by her last will and testament which was dated April 19, 1890, devised her half of this property to her three nieces, Mary Jane Usher the defendant, Sarah Anne Miller and Eliza Clark, in equal shares. It will be seen, therefore, that the plaintiff took nothing under this will, although in his evidence he stoutly maintained that it was under this will that he was entitled to the property, the proceeds of which constituted the deposit moneys. Had this will stood alone, the contention of Mrs. Usher to the effect that the money that was deposited in the bank was hers would have been well made, but from the documents put in evidence it appeared that before the death of Anne Leckie and before her will became effective she had undertaken to convey to George H. Usher and Magnus S. Miller all her right and interest in and to the leasehold property devised to her by Gertrude Ferson, and this was in consideration of Usher and Miller paying to Eliza Dunlop the moneys for her interest in the leasehold land and premises, and paying off the expenses incurred by Anne Leckie in a certain partition suit begun and partially carried on between her and Eliza Dunlop, and providing for her during her lifetime a home where she might reside free of rent, and agreeing that she should be properly cared for during her natural life, and at her death be buried in a respectable and proper manner. There were also further considerations, one of which was that during Anne Leckie's lifetime they would pay over to her one-half of the net profits which might accrue from the house in which she then resided, with provision for the payment of the insurance moneys on the house in case of fire. It appears to me, therefore, that Mrs. Usher took nothing under the will of her aunt, and that the property which her aunt had intended to will to her and her sisters had become

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the property of the plaintiff and Magnus Miller before her aunt's death and when they sold it the plaintiff received one-half of the purchase money and placed it to the joint account of himself and his wife, as before stated. The claim set up on behalf of the defendant that the money did not belong to Usher but to his wife, and that for that reason she had a right to dispose of it as she saw fit must therefore fail.

The plaintiff gave several reasons for depositing the money to the joint account of himself and his wife. During his evidence he said—"I put my wife's name and my own name because if anything would happen to me it would be my wife's." This looks very much like an attempt at a testamentary disposition. He says he said nothing to his wife about opening the account, and that the idea of opening it in the joint names was his own altogether. When he took the bank-book home he says he gave it to his wife, and in answer to the question "Did you say anything to her" he said "I did, I told her there was some money for you and I and you take charge of the bank-book in case if anybody —— Q. Just what you said? A. That is about what I said to her. She put it away and it has been there for eight years."

During the years that intervened he drew a few small sums from time to time and added some small amounts to the account, but his wife drew nothing at all and apparently did not interfere with regard to it.

At another point in his evidence he says that it was his money and he only gave the money to his wife for protection, and that he was saving the money for a rainy day, for his wife. In answer to a direct question as to what object he had in opening the account in the joint names of himself and wife, he said one was that he thought it would be safer because if anyone asked him to lend them money it would be in his wife's and his own name and he could say he did not have it, and as a protection for his wife, and in cross-examination in answer to the question:—"Q. You say if anything happened to you it would be hers? A. Well certainly not while I was living I didn't expect that. I was going to use it just as well as her."

The defendant says that during the greater part of her life she had done considerable business for her aunt, and this had been going on for years, and that from the time she was a school-girl she had spent a great deal of time at her

aunt's house and was in the habit of visiting her frequently, almost daily. She says she knew nothing about the money being in the bank until the plaintiff told her about it. He gave her this information while she was sitting in his kitchen, and said he deposited the money in the bank out of the sale of the property for Mrs. Usher, and he asked the defendant if Mrs. Usher had not told her about it. This the plaintiff denies. Subsequent to that one afternoon when she went down to see her aunt as usual, the latter got up off the lounge where she was lying down, went out into her kitchen, brought down a satchel from which she took the bank book, and inside the book was a piece of paper with her name written on it. This piece of paper was produced in evidence and is simply the signature "Mary Jane Usher." Having given her the bank book and this piece of paper she told the defendant to go to the Bank of Nova Scotia. She went there, and presented the paper to the clerk at the bank, who thereupon made out a form which defendant took back to her aunt, who signed it, and she thereupon went to the bank and drew the money. She states that she did not induce her aunt to do this, that it was not done as a result of any advice she gave her, and that she never mentioned money matters to her in any shape or form at any time, and that her aunt told her she wanted to have the money put in the bank in her (defendant's) name. She further says her aunt told her she (defendant) could withdraw any of that money at any time, and that she wished her to buy her any clothes or anything she would need out of it, and that she could hold the money and any time that she, Mrs. Usher, wanted a home with her, supposing her husband died, she would come to her for a home. The defendant further swore that she did not understand that Mrs. Usher was retaining an interest in the money, but what she understood was that if she wanted any little money at any time from her she was to get it, it being left to her (defendant's) discretion whether she was to give it or not. The defendant subsequently withdrew the money from the bank, and has spent $50 of the amount for Mrs. Usher's benefit, and at her request, and another $50 which she paid to her counsel on being threatened with suit, so that the amount which she now had in hand is approximately $350.

Mrs. Usher, wife of the plaintiff, confirmed in a very large measure the evidence given by Mrs. Barnes. She says she took her bank book out of her drawer, gave it to

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the defendant and told her to draw out the money and to use it as she thought best, adding "as I could trust her faithfully." She was asked where the money came from, and said that her husband had given it to her, that he gave her the book and said that was hers; and she further adds that it was her share of the property that was sold, and that she had asked him for her share, and throughout her evidence it was clear that she was under the belief that one-half the property that was sold by her husband and Miller was her own. She said that she never had any conversation with Mrs. Barnes about the money before she gave her instructions to withdraw it from the bank and put it in her own name; that what she did she did of her own accord and she told Mrs. Barnes to draw it out, and she says the bank book was given to her by her husband some days after she had asked for her share of the money, meaning thereby her share of the money obtained from the sale of the leasehold property that Usher and Miller had acquired from Mrs. Leckie.

Having regard to this evidence and to all the circumstances of the case, I cannot come to the conclusion that when the plaintiff handed his wife the bank book it operated a gift inter vivos of the money on deposit in the bank, and I think that he intended to create a joint tenancy, with a right of survivorship, and had the question as to the ownership of money arisen after his death, I am disposed to think that the facts would have been conclusive in favour of his wife having the right to it.

In the case of Paul Daly (1907), 39 Can. S.C.R. 122, before referred to, Maclennan, J., referring to the contention that the form of the receipts given for the deposits made the father and his daughter joint tenants of the money, so that at the father's death the daughter became entitled to the whole as survivor, said, at pp. 148, 149:—

"I do not see how that can be so. In a case of joint tenancy neither party is exclusive owner of the whole. Neither can appropriate the whole to himself. Here, however, the father did not lose his right to take the whole by authorising his daughter also to draw. He could still draw the whole whenever he pleased up to the day of his death and if he did it would all be his own money. Could his daughter have done that? I do not think so. She could as against the bank have drawn it all and on payment to her would have discharged the bank, but the money would still

have been the father's money in her hands—she would have been accountable to him for it all. If I authorise another to draw a cheque on my bank account that is not necessarily a prima facie gift. My mandatory would be responsible to me for so much money unless I gave it to him expressly as a gift. Here there are no words at all of gift used by the father. He gave her nothing but authority to draw or to receive his money, expressly reserving and retaining his own right. It is no more than if he wrote to the bank saying, I authorise you to honour my daughter's cheques on my deposit."

In this case I might point out that Daly had deposited money in a bank in the joint names of himself and daughter with power in either to draw against it, and that the daughter never exercised that power, and it was held that the money in the bank remained the property of Daly and did not pass to the daughter at his death. If that is the case a fortiori the money in this case represented by the bank book did not pass absolutely to Mrs. Usher, and while she could as against the bank have drawn it all, I think the money still remained in the control of the defendant, [plaintiff]. I cannot for one moment believe, having regard to all the facts and circumstances of the case, that Usher ever intended or contemplated that his wife would draw the whole of this money at any one time. I think he had in mind the fact that if anything happened to him it would then be her property, and that from time to time she might draw upon it for small necessaries such as she might require, but that she should divest herself and himself of it at one stroke I am quite satisfied never entered into his thoughts at all.

On the other hand, Mrs. Barnes, as I said before, I am satisfied acted in perfect good faith, and was not attempting by fraud or misrepresentation to deprive the plaintiff or his wife of the money, but honestly believing that it belonged to Mrs. Usher and she had a right to do what she pleased with it, she felt she was simply carrying out her aunt's wishes in transferring the money at her aunt's request to her own name in the bank.

I am of opinion that the sums that have been drawn since the change in the account was made, for Mrs. Usher's benefit, amounting to the sum of about $50, should not be charged against the defendant. Neither do I think that the amount that she paid for legal expenses should be charged against her, for Usher by his own act in placing the moneys

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as he did in the bank and handing the book to his wife, no doubt left the impression on her mind, she at the same time having the erroneous idea that the money was her own, that she had a right to do with it as she pleased, and no doubt Mrs. Barnes was of the same opinion. I do not think, therefore, for having carried out her aunt's wishes Mrs. Barnes should now be compelled to account for the $50 which she paid to her lawyer after the proceedings had been commenced.

I am not certain of the actual amount which remains after deducting these sums. It is approximately $350, and this sum of money should be paid by the defendant to the plaintiff. Counsel can no doubt agree as to the amount, but if otherwise I will hear further evidence on the point. As the suit is virtually between plaintiff and his wife, there will be no costs of this action.

Judgment accordingly.

JOHNSTON AND DUNPHY v. PRITCHARD.

New Brunswick Supreme Court, Chancery Division, Hazen, C.J. September 12, 1921.

Specific Performance (§IA.—12)—Sale of Land—Agreement—Material Term of Agreement not Carried Out—Inability to Enforce.

Where a material term of a contract to purchase is left to future agreement or where a material term is left to the decision of a third party specific performance of the contract is not enforceable until the term has been agreed to, or while the decision is lacking.

[Tillett v. Charing Cross Bridge Co. (1859), 26 Beav. 419, 53 E.R. 959; Earl of Darnley v. London, Chatham & Dover R. Co. (1865), 3 DeG. J. & Sm. 24, 46 E.R. 547, (1867), L.R. 2 H.L. 43, followed.]

ACTION for specific performance of an agreement for the sale of land. Action dismissed.

S. A. M. Skinner, for plaintiff.

B. L. Gerow, for defendant.

Hazen, C.J.:—This was an action for specific performance of an agreement for the sale of property situated on Waterloo St. in the city of St. John, and entered into on January 26, last, between the plaintiffs and defendant; the agreement on behalf of the vendor, who in this case was the defendant, being signed by W. E. A. Lawton, her agent. On April 6, 1918, the defendant signed what is called a sale contract, a card whereby she authorised W. E. A. Lawton, a real estate broker in the city of St.

John, to negotiate a sale of property described on the front of the card, and agreed to pay him a commission of 2½% on $8,000, or 5% on $8,500, provided he sold or furnished her, either directly or indirectly, the name of a party to whom she might sell, the commission to be due and payable when the sale was made. Language of this import was printed upon the card, and then these words were added in typewriting: "This authority to remain in force for five months and continue in force until fifteen days' notice of its cancellation."

The defendant testified that those words in typewriting were not upon the card when she signed it, and that the understanding between herself and Lawton was that she gave him three months in which to sell the house, and that that was the end of the agreement. On the other hand Lawton swore that these words were there at the time Mrs. Pritchard signed and produced contracts with other parties on similar forms where similar words had been added before the contract had been signed, and said that this was his practice. No sale was effected by Lawton within 5 months, nor for a long time afterwards, and on March 25, 1920, an arrangement was come to, whereby the sale price was increased to $10,000, a memorandum to that effect being placed on the card by Lawton. In November, 1920, Lawton endeavoured to sell the property to two men named Scott, and at that time it appears by his evidence that the defendant was asking $10,500. Later on, the plaintiffs in this suit opened negotiations with Lawton for the purchase of the property, and in company with him went to the house, and were shewn through it by the defendant. In reply to a question if anything was said about the price at that time, Lawton says he told the defendant he was asking $11,000 and that she did not make any reply but seemed to be satisfied. A few days afterwards the plaintiffs made an offer of $10,750 and gave him $100 on account, whereupon he went down to the defendant's house and read her the offer and he told her that they meant business and were willing to take the place at the price named. She objected and said she would not take that amount, that she wanted $11,000. Then she said she ought to get $12,000 and Lawton says in his evidence, "So she wouldn't hear to it at all," and the only thing he could do was to report back to the purchasers that she would not accept the price. The matter went along for

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some time, and Mrs. Pritchard said she would like to get $12,000. According to Lawton's statement she did not seem to know what her mind was. He tried to convince her that people were not building houses at the high cost of building, and that that did not put a value of that price on her property, but she said she would like to get the $12,000 and he left her to think it over, and made an appointment for the next evening, and when he called upon her a few days afterwards she said she would not take the $10,750, that she would like to get the $12,000, and she finally decided if she got $11,000 or anything over $11,000 she would be willing for the sale to be completed. After that the plaintiffs offered $11,600 to Mr. Lawton and he closed the sale. This amount, after paying his commission, would have left the plaintiff $11,000 or thereabouts. When Lawton told the defendant he had closed the sale, to use again his own language, "She went up in the air" and said she wouldn't take less than $12,000 and ought to have $13,000. He told her he had closed the sale and had been paid $600 on account, and offered her the money. She refused to take it—would not take anything.

As I said, the defendant denies absolutely that the agreement she originally entered into with Lawton for the sale of the property was to continue for more than 3 months. She further says that she never authorised Lawton to sell the property for $11,000 and absolutely contradicts his statements in that regard. She said when Lawton informed her that he had sold the house for $10,750 she told him she would not sell it at that, and that Lawton instead of going away and keeping away kept running after her about 3 times a day trying to induce her to sell. After that she talked to Dunphy, one of the plaintiffs, 2 or 3 times, and he made out several papers and gave her one paper and said, "you look over that." He said "I will give you $10,900 and pay Mr. Lawton his commission." She said she wanted $12,000, and said to him, "You pay $12,000 and you can have the house," which Dunphy declined to do, and when Lawton came down with the agreement for sale which he had signed, defendant asked who signed her name, and on his replying that he did she asked "Who told you to do it," to which he replied that he did so as her agent, and she said "You are no agent of mine," and said she would not sell the house. Asked the question—"Before this agreement was signed or after the agreement was

signed did you tell Mr. Lawton about acting for you as agent that you wished him to continue to act or cease acting"—she replied, "No I didn't tell him because the three months was over. That was all there was to it. I wanted him to rent my flat and of course if he had got the price I wanted to and not had so much talk about it, that would have been all right. I told Mr. Dunphy I wanted $12,000 for it."

Q. You have heard Mr. Dunphy's statement that you said if you obtained $11,000—is that what you said? A. "No."

In answer to a further question, she says she told Dunphy that she would take $12,000. It will be seen therefore from this evidence that there is an absolute conflict of statement regarding the facts between Lawton and the defendant. The only other evidence bearing on the question of price is that of Dunphy, who says that on one occasion Mrs. Pritchard told him if she had $11,000 for herself she would feel happy. This statement Mrs. Pritchard denies.

It will be seen that the evidence is most conflicting, but I do not feel it necessary to give any decision on the points in dispute with regard to the length of time the authorisation to Lawton was to continue or his authority to sign an agreement to sell for $11,600 as the case, in my opinion, can be and ought to be disposed of on other grounds. It was contended by counsel for the defendant that specific performance should not be decreed as no tender of the purchase money had been made to Mrs. Pritchard, and no deed had been prepared and submitted to her for her signature. It is usual in cases for specific performance for the sale of property for the purchaser, in order to obtain what is purchased, to tender the amount of purchase money, and I think it is the almost universal practice with conveyancers in this Province also to prepare and present a deed of the property purchased, for signature. There are authorities however, to the effect that a tender of payment by a purchaser in order to obtain an article purchased is unnecessary where the vendor admits the tender would be fruitless, (See Jackson v. Jacob (1837), 3 Bing. (N.C.) 869, 132 E.R. 645,) and that the tender of a deed of land to be given by the vendee in exchange as part of the purchase money and of the balance of the adjustment money is waived by the vendor's unwarranted notice to the vendee

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that the vendor considered the contract off, and that the purchaser's action for specific performance is not barred by the failure to make the tender. (See Cudney v. Gives (1890), 20 O.R. 500; Norman v. McMurray (1913), 10 D.L.R., 757), and the American authorities to the effect that where a party has flatly refused on his part to carry out the contract a tender by the other party of the performance is not necessary before bringing a suit for specific performance. I am not deciding what the law is in this Province with respect to the matter, but in view of the authorities I have mentioned and of the circumstances of this case, I do not intend to decide the point that the plaintiffs cannot recover because there was no tender of purchase money to the defendant or of a deed of the property to be executed by her. The agreement, however, which was signed on January 26, by the plaintiffs and by the defendant, Ada B. Pritchard, by her agent, Lawton, provided that the deed was to be delivered any time or date between that date and May 1, the date and place to be named by Lawton. It is an established principle of law regarding specific performance that where a material term of a contract is left to future agreement the contract is not enforceable until that term has been agreed to, (See May v. Thompson (1882), 20 Ch. D. 705 (C.A.), and where a material term is left to the decision of a third party specific performance of the contract is not granted while such decision is lacking. (Tillett v. Charing Cross Bridge Co., (1859), 26 Beav. 419; 53 E.R. 959; The Earl of Darnley v. London, Chatham & Dover R. Co., (1865), 3 DeG., J. & Sm. 24, 46 E.R. 547, (1867), L.R. 2 H.L. 43.) In this case there is no evidence whatever of any date and place between the date of the agreement and May 1, or any other date or place having been named by Lawton for the delivery of the deed. There was some evidence of a document in writing having been sent by registered letter, but no evidence of its contents, and I would be inclined to think, judging from the evidence of Lawton himself, that the document that was sent to Mrs. Pritchard after the agreement for sale was entered into between himself and the plaintiffs was a copy of that agreement. The only notice in addition to the copy of the agreement which Lawton says he sent her was a notice to come to his office and get the money and settle up, as the purchaser was anxious and wanted to get possession of two flats He says he sent the notice

by his son in one of his envelopes, and that Mrs. Pritchard refused to accept it, and that then he registered it to her, though on this point his evidence is by no means clear as to the document that was registered. No copy of the notice which was sent by the registered letter or by Lawton's son which she refused to accept was put in evidence, and there was no evidence of its contents further than his statement which I have just quoted. This certainly cannot be construed as a fixing of a time and place by Lawton for the delivery of the deed between the dates mentioned. As a material term was left to the decision of Lawton, and as evidence of any such decision is lacking, in my opinion specific performance of the contract cannot be granted. The plaintiff's claim must therefore be refused with costs.

Action dismissed.

B.C.

C.A.

WESTERN IMPERIAL CO. v. NICOLA LAND CO.

WESTERN IMPERIAL CO. v. NICOLA LAND CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ. A. March 1, 1921.

Mortgage § (VIIC—156)—Order Nisi for Foreclosure—Time for Redemption Fixed at Request of Mortgagor—Application by same Party to Shorten Period.

Where by an order nisi for foreclosure the Judge has fixed a lengthy period for redemption, at the request of and for the advantage of the mortgagor, the period of redemption will not afterwards be shortened on the application of the parties at whose request it was originally fixed.

Rule 833 does not apply to a case where it is a term of an order nisi and not of the registrar's certificate which is sought to be varied.

APPEAL by the defendant from the judgment of Morrison, J., refusing to vary the Registrar's report by reducing the period of redemption. Affirmed, the Court being equally divided.

A. Bull, for appellant.

C. W. Craig, K.C., for respondent.

Macdonald, C.J.A.:—By the order nisi for foreclosure, the trial Judge fixed the period of redemption at one year, that is to say, the Registrar was directed to take the accounts and ascertain the amount which would be owing by the mortgagors at the end of 12 months from the date of his certificate. This lengthy period was fixed for the advantage of the mortgagors, as appears from the observations of the Court and counsel at the time. The Judge said:—"Under the circumstances, I would be inclined to

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give more" (than 6 months). Mr. Bull, counsel for appellants:—"I was going to ask that." Whereupon the period of one year was named in the order as aforesaid.

The mortgagors sold the property shortly after the Registrar's report was made, thereby obtaining the moneys for redemption. They then applied to a Judge in Chambers to vary the Registrar's report by reducing the period of redemption and from the refusal of that application this appeal was taken.

The cases to which we were referred, with the exception of Hill v. Rowlands, [1897] 2 Ch. 361, are not in point, and the case just mentioned is an authority against the appellants. What is sought by the appellant is to have the order of the Supreme Court which was duly drawn up and entered, varied in Chambers. That cannot be done either in Chambers or in Court, unless the power to do so is conferred by R. 833, and in my opinion, it is not conferred by that rule. I am satisfied that that rule does not apply to a case like the present one, where it is a term of the order nisi and not of the Registrar's certificate which is sought to be varied. Moreover, the application is made on behalf of parties at whose request the period of one year was fixed by the Court itself. In these circumstances, apart from any other, I think the refusal complained of was right, and that this appeal should, therefore, be dismissed.

Martin, J.A., would allow the appeal.

Galliher, J.A.:—I agree with the Chief Justice.

McPhillips, J.A., would allow the appeal.

Appeal dismissed by an equally divided Court.

NICHOLSON v. MUSTARD.*

Alberta Supreme Court, Simmons, J., April 22, 1921.

Master and Servant (§IA.—4a)—Master Employing Servant as Captain of Ship on Prospecting Trip—Servant Locating and Staking Mineral Claims for Himself—Right of Master to Claims Located.

In the absence of any agreement between the plaintiff and the defendant that the defendant would locate and stake mineral claims for the plaintiff, during a prospecting trip for which he was hired as ship's captain, the Court held that the plaintiff had no right to claims staked by the defendant for himself during the trip, the fact the defendant was plaintiff's employee did not make him the agent or trustee of the plaintiff in regard to any work that he performed during the trip.

ACTION on an alleged oral contract whereby the defendant was to become an employee of the plaintiff at a

* This decision was reversed, December 19, 1921.

fixed salary and was required to assist in prospecting for petroleum, and whereby the defendant agreed to record the locations with the proper mining recorder and to transfer the claims so located to the plaintiff. Action dismissed.

Frank Ford, K.C., and C. F. Newell, K.C., for plaintiff.

J. F. Lymburn, for defendant.

Simmons, J.:—The plaintiff claims that on or about May 1, 1920, he was organising a party to go into the North West Territories on his behalf to prospect for oil and natural gas, and that the defendant entered into an oral agreement with the plaintiff whereby the defendant became an employee of the plaintiff at a fixed salary, and that the said employment required the defendant to assist in the prospecting tour for petroleum and natural gas and mineral claims and locations in the vicinity of Great Slave Lake, in the North West Territories of Canada; and further that the defendant agreed to record the locations with the proper mining recorder and to transfer the claims so located to the plaintiff.

It is admitted that the defendant staked three claims in the vicinity of Great Slave Lake and has recorded the same with the mining recorder, and the defendant has paid the recording fees for same.

It is also admitted that the plaintiff has paid the defendant the wages stipulated for in regard to the employment.

The defendant denies that there was any agreement made by him to locate mineral claims or a claim on behalf of the plaintiff, and denies that he agreed to assign to the plaintiff any claim that he might locate.

The defendant admits an oral contract entered into between the defendant and the plaintiff, and alleges that the said oral contract was solely a hiring of the defendant as a ship's captain or skipper for said expedition. The oral contract alleged by the plaintiff is said to have been made when the plaintiff and his agent W. J. George had two meetings with the defendant, one at a motor boat house in Edmonton and the other at the Royal George Hotel. The defendant admits that both of the said meetings took place; and the defendant alleges that an offer was made to him at the motor boat house to enter into the employment of the plaintiff as a ship's captain, which offer was renewed at the Royal George Hotel meeting and accepted by him as a hiring at the rate of $2,200 per year during the term of said expedition.

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There is a direct conflict of evidence between the plaintiff and his agent George and the defendant in regard to the terms of the oral contract, and after hearing them and hearing other witnesses called on each side, I have no difficulty in arriving at the conclusion that the defendant's version of said contract is substantially correct and in the result I find there was no oral agreement to either stake claims or assign the same; nor was there any communication made to the defendant when the said contract was entered into which would give him any intimation that staking of claims, or recording them or assigning them would be a part of his duties. It was represented to him by the plaintiff and by his agent George that the services of a certificated captain were very necessary for the expedition and that was the reason they wished him to go.

The plaintiff organised two parties. One party left via Fort McMurray in charge of George, and the other party went via Peace River in charge of the plaintiff, and these parties subsequently met at Fort Smith and joined into one party. When the defendant arrived at Fort McMurray he learned that Captain Williscroft was also employed by the plaintiff on the same expedition. He was informed however by George that a second boat would travel with the expedition from Smith to Slave River, and on that understanding he went from Fort McMurray on the "Lily of the Lake" commanded by Captain Williscroft. When the parties arrived at Smith the defendant was then informed that the "Lily of the Lake" was the only boat which would carry the expedition and that Captain Williscroft would be in command. At that time the defendant raised the question of his duty, and it was intimated to him that the plaintiff wished him to come along with the party, but no suggestion was made to him that his duties were other than those which were arranged for in Edmonton.

When the party arrived at Windy Point, on Slave Lake, it was again divided and 4 or 5 of the party, in charge of a surveyor named Elliott, were put ashore there. Among this party was defendant. The "Lily of the Lake" then proceeded to Fort Norman with the rest of the party. Elliott proceeded to survey claims, and all of the party who were put ashore there excepting the defendant had entered into a written agreement with the plaintiff to locate claims in his behalf, which apparently they all did. The defendant then discussed with Elliott the matter of

staking a claim for himself, and Elliott agreed to assist him by making the surveys, and this was done and 3 claims staked by the defendant which are the subject matter of this action.

The party at Windy Point, on Slave Lake, remained there for some 2 weeks longer until the return of the "Lily of the Lake" from Fort Norman; and the party joined again and returned.

A good deal of evidence was given in regard to certain dealings of the plaintiff and defendant subsequent to their return, but I do not find anything either said or done by the defendant inconsistent with his position which he now claims, viz., that he is the sole owner of the petroleum claims which he staked; therefore, I do not think it necessary to discuss them other than this, that he did tell the plaintiff that he would give him the first opportunity of purchasing them or otherwise acquiring an interest in his claims, and this offer was not accepted by the plaintiff.

In regard to certain conversations between the defendant and M. M. Stewart, a brother-in-law of the plaintiff, I am satisfied that the defendant's version of the same is substantially correct.

The plaintiff has based his claim upon an alleged oral contract which I have found never existed. After the trial, however, it was suggested that since the defendant was the plaintiff's employee that he became the agent or trustee of the plaintiff in regard to any work that he performed during the trip. No such question was raised on the pleadings, but since it was raised upon the argument I think I might deal with it.

While the defendant was at Windy Point, on Slave Lake, the plaintiff and his party were absent some 4 weeks. It took about 13 days for the party at Windy Point to complete the surveying and locating of the claims, of all of them except the defendant. They had no work or employment during the remainder of the time; they were waiting for the return of the boat the "Lily of the Lake" to transport them homeward. The defendant in no way failed to perform the duties arising out of his employment. During his sojourn at Windy Point, on Slave Lake, there was a period of time in which there was nothing for him to do except the light duties of assisting in cooking and other duties involved in keeping camp. All the surveying which was to be done on behalf of the plaintiff had been done.

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There was never anything said or done at the time of his entering into the employment of the plaintiff implying that it would be a breach of his employment for him to stake a claim when he had idle time upon his hands, and I am of opinion that the plaintiff could not lay any claim in damages. Nothing was done to prejudice the plaintiff in any way. The acts of the plaintiff's employee Elliott were voluntary on his part. He was not called as a witness, and if the plaintiff has any claim at all, it must arise out of the fact that Elliott, an employee of the plaintiff, assisted the defendant in locating the claims. There is no evidence before me of the actual contract between the plaintiff and Elliott further than that he was an employee and a surveyor whose duty it was to assist in locating claims and also to personally locate a claim.

In the result, then, I dismiss the plaintiff's action, with costs.

Action dismissed.

ELKOWECH v. ELKOWECH, ET AL.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. May 20, 1921.

Jury (§IA.—1)—Action against Co-respondent in Divorce Action—Right to Trial by Jury—Divorce and Matrimonial Causes Act.

A claim for damages against a co-respondent in a divorce action need not necessarily be tried by a jury under sec. 33 of the Divorce and Matrimonial Causes Act 1857 (Imp.) ch. 85. The matter is one of procedure entirely and subject to the ordinary Rules of Court, and if either party desires a jury he must apply as in an ordinary action.

RESERVED CASE for the opinion of the Appellate Division submitted by Scott, J. May 20, 1921. The reserved case was as follows:—

"This action is one for divorce as against the defendant, Elkowech. The defendant, Serafinchan, was joined as a party defendant by leave of a Judge, the claim against him being one for damages for adultery committed by him with his co-defendant.

Counsel for the defendant, Serafinchan, contends that, under sec. 33 of the Divorce and Matrimonial Causes Act, 20-21 Vict. 1857, (Imp.) ch. 85, the action against him must be tried by a jury.

By the order of the Master for directions, dated January 11, 1921, he directed that the action be set down for trial

at the earliest available date subsequent to February 7, 1921.

It is admitted by counsel that upon the hearing of the application for directions, counsel for the co-respondent raised the question that the action against him must be tried by a jury and then contended that the order for directions must be subject to a right to raise that objection thereafter.

The question submitted for the opinion of the Appellate Division is:—Under the provision referred to, is it imperative that the action against the co-respondent shall be tried by a jury?"

A. Bisset, for plaintiff, C. Moeller, for defendant.

The Court held that the matter was subject to the ordinary Rules of Court; and if either party desired a jury trial he would have to apply as in an ordinary action. There was no rule requiring it to be tried by a Jury.

THAKER v. JENNISON.

British Columbia Supreme Court, Macdonald, J. February 1, 1921.

Marriage (§IVB—57)—Essentials to Validity—Duress in Taking Advantage of Child of Weak Mind—Duress and Fraud as Ground for Annulment.

The requisites of a valid marriage are that, each of the parties should as regards age, mental capacity, and otherwise, be capable of contracting marriage, and that the parties, understanding the nature of the contract, should freely consent to marry one another. Duress or fraud is a ground for dissolving a marriage and there may be, while not surrounding the marriage itself, a fraud in taking advantage of a person of weak mind and thus bringing about a marriage which amounts to the same, as if the fraud was actually in the marriage itself.

[See Annotation, Divorce Law in Canada, 48 D.L.R. 7.]

PETITION for annulment of marriage. Granted.

H. S. Wood, for petitioner.

A. Henderson, K.C., for respondent.

Macdonald, J.:—A petition for annulment of marriage is presented by a wife, through her guardian, she being under age. No question has been raised that this Court has not the power, aside from the special statutory provisions as for divorce, to declare a marriage null and void on such grounds. A decree under such circumstances has been repeatedly granted in this Province, e.g., see P. v. P. (1905), 11 B.C.R. 369, and B. v. B. (1907), 13 B.C.R. 73.

This marriage, in the sense of being a contract, is, generally speaking, subject to the same rules and principles as

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would ordinarily be applicable to any civil contract. It is true that, beyond being a contract, there is a status created by marriage. As to the requisites of a valid marriage, there are two essentials, amongst others. (1) That each of the parties should as regards age, mental capacity and otherwise, be capable of contracting marriage; (2) That the parties, understanding the nature of the contract, should freely consent to marry one another.

In approaching the consideration of this case, I do so with considerable caution. That feeling arises from two causes. In the first place, there is no appeal from my judgment, our Courts being so constituted, that there is no higher Court of Appeal to review our judgments and correct an error. The other cause is, that when you consider a severance of a marriage tie, you should be particularly careful that it be done upon safe grounds. One must recognise the importance of a marriage not being loosely dissolved by any Court. One of the reasons being that in our Province, as part of the Empire we should aim, not to arrive at a condition of affairs where marriages are lightly negotiated, if I might use the term, or at any rate are not readily or easily destroyed. Then again, I must, in the consideration of this case, endeavour not to base my judgment upon the impropriety of the marriage. It has been often said, that hard cases make bad law, so that I must steel myself, as it were, against coming to a conclusion in favour of dissolution, because I might consider that this marriage was, to put it mildly, a most unfortunate affair. Aside from any question of mental capacity on the part of the wife, to think of a child even of 16 years of age, hurriedly marrying a man of 42, with nothing in common between them, and with no symptom of affection on her part, is a deplorable state of affairs. Still, I repeat, that I must not allow these considerations to weigh with me in coming to a decision.

Now, as to the requisites to perform a valid marriage the two essentials that I have referred to, may be grouped together. I have to ask myself the question, were this a contract between two parties in connection with a business affair, "Did both parties possess the mental capacity to form a contract?" that is, even assuming that it was a matter of minor importance, as far as they were concerned. Here, I am considering one of the gravest events that can occur in the history of a child, who has any idea of marriage whatever, that is, as to whether she is to be linked up for her lifetime to a man, without any consent on her

part. Then the other essential, as I say, can be considered as the one of mental capacity. I have then to come to a conclusion, as to whether these two, being grouped together, upon the facts, would indicate that the wife gave a real consent to her marriage with the respondent. A number of cases have been cited but none of them are on all fours as to facts with the circumstances here disclosed.

There is no doubt that duress or fraud is a ground for dissolving a marriage, and there may be, while not surrounding the marriage itself, a fraud in taking advantage of a person of weak mind and thus bringing about a marriage which amounts to the same, as if the fraud was actually in the marriage itself.

That is the statement of the law referred to by Sir F. H. Jeune in Moss v. Moss, [1897] P. 263, at p. 269, 66 L.J. (P.) 154. He refers to some cases and then says:—"The fraud consisted in taking advantage of a mind not absolutely insane, but weak, to induce in the one case a man, in the other a woman, to enter into a contract, which (to use the phrase of Wood, V.-C., in the latter case) he or she did not understand."

I find in the record of Police Court proceedings that Marion Thaker was, upon the information of Violet Thaker, her mother, charged before the Police Magistrate, or rather before H. C. Shaw, acting as Judge of the Juvenile Court, on February 1, 1916, that she was incorrigible, and of a vicious nature, and beyond the control of her parents; somewhat changing the wording, this is the substance of the information. Then, I find that the Judge of that Court, committed Marion Thaker to the girls' industrial school on the strength of such information and the conviction is attached, also the warrant of commitment. The mother, thus having been enabled to dispose of the child in 1916, we find that for several years, a condition of affairs (perhaps speaking in charity, caused by a large family) prevailed, which necessitated the child being more or less in the custody of the authorities, until October, 1920. In the meantime Marion had been placed in the control of Mrs. Macgill, junior Judge of the same Court, and she was endeavouring as best as she could, to afford a comfortable home for the girl. The mother had, during the year of 1920, obtained a position as housekeeper for the respondent, and during that summer it seemed to have been impressed upon the mind of herself as well as her employer, if I accept their

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evidence, that Marion was not receiving good treatment at the hands of Mrs. Macgill.

I do not believe that such a state of affairs existed. On the contrary, I am of opinion that the mother, being the housekeeper of the respondent, and the respondent being anxious once again to resume marriage relations with someone, determined, if he could, to obtain this young girl as his wife. It must have been apparent to both of them, that this could not be done, because the girl was still in the charge of the authorities, although temporarily in Mrs. Macgill's house. Be that as it may, shortly before the marriage it was determined to so arrange matters that the marriage could be consummated. To effect this object, and to pass inspection by the authorities, two events happened, viz.: Marion was, through deception, taken away from the home of Mrs. Macgill and brought to the home of the respondent. She was then dressed up to appear older, and in such camouflaged condition it was found necessary to apply for the consent of Ruggles, J., in order that the proper license be obtained for her marriage. The Judge, apparently, has a [no?] clear recollection of what took place before him. There has been nothing in the shape of evidence as to the statements made, nor was there anything adduced before me, to shew that the respondent proved to his satisfaction that he was able to properly support his prospective wife, or that she on her part, was desirous of being married, though it is true she carried out the appearance of consenting by her answers to the questions submitted. Then from the attendance before the Judge, they must necessarily find the minister who was ready to marry this couple. Mrs. Thaker is an adherent of the Church of England, and in the ordinary course her daughter would have been married in that church, but for reasons that are explained by the respondent, as the inability to obtain the services of a clergyman, they went to the eastern part of the city to the Rev. Mr. Roberts, who is in charge of the Turner Institute, a Methodist mission, and were there married. I have only in passing, referred to the manner in which the license was obtained, because I think that the counsel for the petitioner is correct, in his view of the law, that the manner of obtaining a license cannot be successfully attacked, when you are considering the validity of a marriage.

Having thus shortly outlined the facts, and the manner

in which this marriage was brought about, I turn then, to the consideration as to whether or not Marion Thaker had the mental capacity to appreciate what she was doing as to marriage, or did she merely formally consent to what was taking place. She stated that she did not consent to the marriage, and the first she knew of it was upon the day of the marriage.

This is contradicted by her mother and the respondent, On all points where there is a contradiction as between Marion, who gave her evidence to my mind, very fairly, and her mother and the respondent, I feel disposed to accept the evidence of the child as against the two older people. She may not be, and I hold that she is not, of the mental capacity commensurate with her age, but I think she has a recollection that children often possess, much better in this matter than the older people. I put it simply on the ground that her recollection is better, as distinguished from finding that the mother and the respondent in defending their course of conduct are stating what they know to be untrue. I might, but do not feel disposed to reflect upon the conduct of the mother. It is not necessary to do so in coming to a conclusion in this case. Suffice for me to say, that all the surroundings of this marriage are of a deplorable nature. In coming to a decision in this matter, while I entertain such a view of a marriage, I have endeavoured not to be influenced in such decision by any impression I may have gained as to the character of the respondent and his peculiar actions both before and after the marriage. In this connection it is only necessary to refer to his letters written to Mrs. Macgill.

I may be repeating myself, but even at the risk of doing so, I reiterate that the thought of this mere child being taken from a comfortable home and being placed in the home of the respondent, is contrary to paternal instincts. It is something I would have thought a mother would oppose, rather than assist. But, I am not adjudicating upon the conduct of the mother, and will pass simply to a consideration as to whether the daughter had the mental capacity, in the month of October last, to give a consent, even assuming that she went through what was apparently a consent as far as His Honor the Judge and the minister who was marrying them, were concerned.

I am satisfied on this point with the evidence given by Miss Kerr, and I accept her evidence in toto. She is a competent, clever young woman and without the slightest

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idea of exaggerating her evidence. She has studied this child for years, you might say. She had the child as a pupil, and then examined her last fall to determine as to whether or no her mental capacity was sufficient for her to properly realise what she was doing when she came under the control, as I find, of her mother, and consented to go through the form of marriage.

There must be a voluntary consent on the part of both parties; no advantage must be taken of a weak mind, to obtain what is not really a consent. I find that Marion Thaker, at the time when she went through the form of marriage, did not appreciate what she was doing. Her mental capacity was only equal to a child under 9 years of age and was such that she could not appreciate the seriousness of the action to which she was then becoming a party. She could not foresee all the serious responsibilities of married life, and her mother was certainly not pointing them out to her. Even if she had done so, I do not think she would have been able to comprehend what the mother might tell.

I consider such lack of real consent a fatal objection to the marriage. What should have been a voluntary act on the part of both of these people, was simply voluntary on the respondent. There was not on the part of the wife that power of decision and apprehension which is required of a party in performing even an ordinary contract in everyday life. When one comes to consider the importance of this particular contract, so much the more should there be a complete comprehension by each of the parties of what he or she is doing.

So, with the full appreciation of the responsibility I am taking, I find that this marriage was of such a nature that it should be declared a nullity.

Let me, in conclusion, express the hope that never again will there be circumstances approaching those outlined at this trial, which will enable any counsel to use my decision as a precedent. In other words, this decision is based upon the particular facts of the case. Not only is the marriage declared a nullity, but the petitioner is entitled to her costs. The marriage is dissolved. The petitioner is entitled to costs.

Judgment accordingly.

RE TRUSTEES OF THE 66TH BATTALION.

Alberta Supreme Court, Beck, J. December 23, 1920.

Military Law (§I—1)—Battalion Fund—Beneficiaries—Distribution Upon Disbandment.

A commanding officer of a battalion of the C. E. F. holding property in trust for the members of the battalion has no legal power or authority to effect a change in the personnel of the beneficiaries. There are three classes of persons who, forming together one body, constitute the beneficiaries of the trust (1) Those who were members at the date of disbandment; (2) Those discharged from time to time as being unfit for further service; (3) The widows, dependents or next-of-kin of those who died while members of the battalion. The rights of these beneficiaries is subject first to the payment of debts and expenses and then to such grants as the trustees in their judgment have made or may see fit to make and upon disbandment the residue is distributable pro rata among the former members coming within either of the classes one and two.

APPLICATION by two trustees for a judicial declaration (1) to the effect that a third trustee has removed from Canada so as to justify the applicants in appointing a new third trustee; and (2) as to the meaning or effect of a certain trust agreement so as to identify the beneficiaries or enable them to be identified.

F. C. Jamieson, K.C., for the trustees.

G. B. O'Connor, K.C., for the Bank of Montreal.

Beck, J.:—This is an application by Major John A. Hislop and Sergeant W. Irwin, two of three trustees—Lieut.-Col. J. W. H. McKinery being the third—named in an instrument, called a "trust agreement," dated July 3, 1917.

The instrument is expressed to be made between McKinery "the present Officer Commanding the 66th Overseas Battalion of the Canadian Expeditionary Force, acting on his own behalf and on behalf of all Ranks of the said Battalion, "hereinafter called the Officer Commanding" and McKinery, Hislop and Irwin "hereinafter called the trustees."

The instrument witnesses that:

"(1) The O.C. has assigned and does assign unto the trustees and their successors duly appointed the following funds of the above-mentioned battalion, that is to say, the sum of £36 16s. 9d., together with the band instruments which are now or may hereafter come into his possession or control or become available for the benefit of the battalion, to be disposed by the trustees upon the following trusts, that is to say: "(a) Upon trust to pay all lawful debts of the said battalion and the necessary expenses of

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administering the trusts hereby created; (b) Upon trust to distribute the whole or such portion of the trust funds as they may consider necessary in grants from time to time to and for the benefit of the deserving of all ranks of the battalion, their widows, dependents, or next-of-kin who may be in immediate need of assistance and the balance to be disposed of for the general benefit of the members of the battalion as may be determined by the trustees.

(3) A nominal roll of all ranks of the battalion as issued by the Department of Militia & Defence, Ottawa, Canada, shall be conclusive as to membership in the battalion and the right to share in the benefits hereby secured, except where the same shall be proved to be erroneous."

Then there is provision, inter alia, that if any member of the Board of Trustees shall remove from Canada he shall thereupon cease to be a trustee and the vacancy shall be filled by appointment in writing of the remaining trustee or trustees.

I have quite satisfactory evidence before me that Lieut.-Col. McKinery has removed from Canada and the first thing I am asked to do is to make a judicial declaration to that effect so as to justify the two remaining trustees in appointing a new third trustee to take the place of McKinery. I now do so.

Then I am asked, and this is of course the substantial reason for the application, to make a judicial declaration as to the meaning or effect of the trust agreement so as to identify the beneficiaries or enable them to be identified.

The militia department had a nominal roll of each unit or contingent as it left Canada. A copy of this was published. The original was kept at the record office in London, an office under the Militia Department. This nominal roll was kept revised. It shewed the names of all men transferred into and out of the battalion from time to time until the disbandment of the battalion. The 66th battalion was disbanded and notice of its disbandment was published in "The Canada Gazette" on September 15, 1920. General Order No. 149.

I think it goes without saying that those men who were members of the battalion at the time of its disbandment are beneficiaries under the trust.

It seems to me beyond question that the commanding officer of the battalion holding property in trust for the members of the battalion had no legal power or authority to effect a change in the personnel of the beneficiaries and

consequently although the trust agreement of July 3, 1917, would on its face appear to create a trust for the benefit of those only who were members of the battalion on that date and perhaps those who should subsequently become members, the instrument, in view of the indisputable facts, must be taken to have no greater effect than that of substituting the trustees named therein for the commanding officer leaving the personnel of the beneficiaries the same as if the instrument had never been executed.

I understand that the commanding officers of all the battalions of the C.E.F. from time to time acquired and held moneys and property for the benefit of their respective battalions and that the trusts in each case were the same as in the case of the 66th battalion.

This being so, if I were to hold that all men transferred out of the battalion into another battalion continued to be beneficiaries of the trust, the result would be that a very large number of men would be beneficiaries of the moneys and property belonging to two or several, and in many instances a considerable number of different battalions, a result which I feel sure was never intended. I think too that the intention must have been to exclude from the benefits of the trust those who ceased to be members of the battalion through their own misconduct. Those who were discharged from the battalion by reason of becoming unfit for further service and consequently were not transferred out of the battalion into another battalion would, in my opinion, remain beneficiaries of the trust just as those who were discharged from the battalion by reason of its disbandment. In both cases the men ceased to be members of the battalion while in good standing and having fulfilled the duties which their membership imposed upon them. Then I think it is clear that the widows, dependents, or next-of-kin of those who died while members of the battalion are beneficiaries. Then, in my opinion, there are three classes of persons who, forming together one body, constitute the beneficiaries of the trust: (1) Those who were members at the date of disbandment; (2) Those discharged from time to time as being unfit for further service; (3) The widows, dependents or next-of-kin of those who died while members of the battalion.

When I say that this body constitutes the beneficiaries their rights are obviously subject first to the payment of debts and expenses and then to such grants as the trustees, in the exercise of their judgment, have made or may see fit

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to make "to or for the benefit of the deserving of all ranks of the battalion, their widows, dependents or next-of-kin who may be in immediate need of assistance."

After the trustees in the fair exercise of their judgment have disposed of all such cases then, in my opinion, in view of the fact that the battalion has ceased to be an entity, the residue is distributable pro rata among the former members of the battalion coming within either of the classes (1) and (2) above stated; the two in my opinion as I have said being upon an equal footing; the third class—the widows, dependents and next-of-kin—being, I think, only beneficiaries in so far as the other two classes shall bona fide deem them deserving.

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Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. March 11, 1921.

Homicide (§I—13)—Driver of Automobile—Legal Duty to Use Reasonable Care—Negligence—Manslaughter—Liability.

A person driving an automobile on a public street is under a legal duty to use reasonable care and diligence to avoid endangering human life. If he fails to perform that duty without lawful excuse he is criminally responsible for the consequences.

APPEAL from the judgment of the Saskatchewan Court of Appeal (1921), 57 D.L.R. 93, 14 S.L.R. 145. The facts of the case are that the accused who was driving an automobile in Regina, Saskatchewan, struck and killed a telephone workman who was working in a man-hole in the street. The man-hole was covered with a canvas tent about 4 feet high under which the deceased was working.

The case is fully reported in 59 D.L.R. at p. 206.

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Criminal Responsibility for Negligence in Motor Car Cases.

The first statutory enactment in Canada declaring the criminal responsibility of persons in charge of dangerous things was that contained in the Criminal Code of 1892, (Can.), ch. 29, sec. 213. That section was carried into the Criminal Code of 1906 as section 247, and reads as follows:—

"247. Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes or maintains anything whatever which, in the absence of precaution or care, may endanger

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human life, is under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty."

This enactment appears to have been intended to declare the criminal liability already existing at common law. Sir James Fitzjames Stephen in his Digest of the Criminal Law of England states the related proposition based upon the common law as follows:—

"It is the legal duty of every one who does any act which without ordinary precautions is or may be dangerous to human life, to employ those precautions in doing it." Stephen's Digest of Criminal Law, 6th ed., article 237.

Sec. 247 of the Criminal Code declares criminal responsibility for the consequences of omitting to take reasonable precautions against and to use reasonable care to avoid endangering human life, provided the omission so to do is without "lawful excuse."

Secs. 16 to 68, inclusive, of the Criminal Code, 1906, deal with matters of justification and excuse. By sec. 16 "All rules and principles of the common law which render any circumstances a justification or excuse for any act, or a defence to any charge, shall remain in force and be applicable to any defence to a charge under this Act except in so far as they are hereby altered or are inconsistent herewith."

The common law is not abrogated by the Code, and will still be applicable in cases for which no provision has been made in the Code as well to their prosecution and defence. Even in cases provided for by the Code the common law jurisdiction as to crime is still operative except where there is a repugnancy in which event the Code will prevail. R. v. Cole (1902), 5 Can. Cr. Cas. 330, 3 O.L.R. 389; R. v. Walkem (1908), 14 B.C.R. 1 at p. 7.

Culpable homicide, not amounting to murder, is manslaughter. Cr. Code sec. 262.

And, with certain limitations as to the time of death being within a year and a day of the cause of death (Cr. Code sec. 254), homicide is culpable when it consists (inter-alia) in the killing of any person by an omission without lawful excuse to perform or observe any legal duty. Cr. Code sec. 252. The legal duty referred to is presumably a duty qua the criminal law which is the subject of the Code and does not refer to such civil rights as are, in general, outside of the legislative jurisdiction of the Dominion

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The decision in the McCarthy case, supra, affirms in the result the majority opinion of the Saskatchewan Court of Appeal, sec. R. v. McCarthy (1921), 57 D.L.R. 93, 14 Sask. L.R. 145. It may be taken as establishing that there was no substantial wrong or miscarriage in the direction by the trial court that in a criminal case the degree of negligence which renders a man culpably negligent is greater than in a civil case; but while so affirming the result in the trial court and in the Saskatchewan Court of Appeal, some of the opinions in the Supreme Court of Canada contain dicta which would support the proposition that there is no such difference between negligence involving criminal responsibility and negligence which results in civil responsibility at least in the Province of Saskatchewan which was the jurisdiction appealed from. The questions of criminal responsibility becoming enlarged or diminished under Cr. Code sec. 247 because of differences in the various provincial laws dealing with civil negligence was not considered. The reference to "reasonable" precautions in Code sec. 247 gives room for much difference of opinion as to the scope of criminal responsibility and as to how far the question of reasonableness of the precaution or care referred to in Code sec. 247 may, on the one hand, be a question of fact only for the jury and, on the other hand, a question of law for the court.

The development of the Criminal Code of Canada (with the exception of the practice clauses) from the draft English Criminal Code which did not become law in England, tends to show that Code sec. 247 was framed solely with reference to the criminal responsibility under the English common law as applied to crimes, and that it may be treated as a definition of what is sometimes termed "gross negligence" and sometimes "negligence per se" in the criminal courts.

Carelessness is criminal and, within limits, supplies the place of direct criminal intent. Bishop on Criminal Law 313.

In Sir James Fitzjames Stephen's History of the Criminal Law of England (1883) it is said in reference to manslaughter by negligence that the legal and popular meanings of the word are nearly identical as far as the popular mean-

ing goes; but in order that negligence may be culpable "it must be of such a nature that the jury think that a person who caused death by it ought to be punished; in other words it must be of such a nature that the person guilty of it might and ought to have known that neglect in that particular would, or probably might, cause appreciable positive danger to life or health, and whether this was so or not must depend upon the circumstances of each particular case." Vol. 2 Stephen's History of Criminal Law, p. 123. ANNOTATION

Although it is manslaughter, where the death was the result of the joint negligence of the prisoner and others, yet it must have been the direct result wholly or in part of the prisoner's negligence, and his neglect must have been wholly or in part the proximate and efficient cause of the death, and it is not so where the negligence of some other person has intervened between his act or omission and the fatal result. R. v. Ledger (1824), 2 F. & F. 857.

If a person is driving a cart at an unusually rapid rate, and drives over another and kills him, he is guilty of manslaughter though he called to the deceased to get out of the way, and he might have done so, if he had not been in a state of intoxication. Reg. v. Walker (1862), 1 C. & P. 320.

In the application of the English common law, the prevailing rule is to exclude contributory negligence on the part of the deceased as an excuse in a criminal case. Reg. v. Jones (1870), 11 Cox C.C. 544, disapproving Reg. v. Birchall (1866), 4 F. & F. 1087; Reg. v. Swindall (1846), 2 Cox C.C. 141; Reg. v. Dant (1865), 10 Cox C.C. 102; Reg. v. Hutchinson (1864), 9 Cox C.C. 555.

And in a recent Canadian case it was held that contributory negligence is no defence to the criminal prosecution under Cr. Code secs. 247 and 284, of a light and power company for causing grievous bodily injury by omitting without lawful excuse to take reasonable precautions against endangering human life in the care of the company's electric wires, R. v. Yarmouth Light and Power Co. Ltd. (1920), 56 D.L.R. 1, 53 N.S.R. 152, 34 Can. Cr. Cas. 1, and see annotation to that case, 56 D.L.R. at p. 5.

In cases of homicide the rule is established in many of the United States that one who wantonly or in a reckless or

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grossly negligent manner does that which results in the death of a human being, is guilty of manslaughter although he did not contemplate such a result. Commonwealth v. Hawkins (1893), 157 Mass. 551, 553, 32 N.E. 862. His gross negligence in exposing another to a personal injury by intentionally doing the act, makes his intention criminal. Commonwealth v. Hawkins, supra; Banks v. Braman (1905), 188 Mass. 367, 74 N.E. 594.

Criminal negligence is sometimes referred to as negligence per se. Such negligence has been defined as "the omission to do what the law requires or the failure to do anything in the manner required by law." Babbitt's Law of Motor Vehicles, 2nd ed., sec. 954; St. Louis, etc., Ry. v. Keokuk (1887), 31 Fed. Rep. 755 at p. 756.

"Negligence per se" has been described as an act or omission which the law has commanded or prohibited, the occurrence of which is, of itself and independent of its result, as matter of law declared a failure of duty rendering the culprit liable to public punishment, and this irrespective of all questions of the exercise of prudence, diligence, care or skill in case a fellow being is injured. Thompson Commentaries on Negligence, 2nd ed. secs. 10, 204; Babbitt's Law of Motor Vehicles (1917), 2nd ed., sec 955; Cecchi v. Lindsay (1910), 1 Boyce 185 (Del.), 75 Atl. 376; Robinson v. Simpson (1889), 8 Houst. 398 (Del.), 32 Atl. 287.

"When the imperfection in the discharge of duty is so great as to make it improbable that it was the result of mere inadvertence, then in proportion to such improbability does the probability of negligent injury diminish and that of malicious injury increase." Wharton on Negligence, 2nd ed., sec. 22.

If one is grossly and wantonly reckless in exposing others to danger, the law holds him to have intended the natural consequences of his act, and treats him as guilty of a wilful and intentional wrong. It is no defence to a charge of manslaughter for the defendant to show that, while grossly reckless, he did not actually intend to cause the death of his victim. In these cases of personal injury, there is a constructive intention as to the consequences which, entering into the wilful intentional act, the law imputes to the offender and in this way a charge which would be mere negligence becomes, by reason of a reckless disregard of probable consequences, a wilful wrong. Banks v. Braman, 188 Mass. 367, 74 N.E. 594. That this constructive inten-

tion to do an injury in such cases will be imputed in the absence of an actual intent to harm a particular person, is recognised as an elementary principle in criminal law. Banks v. Braman, supra; and see Commonwealth v. Pierce (1884), 138 Mass. 165; Commonwealth v. Hartwell (1880), 128 Mass. 415; Bjornquist v. Boston & Albany Railroad (1904), 185 Mass. 130, at p. 134.

If the operator of a motor vehicle, with reckless disregard for the safety of others, so negligently drives his vehicle in a public highway as to cause the death of a person thereon, he is guilty of criminal homicide. Davids' Law of Motor Vehicles (U.S.A. 1911), sec. 237; State v. Goetz (1910), 83 Conn. 437, 76 Atl. 1000; State v. Campbell (1910), 82 Conn. 671 at p. 677, 74 Atl. 927, 135 Am. State Rep. 293.

Individuals as well as corporations, in the use and operation of dangerous machines, should have a due regard to the preservation of the rights of the public in the use of the public streets, as well as the protection of persons using such streets from injury; and if they fail in this and should in the operation of a vehicle which is always attended with more or less danger negligently, carelessly and recklessly destroy human life, it is but in keeping with the proper and impartial administration of justice, that penalties should be suffered for the commission of such acts. State v. Watson (1909), 216 Mo. 420, 115 S.W. Rep. 1011, at p. 1015.

RE RICHARDSON.

Ontario Supreme Court in Bankruptcy, Holmested, K.C.
January 21, 1921.

Bankruptcy (§I—6)—Application for Approval of Composition and Extension Agreement—Failure to File Statement of Affairs—Necessity of Application of Rule 97.

Section 13 of the Bankruptcy Act requires the debtor when seeking a composition and extension to lodge a statement of affairs, and whenever the Act requires this to be done Rule 97 applies and it must be prepared and filed as therein mentioned.

[See Annotations, Bankruptcy Act 1920, 53 D.L.R. 135, Bankruptcy Act Amendment Act, 59 D.L.R. 1.]

APPLICATION for approval of composition and extension agreement.

Miss Robinson for trustee moved for approval of composition and extension agreement.

Holmested, K.C.:—In this case it is not shewn that the

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S.C.

RE RICHARDSON.

required majority of creditors have accepted the proposal: see sec. 13 (3). The proposal of the debtor was varied by the creditors and the consent of the debtor to the variation is not shewn to have been given. The report of the trustee as to the conduct of the debtor is not full enough: see sec. 13 (7), (9), and sec. 59. The statement of affairs also should be, but is not, filed. It was argued that R. 97 (53 D.L.R. 218) does not apply to proceedings under the following rules relating to composition and extension agreements, but it appears to me to apply to all statements of affairs. Under sec. 13 (2) (53 D.L.R. 157) the debtor when seeking a composition and extension must lodge a statement of his affairs; and whenever the Act requires a statement of affairs to be made by the debtor, it seems to me clear that R. 97 applies, and it must be prepared, and filed as therein mentioned.

This statement filed in Court remains of record and exhibits the state of the debtor's affairs at the time of the agreement, for the information of all whom it may hereafter concern.

This application must therefore stand for the production of fuller evidence.

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THE ONTARIO TEMPERANCE ACT.

By J. C. McRuer.

Note:—In reading any of the cases cited care must be exercised to see that they are applied in the light of the latest amendments to the Act 1916 (Ont.) ch. 50, as many amendments have been made as the result of these decided cases.

Section 1.

Section 2. (e). Licensee as referred to in the Act is one to whom a license is granted under secs. 3 to 6 of the Act and not the keeper of a standard hotel to whom a license has been granted, under sec. 146. A license granted under secs. 3 to 6 is a license **in personam** while a license granted under sec. 146 is a license **in rem**. R. v. Boileau (1917), 36 D.L.R. 781, 28 Can. Cr. Cas. 144, 38 O.L.R. 607.

2. (f). When the word "liquor" is used in giving evidence on a prosecution under a section using the word in the special sense given to it by sec. 2, sub-sec. (f) it may be assumed that the word is used by the witness in that sense unless this inference is displaced on cross examination. R. v. Foxton (1920), 34 Can. Cr. Cas. 9, 48 O.L.R. 207.

It is however of utmost importance to prove on all prosecutions that the liquor in question is intoxicating within the meaning of this sub-section, and for this purpose a certificate of the Government analyst under sec. 90 of the Act should always be obtained when there is any reason for doubt.

The labels on bottles or boxes may be some evidence of their contents, if supported by other evidence, R. v. Bierenholtz (1921), 36 Can. Cr. Cas., 20 O.W.N. 233; but such evidence is not sufficient if unsupported. R. v. Hayton (1920), 57 D.L.R. 532, 35 Can. Cr. Cas. 193, 48 O.L.R. 494; Sec. 2 (f) referred to in R. v. Axler (1917), 40 O.L.R. 304.

Section 2 (i). "Actually and exclusively occupied and used as a private residence" refers to the residential character of the place and does not demand actual physical occupancy, R. v. Mark Park (1920), 61 D.L.R., 48 O.L.R., 623, 34 Can. Cr. Cas. 203. Thus a man may have two private residences within the meanings of the Act, a summer home and a winter home; or a house he has purchased with the intention of occupying and the one he still occupies.

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A railway car occupied by four men has been held not to be a private dwelling house within the meaning of the Act. R. v. Gulex (1917), 39 O.L.R. 539, 28 Can. Cr. Cas. 261. Sec. 2 (i) referred to in R. v. Tereschuk (1919), 17 O.W.N. 281.

Section 2. (i) (i). Apartments over a place of business on the ground floor are excepted from the operation of this sub-section by the provisions contained in the last sentence of the sub-section, with the condition that there be no internal communication between the apartments and the ground floor. This exception does not apply in favour of an apartment on the ground floor under a place of business, shop or office as mentioned in the section, although there be no internal communication between the apartment and the place of business. R. v. Purdy (1917), 41 O.L.R. 49.

It would also appear on a strict reading of the sub-section that "the place of business" must necessarily be on the ground floor, and an office, shop, or place of business on the second, or third floors of a block of apartments would cause all the apartments in the block to lose their character as private dwellings.

One apartment of a duplex house is a private dwelling within the meaning of the Act. R. v. Carswell (1918), 43 D.L.R. 715, 30 Can. Cr. Cas. 282, 42 O.L.R. 34. Sec. 2. (i) (i) referred to in R. v. Smith (1920), 18 O.W.N. 220. R. v. Martel (1920), 35 Can. Cr. Cas. 105, 48 O.L.R. 347.

Section 2. (i) (ii). Where the defendant was an unmarried man occupying a suite of rooms in an apartment house, where he slept and had breakfast and dinner which were prepared by a woman who came in for that purpose, it was held that the words "and a family actually residing" brought the defendant's apartment within this sub-section.

Separate apartments on the ground floor, under one roof between which there is no internal communication comes within the provisions of this sub-section. R. v. Maker (1920), 54 D.L.R. 684, 48 O.L.R. 182.

Sections 3, 4, 5, 6, 7, 13, 33. See R. v. Boileau, 36 D.L.R. 781, 28 Can. Cr. Cas. 144, 38 O.L.R. 607.

Section 40. On a charge of keeping liquor for sale, after it has been proved that the accused had liquor in his possession, evidence may be given that he sold liquor; this may be proved by the production of a previous conviction for selling. R. v. McKenzie (No. 2) (1921), 20 O.W.N. 81.

An unlawful sale however may be made without keeping

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for sale; a sale may be made of that which is kept for a lawful purpose. R. v. McKay (1919), 46 O.L.R. 125, 32 Can. Cr. Cas 9.

But when a man has been convicted for selling liquor he may be charged with having liquor for sale on a date prior to the conviction for selling. R. v. McKenzie (Nos. 1 & 2) (1921), 20 O.W.N. 80 & 81.

On a charge of keeping liquor for sale the character of the house, the frequent presence of other men, their entering or leaving the house intoxicated, the number of empty bottles, and the drinking of liquor in the house by strange men are all factors in assisting the Magistrate to come to a conclusion. R. v. Collina (1920), 55 D.L.R. 29, 34 Can Cr. Cas. 109, 48 O.L.R. 199.

On a charge of selling liquor, an earlier date of a sale than the date of delivery may be inferred from the facts. Sale of Goods Act 1920 (Ont.) ch. 40, sec. 20, R. 5. R. v. Robins (1920), 48 O.L.R. 527, 35 Can. Cr. Cas. 1.

Section 40 has been referred to and dealt with in the following cases which are noted for reference. R. v. Bracci (1918), 29 Can. Cr. Cas. 351; R. v. Bondy (1921), 19 O.W.N. 489; R. v. Bierenholtz, 20 O.W.N. 233; R. v. Donihee (1921), 20 O.W.N. 72; R. v. Drury (1921), 19 O.W.N. 521; R. v. De Angelis (1920), 48 O.L.R. 160, 34 Can. Cr. Cas. 12; R. v. Fields (1921), 58 D.L.R. 507; R. v. Grassi (1917), 40 O.L.R. 359; R. v. Harris (1917), 40 D.L.R. 684, 30 Can. Cr. Cas. 13, 41 O.L.R. 366; R. v. Hogan (1920), 47 O.L.R 243; R. v. Hagen (1920), 53 D.L.R. 479, 33 Can. Cr. Cas. 208, 47 O.L.R. 384; R. v. Johnston (1921), 58 D.L.R. 452, 49 O.L.R. 74; R. v. Korluck (1920), 19 O.W.N. 34; R. v. Le Clair (1917), 28 Can. Cr. Cas. 216, 39 O.L.R. 436; R. v. Lake (1916), 28 Can. Cr. Cas. 138, 38 O.L.R. 262; R. v. Lemaire (1920), 57 D.L.R. 631, 34 Can. Cr. Cas. 254, 48 O.L.R. 475; R. v. McFarline (1917), 27 Can. Cr. Cas. 445; R. v. Mooney (1921), 58 D.L.R. 524; R. v. McCranor (1918), 47 D.L.R. 237, 44 O.L.R. 482; R. v. Nazzareno (1918), 30 Can. Cr. Cas. 290, 44 O.L.R. 36; R. v. Powell (1920), 57 D.L.R. 741, 34 Can. Cr. Cas. 240, 48 O.L.R. 492; R. v. Punnitt (1920), 18 O.W.N. 229; R. v. Riddell (1916), 28 Can. Cr. Cas. 317, 38 O.L.R. 222; R. v. Sakalov (1921), 20 O.W.N. 302; R. v. Soo Tong (1919), 16 O.W.N. 146; R. v. Warne Drug Co. (1917), 37 D.L.R. 788, 29 Can. Cr. Cas. 384, 40 O.L.R. 469.

Section 41 (1). "Private dwelling house" within the

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meaning of the Act is defined by sec. 2, sub-sec. (i). Vide cases noted ante.

Where a sale is made by one party to another, the latter cannot be convicted under sec. 41 unless it is shown either that possession has been given or the property passed. See Sale of Goods Act 1920 (Ont.), ch. 40, secs. 18, 19, 20; R. v. Chappus (1920), 55 D.L.R. 77, 34 Can. Cr. Cas. 694, 48 O.L.R. 189.

Upon it being established that a house is used as a common bawdy-house, it is deprived of its exclusive character as a private dwelling house. R. v. Tereschuk, 17 O.W.N. 281.

The words "in which he resides" do not demand actual physical occupancy of the place, if the bona fide residential character is otherwise established. Possession may be sufficient and it is not necessary that the accused may have commenced to sleep and have his meals there. The essential feature is bona fides and absence of any effort to evade the law. R. v. Mark Park, 61 D.L.R., 34 Can. Cr. Cas. 203, 48 O.L.R. 623.

Section 41 is not intended to afford a basis for interfering with the export of intoxicating liquors from the Province. Graham & Strang v. Dominion Express (1920), 55 D.L.R. 39, 35 Can. Cr. Cas. 145, 48 O.L.R. 83.

On a charge of having liquor in an illegal place under sec. 41, evidence that men had been seen coming from the defendant's premises in an intoxicated condition is irrelevant and inadmissible. R. v. Melvin (1916), 34 D.L.R. 382, 27 Can. Cr. Cas. 350, 38 O.L.R. 231.

It is illegal to have liquor in an apartment under a place of business even though there be no internal communication. Sec. 2, sub-sec. (i) (i), R. v. Purdy (1917), 41 O.L.R. 49.

The following decisions refer to or are based on sec. 41 and are noted for reference:—R. v. Kaplan, 52 D.L.R. 596, 36 Can. Cr. Cas. 24, 47 O.L.R. 110; R. v. Moore (1917), 30 Can. Cr. Cas. 206, 41 O.L.R. 372; R. v. Gulex (1917), 28 Can. Cr. Cas. 261, 39 O.L.R. 539; R. v. Tugman (1917), 40 O.L.R. 349; R. v. Martin (1917), 40 O.L.R. 270 affirmed (1917), 39 D.L.R. 635, 41 O.L.R. 79; R v. O'Donnell (1919), 16 O.W.N. 330; R. v. Harris (1917), 40 D.L.R. 684, 30 Can. Cr. Cas. 13, 41 O.L.R. 366; R. v. Hanley (1917), 30 Can. Cr. Cas. 63, 41 O.L.R. 177; R. v. Leduc (1918), 30 Can. Cr. Cas. 246, 43 O.L.R. 290; R. v. Cramner (1920), 54 D.L.R. 606, 48 O.L.R. 21; R. v. Kozak (1920),

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53 D.L.R. 369, 33 Can. Cr. Cas. 189, 47 O.L.R. 378, affirmed 16 O.W.N. 253; R. v. Hagen, 53 D.L.R. 479, 33 Can. Cr. Cas. 208; 47 O.L.R. 384; R. v. Williams (1916), 27 Can. Cr. Cas. 264; R. v. Rosarri (1918), 29 Can. Cr. Cas. 297; R. v. Mercier (1919), 31 Can. Cr. Cas. 171, 45 O.L.R. 237, affirmed 16 O.W.N. 253; R. v. Maker, 54 D.L.R. 684, 48 O.L.R. 182; R. v. Nealon (1920), 19 O.W.N. 83; R. v. Perron (1920), 19 O.W.N. 351; R. v. Helpert (1920), 35 Can. Cr. Cas. 25, 48 O.L.R. 627; R. v. Martel (1920), 35 Can. Cr. Cas. 105, 48 O.L.R. 347; R. v. Slew (1921), 19 O.W.N. 497; R. v. Condola (1918), 30 Can. Cr. Cas. 298, 43 O.L.R. 591; R. v. Baird (1919), 45 O.L.R. 242; R. v. Smith (1920), 18 O.W.N. 220; R. v. Carswell (1918), 43 D.L.R. 715, 30 Can. Cr. Cas. 282, 42 O.L.R. 34; R. v. Foxton, 34 Can. Cr. Cas. 9, 48 O.L.R. 207; R. v. Johnson (1920), 55 D.L.R. 65, 34 Can. Cr. Cas. 98, 48 O.L.R. 203; R. v. Moore (1917), 30 Can. Cr. Cas. 206, 41 O.L.R. 372; R. v. Faulkner (1920), 57 D.L.R. 549, 34 Can. Cr. Cas. 224, 48 O.L.R. 500; R. v. Hayton (1920), 57 D.L.R. 532, 35 Can. Cr. Cas. 193, 48 O.L.R. 494; R. v. Cordelli (1921), 20 O.W.N. 172; R. v. Newton (1920), 36 Can. Cr. Cas. 80, 48 O.L.R. 403; R. v. Fields, 58 D.L.R. 507.

41 (1a). R. v. Kallas (1919), 31 Can. Cr. Cas. 57.

41 (2). R. v. Schooley (1917), 27 Can. Cr. Cas. 444.

Section 43. Prior to July 19th, 1921, under the provisions of sec. 43, it was legal to carry liquor from one place, where liquor might lawfully be kept within Ontario, to another such place. But under sec. 8 of the Liquor Transportation Act, 1920 (Ont.), ch. 80, which was made operative by Order in Council dated July 5, 1921, on July 19, 1921, sec. 43 was amended by striking out all the words after the word "sale" in the fifth line.

Liquor may now be carried or transported from one place to another within Ontario only in the following cases:

1. The sale, carriage, transportation, or delivery of liquor by or under order of the Board of License Commissioners. 1920 (Ont.) ch. 80, sec. 6 (C.).

2. The carriage, transportation, receiving, or taking delivery of liquor sold under execution or other judicial process, or for distress, or sold by assignees, or trustees in bankruptcy or insolvency, provided that the stock of liquor is not broken for the purpose of such sale—Section 43 as amended, 1920 (Ont.), ch. 80, sec. 8 and 1921 (Ont.), ch. 73, sec. 9.

3. The owner in his private capacity may trans-

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port liquor from any place where the same may be lawfully kept to any other premises or place where the same may be lawfully kept and which such owner controls within the Province of Ontario, provided the ownership in such liquor remains unchanged. 1918 (Ont.), ch. 40, sec. 30; 1920 (Ont.), ch. 80, sec. 6—amended by 1921 (Ont.), ch. 73, sec. 9.

4. The carriage or delivery of native wines under sec. 44.

The following cases affecting sec. 43 were decided prior to the amendment above referred to and are cited for reference only:—R. v. McGonegal (1920), 57 D.L.R. 475, 48 O.L.R. 499; R. v. Newton, 36 Can. Cr. Cas. 80, 48 O.L.R. 403; R. v. Kozak (1920), 53 D.L.R. 369, 33 Can. Cr. Cas. 189, 47 O.L.R. 378; R. v. Cramer (1920), 54 D.L.R. 606, 48 O.L.R. 21.

Section 44 (1). Anyone who buys and has in possession native wine is subject to the same onus under sec. 88 as the possessor of any other liquor. R. v. Nazzareno, 30 Can. Cr. Cas. 290, 44 O.L.R. 36.

Section 46. The right to export liquor from the Province is fully supported in Graham and Strang v. Dominion Express Co., 55 D.L.R. 39, 35 Can. Cr. Cas. 145, 48 O.L.R. 83.

Section 49. Under sec. 49 it is not necessary to shew that the accused knew that the person who received the liquor intended it for an unlawful purpose but on the other hand the onus is on the accused under sub-sec. (2) to shew that he had reason to believe and did believe the person to whom the liquor was sold or delivered did not sell liquor unlawfully, or did not buy to re-sell and that he was entitled to purchase the same.

On a prosecution under sec. 49 the Magistrate may infer from all the circumstances that the person to whom the liquor is delivered received it for an unlawful purpose within the meaning of the section. R. v. McEwan (1917), 30 Can. Cr. Cas. 212, 41 O.L.R. 324. See also R. v. McFarline, 27 Can. Cr. Cas. 445.

Section 51. Before a physician may lawfully prescribe liquor for a patient, two things are necessary:—(1) The physician must in his judgment deem intoxicating liquor necessary to the health of the patient; (2) There must be actual need.

It is open for the Magistrate to review the opinion of the physician as to "actual need" and find on the evidence that there is not "actual need," but this ought to be done only

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when the Magistrate finds that the physician did not act in good faith. R. v. Rankin (1918), 31 Can. Cr. Cas. 275, 45 O.L.R. 96.

The good faith of the physician in granting prescriptions under this section is vital and in a prosecution evidence of other prescriptions given by the accused is admissible. R. v. Welford (1918), 30 Can. Cr. Cas. 156, 42 O.L.R. 359. (Makin v. Att'y Gen'l for New South Wales, [1894] A.C. 57 followed).

The words "In evasion or violation" mean any of the following:—(1) Where the physician does not deem liquor necessary for the health of his patient; (2) To enable any person to evade the Act; (3) To obtain liquor as a beverage; (4) To obtain liquor to be sold in violation of the Act. R. v. MacLaren (1917), 39 O.L.R. 416. See also Re Cherniak and College of Physicians and Surgeons of Ontario (1919), 51 D.L.R. 522, 33 Can. Cr. Cas. 43, 46 O.L.R. 434.

Section 54. Prior to June 4, 1920, when the words "or any member of the family of the occupant" were inserted in the section, in order that the house should lose its character as a private dwelling house, it was necessary that the head of the house should be convicted. R. v. Condola (1918), 30 Can. Cr. Cas. 298, 43 O.L.R. 591.

However, a conviction of a member of the family of the occupant prior to the date of the amendment does not operate to prevent the occupant from now keeping liquor in the house, as the amendment was not stated to be retroactive. R. v. Goldman, Coatsworth Co. J. York, unreported. When a member of the family of the occupant is convicted the place to which he may remove is a legal place within the meaning of the Act, but.....it is not clear that the occupant himself enjoys such a wide privilege although he may not have been convicted. The amendment says "and any house or portion of a house to which such occupant may remove within one year.....shall be deemed to have ceased to be a private house within the meaning of this section." No distinction seems to have been made in the amendment between an occupant, a member of whose family has been convicted and an occupant who has been himself convicted.

But in view of the fact that no ban has been put on the house to which the convicted member of the family may remove, it seems only fair to assume that the amendment is intended to apply to an occupant who has been himself convicted, or to one a member of whose family

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has been convicted and continues to reside with him after he (the occupant) has removed to another house within the term mentioned.

The section seems to make it clear that where the offence is committed by the occupant in, or in respect of any private dwelling house, that house and any house to which he may remove within one year after the offence is committed remains an illegal place as long as such occupant continues to reside there.

Section 55 (4). This sub-section added to sec. 55 in 1918, authorises the arrest of the accused without a warrant, where he is found committing the offence upon a street, highway, or in any public place. The right to arrest a man without a warrant in cases not covered by this subsection is very questionable. Middleton, J., in R. v. Hanley, 30 Can. Cr. Cas. 63, 40 O.L.R. 177, gave his opinion prior to this amendment that there was no right to arrest without a warrant.

The proceedings before the Magistrate will not be invalidated by reason of the irregularity or illegality of the process by which the accused was brought before him. R. v. Hanley, 30 Can. Cr. Cas. 63, 41 O.L.R. 177.

Section 58. It is not necessary to attempt to levy distress before imprisonment. The words of the section are "and in default of immediate payment." R. v. Martin (1917), 39 D.L.R. 635, 29 Can. Cr. Cas. 189, 41 O.L.R. 79.

See sec. 744 and 745 Criminal Code made applicable by sec. 4, Summary Convictions Act, R.S.O. 1914, ch. 90, which is made applicable to the Ontario Temperance Act by sec. 72.

The power to impose imprisonment under secs. 58-59 authorises the imposing of hard labor. Interpretation Act, R.S.O. 1914, ch. 1, sec. 25; R. v. Powell (1920), 57 D.L.R. 741, 34 Can. Cr. Cas. 240, 48 O.L.R. 492.

In determining the sentence to be imposed under sec. 58, the Magistrate ought not to increase the penalty because he believes the accused is guilty of another offence with which he has not been charged. R. v. Harris, 40 D.L.R. 684, 30 Can. Cr. Cas. 13, 41 O.L.R. 366.

But there can be no objection to the Magistrate receiving evidence as to all the surrounding circumstances in order to determine the proper punishment in each case, or otherwise the one who flagrantly defies the law would receive the same punishment as one who innocently transgresses.

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But it is improper for a Magistrate to increase the punishment because he believes the accused or his witnesses have committed perjury. R. v. De Angelis, 34 Can. Cr. Cas. 12, 48 O.L.R. 160.

A conviction for a second or subsequent offence must be a conviction for a second or subsequent offence charged as such. R. v. Berlin Lion Brewery Ltd. (1919), 31 Can. Cr. Cas. 155, 45 O.L.R. 340.

It is not necessary that the previous offence shall have been made under the same section as that under which the second charge is laid. A conviction under any of the enumerated sections would render a later offence under any other of the enumerated sections a second offence. R. v. Johnston, 58 D.L.R. 452, 49 O.L.R. 74.

But an offence under any of the sections enumerated in sec. 58 would not render a subsequent conviction for an offence under any of the sections enumerated in sec. 59 a second or subsequent offence and vice-versa.

A second or subsequent offence must be an offence committed after the accused was previously convicted. R. v. Robins, 35 Can. Cr. Cas. 1, 48 O.L.R. 527.

In construing sec. 58 rules of grammar and syntax must be disregarded in favour of giving effect to the intention of the Legislature. The words "and for a second or any subsequent offence" must be taken to refer back to "every person" and not to "licensee." It is intended that every person who is convicted of a second or subsequent offence shall be liable to the greater punishment and not the licensee only. R. v. Sova (1920), 57 D.L.R. 740, 34 Can. Cr. Cas. 276, 48 O.L.R. 497.

Section 59. R. v. Berlin Lion Brewery Ltd., 31 Can. Cr. Cas. 155, 45 O.L.R. 340.

Section 61 (2). Where an amendment to a charge in effect sets up a new charge the amendment must be made within three months after the offence was committed. Section 78 in no way repeals the effect of sec. 61. R. v. Kaplan (1920), 52 D.L.R. 596, 36 Can. Cr. Cas. 24, 47 O.L.R. 110.

But where the effect of the amendment is not to substitute or add another or different offence, but merely to add words necessary to describe the offence intended to be charged in the information which was insufficiently because incompletely described, it may be made after the three months have elapsed. R. v. Ayer (1908), 17 O.L.R. 509.

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Section 61 (3). Licensee as referred to in this section does not include the holder of a license granted under sec. 146 and a prosecution against a holder of such a license must be heard by two justices. R. v. Boileau, 36 D.L.R. 781, 28 Can. Cr. Cas. 144, 38 O.L.R. 607.

Section 66 (1). Section 66 gives a right to search for liquor without a warrant. This right is given for the purpose of preventing and detecting the contravention of any of the provisions of the Act. It does not require a belief on the part of the officer that an offence has been, or is being committed as is required by sec. 70. Fleming v. Spracklin (1920), 56 D.L.R. 518, 35 Can. Cr. Cas. 40, 48 O.L.R. 533. Affirmed in 20 O.W.N. 152. R. v. McDonald (1921), 19 O.W.N. 557; R. v. Grassi (1917), 40 O.L.R. 359.

Section 67. Where liquor is found under a search warrant the presumption under this section that the liquor is kept for sale is against the occupant of the premises and not against the owner of the liquor who may have stored it on the premises. R. v. Riddell, 28 Can. Cr. Cas. 317, 38 O.L.R. 222.

The provisions of secs. 67 and 88 do not conflict but overlap and the presumption raised against the accused under sec. 88 is not restricted to the cases under sec. 67. R. v. Collina, 55 D.L.R. 29, 34 Can. Cr. Cas. 109, 48 O.L.R. 199.

The officer laying the information must satisfy the Magistrate that there is reasonable ground for belief and not mere suspicion. Fleming v. Spracklin, 56 D.L.R. 518, 35 Can. Cr. Cas. 40, 48 O.L.R. 533; 20 O.W.N. 152. Section 67 referred to in R. v. McDonald, 19 O.W.N. 557; R. v. Gosling (1921), 20 O.W.N. 73.

Section 70 (1 and 2). Section 70 does not create an offence and there is nothing to prevent the seizure of liquor under sec. 70 and the prosecution of an offence under sec. 40 or 41. R. v. Le Clair (1917), 28 Can. Cr. Cas. 216, 39 O.L.R. 436; R. v. Hagen (1920), 33 Can. Cr. Cas. 208, 47 O.L.R. 384; R. v. Hogan (1920), 47 O.L.R. 243.

Before an officer is justified in exercising the right of search under this section he must believe that liquor is kept in contravention of the Act; mere suspicion is not sufficient. Fleming v. Spracklin, 56 D.L.R. 518, 35 Can. Cr. Cas. 40, 48 O.L.R. 533.

In Fleming v. Spracklin it was decided that a boat is not a vehicle following In re Sault Ste. Marie Provincial Elec-

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tion (1905), 10 O.L.R. 356. The section was amended after this decision to include any boats on the inland water of Canada within Ontario. R. v. McDonald, 19 O.W.N. 557.

Section 70 (3). R. v. Belanger (1921), 20 O.W.N. 61.

Section 70 (9). Where liquor was shipped from Montreal to Winnipeg consigned as "Pickles" and was discovered in Ontario it was held that the Magistrate had jurisdiction to enter into an inquiry and all the provisions of the Act applied until it was shewn that the transaction was one to which the Act did not apply.

It was held also that the onus under this sub-section applied and the onus was not displaced. Re Ontario Temperance Act and Renaud's Application (1918), 30 Can. Cr. Cas. 426, 44 O.L.R. 238.

"Fictitious name" within the meaning of the section is a name used for the purpose of deceit.

The presumption raised by this sub-section is meant to apply only to liquor seized in transit under sec. 70 and not to charges under other sections of the Act. R. v. Le Clair, 28 Can. Cr. Cas. 216, 39 O.L.R. 436.

Section 72. Except where there are provisions to the contrary the proceedings on a prosecution are governed by the Ontario Summary Convictions Act, R.S.O. 1914, ch. 90.

The accused is entitled to a postponement of his trial in order to secure witnesses, and the Magistrate ought not to act on information communicated to him by the prosecution in determining whether or not the evidence to be given by the witnesses required by the accused is important. R. v. Perron (1920), 19 O.W.N. 351.

Any evidence secured by the Magistrate in reference to the offence charged, other than the sworn testimony in the trial, is improper, and where such evidence has been obtained the conviction will not be sustained. R. v. Hayton (1920), 57 D.L.R. 532, 35 Can. Cr. Cas. 193, 48 O.L.R. 494.

Where the accused has been properly summoned and does not appear, but counsel appears and represents him, the trial may proceed and a conviction made, even though the service of the summons be irregular. The appearance by counsel is a waiver of any irregularity in the service of the summons. R. v. Johnson, 58 D.L.R. 452, 48 O.L.R. 203.

Where the accused is regularly summoned and does not appear, the Magistrate may proceed with the trial in his absence, hear the evidence and give judgment convicting

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or dismissing the case. Section 718 Criminal Code—made applicable by the Summary Convictions Act—R. v. Coote (1910), 22 O.L.R. 269.

An irregularity in the arrest of the accused will not invalidate the conviction. R. v. Hanley, 30 Can. Cr. Cas. 63, 41 O.L.R. 177.

Section 72 also referred to in R. v. Martin (1917), 39 D.L.R. 635, 29 Can. Cr. Cas. 189, 41 O.L.R. 79; R. v. Hogan (1920), 47 O.L.R. 243.

There is no rigid rule that it is necessary to make all the evidence given by witnesses intelligible to the accused. R. v. Grassi, 40 O.L.R. 359.

Section 74. The failure of the Magistrate to comply with the provisions of this section will not invalidate the conviction unless it is shown that the defendant is prejudiced thereby. R. v. Tugman, 40 O.L.R. 349; R. v. Leach (1908), 17 O.L.R. 643; R. v. McDevitt (1917), 28 Can. Cr. Cas. 352, 39 O.L.R. 138.

Section 74 (2). Stenographer's notes do not necessarily constitute a record of all that took place before the Magistrate. R. v. Hanley, 30 Can. Cr. Cas. 63, 41 O.L.R. 177.

Section 76. The charge may be in the alternative where such alternative is referred to in the same section, but the conviction must not be in the alternative. R. v. Kaplan, 52 D.L.R. 596, 36 Can. Cr. Cas. 24, 47 O.L.R. 110.

Section 78. This section does not in any way repeal the provisions of sub-sec. 2 of sec. 61, and any amendment substituting one offence for another must be made within three months from the time the offence is alleged to have been committed. R. v. Kaplan, 52 D.L.R. 596, 36 Can. Cr. Cas. 24, 47 O.L.R. 110.

If the evidence proves another offence than that charged, the Magistrate cannot convict for that offence unless he amends the information. R. v. Kallas (1919), 31 Can. Cr. Cas. 57. Section 78 referred to in R. v. Faulkner (1920), 57 D.L.R. 549, 34 Can. Cr. Cas. 224, 48 O.L.R. 500.

Section 81. R. v. Boileau, 36 D.L.R. 781, 28 Can. Cr. Cas. 144, 38 O.L.R. 607.

Section 84. This section does not apply to a transaction which takes place in a lane adjacent to a dwelling house. R. v. McKay (1919), 32 Can. Cr. Cas. 9, 46 O.L.R. 125.

Section 84 (2). R. v. Cramer (1920), 54 D.L.R. 606, 48 O.L.R. 21; R. v. Maker, 54 D.L.R. 684, 48 O.L.R. 182; R. v. Ollman (1921), 19 O.W.N. 563.

Section 85. R. v. Williams (1916), 27 Can. Cr. Cas. 264;

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R. v. Warne Drug Co. Ltd., 37 D.L.R. 788, 29 Can. Cr. Cas. 384, 40 O.L.R. 469; R. v. Leduc (1918), 30 Can. Cr. Cas. 246, 43 O.L.R. 290.

Section 88. This section does not justify a conviction where the proof of possession shews legal possession. Therefore on a charge against an accused of having liquor in a place other than the private dwelling in which he resides and upon it being established that the accused had possession of liquor in his private dwelling, the proof which shifts the onus furnishes the proof which proves his innocence and sec. 88 cannot be applied. R. v. Faulkner, 57 D.L.R. 549, 34 Can. Cr. Cas. 224, 48 O.L.R. 500.

Where suspicion only is established and there is no proof of possession sec. 88 cannot be invoked by the prosecution. R. v. Goslin, 20 O.W.N. 73.

Section 88 cannot be applied to support a conviction for "having liquor in a place other than the private dwelling in which he resides" where the only evidence is that the accused had a quantity of liquor and later had a lesser amount. R. v. Faulkner (supra).

The proper construction and application of sec. 88 has not yet been determined. There are a number of decisions by courts of co-ordinate jurisdiction which conflict in part and do not definitely settle the law. The leading cases in order of the date of the decision are as follows:—R. v. Le Clair, 28 Can. Cr. Cas. 216, 39 O.L.R. 436; R. v. Moore (1917), 30 Can. Cr. Cas. 206, 41 O.L.R. 372; R. v. Kozak (1920), 53 D.L.R. 369, 33 Can. Cr. Cas. 189, 47 O.L.R. 378; R. v. Lemaire (1920), 57 D.L.R. 631, 34 Can. Cr. Cas. 254, 48 O.L.R. 475. In R. v. Le Clair, Middleton, J., says, at pp. 217, 218 (28 Can. Cr. Cas.): "The result is, that wherever there is possession of liquor there is liability to a fine unless the magistrate accepts the evidence of the accused.

There is a statutory presumption of guilt upon proof of custody of the dangerous thing, and the common law rule is reversed—the accused must prove his innocence to the satisfaction of the magistrate, or take the consequences."

In R. v. Moore the same Judge says, at p. 208 (30 Can. Cr. Cas.): "It is proved that liquor was delivered to the accused.....so he may be convicted unless he prove that he did not commit the offence with which he is charged."

The section is discussed at length in R. v. Lemaire by Meredith, C.J.C.P., but the opinions expressed there are obiter dictum. The reasoning in this case is nevertheless

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convincing. The Judge says, at pp. 633, 634 (57 D.L.R.): "Mere possession, charge, or control does not make an accused prisoner prima facie guilty of all the crimes of the Ontario Temperance Act calendar. If any one is charged with selling liquor which it is proved he once had, but which now some one else has, he may, not must, be convicted, if he fails to shew, as he should be able easily to do if innocent, that the change of possession was lawful, whilst if charged with unlawfully having liquor, and the prosecution proves only that the possession was had in the dwelling house in which the accused resides, [if it is a legal place] the prosecution must fail; whilst if it is in a place where it may not lawfully be had the onus apart from the section should be on the accused to exculpate himself. And when a case is made against an accused person under sec. 88, its weight, must of course, depend upon its circumstances."

A careful reading of these decisions and the section seems to warrant the conclusion that the Magistrate may in his discretion convict where proof of possession of the liquor in question has once been established. But there is nothing in the section to say that the magistrate must convict in such a case unless he is satisfied on the evidence that a conviction ought to be made. The opinion expressed in R. v. Le Clair does not seem to be wholly warranted by the wording of the section.

There is nothing in the section to prevent the magistrate from giving the accused the benefit of the doubt where he considers he is entitled to a doubt. R. v. McKay, 32 Can. Cr. Cas. 9, 46 O.L.R. 125.

The Magistrate may or may not convict under sec. 88 as he thinks proper and its application must depend upon the circumstances.

It is also a matter for the discretion of the Magistrate as to whether the evidence for the defence is sufficient proof that the accused did not commit the offence charged. R. v. Leduc, 30 Can. Cr. Cas. 246, 43 O.L.R. 290.

Section 88 is also considered in the following cases:— R. v. Melvin (1916), 34 D.L.R. 382, 27 Can. Cr. Cas. 350, 38 O.L.R. 231; R. v. Rosarri, 29 Can. Cr. Cas. 297, 14 O.W.N. 117; R. v. Warne Drug Co., 37 D.L.R. 788, 29 Can. Cr. Cas. 384, 40 O.L.R. 469; R. v. Tugman, 40 O.L.R. 349; R. v. Axler (1917), 40 O.L.R. 304; R. v. Kallas, 31 Can. Cr. Cas. 57, 16 O.W.N. 164; R. v. Nazzareno, 30 Can. Cr. Cas. 290, 44 O.L.R. 36; R. v. Punnitt, 18 O.W.N. 229; R. v.

Smith, 18 O.W.N. 220; R. v. Hagen, 53 D.L.R. 479, 33 Can. Cr. Cas. 208, 47 O.L.R. 384; R. v. Hogan, 47 O.L.R. 243; R. v. Collina, 55 D.L.R. 29, 34 Can. Cr. Cas. 109, 48 O.L.R. 199; R. v. Korluck, 19 O.W.N. 34; R. v. Fields, 58 D.L.R. 507; R. v. Mooney, 58 D.L.R. 524; R. v. Sakalov (1921), 20 O.W.N. 302. ANNOTATION.

Section 92 of the original Act, 1916 (Ont.), ch. 50, was struck out in 1921, (Ont.), ch. 73, and a new section substituted providing for appeals in all cases to the County Judge.

Sub-section 12 of this section purports to confer very broad powers on the Judge hearing the appeal, but these powers appear to be very much limited by sec. 102 of the Act, which provides as follows:—"Upon any application to quash or set aside any such conviction or order..... whether in appeal or upon habeas corpus, or by way of certiorari, or otherwise, the Court or Judge to which or to whom such appeal is made.....shall dispose of such appeal or application upon the merits notwithstanding any such variance, excess of jurisdiction or defect as aforesaid; and in all cases where it appears that the merits have been tried.....and there is evidence to support the same, such conviction, warrant, process, or proceeding shall be affirmed....."

It has been decided in R. v. Denny, 36 Can. Cr. Cas. 77, that since the amendment to sec. 92 in 1921 providing for appeal that certiorari will not lie. If the portions of sec. 102 referring to appeals is not to be taken to refer to appeals under sec. 92, the whole section would now be obsolete and meaningless.

In R. v. McCranor, 47 D.L.R. 237, 44 O.L.R. 482, it is laid down by Riddell, J., that a County Judge hearing an appeal on the record under sec. 92 as it was previous to the amendment ought not to reverse the decision of the Magistrate if he found that there was sufficient evidence upon which to base the decision.

The Judge hearing the appeal on the record under the amended section appears to be in no better position than the county Judge was in R. v. McCranor and it therefore appears that he must still be bound by sec. 102.

Section 94. R. v. McCranor, 47 D.L.R. 237, 44 O.L.R. 482.

Section 95. The general right of appeal under the Habeas Corpus Act, R.S.O. 1914, ch. 84, sec. 8, is curtailed by this section. R. v. Martin, 39 D.L.R. 635, 41 O.L.R. 79.

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Section 96. The provisions of sec. 96 are directory and not imperative and a conviction will not be set aside by reason of the fact that the magistrate failed to follow the procedure laid down in this section. R. v. Mercier, 31 Can. Cr. Cas. 171, 45 O.L.R. 237; R. v. Coote, 22 O.L.R. 269; R. v. Hanley, 30 Can. Cr. Cas. 63, 41 O.L.R. 177; R. v. Berlin Lion Brewery Ltd., 31 Can. Cr. Cas. 155, 45 O.L.R. 340. (Over ruled in part by R. v. Mercier); R. v. McDevitt, 28 Can. Cr. Cas. 352, 39 O.L.R. 138.

The provision of sub-sec. (b) merely states a method by which a previous conviction may be proved—a permissive method, not an imperative method. R. v. Helpert, 35 Can. Cr. Cas. 25, 48 O.L.R. 627.

The form of information and form of conviction for a second or subsequent offence both contemplate that both the information and conviction shall set out explicitly the date, the place where, and the names of the Magistrates, or Justices of the Peace before whom the accused was previously convicted, and also the date when and the place where the previous offence was committed and the specific nature of the previous offence. It is not fatal if these be omitted but extremely unsafe and unwise. R. v. Johnston, 58 D.L.R. 452, 49 O.L.R. 74.

Before an accused can be convicted of a subsequent offence the previous conviction must be charged in the subsequent information. R. v. Berlin Lion Brewery, Ltd., 31 Can. Cr. Cas. 155, 45 O.L.R. 340. See also R. v. Robins (1920), 35 Can. Cr. Cas. 1, 48 O.L.R. 527; R. v. Sequin (1921), 59 D.L.R. 534, 34 Can. Cr. Cas. 374, 49 O.L.R. 28; R. v. Merritt (1921), 20 O.W.N. 162.

Section 97. A conviction for a third offence means a conviction for an offence charged as a third offence. R. v. Berlin Lion Brewery Ltd., 31 Can. Cr. Cas. 155, 45 O.L.R. 340.

Section 98. A conviction for more than one offence committed on the same day was made in R. v. Hagen, 53 D.L.R. 479, 33 Can. Cr. Cas. 208, 47 O.L.R. 384.

Section 101. If a conviction is bad on its face and the Crown seeks to amend it so as to make it good, the amendment should be made only if there is evidence in the opinion of the Appellate Court to support the same. R. v. Newton, 36 Can. Cr. Cas 80, 48 O.L.R. 403.

The following decisions affecting sec. 101 having been made prior to the amendment of sec. 92 are cited for reference only:—R. v. Robins, 35 Can. Cr. Cas. 1, 48 O.L.R.

527; R. v. Fields, 58 D.L.R. 507; R. v. Martin, 39 D.L.R. 635, 29 Can. Cr. Cas. 189, 41 O.L.R. 79; R. v. Leduc, 30 Can. Cr. Cas. 246, 43 O.L.R. 290; R v. Kaplan, 52 D.L.R. 596, 36 Can. Cr. Cas. 24, 47 O.L.R. 110; R. v. Johnston, 58 D.L.R. 452, 49 O.L.R. 74.

Section 102. Since the amendment of 1921 providing for appeal in all cases to the County Judge, certiorari will not lie. Rex v. Denny, 36 Can. Cr. Cas. 77.

The following cases affecting sec. 102 are cited for reference only:—R. v. Martin, 39 D.L.R. 635, 29 Can. Cr. Cas. 189, 41 O.L.R. 79; R. v. McKay, 32 Can. Cr. Cas. 9, 46 O.L.R. 125; R. v. Johnston, 58 D.L.R. 452, 49 O.L.R. 74; R. v. Kaplan, 52 D.L.R. 596, 36 Can. Cr. Cas. 24, 47 O.L.R. 110; R. v. Robins, 35 Can. Cr. Cas. 1, 48 O.L.R. 527; R. v. Leduc, 30 Can. Cr. Cas. 246, 43 O.L.R. 290; R. v. Faulkner, 57 D.L.R. 549, 34 Can. Cr. Cas. 224, 48 O.L.R. 500.

Section 102 (a). R. v. De Angelis, 48 O.L.R. 160; R. v. Korluck, 19 O.W.N. 34; R. v. Martel, 35 Can. Cr. Cas. 105, 48 O.L.R. 347; R. v. McDonald, 19 O.W.N. 557; R. v. Newton, 36 Can. Cr. Cas. 80, 48 O.L.R. 403; R. v. Sakalov, 20 O.W.N. 302.

Section 115. R. v. Boileau, 36 D.L.R. 781.

Section 124. The Dominion Proprietary or Patent Medicine Act 1908 (Can.), ch. 56, and the Ontario Temperance Act do not enter upon the same field of legislation. The Proprietary or Patent Medicine Act is to prescribe with respect to the sale of patent medicines certain conditions and limitations for the protection of the public and it does not purport to confer upon the licensee any special authority to carry on trade throughout Canada. R. v. Warne Drug Co., 37 D.L.R. 788, 29 Can. Cr. Cas. 384, 40 O.L.R. 469.

Section 125. When a merchant or druggist sells any preparation containing more than 2½% proof spirits he must bring himself within the protection afforded by sec. 131 or sec. 125 (a) or (b) and the onus is on him to shew that the preparation contains sufficient medication to prevent its use as an alcoholic beverage. R. v. Axler, 40 O.L.R. 304; R. v. Warne Drug Co., 37 D.L.R. 788, 29 Can. Cr. Cas. 384, 40 O.L.R. 469.

Proof may be given that the liquor in question has been used as an alcoholic beverage.

Section 126. The certificate mentioned in sub-sec. (4) applies only to patent, or proprietary medicines.

Section 139. The provisions of Part IV. of the Canada

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Temperance Act enacted by 1919 (Can.), 2nd Sess., ch. 8, and made operative as to Ontario by Order in Council dated June 18, 1921, supersede the provisions of sec. 139 as far as they apply to the importation of liquor in Ontario.

Section 139 must be construed as an over riding section to which other provisions of the Act must be interpreted as subsidiary if they appear in any way to conflict with it. Graham and Strang v. Dominion Express Co., 55 D.L.R. 39, 35 Can. Cr. Cas. 145, 48 O.L.R. 83; R. v. Toyne (1916), 38 O.L.R. 224; R. v. McEvoy (1916), 28 Can. Cr. Cas. 135, 38 O.L.R. 202; R. v. Lemaire, 57 D.L.R. 631, 34 Can. Cr. Cas. 254, 48 O.L.R. 475; Gold Seal Ltd.v. Dominion Express Co. (1921), 58 D.L.R. 51, 34 Can. Cr. Cas. 259, 16 Alta. L.R. 113.

Section 140. R. v. Thorburn (1917), 39 D.L.R. 300, 29 Can. Cr. Cas. 329, 41 O.L.R. 39.

Section 145. National Trust Co. v. Hannan (1918), 15 O.W.N. 54.

Section 146. R. v. Boileau, 36 D.L.R. 781, 28 Can. Cr. Cas. 144, 38 O.L.R. 607.

ROYAL TRUST COMPANY v. MINISTER OF FINANCE OF BRITISH COLUMBIA.

Judicial Committee of the Privy Council, Viscount Haldane, Viscount Cave, Lord Parmoor, Lord Carson, and Sir Robert Stout.
October 27, 1921.

Taxes (§VC—198)—Succession Duties Act (R.S.B.C. 1911 ch. 217) —Rate of Duty—Schedule as Laid Down by Provincial Statute —Interpretation.

The expression "net value" as used in para. (a) (b) and (c) of sec. 7 of the Succession Duty Act, R.S.B.C. 1911, ch. 217, is properly and naturally to be referred to the property described in the words immediately preceding these paragraphs, that is to say to the property within the Province passing to the near relatives mentioned in the section, and the sums of $100,000 and $200,000 afterwards referred to are to be treated as constituent parts of that net value; and the rate of taxation is therefore to be ascertained with reference to the net value of the property within the Province only, and not the total net value of the estate where ever situated.

[Re Succession Duties Act (1921), 56 D.L.R. 226, reversed, judgment of Hunter, C.J.B.C. (see 47 D.L.R. 529) restored.]

APPEAL by the Royal Trust Company from the judgment of the Supreme Court of Canada (1920), 56 D.L.R. 226, 61 Can. S.C.R. 127 in an action to determine the duties to be levied under the Succession Duties Act, R.S.B.C. 1911, ch. 217. Reversed and order of Hunter, C.J.B.C., restored.

The judgment of the Board was delivered by

Viscount Cave:—This appeal raises a question as to the construction of the Succession Duty Act of British Columbia. By sec. 5 of the Succession Duty Act of 1907, ch. 217, R.S.B.C. 1911, all property of a deceased person, whether domiciled in the Province or not, which is situated within the Province, is made subject on his death to succession duty, the rate of duty being fixed by secs. 7 to 9 of the Act. Section 7 of the Act, as amended by the Succession Duty Act of 1915, ch. 58, sec. 4, is as follows:—

"7. When the net value of the property of the deceased exceeds twenty-five thousand dollars and passes under a will, intestacy or otherwise either in whole or in part to or for the use of the father, mother, husband, wife, child, daughter-in-law or son-in-law of the deceased, all property situate within the Province or so much thereof as so passes (as the case may be) shall be subject to duty as follows:—(a) Where the net value exceeds twenty-five thousand dollars but does not exceed one hundred thousand dollars, at the rate of one dollar and fifty cents for every one hundred dollars. (b) Where the net value exceeds one hundred thousand dollars but does not exceed two hundred thousand dollars, at the rate of one dollar and fifty cents for every one hundred dollars of the first one hundred thousand dollars and two dollars and fifty cents for every one hundred dollars above the one hundred thousand dollars. (c) Where the net value exceeds two hundred thousand dollars, at the rate of one dollar and fifty cents for every one hundred dollars of the first one hundred thousand dollars, two dollars and fifty cents for every one hundred dollars of the second one hundred thousand dollars and five dollars for every one hundred dollars above the two hundred thousand dollars."

Section 8 of the Act fixes the duty on property situate within the Province, and passing on death to a lineal ancestor of the deceased (other than a father or mother) or to a brother or sister of the deceased or a descendant of a brother or sister or to an uncle or aunt of the deceased, or a descendant of an uncle or aunt at 5% of the net value; and sec. 9 fixes the duty on all property situate within the Province and passing to a more distant relation or to a stranger in blood at 10% of the net value.

"Net value" is defined in the interpretation clause (sec. 2) of the Act as meaning "the value of the property, both

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within and without the Province, after the debts, incumbrances or other allowances or exemptions authorised by this Act are deducted therefrom."

The late Sir William Cornelius Van Horne died at Montreal on September 11, 1915, being then domiciled in the Province of Quebec, and having made a will whereby (subject to a legacy of $200,000 in favour of a grandson) he left his property to his wife, son and daughter in unequal shares. The gross value of his estate within and without British Columbia was found to be $6,371,374.73 and his gross liabilities $169,989.56, leaving a net value of $6,201,385.17. His only property in British Columbia consisted of certain shares which were valued at $300,000; and if a proportion of the gross liabilities (namely $9,536.75) is deducted from the last mentioned sum, it appears that the net value of the property in British Columbia was $290,463.25. No question is raised in these proceedings as to what is to be described as property within the Province, or as to the propriety of deducting the above-mentioned sum of $9,536.75; and the above sum of $290,463.25 is practically an agreed figure. It is with reference to the amount of succession duty payable on this sum of $290,463.25 that the contest in this case has arisen.

The amount of duty claimed by the respondent, the Minister of Finance of British Columbia, was $14,242.10, made up as follows:—

$1\frac{1}{2}$ per cent. on $\frac{290,463.25}{6,201,385.07}$	of $100,000, or $4,683.84 ..	$70.24
$2\frac{1}{2}$ per cent. on $\frac{290,463.25}{6,201,385.07}$	of $100,000, or $4,683.84 ..	117.09
5 per cent. on $\frac{290,463.25}{6,201,385.07}$	of $6,001,385.07 or $281,095.57	14,054.77
		$14,242.10

The appellants, the executors of Sir Wm. Van Horne, denied that they were liable under the statute for the above sum of $14,242.10, but admitted liability for $8,523.16, made up as follows:—$1\frac{1}{2}$ per cent. on $100,000, $1,500; $2\frac{1}{2}$ per cent. on $100,000, $2,500; 5 per cent. on $90,463.25, $4,523.16. Total, $8,523.16.

The appellants accordingly presented a petition to the

Supreme Court of British Columbia praying that it might be declared that the claim of the respondent proceeded upon a wrong basis, and that the succession duty payable was $8,523.16, and no more.

The petition has given rise to a remarkable division of judicial opinion. Hunter, C.J.B.C., by whom the petition was heard, gave judgment in favour of the appellants. On an appeal by the respondent to the Court of Appeal of the Province, that Court (1919), 47 D.L.R. 529, 27 B.C.R. 269, by a majority of three to two (Macdonald, C.J.A., Galliher, J.A., and Eberts, J.A., Martin, J.A., and McPhillips, J.A., dissenting) affirmed the judgment of the lower Court and dismissed the appeal; but on a further appeal to the Supreme Court of Canada (1920), 56 D.L.R. 226, 61 Can. S.C.R. 127, that Court by a majority of three to two (Idington, Duff and Brodeur, JJ., Anglin and Mignault, JJ., dissenting), reversed the decision of the Court of Appeal of British Columbia, and decided in favour of the Minister of Finance. Thereupon the present appeal was brought by the executors to His Majesty in Council.

The claim of the respondent, the Minister of Finance, which has been affirmed by the Supreme Court, rests upon the following basis. He contends that, having regard to the definition of "net value" contained in sec. 2 of the Act, the expression "net value" in paras. (a) (b) and (c) of sec. 7, means the total net value of the testator's estate wherever situate, and accordingly that the sums of "one hundred thousand dollars" and "two hundred thousand dollars" mentioned in those paragraphs are to be treated as constituent parts of that total net value. Thus, taking para. (c) as the paragraph applicable to the present case, it is said that the meaning and effect of that paragraph is that where (as in this case) the total net value of the testator's estate, wherever situate, exceeds $200,000, the duty is to be calculated at the rate of 1½ per cent. on the first $100,000 of that total net value, 2½ per cent. on the second $100,000 of that total net value, and 5 per cent. on the remainder of the same total net value; but that, as it cannot be intended that the property within the Province shall be charged with a percentage on the net value of the whole estate wherever situate, the duty when so calculated is to be levied only on such proportion of each constituent part of the total net value as is situate within the Province. The argument is most clearly stated in the following extract from the judgment of Duff, J., at p. 229 (56 D.L.R.):—

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"Net value as defined in the interpretation section means a net value ascertained by taking into account the value of all property both within and without the Province. It seems reasonably clear that the scheme contemplated by the Legislature, as brought into force by para. (c), is that for the purpose of ascertaining the rate in the case of estates falling within that paragraph, the net value of the estate is to be divided into three parts; the first being the sum of $100,000, the second also being the sum of $100,000, the third being the difference between the sum of $200,000 and the sum representing the aggregate net value; the net value in every case as already mentioned being ascertained by reference to the whole of the property both within and without the Province. This division having been made, the rate prescribed by para. (c) is the rate of $1.50 notionally applied to the whole of the first $100,000 of the net value, the sum of $2.50 for every $100 on the second $100,000 notionally applied to the whole of that sum and $5 for every $100 above the $200,000 notionally applied to the whole estate both within and without the Province. In this manner the rate of taxation is ascertained. The property taxed, however, is only the property situated within the Province, and in the case of each of the parts only that part of the first $100,000, the second $100,000 or the excess over $200,000, as the case may be, which is so situate is subject to taxation according to the several rates prescribed by sub-sec. (c), for the parts mentioned."

It is obvious that the effect of so calculating the duty is to accelerate, in the case of a deceased person who leaves property both within and without the Province, the process of graduation on the property within the Province; and, if this be the clear meaning of the statute, there appears to be no reason why it should not have effect. As Martin, J.A., says, at p. 274 (27 B.C.R.), "it is not a matter of indirect taxation at all, but simply the fixing of a basis of domestic assessment in certain varying circumstances, domestic and foreign." But taxation, to be effective, must be imposed by clear words; and, with great respect to the Judges who have taken a different view, their Lordships are unable to find in the Act any words imposing the tax which the respondent claims to levy. If the expression "net value" in para. (c) means the total net value of the property of the deceased, then the duty imposed by the paragraph is, according to the natural meaning of the language used, a percentage upon that total net value; and, if this construction leads to results

which are inadmissible, those results cannot be avoided by importing into the paragraph a principle of proportionate levy which is not to be found there. In order to support the respondent's construction it would be necessary to substitute for "the first one hundred thousand dollars" in para. (c) some such words as the following:—"a sum bearing the same proportion to the first one hundred thousand dollars as the net value of the property situate within the Province and passing to any of the persons described in this section bears to the net value of all the property of the deceased," and to make corresponding changes in the later words of the paragraph. This would be, not to construe, but to amend the Act; and it appears to their Lordships that it would be contrary to the established rule as to the construction of taxing statutes to make so generous an addition to the language of the Act.

On the other hand, their Lordships have difficulty in accepting the argument put forward by counsel for the appellants. They contended that, even if the "net value" referred to at the beginning of para. (c) is the net value of the whole estate of the deceased, wherever situate, the sums of $100,000 and $200,000 mentioned in the latter part of the same paragraph are nevertheless intended to be constituent parts of the net value within the Province only; but such a construction would not be consistent with the language of the paragraph. The "first one hundred thousand dollars" and the "second one hundred thousand dollars" mentioned in the paragraph are plainly intended to be fractions of the net value mentioned in the first words of the paragraph; and the expression "the two hundred thousand dollars" occurring at the end of the paragraph can only refer to the two hundred thousand dollars of net value specified at the beginning. Further, if the meaning of the paragraph is that the duty is to be graduated according to the net value of the property within the Province only, there is no sense or purpose in making that graduation contingent on the total net value of the estate reaching a particular figure.

In these circumstances it is necessary to seek some other solution of the problem; and in the opinion of their Lordships the solution is to be found in a close consideration of the meaning of the expression "net value" as used in sec. 7 of the Act. Section 2 does not say (as was assumed in the argument) that "net value" wherever used means the value of all the property of the deceased wherever situate, less his

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debts and incumbrances, but only that "net value" means the value of "the property,"—that is to say, of the particular property with reference to which the expression is used in the section which is to be construed—whether that property be within or without the Province, less the authorised deductions from that value. If so, then, the expression "net value" used in paras. (a) (b) and (c) of sec. 7 is properly and naturally to be referred to the property described in the words immediately preceding those paragraphs, that is to say, to the property within the Province passing to the near relatives mentioned in the section, and the sums of "one hundred thousand dollars" and "two hundred thousand dollars," afterwards referred to, are to be treated as constituent parts of that net value; and it follows that the rate of taxation is to be ascertained with reference to the net value of the property within the Province only. It may be objected that the initial words of the section ("where the net value of the property of the deceased exceeds twenty-five thousand dollars") refer to the total net value of the estate, and no doubt this is so. But those words are introduced only for the purpose of keeping the section in compliance with sec. 4 of the Act, which provides that where the net value of the property of the deceased does not exceed $25,000 no succession duty shall be payable on property passing to a parent, husband, wife, child, daughter-in-law or son-in-law of the deceased; and there is no reason why they should govern the meaning of "net value" throughout sec. 7.

The construction here suggested which also commended itself to Macdonald, C.J.A., is more consistent with the history of sec. 7 than that for which the respondent contends. In that section as passed in 1907, paras. (b) and (c), were similar in form to para. (a), and read as follows:—

" (b) Where the net value exceeds one hundred thousand dollars, but does not exceed two hundred thousand dollars, at the rate of two dollars and fifty cents for every one hundred dollars. (c) Where the net value exceeds two hundred thousand dollars, at the rate of five dollars for every one hundred dollars."

It is difficult to construe these paragraphs otherwise than as imposing a tax of 2½% or 5 % (as the case may be) on the property to be taxed; and it is most improbable that the amendment made in 1915, which was obviously enacted for the relief of the taxpayer, can have been intended to alter the whole construction of the section to his detriment.

Further, the above construction of sec. 2 of the Act makes it possible to put a reasonable interpretation on secs. 8 and 9. Section 8 provides that where the net value of the property of the deceased exceeds $5,000 (the minimum sum mentioned in sec. 4) and passes in whole or in part to a lineal ancestor of the deceased (except his father or mother) or to his brother, sister, uncle or aunt or their descendants, "all property situate within the Province or so much thereof as so passes (as the case may be) shall be subject to a duty of five dollars for every one hundred dollars of the net value without any exemption." If (as the respondent contends) the "net value" here referred to is the total net value of the estate, then it is necessary here also to calculate the duty on the whole estate wherever situate and then to apply the principle of proportionate levy in order to support the taxation; but if "net value" means the net value of the property within the Province passing to the persons named in the section, then there is a direct levy of 5% on the value of that property. The pecuniary result of both methods may be the same; but the first method is artificial and indirect, while the latter is simple and direct. The same observations apply to sec. 9.

For the above reasons their Lordships are of opinion that the claim to duty made by the Minister proceeds upon an erroneous basis, and that the amount of duty payable by the appellants is the sum of $8,523.16 and no more; and they will humbly advise His Majesty that this appeal should be allowed, and the order of Hunter, C.J.B.C., restored. The respondent will pay the appellants' costs of the appeal to the Supreme Court of Canada, and their costs of this appeal.

Appeal allowed.

REX v. LOY WAY.

British Columbia Supreme Court, Morrison, J. January 28, 1921.

Internal Revenue (§I—8)—Inland Revenue Act, sec. 356—"Possession" of Tobacco—Meaning of.

Section 356 of the Inland Revenue Act, R.S.C. 1906, ch. 51, forbids a vendor to have possession of tobacco not put up in packages and stamped. Held that a vendor who has sold tobacco to a customer and at his request has cut it up and is keeping it for the customer, who is to call back for it, has the tobacco in his possession within the meaning of the Act.

[See also R. v. Yet Sun (1920), 61 D.L.R. 281, 36 Can. Cr. Cas. 8.]

CASE STATED by the Deputy-Police Magistrate in and for the City of Vancouver as follows:—

On September 28, 1920, an information was laid under

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the provisions of the Inland Revenue Act, R.S.C. 1906, ch. 51, by the appellant against the respondent for that at the City of Vancouver, on September 27, 1920, the said Loy Way, not being a licensed tobacco manufacturer, did unlawfully have in his possession manufactured tobacco not put in packages, and stamped as required by the Inland Revenue Act, contrary to the form of the statute in such case made and provided.

The charge was duly heard before me in the presence of both parties under Part XV. of the Criminal Code, R.S.C. 1906, ch. 146, and after hearing the evidence adduced and the statement of counsel, I found that the said Loy Way had not been proved to be guilty of the said offence, and on December 7, 1920, dismissed the charge, but at the request of counsel for the prosecution, I state the following case for the opinion of this Court:—

It was shewn before me:—

1. That on the day of the alleged offence, James Thorburn, inland revenue officer, and Detectives Sinclair and Ricci, of the Vancouver police force, entered certain premises at 526½ Shanghai Alley, in the said City of Vancouver, and found the accused in charge of the store at that address. From the evidence it appeared that he had sufficient control of the premises to be able to open the safe and to be in possession of the keys of the premises. The inland revenue officer and the detectives found a large quantity of tobacco on the said premises not put up in packages and stamped in accordance with the provisions of the Inland Revenue Act. 2. It was shewn that the firm of Tai Duck & Co. carried on business at the said address, and a declaration of partnership was produced, showing that Loy Way was a partner of Tai Duck & Co., and in his defence the said Loy Way admitted that he had signed the said declaration of partnership. 3. In his defence, the accused stated that on the day of the alleged offence one Wing Gow had come to his premises and had bought some tobacco from him in plug form, and requested the accused to cut it up. Wing Gow paid for it and was to call back and get it when it was cut up. The accused proceeded to cut up the tobacco and when he had finished the inland revenue officer and detectives visited the store, seized the tobacco and arrested the accused. 4. I found as a fact that Loy Way was a partner of Tai Duck & Co.; that he was in charge of the store at the time of the offence; that neither the said Loy Way nor Tai Duck &

Co. had any license of any description under the Inland Revenue Act nor had the said Wing Gow; that at least one of the other partners of Tai Duck & Co. is in China; that Wing Gow called at the said store prior to the arrest of the accused and bought some tobacco from the accused and requested the accused to cut it up for him; that the accused did cut up the tobacco and that it had never left his store. Counsel for the accused contended that Wing Gow was the owner of the tobacco and hence legally in possession. I concurred and dismissed the charge. My decison turned entirely on the meaning of the word "possession." I found that the tobacco was in the possession of Wing Gow, and that, therefore, the accused was not in possession of the tobacco as provided by sec. 356 of the Inland Revenue Act. 5. Counsel for the prosecution desires to question the validity of my said judgment on the ground that it is erroneous in point of law, the question submitted for the opinion of this Court being whether or not the facts as found by me warrant the finding that Loy Way was not in possession of the tobacco within the meaning of sec. 356 of the Inland Revenue Act.

Alfred Bull, and A. A. Gray, for the Crown.

A. D. Taylor, K.C., for the accused.

Morrison, J.:—The only question I am called upon to decide by the stated case is whether or not the tobacco was in possession of the accused or in the possession of the customer who had ordered the tobacco to be cut for him with the understanding that he would call back for it when it was cut. I have no hesitation in arriving at the conclusion that the tobacco was in possession of the accused. The case is remitted to the Magistrate.

REX v. CALBIC.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. April 6, 1920.

Constitutional Law (§IA—20)—Statute—Construction—Provincial Statute Empowering City Municipality to Prohibit Operation of Certain Motor Vehicles on Streets—Validity of—Validity of By-law Passed under Authority of Act.

Section 7 of ch. 104, B.C. Stats. 1918, which gives the City of Vancouver the right to arrange all motor vehicles in classes and prohibit the operation on any or all of its streets of all motor vehicles coming within any of such classes, is intra vires the Provincial Legislature, and a by-law of the city passed in accordance with the statute, which prohibits the operation in the city of vehicles of a particular class, is a valid by-law which has the force of statute law, and which must be upheld and obeyed.

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APPEAL by accused from an order of Morrison, J., of October 22, 1919, refusing a writ of certiorari, the accused having been convicted by the Police Magistrate in Vancouver on a charge that he unlawfully drove a motor-vehicle in the city of Vancouver, coming within class "B" as defined by sec. 11 (1) of by-law 1359, as amended by by-law 1370 of the City of Vancouver. Section 11 (1) of the by-law provided that for the purpose of the by-law all motor-vehicles be arranged in classes. Class "B" is as follows:—"This class shall include every motor-vehicle which accepts, carries and discharges as passengers such persons as may offer themselves for transportation at or near the terminus of the route traversed by such motor-vehicle," etc.

And sec. 11 (2) provides that, "No person shall, after the passing of this by-law, drive or operate, or permit to be driven or operated, on any of the streets of the city, any motor-vehicle coming within classes 'A' or 'B'."

It appeared by the evidence that accused, who ran his car between Vancouver and New Westminster, was taking on and discharging passengers at the terminus of his run within the city of Vancouver.

R. M. Macdonald, for appellant.

Macdonald, C.J.A.:—The facts in this case are analogous to those in question in Municipal Corp'n of City of Toronto v. Virgo, [1896] A.C. 88, with this difference, that there the municipality had not been given by the Legislature, power to prohibit but only to regulate. Here the by-law does not transgress the power given by the Legislature.

There was some argument directed to the jurisdiction of the Legislature to confer the powers exercised by the city council, but I entertain no doubt of the jurisdiction.

Martin, J.A.:—At the argument the first point raised by the appellant's counsel respecting the constitutionality of the by-law was not plausible enough to justify our calling upon the respondent's counsel to reply to it, and we only desired to hear him upon the question of classification raised by sec. 7 of ch. 104 of 1918, (B.C.), which provides that:—"The City may, if it should deem it advisable to do so, arrange all motor-vehicles in classes and differentiate in the conditions contained in licenses granted. . . ."

It is submitted that the only classification open under this section is restricted to the vehicles themselves and does not extend to the routes or areas over which they run or within which they operate, or otherwise.

Now a power to classification, to be exercised as the donee "should deem it advisable," is a very wide one, and I am quite unable to see upon what ground it should be cut down, as suggested, far below its ordinary meaning.

What the city has made here is undoubtedly a classification of a reasonable kind, based partly upon the style of the vehicles, or their routes or areas (or "zones") or place of hiring or the fares charged, a combination of all of which elements is to be found in, e.g. class "C" dealing with a particular style of motor-vehicle, viz., "taxi cabs or touring cars," hired from public stands or garages, operating on unspecified routes and charging a minimum fare of 25 cents. Now this is a classification upon four distinct bases, viz., the vehicle itself, the place of hiring, the route of operation and the fare charged, and so embraces the very element which is conceded to be intra vires. Then class "D" relates to "sight-seeing trip" motors, a well-known feature of our tourist traffic requiring a special type of car, not used in carrying passengers in the ordinary way; class "E" with hotel motor-buses; class "F" with ambulances and hearses; and class "G" with vehicles operating on a particular route, from Woodward's Landing to the Vancouver Post Office; all of which shews how varied the classification must necessarily be to cover the various kinds of traffic, and how unreasonable it would be to attempt to curtail it in the manner suggested. The appeal should, in my opinion, be dismissed.

Galliher, J. A. would dismiss the appeal.

McPhillips, J.A.:—The appeal, in my opinion, is a hopeless one. The conviction was one for the unlawful driving of a motor-vehicle coming within class "B" as defined in sub-sec. (1) of sec. 11 of by-law number 1359, as amended by by-law number 1370 of the City of Vancouver, passed in pursuance of ch. 104 of B.C. Stats. 1918, sec. 7.

The offence was clearly proved, but it is attempted to quash the conviction upon proceedings by way of certiorari, the contention being that the Legislature, in passing the enactment under which the challenged by-law was passed, exceeded its powers, that is, the legislation was ultra vires of the Legislative Assembly of the Province of British Columbia, the express exception being that it is an interference with trade and commerce, and thereby transcends Provincial authority under the B.N.A. Act. Other grounds

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were taken even if it were assumed that the point of ultra vires was not fatal, such as discrimination between rival businesses, that there was no power of delegation of authority from the Legislature to the municipal corporation, that the by-law was not bona fide, but passed for the purpose of creating a monopoly, and that it was necessary to have the assent of the electors to the by-law, which was not obtained.

The motion for the writ of certiorari came before Morrison, J., who dismissed the same, and now the appeal to this Court is presented upon the same grounds as contained in the motion made to the Court below.

The ultra vires ground of appeal was the one most strenuously pressed. With all deference to the very able argument of R. M. Macdonald, the counsel for the appellant, I cannot see that the legislation in any way offends against the provisions of the B.N.A. Act, or that it is beyond the power of the Legislature to prohibit the plying for hire of certain named and described vehicles in and throughout the boundaries of any municipality, without the boundaries thereof, and generally throughout the Province, and the delegation of authority to the municipal corporations to pass by-laws so prohibiting the same. Wherein does this affect trade and commerce? I cannot see that there is any invasion of the domain of legislation exclusively vested in the Parliament of the Dominion.

It is idle to contend that the effect of the legislation is the dislocation of all business, or the inhibition of all travel. It might well be said to be merely regulatory and the exercise of control over the streets of the city, and what class of vehicles may pass over the same. The by-law is not attacked as being unreasonable, but in any case, with the power of prohibition conferred upon the municipal authority and that power implemented by the passage of the by-law, the by-law has the force of statute law, and if it does not in its effect transcend the powers committed to the Provincial Legislature, it must be upheld and obeyed.

As in my opinion the legislation was intra vires of the Legislative Assembly of British Columbia, I am in agreement with the judgment of the Court below.

I would dismiss the appeal.

Eberts, J.A. would dismiss the appeal.

Appeal dismissed.

REX v. PETERS.

Nova Scotia Supreme Court, Russell and Longley, JJ., Ritchie, E.J., and Mellish, J. April 2, 1921.

Intoxicating Liquors (§IIIJ—94)—Nova Scotia Temperance Act—Conviction for Offence against—Regularity of Conviction not Questioned until Information Laid for Second Offence—Writ of Prohibition to Restrain Magistrate from Proceeding on Ground that First Conviction Bad.

A magistrate cannot set aside or disregard his own conviction, and if not attacked, its regularity will be presumed as a matter of evidence, and a subsequent information for an infringement of the Nova Scotia Temperance Act, which recites the previous conviction and states that the offence is a second offence, is properly laid; and a writ of prohibition to restrain the magistrate from further proceedings on the information on the ground that the accused was not properly convicted of the first offence will be refused.

MOTION for a writ of prohibition to restrain stipendiary magistrate from further proceedings on an information laid against defendant for unlawfully selling intoxicating liquor contrary to the provisions of the first part of the Nova Scotia Temperance Act, 1910 ch. 2. Refused.

J. J. Power, K.C., in support of application.

The judgment of the Court was delivered by

Mellish, J.:—On May 6, 1920, the defendant was convicted before A. G. MacKenzie, stipendiary magistrate at Amherst for that between February 4, 1920, and May 4, 1920, she did unlawfully sell intoxicating liquor at the town of Amherst.

On November 27, 1920, an information was laid before the same Magistrate that she had committed the same offence between November 1 and 27, 1920. The information further recites the previous conviction and states that the offence first charged is a second offence against the provisions of the Nova Scotia Temperance Act, 1910, ch. 2. A warrant was issued on this information and the accused was brought before the Magistrate and as we are informed by his affidavit convicted of the offence charged.

The defendant now moves the Court under notice of motion for an order for a writ prohibiting the Magistrate from proceeding further on this information. We are not informed in detail as to what evidence was taken by the Magistrate or of the precise terms of the conviction. The

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accused, however, swears that "the Magistrate purported to convict me the said Mary Peters of the offence so charged in such information" and perhaps we should conclude from this that the conviction was as for a second offence.

The ground upon which the motion was made is that as shewn by the affidavits the accused was not served with the process upon which the first conviction was based and that therefore such conviction is bad and that it consequently follows the second conviction as for a second offence is also bad and should not be enforced.

There are doubtless numerous authorities, including those cited by Mr. Power, K.C., that the first conviction, assuming the facts to be correctly stated in the affidavits, could be quashed on certiorari and with that proposition I do not feel called upon to disagree.

The first conviction however has apparently not been set aside and the accused seems to have paid the penalty imposed thereby under coercive process issued by the Magistrate. Apparently until now she has taken no steps to impeach the conviction and possibly has had the benefit of it as a bar to any other proceedings being taken against her for a similar offence committed between the dates therein specified.

The motion was not opposed and we do not know precisely what occurred before the Magistrate or whether any objection was taken to putting the first conviction in evidence or as to how it was proved, if proved at all.

Whether the accused was previously convicted or not was a question of fact solely for the Magistrate (Regina v. Brown (1888), 16 O.R. 41), a fact which is here admitted.

I incline to the opinion that the magistrate could not set aside or disregard his own conviction and that it was conclusive. If, on the other hand, the Magistrate is to go behind the conviction, I do not think he is required to do so at least until it is attacked before him. If not so attacked its regularity, I think, would be properly presumed as a matter of evidence. We do not know whether it was attacked before him or not or whether or not he tried out the question if raised before him.

I think, under the circumstances we should refuse the order applied for.

Order refused.

MCDONALD v. MCLEOD ET AL.

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Nova Scotia Supreme Court, Russell and Longley, JJ., and Ritchie, E.J. April 2, 1921.

MCDONALD v. MCLEOD.

Wills (§IIIG—136)—Bequest to Wife for Life—After Her Death to Son-in-law on Condition that He Supports Her According to His Ability—Widow Not Continuing to Live with Him — Construction of Condition.

A testator bequeathed to his wife a certain portion of his farm during her life, after her death to belong to a son-in-law upon condition that he support her according to ability during her life, the son-in-law to have the use of the farm bequeathed while he supported the widow. The widow shortly after the re-marriage of the son-in-law went to live in Montana with one of her sons. The Court held that there was no condition making the widow's right to support conditional on her continuing to live with the son-in-law, and that he was bound to contribute to her support "according to his ability notwithstanding her removal to Montana, and that there being no evidence that he had ever contributed anything to her support while she was living in Montana, he had no right or claim to the land on her death.

[Swainson v. Bentley (1882), 4 O.R. 572, followed.]

APPEAL from the judgment of Mellish, J., in favour of defendants in an action claiming the partition of land.

T. R. Robertson, K.C., for appellant.

D. V. White, for respondents.

The judgment of the Court was delivered by

Russell, J.:—By the last will and testament Philip Ross provided as follows:—

"I give and bequeath to my wife Isabella Ross the western half of my farm which would be 110 acres more or less. This, she is to hold in her name while she lives without the power of disposing of it. At my wife's death the said western half of my farm will belong to D. J. McDonald upon condition that he supports her according to ability while she lives. The said D. J. McDonald is to have the use of the said western half of my farm while he supports my wife."

The plaintiff, D. J. McDonald had married the testator's daughter who died before the death of the testator. McDonald afterwards took a second wife and the widow after the death of the testator lived with him and his second wife for less than a year, after which she went to Montana to live with one of her sons. The trial Judge finds that the plaintiff deliberately failed to perform the condition which alone would entitle him to the use of the land described, and further bases his decision on the ground that the plaintiff has not averred or proved any willingness to perform the condition. He, accordingly, dismisses the claim of the plaintiff in respect to the western half.

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It is from this part of the decision only that the appeal is taken, and among other grounds it is argued that there was no demand of support, and no entry as upon a forfeiture. I incline to the view which seems to have been that of the trial Judge that the plaintiff's rights as to this western half of the land depend upon his performance of the condition precedent that he supports the widow according to his ability.

In Swainson v. Bentley (1882), 4 O.R. 572, a testator gave and devised to his daughters their support and maintenance so long as they or either of them remained at home with his sons,—to whom he had devised certain lands charged with legacies. It was held that the daughters might, for sufficient reasons, cease to remain at home, and yet be entitled to such support and maintenance. In the present case it was no doubt the assumption of the testator that the widow would live with her son-in-law on the property, but nothing is said as to that, and he is to support her "according to his ability." There is no explicit finding as to the sufficiency or otherwise of the widow's reasons for ceasing to remain with the son-in-law, but as I have just said, there is no condition making her right to support dependent on her living with him on the land which he was to acquire on condition of such support. The case is by that much the stronger in this respect in the widow's favour than the Ontario case referred to was in favour of the daughters, inasmuch as in that case the daughters by the terms of the will were seemingly entitled to support only so long as they remained at home with the sons.

As the trial Judge has found as a fact that the plaintiff deliberately failed to perform the condition of supporting her, it is not necessary to inquire into the extent of his ability. If her support in Montana would be more expensive than at home the condition could probably be performed without his giving her full support, but he would, I think, nevertheless, be bound to contribute to her support there "according to his ability." There is no evidence of his readiness or willingness to contribute anything whatever to her support.

As to the contention that there was no entry, this proposition seems to be implicated with the contention that the widow's rights depend upon a forfeiture of his rights by the plaintiff and this in turn is dependent upon the construction of the condition as a condition subsequent. The Judge has treated the condition not as a condition subsequent but

as a condition precedent to the plaintiff having any rights in the property and that seems to me the more natural construction.

I think the appeal should be dismissed with costs.

Appeal dismissed.

PLANT v. URQUHART.

British Columbia Supreme Court, Murphy, J. March 31, 1921.

Evidence (§IVE—412)—Conviction by Magistrate Under B. C. Prohibition Act—Declaration that Liquor Confiscated to Crown—Another Document Subsequently Signed by Magistrate which Contained No Adjudication as to Confiscation—Second Document Sent to County Court on Appeal Which was Dismissed—Right to Use Proper Conviction as Evidence in Action Against the Crown for Return of the Liquor.

Where a Magistrate declares liquor confiscated to the Crown under the provisions of the British Columbia Prohibition Act 1916, ch. 49, and signs a conviction to that effect, but who a few days afterwards inadvertently signed another document purporting to be a conviction in the same case, which contained no adjudication of confiscation, the second document being forwarded to the County Court instead of the true conviction on an appeal to that Court which was dismissed, the true conviction may be adduced in evidence in an action against the officers of the Crown for a return of the liquor.

ACTION by plaintiff for the return of certain whiskey seized from him by the defendant police officers in the City of Vancouver and confiscated to the Crown, represented by the prohibition officers. Action dismissed.

C. Wilson, K.C., for plaintiff.

S. S. Taylor, K.C., for defendants.

Murphy, J.:—It is conceded that so long as the decision in Canadian Pacific Wine Co. v. Tuley (1921), 60 D.L.R. 314 stands unreversed,* plaintiff must rest his case on one point based on the following facts: The Magistrate declared the liquor confiscated to the Crown under the provisions of the British Columbia Prohibition Act, 1916, ch. 49 and signed a conviction to that effect. A few days later, he inadvertently signed another document purporting to be a conviction in the same case, which contained no adjudication of confiscation. He did this without realizing that he was dealing with something he had already disposed of. He properly noted the real adjudication on the information. An appeal was taken to the County Court and by mistake the second document was forwarded to the County Court instead of the true conviction. The appeal went into the County Court list and was dismissed.

*This decision was affirmed by the Privy Council, 60 D.L.R. 520.

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It is contended by plaintiff's counsel that the true conviction cannot be adduced in evidence but that the County Court record only is admissible. If so, as the so-called conviction appearing in that record contains no adjudication of confiscation, the defence fails. It is argued that as the County Court is a Court of record no evidence to impeach or vary its record can be admitted as no attempt has been made to attack the disposal by the County Court of the appeal so taken or to correct its record. In view of the nature of a Court of record and of the principle interest rei publicae ut sit finis litum the general correctness of this proposition may, I think, be admitted where subsequent proceedings are so related to the County Court proceedings as to make the County Court record a part thereof. But whether this is correct or not in my view, this case has nothing to do with the County Court appeal. The defendants justify under a conviction of the Magistrate which, as the law stands at present, is unimpeachable. No authority, or statutory provision, has been cited to me to the effect that where an appeal has been taken from such a conviction, the conviction itself can only reach any other Court by way of the County Court in proceedings which have nothing to do with the County Court appeal. The jurisdiction exercised by the County Court herein was quasi-criminal. The case at Bar is wholly civil. It is true that the Magistrate where an appeal is taken is directed by statute to forward the conviction to the County Court. If he, in error, forwards the wrong document, that, as stated, may possibly be conclusive in subsequent proceedings which are so related to such appeal as to necessarily import into them the County Court record but only, I think, in such an instance if at all. Were the law otherwise, the case at Bar would be an apt illustration of the startling consequences. Property of great value, which as the law now stands is the property of the Crown, would be lost to it and individuals rendered liable to heavy damages for detinue as the result of two acts by the Magistrate—one in law a nullity and the second a clear mistake. The Magistrate having signed a conviction in accordance with his adjudication was functus. The subsequent document signed by him is legally a nullity. The transmission of this document to the County Court was a blunder. Unless bound by clear authority a Court of first instance should

not, I think, give a decision having such results. The action is dismissed.

Action dismissed.

HAMILTON v. FERNE AND KILBIER.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. September 15, 1920.

Landlord and Tenant (§IID—33)—Covenant not to Assign or Sublet—Breach of Covenant—Forfeiture—Recovery of Possession and Mesne Profits.

In a lease of certain lands the lessees covenanted that they would not assign or sublet without leave first had and obtained from the lessor, and the lease further contained a proviso for re-entry in case of breach of the aforesaid covenant. The trial Judge found as a fact that there had been an assignment of the lease, and the Court held that that being so there was a forfeiture of the lease and that the lessor was entitled to recovery of possession of the lands and premises and mesne profits.

APPEAL from the judgment of Murphy, J. on a claim for possession of certain lands and premises situate in the municipality of South Vancouver, which by lease, dated August 25, 1919, were leased by the plaintiff to two of the defendants Killick and Borthwick. The lessees covenanted in the said lease that they would not assign or sublet without leave first had and obtained from the lessor, and the lease further contained a proviso for re-entry in case of breach of the aforesaid covenant. The trial Judge, Murphy, J., found as a fact that there had been an assignment of the lease although the defendants contended very strongly to the contrary. The judgment appealed from is as follows:

The facts of this case shew an absolute assignment, undoubtedly, to my mind. It was never intended to execute any further document. The premises were turned over to Ferne, rent adjusted with him and the other defendants were there as his servants and in no other capacity. Now the only principle at all on which I could relieve against this forfeiture is under the very wide wording of the Laws Declaratory Act, R.S.B.C. 1911, ch. 133 in the Province, but that has been commented on by the full Court and certainly I, as a nisi prius Judge, am not going to extend the doctrine of relief in a case of this kind, much as I would like to do so. It is possible there is jurisdiction in the Court. It has never been exercised as far as I know. In my opinion the case Barrow v. Isaacs & Son, [1891] 1 Q.B. 417, 60 L.J. (Q.B.) 179, is conclusive on this matter. I have no doubt there was a perfectly completed assignment, carried

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out in every particular. That being so, there was a forfeiture of the lease and I can do nothing else than declare there was; rents and profits on the basis of $50 a month from the month of January; nothing previous to it.

S. S. Taylor, K.C., and W. D. Gillespie, for appellants.

R. W. Ginn and G. A. King, for respondent.

Macdonald, C.J.A.:—I would dismiss the appeal.

Martin, J.A.:—I concur in the dismissal of this appeal.

Galliher, J.A.:—I agree in the conclusions of the trial Judge.

McMahon v. Coyle (1903), 5 O.L.R. 618, 2 O.W.R. 265, is practically on all fours with the present case. This is a decision of Boyd, C., touching the very point raised here as to the agreement to assign.

I am also of opinion that it is not a case where we should relieve against forfeiture.

The appeal should be dismissed.

McPhillips, J.A.:—I am of the opinion that the appeal fails; the trial Judge arrived at the right conclusion.

There was an express breach of the covenant not to assign without leave and it would follow that it would be a proper case for ejectment, recovery of possession of the lands and premises and mesne profits.

With respect to the claimed relief from forfeiture, I cannot come to a conclusion differing from that of the trial Judge, who did not think it a proper case for relief. See Barrow v. Isaacs & Son, [1891] 1 Q.B. 417, 60 L.J. (Q.B.) 179; Eastern Telegraph Co. v. Dent, [1899] 1 Q.B. 835, 68 L.J. (Q.B.) 564; De Soysa v. De Pless Pol, [1912] A.C. 194, 81 L.J. (P.C.) 126; Ellis v. Allen, [1914] 1 Ch. 904, 83 L.J. (Ch.) 590.

I would dismiss the appeal.

Appeal dismissed.

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Quebec Superior Court in Bankruptcy, Panneton, J. April 21, 1921.

Bankruptcy (§III—26)—Sale of Goods to Insolvent—Petition to Cancel Sale and Return Goods—Goods in Hands of Trustee—Petition Not Made Within 30 Days of Delivery of Goods — Quebec Civil Code, arts. 1541, 1542, 1543, 1980-2081.

In the case of the sale of goods to an insolvent the Court will not grant a petition to cancel the sale and return the goods to the petitioner, the goods being in the possession of the trustee at the time the petition is made, where such petition is not made within 30 days of the delivery of the goods.

[See Annotations Bankruptcy Act, 1920, 53 D.L.R. 135; Bankruptcy Act Amendment Act 1921, 59 D.L.R. 1.]

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THE PETITIONER alleges that in January, 1921, it sold to the insolvent a number of men's suits for $135 and that these goods are still in possession of the trustee and in the stock taken over by him, and that it is entitled to ask for cancellation of the sale of the said merchandise to the insolvent and that the said goods be returned to it, and for an order to that effect.

The trustee alleged that the sale was made on credit and that the petition was made and served upon him more than 30 days after the delivery of the said merchandise, and that, therefore, the petitioner has no right to its demand. It is admitted that the said petition was made and served on the trustees more than 30 days after delivery of the goods in question to the insolvent.

Articles 1541-1543 of the Quebec Civil Code provide as follows:—

"1541. The seller is held to have abandoned his right to recover the price when he has brought an action for the dissolution of the sale by reason of the non-payment of it.

"1542. A demand of the price by action or other legal proceedings does not deprive the seller of his right to obtain the dissolution of the sale by reason of non-payment.

"1543. In the sale of moveable things, the right of dissolution by reason of non-payment of the price can only be exercised while the thing sold remains in the possession of the buyer, without prejudice to the seller's right of revendication as provided in the title of Privileges and Hypothecs.

In the case of insolvency such right can only be exercised during the thirty days next after the delivery. [as amended 1890, (Que.) ch. 39, sec. 1]."

Under the heading of Privileges and Hypothecs, secs. 1998-2000 of the Quebec Civil Code provides as follows:—

"1998. The unpaid vendor of a thing has two privileged rights: 1. A right to revendicate; 2. A right of preference upon its price.

In the case of insolvent traders these rights must be exercised within thirty days after the delivery [As amended (1885) (Que.) ch. 20, sec. 1 and (1890), (Que.) ch. 39, sec. 2].

1999. The right to revendicate is subject to four conditions:—1. The sale must not have been made on credit. 2. The thing must still be entire and in the same condition; 3. The thing must not have passed into the hands of a third party who has paid for it; 4. It must be exercised

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within eight days after the delivery; saving the provision concerning insolvent traders contained in the last preceding article.

2000. If the thing be sold pending the proceedings in revendication, or if, when the thing is seized at the suit of a third party, the vendor be within the delay, and the thing in the conditions prescribed for revendication, the vendor has a privilege upon the proceeds in preference to all other privileged creditors hereinafter mentioned.

If the thing be still in the same condition, but the vendor be no longer within the delay, or have given credit, he has a like privilege upon the proceeds, except as regards the lessor or the pledgee."

Panneton, J.:—The proof establishes that petitioner delayed making its petition upon representation of the trustee to the effect that a compromise was being effectuated by the insolvent, and that if it did not carry through within the delay the petition could be made afterwards. The meeting of creditors rejecting the offer of composition took place after 30 days. The present petition was made immediately after that meeting.

Considering that the trustee had no authority to make such representations and that the law fixes the delay of 30 days within which such petition, as the present one, must be made (art. 1543 C.C. (Que.)), and that it was not made within that delay, I reject said petition without costs.

Claim for rescission dismissed.

NEVE v. LEESON.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. March 5, 1921.

Principal and Agent (§III—36)—Sale of Garage Property—Agent Introducing Purchaser—No Sale Resulting from Introduction—Vendor and Purchaser Subsequently Brought Together by Another Party—Right of Agent to Commission.

Where the only service rendered by the plaintiff to the defendant in connection with the sale of a garage in which defendant had an interest, was to introduce him to the purchaser, and no sale took place as a result of that introduction, but only from the fact that the vendor and purchaser were subsequently brought together by another party, the Court held that as there was no contract between the plaintiff and the defendant sufficient to satisfy the provision of ch. 27 of Stats. of 1906 (Alta.), and as the sale was not the result of the services rendered by the plaintiff, he was not entitled to commission.

[See Annotation Real Estate Agents Commission, 4 D.L.R. 531.]

APPEAL by plaintiff from judgment of Scott, J. in an action for commission on the sale of certain real estate. Appeal dismissed with costs.

The judgment appealed from is as follows:—

Scott, J.:—The plaintiff claims $3,250 for commission on the sale of certain real estate of the defendant.

The plaintiff alleges that in October, 1919, the defendant engaged him as agent for the purpose of obtaining a purchaser for a property in Calgary known as the Speedway Garage, that he secured one Hutchings as a purchaser to whom the defendant sold the property for $65,000 and that he was the effective means by which the defendant was enabled to make the sale.

The plaintiff was not a real estate agent but was manager of the insurance department of Lougheed & Taylor. Sometime in October, 1919, he learned from one Smallpiece, the manager of the General Supply Co., that his company desired to obtain a lease of the defendant's garage. The plaintiff appears to have spoken to the defendant about leasing it. The latter declined to lease it but intimated that he would sell it, upon certain terms. The plaintiff mentioned this to Smallpiece who requested that the offer should be submitted in writing. The plaintiff thereupon dictated in defendant's presence, a letter to the company setting out the terms upon which the latter would sell. Smallpiece afterwards told the plaintiff that Hutchings, who was a director of the company, was opposed to the purchase upon those terms but that, if the defendant would accept a garage then owned by the company in part payment of the purchase-money, the offer to sell might be considered. The plaintiff thereupon introduced the defendant to Hutchings and they discussed the offer but, as the defendant refused to accept the company garage in part payment, the negotiation ended.

It does not appear that the plaintiff made any further effort to secure a purchaser or sell the property. On the contrary it appears that in January last he met the defendant, who was then anxious to sell and that he then advised the latter to advertise it in the eastern papers. This fact leads to the conclusion that the plaintiff was no longer attempting to sell the property.

The defendant afterwards sold the property to Hutchings who purchased it for and on behalf of the Hutchings Garage Co., which was then in process of incorporation. The General Supply Co. had no interest in the purchase. The defen-

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dant paid The Security Trust Co. a commission of $2,000 upon the sale.

The circumstances under which the sale to Hutchings was effected was as follows:—One Connacher, who is the manager of the Security Trust Co. was also one of the executors of the will of the defendant's father in which estate the defendant had an interest. Being financially involved it became necessary for him to sell his garage property and with the object of assisting him to make a sale, Connacher, in March or April last, brought the property to the attention of Hutchings who thereupon entered into negotiations with the defendant which resulted in the sale.

It is apparent, therefore, that the only service rendered by the plaintiff to the defendant in connection with the sale was to introduce him to Hutchings in his capacity of a director of the General Supply Co., and that the sale did not result from that introduction but only from the fact that the vendor and purchaser were brought together by Connacher.

As there was no contract between the plaintiff and the defendant sufficient to satisfy the provision of ch. 27 of 1906 (Alta.), an Act to prevent Frauds and Perjuries in relation to Sales of Real Property, and as the sale to Hutchings was not the result of service rendered by the plaintiff, I dismiss the action with costs.

W. D. Gow, for plaintiff.

W. P. Taylor, K.C., for defendant.

The judgment of the Court was delivered by

Stuart, J.:—I think this appeal should be dismissed with costs. The plaintiff's claim, I think, cannot succeed for the reasons given by the trial Judge to which it seems to me unnecessary to add anything more.

Appeal dismissed.

McTAVISH v. TICE.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. February 4, 1921.

Certiorari (§IA—3)—Conviction by Magistrate—Conviction Indefinite—Authority of Court to Amend.

The Court has no authority on certiorari to substitute itself for the Magistrate making a conviction and make a definite conviction where the Magistrate has shewn his intention, where the conviction shews that it contains two quite distinct offences and the evidence relates only to one of these.

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RE LEVINE; LIBERTY CLOAK CO'S. CASE.

APPEAL from order of Scott, J. quashing a conviction made by two Justices of the Peace. Appeal dismissed with costs.

Frank Ford, K.C., for appellant.

J. K. McDonald, for respondent.

The judgment of the Court was delivered by

Harvey, C. J.:—I would dismiss this appeal with costs on the single ground that the conviction which was ordered to be quashed does not disclose the offence of which the defendant was convicted and is, therefore, void for uncertainty. The conviction does not follow the information, which itself is perhaps not valid, but is for a violation of sec. 4 of the by-law. A reference to sec. 4 shows that it contains two quite distinct offences, one relating to the building proper and the other relating to the roof. It is true the evidence only relates to one of these, but we cannot say that the intention of the Justices must have been with regard to that since they did not say so. Wide powers of amendment are given to the Court in matters of form and in some cases of substances, but I know of no authority which would permit the Court on certiorari to substitute itself for the Magistrate to make a definite conviction when the Magistrate has not shown his intention.

Although the other objections raised are of much more general importance there are obvious reasons for not expressing any opinion on them, having reached the conclusion I have on the point considered.

Appeal dismissed.

RE LEVINE: LIBERTY CLOAK CO'S. CASE.

Ontario Supreme Court in Bankruptcy, Orde, J. April 8, 1921.

Bankruptcy (§III—28)—Chattel Mortgage Given Within Three Months of Authorised Assignment—Fraudulent Preference—Summary Application by Trustee to Set Aside—Rule 120 Bankruptcy Act—Application.

A chattel mortgage given to secure an already existing debt and given within three months prior to an authorised assignment, must be prima facie presumed to have been with a view of giving the mortgagee a preference under sec. 31 of the Bankruptcy Act, 1919, (Can.) ch. 36, and where the mortgagee fails to meet this prima facie presumption with any defence whatever such mortgage will be deemed fraudulent and void as against the trustee. Rule 120 of the Bankruptcy Act authorises the Court to set aside such mortgage on summary application where the evidence is all before the Court and where nothing would be gained by directing an issue to try the question of validity.

[See Annotations, Bankruptcy Act, 1920, 53 D.L.R. 135; Bankruptcy Act Amendment Act 1921, 59 D.L.R. 1.]

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RE LEVINE; LIBERTY CLOAK CO'S. CASE.

SUMMARY APPLICATION under Rule 120 of the Bankruptcy Act, by an authorised trustee, to set aside a chattel mortgage as giving a fraudulent preference within sec. 31 of the Bankruptcy Act.

R. Forsyth, for the authorised trustee.

S. W. Graham, for Louis Fluxgold.

Orde, J.:—Esther Levine and Joseph Fluxgold, trading in partnership as the Liberty Cloak Co., made an authorised assignment under the Bankruptcy Act, 1919, (Can.) ch. 36, to the trustee on March 1, 1921.

The trustee now moves for an order to set aside a chattel mortgage given to one Louis Fluxgold on January 3, 1921. The mortgage purports to secure the sum of $1,600 paid at or before its execution, and the money is to be repaid with interest at 7% on January 3, 1922.

Louis Fluxgold, the mortgagee, files an affidavit in which he swears that between March 1 and November 11, 1920, he sold goods to the debtors to the amount of $3,220.38 and received in cash $1,677.50, leaving a balance due of $1,542.88; that between December 24, 1920, and February 14, 1921, he advanced to the debtors cash and goods aggregating $2,346.91, making a total of goods and cash advanced of $5,567.29, on account of which the debtors had paid in all $3,157.50, leaving a balance due of $1,809.79. The affidavit does not shew what was due on January 3, 1921, and no effort is made by the mortgagee to establish that there was in fact any present advance of $1,600 on that date, or that the mortgage was given in pursuance of any agreement made at the time of the sale of the goods in respect of which the debtors were then indebted to him. He states that the chattel mortgage was given to secure the goods and moneys that he had advanced and the moneys which he intended to advance, and not for the purpose of committing a fraud on any other creditors.

The trustee produces the ledger account of the mortgagee from the debtor's books, from which it appears that on December 27, 1920, the debtors owed Louis Fluxgold $1,494.45.

The claim by the mortgagee to hold the mortgage as security for any moneys or goods afterwards advanced cannot stand in view of the terms of the mortgage itself and of the failure to comply with the requirements of sec. 6 of the Bills of Sale and Chattel Mortgage Act R.S.O., 1914, ch. 135. The mortgagee fails to establish any clear line of demarcation between the transactions before and after

January 3. The debtors owed him $1,542.88 on November 11; the debt was $1,494.45 on December 27, 7 days before the chattel mortgage was given, and is now $1,809.79.

The conclusion is irresistible that the chattel mortgage was given to secure an already existing debt. The effect is undoubtedly to give the mortgagee a preference over the other creditors, and that being so, and the mortgage having been given within three months prior to the assignment, it must be prima facie presumed to have been made with the view of giving the mortgagee such preference under sec. 31, of the Bankruptcy Act, 1919, (Can.) ch. 36, as passed by the amending Act of 1920, ch. 34, sec. 8 (53 D.L.R. 169). The mortgagee fails to meet this prima facie presumption with any defence whatever. The mortgage must, therefore, be deemed fraudulent and void as against the trustee. And if it is to be "deemed" fraudulent and void the Court must declare it to be so. Reference may be made to Kirby, et al v. The Rathbun Co. (1900), 32 O.R. 9, where a somewhat similar provision in the Dominion Winding-up Act, R.S.C., 1906, ch. 144, was applied. The section of the Winding-up Act, seems more sweeping than sec. 31, of the Bankruptcy Act, and apparently leaves no loophole for any defence whatever in the case of a mortgage to a creditor to secure an existing debt if made within the 30 days. Section 31 of the Bankruptcy Act seems to leave some opportunity for a defence if the mortgage is attacked, even though given within the 3 months.

The only question remaining to be dealt with is one of procedure. To set aside a mortgage as fraudulent and void in a summary way upon a motion and upon affidavit evidence, may seem unusual, but Bankruptcy R. 120, 53 D.L.R. 222, expressly contemplates this. Where, as here, the evidence is all before the Court nothing would be gained by directing an issue to try the question of validity, and in the absence of any reasonable defence by the chattel mortgagee it would merely add unnecessary costs to direct an issue; the case seems to be one in which the power to dispose of the matter summarily should be exercised.

I accordingly declare that the chattel mortgage in question is fraudulent and void, and order that it be set aside with the costs of this motion to be paid by Louis Fluxgold to the trustee.

Judgment accordingly.

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Ex.

THE "JESSIE MAC" v. THE "SEA LION."

THE "JESSIE MAC" v. THE "SEA LION."*

Exchequer Court of Canada, Audette, J. November 6, 1920.

Collision (§I—3)—Tug Anchoring With Tow—Failure to Pick Out Good Clear Swing Berth—Damage to Other Tug Anchored Nearby—Inevitable Accident—Essentials of as a Defence.

Inevitable accident in the case of a collision between vessels, is where the collision could not have been prevented by proper care and seamanship in the particular circumstances of the case. A ship which anchors too near another ship so as to give her a foul berth, or which does not pick out a good clear swing-berth, is liable for resulting damages. Such damages cannot be said to be the result of inevitable accident.

[See Annotations, 11 D.L.R. 95, 34 D.L.R. 8.]

APPEAL from the judgment of Martin, L. J. A. of the B.C. Admiralty District (1919), 48 D.L.R. 184, 19 Can. Ex. 78, 27 B.C.R. 394, dismissing the plaintiff's action for damages done to the "Jessie Mac." Reversed.

H. B. Robinson, for appellants.

Wallace Nesbitt, K.C., for respondents.

Audette, J.:—To properly understand the facts of the case and the circumstances of the accident which are clear and simple, it is well to keep before our eyes the plan of the locus in quo, filed as Ex. 2.

Owing to strong westerly winds producing heavy sea in the open, a number of tugs, about 10 in number, towing a raft of logs, sought shelter in Trail Bay, under the lee of Trail Island, off Sechelt, where it is customary and proper to go for refuge in westerly winds; but unsafe with easterly winds, with perhaps the exception of the inside shore position between the south-west point of the island and a well-known rock—a position taken by the "Jessie Mac" upon her arrival in the bay.

At various times between March 30 and April 1, 1913, inclusive, these tugs and rafts came into this haven. The "Jessie Mac" (39 tons net) was the first to come in, at about 3 o'clock a.m., on March 30, and made fast to the shore with two five-eighths inch wires at the east end and centre and with one one-half inch wire at the west. Subsequently the "Chieftain," the "Stormer" and the "Vulcan," tugs of approximately the same size, came in with rafts and moored alongside the "Jessie Mac's" boom or rafts, in the manner approximately shewn on Ex. 3, with, however, some slight variations which have no bearing on the case.

The "Sea Lion," 129 ft. long, 22 beam, drawing 15 ft. gross tonnage 218, with 46 swifters, in 3 rafts or booms,

*Appeal to the Supreme Court of Canada pending.

arrived on Sunday, March 31, at 2 o'clock a.m. and cast anchor at the place shewn on ex. 2, and with westerly wind prevailing, her tow swung to eastward. She remained there all Sunday and the best part of Monday, when at 3 o'clock p.m. on that day, her tow changed position, the tide having started to flood and the westerly wind having died out and a light wind having sprung from the north-east, her tow swung to the west, in a southerly direction, and the tail end of the raft swung on the island and remained there fast until 9.30 p.m. of the same day, when the captain said he felt his anchor was dragging. Then being asked: "Q.—And what did you do as a result of that? (result of dragging anchor). A.—Well, I had to—when I was dragging my anchor I seen that was going to drag me into a very awkward position and I raised my anchor and steamed ahead. . . . . Q.—Now, what position did you take up, looking at the chart—is your position practically shewn there? A.—After I had raised my anchor I headed more to the eastward so as to draw my tow—and I used the stern of the boom for a fulcrum. Q.—And you used the stern of the boom as a fulcrum? A.—Yes, I headed towards the eastward, and used the stern of my boom as a fulcrum to swing the boom —the whole tow, more to the eastward, so that I could draw it straight off, so that the stern would not strike the boats on the beach. In doing that the boom parted."

It is well to note, by way of testing his judgment and seamanship that his raft went aground at 3 o'clock in broad daylight in the afternoon, and that it is only at 9.30 p.m. when it is dark and his anchor is dragging that he even awakes to the necessity of doing something. The boom parted at the end of the ninth swifter, leaving 6 swifters at the island. The tail-end of the 9 swifters, with the help of the tide and the wind, swung towards the 4 tugs and rafts fastened to the shore, and struck the head of the "Chieftain's" rafts. The two wires tying the "Jessie Mac's" rafts at the east and centre broke and the 4 tugs and rafts swung to the west, the western wire still holding, the "Jessie Mac" being dragged onto the rock shewn to the north-west, she sunk and suffered damages for which she is now suing in the present case.

Some witnesses contend that these big tugs usually anchor far enough to clear the rock and the vessels fastened to the island. Captain Jones testifies that the tail of the tow fouling the shore, would indicate the "Sea Lion" was anchored too close.

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Now the trial Judge found that, under such circumstances the accident was inevitable, 48 D.L.R. 184.

What is a inevitable accident? Marsden's Collisions at Sea, 7th ed., pp. 18, 19, says:—

"In the 'Europa' (1850), 14 Jur., 627, at p. 629, Dr. Lushington states that inevitable accident is where one vessel doing a lawful act without any intention of harm, and using proper precautions, unfortunately happens to run into another vessel." Again it has been said, "to constitute inevitable accident, it is necessary that the occurrence should have taken place in such a manner as not to have been capable of being prevented by ordinary skill and ordinary prudence. We are not to expect extraordinary skill or extraordinary diligence, but that degree of skill and that degree of diligence which is generally to be found in persons who discharge their duty. The Privy Council adopting the language of Dr. Lushington, defined inevitable accident to be 'that which a party charged with an offence could not possibly prevent by exercise of ordinary care, caution, and maritime skill, and this must now be regarded as an authoritative definition.'"

In Lowndes, Collisions at Sea, pp. 98, et seq., almost the same definition is to be found, but it adds:—

"In the subsequent case of The "Lochlibo," 2 W. Rob. 205, the same principle was laid down in almost the same words. 'By inevitable accident I must be understood as meaning a collision which occurs when both parties have endeavoured by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident.' Again, in the case of W. V. Moses, 6 Mitch, 1553, the same learned Judge defined inevitable accident to be 'that accident, that calamity, which occurs, without there being any practicable means of preventing its taking place; it is that accident which takes place when everything has been done which ordinary skill, care and ability could do to prevent the accident.'"

See also Williams' and Bruce's Admiralty Practice, p. 94

What is the first and elementary duty of a captain picking out a berth: Todd & Whall, Practical Seamanship, under the chapter, intituled "Coming to an anchor," says at p. 81: "Supposing many vessels are lying about, look out and pick out a good, clear swing-berth" and further on the guards against bringing up close to other vessels and against being too near the ground to be pleasant.

Marsden, p. 461: "In coming to an anchor caution must

be used not to injure or embarrass other ships. A vessel rounding-to, so as to bring her head upon tide, should, before altering her helm, look round and see that all is clear, and that her manoeuvre will not endanger other ships. The 'Ceres' (1857), Swab. 250; The 'Shannon,' (1842), 1 W. Rob. 463; The 'Philotaxe' (1878), 3 Asp. M.C. 112, 37 L.T. 540."

Then at p. 462: "After coming to an anchor, those on board must show proper skill and seamanship in keeping their vessel from driving and endangering other crafts."

Lowndes, p. 76: "A ship which anchors too near another ship, so as to give her what is called 'a foul berth,' or which neglects to drop a second anchor when she ought to do so, and then in a gale drifts foul of the other vessel, will be held answerable in damages."

The "Secret" (1872), 1 Asp. M.C. 318; see head-note 26 L.T. 670: "Inevitable accident is where the collision could not have been prevented by proper care and seamanship in the particular circumstances of the case. A defendant, in order to support a defence of inevitable accident, is bound to show that everything ordinary and usual was done which could and ought to have been done to avoid a collision."

See also the "Saima" v. Wilmore, 4 Lloyds L.L. Rep. 218, et seq.; The "City of Seattle," (1903), 9 Can. Ex. 146, at pp. 152, et seq., 10 B.C.R. 513.

A number of cases bearing upon the facts of the case in question are hereafter cited:—

In Marsden's Collisions at Sea, 7th ed. Art. 29, at p. 459, we find:—

"If one ship properly lighted (if at night), is fast to the shore, or lying at established moorings, it can scarcely happen that the other would not be held in fault for the collision. See The Secret, (1872), 1 Asp. M.C. 318, and Culbertson v. Shaw, 18 How. 584: Portevant v. The Bella Donna, Newb. Adm. 510; The Bridgeport, 7 Blatchf. 361, 14 Wall. 116; The Granite State, 3 Wall. 310; The Helen Cooper and the R. L. Mabey, 7 Blatchf. 378."

Then at pp. 460, 461, 462:

"A ship in bringing up must not give another a foul berth. 'If one vessel anchors there, and another here, there should be that space left for swinging to the anchor that in ordinary circumstances the two vessels cannot come together. If that space is not left, I apprehend it is a foul berth.' (Per Dr. Lushington in The Northampton (1853), 1 Spinks 152, 160.) In an American case it was held that

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a ship at anchor is entitled to have room to swing, not only with the scope of cable which she has out at the time when the other ship takes up her berth, but with as long scope as may be necessary to enable her to ride in safety, (The Queen of the East and The Calypso, 4 Bened. 103.)

"If a ship gives another a foul berth she cannot require the latter to take extraordinary precautions to avoid a collision. (The Vivid (1872), 1 Asp. M.C. 601; The Meanatchy, [1897] App. Cas. 351.) It has been held that in the Mersey a cable's length between the two ships is a clear berth. (The Princeton (1878), 3 P.D. 90). This, however, cannot be laid down as a general rule, for at this distance a laden vessel riding to the tide might, in swinging, come dangerously close to a light vessel riding athwart the tide. And not only must a vessel not bring up so close to another as not to give her room to swing, but she must not bring up in such a place that she endangers the other ship. She should not bring up directly ahead, or in the stream of another ship, having regard to the current and also the prevailing winds. If she brings up directly in the hawse of another ship, or elsewhere in the neighbourhood of another ship there should be such a distance between them that if either of them drives or parts from her anchors she may have the opportunity to keep clear. (The Cumberland (Vice-Ad. Court, Lower Canada), Stuart's Rep. (1858), p. 75; The Egyptian (1862), 1 Moo. P.C.N.S. 373). Where a ship in bad weather took up a berth two cables' length to windward of another, in an anchorage where there was plenty of room, and then rode with only one anchor down and that not her best, she was held in fault for a collision with the ship to leeward, against which she was driven when her cable parted in a heavy squall. (The Volcano (1844), 2 W. Rob. 337; The Maggie Armstrong and The Blue Bell (1866), 14 L.T. 240.)

"If a vessel takes up a berth alongside another where she takes the ground and falls over and injures the other, she will be held in fault. (The Indian and The Jessie, (1865), 12 L.T. 586; The Lidskjalf (1857), Swab. 117; The America, 38 Fed. Rep. 256; The Addie Schlaefer, 37 Fed. Rep. 382; The Behera, 6 Fed. Rep. 400.) A vessel voluntarily taking up such a berth in a dock does so at her own risk. (The Patriotto and The Rival, (1860), 2 L.T. 301.) So where two colliers were beached near each other for the purpose of discharging cargo, it was held that it was the duty of the last comer to moor head and stern, and in

such a way as not to foul the other when the wind shifted. (The Vivid, (1872), 1 Asp. M.C. 601.) . . . .

"The omission to warn a ship astern of her intention to bring up has been held neglect of a 'precaution required by the special circumstances of the case.' (The Philotaxe (1874), 2 Asp. M.C. 512., and see The Queen Victoria (1891), 7 Asp. M.C. 9, The Helen Keller, 50 Fed. Rep. 142.)"

And at p. 463: "A tug in charge of an unwieldy tow of car floats in New York harbour was overpowered by her tow in a heavy squall, and, having let go her anchor, which did not hold, she drove against a third ship. It was held that she was in fault for not having an anchor that would hold her. (The J. H. Rutter, 35 Fed. Rep. 365.)"

"Vessels navigating in an unusual manner or by an improper course do so at their own risk" (p. 472.)

"A tug took her tow so close to a ship at anchor that, upon her suddenly altering her course to clear the ship at anchor, the tow line parted, and the tow fouled the ship at anchor. The tug was held in fault for the collision. (The City of Philadelphia v. Gavagnin, 62 Fed. Rep. 617)." (p. 476.)

In Lowndes, Collisions at Sea, pp. 57 et seq.:—

"The next subject for consideration is the case where one of the colliding ships is at anchor. Here, supposing that a proper light has been exhibited by the ship at anchor, the presumption of law is that the vessel which runs into her is in fault and the burden of exculpating herself rests with the latter. Thus, in the case of The Percival Forster, Dr. Lushington said: "She had anchored in a place respecting which no fault could be found, that is, she had a right to be anchored where she was. The result of that is that if any vessel in motion comes into collision with her while at anchor, the burden of proof lies on the vessel so coming into collision, to show either the collision was inevitable from circumstances, or that the vessel at anchor was to blame. The justice of this, which is a rule of law, is obvious, because a ship lying at anchor has very little means of avoiding a collision; to a certain extent she may possibly manoeuvre, but to a small extent; whereas the vessel driving up with the tide, whether under steam or sail, has much greater means of doing whatever may be necessary.

"Even though the ship should have been anchored in an improper place, the same rule, must hold good. . . Supposing a carriage be standing still, and be on the wrong side of the road, it would be no justification for another car-

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riage, which might be on the right side of the road to run into that carriage, if the driver could avoid it without risk to himself."

See also Pritchard's Admiralty Digest, pp. 288, et seq., Nos. 884, 885, 886, 887, and 888.

See also Culbertson v. Shaw (1855), 18 How. 584, at p. 587: "Where the boat is fastened to the shore especially at a place set apart for such boats . . . . ordinary care, under such circumstances will not excuse a steamer for a wrong done. A vessel tied to the shore is helpless, etc."

In Parsons on Shipping and Admiralty, vol. 1, pp. 573, et seq.: "If a ship at anchor and one in motion come into collision, the presumption is, that it is the fault of the ship in motion, unless the anchored vessel was where she should not have been. The rule of law is the same when a vessel aground or one lying at a wharf, is run into. . . If a vessel is at anchor, another must not anchor so near as to cause damage to her. . . If a vessel about to get under way is so near to a vessel at anchor that there is danger of a collision, she should notify such vessel of her intention to get under way."

And in The "City of Seattle" (1903), 9 Can. Ex. 146, Martin, J. said at pp. 150, 151, 152:—"Her position there was tantamount to that set out by the preliminary act, that is to say, 'being fast to the shore'; and she was not a ship 'at anchor' or 'under way' within the proper meaning of these terms as understood by seafaring men. . . . She was moored. . . . in a position of safety and entitled to assume that she was safe. . . .

"The facts that . . . was in the position I have referred to and that she was run down, as aforesaid, establish a prima-facie case of negligence against the defendant ship that the rule of law set out in the case of The 'Merchant Prince' [1892] P.D. 179, is properly invoked against her. That is to say, the defence has failed to sustain the plea of inevitable accident, because to do so it was necessary to show what was the cause of the accident, and that, though exercising ordinary care and caution and maritime skill, the result of that accident was inevitable."

The "Jessie Mac" fastened to the shore, not under way, moored to a position of safety, exhibiting proper light, was entitled to assume that she was safe.

See also the "Brig report" (1870), 7 Blatchf. 361; 14 Wall. 116, as to light, and The "Northampton," (1853), 1 Spinks 152, Lloyd's List Law Reports, vol. 4, p. 283; The

"Hatfield" v. The "Wandrian," (1906), 11 Can. Ex. 1; The "Helen Cooper," (1870), 7 Blachtf. 378; The "Volcano," (1844), 2 W. Rob. 337; The "Granite State" (1865), 3 Wall. 310; The "Neptune the Second" (1814), 1 Dod. 467.

Having set forth, perhaps at too great length, a number of cases and extracts from text books on the question at issue, let us follow the modern tendency of the Courts and view the facts of the case in the light of the first principles of law that must guide in the present case. Craig v. Glasgow Corpn. (1919), 35 Times. L.R. 214 at p. 216.

I am of opinion that the captain of the "Sea Lion" in selecting his berth—he being the first of the 6 large tugs to come in at anchor in the open on the north-west of the island failed to shew ordinary maritime skill, ordinary prudence, and failed to exercise care, caution and maritime skill. As laid down by Todd & Whall—and it is of ordinary common sense prudence for a mariner—the first duty incumbent upon a captain bringing his vessel to anchor is to pick out a good, clear, swing-berth and to guard against bringing her up close to another vessel or the shore.

The berth selected by the "Sea Lion" when there was plenty of space available, placed her in the position that if the tide turned and flowed to the west and if the wind, when changing from west, did change to south-east, instead of north-east as it did, she would swing into the tugs fastened at the shore. It is too obvious. Looking at Ex. 2, placing a rule on the bow of the "Sea Lion"—although it should be placed above her anchor which is still more to the west, the tug and tow would swing directly north, west and south upon the well-known rock and the 4 tugs and tow fastened to the shore. That alone would denote bad seamanship, want of ordinary maritime skill, etc.

However, the wind happened to shift from west to north-west and with the tide, the "Sea Lion's" tow swung upon the island, grounded hard and fast, on the exposed beach. This wrong anchoring—foul anchoring—resulted in taking the raft to the shore, moreover followed, as said by her captain, by the dragging of her anchor as too much stress was placed upon it from the grounding of the raft and the tide—a position circumspect of consequences of danger. He then steamed up harder, as he said, and pulled his raft at right angle to the east, with the object of freeing her from the shore. Pulling this at right angles, especially with the tail-end of the raft grounded at the beach, placed a much heavier strain on the raft, as admitted in the evidence, with

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the result that it broke at the end of the 9th swifter, leaving 6 swifters to the shore, that raft being of 15 swifters altogether. The tail-end of these 9 swifters swung to the west and struck the eastern end of the "Chieftain's" boom, the second from the shore, breaking the eastern and centre shore wires fastening the "Jessie Mac's" boom to the shore, and shoving the rafts and tugs to the west and landing the "Jessie Mac" on the rock and foundering her.

The following question was put to one of the expert witnesses for the defence: "Q.—So according to you, you would just as soon have your boom ashore as in open water? A.—No. No! Q.—Then it must be worse to have it ashore? A.—Well, you try to keep it off, if you can."

The answer is obvious, although some witnesses contend it could be done. Some witnesses testified, in an irresponsible manner, that it was a proper manoeuvre to intentionally anchor close enough to the shore to allow the boom to come in contact with the beach and ground thereon. It is hard to believe good experienced mariners—outside of the law suit—would assert such a proposition. Why! All seafaring men, mariners, worthy of the name, as a rule seek as much as possible to navigate in open waters and keep away from land. It was further contended at Bar, that one of the reasons why the "Sea Lion" dropped anchor where she did, was because she knew the island protected the 4 tugs fastened to the shore, in that the end of the rafts would be stopped by the island. Overlooking that, if the raft had swung north-west and south, that then it came directly in contact with the rock and the 4 tugs at the shore.

However, the irony of such an after-thought and specious argument would not commend itself to a competent mariner. That was the cause of the accident; anchoring where he did eventually led to and created the accident. A manoeuvre is prima facie wrong if it creates a risk of collision; but the best test is when it creates such a risk and eventually actually contributes to the accident, and in that case it then becomes a fault. It is a bad thing to have your boom hung on the shore. Good and competent seamen and skippers always seek good, deep and open waters to manoeuvre, they always endeavour to get away from the shore and where there is plenty of water.

It is contended at Bar that the "Sea Lion" had a right to anchor where she did. No doubt that per se she had that

right but having taken a foul berth endangering other crafts, she is responsible for all that might result therefrom. She anchored too close to the shore, too close to other vessels and she did so at her own risk and peril and she must bear the consequences of a contingency to which she exposed herself. She must extricate herself at her own risk and peril. The "Hope" (1913), 2 W. Rob. 8; The "Cape Breton" (1904), 9 Can. Ex. 67, at p. 116 affirmed 36 Can. S.C.R. 564, at p. 579; affirmed [1907] A.C. 112, 76 L.J. (P.C.) 14; The "Lancashire" (1874), L.R. 4 A. & F. 198, 2 Asp. M.C. 202; The "Patriotto" v. The "Rival" (1860), 2 L.T. 301.

A significant fact which should be noted is that when finally the "Sea Lion" succeeded in freeing her raft from the shore, she did not go back to her old anchoring. She anchored, according to her own reckoning, about 1,000 feet further out.

The want of due diligence in picking up a clear-swung berth and the wrong and initial manoeuvre of the "Sea Lion" in anchoring at such a place, endangering other ships, dragging her anchor, etc., thus departing from good and cautious seamanship, destroyed the safe position and by her error and want of ordinary maritime skill, prudence, care and caution she became and was the cause of the accident —ignoring the dictates of good seamanship. She failed to shew that degree of skill and that degree of diligence which is generally to be found in persons who discharge the duty of master on board ships and which amount in other words, to what is termed good seamanship. The tugs fastened to the shore, in a like position to vessels moored at a wharf or pier, had the right to expect that incoming large vessels anchoring outside, would anchor far enough to avoid colliding with them. If the "Sea Lion" had anchored far enough away from the shore, as far as she did after the accident, her boom would have swung free from the shore and there would have been no accident.

Under the circumstances I am unable to adopt the finding of inevitable accident. An accident that can be avoided by mere ordinary seamanship cannot, in any manner, be termed inevitable. The fallacy of such a conclusion lies in the premises of the syllogism, (The "Volcano," 2 W. Rob. 337), the "Sea Lion" having been guilty of wrong and faulty seamanship, in anchoring as she did, as above set forth. She was primarily at fault in choosing her anchoring without first ascertaining she had a clear berth that

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would not endanger other ships. The "Ceres" (1857), Swab. 250; The "Shannon," 1 W. Rob. 463; The "Philotaxe," 3 Asp. M.C. 112, 37 L.T. 540. After coming to an anchor, her master had to shew proper skill and seamanship, in keeping his vessel from driving and endangering other crafts.

The appeal is allowed and with costs.

Appeal Allowed.

RE EXCELSIOR DAIRY MACHINE CO. LTD.

Ontario Supreme Court in Bankruptcy, Holmested, K.C.
December 20, 1920.

Bankruptcy (§I—6)—Adjudication in Bankruptcy—Receiving Order made—Notice of Order and of First Meeting of Creditors not Published in the Canada Gazette—"Formal Defect" within Meaning of sec. 84—Validity of Proceedings—

The debtors were adjudicated bankrupt and a receiving order was made. Notice of the order and of the first meeting of creditors was duly published in a local newspaper and also in the "Ontario Gazette," but by inadvertence the notice was not published in the "Canada Gazette," as required by sec. 11 (4) of the Bankruptcy Act, 1919 (Can.) ch. 36. The meeting was held, inspectors appointed and the trustee has, with their approval sold the assets and is prepared to distribute them. The Court held that while it was important that the Act should be complied with in this respect, it did not appear in the least probable that any injustice had been done, that the omission came within the category of "formal defects" in sec. 84 and that the proceedings should not be invalidated by the omission. The Court therefore made an order directing an advertisement in the "Gazette" giving due notice to creditors of the receiving order and all of all that had taken place subsequent thereto, and appointing a time for a further meeting to consider and confirm what had been done and also appointing a further day for sending in claims if any.

[See Annotations, Bankruptcy Act, 1920, 53 D.L.R. 135; Bankruptcy Act Amendment Act, 1921, 59 D.L.R. 1.]

MOTION by liquidator for directions. The debtors were adjudicated bankrupt and a receiving order was made on October 25 last. Notice of the order and of the first meeting of creditors was duly published in a local newspaper and the notice was also published in the "Ontario Gazette," but by inadvertence the notice was not published in the "Canada Gazette" as required by sec. 11 (4) of the Bankruptcy Act, 1919, (Can.) ch. 36. The meeting was held, inspectors were appointed, and the trustee has, with their approval, sold the assets and is now prepared to distribute them. By sec. 84 no proceeding in bankruptcy shall be invalidated by any formal defect, or by any irregularity unless the Court upon which an objection is made is of opinion that substan-

tial injustice has been done which cannot be remedied by any order of the Court.

C. P. Tisdall, for liquidator.

Holmested, K.C.:—The omission here in question seems to come fairly within the category of "formal defects."

It is true that it is important that the Act in this respect should be complied with, as the "Gazette" is one of the mediums to which the public is to look for information respecting bankrupts and their estates. At the same time, in the circumstances, it does not appear to be in the least degree probable that any injustice has been done which the Court cannot remedy. I, therefore, am of the opinion that an order may now be made directing an advertisement to be published in the "Gazette" giving due notice to creditors of the receiving order and of all that has taken place subsequent thereto, and appointing a time for a further meeting to consider and confirm what has been done, and also appointing a further day for sending in claims, if any.

I have not overlooked the fact that the neglect of a trustee to gazette a receiving order or assignment may involve him in a serious liability at the suit of the debtor and its creditors; sec. 11 (14). In this case the omission was purely accidental and not in any sense whatever a wilful act of the trustee, and it is not a case for imposing any penalty.

BANQUE D'HOCHELAGA v. MARSHALL.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton, and Dennistoun, JJ.A. May 31, 1921.

Banks (IVB—70)—Forged Cheque—Payment by Bank to Agent having no Interest in Cheque—Proceeds paid over by Agent to Principal—Right of Bank to Recover Amount from Agent.

A person who is not the holder of a cheque in due course and who has not given value for it but who acts merely as the agent of another in cashing the cheque at the bank, and hands over the proceeds to his principal, making it clear to the bank that he is merely an agent and has no personal interest in the cheque, cannot be held liable to the bank for the amount of the cheque, upon it turning out to be a forgery.

APPEAL by defendant from judgment of Paterson Co. Ct. J. in an action to recover a sum of money paid by plaintiff bank on a forged cheque. Reversed.

E. P. Garland, for appellant.

W. L. McLaws, for respondent.

Perdue, C. J. M.:—This is an appeal from the decision of Paterson, Co. Ct. J., in the County Court of Winnipeg. The action is brought to recover from the defendant the sum of

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$300 paid on a cheque the signature to which turned out to be a forgery. At the trial the plaintiff's counsel put in the defendant's examination on discovery as part of the plaintiff's case. The facts as narrated by the defendant are as follows:—

The defendant saw an advertisement in a newspaper calling for 2 young men to act as assistants to a sales manager. The defendant called at the place indicated in the advertisement and met a Mr. Lane who claimed to be the representative of the Westinghouse Shock-Absorber Co. of Toronto, and who was the person requiring the assistants. Lane engaged the defendant, or led the latter to believe, that he was engaged as Lane's assistant. On the following morning defendant was told by Lane to take the cheque in question to the Bank of Hochelaga and get it cashed for him and to meet him in the afternoon at the St. Regis Hotel. The cheque purported to be signed by O. E. Gaza, and was payable to "Cash or bearer." Defendant says he took the cheque to the ledger-keeper of the bank and told her that it had been given to him by another man to cash and that he knew nothing about it.

The cheque was marked accepted by the ledger-keeper. Defendant then endorsed the cheque and presented it to the teller for payment. The teller required him to be identified and referred him to the assistant accountant. The latter was satisfied with what defendant told him and the cheque was paid.

The defendant went to the St. Regis Hotel in the afternoon to meet Lane, but could not find him. Defendant and his father went to the hotel on the following morning and were told that Lane had left. They then went to the police station and reported the matter. From the latter place they went to plaintiff's bank and defendant told the assistant accountant of Lane's disappearance. Defendant said he wished to deposit the money in his own name in trust so that if Lane turned up he could get the money at any time, "and if there is anything crooked about it the bank will have the money right there." This proposal was carried out and the money was deposited in the bank in defendant's name in trust. Defendant then went to dinner at the McLaren Hotel, and while there he was called up on the telephone by Lane who asked him to meet him at the St. Charles Hotel in 10 minutes. He found Lane at the place appointed and was informed by the latter that he had been out demonstrating the shock absorber, that the car had broken down

and that he had not got back until late the night before. Lane asked him to get the money and meet him at the St. Charles in half an hour. On going to that hotel he received a telephone message from Lane to meet him on Ellice Avenue. Again Lane failed to keep his appointment and defendant returned to the St. Charles. There he received a telephone message from Lane saying he was too busy to meet him and to leave the money in an envelope with the clerk at the desk; to address the envelope to "Mr. George Marshall, care Mr. Little, Room 1224, St. Charles Hotel." Lane promised to meet defendant at the McLaren at 7 o'clock that evening. Defendant carried out these instructions and left the money with the clerk in an envelope directed in accordance with Lane's message. Lane did not keep his appointment for that evening and defendant never saw him again. Five or six days afterwards defendant was informed by the bank that the cheque was a forgery.

The defendant's statement of the facts, so far as known to him, is not contradicted.

There is no evidence to shew that the defendant was a party to, or interested in, the forgery. He thought Lane's action queer in getting him to cash the cheque and "wanted to make sure that there was nothing crooked about it." When, however, the bank accepted the cheque as genuine and paid him the amount called for, his doubts were removed. The defendant at the time of the payment of the cheque was not a holder in due course, not having given value for it. The bank is not therefore estopped by sec. 129 of the Bills of Exchange Act, R.S.C., 1906, ch. 119, from denying the genuineness of the signature of the drawer. The cheque being a forgery is wholly inoperative (sec. 49, the Bills of Exchange Act). The bank has an equitable right to recover back money paid in good faith on a forged cheque, as having been paid under a mistake of fact. But where the party receiving the money has by reason of the payment changed his position there is a countervailing equity and a good defence. (Union Bank v. Dominion Bank (1907), 17 Man. L. R. 68, Howell, C. J. M. at p. 72.) So also where the person receiving the money is merely an agent and has handed it to his principal.

In Continental Caoutchouc & Gutta-Percha Co. v. Kleinwort (1904), 20 Times L. R. 403, 90 L. T. 474, Collins, M.R., giving judgment in the Court of Appeal, stated the law in such case as follows at p. 405:

"It is clear law that prima facie the person to whom

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money has been paid under a mistake of fact is liable to refund it, even though he may have paid it away to third parties in ignorance of the mistake. He has had the benefit of the windfall and must restore it to the true owner. On the other hand, it is equally clear that an intermediary who has received money for the purpose of handing it on to a third party and has handed it on is no longer accountable to the sender. In such a case he is a mere conduit-pipe and has not had the benefit of the windfall."

See also the judgment of Romer, J. at p. 405 of the same report.

In Kleinwort v. Dunlop Rubber Co. (1907), 23 Times L. R. 696, 97 L.T. 263, Lord Atkinson said, in giving judgment in the House of Lords at p. 696:

"Whatever may, in fact, be the true position of the defendant in an action brought to recover money paid to him in mistake of fact, he is liable to refund it if it be established that he dealt as a principal with the person who paid it to him. Whether he will be liable if he dealt as agent with such a person will depend upon whether, before the mistake is discovered, he has paid over the money he received to his principal, or has settled such an account with his principal as amounts to payment, or did something which so prejudiced his position that it would be inequitable to require him to refund."

In the present case the defendant made it clear to the officers of the bank who dealt with him in regard to the cheque that he was merely getting it cashed for Lane and that he had no personal interest in it.

It is argued that the defendant acted carelessly in parting with the money as he did, but this is not a circumstance of which the bank can take advantage. He obeyed the order of his employer and principal in doing what he did with the money. The plaintiffs are in no better position than if he had handed the money to Lane immediately after he received it. In either case his position as a mere agent who has paid the money to his principal protects him.

I would allow the appeal with costs and set aside the judgment in the County Court and enter judgment for the defendant. The defendant will be entitled to his costs in the County Court, with the usual counsel fee.

Cameron, J.A., concurs in allowing the appeal.

Fullerton, J.A.:—This action was brought to recover from the defendant the sum of $300 paid to him upon a cheque the signature to which had been forged.

At the trial the plaintiff read portions of the defendant's examination for discovery which establish the following facts:—The defendants in September, 1920, saw in the "Free Press" the following advertisement:—"Wanted, two neat appearing young men as assistants to sales manager: apply at the St. Regis Hotel between 3 and 5; ask for Mr. Lane."

He went to the St. Regis, saw the man who called himself Lane, and was employed by him. Lane claimed to be a representative of the Westinghouse Shock-Absorber Co. of Toronto. After explaining to the defendant the work he would be required to do, Lane instructed him to be at the St. Regis the following morning. The next morning Lane gave the defendant the cheque in question here and instructed him to go to the Bank of Hochelaga and get it cashed for him. The cheque is dated Winnipeg, Man., September 21, 1920, and purports to be drawn by O. E. Gaza upon the plaintiff bank for the sum of $300 in favour of "Cash." It bears the acceptance stamp of plaintiff bank and is endorsed by the defendant. The defendant took the cheque to the ledger-keeper and told her that it had been given to him by another man to cash and that he knew absolutely nothing about it. Defendant, then endorsed his name on the cheque and had it cashed. He then returned to the St. Regis, waited around for about 2 hours, but did not see Lane. The next morning the defendant and his father went to the St. Regis, inquired for Lane and were told that he had left the hotel. They then went to the police station and reported the matter to an inspector. After that they went to the plaintiff bank and saw the assistant accountant. Defendant asked if he remembered cashing this cheque. The assistant accountant replied that he did. Defendant told him that he had been given this cheque by a man that claimed to be a representative of the Westinghouse Shock-Absorber Co., that he had made arrangements to meet him at 3 o'clock the previous afternoon, that since then he had not seen him, that he wanted to deposit the money in his own name in trust, that he did not like the look of it, but would not go so far as to say the man was not straight. Defendant then deposited the $300 in his own name in the plaintiff bank. Defendant then went to the McLaren Hotel where he was living, and about the time of his arrival was called on the telephone by Lane, who asked if he had got that business fixed up all right. He replied that he had and Lane asked him to meet him at the St. Charles Hotel in 10 minutes. Defend-

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ant went to the St. Charles Hotel and saw Lane, who explained that he had broken down while out demonstrating the day before and did not get back until late. Defendant told him that he had redeposited the money and Lane asked him to get it and meet him at the St. Charles Hotel in half an hour. Defendant got the money and returned to the St. Charles, and while waiting for Lane got a telephone message from him asking him to walk down Ellice Avenue and meet him. Defendant walked down Ellice Avenue and waited around for about half an hour without seeing Lane. Another man, who appeared to be waiting around, came up to him and asked him if he was looking for Lane, and on being informed that he was, told defendant that he had been employed by Lane, too, and was to meet him there. Together they returned to the St. Charles Hotel. In about half an hour defendant received a telephone message taken by one of the clerks, which said: "I am too busy to meet you, will see you at the McLaren at 7 o'clock to-night. Leave the money in an envelope with the clerk at the desk; address the envelope to Mr. George Marshall, care Mr. Little, Room 1224, St. Charles Hotel."

Defendant put the $300 in an envelope, addressed it as instructed and gave it to the clerk.

On the evidence of the defendant so put in by the plaintiff as part of its own case I think we are bound to hold that the defendant acted in good faith throughout the whole transaction and paid over the money relying on payment of the cheque by plaintiff bank as a representation that the cheque was genuine.

In Bank of Montreal v. The King (1906), 38 Can. S.C.R. 258, a clerk in a department of the Government of Canada forged the names of the signing officers to a number of cheques drawn on the Bank of Montreal and deposited them to his credit in other banks. These cheques were paid by the Bank of Montreal and the proceeds paid over by the several banks to the forger. It was held that the Bank of Montreal could not recover the amount from the other banks. The case was tried by Anglin, J., who rests his judgment upon the ground of estoppel arising from the payment of the forged cheques and the change in the position of the third parties which ensued (1905), (10 O.L.R. 117 at p. 145).

In the Supreme Court of Canada, Girouard and MacLennan, JJ., held that sec. 54 (now 129) of the Bills of Ex-

change Act, was decisive of the case. Davies, Idington and Duff, JJ., put the case on the ground of estoppel.

There is also another ground upon which the defendant can rely.

The authorities are clear that where an agent has innocently received money paid him for his principal and has handed it over to that principal, it cannot be recovered from him, either by the person who paid it or by the person entitled to it. Paget on Banking, p. 179.

This principle is clearly applicable to the present case. Not only was the defendant merely an agent but the plaintiff bank had been informed of the fact before the money was paid to him.

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

Dennistoun, J. A.:—The defendant appeals from a judgment of the County Court of Winnipeg in favour of the plaintiff bank for the sum of $300.

The story told by the defendant is extraordinary and the County Court Judge might well have doubted it had it been open to him to do so. It introduces an unknown unidentified person called Lane, and a mysterious unnamed person who had some association with Lane but even the personal appearance of whom is forgotten.

The defendant as agent for Lane obtained $300 from the bank upon a forged cheque and paid over the money in accordance with Lane's instructions by leaving it in a sealed envelope with an hotel clerk. Nothing has been heard since of Lane, or the hotel clerk or the money.

The bank admits its own negligence. It was its duty to know the signature of its customer, and it had ample notice of suspicious circumstances to put it upon guard against the forgery. But the negligence of the bank does not necessarily deprive it of the right to recover the money unless the rights of innocent parties have been prejudiced thereby so as to work an estoppel.

The trial Judge gives no reasons for his judgment, but it would appear that he considered the receipt of the money by the defendant sufficient to impose liability upon him, and he disregarded the explanation given that the defendant was merely an agent, and that he had paid over the money as directed by his principal in good faith, before the bank discovered the forgery.

Counsel for the bank are careful to make no insinuations against the bonâ fides of the defendant, and accept his story as true. This appears in two ways: (1) By putting in the

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defendant's examination for discovery in which the whole story is told as the foundation of the bank's case at the trial, and (2) by stating on the argument of this appeal that they did not seek to discredit the evidence so given, in view of the fact that there is no evidence to contradict or vary it.

This Court in considering the appeal is thereby relieved from the necessity of passing upon the truth or falsity of that evidence and the question for decision may be answered by a statement of the law applicable to admitted facts.

That law has been well summarised in these words (1 Hals, p. 223, para. 468):

"The receipt of money from a third person by an agent on his principal's behalf, does not in itself render the agent personally liable to repay it when the third person becomes entitled as against the principal to repayment, whether the money remains in the agent's hands or not. But if a third person pays money to an agent under a mistake of fact, or in consequence of some wrongful act, the agent is personally liable to repay it, unless before the claim for repayment was made upon him, he has paid it to the principal, or done something equivalent to payment to his principal. Where, however, the agent has been a party to the wrongful act, or has acted as a principal in the transaction, in consequence of which the money had been paid to him, he is not discharged from his liability to make repayment by any payment over to his principal."

Continental Caoutchouc & Gutta-Percha Co. v. Kleinwort, 20 Times L.R. 403, at p. 405, 90 L.T. 474; Kleinwort v. Dunlop Rubber Co., 23 Times L.R. 696; Dominion Bank v. Union Bank (1908), 40 Can. S.C.R. 366.

In the case at Bar the bank paid money on a forged cheque to an innocent agent, who before discovery of the forgery paid it over in accordance with instructions received from his principal. The agent at the time he cashed the cheque informed the bank officials that he was an agent and not a principal, and his good faith in so doing is not questioned.

It was argued that the Bills of Exchange Act, R.S.C. 1906, ch. 119, applied, but that cannot be so; the defendant was a mere messenger. He was never a holder in due course, and the rights of the parties must be settled by the law of agency, and not by the law merchant governing negotiable instruments.

With much respect I think the appeal should be allowed with costs and the action dismissed with costs.

Appeal allowed.

O'MEARA v. BENNETT.

Judicial Committee of the Privy Council, Viscount Haldane, Lord Buckmaster, Lord Carson and Sir Louis Davies.
October 20, 1921.

Gift (§III.—17)—Of Shares in Company—No Transfer by Deed or Delivery—Validity—Quebec Civil Code Arts, 383, 387, 754, 755, 758, 776, 760, 981.

The holder of certain shares of the capital stock of a limited company in order to carry out her intention to give them to the appellant, and that she did not want them to form part of her estate at death or to be affected by her will, but reserving to herself the dividends on the shares during her life time, communicated through her husband with the company and in accordance with their directions the certificates were sent to the company with an endorsed transfer on the back in the following words: "For value received I hereby sell, assign and transfer unto (the owner) in trust for (the appellant) ..... shares of capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint .....attorney to transfer the said stock on the books of the within named Company with full powers of substitution in the premises," and this was duly signed by the owner and her husband. The original certificates were cancelled and new ones issued in this form: "This certifies that ..... in trust for ..... is the registered holder of ..... shares." Their Lordships held affirming the judgment of the Court of King's Bench for Quebec that under the Quebec Civil Code the attempted creation of the trust failed, there being no gift by delivery the property being incapable of being so delivered under art. 981 of the Quebec Civil Code, and there being no transfer by deed as required by art. 776.

[Quebec Civil Code arts. 383, 387, 754, 755, 758, 776, 760, 981, considered.]

APPEAL from the judgment of the Court of King's Bench (Quebec) (1918), 28 Que. K.B. 332, in an action to recover certain shares of capital stock in a limited company. Affirmed.

The judgment of the Board was delivered by

Lord Buckmaster:—The question in this appeal relates to the ownership of 130 preferred shares and 33 ordinary shares of the capital stock of the Corby Distillery Co., Ltd., who are the second respondents. The shares are claimed by the appellant Mrs. O'Meara (hereinafter called the appellant), by virtue of a gift alleged to have been made in her favour by Mrs. Mary M. Thomas, who was the rightful holder of the shares; this claim is disputed by the first respondent, Mrs. Constance Edith Bennett, who claims as a beneficiary under the will of Mrs. Thomas, the remaining respondents, the Royal Trust Co., being the executors of the will.

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The shares in question were originally held by Mrs. Thomas in her own right, and at the end of 1912 she formed the intention of disposing of them in favour of the appellant, who states—and her statement is not contradicted—that this intention was mentioned to her by her mother at an interview which took place some time before January, 1913. To use the appellant's own language, what took place was this:—

"The terms she used—as well as I can remember them—were that she had decided to give these shares to me as a gift and that she did not want them to form any part of her estate at death, or to be affected by her will, but that she intended to reserve to herself the dividends on the shares during her own lifetime. She mentioned at the time that she had once intended this investment for her son Arthur, my brother, but as he was dead, she decided to give these shares to me. My mother also said either that she had, or that she would have, my father attend to having these shares transferred into my name. I accepted the gift from my mother and both my husband and I thanked her for it."

In order to carry out this intention, Mrs. Thomas communicated through her husband with the company, informing them of her desire that the shares should be regarded as held by her in trust for the appellant, but that the dividends should be forwarded to her as usual, and in accordance with their directions the certificates were sent to the company with an endorsed transfer on the back in these words:—"For value received I hereby sell, assign and transfer unto Mary M. Thomas in trust for Gertrude Mary O'Meara.....shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint ..... attorney to transfer the said stock on the books of the within-named Company with full powers of substitution in the premises." and this was duly signed by Mrs. Thomas and also by her husband. The original certificates were cancelled and in their place two new certificates were issued, dated January 15, 1913. The one as to the ordinary shares was in this form:—"This certifies that Mrs. Mary M. Thomas, in trust for Mrs. Gertrude M. O'Meara, is the registered holder of 33 common shares;" and the one for the preference shares was in similar terms. These certificates again contained transfers in blank upon their back, but neither of these transfers

was ever executed. The certificates were handed to Mrs. O'Meara some time afterwards and have remained in her custody ever since, but the dividends were received by Mrs. Thomas during her life. The question is whether in these circumstances a valid gift of the shares was made in favour of the appellant.

This question falls to be determined exclusively by the consideration of the Quebec law, and this is contained in the Code, the construction of which is the real question in the action. By arts. 383 and 387 the shares in question are, by determination of law, regarded as moveable property. By art. 754 it is provided that "A person cannot dispose of his property by gratuitous title otherwise than by a gift inter vivos or by will." Article 755 defines a gift inter vivos "as an act by which the donor divests himself, by gratuitous title, of the ownership of a thing, in favour of the donee, whose acceptance is requisite and renders the contract perfect." In this case there seems no doubt that acceptance was given. Article 758 declares that "Every gift made so as to take effect only after death, which is not valid as a will, or as permitted in a contract of marriage, is void"; and art. 760 enables a gift to be conditional. The Code then proceeds to contemplate the different forms by which gifts may be made, and they may either be by deed, or, in the case of moveable property accompanied by delivery, may be made by private writing. This is regulated by art. 776 which provides that "gifts of moveable property accompanied by delivery may, however, be made and accepted by private writings or verbal agreements." There was no deed in the present case as between the donor and the donee. Apart, therefore, from the question as to the effect of the trust, the gift in this case can only be established if it were made by delivery. Now the share certificates were not negotiable documents. Whatever might have been their commercial quality, if the transfer had been executed, in the form in which they stood, they were not capable of passing the property by delivery, nor of effecting any change in ownership. "Gifts of moveable property accompanied by delivery" in art. 776, must, in their Lordships' opinion, be read as relating solely to gifts of such moveable property as is capable of passing by delivery, for delivery has no value, apart from being evidence, unless it can effect a change of ownership, and it is not to evidence that the provisions of the section as to delivery relates, for this is

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provided by "the private writings or verbal agreements." This explanation of the meaning of sec. 776 becomes plain, when the French version of the Code is examined, for the words used to describe the class of property are "choses mobilieres," and this phrase is distinct from the words "biens" the interpretation of which includes shares in a company. This distinction has been pointed out by Pelletier, J., to whose close analysis of the argument their Lordships have nothing further to add. It is true that this view appears to differ from that of Cross, J., who considers that a "gift of shares in a trading company's stock can be made verbally." But this fails to give any affect to the difference between share certificates that are negotiable, and those that are not, for if the gift in the present case were effected by the delivery and the verbal statement, the alteration in the books of the company would not add to the essentials of the gift, and the form of the certificates would be equally immaterial unless indeed they were in the name of the donee, with the result that no difference would exist between the delivery of a negotiable and a non-negotiable instrument. In fact, in this case, there was no transfer of ownership. What was attempted was to impose upon the ownership of Mrs. Thomas a trust which would operate in favour of the appellant, and, but for the law permitting the creation of trusts, the alteration upon the certificates and in the books of the company would not have effected any change at all. The extent to which trusts can now be created varies the position. It is true that if the shares had been shares in a bank the liability might have been cast in a case of insolvency upon the appellant by virtue of sec. 53 of the Bank Act, R.S.C. 1906, ch. 29, but the same thing is not true of the Companies Act, R.S.C. 1906, ch. 79, which merely provides that the estate and funds shall be liable; no liability is cast upon the beneficiary. If the gift by delivery of the shares were in itself good, the change of name in the register of the books of the company would not have added to its effect; it would only have afforded evidence of the gift; and if, as their Lordships think, the delivery of the certificates, though accompanied by words of gift, did not alone create a gift inter vivos, there remains only the consideration of the effect of the attempted verbal creation of the trust.

In considering this it is essential to remember that the law of trusts is not innate in the law of Quebec, and that

an examination of the question of how far the transaction would have been valid under the English law is misleading until it is ascertained to what extent the English law applies. The article in the Code that is applicable is 981 (a), which provides that "all persons capable of disposing freely of their property may convey property, moveable or immoveable, to trustees by gift or by will for the benefit of the persons in whose favour they can validly make gifts or legacies." It is urged here that the word "convey" (a translation of the French word "transporter") covers a transaction well known to English law effected by means of a declaration of trust. But their Lordships find it impossible to impose such a meaning on the word. A declaration of trust is the exact opposite of any conveyance or transfer of the property. It imposes the trust without any conveyance upon the person who holds it, and, in their Lordships' opinion, art. 981 (a) does not include such a transaction. They are strongly confirmed in this view by the comment that is to be found in the well-known book by Mr. Mignault on the Canadian Code. At p. 157 of the 5th volume there is a discussion upon the creation of a trust by a gift, and in this connection he considers how far the acceptance of the beneficiary is necessary to complete the transaction; as trusts had their origin in the English law he considers this matter in connection with those principles and continues in these words:

> "Or il est certain que, dans le droit anglais, l'acceptation du bénéficiaire n'est nullement necessaire pour lier le donateur. Ce dernier peut même se constituer le fiduciaire de sa propre libéralité, sans l'intervention de personne, et le bénéficiaire peut acquerir en vertu d'une disposition dont il n'aurait pas eu connaissance."

The phrase: "Ce dernier peut même se constituer le fiduciaire de sa propre libéralité, san l'intervention de personne," appears to their Lordships to shew the contrast which the author himself felt between the English and the Quebec principles of law, for if it had been possible according to the Quebec Code for a person holding property to create himself a trustee, there would have been no need for his emphasis on this peculiarity of the English law for the purpose of proving that acceptance was unnecessary. There can be no conveyance by a person to himself, and as the declaration of trust is a method of creating a fiduciary relationship which, in their Lordships' opinion, is unknown to the law of Quebec, the appellant's argument upon this point must also fail.

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There is only one further point which needs to be mentioned. That is to be found in the judgment of Cross, J., who says that the appellant's title can be justified on the further ground that, even though the conveyance to her was in reality a gift, it was nevertheless put into the form of a transfer for value received. But there never was in fact any conveyance to her. The statement of the value received occurs in the transfer which was found upon the share certificates as they were originally held by Mrs. Thomas, and is in fact nothing but a transfer to herself in trust for her daughter. This was in accordance with the direction of the company, who requested that it should be done in order that they might make the necessary entries and issue the new certificates, and who may have been under a misapprehension as to the legal effect of this change. There has been no gift by delivery, for the property was incapable of being so transferred. There has been no transfer by deed, for no deed was executed in favour of the appellant; and the attempted creation of the trust fails for the reasons which their Lordships have pointed out.

They, therefore, think that the judgment of the Court of King's Bench for Quebec was correct, and that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

MORTGAGE CO. OF CANADA v. FILER, VERMILION LAND AND RANCHING CO. LTD., ET AL.

Alberta Supreme Court, Appellate Division, Stuart, Beck and Clarke, JJ.A. October 12, 1921.

Specific Performance (§IE.—30)—Order for—Application to Set Aside and for Leave to Defend—Injustice to Plaintiff if Application Granted—Discretion of Court.

An application to set aside an order for specific performance and for leave to defend will be refused where the defendant is in default under an agreement to purchase, and the granting of the application will put the plaintiff to great expense in making payments to prevent the lands from being sold for taxes which the defendant should have paid, and where in the opinion of the Court, justice would not be done the plaintiff by allowing the application.

APPEAL by the first two defendants from order of Scott, J., dated May 30, 1921, dismissing their application to set aside order for specific performance and for leave to defend.

C. C. McCaul, K.C., and J. F. Lymburn for appellants.

H. H. Hyndman for respondent.

The judgment of the Court was delivered by

Clarke, J.A.:—The action is by a vendor claiming specific performance of an agreement for sale of land against the purchaser Filer, his assignee, Vermilion Land and Ranching Co. Ltd., and a large number of sub-purchasers.

The agreement for sale contains the following provision:

"13. Provided the purchaser be not in default he shall have the privilege of obtaining release by conveyance of any section of the said lands upon payment of the pro rata proportion of the unpaid purchase money and interest by acreage according to the last Dominion Government Survey plus the further sum of three dollars per acre thereof, the said sum of three dollars per acre to apply upon the last instalment of purchase price maturing hereunder."

No defence was entered but the first named two and some of the other defendants filed demands of notice and most of them, including the first named two, were represented on the motions for an order nisi which was made on April 27, 1921, by the Master in Chambers at Edmonton, giving three months from the service of the order to pay the amount found due by the Master's order.

The defendants appealing do not contest the correctness of the amount found to be due by the Master nor the fact of default but desire to defend to protect sub-purchasers in respect of their purchases and payments made by them and to protect themselves from claims by the sub-purchasers. They do not offer to pay the amount in arrear nor even the taxes in arrear but do offer to assign to the plaintiff as security the agreements with sub-purchasers and moneys owing by them, which the plaintiff refuses to accept.

None of the sub-purchasers have asked to defend.

The plaintiff has already paid a large sum for taxes which defendants should have paid. Some of the lands have been sold for taxes and the time for redemption will expire very shortly—it will require approximately $25,000 to save these lands.

A very wide discretion is given to the Court to set aside judgments entered upon default of defence but under the circumstances of this case I do not think justice would be done the plaintiff by allowing the appellants now to open up the judgment and defend—they are admittedly in de-

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fault and should not be permitted to delay and embarrass the plaintiff by compelling it to advance large sums of money for taxes in order to save the lands, which the appellants ought to pay.

I do not think the plaintiff is required to accept the proffered assignments which would perhaps entail great trouble and expense in their enforcement. If the claims against sub-purchasers are substantial and valid the appellants should have enforced payment and made good their default.

The plaintiff must still obtain a final order and on that motion any meritorious reasons for further delay or further enquiries or further directions can be considered.

I would dismiss the appeal with costs.

Appeal dismissed.

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British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. September 9, 1921.

New Trial (§II.—8)—Alleged Mis-direction by Trial Judge—Jury Understanding Issues—No Mis-trial.

An Appellate Court will not order a new trial on the ground of mis-direction or non-direction where it is not made out that a mis-trial has taken place, and the Judge's charge has not confused the jury.

APPEAL by plaintiff from the judgment at the trial on the ground of mis-direction and non-direction of the jury by the trial Judge. Affirmed by an equally divided Court.

Chas. H. Tupper, K.C. for appellant.

A. Dunbar Taylor, K.C., for respondent.

Macdonald, C.J.A.:—I think there should be a new trial. The Judge's charge, in my opinion, was calculated to confuse the minds of the jury.

Martin, J.A., would dismiss the appeal.

Galliher, J.A.:—I would grant a new trial.

It appears to me that the two transactions, the one verbal and the other the partnership, separate and distinct from each other, were not with sufficient clearness so presented to the jury, and as I view the charge as a whole, it would tend to create in the minds of the jury the impression that the writing had reference to both transactions, while as a matter of fact, it had reference only to the partnership.

The appeal should be allowed.

McPhillips, J.A.:—The action was tried before Morrison, J., and a jury, and resulted in a verdict for the defendant,

upon which followed a dismissal of the action.

The appeal is based upon grounds of objection that there was misdirection as well as non-direction. During the argument I formed the opinion that it was not made out that a mis-trial had taken place and I am still of that opinion, notwithstanding the very able and forcible argument of Sir Charles Tupper, the counsel for the appellant.

It is a very serious onus that rests upon an appellant, i.e., to demonstrate that the charge of the trial Judge was of such a character that the ends of justice require the submission of the issues to another jury. Upon a careful perusal of the charge, I cannot come to the conclusion, taking the charge as a whole, (see Blue & Deschamps v. Red Mountain Railway, (1909), 78 L.J. (P.C.) 107) that there was any failure to carry out the duties that are statutorily imposed on the trial Judge.

It is instructive in this connection to remember what Lord Loreburn said in the Kleinwort case, (1907), 23 Times L.R. 696 at p. 697, 97 L.T. 263:—

"To my mind nothing would be more disastrous to the course of justice, than a practice of lightly overthrowing the finding of a jury on a question of fact. There must be some plain error of law which the Court believes has affected the verdict, or some plain miscarriage before it can be disturbed. I see nothing of the kind here. On the contrary, it seems to me that the jury thoroughly understood the points put to them and came to a sensible conclusion..... That is, in my opinion, what the finding means and there is sufficient evidence to support it."

Now one salient feature of the case was whether the settlement which was come to, was or was not determinative of the matters that were in litigation? If the answer was or should have been in the affirmative, that must be the end of the case. Where as here, there was upon the one side—the side of the defendants—documentary evidence corroborative of the defendant's version of matters, the conflict of evidence cannot be said to be a matter of moment; further the issues were in my opinion fully and completely put before the jury and they have found a general verdict for the defendants, which means that all material issues are found for the defendants. It is for the plaintiff to secure a finding from the jury which will entitle the entry of judgment for him. See Rickards v. Lothian, [1913] A.C. 263, Lord Moulton at p. 267.

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It is true that what is asked here is not judgment for the plaintiff but a new trial. As previously stated, no case has been made out in my opinion, which warrants a new trial being directed. Further the Court of Appeal is under no real requirement to direct a new trial, when it has all the relevant evidence before it. (See Allcock v. Hall, [1891] 1 Q.B. 444; Winterbotham et al v. Sibthorp, et al, [1918] 1 K.B. 625), and upon the whole evidence I am unable to say that the jury have arrived at a wrong conclusion. It is not necessary for the Court of Appeal to say that the jury have arrived at the right conclusion—in this connection I would refer to what Sir Arthur Channell said in Toronto Power Co. v. Paskwan, 22 D.L.R. 340, at p. 344, [1915] A.C. 734, relative to what is sufficient upon the part of the jury:—"that they have come to a conclusion which on the evidence, is not unreasonable."

The counsel for the appellant strenuously submitted that but one point was left to the jury, settlement or no settlement, and that admittedly there was a settlement but not as contended for by the appellant—a settlement in toto—that the plaintiff was prejudiced in the way the case was submitted to the jury. I cannot, with deference, follow this reasoning. It seems to me that upon this point it is only necessary to advert to but one excerpt from the charge of the trial Judge,:—

"If you believe that an adjustment was made, but certain things were left outstanding, you must open up things and work it out, but if you conclude that these documents mopped up the whole matter and adjusted all the differences, you will find a verdict for the defendants."

I do not find it necessary to canvass in detail the somewhat voluminous evidence adduced at the trial or to further dwell upon the tenor of the charge of the trial Judge to the jury, but content myself by saying that there was sufficient evidence before the jury to find as they did, and that the issues were submitted to them by the trial Judge in such a comprehensive manner that it cannot be said effectively that there was failure to carry out the statutory requirement, which after all is the enactment of that which was always the accepted practice at nisi prius.

It follows that in my opinion the appeal should be dismissed.

Appeal dismissed by an equally-divided Court.

ATTORNEY-GENERAL OF NOVA SCOTIA v. DE LAMAR ET AL.

Nova Scotia Supreme Court, Harris, C.J., Russell, J., Ritchie, E.J., Chisholm and Mellish, JJ. September 17, 1921.

Taxes (§VA.—180)—Will—Bequest of Shares in Company in Nova Scotia—Testator Citizen of and Domiciled in United States of America—Shares Capable of Being Transferred in New York Without Invoking Aid of Laws of Nova Scotia—Share Certificates Held in New York at Time of Death of Testator—Liability for Payment of Succession Duty.

The testator a citizen of the United States of America, and having his domicile in the city of New York, bequeathed to his daughter, also a citizen of the United States and domiciled in the state of New York, certain shares of common stock of the Nova Scotia Steel and Coal Co., a company incorporated by special Acts of the Nova Scotia Legislature, having its head office at New Glasgow in said Province. The company's stock was listed on the New York stock exchange and the Equitable Trust Co. of New York was the transfer agent of the shares of the company in New York and was authorised by resolution of the directors of the company to issue and countersign, when properly signed by officers of the company, an issue of certificates of shares of common stock to the number of 75,000 shares and also to keep the necessary records in connection therewith. The National Trust Co. of Montreal, and of Toronto, and the Old Colony Trust Co. of Boston and the Bankers Trust Co. of New York, were appointed agents of the company each with the title of Registrar for the registration of certificates for the 75,000 shares of common stock, and these Registrars were directed to register and countersign as Registrar, certificates for not exceeding 75,000 shares of common stock when signed by the officials of the company and countersigned by the transfer agent of the company in the same city as the Registrar. The Court held that as the certificates for the shares bequeathed were in New York at the time of the death of the testator they could not be said to be "property situate in Nova Scotia" within the meaning of sec. 7 of the Succession Duty Act of 1917 N.S. ch. 5, as they could be transferred in New York, where they were registered, without reference to any one in Nova Scotia, and without invoking the aid of the laws of the Province and it not being necessary to come to Nova Scotia for administration of the estate or for ancillary probate, everything necessary being able to be done in New York, and that such shares were not subject to the payment of duty under the Succession Duty Act of 1917.

THE PLAINTIFF claimed that certain shares of the capital stock of the Nova Scotia Steel and Coal Co. held by Joseph Raphael De Lamar at the time of his death the certificates for which shares at the time of the death of said De Lamar were in the city of New York were property situate in Nova Scotia and subject to the payment of duty under the Succession Duty Act, 1917 (N.S.), ch. 5, sub-sec. 1 of sec. 13.

A stated case was submitted for the opinion of the Court.

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ATTORNEY-GENERAL OF NOVA SCOTIA v. DE LAMAR ET AL.

S. Jenks, K.C., and F. F. Mathers, K.C. (Deputy Attorney-General), for plaintiff.

J. McG. Stewart, K.C., for defendant.

Harris, C.J.:—Joseph Raphael De Lamar, a citizen of the United States of America and having his domicile in the State of New York, died there on December 1, 1918, leaving an estate valued at upwards of $30,000,000.

He left a will under which he gave and bequeathed to his executors and trustees the sum of $10,000,000 in trust to invest and pay the net income thereof to his only child, a daughter, Alice Antoinette De Lamar, the defendant, during her life, and upon her death he devised the principal sum of $10,000,000 so held in trust to her lawful issue in equal shares per stirpes and not per capita, and in case the said Alice De Lamar died without lawful issue surviving the said trust fund was to become part of the residuary estate.

There were numerous bequests of sums of money from $25,000 to $500,000 to various individuals and corporations, all in the United States of America, and the usual provision with regard to the payment of debts, funeral expenses, etc., and then the residue of the estate was devised to Harvard College, Columbia University, and the Johns Hopkins University, all in the United States, for certain defined purposes.

The will contained a provision that all transfer or inheritance taxes required to be paid upon or in respect of any of the legacies whether absolute or in trust (other than those upon the residuary estate) should be paid by the executors out of the estate as expenses of administration, and they were not to be charged against the legatees nor deducted from the amount of the legacies.

Alice De Lamar was also a citizen of the United States, domiciled in New York, and the executors and trustees of the estate of the deceased were also American citizens domiciled in New York, and letters testamentary of the estate were duly granted in the State of New York.

The deceased at the time of his death held 5,000 common shares of the Nova Scotia Steel and Coal Co. of the par value of $100 each—the market value of which was $295,000.

The Nova Scotia Steel and Coal Co. was incorporated by special Acts of the Legislature of Nova Scotia and the head

office of the company was at New Glasgow in the Province of Nova Scotia.

The company's stock was listed on the New York Stock Exchange and the Equitable Trust Co. of New York was the transfer agent of the shares of the company in New York and was authorised by resolution of the directors of the Nova Scotia Steel and Coal Co. to issue and countersign when signed by the president or vice-president or a director, and treasurer or secretary, or assistant-secretary of the company, an issue of certificates of shares of common stock to the number of 75,000 shares, and also to keep the necessary records in connection therewith.

By the same resolution the National Trust Co. of Montreal (in the Province of Quebec), and Toronto (in the Province of Ontario), the Old Colony Trust Co. of Boston (Mass., U.S.A.) and the Bankers Trust Co. of New York (U.S.A.) were appointed agents of the Nova Scotia Steel and Coal Co. each with the title of Registrar for the registration of certificates for the 75,000 shares of common stock of the company, and these Registrars were directed to register and countersign as Registrar certificates for not exceeding 75,000 shares of common stock when signed by the officials of the Nova Scotia Steel and Coal Co. and countersigned by the transfer agent of the company in the same city as the Registrar in such amounts as the company might from time to time direct in writing; and each Registrar was authorised and directed to register transfers and to issue and countersign new certificates on delivery and cancellation of the old ones issued in the same city.

The 75,000 shares were therefore interchangeably transferable from one of these cities to the other.

The 5,000 shares of the common stock of the Nova Scotia Steel and Coal Co. owned by the deceased were part of these 75,000 shares and the certificate was issued to him in New York and were countersigned by the transfer agent and Registrar of the company in New York, and registered there in accordance with the resolution referred to.

The certificates for the 5,000 shares were in New York at the time of the death of the deceased.

Each of the Registrars and transfer agents referred to had instructions from the Nova Scotia Steel and Coal Co. not to register transfers contrary to the provisions of sec. 12 of the Succession Duty Act, ch. 5, 1917, of Nova Scotia. I quote this section later.

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Chapter 2 of the Acts of the Legislature of Nova Scotia for 1916 provides as follows:—

"1. Every Company incorporated by or under any Act of the Legislature of Nova Scotia shall keep or cause to be kept in Nova Scotia a register, on which the bonds, debentures, stocks, shares or other securities which have been or may hereafter be issued by the Company may be registered, and on which such bonds, debentures, stocks, shares or other security may be validly transferred. 2. Such register shall be the principal register and any other register, on which such bonds, debentures, stocks, shares or other securities are or may be also registered or may be also transferred, shall be deemed to be part of the principal register, and shall be a branch or subsidiary register. 3. The principal register shall be prima facie evidence of any matters inserted therein, if such matters are authorised or directed by this Act to be inserted therein."

The Province of Nova Scotia claims that a succession duty is payable upon the market value of the 5,000 shares of the common stock of the Nova Scotia Steel and Coal Co. held by the deceased at the time of his death and this case has been stated for the opinion of the Court as to whether or not such duty is payable.

The action as originally brought was against Alice Antoinette De Lamar only, and seems to be based upon the theory that she was liable for such a proportionate part of the duty as the value of her life interest (under the Succession Duty Act) in the $10,000,000 trust fund bore to the whole value of the estate—and it is agreed that the duty payable on this theory would be $10,998.39.

Subsequently the executors and trustees of the estate were made defendants and when the case came before the Court it was pointed out by the Court that inasmuch as the succession duties if payable would come out of the residue of the estate, the residuary devisees were the parties really interested and they were joined as defendants and appeared by counsel on the argument.

The relevant sections of the Succession Duty Act, 1917, are:—

"2. (1) (a), The expression "passing on the death" or a similar expression, means passing either immediately on the death or after an interval either certainly or contingently and either originally or by way of substitutive limitation,

whether the deceased was at the time of his death domiciled in Nova Scotia or elsewhere."

"3. (1). For the purpose of raising a revenue for Provincial purposes, and save as hereinafter otherwise expressly provided, there shall be levied and paid for the use of the Province a duty (called Succession Duty) at the rates hereinafter specified upon all property hereinafter mentioned which has passed on the death of any person who has died on or since the 1st day of July, A.D. 1892, or which passes on the death of any person who shall hereafter die, the duty to be according to the fair market value of such property at the date of the death of the deceased."

7. (a). All property situate in Nova Scotia which has passed as aforesaid or which passes as aforesaid on the death of any person, whether the deceased was at the time of his death domiciled in Nova Scotia or elsewhere; and debts and sums of money due and owing or accruing due and owing from persons in Nova Scotia to any deceased person at the time of his death on obligation or other specialty shall be property of the deceased situate in Nova Scotia without regard to the place where the obligation or specialty shall be at the time of the death of the deceased.

(b). Property which has passed as aforesaid or which passes as aforesaid on the death of any person and which is situate out of Nova Scotia on the date of the death and which is brought or sent into Nova Scotia to be administered or distributed, including money received in Nova Scotia by any donee mentioned in this clause under a policy of insurance effected by any person on his life where the policy is wholly kept up by him for the benefit of any existing or future donee, whether nominee or assignee or for the benefit of any person who may become a donee or a part of such money in proportion to the premiums paid by him where the policy is partially kept up by him for such benefit."

"11. (1). No executor shall in the first instance be personally liable to pay the duty on any property which passes on the death of the deceased and to which any person is beneficially entitled, but an executor or other person in whom any interest in any property so passing or the management thereof is at any time vested, shall not transfer or deliver such property to the person so entitled without deducting therefrom the duty for which such person is liable. If any executor or other person violates the provisions of this section he shall be liable to a penalty equal

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to twice the amount of the duty payable in respect of such property, and such penalty shall be recoverable with full costs from any person liable therefor in any Court of competent jurisdiction by an action brought by the Provincial Treasurer in his name of office and such action may be continued by his successor in office as if no change had occurred."

"12. No executor foreign or otherwise shall assign or transfer any bond, debenture, stock or share of any corporation whatsoever incorporated by or under the authority of an Act of the Legislature of Nova Scotia of any bond, debenture, stock or share situate in Nova Scotia or any other corporation whatsoever standing in the name of a deceased person or in trust for him, nor shall any such corporation allow or permit to be registered a transfer of any such bond, debenture, stock or share unless and until the duty thereon, if any, is paid. If any such corporation allows or permits any such transfer to be registered contrary to this section such corporation shall be liable to a penalty equal to twice the amount of the duty if any payable in respect of such bond, debenture, stock or share, and such penalty shall be recoverable with full costs from any corporation liable therefor in any Court of competent jurisdiction by an action brought by the Provincial Treasurer in his name of office, and such action may be continued by his successor in office as if no change had occurred."

It is also to be noted that sec. 13 (1) provides that the duty imposed by the Act "shall be and remain a first lien upon the property in respect of which it is payable until it is paid."

If we admit all other contentions of the Crown it is obvious that the action must fail unless these shares can be said to be "property situate in Nova Scotia" within the meaning of sec. 7 of the Act; and I have reached the conclusion that the shares do not come within the meaning of that section. These shares can be transferred in New York, where they are registered, without reference to any one in Nova Scotia, and without invoking the aid of the laws of this Province. It is not necessary to come to Nova Scotia for administration of estate or for ancillary probate. Everything necessary can be done and would have been done in New York to transfer the shares there but for the action of the Nova Scotia Government in demand-

ing payment of the duty. The Government cannot by giving a notice forbidding the transfer in New York and bringing the parties before the Court here change the situs of the property. When the deceased died the situs was fixed and it was either here or in New York and the property either was or was not liable for duty. If the situs of the shares was then in New York they could not be taxed by the Legislature of Nova Scotia because power to tax is by sec. 92 of the B.N.A. Act limited to direct taxation within the Province. It follows that no notice given after the death of the deceased by the Province or on its behalf to the Nova Scotia Steel and Coal Co. prohibiting the transfer in New York and no action taken in the Province to bring the parties here to try out the question as to liability for the tax nor anything in sec. 12 of the Act can alter the position. That seems a self evident proposition and I only mention it because the Deputy Attorney-General urged the contrary. In my opinion, the fact that the deceased lived in a foreign country; that the certificates were there, renders it impossible for the Court to say that the shares are property situate in Nova Scotia, within the meaning of the Act.

The Act of 1916, ch. 2, providing that all registers for shares outside the Province are to be deemed to be part of the principal register and as a branch or subsidiary register does not in my opinion affect the result. The Legislature cannot by calling the New York register a branch or subsidiary register, nor by saying that it is to be deemed a part of the principal register in Nova Scotia, alter the fact that the register is in New York and the shares can be effectually dealt with there, without coming into this Province or doing any act here. That in my opinion is the test and the point upon which this case turns. Att'y-Gen'l v. Bouwens (1838), 4 M. & W. 171, 150 E.R. 1390; Winans v. The King, [1908] 1 K.B. 1022; In re Clarke, [1904] 1 Ch. 294.

The case ought to be treated as if the circumstances were otherwise the same but the deceased had died and been domiciled in some other Province of Canada, say Ontario, instead of New York. In such a case I do not see any escape from the conclusion that the shares would be taxable in Ontario and not in Nova Scotia.

It becomes therefore unnecessary to discuss the question as to the fiction embodied in the maxim mobilia sequuntur

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personam and its application to cases of this kind of intangible property as to which there seems to be much difference of judicial opinion in the American Courts as well as our own; and it becomes unnecessary to decide any of the other questions raised on the argument.

It is perhaps necessary to point out that the theory upon which the case was launched by the Crown which involves a finding that a portion of the shares passed to the defendant Alice De Lamar under the will of the deceased and the circumstances of this case seem to be without any foundation in law. I can find no authority for such a proposition and I pressed counsel in vain for it on the argument. The whole of the 5,000 shares passed to the executors and could have been sold by them and the proceeds applied in payment of the debts of the deceased or of any one or more of the legacies and the defendant could not have prevented such an application of the shares or the proceeds. Williams on Executors, 11th ed., vol. I., pp. 700, et seq. Alice De Lamar had no right to have those particular shares or any part of them set aside as part of the $10,000,000 trust and they cannot be said to have passed to her in any sense within the meaning of the Act. If this be so then it would seem to follow that the defendant, Alice De Lamar, ought to succeed in the action with costs, even if it should be eventually held that the residuary legatees or devisees are liable for the payment of the duty.

I would dismiss the action with costs to all the defendants.

Russell, J.:—I concur.

Ritchie, E.J.:—I would dismiss this action with costs on the ground that the shares in question are not "property situate in Nova Scotia" and therefore are not subject to the provisions of the Succession Duty Act, 1917.

Chisholm, J., concurs with Harris, C.J.

Mellish, J.:—This is a motion on behalf of defendants to dismiss the plaintiff's action on the ground that upon the facts disclosed in the statement of claim, it is not maintainable.

The statement of claim discloses the following facts:—

Joseph Raphael De Lamar died in New York on December 1, 1918, leaving a will made in New York, of which the defendants, Cromwell Taritzki and the United States Trust Co. are executors, domiciled in New York. The defendant, Miss De Lamar, also domiciled there, is a beneficiary under

the will and takes thereby certain real and personal property, besides the interest for life on $10,000,000, which is to be invested and held in trust by the executors. The testator at the time of his death was a citizen of the United States of America and domiciled there. He owned at the time of his death 5,000 ordinary shares of the Nova Scotia Steel and Coal Co. Ltd., a company incorporated by special Acts of the Nova Scotia Legislature and having its head office at New Glasgow in said Province.

The testator's will disposes of his whole estate but there is no special bequest of any of these shares. The company by resolution passed on September 14, 1916, appointed The Equitable Trust Co. of New York transfer agents of certain of the stock or ordinary shares of the company with power to issue and countersign certificates therefor, and also appointed the Bankers Trust Co. of New York agents of the company with the title of Registrar for the registration of the certificates of such shares. The resolutions further provide for Registrars at Montreal, Toronto, and Boston, and expressly declare that "it is the intention and purpose of these resolutions that certificates of the stock of this company shall be interchangeably transferrable in the cities of Montreal, Toronto, Boston and New York." The shares held by the testator are part of the common or ordinary shares referred to in these resolutions. The certificates for these shares held by the testator at his decease had been issued, countersigned and registered as provided in said resolutions and delivered to testator and at the time of his death were in New York. The statement of claim further alleges that the value of the life annuity bequeathed to Miss De Lamar under the will is $7,300,440 and that a proportionate part thereof, viz., $73,332.62 is represented by these shares. It was pointed out on the argument that as there was no specific disposition of the shares by the will, such a conclusion might not be justifiable. Accordingly the plaintiff was allowed to amend his statement of claim so as to add other beneficiaries under the will and to raise, as I understand it, the broad question whether any succession duty under the Nova Scotia Succession Duty Act of 1917 is payable in respect of these shares.

Such an action seems to be authorised by sec. 20 of this Act. The statement of claim as originally framed, claimed payment of the duty by Miss De Lamar and "such further

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or other relief as in the circumstances the Court might deem meet."

It remains to consider the law as applicable to these facts.

Section 7 of the Nova Scotia Succession Duty Act, 1917, provides:—[See judgment of Harris, C.J., ante p. 255].

An apparent effect of this section is by implication at least to exclude domicile as determining the situs for purposes of duty on personal property under this Act.

But sec. 11 of the Act makes the personal property of a deceased person "domiciled in Nova Scotia at the time of his death" liable to duty wherever such property may be situate at the time of his death, at least if it is brought into Nova Scotia. That section is in part as follows:—

"11. (1) No executor shall in the first instance be personally liable to pay the duty on any property which passes on the death of the deceased and to which any person is beneficially entitled, but an executor or other person in whom any interest in any property so passing or the management thereof is at any time vested, shall not transfer or deliver such property to the person so entitled without deducting therefrom the duty for which such person is liable. If any executor or other person violates the provisions of this section he shall be liable to a penalty equal to twice the amount of the duty payable in respect of such property, and such penalty shall be recoverable with full costs from any person liable therefor in any Court of competent jurisdiction by an action brought by the Provincial Treasurer in his name of office and such action may be continued by his successor in office as if no change had occurred."

(4) It is the duty of an executor or administrator where the deceased was domiciled in Nova Scotia at the time of his death to exercise due diligence to bring or to cause to be sent into Nova Scotia to be administered or distributed all personal property forming part of the estate of the deceased and situate out of Nova Scotia at the time of his death."

And by sec. 16 of the Act every executor is required to file with the Provincial Treasurer "within three months after the death of the deceased" an inventory shewing in detail inter alia all property that passed on his death and which is situate out of Nova Scotia.

Section 12 of the Act deals with dutiable shares in cor-

porations and is as follows:—[See judgment of Harris, C.J., ante, p. 256].

It will be observed that this section only applies to such shares as are dutiable and cannot, I think, be read as impliedly meaning that the shares of companies incorporated under local authority are to be deemed situate in Nova Scotia for the purposes of the Act.

The section, however, seems to recognise the possibility of a share in a foreign corporation being "situate in Nova Scotia" and sec. 7 (b) and 11 (4) above quoted, would perhaps indicate the possibility, if not also the duty, of bringing such shares into Nova Scotia in the case of the deceased owner having been domiciled in the Province. This might be possible if the situs of the share certificate be regarded as that of the share itself. Unless such be the intention of the Legislature, it is difficult to see how in all requisite cases in compliance with sec. 11 (4) there could be "sent into Nova Scotia. . . all personal property forming part of the estate of the deceased and situate out of Nova Scotia." I incline to the opinion from a perusal of the various sections, that when property therein is spoken of as "situate in Nova Scotia" an actual or physical situs is contemplated. A share of the capital stock in a corporation from its nature can have no such location. The certificate, of course, can.

From considerations of necessity and convenience and to meet the intention of parties interested therein, such shares are nevertheless given a location in law (see for example, In re Clark, [1904] 1 Ch. 294; Att'y-Gen'l v. Higgins (1857), 2 H. & N. 339, 157 E.R. 140). The shares in question have been "localised" outside the Province of Nova Scotia by their owner and by the company that created and issued them, and cannot in my opinion upon any construction of the Succession Duty Act be said to have been property situate in Nova Scotia, upon the facts disclosed in the statement of claim. The motion should, therefore, be allowed with costs.

Action dismissed.

RE WHITE.

Ontario Supreme Court in Bankruptcy, Orde, J. August 25, 1920.

Bankruptcy (§I—6)—Application to Confirm Steps taken by Authorised Trustee and to Continue Proceedings Already Begun under an Unauthorised Voluntary Assignment—Meeting of Creditors not Published in Canada Gazette—Refusal of Application.

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RE WHITE.

An application for an order confirming the steps taken by the applicant for the protection of the creditors and the winding-up of the estate of a debtor, and declaring that the applicant, as authorised trustee, and the inspectors named by the creditors, are at liberty to proceed with the winding-up of the affairs of the debtor as if a certain meeting of creditors had been held under and by virtue of the Bankruptcy Act will be refused where the creditor's meeting has not been published in the Canada Gazette as required by sec. 11 (4) of the Bankruptcy Act.

[See Annotations, 53 D.L.R. 135, 59 D.L.R. 1.]

APPLICATION for an order confirming steps taken by the applicant and giving liberty to proceed with the winding-up of the affairs of the debtor under the Bankruptcy Act. Refused.

On July 27, 1920, White made an assignment for the benefit of his creditors, under the Assignment and Preferences Act, R.S.O. 1914 ch. 134, to the applicant, who had not at that time been appointed an authorised trustee under the Act. The assignment was registered and the usual notice to creditors was mailed by registered letter, to each creditor, on July 31, 1920, and was also published in a newspaper on July 31 and August 4, 1920. Pursuant to the notice, a meeting of creditors was held on August 10, 1920.

The meeting, by resolution, instructed the assignee to obtain from White an assignment under the Bankruptcy Act, 1919 (Can.), ch. 36, and, if that was not obtained within 3 days, "to file an application before the Court to have White declared a bankrupt," etc.

On the same day, the applicant was appointed an authorised trustee under the Act; and on August 13, 1920, White made an assignment to the applicant, in the form authorised by the bankruptcy rules.

J. F. Strickland, for Morris, an authorised assignee.

Orde, J.:—By the amending Act, 1920 (Can.), ch. 34, sec. 2, the Court may give leave to a corporation to be wound up, or to continue winding-up proceedings; but I have not been referred to and have been unable to find any provision in the Act or in the amendments which even by implication, empowers the Court either to authorise an insolvent person to make a voluntary assignment (other than as authorised by the Act) or to continue proceedings already begun under any voluntary assignment or to declare that proceedings already taken under any unauthorised voluntary assignment shall be deemed to have been taken under the Act.

The Bankruptcy Act makes a voluntary asignment an

act of bankruptcy (sec. 3 (a)), and further declares (sec. 9) that any assignment, other than an authorised assignment, made by an insolvent debtor for the general benefit of his creditors, shall be null and void. So far as proceedings under the Bankruptcy Act are concerned, that means that no such unauthorised assignment can have any validity whatever.

The meeting of creditors was probably regularly held so far as the requirements of the Ontario Act are concerned; but sec. 11 (4) of the Bankruptcy Act requires the notice calling the first meeting of creditors to be published in the "Canada Gazette" (see definition of "gazetted," sec. 2 [q]). It is conceivable that some person entitled to be present at the meeting failed to hear of it because of the failure to publish the notice in the Gazette. In such circumstances, to validate the meeting would not be proper, even if there was power to do so.

All that took place prior to the authorised assignment of August 13, 1920, must be disregarded; and the trustee must commence anew by publishing and mailing proper notices in the manner required by the Act and Rules and holding a new meeting of creditors.

Motion refused.

R. v. SHARPE AND LINGLEY; EX PARTE SHARPE.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., McKeown, C.J., K.B.D., and Grimmer, J. May 20, 1921.

Contempt (§IC—10)—Order for Custody of Children—Condition that Children to be Kept Within Jurisdiction of Court—Application for Permission to Remove — Refusal of Permission—Removal in Disregard of Order.

A judgment was obtained giving the custody of children to the father on certain conditions, one of which was that they were to be kept within the jurisdiction of the Court. Some time after the giving of this order an application was made by the father for permission to remove the children from the Province. This application was refused, and two days afterwards the father in defiance of the Court removed the children out of the Province. The Court held that this was a deliberate contempt of the order of the Court and ordered the father to be committed to the common gaol. Objections that the documents on which the application was based had not been served six clear days before the hearing were overruled, the Court having power under C.S.N.B. 1903, ch. 112, sec. 109, to enlarge or abridge the time. Also held that personal service of the order which had been disregarded was not necessary as it was perfectly clear that it had come to the knowledge of the defendant. The claim that a remedy on the recognisance was the only remedy was also dismissed and also a contention that because criminal proceedings had been taken under sec. 165 of the Criminal Code, proceedings for contempt would not lie, was overruled.

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APPLICATION for an order for committal to gaol for contempt for disobeying an order of the Court. Application granted.

C. F. Inches, for Cora Mabel Sharpe.

W. B. Wallace, K.C., contra.

Hazen, C.J. (oral):—This is an application for the committal to the common gaol of the City and County of Saint John of William H. Sharpe, for contempt of Court, the contempt consisting in disobeying an order made by this Court on November 19, last. The order sustained the judgment of Barry, J., awarding the custody of the 3 infant children, George Lingley Sharpe, Doris Elsie Sharpe and Joan Anita Sharpe to their father, William H. Sharpe, and ordered that all times after the custody of the children should have been committed to him, and so long as his right to such custody should continue, each of the infants until attaining the age of 16 years should be kept by the said Sharpe within the jurisdiction of this Court, and should not depart the Province without leave of this Court or a Judge thereof first obtained; and also provided that the mother of the said infants, Cora Mabel Sharpe, should at all reasonable times have access to all of the said infants, and by consent of parties it was ordered that during the months of July and August of each year the mother of the children should be entitled to have and maintain them at the home of her father, in the parish of Westfield, in the county of Kings, her counsel undertaking that at the end of each of such periods the children should be returned to the custody of their father, and during said periods the said father should at all times have access to all of said infants.

Under the provisions of this order the children were entrusted to the custody of the father, and it appears from statements made here to-day that on April 25, last, an application was made by the father to Grimmer, J., and at his request I sat with him on the hearing of the application for leave to remove the children from the Province. The application was refused, and it now appears that 2 days—I think I am correct in saying—after judgment was given, Sharpe removed his children from the Province and took them to Truro, in the Province of Nova Scotia, where they now are, as far as it appears. This was clearly an absolute violation on the part of Sharpe of the order of the Supreme Court of November 19, last, and consti-

tutes, I think, without question, a contempt of Court, and it seems to me that the contempt is somewhat, if not largely, aggravated by the fact that only 2 days before committing it, he was aware of the judgment of 2 of the Judges of the Court of Appeal refusing permission to allow the children to be removed from this Province. Yet, in face of that, he removed the children to the Province of Nova Scotia, and that it appears to me constituted a most deliberate contempt of the order of this Court.

It was contended by the able counsel who appeared for Sharpe to-day that we could not proceed, as the affidavits and the documents upon which the application was based had not been served 6 clear days before the date of this hearing. I am of opinion that, having reference to sec. 109 of the C.S.N.B. 1903, ch. 112, the Supreme Court in Equity Act, this objection cannot prevail. That section distinctly states that "the Court or a Judge shall have power to enlarge or abridge the time appointed by the provisions of this Chapter regarding the practice or procedure." The 6 days rule is a time appointed by the provisions of this Chapter, and it clearly relates to procedure, and that being the case, without in any way dissenting from the decision of our Court in the case of Turnbull Real Estate Co. v. Segee (1914), 19 D.L.R. 525, 42 N.B.R. 625, I am of opinion that the solicitor for Mrs. Sharpe, having obtained an order from a Judge of this Court abridging the time for service of these necessary papers, the point taken by Mr. Wallace must fail.

Certain other points were taken and argued. It was contended that there had been no personal service of the order, and that this being a quasi criminal order, that it was fatal to the proceeding that there had been no such service. It is perfectly clear that the order came to the knowledge of Sharpe, there can be no question about that. It is not necessary to refer to all the facts which shew that that was the case. One will be sufficient, and that was that he himself made application to Grimmer, J., for leave to take his children out of the Province, shewing clearly that he was aware of the order made on November 19, and of the contents of that order, and further than that the order was in his favor, as it really dismissed the appeal which was made from Barry, J.'s order giving him the custody of the children. It was contended further that the papers were not properly entitled, that the case

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as entitled "ceased to be" on delivery of the judgment of the Supreme Court on which the order of November 19 was made. The same practice apparently was pursued in this case as was pursued in the case of Turnbull v. Segee, and the authorities cited to us from the White Book by Mr. Inches, including the case of O'Shea v. O'Shea et al (1890), 15 P.D. 59, satisfy me that this ground cannot prevail.

With regard to the claim that a remedy on the recognisance is the only remedy, and that there is no breach of the order because the recognisance has been given and that the order was fulfilled when the recognisance was given, I am of opinion that the same principle obtains in a proceeding of this sort as in an ordinary case, and that the fact that the recognisance was given in no way interferes with the right to take proceedings for contempt in the event of an order of the Court having been violated. Neither can I concede to the view taken that because criminal proceedings may have been taken under sec. 165 of the Crim. Code, proceedings for contempt will not lie.

In my opinion, the Court, being of opinion upon consideration of the facts disclosed by the affidavits and other papers submitted, and the order of November 19, 1920, that the defendant Sharpe has been guilty of a contempt of this Court by a breach of the said order, the Court should now order that the defendant Sharpe stand committed to the common gaol of the City and County of Saint John for his said contempt.

McKeown, C.J.K.B.D. (oral):—In answer to this motion made by Mr. Inches a number of points have been urged by Mr. Wallace, counsel for Sharpe, and he has pressed them upon the Court in a way that leads one to the conclusion that he has expended a great deal of time and learning in presenting his client's case. These individual points have been taken up seriatim by the Chief Justice, and he has, to my mind, disposed of them in a most satisfactory way. I concur in the conclusion at which he has arrived and the reasons which he has given for coming to that conclusion. It is not necessary to say anything concerning what may happen later, but I may express regret that something a little more substantial in the way of defence could not have been suggested to the Court. This is the second flagrant disobedience to the order of the Court on the part of Sharpe, and to-day we find that notwithstanding he has been given notice of this hearing,

the act of contempt still continues—that is to say, that he has not thought it necessary to have brought the children into the locality in which the order of the Court says they must be kept. In defiance of the order of the Court, and I am pleased to be able to state in defiance also of the advice of his counsel, he has committed this contempt. The Court, I conceive, has no desire to exercise the almost unlimited power it has, to oppress anybody, but it must see that its orders are obeyed, and those who do not appreciate the binding force of the order of a Court must be made to understand that its commands cannot, at the desire, or at the whim of the party at whom they are directed, be flouted and set aside.

I concur in the conclusion which has been pronounced by the Chief Justice of the Court, that Sharpe be committed to the common gaol of the City and County of Saint John, for his contempt.

Grimmer, J. (oral):—I concur, for the reason I think the contempt of which the defendant has been found guilty, in fact which he admitted himself to be guilty of, was a deliberate contempt and a disregard of the order of this Court on the part of the defendant. I wish there was another way in which I could put it, but having made application to have the order of the Court changed for the purpose of his own convenience, and the members of the Court who heard that application having refused it on the ground solely that no sufficient reason was presented to us why it should be changed, after hearing that decision—having been present in Court when it was given—he then assumes to himself the privilege of defying the authority of this Court and takes or removes the children beyond jurisdiction. I can conceive of no more serious contempt that tunate not only for the defendant but particularly for the could be exercised by anyone, and while it is very unforchildren that their father should have chosen to pursue that course, yet the dignity of this Court must be upheld in circumstances of this kind, and I concur with the conclusion at which the other members of the Court have arrived.

Application granted.

B.C.

C.A.

MARSHALL v. CANADIAN PACIFIC LUMBER CO.

MARSHALL v. CANADIAN PACIFIC LUMBER CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. September 9, 1921.

Judicial Sale (§IIIB—30)—Company in Liquidation—Receiver Authorised by Court to Borrow to Carry on Business—Provision Made for Sale of Property in Case of Default of Payment—Sale by Public Auction in Accordance with Order—Part of Property not Included in Particulars of Sale—Right of Court to Order Receiver to Give Deed to Property not Included.

Where a receiver is empowered by order of the Court to borrow sums of money for the purpose of carrying on the business of a company in liquidation, and it is provided that upon default of payment the creditor is to be at liberty to sell the property of the company as directed in the order and through the misapprehension of the solicitor who prepares the conditions of sale and particulars, part of the property which should have been included, is deliberately excluded from the particulars, such property cannot be said to form part of what was offered for sale or purchased, and an order that the receiver execute and deliver a conveyance of such excluded property to the purchaser, is wrongly made and will be set aside.

APPEAL by plaintiff from a judgment of Morrison, J., ordering the receiver to execute and deliver to the purchaser of certain property at a public auction, a deed to property not included in the particulars of sale, such property being excluded from the particulars owing to a misapprehension on the part of the solicitor who prepared the particulars. Reversed.

F. T. Congdon, K.C., for appellant.

H. Symes, for London and Canadian Investment Co.

Alexander, for Dominion Bank.

Macdonald, C.J.A.: — I would allow the appeal for the reasons given by my brother Galliher.

Martin, J.A. (dissenting), would dismiss the appeal.

Galliher, J.A.:—This is an appeal from the order of Morrison, J., by which it was ordered that the Receiver, Leonard Austin Matthews, do execute and deliver to the London and Canadian Investment Co., Ltd., a conveyance of a certain Lot 14, as therein described, together with a portion of the foreshore abutting on said lot, also fully described in said order.

Matthews was the Receiver for the defendants, the Canadian Pacific Lumber Co., Ltd. (in liquidation), and as such Receiver was, by order of the Court (Murphy, J.) empowered to borrow large sums of money from the Dominion Bank for the purpose of carrying on the business of the

company, and by said order the sums so borrowed, together with interest, were declared to be a charge upon the revenues and upon the whole property and assets of the company.

It was further provided that in default of payment of monies so advanced that the Dominion Bank should, under certain conditions, and after giving certain notice, be at liberty to sell the property of the said company in the manner directed in the said order. Default having been made the bank proceeded to sell the property by public auction and the respondents, the London and Canadian Investment Co., through their manager, E. W. Hamber, became the purchasers at such sale.

This Lot 14 and that portion of the foreshore abutting thereon, which I have before referred to, were not included in the particulars of sale and upon discovering after the sale that they had been omitted, application was made to the Receiver to execute a transfer of these to the purchaser. This was not acceded to and an application was made to Morrison, J., who granted the application and made the order appealed from.

This application was made jointly by the Dominion Bank and the London Canadian Investment Co., Ltd., represented by separate counsel at the hearing.

There was also represented by counsel at the hearing the Receiver—the plaintiff—the defendants, the Canadian Pacific Lumber Co., Ltd., and the Trustees Corporation Ltd.

It appears that in February, 1913. . . the Dominion Government expropriated the whole of Lot 14 and the water lot adjoining for the purpose of constructing a Government wharf, and later on, discovering that the whole of said lot and water lot was not required for such purposes, the Minister of Public Works of Canada gave notice of abandonment of that portion of Lot 14 and water lot adjoining, which is now the subject of dispute, said notice bearing date February 5, 1914, and served on Messrs. Davis & Co., solicitors for the Receiver, on or about February 16, 1914..

Mr. Tiffin who appeared on behalf of the Receiver, in the expropriation proceeedings was not aware of this abandonment, as the Receiver's solicitors at that time were Messrs. Davis & Co.

In preparing the conditions and particulars for sale on behalf of his clients, the Dominion Bank, Mr Tiffin, not being aware of the abandonment, excluded Lot 14 and the

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adjoining water lot, as he thought the Dominion Government had taken all of said lot and water lot and that they were no longer the property of the Pacific Lumber Co. (in liquidation).

These particulars were checked up with a Mr. Speer, in the office of Davis & Co., who apparently had forgotten or did not know of the abandonment by the Government.

It is abundantly clear that the Dominion Bank intended to sell under its securities all the property of the Pacific Lumber Co., and the Receiver states, that had he known Lot 14 and the water lot were not included in the particulars, he would have had same inserted before the sale, as he was aware of the abandonment.

It is equally clear I think from Hamber's affidavit that he thought he was bidding on the whole of the company's property, including Lot 14, as he says that prior to the sale he had seen this property used as a piling ground for the mill and though he did not identify the description with that in the particulars, he took it into consideration in the valuation on which his bid was based and believed it was included. Moreover, he made enquiries and was justified in believing from such enquiries that he was purchasing the whole of the company's property.

We have, then, this situation—the Dominion Bank believed they were selling all the company's property and the purchasers believed they were purchasing same. But the fact is that the property in question was not included in the particulars and was never sold (subject to a phase of the question, I will deal with later).

Now as I have before pointed out it seems clear that it was the intention to sell and the intention to purchase all the company's property, but through a misapprehension as to the ownership of the property in dispute, it was deliberately excluded from the particulars of sale and cannot be said to form a part of what was offered for sale or purchased.

The phase of the question referred to above is whether under the paragraph at p. 61 of the Appeal Book, the property in question could be said to come within the word "plant." The paragraph is as follows:—

"On the property situate at Vancouver are mill buildings, plant and machinery fully equipped for a capacity of approximately 80,000 feet per day. The mill is at present

leased to a lessee whose lease expires on January 1st, 1921."

Now a piling ground is a very necessary adjunct in connection with a mill of this capacity, or any mill for that matter, but whatever force there might be in the contention that as such it might be treated as plant, is, I think, nullified by the fact that under the heading "Vancouver" at p. 56 of the Appeal Book, we find a particular description of the real estate connected with the mill site set out and the property in question forms no part of that description, neither is the lease mentioned at p. 61 before us, so that we are in no position to determine whether that would throw any further light on the matter.

I regret to have to come to the conclusion that the appeal must be allowed, as I have no doubt that but for the misapprehension on the part of Mr. Tiffin this matter would never have been before us.

In connection with this I wish to point out that in my opinion there is not a shadow of suspicion that can attach to the bona fides of either Mr. Tiffin or Hamber in this transaction. Both acted bona fide throughout, and unfortunately for Hamber or his company, he believed he was bidding on and purchasing something not actually included in the sale particulars.

McPhillips, J.A., would allow the appeal.

Appeal allowed.

REX v. HONG LEE ALIAS WAH CHEW.

British Columbia County Court, Cayley, J. September 17, 1920.

Appeal (§IC—25)—Under Summary Conviction Procedure from Dismissal of Charge—Opium and Drug Act 1908 Can., ch. 50 and amendments—Status of Crown and of Police Court Clerk to Appeal—Persons "Aggrieved"—Cr. Code sec. 749.

Where there is an acquittal upon a charge tried under the summary convictions procedure (Cr. Code Part XV) for an offence against public order created by Dominion statute, ex. gr. the Opium and Narcotic Drugs Act, the Crown is a party aggrieved and the police court clerk who laid the charge on behalf of the public is a party aggrieved under Cr. Code sec. 749 for the purpose of instituting an appeal taken on behalf of the Crown and of such complainant. In such case it is not essential that the complainant should have suffered any pecuniary damage by the dismissal order which is the subject of the appeal.

APPEAL from the decision of the police magistrate at Vancouver, dismissing a charge of having in his possession morphine, cocaine and opium, for other than scientific or medicinal purposes.

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REX v. HONG LEE ALIAS WAH CHEW.

Reid, K.C., for the prosecution.

J. A. Russell, for the accused.

Cayley, Co. Ct. J.:—This is an appeal from a decision of the police magistrate, dismissing a charge brought against Hong Lee for having in his possession morphine, cocaine and opium for other than scientific or medicinal purposes.

The information was laid by Earl E. Robinson, who describes himself in the information as simply "Earl E. Robinson." The notice of appeal reads as follows:—

"Take notice that The King, on the information of Earl E. Robinson and the said Earl E. Robinson being persons who think themselves aggrieved, intend to prosecute an appeal," etc.

Mr. Russell for the respondent, now objects that the King and Earl E. Robinson are not parties "aggrieved" and that, therefore, the appeal should be dismissed. He relied upon Rex v. Suckling, decided December 5, 1919, [1920] 3 W.W.R. 89], where I sustained the objection then taken on the ground that the appellant was not a party aggrieved. He also cited Rex. v. Lee Tan and Lee Him, a decision dated March 18, 1920 [61 D.L.R., 35 Can. Cr. Cas. 377, 28 B.C.R. 49;] in which I sustained a similar objection, but those cases are, in my opinion, quite different from the present one.

In Rex v. Suckling the King did not appeal. Complainant went into the box, and being asked whether he felt himself aggrieved or not, stated that the appeal had been taken without his knowledge and without his being consulted, and that he did not consider himself to have been "aggrieved." The complainant was, at that time, police clerk of the City of Vancouver, just as Earl E. Robinson was, in the present proceedings, police clerk of the same city. In Rex v. Lee Tan and Lee Him, 61 D.L.R., 35 Can. Cr. Cas. 377, the appellant was president of a Chinese Club. He laid his information, however, as a private person and in his notice of appeal, he appeared as a private person, whereas the property, whose destruction he complained of, was admitted to be the property of the club. I decided, in that case, that the appeal was not rightly taken in the form in which it was taken; that it was the club which was "aggrieved" but as the club did not lay the information and as the complainant did not lay the information in the name of the club, he had no locus standi to appeal.

In the present instance, the complainant, Earl E. Rob-

inson, goes into the box and states that he is the police clerk of the City of Vancouver and that it was on behalf of the public that he laid the information against Hong Lee. Upon the charge being dismissed by the police magistrate, he authorized an appeal to be taken and instructed counsel for the Crown, although, as a matter of course, we know that the real authority to appeal came from the law officer of the Crown and that Mr. Robinson's "authority" and "instructions" to appeal were formally given by him to counsel for the Crown at the direct request of counsel for the Dominion Government. It is well to have all the facts as they actually are. Now, as police clerk representing the public, it may be said that Mr. Robinson was not an agent of the Crown, and this feature is the only thing that makes me hesitate in the conclusion which I have come to dismissing the objection of Mr. Russell, but I consider that the Crown has adopted Mr. Robinson as its agent and that the Crown is always behind every public official, who lays an information in the course of his duties as an official. The Crown is present in every Court of Justice and is properly said to be represented by public officers while performing their public duties and within the scope of their duties. The Crown is, therefore, properly joined as appellant in this case, so that the question comes down to this: Can the Crown be said to be "aggrieved" in the sense in which the word "aggrieved" has been used in the past, especially in such cases as Rex v. The Justices of Essex (1826), 5 B. & C. 431; Harrup v. Bayley (1856), 6 El. & Bl. 218; 119 E.R. 845, and The Queen v. Justices of London (1890), 59 L.J.M.C. 146?

The position of the Crown in regard to offences is set out in Blackstone's Commentaries, Lewis's Ed., Book 1, cap. 7, p. 268, quoted in Stephen's Commentaries on the Laws of England, 15th ed., vol. 2, pp. 579-80, as follows:

"All offences are either against the King's peace or his crown and dignity; and are so laid in every indictment. For though, in their consequences they generally seem (except in the case of treason, and a very few others) to be rather offences against the kingdom than the King, yet as the public, which is an invisible body, has delegated all its powers and rights, with regard to the execution of the laws, to one visible magistrate, all affronts to those powers and breaches of those rights are immediately offences against him to whom they are so delegated by the public.

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He is therefore the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of the law."

There is, of course, a slight difference between the injury the Crown is supposed to suffer and a grievance which an unsuccessful complainant must shew, but to interpret section 749 of the Code (Criminal Code, Canada) as meaning that no one can be "aggrieved" unless he has suffered pecuniary damages would not be interpreting the section in a reasonable sense. I think the section must be interpreted as extending more widely the liberty of an appeal; that is, extending it from those who had been convicted and were appealing, to those who prosecuted in an official capacity and alleged themselves to be aggrieved although not pecuniarily hurt by the decision. The public are the real parties behind a public official who acts as prosecutor, and the public is, in this appeal, represented by the King. To construe the word "aggrieved" in the same sense as it is construed in Harrup v. Bayley, supra, would be to deprive the Crown in every action of a right of appeal from an erroneous decision of a magistrate. I do not agree with that. The Crown is always "aggrieved" when there has been a failure of justice. When there is a conviction, the accused is assumed to be "aggrieved"; when there is an acquittal and the law officers of the Crown advise that the magistrate should have convicted, the Crown may properly allege in the notice that it is aggrieved, and police officers and police-court clerks, "who are complainants for the public," have a right to allege that they are "aggrieved." In Blackstone's words, the King is "the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of the law" and this of course, includes appeals from acquittals by magistrates.

Preliminary objection overruled.

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Nova Scotia Supreme Court, Harris, C.J., Russell, J., Ritchie, E.J., and Mellish, J. September 17, 1921.

Infants (§IC—11)—Parent's Right to Custody—Welfare of Infant to be Primarily Considered—Custody of Infants Act R.S.N.S. 1900, ch. 121 sec. 2—Jurisdiction of Court to Override the Common Law Right of the Father to the Custody of the Infant.

Section 2 of the Custody of Infants Act, R.S.N.S. 1900, provides that "in making such an order the Court or Judge shall have regard to the welfare of the infant, and to the conduct or circumstances of the parents, and to the wishes of the mother

as of the father." The Court held that this section gave the Court full jurisdiction to override entirely the common law rights of the father in relation to the custody of his infant children and in a proper case to give the custody to the mother, and in considering the application the Judge must exercise his discretion and look primarily to the welfare of the infant, and where the infant was too young to have any religious preference the religious question should be left until the necessity of dealing with it arose.

[Re Keys (1908), 12 O.W.R. 160; Re Baylis Infants (1913), 13 D.L.R. 150, 7 Alta. L.R. 54; Re Maher (1913), 12 D.L.R. 492, 28 O.L.R. 419, In re McGrath, [1893] 1 Ch. 143; Re Argles (1907), 10 O.W.R. 801; Re O'Hara, [1900] 2 Ir. Rep. 232, referred to.]

APPEAL from the judgment of Chisholm, J., refusing an application of the mother to the Judge in Chambers for the custody of her infant child. The application was opposed by the father and the order was made in his favour dismissing the application of the mother. Reversed.

R. H. Murray, K.C., for appellant.

W. J. O'Hearn, K.C., for respondent.

Harris, C.J.:—Hattie Boyd, the mother of a child (Donald Boyd, born on February, 13, 1919, and now 2 years and 3 months old) applied to the Chambers Judge for the custody of her child and the application was opposed by the father, John Boyd. The father and mother were married in 1918 and their married life seems to have been an unhappy one. In March, 1921, the husband took the boy, Donald, and announced his intention of taking him to see a show at the Strand Theatre. He took the child away and did not bring it back and did not return to his wife. He was arrested for non-support, but the proceedings were not continued as the parties after the application of the wife for the custody of the child arranged to live together again and the application was adjourned by the Chambers Judge to see what would result from the attempt at reconciliation. They parted again after a short time—the wife leaving with the child—and the proceedings were continued before the Chambers Judge who eventually decided that the father had not forfeited his paramount right at "common law to the custody of his child" and he ordered that the father should have the custody of it and dismissed the application of the mother.

From this there is an appeal to this Court.

It is, I think, with deference to the Judge who heard the application, not a correct statement of the law to say that the common law right which the father had to the custody of a child continues unless forfeited.

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The paramount right which the father had at common law has been seriously affected by the statutes which have been passed for the relief of the mothers of children, which Lindley, L.J., says are "essentially mothers' Acts," and as I understand these statutes, as much regard has now to be paid by the Courts to the wishes of the mother as to those of the father.

Chapter 121 of R.S.N.S. 1900, sec. 1, provides:—

"1. (1). The Supreme Court or a judge thereof, upon the application of the mother of any infant (who may so apply without next friend) may order, (a) That the petitioner shall have access to such infant at such time and subject to such regulations as the court or judge deems proper, or (b) That such infant shall be delivered to the mother and remain in or under her custody or control, or shall, if already in her custody or under her control, remain therein until such infant attains majority or such age as the court or judge directs, and that such custody or control shall be subject to such regulations as regards access by the father or guardian of such infant, an otherwise, as the said court or judge deems proper. (2). The court or a judge may afterwards alter, vary or discharge such order on the application of either parent (in which case the mother may apply or oppose the application without next friend) or, after the death of either parent on the application of the guardian of any such infant; and in every such case may make such order respecting the costs of the mother and the liability of the father for the same, or otherwise as to costs, as the court or a judge thinks just."

And secs. 2 and 3 of the same chapter read:—

"(2). In making such order the court or judge shall have regard to the welfare of such infant, and to the conduct or circumstances of the parents, and to the wishes as well of the mother as of the father. (3) The court or a judge may also make an order for the maintenance of the infant by the father thereof, or by payment out of any estate to which the infant is entitled of such sum or sums of money, from time to time, as, according to the pecuniary circumstances of the father, or the value of the estate, the court or judge thinks just and reasonable."

Section 2 is a copy of sec. 5 of the English Guardianship of Infants Act of 1886, and that section has been more than once considered by English Judges.

In the case of In re A. and B. (Infants), [1897] 1 Ch.

786, it was decided that the Court has after taking into account the various considerations mentioned in sec. 5 (our sec. 2) full jurisdiction to override entirely the common law rights of a father in relation to the custody of his infant children and in a proper case would even give the mother the custody of her infant children notwithstanding that the mother may have been guilty of matrimonial misconduct.

Chitty, J., after referring to the common law and pointing out how it had been modified, thus refers to sec. 5 of the Guardianship of Infants Act, 1886, at p. 789:—

"This section confers upon the Court in terms a wide discretion as to the custody of and access to infants, but the discretion is a judicial discretion and must be exercised having regard to the matters mentioned in the section. These are (1) the welfare of the infant, (2) the conduct of the parents, and (3) the wishes as well of the mother as of the father."

He gave the custody of the child to the mother.

There was an appeal from Mr. Cozens Hardy and Mr. Levett argued for the father that the Act of 1886 had not placed the father and mother on an equal footing and that the father's rights must not be interfered with unless his conduct to the children justified it. But Lindley, L.J., said, at pp. 790, 791:—

"I do not take the view that Mr. Cozens Hardy and Mr. Levett have urged upon us—that this section must be read in the narrow way for which they contend. Nobody can read the various sections in the Act without seeing that it is essentially a mother's Act. It has very greatly extended the rights of mothers. I do not say that it has much, if at all, diminished the rights of fathers except as regards mothers; but to say that sec. 5 is to have no operation unless the father has so conducted himself towards his children as to justify the Court in depriving him of his children, is to reduce the section to a nullity; the section might as well be out altogether. What was the section put in for? What did the Legislature want to accomplish? The section was considered necessary and was inserted because Talfourd's Act and the Act of 1873 as construed by the Courts had not gone far enough in favour of the mother. It was to increase her rights, regard being had of course to the interest of the children. Section 5 has nothing to do with the rights of the father except as between him and his children and

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their mother. Section 5 says this. [His Lordship read the section and proceeded:—] The section has very materially altered the law relating to the custody of infants, and I am not in the least disposed to say anything that will narrow the ordinary construction of its words. Having regard to them the judgment of Chitty, J., is perfectly right, and I can add nothing usefully to it. Unless the appellant's contention can prevail, that the father in entitled to these children unless he has so conducted himself towards them as to forfeit that right, a contention which I protest against, the order is as right and judicious an order as can be made."

Lopes, J., said, when reading the Act (p. 792): "It is remarkable how the word 'mother' pervades this Act."

And again on same page:—

"Now I come to the important words—'having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well' — mark these words — 'of the mother'—she is put first—'as of the father, and may alter, vary or discharge such order on the application of either parent, or after the death of either parent, or of any guardian under this Act, and in every case make such order, and so on. Now what has the learned judge to do when he is asked to exercise his discretion under this Act? I take it there are three things he must look at. He must look primarily, I am entitled to say, to the welfare of the infant, then to the conduct of the parents, and then take into consideration the wishes—not of the father, which it is suggested to us are paramount—'as well of the mother as of the father.' "

And Rigby, L.J., at pp. 794, 795, said:—

"And then you come to the words 'the wishes as well of the mother as of the father.' Those are very remarkable. If the rights of the father as they were construed down to that time are not intended to be interfered with by this section, what is the meaning of referring to the mother's wishes? If that means, 'to the wishes of the mother subject to the rights of the father' it would be a transparent absurdity; if the rights of the father are to override the wishes of the mother, what is the use of mentioning them? When it says 'the wishes of the mother as well as of the father,' as a general rule, you are to consult the wishes of one as well as the other. Now I cannot believe that it is the proper construction of this Act that you are to read into

that section 'without prejudice to the rights of the father at common law, as they stand by the decisions down to this time.' The Act is intended to interfere, and interfere to a very great extent, with the rights of the father."

In the case at Bar there is no allegation against the mother or her fitness to care for the child which is only 2 years and 3 months old.

In Re Keys (1908), 12 O.W.R. 160, Clute, J. had to consider a somewhat similar case—where the child was about the same age, and he said, at p. 161:—

"That a child of such tender age needs the constant care of a mother goes without saying. I have no doubt that whatever may be the merits of the dispute between the wife and husband, it is for the benefit of the child that the mother should have its custody."

There was an appeal which was dismissed with costs. See page 269.

In Wood v. Wood, [1919] 3 W.W.R. 246, at p. 251, Taylor, J., said:—"I think the Court should not be unmindful of the fact that there is danger to the health of the child in depriving it of the mother's control and the mother's love."

I have examined many cases not referred to by counsel on the argument, and among others the following: Re Baylis Infants (1913), 13 D.L.R. 150, 7 Alta. L.R. 54; Re Maher (1913), 12 D.L.R. 492, 28 O.L.R. 419; In re McGrath, [1893] 1 Ch. 143; Re Argles (1907), 10 O.W.R. 801; Re O'Hara, [1900] 2 Ir. Rep. 232.

It will be found that in many of the cases the Court refers to the necessity of the child having the care and love of the mother, particularly a child of tender years. On the argument I asked counsel for the father whether he had found any case where the custody of a child of this age had been taken away from the mother where, as here, there was nothing against her moral character, or fitness, and he candidly admitted that he had found none. I can find none after a careful search and I do not believe such a case exists. It is quite unnecessary to say that the father who is a labourer cannot take the child to his work and of necessity he must leave it and its care to strangers, or it may be to relatives of his, but none of them can give it that love and care which its own mother should, and no reason has been suggested why she should be deprived of it.

It is said that the father desires to bring the child up as

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a Roman Catholic while the mother is an Anglican. The religious question in my opinion cannot affect the case. This child is only just old enough to talk and it will be years before it will be able to have any understanding about such matters. We have to deal with the present custody of the child. The Court always has power to vary or alter its order if circumstances require it and the religious question can safely be left for the present and for many years to come and can be dealt with when the necessity arises if it does arise.

I quote what Middleton, J., said in similar case, Re Maher, 12 D.L.R. 492, at p. 498:

"I think that where, as here, the interests of the child demand that there should be a united home, and where as yet the children are too young to have any real religious preference, the Court has power to hand the children over to the custody of the mother, without imposing any condition as to the faith in which they shall be brought up."

It was suggested that the mother had left the husband for insufficient cause. It must be pointed out that it was the father who first left the mother and took the child away and remained away himself and kept the child away until proceedings were threatened or taken against him for non-support and indeed until after the mother took these proceedings for the possession of the child. Then, after counsel and the Court suggested reconciliation, they tried living together again, and the wife left. Allowing for considerable exaggeration in the statements of the wife as to the husband's conduct to her, his treatment does not seem to have been such as any woman should receive from the man who had pledged himself to love, honour and cherish her. Her own conduct under the circumstances may not have been quite what it should have been but we find them separated and living apart and the Court and counsel have tried unsuccessfully to get them to live together and we must deal with the situation as we find it and make such order as will be for the welfare of the child. Counsel for the father suggested that the Court should order them to live together, but it is obvious that we have no such power.

The appeal should be allowed with costs and the order should in my opinion be that the child be delivered to the mother, but provision should be made that the father have access to him and an opportunity of seeing him from time

to time at the home of the mother at suitable and convenient times.

If the parties do not agree as to the terms of the order they can be settled by the Court. Nothing was said about an order under sec. 3 of ch. 121, R.S.N.S. 1900 for the maintenance of the child and it may be discussed on the settlement of the order if necessary.

Russell, J.:—I agree.

Ritchie, E.J.:—Unhappy differences have arisen between the father and the mother for which probably one is as much to blame as the other. The evidence of them both must, I think, be taken with the proverbial grain of salt.

I cannot find that the husband has been guilty of misconduct that justifies the wife in living apart from him, but I think the primary consideration is the welfare of the child. The fact that the child was only 2 years old on February 19 last and it is in a delicate state of health has convinced me that for the present the welfare of the child will be best attained by giving his custody to the mother. The father should have access to the child at all reasonable times.

The question of the religion in which the child is to be brought up probably is, or will be an acute one. The husband has rights in this regard which are not to be prejudiced by giving the present custody to the mother; when the child is older and not so much in need of a mother's care it will be open to the husband, if he so desires, to bring the case again before the Court.

Mellish, J.:—The facts of this case are peculiar.

I am not satisfied on the evidence of the good faith of the father in regard to the contentions raised on his behalf, and think the appeal should be allowed.

Appeal allowed.

REX v. YET SUN.

British Columbia Supreme Court, Morrison, J. February 23, 1920.

Internal Revenue (§I—8)—Tobacco Tax—Inland Revenue Act, R.S.C. 1904, ch. 51, and Amendments—Illegal Possession of Unstamped Manufactured Tobacco.

For the purposes of the Inland Revenue Act the person who is in charge of a store for an absentee owner and brings manufactured tobacco not packed in stamped packages into the store for re-sale is liable to conviction as a person "in possession" of the tobacco.

[Cf. R. v. Young (1917), 30 Can. Cr. Cas. 137, 24 B.C.R. 482, which is distinguishable on the facts.]

[See R. v. Loy Way (1921), ante p. 201, 36 Can. Cr. Cas. 384.]

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CASE STATED by the deputy police magistrate of the City of Vancouver for the opinion of a Judge of the Supreme Court, under section 761 of the Criminal Code.

The case stated was as follows:

"An information was laid under oath before me by James Thorburn, of the City of Vancouver, Inland Revenue officer, for that, at the said City of Vancouver, on the 11th of October, 1919, the said Yet Sun, not being a licensed tobacco manufacturer, did unlawfully have in his possession manufactured tobacco not put up in packages and stamped in accordance with the provisions of the Inland Revenue Act, contrary to the form of the statute in such case made and provided.

The charge was duly heard before me in the presence of both parties, under Part XV. of the Criminal Code, and after hearing the evidence adduced and the statements of counsel, I found that the said Yet Sun had not been proven to be guilty of the said offence, and on the 2nd day of December, 1919, dismissed the said charge, but at the request of counsel for the prosecution I state the following case for the opinion of this Honourable Court.

"It was shewn before me, inter alia:

"1. That on the day of the alleged offence James Thorburn, Inland Revenue officer, and two detectives, entered certain premises at 107 Pender St. East, in the said City of Vancouver, and found the accused in charge of a tobacco store. They also found a quantity of tobacco not put up in packages and stamped in accordance with the provisions of said Act:

"2. The accused stated in his defence, and which I find to be a fact, that the store and contents belonged to one Wong Noon; that Wong Noon was then in China, and had been in China for eight months last past; that the accused is an employee of said Wong Noon; that when Wong Noon went to China he left the accused in charge of said store; that the accused handles moneys received from the business, and has remitted a small amount to Wong Noon in China; that the accused buys all goods for said store during the absence of said Wong Noon; that he bought the tobacco in question about two months before the date of the alleged offence; that he cut the tobacco up and put it in the packages in which it was found by the officers, and that he was offering such tobacco for sale;

"3. Neither the said Wong Noon nor the said Yet Sun

had any license to have the unstamped tobacco in possession. Counsel for the accused contended that the said Wong Noon was the party guilty of the offence as he was the owner and hence legally in possession. After consideration I concurred and dismissed the charge. My decision turned entirely on the meaning of the word "possession." I found that the accused had not been proven to be in possession of the said tobacco as provided by section 356 of the Inland Revenue Act, R.S.C. 1906, ch. 51.

"4. Counsel for the prosecution desires to question the validity of my said judgment on the ground that it is erroneous in point of law, the question submitted for the opinion of the Honourable Court being whether or not the facts, as found by me, warrant the finding that Yet Sun was not in possession of said tobacco within the meaning of section 356 of the Inland Revenue Act."

Baird, for Inland Revenue Department.

Eyre, for accused.

Morrison, J.:—The accused was the person in charge of the store in which the tobacco in question was found. The responsibility for conducting the store in accordance with the requirements of the statute rested on him. The tobacco was there with his knowledge and consent; in fact, he was responsible for its having been brought there. He must, therefore, be held to be in possession of the tobacco. The question should be answered in the negative.

Case remitted to the magistrate.

THE KING v. WALKER AND KING, LTD.

Alberta Supreme Court, Stuart, J. September 16, 1921.

Taxes (§VII—230) — Luxury Tax — Special War Revenue Act 1915 as Amended by Act of 1920—Failure to Collect by Vendor—Action by Crown for Debt—Penalties Provided by Act.

No civil action for debt will lie at the instance of the Crown for arrears of excise (luxury) tax under sec. 19 BB sub-sec. 2 (b) of the Special War Revenue Act 1915 (Can.) ch. 8, as amended by 1920, (Can.) ch. 71, sec. 2. The Act does not make the vendor liable for the tax but makes him the collecting agency with a heavy penalty under sec. 3 (4) of the Act of 1920 for failure to do so, and this appears to be the only remedy.

[See Act of 1921 (Can.) ch. 50, amending secs. 19 BB and 19 BBB of the Act of 1920.]

ACTION by the Crown to recover from the defendant a certain sum, alleged to be due for arrears of luxury tax, under Special War Revenue Act 1915 (Can.), ch. 8.

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THE KING v. WALKER AND KING, LTD.

T. Gillespie, for plaintiff.

E. G. Pescod, K.C., for defendant.

Stuart, J. A.:—His Majesty, represented by the Minister of Finance of Canada, sues the defendants for the sum of $682.55. The statement of claim is very succinct. The only ground of action specified is set forth in para. 2 of the claim which briefly alleges that the defendant is indebted to the plaintiff in the said sum "for arrears of excise (luxury) tax for the period from 19th May to 31st December, 1920, under sec. 19 BB sub-section 2 (b) of the Special War Revenue Act, 1915."

The defence, in para. (1) denies that the defendant is indebted to the plaintiff in any sum whatever, in para. (2) pleads that it was impossible for the defendant "to collect the luxury tax from purchasers of tailor-made suits," although "every effort" was made to do so and that the defendant repeatedly offered to supply the plaintiff with the names and addresses of the purchasers who had refused to pay the tax and in para. (3) alleges discrimination in the effort to collect the tax.

An application by the plaintiff was made to me by leave in vacation to set down a point of law for argument, to which I assented. It is obvious that upon the pleadings no very definite point of law is raised at all. However, upon the argument it was agreed that the following was the point of law involved:—

"Under Section 19 B.B. of the Special War Revenue Act of 1915 as enacted by section 2 of 10-11 Geo. V. C. 71 (1920), and sub-section 3 thereof is the vendor referred to therein liable to pay to the Crown the excise taxes referred to therein whether the same have been collected from the purchaser or not or is the purchaser alone the person liable to pay and to be sued therefor by the Crown."

The sub-sec. 3 referred to reads as follows:—

"The excise taxes imposed by the preceding sub-sections shall be paid by the purchaser to the vendor at the time of sale and delivery for consumption or use or on importation for consumption or use other than for re-sale on the duty paid value in addition to the duties of customs already imposed and such taxes shall be paid in stamps or otherwise by the vendor to His Majesty in accordance with such regulations as may be prescribed."

By sec. 3, sub-sec. 4, of the Act of 1920, it is enacted that "Every person who, being thereto liable, refuses or

neglects to pay the taxes prescribed by sections 19 BB and 19 BBB of this Act, or if such duty is payable in stamps neglects or refuses to duly affix such stamps and to duly cancel the same, shall be liable on summary conviction to a penalty equal to not less than ten times the amount of such duty but in no case less than fifty dollars."

Among the regulations referred to I find the following as being passed on July 30, 1920: "The luxury tax except on importations or unless otherwise specifically authorised by the department will be collected by means of stamps which may be obtained from all customs and inland revenue offices and banks."

Vendors selling articles subject to luxury tax are required to furnish the purchaser at the time of sale with a voucher or sales slip representing such sale and showing the tax as a separate item. Before delivering such voucher or sales slip to the purchaser the vendor must affix to such voucher or sales slip a stamp or stamps of the requisite denomination sufficient to cover the tax payable on such article."

It is apparent from these provisions that the vendors were supposed to purchase in advance a supply of stamps from the revenue offices or banks and to have these on hand for use whenever a sale was made. The question, therefore, is reduced to this whether, when a vendor has failed to affix the proper stamps either because he has never bought them or because he is economising on those he has bought by violating the regulation and omitting to affix the stamp, the Crown has only the remedy by summary conviction or can also sue the vendor in a civil action.

It is to be observed that the statute after enacting that the purchaser must pay the tax to the vendor goes on to say that "such taxes shall be paid in stamps or otherwise by the vendor in accordance with such regulations as may be prescribed."

First, what taxes are "such taxes?" Does it mean merely those which have been paid by the purchaser or "the excise taxes imposed by the preceding sub-sections?" I think clearly the latter is the meaning. But then they are to be paid only in stamps previously purchased because in the regulations the method of payment by stamps is the only method prescribed. There is no description of any other method of payment, no reference to a checking up of and a return of a record of sales and a remittance in cash for

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the amount shewn on the return. I can find no reference to the necessity for any duly verified return or for any return of any kind, nor anything creating an obligation to pay in cash any specific sum of money which could be sued for as a debt. The obligation is to buy stamps and affix them. My opinion, therefore, is that the effect of the legislation is that the vendor must obey the law by affixing the requisite stamps already purchased or on default become liable to the decuple penalty on summary conviction. The Act nowhere makes the vendor in express language liable for the tax. Craie's Hardcastle, 2nd ed. p. 119. Its effect, in my opinion, is to make him the collecting agency with a very heavy penalty for failure to collect by the method prescribed. In other words, I think the question submitted should be answered favourably to the defendant.

I do not propose, however, at least without further motion, to dismiss the action under R. 715. I may say that if I had reached a contrary conclusion I should not have given judgment for the plaintiff either. In that case there would have been still open to the defendant under the first plea of its defence to insist on the plaintiff proving the correctness in point of fact of the amount sued for, which does not appear to have been admitted. I would therefore venture to suggest that if the plaintiff is not satisfied with my view he should, instead of appealing at once, rather either go on to trial to get the exact facts determined or have all the material facts specifically admitted so that there would be no chance of the necessity of a second appeal.

The costs will be in the cause.

Judgment accordingly.

REX v. BLANCHET.

Quebec Court of King's Bench, Appeal Side, Lamothe, C.J., Lavergne, Carroll, Pelletier and Martin, JJ. April 30, 1919.

1. **Criminal Law (§IIG—83)—Speedy Trial Procedure—Several Counts in Formal Charge, Each in Respect of the One Transaction—Substantial Identity of Offences—Direction of Trial Judge to Order Trial on One Separately—Separate Conviction—Plea of Autrefois Convict to Other Counts—Cr. Code secs. 405, 405A, 407A, 906, 907, 1028.**

On several offences being joined in a formal charge under Part XVIII. of the Criminal Code (Speedy Trials), the presiding Judge has a discretion under Cr. Code sec. 857 (2) to direct that the trial proceed first upon one of the counts designated by him as upon a separate trial. This may be done even after a plea of not guilty to all counts. If a conviction is had upon that count, the accused will be allowed to plead that conviction

on a trial of the other counts under Cr. Code sec. 907 (autrefois convict) if the offences then being charged are in whole or in part the same as those disposed of on the former trial. This will apply where the three counts deal with one and the same transaction and there is identity or substantial identity of the offences charged.

[R. v. Barron, [1914] 2 K.B. 570, 10 Cr. App. R. 81, and R. v. Tonks, [1916] 1 K.B. 443, 11 Cr. App. R. 284, considered and applied.]

2. Criminal Law (§IVC—116)—Punishment for Criminal Offence—Offences under Criminal Code—Where Both Fine and Imprisonment Specified for the Particular Crime—Statutory Power to Impose Fine without the Imprisonment—Cr. Code sec. 1028.

On the trial of an offence punishable under the Criminal Code for which the punishment is both fine and imprisonment, Cr. Code sec. 1028 applies to permit the Judge to impose a fine alone or imprisonment without a fine.

[English law distinguished from Canadian law in this respect.]

3. Appeal (§IC—26)—Speedy Trial—Appeal by Crown on Stated Case from Conviction Sought to be Set aside because of the Availability for Plea of Autrefois upon Concurrent Charges—Claim of Irregularity of Sentence—Fine with Alternative, upon Default of Payment, of Imprisonment with Hard Labour—Payment of Fine by Accused—Crown not an Interested Party to Appeal on That Ground—No Substantial Wrong or Miscarriage—Cr. Code secs. 1019, 1057.

An appeal by the Crown against a conviction upon a speedy trial upon which a fine was imposed with a direction for imprisonment at hard labor in default of payment will not be allowed on the ground that such alternative imprisonment with hard labor was illegal if in fact the fine was paid. The Crown is not prejudiced thereby, and there is no substantial wrong or miscarriage under Cr. Code sec. 1019, although it desires to nullify the conviction so as to avoid a plea of autrefois convict raised upon concurrent charges.

[As to discretion under Cr. Code 1057, to impose hard labor, see R. v. Nelson, 17 D.L.R. 305, 22 Can. Cr. Cas. 303, 7 Sask. L.R. 92; R. v. Davidson, 28 Can. Cr. Cas. 44, 11 Alta. L.R. 9.]

TWO APPEALS by the Crown on cases stated by the Court of Sessions. The appeals were dismissed, the following opinions being handed down in which the material facts are stated.

S. Gerald Tritt, for the Crown, appellant.

N. K. Laflamme, K.C., for the respondent.

Carroll, J.:—We have before us two appeals from the Court of Sessions. The facts of the case may be summed up as follows:—Blanchet organized a commercial company of which he was the president. This company failed in 1915, and Blanchet, who also carried on business as a tailor, assigned likewise in 1915. The Merchants Bank which had made money advances to the company laid five charges

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against Blanchet, but the present proceedings bear only on the three following charges:

(1) Having from the 1st December, 1914, to May 1915, with intent to defraud by false pretences, obtained $50,000 from the Merchants Bank of Canada; (2) Having, during that period, in incurring liability to the Merchants Bank of Canada for the sum of $50,000, obtained credit by false pretences or means of fraud; (3) Having during December, 1914, knowingly made a false statement in writing with intent that it should be relied upon respecting the financial condition or means or ability to pay of himself for the purpose of procuring delivery of personal property, the payment of cash, the extension and making of credit, and the discount of cheques, drafts and promissory notes for the benefit of himself.

On these three counts Blanchet made option for a speedy trial. He pleaded not guilty. Following this plea, the prosecution declared that for the moment it desired to proceed on the third count only. The trial proceeded and the accused was fined $500. No further proceedings took place before Judge Choquette on the other two counts, but in the month of August following, he was arraigned before Judge Leet and produced a plea of "autrefois convict" which was upheld by the Court.

The whole question turns on the argument of the prosecution that the offences being different, there should have been a separate trial on each count of the indictment. The attorney for the defence says that the offences described in the three counts of the indictment are substantially the same, and consequently a plea of "autrefois convict" must be upheld by the court. As a rule an accused may not be tried a second time on a charge of the same nature as the first. There is no difficulty in the principle itself. There is difficulty in its application. The facts differ in each case.

In the case of Rex v. Barron, [1914] 2 K.B. 570, 10 Cr. App. R. 81, Lord Reading says that the criterion does not lie in the similarity of the facts to be proved in the particular cases, but in the identity or substantial identity of the offences charged. This decision was reaffirmed in Rex v. Tonks, [1916] 1 K.B. 443, 11 Cr. App. R. 284. In that case certain previous decisions, which had led to confusion were explained, and the Chief Justice laid particular stress on Archbold's error on this subject in the following quotation from Archbold's Criminal Pleading, 24th ed., 177:

"The true test by which the question whether such a plea is a sufficent bar in any particular case, may be tried is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first."

It seems to me that in this case the plea of "autrefois convict" may be justified on the ground that the three counts deal with one and the same transaction, and that there is connexity between the third and the two other counts. In fact, after reproducing the language of article 405 A of the Criminal Code, the indictment added that the document giving a false statement of the position of the company had been used to obtain money, cheques, credit, etc. Now this money, cheques, credit, etc., are precisely the sums of money which Blanchet is accused of having obtained. The document itself was but the means by which the accused committed the crime of obtaining money under false pretences. Article 907 declares that if the offence in whole or in part is the same as that for which the accused is being tried, he may produce a plea of "autrefois convict."

This disposes of the essential part of the stated case of the two magistrates, but the prosecution complains that Judge Choquette pronounced sentence on the third count before proceeding with the trial on the first. My previous remarks meet this complaint, and I may add that when the various counts of the indictment are enumerated, each count may be considered as a distinct accusation. The Judge must here decide in virtue of article 857, sub-section 2; he uses his discretion and orders the trial to proceed on one count; he must then proceed as if it was a separate trial, and a trial is only complete by a judgment. The prosecution further complains that while according to the statute, a penalty of $2,000 and imprisonment for one year is provided for the offence referred to in article 454 A, the Judge imposed a fine only.

The general rule in England and the United States is to the effect that if fine and imprisonment are provided, the Judge must impose both penalties, and he has no discretion to choose one or the other. His discretion in this case is limited to the diminution, if he thinks proper, of the amount of the fine imposed and the term of imprisonment provided, but he must impose both penalties. We have an exception to this general rule, contained in article 1028 Criminal Code which reads as follows:—

"1028. Whenever it is provided that the offender shall

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be liable to different degrees or kinds of punishment, the punishment to be inflicted shall, subject to the limitations contained in the enactment, be in the discretion of the court or tribunal before which the conviction takes place."

This article is taken from the statute 32-33 Vict. Can. ch. 29, and no similar enactment is to be found in the English or American statutes. The prosecution would therefore be quite right in principle were it not for this exception in the Criminal Code.

The prosecution further says that the Judge ought not to have condemned the accused to imprisonment with hard labour in default of payment of the fine. There can be no complaint here, as the prosecution suffers no prejudice from this illegality, if such it be, which I am not prepared to affirm (See article 1019 Criminal Code).

The stated case, prepared by Judge Choquette, sets forth that the accused chose to undergo his trial on the third count of the indictment. It is evident that an accused cannot make this choice, and that where there are several counts, the Judge alone can order the trial to proceed on one count only. But there is an error to be corrected in the stated case, for the motion for a reserved case before the Court of Sessions and before this Court admits that the prosecution asked that the trial proceed on the third count of the indictment.

I am therefore of the opinion that the decisions of the two magistrates were well founded and we shall answer in this sense the various questions submitted to us.

Pelletier, J.:—Mr. Justice Carroll and I have deliberated upon this case together and have come to the conclusion indicated in the notes of my colleague.

The only point on which we had any difficulty was on the validity of the plea of "autrefois convict." There are English and American authorities against the accused, but our article 907 Criminal Code comes to his assistance and declares that the plea of "autrefois acquit" or "autrefois convict" will be maintained if the offence is the same in whole or in part. Now it is clear that the third count on which the accused was convicted deals in large part with the same matters as the other two counts. The demand to proceed on the third count was made by the prosecution itself, and it has only itself to blame for what happened afterwards.

I am of the opinion that Judges Choquette and Leet made

no error of law and that their judgments should be confirmed.

Martin, J.:—In the first case in accordance with the judgment of this Court rendered on the 23rd of January, 1918, the Judge of Sessions has reserved for the consideration of this Court the following questions:

First:—

"Was there an error of law in that the said Joseph W. Blanchet was tried upon the third count of the indictment instead of having been first tried upon one or both of the other counts in the order selected and applied for by counsel for prosecutor?"

The trial Court thought it conducive to the ends of justice to direct that the accused should be tried on the third count upon the request of the prosecution. That was a matter for the discretion of the trial Judge. We have no right to review that discretion or to substitute our own for it. Appeals to this Court are limited to questions of law. We have not here to consider the converse case as if, for instance, the trial Judge had refused to direct the trial to proceed on the third count and ordered the accused to be tried upon all the charges at once. Possibly in such case the accused might have complained of oppression and prejudice.

The answer to the first question should be in the negative.

Second:

"Was there an error of law in that the said Joseph W. Blanchet was convicted of the charge set forth in the third count and sentenced, without having been tried (as on a separate and distinct charge) on one or both of the other counts and in the order selected and applied for by counsel for the prosecutor, before conviction and sentence were pronounced upon him on the third count?"

I should say that the prosecution was without interest to complain. The trial Judge directed that the accused be tried upon the third count as if it were a separate indictment.

Trial means the appearance of the accused, his arraignment, plea, evidence for the prosecution and for the defence, judgment and sentence. No objection was made by the prosecution to the trial proceeding on the third count. On the contrary, the prosecution elected to try the accused on the third count and defer or postpone trial on the other counts.

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The answer to the second question should be in the negative.

Third:

"Was there error of law in that the said Joseph W. Blanchet was adjudged and sentenced to forfeit and pay a sum of money by way of fine, without having been sentenced to any punishment by way of imprisonment?"

The legal consideration of this question is settled by the judgment in the two cases The Queen v. Robidoux, 2 Can. Cr. Cas. 19, and Ex parte Kent, 7 Can. Cr. Cas. 447, and art. 1028 Cr. Code. In this respect our Criminal Code does not follow the rule established by the jurisprudence in England and in the United States.

This question should be answered in the negative.

Fourth:

"Seeing that the said Joseph W. Blanchet was not sentenced directly or in the first instance, to undergo any imprisonment, was there error of law in the sentence in that he was adjudged to be imprisoned and kept in the common jail at hard labour in default of payment of the fine thereby adjudged against him?"

The prosecution is without any interest to raise this question and the accused does not make any objection to the form of the sentence and it is alleged that he had paid the fine.

It was urged that the punishment did not fit the crime and that the nature, extent and gravity of the offence would have justified a sentence of imprisonment with or without the imposition of a fine but that is a matter within the discretion of the trial Judge and we cannot interfere with the sentence pronounced.

This question should be answered in the negative.

Plea of "autrefois convict" (second case). Counsel for the prosecution objected to the reception of the plea of "autrefois convict" on the ground that such plea could not be received after the accused pleaded not guilty to the three counts of the indictment. This objection was overruled by the trial Judge and we think properly so.

At the time the accused pleaded not guilty to the indictment, he could not foresee that the prosecution would elect or that the Judge would direct that he should be tried on one count only and his plea of "autrefois convict" to the other counts could not from its very nature be made until after conviction on the count upon which he was tried. More-

over the indictment was amended after the plea of not guilty and the accused when required to plead to the amended indictment was within his rights in then pleading "autrefois convict."

The other question submitted for our consideration is whether the trial Judge erred in maintaining the plea of "autrefois convict" and holding that the subject matter of the charge in the third count under which the accused was convicted was the same as that charged in the other counts. This question has been the subject of much judicial interpretation, the leading English cases being The Queen v. King, [1897] 1 Q.B. 214; The King v. Barron, [1914] 2 K.B. 570; The King v. Tonks, [1916] 1 K.B. 443.

In the King case, the accused had been convicted upon an indictment charging him with obtaining credit for goods by false pretences and it was held that he could not afterwards be convicted upon a further indictment charging him with larceny of the same goods.

In the present case, the trial Judge in maintaining the plea of "autrefois convict," in part said:—

"Now, as I have said, while I do not think, as a matter of law I could find from reading over the three counts, in the indictment or the three indictments (as you may regard them), that this would necessarily result in the maintenance of a plea of autrefois convict, yet from reading the evidence before the Committing Magistrate, and in the trial on the count already tried, I have not the slightest doubt that there is no further evidence, or other evidence, that can be produced than that which has already been produced in the trial already had and I have no question that by proper amendments to the third count, if that had been the only one laid at the time, the charges which it is now proposed to try could have been and should have been made, but considering especially that there was no good reason for separating the counts, and that they should all have been tried together, and that the matter upon which the accused is proposed now to be given in charge, is the same, practically, as that on which he has already been tried, and convicted, I have no hesitation in ordering him to be discharged from the first two counts of the said indictment or the two indictments (if they be considered as separate indictment) upon which it is now proposed to try him."

It appears to me that the matter on which the accused was tried and convicted in the third count is the same at

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least in part as that on which it was proposed to try him under the first two counts of the indictment. The different counts all deal with the same fraud.

Having in view the provisions of article 907 Criminal Code the plea of "autrefois convict" was properly maintained and that judgment should be affirmed.

Judgment in the first case:—"Considering that, in compliance with a judgment rendered by this Court, on the 23rd January, 1918, a stated case by the trial Judge Choquette has been put into the record, with the following questions: [See above in the notes of Mr. Justice Martin p. 291].

This Court answers as follows:—To the first question:—This question, as drafted, is different from the motion for leave to appeal, and no application was made to reserve this question as drafted; consequently, it is not held advisable to answer this question. To the second question:—The answer is "No." To the third question:—The answer is "No." To the fourth question:—The answer is "No," there being no prejudice.

And it is ordered that the record be remitted to the Court of Sessions.

Judgment in the second case.—To the questions stated by the trial judge, Leet, J., and which reads as follows:—

1. Was there error of law in overruling the prosecutor's objection to the reception of the plea of "autrefois convict" made on the ground that such plea could not be received after the accused had pleaded not guilty to all the counts of the indictment; and ought not the said objection to have been maintained?

2. Do the first count, the second count (as amended) and the third count set forth a separate and distinct indictable offence?

3. (a) Seeing the plea of "autrefois convict," was the conviction of the said Joseph W. Blanchet upon the third count, in law, a conviction of the charge set forth in either of the two other counts? (b) Can the said Joseph W. Blanchet be convicted on the count to which the said plea of "autrefois convict" is pleaded, of an offence of which he could not have been convicted on the former trial?

4. Was there error of law in that the said Joseph W. Blanchet was put on trial on the first count, after he had been convicted on the third count?

5. Was there error of law on the part of the Judge in

deciding that there should not have been separate trials on the said counts, and that the subject matter of the charge in the third count was the same as that charged in the first count?

This Court answers as follows:—To the first question:—No. To the second question:—In a sense the three counts constitute three separate and distinct indictable offences, but in the circumstances of this case they are so interrelated and connected that they are partly for the same matter. To the third question (paragraph (a)):—Yes. Paragraph (b):—No. To the fourth question:—Yes. To the fifth question:—There is no error of law in having decided that there should not have been separate trials, as the subject matter was the same in the three counts.

And it is ordered that the record be sent back to the Court of Sessions."

BARNES v. CANADIAN NATIONAL R. CO.

Saskatchewan District Court, Bell, D.C.J. August 3, 1921.

Railways (§IID—70)—Animal Struck by Train at Railway Crossing—Negligence of Engineer—Competence of Person Driving Animal—Animal Not at Large—Liability.

In broad daylight the plaintiff's bull was struck by one of defendant's trains at a level crossing and was so badly injured that it had to be destroyed. The bull escaped from the plaintiff's pasture through a defective part of defendant's fence where its right of way adjoins the plaintiff's pasture, and strayed to the highway where it was found by the plaintiff's two sons. The sons were in a motor car and on meeting the bull turned about and proceeded to drive him home along the road a distance of about three quarters of a mile, one of the sons going on foot and the other remaining in the car. When on the railway crossing the bull was attracted by some cattle further down the right-of-way, and tried to join them over the cattle guard, and the boys were unable to coax or drive him away, the train rounded a curve, which prevented its being sooner seen at this moment and struck and injured the bull. The Court held that the boys were not incompetent or negligent under the circumstances and that the bull was not at large; that the engineer was negligent in failing to keep a proper look out, and that the plaintiff was entitled to recover the price of the bull.

[Markham v. G.W.R. Co. (1866), 25 U.C.R. 572; Thompson v. G.T.R. Co. (1859), 18 U.C.R. 92; Cooley v. G.T.R. Co. (1859), 18 U.C.R. 96 distinguished. See Annotations, Animals at Large, 32 D.L.R. 397, 33 D.L.R. 423, and Negligence or Wilful Act or Omission, 35 D.L.R. 481.]

ACTION for damages for killing of plaintiff's bull by the defendant's train. Judgment for plaintiff.

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BARNES v. CANADIAN NATIONAL R. Co.

A. C. Stewart, for plaintiff.

G. T. Killam, for defendant.

Bell, D.C.J. (pro. tem):—On September 9, 1919, in broad daylight, the plaintiff's bull, worth at least $500, was struck by one of the defendant's trains at a level railway crossing about half a mile west of the village of Stornoway, and was so badly injured that it had to be destroyed and so became a total loss to the plaintiff.

I find that the bull escaped from the plaintiff's pasture through a defective piece of defendant's fence at a point where defendant's right-of-way adjoins the pasture, and strayed to a highway leading into Stornoway, where he was found by plaintiff's two sons. The sons were in a motor car, and on meeting the bull turned about and proceeded to drive him home along the road, a distance of about three-quarters of a mile, Francis going on foot and the other son remaining in the car. When about 200 yards from the crossing the bull went into the bush at the side of the road and Francis followed to drive him out, while the car remained behind to prevent the bull from breaking back. He emerged from the bushes close up to the crossing, with Francis about four feet behind, and was attracted by some cattle further down the right-of-way which had not been visible sooner, either to him or to Francis because they were in a cut. The bull stopped on the crossing and tried to join them over the cattle guard and Francis was unable to coax or drive him away. The man then saw the train approaching from the north-west, rounding a curve which terminated some 150 to 250 yards from the crossing and which, together with the bush, had prevented him seeing it sooner. He failed to get the bull away and had to leave or be struck himself. He heard the engine whistle but does not remember hearing the bell.

It will be seen that I accept Francis Barnes' version without variation, although the engineer and fireman challenged it by saying they saw no one near the track and that two men were in a motor car about 50 yards down the road. My reasons for so doing are:—Barnes gave his evidence well and I thought it a probable story; the engine passed the road, which was obscured by bush on each side, at between 15 and 20 miles an hour; their attention was fixed chiefly on the bull; the evidence of the engineer seemed to me lacking in candour.

Now Mr. Killam says the plaintiff cannot succeed because:

(1) The animal was at large within the meaning of the Railway Act, 1919 (Can.), ch. 68, sec. 386 (2); (2) he was permitted to be at large contrary to sec. 278 (1); and (3) the proximate cause of the accident was Francis Barnes' negligence in not taking proper charge of the bull when found and in neglecting to listen for the train, or in some other manner endeavouring to find out whether a train was approaching or not. I cannot agree that the bull was at large when his course was being directed and the man in charge was near enough to strike him with a stick; the circumstances were quite different to those in the cases cited by Mr. Killam on this point. Markham v. G.W.R. Co. (1866), 25 U.C.R. 572; Thompson v. G.T.R. Co. (1859), 18 U.C.R. 92; Cooley v. G.T.R. Co. (1859), 18 U.C.R. 96. In my view the whole question is: Was the man in charge "some competent person using all reasonable care and precaution" as laid down in sec. 386 (1) (d)? There is no question that young Barnes was competent. He had arrived at man's estate, appeared to be healthy and active, was a farmer by occupation, and was used to handling cattle in general and this bull in particular. Then, was he negligent?

Driving does not seem a very reliable way of controlling such an animal as a bull, but negligence depends on the circumstances. The brothers met the bull unexpectedly and had no rope or chain with them; he was docile for an animal of his kind, accustomed to being handled and driven, and drove more freely than he led; they had less than a mile to go along a country road fenced on both sides where, I suppose, there could not be much traffic; and the railway to be crossed was a branch line boasting of no more than two trains a day and which presumably, would be protected by cattle guards. It seems to me that they did just what everyone else would have done under like circumstances. Counsel suggested that the brothers should have gone home for a rope, leaving the bull where they found him, which would certainly have been a violation of sec. 278 of the Act; or, one brother should have remained to herd the animal on the road while the other went for the rope. I do not think either idea occurred to them, nor do I think the extreme caution of the latter alternative was called for under the circumstances. The animal would still have been liable to get away until the rope arrived, and it does not necessarily follow that even with a rope he could have been moved promptly if he turned obstinate. The danger-

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ous situation was created by the presence of cattle on the right-of-way. Barnes might, perhaps, have seen them first and have turned the bull back if he had been leading it or had gone ahead, but he had no reason to expect them to be where they were and, it seems to me, he was not bound to foresee their presence since they had no right to be there, and he was unable to see them until he was actually on the crossing. It is said that Barnes should have used extra care because the train usually went past that point between 11.30 a.m. and noon. I think this does not affect the case much. A way freight does not run to schedule, and although generally passing a given point at about the same hour each day, its time varies with the quantity of freight to be handled and the amount of shunting to be done, and the variation is sometimes very wide. However, if young Barnes was negligent with respect to stopping, looking and listening before going on to the crossing, I do not think that negligence contributed to the accident because the whistle sounded after he and the bull had stopped on the crossing, and he saw the train as soon as it was visible. He would have had plenty of time but for the unexpected obstinacy of the bull.

Finally, I think the engineer was negligent, and that he might have avoided the accident after it was out of the power of Barnes to prevent it. The fireman was firing as the engine left the curve and caught sight of the bull almost accidentally as he got up to look at the injector, the animal being then not more than 100 feet away. While on the curve the engineer could not see the crossing but he could have done so as soon as the engineer reached the straight, a distance variously estimated by the witnesses but at least 150 yards and perhaps as much as 250. The witnesses were excluded and the engineer contradicted all the others by saying the curve continued right up to the crossing. He could not say what he was doing before the accident, but seems to have been in his place in the cab, and if anything had gone wrong on the engine to require his attention no doubt he would have said so. Hence, it seems to me, he had no excuse for failing to keep a look out, and he must have seen the bull on the track had he looked. The train could have been stopped in about 175 feet.

The plaintiff will have judgment for $500 with costs.

Judgment for plaintiff.

REX v. LABRIE.

Quebec Court of King's Bench, Lamothe, C.J., and Carroll, Martin, Greenshields and Dorion, JJ. October 25, 1920.

1. **Habeas Corpus (§IC.—10)—Review of Commitment to Penitentiary by Court of General Criminal Jurisdiction—When Discharge Order a Nullity—Jurisdiction of Quebec Courts.**

A Judge of the Superior Court in Quebec has no jurisdiction upon the return of a writ of habeas corpus to a penitentiary warden to release a convict held under a sentence for crime pronounced by the Court of King's Bench, Crown side, which is a court of record and a court of general criminal jurisdiction. The order of discharge was in such case an absolute nullity and, although acted upon, did not bar the re-arrest and detention under the sentence; nor can the re-arrest serve as a ground for a new writ of habeas corpus.

2. **Appeal (§IA.—2)—From Habeas Corpus Order Made on Wrongful Assumption of Jurisdiction—Powers of Court of King's Bench and of Superior Court in Quebec.**

The Court of King's Bench of the Province of Quebec sitting en banc has power to set aside on appeal an order made without jurisdiction by a Judge of the Superior Court of the Province of Quebec for the discharge on habeas corpus of a convict from the penitentiary under sentence by the Court of King's Bench, Crown side, in the exercise of its general criminal jurisdiction. The order for discharge made by the Superior Court Judge, whether made for default in shewing cause to the writ other than by filing a return or for alleged irregularity in not repeating in the sentence and commitment particulars of the nature of the charge which appeared in the indictment, is an absolute nullity.

3. **Imprisonment (§I.—1)—Commitment to Penitentiary—Stating the offence in the Warrant or Certificate of Sentence—Reference to Indictment and Sentence to Supplement Particulars.**

A warrant of commitment or certificate of sentence to a penitentiary is not invalid because it does not set out the offence with particularity as to details which may be found by reference to the indictment and sentence which are of record. The indictment is always available to explain the sentence and the commitment.

[Cf. Penitentiaries Act, R.S.C. 1906, ch. 47, sec. 44; Ex parte Smitheman, (1904), 9 Can. Cr. Cas. 10, 17, 35 Can. S.C.R. 189; R. v. Wright, (1905), 10 Can. Cr. Cas. 461.]

4. **Appeal (§IA.—2)—From Superior Court, Que., to King's Bench, Que.—Jurisdiction—Final Judgment on Writ of Habeas Corpus—C.C.P. Que., art. 43; 1920 Que., ch. 79.**

Per Greenshields, J.—Under C.C.P. Que., article 43, an appeal lies to the Court of King's Bench, appeal side, from a final judgment of the Superior Court of the province on a writ of habeas corpus.

[See amended C.C.P. articles 42-47, inclusive, as enacted by 1920 Quebec Statutes, ch. 79, as to the jurisdiction of the Court of King's Bench, Que., sitting in appeal.]

APPEAL from an order of discharge made in the Superior Court, Duclos, J., on the return of a writ of habeas

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corpus directed to the Warden of the St. Vincent de Paul penitentiary. The order appealed from was reversed.

The respondent and his brother were found guilty of manslaughter before the criminal court at Sherbrooke. One was condemned to life imprisonment, the other to 25 years. On the 18th of December, 1919, they were both delivered into the keeping of the appellant in his quality of warden of the penitentiary of St. Vincent de Paul. On the 4th of May, 1920, the prisoners obtained a writ of habeas corpus from Duclos, J., who ordered their liberation. The irregularities set up by the respondent were that the names, residence, occupation and sex of the person whom the accused were charged with killing, were not set forth in the sentence and in the warrant of imprisonment. The respondents were arrested a second time by order of the federal and provincial authorities. They again obtained their liberation on a new writ of habeas corpus by the following judgment delivered on the 14th of June, 1920:

"The Court, having heard the petitioner by his attorney on the merits of the habeas corpus issued in this case and seeing that the respondent duly called made default to appear on the said writ and show cause for his detention of petitioner,

Maintains the said writ of habeas corpus, and discharges petitioner from the keeping of the said respondent."

The appeal was taken from this judgment. The respondents moved to quash and dismiss the appeal for want of jurisdiction.

Laflamme, Mitchell and Callaghan, for the penitentiary warden appellant; J. C. Walsh, K.C., counsel.

C. C. Cabana, K.C., for the prisoner, respondent.

Lamothe, C.J.:—Can these two prisoners be liberated on habeas corpus on account of defective wording of the sentence and the warrant of imprisonment? A negative answer is alone possible. Criminals cannot be released on account of an omission by the Clerk of the Crown in a document subsequent to the verdict, even if the omission is of an important particular. The criminal court sitting at Sherbrooke is a court of record. The sentence is a part of the official record. The indictment is always available to complete any information that may be lacking on the warrant of commitment or to shed light on the judge's sentence.

The Habeas Corpus Act is a special law. It gives extraordinary power to the civil judges to ascertain the cause

of the detention of any citizen and to bring this detention to an end if it is the result of a tyrannical or arbitrary act. But if the detention is the result of the sentence of a competent court, the judge, after verifying this fact of capital importance, must not go further, for he has not the power to revise the sentence of a competent court; he lacks jurisdiction on this point, ratione materiae.

In the present case the Superior Court of the District of Montreal ordered on the 14th of June, 1920, that the two Labrie brothers be freed, for the following reasons: (1) because the respondent Malepart, warden of the penitentiary failed to appear; (2) because the allegations of the petitioner are well founded.

On the first point there was an error of fact, for the warden of the penitentiary made a regular return to the Practice Division of the Superior Court.

The second point raises the question of the effect of a previous judgment of the same court and the same judge, dated the 4th of May, preceding, ordering the liberation of the two prisoners and quashing their conviction. This judgment of the 4th of May is in my opinion absolutely null, inasmuch as it quashes the conviction and liberates the prisoners from the verdict rendered against them and the resulting sentence. The Superior Court in this exceeded its jurisdiction. The judgment must be considered as unwritten and non-existent on this point.

From this opinion it follows that the re-arrest of the two Labrie brothers, in virtue of the conviction or verdict of manslaughter rendered against them and in virtue of the sentence pronounced by a court of competent criminal jurisdiction, is a justifiable act and cannot serve as the basis of a new writ of habeas corpus.

When it is evident that a court or judge has exceeded its or his jurisdiction, an appeal will always lie as a common law remedy. This appeal is not for the object of deciding the merits of the litigation, but for the purpose of obtaining a declaration of the existence of an absolute nullity, a nullity "de non esse," as Taschereau, J., said in the Supreme Court Re Sproule (1886), 12 Can. S.C.R. 140. I adhere to the remarks made in the case of the City of Montreal v. Henault (1919), 26 R.L. eg. 270. This decision does not in my opinion conflict with that of Duperron v. Jacques (1917), 26 Que. K.B. 258, for in this last case the lower court was not without jurisdiction, and its judgment was not an absolute nullity.

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The cases of McShane v. Brisson (1880), M.L.R. 6 Q.B. 1; Dostaler v. Lalonde et al (1919), 29 Que. K.B. 195, Mayor, etc. of Montreal v. Brown, (1876), 2 App. Cas. 168, are the precedent I feel bound to follow.

The prisoners' motion for dismissal of the appeal, for lack of jurisdiction, cannot be granted. The judgment of the Superior Court of the District of Montreal, rendered on the 14th of May, 1920, must be quashed as being affected with absolute nullity, and the preceding judgment, that of the 4th of May, 1920, must be declared without effect and non-existent as to the quashing of the verdict or conviction and as to the final liberation of the prisoners.

Greenshields, J.:—Motions were made by the prisoners to dismiss the appeal, and these motions and the two appeals were submitted upon the same argument, and were taken under advisement at the same time. Dealing first with motions. I preface my consideration of these motions by the statement that the arrest, commitment, trial, conviction and sentence of the prisoners, all of which took place and were had in the district of St. Francis, are, in every sense, entirely regular. The Court before which the prisoners were tried, and the Judge presiding, had full and complete jurisdiction ratione personae and ratione materiae. The sentence imposed is provided and permitted by law. The instrument or warrant of detention delivered to the warden of the penitentiary was strictly in accordance with the law.

Emphasising the above statement, I proceed to consider these motions upon two grounds:

1st. Had the Judge any jurisdiction or competency ratione materiae to consider, revise or quash the proceedings had before the Court of King's Bench for the district of St. Francis; if he was without any jurisdiction whatever, and his order or so called judgment being tainted with absolute nullity, is it competent for this Court to declare that nullity?

2nd. If he had jurisdiction over the subject matter of the writs of habeas corpus, and his judgments were valid as judgments, does an appeal lie to this Court?

I shall deal first with the second of these two points. Let me here say that there appears to be much confusion created by the use of the expression habeas corpus in criminal matters. The writ of habeas corpus is essentially a civil prerogative writ, and the expression habeas corpus

in criminal matters is without meaning except, and to this extent, that it may be that the Judge before whom a writ of habeas corpus is being heard, may discover, by the return or otherwise, that the petitioner seeking release is detained as a result of criminal proceedings, which proceedings terminated in conviction and sentence. Or he may discover that the petitioner's detention was brought about in a civil process. Many instances will occur to any one who gives the matter any thought. On the other hand, a petitioner for a writ of habeas corpus may be illegally detained without that detention proceeding from any legal process whatsoever. In neither the first, second or last case is the nature of the writ changed. It only makes to the cause of the detention.

It is the purpose and object of the King's writ of habeas corpus to enquire into the cause by which a person is deprived of his liberty, and that leads me to assert, and I do assert without hesitation, that I am now dealing with order or judgments rendered in a process essentially civil. The orders or judgments are final in their nature and for the purpose of the present consideration I assume that the learned trial Judge had jurisdiction.

The statute, so far as this province is concerned, governing matters of habeas corpus is chap. 95 R.S.L.C. That statute is still in force. It was enacted in 1861. Reference to that statute reveals nothing as to the right of appeal to the Court of King's Bench in banco. Therefore, we have to go elsewhere to seek an answer to the question as to whether or not this Court has appellate jurisdiction. We have in this province a general statute which purports to determine the jurisdiction of this Court. It is known as the Code of Civil Procedure of the province of Quebec. Sec. 43 of that statute reads as follows:

"Unless where otherwise provided by statute, an appeal lies to the Court of King's Bench sitting in appeal from any final judgment rendered by the Superior Court, except, . . ." and then follow a number of exceptions, among which there is no reference whatever either expressly or impliedly to a judgment on a writ of habeas corpus. It would, therefore, seem to me that if there is no statute making other provision, and if the judgments under consideration are final judgments rendered by the Superior Court, then they are appealable.

We are told, and it has been repeatedly said, that in

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England (the birth place of the writ of habeas corpus) no appeal lies. That is quite possible and is probably true. I am satisfied that if in England there was a general statutory provision as found in art. 43 C.C.P., an appeal would lie. The English Courts have always consistently said that the right of appeal is a substantive right and does not exist at common law, but must be given by statute. It has been held in England that, at common law, no Court can assume, without statutory authority, the right to sit in appeal upon a judgment rendered by an inferior Court having jurisdiction.

I am aware that there has been, and still is in this province a difference of judicial opinion upon this point. For that opinion I have profound respect; but where that opinion moved a Court to hold that this Court had no jurisdiction, the profound respect I have does not go to the extent of inducing me to refrain from entering my dissent.

The difficulty or embarrassment which some of our Courts and Judges have experienced is to be found in the provisions of the Habeas Corpus Act itself. There the provision is made that all Judges of the Superior Court and all Judges of this Court, have concurrent jurisdiction to issue, hear and determine writs of habeas corpus.

Under the English Act (from which our Act was largely copied) Judges of many Courts, and others occupying quasi-judicial positions, are given concurrent jurisdiction to deal with habeas corpus. When in 1861 our Habeas Corpus Act became law, the Judges of the Superior Court and of this Court were less in number than to-day. The facilities of transport and communication generally were restricted and often difficult. The hearing and determining of a writ of habeas corpus is essentially a matter requiring expedition. Every subject deprived of his liberty should be given ready access to relief. I have no doubt whatever that in England and in this province that may have entered largely into the consideration of the legislators in declaring the power and jurisdiction of the Judges who might deal with the subject matter of habeas corpus. By the Act, the Judges of this Court, solely and exclusively for the purposes of the carrying out of the Act, are given original civil jurisdiction; a jurisdiction which they have and possess in no other civil matter. I should say, then, if a Judge of this Court proceeds to deal with and finally dispose of a writ of habeas corpus, by giving a judgment, either maintaining

or quashing it, that would be a final judgment in the first instance in a civil matter. He would not sit as an appellate Judge, he would sit as a Judge in the first instance to give effect to a statute which gave him that extraordinary jurisdiction, not otherwise by him possessed. I am of opinion that a judgment so rendered by a Judge of this Court would be upon exactly the same footing as if that judgment had been pronounced by a Judge whose commission placed him in the Superior Court. To be logical, I therefore must conclude, and I do conclude, that a judgment in the first instance of a Judge of this Court, would be subject to revision and reversal or cancellation by this Court sitting in banco.

I am, therefore, of opinion that even if the judgment of Duclos, J., had any existence in law as a judgment, that this Court, sitting in appeal, has jurisdiction. I would, therefore, dismiss the motions. I do not wish to be understood as speaking on this point for my brother Judges. I am speaking for myself.

The second consideration leads to the question, as to whether the trial Judge had any jurisdiction whatever, over the subject matter with which he proceeded to deal. If he had no jurisdiction whatever, then his judgment has no existence in law as such. What is purported to be called a judgment, is blank paper. The subsidiary question is, whether this Court has jurisdiction to so declare it. I am not greatly embarrassed with this, since I have come to the conclusion in any event that this Court has jurisdiction.

I have no doubt whatever that Duclos, J., was without jurisdiction. The writ of habeas corpus is not a means provided to attack the acts and findings of Courts of original criminal jurisdiction. The rights of the prisoner are by our Criminal Code surrounded by safeguards by way of appeal, which are entirely different from any remedy by the civil process of habeas corpus. The writ of habeas corpus entitles a Judge upon complaint being made of illegal detention, to obtain complete information as to the cause of that detention. If the detention is illegal, without just cause, liberation of the detained person should follow. The moment it appears that the prisoner is detained in execution of a sentence of a Court legally constituted and with jurisdiction to hear and determine the offence with which he is charged, no single Judge has jurisdiction to enquire further, much less to pass upon the question as to whether the Court convicting the prisoner and sentencing him acted

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irregularly or not. The moment the jurisdiction of the sentencing Court appears, the competency of jurisdiction of the Judge disappears. There is then but one thing for him to do, to remand the prisoner to the place from whence he came to serve his sentence.

Upon this point there is a remarkable unanimity of jurisprudence. I refer to some Canadian cases: The Queen v. Murray (1897), 1 Can. Cr. Cas. p. 452; The Queen v. Gillespie (1898), 1 Can. Cr. Cas. p. 551; The King v. Sproule (1886), 12 Can. S.C.R. 140, at p. 141 (I quote the holding in this case: "After a conviction for a felony by a Court having general jurisdiction over the offence charged, the writ of habeas corpus is an inappropriate remedy"); Rex v. Goldberg (1919), 54 D.L.R. 559, 33 Can. Cr. Cas. 320, 29 Que. K.B. 47.

A glance at any of the English reports will reveal any number of cases along precisely the same lines and to the same effect.

The United States inherited the writ of habeas corpus from its English ancestors. The uniform and consistent jurisprudence in the United States is to exactly the same effect. Any one curious enough will find that jurisprudence stated with accuracy and precision and considerable detail in that excellent work of Mr. Bailey, on Habeas corpus, vol. 1, commencing at p. 2.

Mr. Bailey's statement is of importance, of course, only in so far as it is in entire accord with the jurisprudence of the highest Court of the United States.

I am, therefore, of the opinion, that the judgments of the 3rd of May, 1920, and of the 14th of June, 1920, with which we are dealing, are absolute nullities; this Court has jurisdiction to so pronounce them, and for that additional reason, I should dismiss the motions.

As to the merits of the appeal, I have, I think, sufficiently disclosed my opinion. I can find no ground whatever in support of these judgments or orders. As I have already said, there is not a suggestion of illegality in the trial, convictions and sentences of these two men. They have been found guilty of a crime after a trial legal and proper and regular in every respect before a Court of full complete original criminal jurisdiction. Their detention in the penitentiary is in virtue of a warrant, proper in every respect as to form and substance. It would seem useless to further enlarge. The writ of habeas corpus will be quashed; the prisoners will be remanded to the place from

whence they came, there to be detained during the term of their sentence, unless sooner legally discharged.

All the members of this Court are unanimous on the question of the absolute nullity of the judgments maintaining the writs of habeas corpus. Carroll, J., and Dorion, J., however, are unable to agree that an appeal to this Court is the proper remedy.

Martin, J.:—Two questions arise for consideration; 1st, what is the effect in law of the judgments of the 3rd of May and the 14th of June; and 2nd, if they are invalid and without effect, has this Court jurisdiction to so declare them invalid and without effect?

Where a Court having tried an accused person on a charge which was within its power to try, has made an adjudication of guilt and of punishment and it is set forth in the adjudication that an offence triable by that Court has been committed and the punishment imposed is such as that Court had power to adjudge, a Judge of the Superior Court is without jurisdiction in proceedings by way of habeas corpus to enquire into the legality of such adjudication.

The respondents had been tried and convicted of a felony before a Court of competent jurisdiction and no Judge of the Superior Court had any right, authority or jurisdiction to release the respondents under a writ of habeas corpus, and a judgment upon a proceeding so taken is a complete nullity, a nullity of non esse, and an order upon such a writ so issued is made without jurisdiction ratione materiae and need not be obeyed. See remarks of the late Strong, J., in the Sproule case, 12 Can. S.C.R. 140 at p. 204; Cyc. vol. 21, verbo habeas corpus, p. 285.

The judgment of a Court of competent jurisdiction is binding until reversed and another Court cannot by means of the writ of habeas corpus re-examine the charges and proceedings, and after the final judgment and conviction in a criminal case, the Superior Court in a habeas corpus proceeding cannot re-try the case. Halsbury, Laws of England, vol. 10, vo Crown Practice, sect. 102, 103.

In the case of O'Neil v. Charbonneau (1918), 29 Can. Cr. Cas. 340, 54 Que. S.C. 417, Mr. Justice Pelletier, a member of this Court, cited with approval the opinion of Lord Campbell in the case of The Queen v. Lees (1858), 27 L.J. (Q.B.) 403. See the remarks of Cross, J., in the case of Rex. v. Therrien (1915), 28 D.L.R. 57, 25 Can. Cr. Cas. 280.

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See also The King v. Flaherty (1918), 43 D.L.R. 253, 32 Can. Cr. Cas. 17, 27 Que. K.B. 555.

As to jurisdiction, the record shews that the sentence was pronounced by the Court of King's Bench, Crown Side, in and for the district of St. Francis and that Court had jurisdiction to try the offence of which the respondents were charged and the sentence shews that it was pronounced as a consequence of the respondents having been found guilty of the crime of manslaughter by a Court having jurisdiction.

Jurisdiction is shewn and the commission of a criminal offence is disclosed and after conviction by a Court having general jurisdiction over the offence charged, the writ of habeas corpus is an inappropriate remedy. The Criminal Code affords a remedy and protection to accused parties by way of appeal to this Court and to the Supreme Court of Canada, and if a conviction is affirmed on appeal to this Court, to the Supreme Court or by the Privy Council, can a Judge of the Superior Court review these judgments and reverse them? In other words, we would have the astonishing proposition that a Superior Court Judge has authority and jurisdiction to reverse a judgment of the highest appellate Court in the land.

The writ of habeas corpus is an effective safeguard of the liberty of the subject but it was never intended that its provisions could or should be invoked by convicts or felons to obtain their release from custody after trial, conviction and sentence by a Court of competent jurisdiction. If such a dangerous doctrine were sanctioned, it would mean that the doors of our penitentiaries would be opened and convicts go at large upon their ex parte applications and averment that some irregularity had occurred in their trial. I have too much faith in the common sense of the law and in the good sense of our forefathers who made the law, to accept such a doctrine which would render abortive the administration of justice and the punishment of criminals if a single Judge of the Superior Court or of this Court could review, revise, reverse and annul on a habeas corpus a conviction by a Court having jurisdiction over the offence charged. I had occasion to express my views on this matter in the case of The King v. Goldberg (1919), 54 D.L.R. 559, 33 Can. Cr. Cas. 320, 29 Que. K.B. 47. I affirm all that I there said.

I would conclude that the so-called orders or judgments

of the 3rd of May and 14th of June were and are ultra vires the Superior Court and without effect.

This leaves for consideration the question as to whether this Court has jurisdiction to so declare them.

It is urged that there is no appeal to this Court in habeas corpus matters. That is true and wisely so, as one can readily conceive cases in which, if appeal were allowed from Court to Court, the beneficial effects resulting from prompt enquiry into the cause of detention, would be nullified, but this is not a case of reviewing or reversing the judgment of the Superior Court on these writs of habeas corpus but of authoritatively stating that such orders have no existence as valid judgments by reason of want of jurisdiction ratione materiae in the Court pronouncing the same, and if there is absolutely no jurisdiction in the Superior Court (and I have endeavoured to shew that there is not) and here a Judge of the Superior Court exercises a jurisdiction which he does not possess, his decision, his orders or his acts amount to nothing. They are a complete nullity, a nullity of non esse, and I think this Court can say so no matter what the subject matter may be. There is always an appeal of right in such cases.

The first requirements to the validity of a judgment is that it should be rendered by a tribunal clothed with authority to render it, and if the Superior Court wrongfully usurped jurisdiction, surely there must be an appeal to this Court. I shall not repeat what was said by this Court in the cases of McShane v. Brisson (1890), M.L.R. 6 Q.B. 1; Dostaler v. Lalonde et al (1919), 29 Que. K.B. 195; City of Montreal v. Henault, 26 Rev. Leg. 270.

But it is urged that these principles do not apply in the present case because we are dealing with habeas corpus in criminal matters. The expression "criminal matters" is not a happy one, though made use of in the Act.

The writ of habeas corpus is one of the prerogative writs. It is a civil writ issued out of a Court of civil jurisdiction, and in the present case it relates to criminal matters only in so far as it goes to the cause of detention, which in this case is a conviction by a Court of criminal jurisdiction, but the judgment or order of release is a judgment of the Superior Court. The great object of the writ is the liberation of those who may be imprisoned without sufficient cause and is the remedy which the law gives for the enforcement of the civil right of personal liberty.

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It is not a proceeding in the original criminal action or proceeding. It is in the nature of a new suit brought by the respondents to enforce a civil right which he claims as against those who are holding him in custody. The proceeding is one instituted by himself for his liberty and not by the Crown to punish him for his crime. The judicial proceedings under the writ is not to enquire into the criminal act of which he has been accused, tried and convicted, but into the right of liberty notwithstanding the criminal act and conviction. A judgment may be questioned anywhere for want of jurisdiction.

I would dismiss these motions to reject the present appeals for want of jurisdiction, and would maintain the appeals, and declare the judgments or orders of the 3rd of May and 14th of June, 1920, to have been and to be null and void, and of no effect, and the appeal is maintained.

Dorion, J. (dissenting):—Is there a right of appeal? This Court has decided that in matters of habeas corpus, the Superior Court and the Court of Appeal, as also their Judges, have concurrent and original jurisdiction, and one cannot review the decisions of the other. But it is argued that the Judge, in rendering the judgment appealed from, exceeded his powers and in that case the Court of King's Bench has jurisdiction to intervene, according to the decisions of this Court in McShane v. Brisson, Dostaler v. Lalonde, and The City of Montreal v. Henault.

In McShane v. Brisson, the reasons given in the report, where article 1142 C.C.P. is invoked, have no application here. In the second case (Dostaler v. Lalonde) the judgment of the majority of the Court of Appeal, three to two, was based on the general jurisdiction given to the Court of Appeal by Art. 43 C.C.P. Similarly, in the case of City of Montreal v. Henault, there was a general appellate jurisdiction in virtue of a statute.

These decisions seem to me founded on the fact that a judgment in which the Court assumes a jurisdiction it does not possess, or a judgment unfounded in law, is not a judgment which falls under any of the exceptions provided by the Code of Procedure. In the present case, however, the Judge had jurisdiction to issue the writ of habeas corpus and to inquire into the cause of the prisoner's detention. He was entitled to declare that the documents presented before him to justify the detention were not valid, or that the Court which had issued them was without jurisdiction

so to do; for instance, in a case in which they would have been issued by an incompetent Court.

What is called want of jurisdiction in the judgment rendered on the basis of the habeas corpus is at the bottom only an error of law.

I cannot admit that an error of law gives to one party a right of appeal which would have been denied to the other party, if the error had been detrimental to its interests. I cannot admit that an appeal lies if the judgment is unfounded in law, and that there is no appeal if it is well founded. That anticipates the judgment. The Court of Appeal will only know that the judgment is well founded if the right of appeal exists.

I think it is incompatible to decide the case on the merits before deciding if there exists a right to make any decision. If indeed the judgment is null on its face and non-existent, the remedy is possibly that which the Supreme Court applied in Re Sproule, 12 Can. S.C.R. 140, in which it was held that a Court always had the right to control the proceedings that fall within its jurisdiction, which are carried out by its officers and bear its seal. As to the mode in which this control is to be exercised, I am not called upon to make any pronouncement.

Judgment:—"Considering that a judgment of a Superior Court rendered in a matter of ratione materiae over which the said Superior Court has no jurisdiction, is radically and absolutely null and non-existent;

"Considering that this Court is competent and has jurisdiction to declare such judgments null and void and of no effect;

"Considering that the Superior Court, and the Judge thereof, who rendered the judgments a quo, had no jurisdiction ratione materiae, and the said judgments are null and void and non-existent, and this Court has jurisdiction to pronounce their nullity;

"Doth dismiss the respondent's motion;

"Proceeding to adjudicate upon the merits of the present appeal:

"Considering that Judges of the Superior Court of the province of Quebec have concurrent civil jurisdiction with the Judges of this Court to order the issue of the King's prerogative writ of habeas corpus in all cases where a petitioner for such writ alleges that he is illegally restrained of his liberty;

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"Considering, however, that when by a return made to a Judge or to a Court, it is made to appear, and is the fact, that the petitioner is detained in execution of a conviction and sentence found against and pronounced upon him by a Court of competent criminal jurisdiction, no Judge of the Superior Court, nor of this Court, has competency or jurisdiction to quash such conviction and order the liberation of the person so detained in execution of such conviction and sentence;

"Considering the judgments of the 3rd of May, 1920, and the 14th of June, 1920, quashing the conviction and sentence rendered and pronounced against the respondent by a Court of competent jurisdiction, and ordering the liberation of respondent, were and are null and void for lack of jurisdiction; doth quash and annul said judgments, and, proceeding to render the judgment which should have been rendered; doth quash and dismiss the writ of habeas corpus; doth remand the respondent to the custody and keeping of the warden of St. Vincent de Paul penitentiary there to be detained till the full expiration of the term of his sentence, unless sooner legally discharged therefrom."

Appeal allowed; remand to custody.

RE JAMIESON.

Alberta Supreme Court, Walsh, J. September, 1921.

Illegitimacy (§I—1)—Child Born in England—Parents Subsequently Married in and Domiciled in Alberta—Right of Parents to have Child Registered under Vital Statistics Act 1916, (Alta.) ch. 22, sec. 18.

Parents of an illegitimate child who have subsequently been married in and are domiciled in Alberta, are entitled to have such child registered under sec. 18 of the Vital Statistics Act, 1916 (Alta.) ch. 22 notwithsfanding that the child was born elsewhere.

APPLICATION for a mandatory order to compel the Registrar General of Alberta to register an illegitimate child under the provisions of the Vital Statistics Act 1916, Alta., ch. 22, sec. 18. Order granted.

G. H. Steer, for applicant.

R. E. McLaughlin, for Registrar General.

Walsh, J.:—A child was born out of wedlock to the applicants in London, England, the father being a resident of Edmonton, who was then temporarily in England, and the mother being then a resident of London. The birth of this child was legitimated by the subsequent marriage of its

parents (sec. 9, sub-sec. 2, ch. 3 (Alta.), 1916) which marriage took place in Edmonton where the parents still live. They applied to the Registrar General to register this child as their lawful issue under sec. 18 of the Vital Statistics Act, ch. 22, 1916 (Alta.), and he refused to register it. They now apply for a mandatory order compelling him to do so.

No objection was taken to the form of the application or the accompanying proof, the sole reason for the Registrar's refusal being that as the child was born in England he had no power to register it. Section 16 which compels the registration of the birth of a child by one of its parents applies in terms only to "any child born in this province." It is argued from this that sec. 18 is equally limited in its application. In the sections which compel the registration of marriages and deaths there is nothing in express words to confine their operation to marriages performed and deaths occurring within the Province but obviously they are so confined. The scheme of the Act is to procure and preserve a record of the births, marriages and deaths happening within the borders of the Province and its compulsory provisions only apply to such events.

Section 18 is however in an entirely different category. It imposes no duty upon the parents of a child born out of wedlock to make the registration which it authorises. Its design appears to me to be to give them an opportunity to make a public record of the fact that the stigma of bastardy has been removed from their child by their subsequent marriage. That being so, and there being nothing in the section to limit its operation to children born in the Province, I am of the opinion that parents domiciled and whose marriage has taken place in Alberta are entitled to the benefit of it even though the child concerned was born elsewhere.

The order will go as asked. There will be no costs of the motion.

Order accordingly.

BIETEL v. OUSELEY.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. August 5, 1921.

Bail and Recognisance (§I—14)—Right of Justice to Correct Recognisance—Record Returned to be in Accordance with Verbal Undertaking and Conditions.

The form of recognisance signed by Justices of the Peace on an appeal from their conviction is the formal record of the

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acknowledgment of a debt due to the King upon the happening of a certain event; it is the public record of the verbal contract reduced to writing by the Justices and signed by them. The debt with its accompanying conditions arises when the individuals appear before the Justices and acknowledge the debt and conditions verbally, and it is the duty of the Justices to return a record in accordance with the actual facts, and to correct any mistake in that record when it is called to their attention.

APPEAL from an order of Embury, J. in Chambers, (1920), 58 D.L.R. 239, 34 Can. Cr. Cas. 176, ordering a District Court Judge to hear and determine an appeal from a conviction by two Justices of the Peace. Affirmed.

P. H. Gordon, for appellant; E. F. Collins, for respondent.

The judgment of the Court was delivered by

Haultain, C.J.S.:—This is an appeal from an order of Embury, J., in Chambers, (1920), 58 D.L.R. 239, 34 Can. Cr. Cas. 176, ordering the Judge of the District Court of the Judicial District of Moose Jaw to hear and determine the appeal of the applicant Bietel from the conviction above mentioned, without the actual issue of a prerogative writ of mandamus.

When the appeal in question came on for hearing before the District Court Judge, the appeal was dismissed on a preliminary objection taken as to recognisance entered into by the appellant to try the appeal.

It appears from the material before us that a recognisance in the prescribed statutory form was duly entered into by Bietel and his sureties. The form that was used by the Magistrates in taking the recognisance having had some changes made in it which required initialing by the Justices, it was arranged that a new form should be drawn up for filing. This was accordingly done, and the affidavit of justification of the bondsmen was added and sworn to and the recognisance was signed by the Justices and filed in Court, with the information, depositions and conviction. Before the appeal came up for hearing, it was discovered that the words "and pays such costs as are by the Court awarded" had, on account of a clerical error, been omitted from the recognisance filed in Court. Upon their attention being called to this fact, the Justices before whom the recognisance was taken went to the office of the clerk of the Court and amended the recognisance filed by them, by inserting the above words, which had been in the recognisance actually entered into. Although the recognisance in its amended form was produced in Court on the hearing of the appeal, the District Court Judge, apparently ignoring

the amendments as irregular, held that in its original form the recognisance was void and dismissed the appeal. Application was then made to Embury, J., in Chambers, for the order which is now appealed from. In granting the order he held, and in my opinion rightly, that the form of recognisance signed by the Justices is the formal record of the acknowledgment of a debt due to the King upon the happening of a certain event.

"It is the public record of the verbal contract reduced to writing by the Justices and signed by them. The debt with its accompanying conditions arises when the individuals appear before the two Justices and acknowledge the debt and conditions verbally."

It is the duty of the Justices to return a record in accord with the actual facts, and, in my opinion, it is their right, as well as their duty, to correct any mistake in that record when it is called to their attention.

In this case, the appellant below had complied with the statutory provisions with regard to entering into a proper recognisance to try his appeal, and he was entitled to have a proper and accurate statement of the precise nature of his recognisance duly filed by the Justices. This, in my opinion, was done.

This appeal should be dismissed with costs.

Appeal dismissed.

RE COOPER ESTATE.

Saskatchewan King's Bench, Embury, J. July 23, 1921.

Wills (§IIIG—120)—Devise to Wife Absolutely "as long as she may live"—Construction.

A testator left a will in his own handwriting, the body of which is as follows: "I leave everything I possess at my death to my dear wife ..... absolutely as long as she may live." The Court held that the widow took an absolute interest in the estate.

[Richard v. Jones. [1898] 1 Ch. 438 applied.]

APPLICATION for interpretation of a will.

N. Gentles, for plaintiffs.

H. Fisher, for official guardian.

Embury, J.:—Greenhalgh Greaves Cooper died leaving surviving him his widow, three adult sons and two infant daughters. The deceased left a will in his own handwriting, the body of which reads as follows:—

"I leave everything I possess at my death to my dear wife Sarah Ann Cooper, absolutely as long as she may live."

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The Court is asked to state whether or not the deceased bequeathed to the widow an absolute interest in his whole estate.

It is possible to read innumerable decisions of the Courts without obtaining very much assistance. Each case of interpretation presents its own special problem. The object to be arrived at is to ascertain what the testator actually had in mind. In this case it is possible to take two views: (1) that the widow was to take absolutely; (2) that the widow was to have unrestricted enjoyment and control of the estate during her lifetime and that if any of the estate still remained after her decease it should go to the children.

I am of the opinion that the first view is correct, i.e., that the widow was to take absolutely. A man not versed in the law, writing his own will, making a gift to his wife absolutely "as long as she may live" would be likely to consider that the words "as long as she may live" would give emphasis to the absoluteness of the gift rather than that they would limit it to a life estate. And, even if the second view is to be adopted, there is authority that the devise would be absolute. In the case of In re Jones; Richards v. Jones, [1898] 1 Ch. 438, 67 L.J. (Ch.) 211, a testator gave all his property to his wife "for her absolute use and benefit, so that during her lifetime for the purpose of her maintenance and support she shall have the fullest power to sell and dispose of my said estate absolutely. After her death, as to such parts of my....estate as she shall not have sold or disposed of as aforesaid, subject to payment of my wife's funeral expenses, I give ..... the same."

And the Court held that the widow took an absolute interest. But it is not necessary for me to seek to apply this case here. For the reason stated I am of opinion that the testator intended to give the wife an absolute interest, and the will will be construed accordingly.

Judgment accordingly.

REX v. TRENHOLME.

Quebec Court of King's Bench, Appeal Side, Lamothe, C.J., and Lavergne, Pelletier, Martin and Greenshields, JJ. October 25, 1920.

1. Appeal (§IC—25)—Application after Conclusion of Trial to Trial Judge to Reserve a Case—Cr. Code sec. 1014 (Amendment of 1909).

Since the amendment of Cr. Code sec. 1014 by the Code Amendment Act, 1909, ch. 9, sec. 2, an application for a reserved case may be made to the trial Judge after the conclusion of the trial.

[Ead v. The King (1908), 40 Can. S.C.R. 272, 13 Can. Cr. Cas. 348; R. v. Pertella (1908), 14 B.C.R. 43, 14 Can. Cr. Cas. 208, and R. v. Toto, 8 Can. Cr. Cas. 410 (Terr.), superseded on this point by the 1909 Amendment of the Criminal Code.]

2. Appeal (§XI—720)—Leave to Appeal—Application of Crown to Review Acquittal by Direction after Rejecting Testimony to Prove Admission of Accused as not Having Been Voluntarily Made—Cr. Code secs. 685, 1002, 1015.

After the refusal of a reserved case by the trial Judge, the Court of Criminal Appeal may order a case to be stated, on the application of the Crown, to bring before the Court the questions of law upon which the Crown attacks the rulings excluding the testimony of witnesses tendered in corroboration of a charge of procuring the defilement of a girl by false representation on the ground that the testimony was directed to shewing an admission or confession by the accused made under circumstances which excluded the statement from being considered a voluntary confession, and the consequent acquittal by direction of the Court for lack of corroborative evidence under Cr. Code 1002.

3. Procuring (§I—5)—By False Representation—Proof of Alleged Confession or Admission—Girl's Father as a Person in Authority at Interview—Cr. Code secs. 685, 1002.

On a charge of procuring the defilement of a girl by false representation (Cr. Code sec. 216 (j)), testimony to prove admissions alleged to have been made by the accused at an interview sought by the girl's father at which two witnesses were within hearing but were concealed from view, is properly rejected if it appears that the alleged admissions were made in answer to questions or reproaches made by the father, who later laid the information, and that the accused was not warned that anything he might say might be used against him.

4. Evidence (§VIII—672)—Of Confession or Admission—Whether Made Voluntarily or Not—Interview between Accused and Person in Prosecuting Attorney's Office—Cr. Code secs. 685, 1002.

An oral admission or confession alleged to have been made in the office of the prosecuting attorney after the charge was laid, and without warning to the accused that his statement might be used against him, is properly excluded at the trial, as not appearing to have been made voluntarily, although the statement was not made directly to the prosecuting attorney, but in his presence to another person, at least where the Crown declined to adduce testimony to explain the circumstances under which the accused came to be in the Crown prosecutor's office at the time.

APPEAL by the Crown on a case stated. The prisoner was arrested for the offence of procuring the defilement of a girl by false representation. He was committed for trial and he was acquitted on the 6th day of December, 1918. Three months later, the Crown presented a motion to the trial Judge, Desy, J., for a reserved case. The motion was denied on the ground that it was made too late. The

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same motion was made before the Court of King's Bench in appeal. The Court granted the motion and directed that there be reserved for the consideration of the Court the questions set out in the following opinions. The appeal on the merits was later heard and dismissed.

J. Nichol, K.C., for the Crown.

Laflamme, Mitchell and Callaghan, for defendant.

Lamothe, C.J.:—The Crown asks the Court of Appeal to grant a reserved case which is demanded to obtain a decision as to whether certain corroborative evidence offered, and in this case corroborative evidence was necessary, was legally rejected. At the hearing the Attorney for the Crown laid stress on the amendment to article 1014 of the Criminal Code by the statute 8 & 9 Edward VII. (Can.) ch. 9, sec. 2. Before this amendment the right of the Crown or of the accused to demand a reserved case covering objections not raised in the course of the trial was very doubtful. The jurisprudence was contradictory. The statute 8 & 9 Edward VII. seems to have been intended to settle the question. How can the ordinary meaning of the words "or after" added to the words "during the trial" be limited or restrained? Why should these words at the place where they are inserted, receive any other interpretation than the same two words occurring in the first paragraph of article 1014?

The question is very important and deserves discussion.

The Hon. Mr. Justice Greenshields has made a study of the case in the notes of which I have taken communication. I refer the interested parties to these important notes. A reserved case must be granted.

I do not for the moment intend to express any opinion as to the legality of the decisions of the Judge presiding at the trial, reserving this subject for later discussion. Were the admissions of the accused voluntary or not, first, those made in the barn where the complainant made him speak before two invisible witnesses, and second, those made in the office of Mr. Hanson, one of the deputies of the Attorney-General? When the case is argued before us, this Court will study these questions and resolve them after mature deliberation.

Greenshields, J.:—The offence created under the sec. 216 is one covered by art. 1002 of the Can. Cr. Code, which states:

"No person accused of any offence under any of the here-

under mentioned sections, shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material part by evidence implicating the accused."

At the trial the young girl, with respect to whom the offence was said to have been committed, was examined. She testified to the complete commission of the offence. The Crown realising the necessity for corroboration, sought to secure that result by the examination (1) of the father of the girl, one Huntoon; (2) by the examination of the witness, Bacon; (3) by the examination of a nurse named Wilcocks, in the employ of the accused. The learned trial Judge upon the objection of the defence, excluded the testimony of these three witnesses.

A brief consideration of the nature of the proof intended to be made by each of these witnesses will sufficiently reveal the grounds upon which the learned trial Judge refused to allow their evidence or testimony to go to the jury. As to Huntoon: The proof would seem to indicate that the accused was induced to go to a hotel presumably for the purpose of joining some friends who were playing cards. Arriving at the hotel he was met by Huntoon, who asked him to go with him to a nearby barn. In this barn, by previous arrangement, two men were concealed. The accused consented and went into, or to the entrance of the barn, at least, within hearing of the two persons concealed therein. Huntoon practically charged and reproached the accused with the commission of the crime. The Crown proposed to prove that the accused then and there made statements practically admitting the guilt.

The Crown urged the admissibility of that testimony, on the ground that it was a voluntary statement and could be admitted as such in corroboration of the testimony of the chief witness. The learned trial Judge was of a different opinion. Apparently, he was of opinion that the father of the victim was a person in authority, and that any statement the accused might have made in answer to charges, questions or reproaches, were not voluntary, and were inadmissible. The Crown did not then and there take exception to the ruling, nor did the Crown then and there ask the trial Judge to reserve the question for an appellate Court.

As to the witness Bacon: It would appear from the statement of counsel, that the accused went of his own accord to the office of a Mr. Hanson, advocate. Mr. Hanson is the

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joint Crown prosecutor for the district of St. Francis, where the trial was had. Being there, the accused commenced a conversation about his case with Hanson. Mr. Hanson, quite properly, did not wish to discuss it, and probably said something, or in some way indicated to the accused his desire to hear nothing. There was in the same room, but some distance from the accused and Hanson, a man by the name of Bacon. It is stated that when the accused was unable to converse with Hanson on the subject matter of the accusation against him, he moved over toward Bacon, and renewed or continued the conversation about his case, addressing himself to Bacon. It is said that he made statements to Bacon which would fully corroborate the testimony of the chief witness, the victim.

The defence again objected to this testimony and the objection was by the trial Judge maintained. It would appear that the learned trial Judge found a reason for his ruling in the fact that Mr. Hanson was present, and that Mr. Hanson was, to the knowledge of the accused, the Crown prosecutor, a person in authority, and therefore the statements of the accused (if any made) were not voluntary and should be excluded. Again the Crown was silent as to any exception taken to the ruling. No application to reserve the question was made.

As to the witness Nurse Wilcocks: She was a nurse employed by the accused. She was domiciled at the house of the accused. The young girl, the alleged victim, was at the time the offence is alleged to have been committed, living in the house of the accused. The Crown called the nurse Wilcocks, with a view of establishing that the girl (the victim) made statements to the nurse in the absence of the accused, which would incriminate the accused. The Crown offered this testimony as corroborative of the sworn testimony of the same girl who made the statements to the nurse. The learned trial Judge excluded all proof of any such statements, and again no objection was taken by the Crown, and no application for a reserved case.

When the Crown had concluded its proof, the learned trial Judge instructed the jury, as a matter of law, that the testimony of the principal witness was without corroboration, and that, seeing sec. 1002, the Crown had failed to prove the case; instructed the jury to acquit; the jury acquitted, and the prisoner, the accused, was discharged.

On the 24th of January, 1920, the Crown moved the trial

Judge to reserve a case for the consideration of this Court. By its application the trial Judge was asked to state a case containing practically the question whether he, in excluding the testimony of the witnesses Huntoon, Bacon and Wilcocks, erred in law.

The learned trial Judge, for reasons given in notes of judgment, dismissed the application. Hence the present application to this Court for leave to appeal.

Counsel for the defence, answering the motion for leave to appeal, raised and urged a preliminary objection, and that objection may be stated as follows:

No application having been made for a reserved case during the trial, but only after the termination of the trial, after the rendering of the verdict, and after the discharge of the prisoner, the Crown is now without any right in law to claim the relief or remedy sought by the motion.

The question raised is not novel. It is not without interest, nor is it free from difficulty. So far as the Canadian criminal law is concerned the first statutory enactment was found in 55-56 Vict. ch. 9, which, as amended by 56 Vict. ch. 32, by 57-58 Vict. ch. 57, by 58-59 Vict. ch. 40, by 63-64 Vict. ch. 46, and by 1 Ed. VII. ch. 42, became our Criminal Code of 1892.

The section of the then Code dealing with the matter is art. 743. It proceeded to abolish the writ of error as known under the English common law, and before that date existing in our law. It then proceeded to enact the sub-par. 2 of the sec. 743.

That sub-par. still finds its place without change in sec. 1014 of the revised or present Code. It will be first noticed, so far as this sub-par. is concerned, that it is the Court before which the person is tried that is given the power; secondly, it is given that power without any application from any one, of its own motion, and thirdly, there is no limit to the time, that is to say, the Court of its own motion may reserve, while the trial is in progress, or after the trial has been completely terminated.

See sub-par. 3 of sec. 743.

We have here a manifest and clear distinction between sub-par. 2 and sub-par. 3, and it must be presumed that that distinction was made knowingly and for a purpose. The purpose is made somewhat clear by the concluding words of the sub-par., and that is, where, at least, provision is made for a proper record being made of the application.

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This was the statutory law as it stood in 1892, and it continued to be the law until 1909. In the interval between these two dates, the jurisprudence of our Courts was confusing, and was far from uniform.

There was a fair degree of uniformity with respect to the right of the Court, of its own motion, to reserve a question of law at any time. That jurisprudence was in conformity with the jurisprudence in England under the English common law.

In the case of The Queen v. Brown (1889), 59 L.J. (M.C.) 47 (English case), the prisoner had pleaded guilty; had been sentenced; the term of the Court was closed, and the trial Judge had left the town where the Assizes were held. He then realised that he had made an error. Thereupon, of his own motion, he stated a case for the Court of Crown Cases reserved, and that Court approved of his action; dealt with the reserved case, and quashed the proceedings.

In a Canadian case decided in 1898 by this Court, The Queen v. Paquin (1898), 2 Can. Cr. Cas. 134, where a prisoner had pleaded guilty, and was sentenced to three years in the penitentiary, and had served about one day of his term, an application was made to the trial Judge to reserve a question of law. He reserved it, and it came before this Court. It was approved of and dealt with, and the Court held as follows:—

"A reserved case may be granted under the Criminal Code, 743, at any time, however remote from the date of the trial or judgment, if it is still possible that some beneficial result may accrue to the prisoner by a decision in his favour."

There are many other cases with similar holdings, but I refrain from further reference to them. So much for the right and power of the Court of its own motion to reserve.

When our Courts came to deal with the right of the Crown or the accused to apply to the trial Judge for a reserved case, seeing the different wording of sub-par. 3, the same jurisprudence was not invariably followed. There was difference of opinion, and there were judgments holding that the Crown or the accused must make such application before the trial was terminated. Such was the holding in R. v. Toto (1904), 8 Can. Cr. Cas. 410, R. v. Pertella, (1908), 14 B.C.R 43, 14 Can. Cr. Cas. 208, and finally in Ead v. The King (1908), 40 Can. S.C.R. 272, 13 Can. Cr. Cas. 348. This latter case was decided in 1908. During the session of the Dominion Parliament of 1909, the amend-

ments of the Criminal Code were introduced and passed, and among the amendments so introduced was an amendment to sub-par. 3 of sec. 1014, and that amendment consisted in the addition of two words "or after," so that the sub-par. read: "Either the prosecutor or the accused may during or after the trial, etc., etc.," which brought it in exact conformity, so far as terminology was concerned, with the paragraph referring to the Court's right to reserve. The law, therefore, as it now stands with respect to the Court, the prosecutor and to the accused reads, in effect:

"The Court may, the prosecutor may, and the accused may, either during or after the trial, the former reserve, the latter make application to reserve."

With that change made, which was probably the result of the confusion arising from the jurisprudence, and particularly as a result of the Ead case, it surely can with certainty be said, that the jurisprudence, English and Canadian, under sub-par. 2 of 743 and 1014, has full application to sub-par. 3.

I make further reference to the case of The King v. Daley (1909), 16 Can. Cr. Cas. 168, where it was held that:

"Where there is a prejudicial misdirection of the trial Judge, the accused is not deprived of his right to a new trial because of his failure to complain of the misdirection at the time."

See also The King v. Blythe, (1909), 15 Can. Cr. Cas. 224.

Upon the whole, I am of opinion that under sub-par. 3, of sec. 1014 of the Criminal Code as it now reads, the Crown is not debarred from demanding that the trial Judge do state a case. I rule against the defence upon this preliminary objection.

At the argument at Bar the merits of the question of the admissibility of the testimony of the witnesses, Huntoon, Bacon and Wilcocks, was not argued at great length, the chief attention being given to the preliminary objection. I am of opinion from the statements made by the counsel (subject to modifying that opinion upon a perusal of the record) that the statements (if any) made by the accused to Huntoon and Bacon should have been admitted. As to the testimony of the nurse Wilcocks, going to prove unsworn statements made by the young girl, I have grave doubt as to the admissibility of that statement. However, I should order a case to be stated upon that question as well

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as upon the others. Upon the whole I would grant the Crown's petition, and I would instruct and direct the learned trial Judge to state for the consideration of this Court:

1. Whether there was error in law in refusing to allow the witness Huntoon to make proof of statements made to him by the accused;

2. Whether the trial Judge erred in law in refusing to admit the testimony of the witness Bacon as to statements to him made by the accused;

3. Whether the trial Judge erred in law refusing to allow the witness Wilcocks to testify as to statements made to her by the witness, Miss Huntoon.

On October 25, 1920, the Court of King's Bench, composed of Lamothe, Chief Justice, Martin, Greenshields, Guerin and Allard, J.J., rejected the appeal, the following opinions being handed down.

Lamothe, C.J.:—When, seeing the importance of the questions submitted, this Court ordered an appeal on a reserved case, I made a few notes indicating the questions which we would be called upon to decide. Were the admissions which it was sought to prove made freely and voluntarily by the accused? There are two incidents involved in this appeal; the Huntoon incident and the Bacon incident. The evidence offered was rejected in both cases.

Huntoon incident: The girl's father, being advised of the necessity of corroborative evidence, formed the plan of luring the accused to a barn, by night, where he might be led to make admissions within earshot of two concealed witnesses. The plan succeeded. The accused followed the father to the spot in question, and there, near the two concealed witnesses, was asked the question to which he is said to have replied. Under English criminal law, evidence of a confession by the accused is inadmissible, unless it was freely and voluntarily made by the accused. If the accused is questioned by a person entitled to ask questions, this person may be considered as "a person in authority," and the accused must then be warned that anything he may say will be used as evidence against him. In my opinion Huntoon was a person in authority. It was he who had confined his daughter to the care of Dr. Trenholme; he was responsible for the doctor's fees; he was entitled to question Dr. Trenholme as to the treatment administered, and Dr Trenholme would have felt morally obliged to answer

his questions. That is enough to secure the rejection of any admissions made without the required warning. But the scene itself, as presented before us, carried an implied threat. The father was outraged. He had decided to lay a complaint. The doctor must have felt that he was to be accused and that the hand of the law was already upon him. From the point of view of English law, admissions made under such circumstances are not free and voluntary.

Bacon incident: When Dr. Trenholme was actually accused, he went to the office of Mr. Hanson, one of the Attorney-General's substitutes in Sherbrooke. Mr. Hanson under the circumstances was a "person in authority." The accused was not warned that what he said would be used against him. He spoke to one Bacon who was in the office of Mr. Hanson, who did not intervene. Why and how did the accused find himself in Mr. Hanson's office on that day? The Judge at the trial asked the Crown if Mr. Hanson would be heard as a witness; he received a reply in the negative. The Judge apparently understood that it was not proposed to throw full light on the circumstances attending the supposed confession. For instance, did the accused go to Mr. Hanson's office at the latter's request? This would have given a particular colour to the incident. As the jury was not to be sufficiently acquainted with the facts, the Judge rightly refused to admit evidence of this conversation.

There is a third incident relating to a conversation between the Huntoon girl and a nurse of the name of Wilcox. Under the circumstances set forth, this conversation, if it took place, cannot be admitted as corroborative evidence.

I think that the instructions of the Judge on these three points were sound in law and the appeal should be dismissed.

Martin, J.:—The principles of law governing the admission of evidence of confession are laid down by Lord Sumner in Ibrahim v. The King, [1914] A.C. 599, where he says, at p. 609:—

"It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him, unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him, either by fear or prejudice or hope of advantage exercised or held out by a person in authority."

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The ground for receiving a voluntary confession is that no person will wilfully make a statement against his interest unless it be true; while the ground for rejecting a confession as not being voluntary is the danger that the prisoner may be induced by hope or fear to criminate himself falsely. The point of the citation from Lord Sumner is that the statement must be a voluntary one and it is moreover upon the prosecution to shew it to have been voluntary statement not obtained by fear or prejudice or hope of advantage held out by a person in authority.

I think there can be no doubt that the record discloses that Huntoon was at the time a person in authority. He had authority and control over the prosecution against the accused. I am of opinion that under the circumstances disclosed, the alleged confession which it is sought to be established as being made by the accused to the father of the girl, is inadmissible, and that the prosecution has not established by the circumstances under which it was made that it was the voluntary statement of the accused freely given.

Taylor on Evidence, 9th Ed. Vol. 1, par. 872, says: "As the admission or rejection of a confession rests wholly in the discretion of the Judge, it is difficult to lay down particular rules a priori for the government of that discretion."

I am not disposed to interfere with the discretion and judgment of the trial Judge and I think the first question should be answered in the negative.

The second question relates to the Bacon incident. Bacon was in the office of Mr. Hanson, joint Crown prosecutor for the district of St. Francois, on the day the accused was to undergo his preliminary examination. The accused came to the office of the Crown prosecutor that day, on the very day that a most serious charge was about to be enquired into by the investigating magistrate at Sherbrooke. How did he happen to go to the office of the Crown prosecutor at that time? It could not have been from accident or idle curiosity. Was he sent for by the Crown prosecutor? We do not know. It was in the power of the prosecution to explain the circumstances under which the accused came to be in the office of the Crown prosecutor on that day and the Court suggested to the prosecution the examination of Mr. Hanson to explain the circumstances of that

meeting and what had brought it about. The prosecution refused to examine Hanson. Why? We do not know.

Applying the general principles of law above enunciated to this incident, I have reached the conclusion that the evidence of Bacon as to any admissions or confessions of the accused made on that day in the office and in the presence of Crown prosecutor Hanson, cannot be legally admitted in evidence. We may not be able to say that the statements made by the accused on that occasion were obtained from him either by fear or prejudice or hope of advantage exercised or held out by a person in authority, but we can and do say that it is not shown by the prosecution that any statement made by the accused on that occasion was free and voluntary.

I would answer the second question in the negative.

The third and last question relates to two conversations which the girl Helena Huntoon had with Mrs. Wilcox, the first of which was said to have been had during the evening and relating to incidents happening the previous night or in the early morning and after they had been together all day.

The general rule governing the admissibility of such evidence is that the declarations of the party interested must be substantially contemporaneous with the fact, that is to say, made either during or made after its occurrence but not at such an interval from it as to allow of fabrication or to reduce them to the mere narrative of a past event.

The conversation between Helena Huntoon and Mrs. Wilcox was not had in the presence of the accused and was mere hearsay and in no sense corroborative in any material particular of anything implicating the accused. It is obvious that if this evidence could serve as corroborative of the girl's story that she might concoct any statement to serve this purpose.

The statement made by her to Mrs. Wilcox at the time and under the circumstances is not admissible in evidence and proves nothing more than what she testified to when examined as a witness before the jury.

The second declaration alleged to have been made by the girl Huntoon to Mrs. Wilcox related to an incident arising from the fact that Mrs. Wilcox had testified that at seven o'clock in the morning she had seen the Huntoon girl in the same bed with the accused and that about half an

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hour after this incident it is alleged that she made to Mrs. Wilcox a declaration regarding this incident. This statement was inadmissible not only on the grounds above stated respecting the other conversation, but it was moreover not corroboration of the essential element of the offence charged, namely, that the defilement was the result of false pretences or false representations, and whatever inferences might be drawn from the incident, neither it nor the statement of the girl amounted to corroboration of false pretences or false representations. I have no hesitation in reaching the conclusion that the third question should also be answered in the negative.

While it may not be necessary for the purpose of disposing of the questions submitted on this reserve case, to examine or consider the testimony of the girl Huntoon, a perusal of the same leads me to the conclusion that her evidence is in many respects, if not in all, material to the charge laid, invraisemblable, and even if her averments are accepted at their face value, they do not make out a case of false pretences or false representations respecting existing facts which, after all, is the gist and gravamen of the charge.

This appeal is taken at the instance of the Crown, and while it is not the province of an appellate Court to appreciate evidence and we cannot speculate on the evidence of the alleged corroboration which was objected to and not given, no new trial should be directed, although it appears that some evidence was improperly rejected or that something not according to law was done at the trial unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned on the trial. Can. Cr. Code, s. 1019.

Under the circumstances of this case, in my opinion, no substantial wrong or miscarriage of justice was so occasioned at the trial and the application for a new trial should be and is denied and the rulings of the trial Judge and the acquittal of the accused are confirmed.

Guerin, J.:—First question: The witness Huntoon is the father of the young girl, his minor child; he has the lawful care and charge of her; her domicile is with him; she cannot leave his house without his permission; she is subject to him until her majority or emancipation. Huntoon therefore very properly laid the charge against the accused whom he believes to be guilty of having defiled

his minor daughter by means of false pretences. Three days before swearing to the information, he sought to obtain corroboration of the accusation, and as alleged in the motion, he met the accused at a hotel, and invited him to the barn where he had a conversation with him touching the alleged offence.

There is no evidence that the accused was put on his guard by Huntoon as to any admissions he might make. The trial Judge's stated case on the contrary mentions that it appears by Huntoon's own evidence that he wanted to entice Trenholme into a barn to have him make an avowal of guilt, in order to lay a complaint against him, should Huntoon succeed in his attempt. When Huntoon made this attempt to obtain corroboration of his daughter's statement, was he in the eyes of the law a person in authority? Was he a prosecutor exercising authority or control over the proceedings or prosecution against Trenholme? If he was, his evidence could not be admitted under the authority of all precedents Canadian, English and American. There is, however, very respectable authority to say that he was not. Trenholme was not then under arrest. There were no proceedings in existence over which Huntoon could exercise any authority or control. No charge or complaint had been made at the time of his interview with Huntoon. Moreover, if their respective intelligence, education, culture and social advantages were to be compared, and if the Court is to determine the question upon such consideration, it will be difficult to say that Huntoon was a person in authority over Trenholme a man in the full strength of his manhood, a medical doctor practising his profession successfully in his home town.

It has been held, especially in U. S. Federal Courts, that the district attorney is the only person known to the law as the prosecutor, and that the person injured being without capacity to control the prosecution, cannot be recognised as a person in authority. Vide U.S. v. Stone (1881), 8 Fed. Rep. 232. On the other hand, the State Courts of the United States have generally recognised the injured party as a person in authority.

In the British Courts, the concensus of opinion has settled in a long line of decisions covering the last 140 years and over, that the aggrieved party who is about to take or who has taken the necessary steps to lodge an information and cause the arrest of a person whom he

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accuses, is a prosecutor and a person in authority. Moreover it belongs to the judicial province alone to determine as a preliminary question whether the confession was made with that degree of freedom which ought to occasion its admission as evidence to be heard by the jury. This may readily be shown by negative answers as to whether the prisoner had been told that it would be better for him to confess or worse for him if he should fail to do so. Many authorities might be mentioned. Vide case cited by the trial Judge on this point. Rex v. Royds, (1904), 8 Can. Cr. Cas. 209.

In the British Courts, the rule laid down by Baron Eyre in 1873 in Rex v. Warickshall, 1 Leach C.C. 263, as to confessions, has not changed to this day. The principle then enunciated is that a free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected. Consult: Rex v. Baldry (1852), 5 Cox C.C. 523; Rex v. Cass (1784), 1 Leach C.C. 293, note; Rex v. Thompson (1783), 1 Leach C.C. 291; Reg. v. Hearn (1841), Car. & M. 109; Rex v. Partridge (1836), 7 C. & P. 551; Jay on Admissibility of Confessions, pp. 1, 67.

I would answer no to the first question.

Second question: There is a mystery about this witness Bacon, which the Crown has not seen fit to elucidate. The trial judge in the stated case has lifted up a corner of the curtain. Whatever the statements made to Bacon by the accused which the Crown intended to prove, they were made in the office of Mr. Hanson, one of the Crown prosecutors, whom Trenholme first addressed, and then he spoke to Bacon. Mr. Hanson, owing to his public functions, was a person in authority; the conversation was taking place in his presence. The record does not show that Trenholme was put on his guard as to any admissions or confessions he might make. The trial Judge called upon Mr. Nichol, the other prosecutor who was conducting the case for the Crown, to examine Mr. Hanson before the jury, if he wished to persist in making Bacon prove the statements made to

him by the accused. Mr. Nicol stated thereupon that he did not wish to examine Mr. Hanson, and that he did not insist on putting his question to the witness Bacon. This necessarily should put an end to all further discussion as to the admissibility of the evidence now sought to be made by Bacon. Moreover the Crown has not attempted to prove affirmatively the circumstances under which this reputed confession was spoken in the presence of one of its own prosecuting officers, whom it declines to examine.

Under the circumstances, I would consider it more prudent to answer no to the second question.

Third question: This kind of evidence can be much better appreciated by the trial Judge than by a Court sitting in appeal. Such evidence is very delicate by its nature. The witness is a young woman not yet 20 years of age. She is nervous probably, and embittered possibly by the tragic events of her young life. Whether she had time to fabricate a story and whether she did fabricate a tale incriminatory of the accused, will be more safely intrusted to the intelligence, wisdom and experience of the vicissitudes of life possessed by the trial Judge. In an English case determined in 1916 in the Court of Criminal Appeal, Rex v. Norcott, [1917] 1 K.B. 347, 86 L.J. (K.B.) 78, 116 L.T.R. 576, the appellant was convicted of an indecent assult on his own illegitimate daughter, a girl of 17. Evidence was admitted of a statement made by the girl to an intimate friend, a much older woman. Lord Reading, C.J., rendered the judgment of the Court of Appeal.

I would answer no to the third question.

To conclude: it does seem reasonable to determine that if there is any doubt as to the proper answers to be given to the second and third questions, a reasonable opinion for this Court of Appeal would be that no substantial wrong or miscarriage was occasioned on the trial by rejecting the evidence covered by the three questions submitted.

Applying the converse of section 1019, Can. Cr. Code, I would therefore favour a judgment dismissing the motion of the Crown, and recommend that the Crown pay the costs of the respondent's attorneys.

Judgment: "Considering as regards the first question, that the witness Huntoon laid the charge against the respondent accusing him of the crime of having defiled the complainant's minor daughter by means of false pretences;

"Considering that three days before swearing to the information against the respondent, he sought to obtain cor-

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roboration of the accusation, by obtaining an admission from the respondent, whom he invited into a barn, where he had a conversation with him touching the alleged offence, without having previously put the respondent on his guard as to any admissions he might then make;

"Considering that when that attempt was thus made to obtain an admission of guilt, Huntoon was a prosecutor exercising control over the proceedings against the respondent, and was by law a person in authority;

"Considering that there was no error in law in refusing to allow the witness Huntoon to testify as to statements made to him by the accused;

"Considering, as regards the second question, that the statements made to the witness Bacon by the respondent were made in the office of Mr. Hanson, one of the Crown prosecutors, who was a person in authority, and were made in the latter's presence, that the record does not show that the respondent was put on his guard as to any admissions which he might then make, that the second Crown prosecutor, Mr. Nichol, was called upon by the trial judge to examine Mr. Hanson, if he wished to persist in making the witness Bacon prove the statements made by the respondent, and that thereupon the Crown prosecutor, Mr. Nichol, who was conducting the case before the jury, stated that he did not wish to examine Mr. Hanson, and that he did not insist on putting his question to the witness Bacon;

"Considering that there was no error in law in refusing to admit the testimony of the witness Bacon as to statements made to him by the accused;

"Considering, as regards the third question, that the evidence sought to be made is of necessity very delicate by its nature, involving the statements made by a young woman not yet 20 years of age, against whose person the respondent is accused of having committed the crime charged in the indictment, and which statements are alleged to have been made to another woman of mature years;

"Considering that no hard and fast line can be safely drawn in such cases, each case depending upon its own circumstances;

"Considering that, in each case, the decision on the character of the question put, as well as the other circumstances relating to such a conversation, are best left to the discretion of the presiding judge;

"Considering that there was no error in law in refusing

to allow the witness Wilcox to testify as to statements made to her by Miss Huntoon;

"Considering that no substantial wrong or miscarriage of justice was occasioned at the trial, by rejecting the evidence suggested and covered by the three questions submitted;

"Considering that the Crown has not justified the conclusions of the motion; doth answer no to each of the aforesaid three questions;

"It is therefore by the Court of Our Sovereign the King now here considered, that the verdict ought not by reason of anything appearing in the said stated Case or set forth on behalf of the Crown to be quashed or set aside; it is accordingly adjudged and finally determined that the said appeal be and the same is dismissed, and that the verdict be and the same is affirmed and it is ordered that an entry hereof be made of record in this Court in the district of Montreal."

Appeal dismissed.

REX v. LEAHY.

British Columbia Supreme Court, Macdonald, J. March 29, 1920.

Summary Conviction (§VII—70)—Charge Alleging Two Offences—Conviction—Application by way of Certiorari to Quash—Evidence only Supporting one Offence—Power of Court to Amend—Crim. Code sec. 1124.

Upon an application by way of certiorari to quash a conviction on the charge that he did "expose for sale and offer for sale . . . intoxicating liquor," and the evidence is insufficient to support the charge of exposing for sale, the Court will not quash the conviction as being defective in that it alleges two offences, but will under the power given to it by sec. 1124 of the Crim. Code amend the conviction by eliminating that portion, and simply allege in the conviction and warrant that defendant "did offer for sale."

APPLICATION by way of certiorari to quash a summary conviction for exposing for sale and offering for sale certain cases of intoxicating liquor. Conviction sustained, conviction and warrant amended.

R. L. Maitland, for the application; Wood, for the Crown.

Macdonald, J.:—Upon this application for habeas corpus and to quash the conviction upon which Leahy is confined in Okalla gaol, B.C., it appears that he was convicted on February 19, by the Police Magistrate of Prince Rupert, for that he did "on the 13th of February at the City of Prince Rupert, expose for sale and offer to sell 24 double

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cases and four single cases of intoxicating liquor for the consideration of $5,000." It has been agreed that all papers and proceedings, including the conviction, should, upon this application, be considered as if they had been properly returned to the Court, upon a writ of certiorari duly issued.

The contention is made that the warrant of commitment is defective, in that it alleges two offences; further, that sec. 1124 of the Code which had been made part of our Summary Convictions Act, R.S.B.C. 1911 ch. 218, cannot be utilised to cure such a defect, if I should find it to exist, by amendment of the warrant and of the conviction upon which it is based. I have first to consider whether this conviction and warrant of commitment are void on such ground. I find, in the short time at my disposal upon looking at the authorities which have been so carefully collected, that they do not, to my mind, seem to be consistent; perhaps a more extended review of these authorities might shew that such inconsistency, appearing at first blush, is not so striking as I, for the moment, think it to be. It should be the endeavour of Courts dealing with criminal or quasi-criminal matters, if possible, to obtain a uniformity in the decisions throughout Canada. I have borne this in mind in previous applications of this nature. With the difficulties, however, that present themselves, I will endeavour, as best I can, to arrive at what I consider a fair conclusion, based upon the evidence and bearing in mind that the trend of the legislation is to arrive at the merits of the conviction, provided always that the accused is not prejudiced by such a course.

First, as to the question of duplicity, it is submitted that the case of Rex v. Toy Moon (1911), 19 Can. Cr. Cas. 33, is distinguishable, upon the facts, from those presented in this case. Further, that in the Toy Moon case, the duplicity was held to exist, and sec. 1124 was applied, because the applicants were simply convicted, under the Code, of an offence contrary to the Vagrancy Act, but alleged to have occurred in two modes, as distinguished from one—that is, that they were convicted of being unlawfully played in a common gaming-house as well as having looked on while the play was proceeding. In the judgment of Perdue, J.A. [now C.J.M.] in that case, he cites with approval the case of Rex v. Ah Yin (No. 1) (1902), 6 Can. Cr. Cas. 63, in which Bole, Co. Ct. J. took the view that

playing and looking on at play were separate and distinct offences, though both arising under the vagrancy provisions of the Code. If I read the Toy Moon judgment aright, sec. 725 of the Code was only referred to incidentally and not applied. In order to effect an amendment of the conviction and consequently of the warrant, sec. 725 reads:—

"No information, summons, conviction, order or other proceeding shall be held to charge two offences, or shall be held to be uncertain on account of its stating the offence to have been committed in different modes, or in respect of one or other of several articles, either conjunctively or disjunctively."

Then an example is given that the defendant "unlawfully did cut, break, root up, and otherwise destroy or damage a tree, sapling or shrub."

It has been pointed out there is a case in Ontario, where it was held, that selling and allowing liquor to be on the premises for sale, constituted two separate offences, so the distinction is sought to be drawn in the present case between a person exposing for sale and offering for sale. I must say the distinction is rather fine as far as the guilt is concerned. However, there might, and probably would be, upon the facts, a different set of circumstances required to exist, so that if sec. 725 was not required to be invoked in the Toy Moon case, then the next question that arises is whether it has any application here. Rex v. Brouse (1913), 9 D.L.R. 458, 21 Can. Cr. Cas. 17, was a case under Dominion legislation, and somewhat similar to the facts in this case. There the defendant was convicted of an infraction of the Inspection and Sales Act R.S.C. 1906 ch. 85, for that "he did unlawfully offer, expose, or have in his possession for sale" 10 barrels of apples packed in contravention of that statute. Objection was taken that this was a conviction in the alternative and subject to objection on that account. It is to be noted, however, that there the defendant pleaded guilty, and Britton, J. said, at p. 460:—"If the objection had been taken before the Police Magistrate, and before the plea of 'guilty' was recorded, the information could, if necessary have been amended."

Then he refers to the Act and goes on to discuss the different offences that come within the purview of the legislation, and adds, at p. 460:—"I think the informa-

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tion discloses only one offence, and so is not open to the objection taken."

If this statement be accepted as a "decision," then the conviction before me does not shew two offences; it states that the accused "exposed for sale" and "offered for sale" so if I were not required to even consider the evidence, I might follow that authority, as supporting a conclusion that there is only one offence charged. Britton, J. referred to the case The Queen v. McDonald (1898), 6 Can. Cr. Cas. 1, with approval. He says, the case then before him for consideration falls into that decision, as being an offence which might be committed in one of several ways. I lay stress upon this approbation, as it places a construction upon the meaning of the words "nature of the offence" in sec. 1124. The "nature of the offence" here charged is an infraction of the Prohibition Act, 1916 (B.C.) ch. 49. In The Queen v. McDonald, Ritchie, J., according to the head-note held that "a summary conviction for unlawfully distilling spirits and making or fermenting beer without a revenue license is not void as charging two offences." It was held to be only one offence through applying sec. 907 of the Code. I take it the matter was well considered by such a distinguished jurist. He says, p. 2:—"The objection that the conviction finds the person guilty of two offences is, I think, disposed of by sec. 907 [now 725] of the Code." In Reg. v. Monaghan (1897), 18 C.L.T. 45, Scott, J. upheld a conviction that the defendant, under the Indian Act R.S.C. 1886 ch. 43, did "give and sell" intoxicating liquor, deciding that this allegation did not constitute two offences—giving and selling are akin, as constituting a disposition, but differ as to the mode adopted.

In Reg. v. Young (1884), 5 O.R. 184a, it was conceded by counsel for prosecution and decided by the Court, that the selling of liquor and allowing liquor to be consumed on the premises were two offences.

The conviction in question was for infraction of the provisions of sec. 10 of the Prohibition Act. As to this section, the side-note says: "Sale of Liquor prohibited." It describes the different modes of infractions of the Act, e. g., no person shall "expose or keep for sale" or "offer to sell or barter" any liquor. Other authorities have been cited which seemingly shew the conflict to which I have referred. The conviction and warrant in this case may only indicate different modes of committing the same offence and so not be defective on account of duplicity.

I propose, however, in any event, to apply the decision in Rex v. Toy Moon, in which sec. 1124 of the Code (which has been incorporated in our Summary Convictions Act) is referred to as follows by Perdue, J.A., at p. 37:—

"By the effect of that section [1124] construed with secs. 754 and 749, the Court shall, notwithstanding any defect in the conviction, determine the complaint on the merits, and it is empowered to confirm, reverse, or modify the decision of the justice or make such other conviction as the Court thinks just . . . Under these provisions, therefore, the Court should, in the present case, look at the evidence to ascertain if an offence of the nature described in the conviction was committed for which the accused might have been convicted by the magistrate; and if the Court is of the opinion that there is no evidence to warrant it, the conviction may be modified or a new conviction may be made, so as to declare the accused guilty of the offence so warranted by the evidence."

It is not necessary for me in this case, in my view of the evidence, to go as far as was indicated by Perdue, J.A. I am quite satisfied upon the evidence of Miller, coupled with the evidence given by the applicant and his son, that there was an offering for sale. As to the exposing for sale the evidence is somewhat limited. It appears only a sample was produced, so it could not be said that defendant Leahy actually exposed for sale 24 double cases and 4 single cases of intoxicating liquor. I see no reason, even if I were hearing the evidence in the first instance, to refuse to follow the evidence of Miller, as compared with the evidence of the party who is accused of an offence under the Act. There is no suggestion that Miller did not come into the matter innocently. He was not even cross-examined by counsel appearing for the accused.

As to the evidence necessary to prove an offence, e. g., a sale, even though the person accused is not actually engaged as a principal, I might refer to the amendment to the Summary Convictions Act in 1918 (B.C.) ch. 87, sec. 67A. It is similar to the Code in that respect, and stated that "Every person who—(a) Does or omits an act for the purpose of aiding any person to commit an offence; or (b) Abets any person in commission of an offence; or (c) Counsels or procures any person to commit an offence—is a party to the offence, and shall be liable to be tried, convicted, and punished as a principal offender."

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Under these circumstances I see no reason to quash the conviction. That means the warrant is supported and held to be valid except that, under the powers of amendment, as the evidence does not fully support the charge of exposing for sale, I pursue the same course as in the Toy Moon case, of amending the conviction and warrant, by eliminating that portion and simply alleging in the conviction and warrant that defendant "did offer for sale," etc.

Conviction sustained.

COCHRANE v. McKAY.

Nova Scotia Supreme Court, Harris, C.J., Russell, J., Ritchie, E.J., Chisholm and Mellish, JJ. September 17, 1921.

Writ and Process (§II.A—16)—Contract to Build Vessel in Nova Scotia—Letter Posted in Ontario Cancelling Contract—Failure to Make Payments in Nova Scotia under the Contract—Order for Service out of Jurisdiction—Right of Court to Grant under Supreme Court Rules, O.XI., R.1. (a).

The plaintiff residing in Nova Scotia, made a contract with the defendant who resides in Ontario to build for him a vessel in Nova Scotia. Before the vessel was completed the defendant posted a letter in Ontario addressed to the plaintiff in Nova Scotia cancelling the contract. The Court held that the breach occurred in Ontario when the letter was posted and that an order for service out of the jurisdiction could not be granted under Rules of the Supreme Court N.S. O.XI., R. 1. (a) but a breach of the contract in not making payments as the work advanced was a breach of the contract in Nova Scotia, and that the plaintiff was entitled to the order on this ground although not referred to in the writ of summons, no statement of claim having been delivered and it being competent for the plaintiff to assign it as a breach in his statement of claim.

[Holland v. Bennett, [1902] 1 K.B. 867, followed, and Cherry v. Thompson (1872), L.R. 7 Q.B. 573 referred to.]

PLAINTIFF who resided in Nova Scotia in October, 1918, made a contract with defendant who resided in the Province of Ontario to build a vessel for him in Nova Scotia at cost plus 15%, defendant to advance money to plaintiff from time to time as required.

Defendant having subsequently cancelled the contract, plaintiff obtained an order for service out of the jurisdiction claiming $20,000 damages for breach of contract.

Defendant moved to set aside the order for service out of the jurisdiction and the proceedings thereunder as not being authorised by the Rules of the Supreme Court, O.XI. R. 1 (a).

The motion was heard by Harris, C.J., and was referred

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by him to the Full Court and came on for hearing on a case stated.

Norman McKay, for plaintiff.

D. V. White, for defendant.

Harris, C.J.:—Further consideration has convinced me that the conclusion reached by me on the motion at Chambers was the correct one and that the order allowing service out of the jurisdiction should not be set aside.

There has, I think, been a breach within the jurisdiction by the failure to pay the amount due here under the contract.

There may be more than I at first thought in the contention of Mr. McKay that the contract was not rescinded by the giving of the notice from St. John, and that there was no rescission at least until the receipt of the notice by the plaintiff in Nova Scotia, but it is not necessary to decide that question.

I would dismiss the application; costs on the motion before the Full Court and at Chambers to be plaintiff's costs in the cause in any event.

Russell, J.:—The plaintiff residing in Nova Scotia made a contract with the defendant who resides in Ontario to build for him a vessel in Nova Scotia and defendant was to advance the money to pay for the vessel from time to time as required. Before the vessel was completed the defendant posted a letter in Ontario addressed to the plaintiff in this Province which it is claimed was a breach of the contract resulting in damages for which the action is brought. The only question to be decided on this application to set aside the service of the writ is whether there has been a breach in this Province of the contract so as to bring the case within the terms of Order XI. R. 12. The contract was made in this Province by the acceptance posted within the Province of a proposal contained in a letter from St. John, N.B., and it was to be performed here. The breach assigned, if there was one, which can only be decided by the trial of the cause, consisted in the communication by the defendant to the plaintiff of his determination not to fulfil his obligations under the contract. That communication took place when and where the defendant's letter was delivered to the plaintiff. Where an offer is made by post the acceptance of that offer is held to be complete when the acceptance is posted, but that rule is fully recognised to be mere "rule of thumb" based on convenience, and an exception to the general rule which I take to be that a communication is not

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complete until it is brought home to the knowledge of the person to whom it is made. The exception has been extended by Lord Herschell in the case of Henthorne v. Fraser, [1892] 2 Ch. 27, 61 L.J. (Ch.) 373, 66 L.T. 439, to any case "where the circumstances . . . are such that it must have been within the contemplation of the parties that according to the ordinary usages of mankind the post might be used as a means of communicating the acceptance of it, the acceptance is complete as soon as it is posted." Where the communication is not the acceptance of an offer, but the revocation of a letter containing an offer, it has been clearly decided that the communication is not completed by the posting of the letter. It is only completed when the letter containing the revocation is received: Byrne & Co. v. Leon Van Tienhoven & Co. (1880), 5 C.P.D. 344.

It may be that the service of a notice of dishonour is another exception to the rule that a communication is not complete until it is received. The Bills of Exchange Act, R.S.C. 1906, ch. 119, provides by sec. 104 that where a notice of dishonour is duly addressed and posted the sender is deemed to have given due notice of dishonour notwithstanding any miscarriage by the post office. If this section were not merely the reproduction of a principle of the law merchant, the very fact of its having been enacted would suggest the inference that in its absence an actual communication would have been necessary to constitute a notice. But this inference is not permissible because the section is merely a reproduction of the provision of the law merchant on the subject, which exception may for aught I know extend to other instances of notice required among merchants. The general rule is clearly indicated by Lord Bramwell in his dissenting opinion in Household Insurance Co. v. Grant (1879), 4 Ex. D. 216, where he puts the case of a landlord whose tenant offers to sell him some hay. The landlord duly posts a letter containing an acceptance of the offer accompanied by a notice to quit, but the letter does not reach the tenant. Because of the exception to the rule in the case of the acceptance of an offer this was decided in the case mentioned, against Lord Bramwell's dissenting opinion, to be a good acceptance although it never reached the offerer; but would anybody contend that Lord Bramwell is in error when he scouts the idea of its being a good service of the notice to quit?

In the case now before us the defendant was not accepting an offer or mailing a notice of dishonour. He was an-

nouncing to the plaintiff his refusal to fulfil his obligations under a contract. The plaintiff had no reason to look for such a communication. There was no basis for the application of the theory which in the case of the acceptance of an offer would make the post office his agent to receive a communication by a letter posted in Ontario. If the theory of post office agency is to be applied the defendant was making the post office his agent to communicate to the plaintiff in this Province the repudiation of his obligations under the contract, and the case is the same as if he had sent his own messenger with the letter to be delivered to the plaintiff at Port Greville. The defendant thus in Ontario set in operation a series of causes which when complete resulted in a communication made in this Province of his intention not to fulfil his obligations under the contract. If that process had been arrested at any point previously to the receipt of the letter,—possibly at any point previously to its being read,—the communication would not have been complete,—there would have been a locus paenitentiae for the defendant. Had the defendant after posting his letter availed himself of his opportunity to repent by means of a telegram cancelling the letter it cannot be contended that plaintiff would have had any right of action for a breach of the contract. The posting of the letter in Ontario, in that case would not have constituted an actionable breach. The communication not being complete until the notice from the defendant was received, I should have concluded but for the reasons appearing in the next following paragraph, that there was a breach within the Province of the contract to accept and pay for the vessel to be constructed by the plaintiff.

In the case of Cherry v. Thompson (1872), L.R. 7 Q.B. 573, 41 L.J. (Q.B.) 243, it seems to have been held that a breach of contract to marry occurred in Germany when a letter was posted in Germany addressed to the plaintiff in England. But this ruling might possibly be ignored by treating it as an obiter dictum because the Court had already decided that the action could not be brought in England unless the whole cause of action had arisen there, and the contract to marry had been made in Germany. The only other case I know of by which this Court could be bound is that of Holland v. Bennett, [1902] 1 K.B. 867. I am unable to reconcile the ratio decidendi of this case with the grounds upon which I should have come to the conclusion that there was in the present case a breach within

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the Province, and equally unable to find any distinction in this case which will enable me to hold that there was not a breach of the contract when the letter was posted in Ontario. Nor is it open to me to argue that while the posting of the letter in Ontario was a breach, the breach was continuous and was also, therefore, a breach within this jurisdiction, because in both the English cases referred to the order for service out of the jurisdiction was refused on the ground, not merely that there had been a breach outside the jurisdiction, but that there was no breach within the jurisdiction. But I cannot follow these cases without rejecting the authority of decisions and dicta by Courts and Judges which have been established beyond doubt to my mind that apart from the rule regarding the acceptance of an offer and the rule that a notice of dishonour posted to the address of the party in default is sufficient without actual communication, no communication by letter is complete until it reaches the person to whom it is addressed. But for the case of Holland v. Bennett, therefore, I should have been inclined to hold that there was a breach of this contract in this Province when the letter from the defendant was received by the plaintiff and that the order for service out of the jurisdiction was properly granted.

Fortunately for the plaintiff in this case the posting of the letter repudiating defendant's obligations under the contract is not the only breach which it is open to him to assign. The defendant could not by repudiating his obligations put an end to the contract. The consent of both parties is required to discharge a contract as it is for the making of one. The defendant under the agreement was obliged to "advance money from time to time as required." It would be a fair question for a jury to consider whether the plaintiff was not justified in demanding an interim payment on account. The writ was not issued until December 17, and an explicit request was made on November 27 for a cheque for two or three thousand dollars which can be fairly read as the request for a payment on account of the vessel to which these proceedings relate. The whole paragraph is as follows:—"I would appreciate if you would send me a cheque for two or three thousand dollars if convenient. I have the keel out for the new schooner and to work cutting the frame and as I will have a pay day soon I would be glad to have this cheque." The particular breach here suggested is not referred to in the writ of summons, but no statement of claim has been delivered and I assume that it is competent

for the plaintiff in his statement when delivered to assign it as a breach. If the failure to pay the amount requested was a breach it was undoubtedly a breach within the Province and it is not the function of the Court to inquire as to the validity of the plaintiff's contentions on the motion for leave or on the present motion to set aside the service. The question for the Court would have been a simpler one than it is if the application for leave to serve out of the jurisdiction had not been based restrictively upon the breach specifically assigned, but I think that where it appears to us that a claim may fairly be made under the writ in respect of breaches occurring within the Province, we should not deprive the plaintiff of the opportunity to bring them forward by setting aside the service. For these reasons I am of opinion that the present application should be dismissed.

Ritchie, E.J.:—I agree in the conclusion arrived at by the Chief Justice.

Chisholm, J., concurs with Harris, C. J.

Mellish, J.:—In my opinion a breach of contract within the jurisdiction as contemplated by Order XI. is disclosed on this application and should therefore be refused.

Application dismissed.

MURPHY v. BARR.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. September 9, 1921.

Fraudulent Conveyances (§VIII.—40)—Mineral Claim—Owners in Equal Shares—Conveyance Taken in Name of One—Fraudulent Transfer of Whole Claim—Remedies of Parties.

Where two persons have an equal interest in a mineral claim and a conveyance of the claim is taken in the name of one of the parties, such party becomes a trustee of an undivided one-half interest for the other party, and where the party in whose name the conveyance is taken obtains it from the other party by fraud and conveys the whole interest in fraud of the rights of such other party, the Court will order a reconveyance of the one half interest of such party or if the parties refuse to re-convey will make a vesting order.

APPEAL by plaintiff from the judgment of a County Court Judge in an action for a reconveyance of an undivided one-half interest in a mineral claim fraudulently conveyed. Reversed.

D. Donaghy, for appellant; E. C. Mayers, for respondent.

Macdonald, C.J.A.:—The evidence clearly enough shews that the plaintiff and defendant were to have equal interest in the mineral claims in question, indeed that is hardly dis-

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puted, and has been, in effect, found by Forin, County Court Judge.

The conveyance of the claims was taken to the defendant, but before this the correspondence shews that the defendant requested the plaintiff to procure the deed either in their joint names or to the defendant, the latter course having been adopted, the defendant was a trustee for the plaintiff of an undivided one-half interest in the claims.

The Judge thought that the arrangement between them was a sharing of the profits rather than a sharing of the claims; he thought the defendant was authorised to make a sale without consulting the plaintiff with liability merely to account to the plaintiff for one-half of the profits.

While the deed was taken to defendant it was retained by the plaintiff and some time after the purchase, defendant wrote asking to have the deed sent to him. Plaintiff not wishing to part with the deed until his interest was protected, forwarded the deed to a bank in Philadelphia, where the defendant resides, to be delivered to the defendant when the defendant had executed a deed of plaintiff's one-half interest in the claim to a Mrs. Leonard, plaintiff's sister, who was to be trustee thereof for the plaintiff. This the defendant did. Subsequently the defendant called upon Mrs. Leonard and represented that he wished to obtain this deed from her in connection with the payment of taxes upon the claims, and thereby prevailed upon her to give it to him. It could not be disputed that this transaction was a dishonest one and that this deed had been obtained from Mrs. Leonard by false pretences. Neither was it disputed that later on the defendant was guilty of falsehood when he alleged he had destroyed this deed. There is another falsehood also contained in his dispute note, where he alleges that he bought Mrs. Leonard's interest. His conduct throughout has been most reprehensible, while that of the plaintiff and Mrs. Leonard appears to me to have been in accordance with perfect good faith and honourable dealing.

Having got the deed from Mrs. Leonard the defendant made a sale of the property without notice to the plaintiff or Mrs. Leonard, but the plaintiff hearing of the sale from other sources, immediately issued the writ in this action and filed a certificate of lis pendens before application was made to register the deed to the defendant's vendee. The plaintiff in this action claims what he has a perfect right to, namely, an order that his undivided one-half interest shall be reconveyed to him. Neither the defendant nor his ven-

dee in the circumstances above related, have any ground for resisting that claim.

The appeal should, therefore, be allowed, and a decree made accordingly. If the defendant will not re-convey, there should be a vesting order.

Martin, J.A., would allow the appeal.

Galliher, J.A.:—I would allow the appeal.

McPhillips, J.A. (dissenting), would dismiss the appeal.

Appeal allowed.

GUILLEMETTE v. THE KING.

Quebec Court of King's Bench, Appeal Side, Lamothe, C.J., and Lavergne, Pelletier, Martin and Greenshields, JJ. November 25, 1919.

Depositions (§I—1)—Commission in Criminal Case to Take Testimony Ex Juris for the Crown—Provision for Attendance of Defendant's Counsel on Viva Voce Examination—Expenses of Counsel Not Provided by Crown as Recommended in Court Order—Reservation of Right to Make Further Order—Conviction Based upon Irregular Depositions Quashed—Cr. Code secs. 355, 997.

A conviction based upon Commission evidence taken in a foreign country on behalf of the Crown without the attendance of counsel for the accused will be set aside if it appears that exception was duly taken at the trial to the admission of such testimony; that the notice for which the order for commission provided had not been given to counsel for the accused, and that the consent of the accused to an open commission in lieu of one for interrogatories and cross-interrogatories was induced and given upon the understanding that the Crown would provide funds to enable counsel for the accused to be present at the examination of the witnesses under the Commission ex juris, and that his right in this respect was protected by a reservation of the right to make further order if the Crown failed to pay the expenses of defendant's counsel as recommended by the Court order.

APPEAL by the accused by case reserved on questions of law.

The appellant was accused of the theft of a sum of money, before the Court of the Sessions of the Peace, presided over by Mr. Justice Bazin. The Crown presented a petition before Mr. Justice Martin, one of the Judges of the Court of King's Bench, for the issue of a rogatory commission, and such was ordered (R. v. Guillemette (1919), 30 Can. Cr. Cas. 276).

This commission was executed, but the defence took exception as follows to the production of the Commissioner's report:

"Objection to the production of the Commissioner's report and the depositions annexed thereto, before Judge Bazin,

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the said report having been made and said depositions taken in virtue of a rogatory commission ordered in this case on the 27th of January, 1919.

The grounds of the accused for his objection to the report and depositions are the following, as appears from the statement of facts prepared by Mr. Justice Bazin:—

1. The accused was not present when the witnesses, who gave these depositions, were heard, and the Crown did not take the means to assure itself that the accused would be present when said depositions were taken.

2. The accused was not represented by attorney at the examination of said witnesses and the taking of their depositions, and the Crown, in spite of the recommendation of Mr. Justice Martin, of the Court of King's Bench, to that effect, at the time of the issue of the commission, did not take the means to facilitate the presence of the attorney for the accused at the examination of said witnesses and the taking of said depositions.

3. The accused was unable, either personally or by attorney, to hear the evidence of said witnesses, or to cross-examine them, or to procure on the spot other witnesses to verify the statements made.

"Montreal, March 7, 1919."

These objections were dismissed by the Court of Sessions of the Peace, which nevertheless reserved, for the decision of the Court of Appeal, the questions set forth in the judgment which follows.

J. A. Pilon, for the appellant.

Lafortune and Walsh, for the Crown.

Judgment:—"Seeing the following questions were reserved for the decision of this Court:—

"Was there error:—

"1. In deciding that the execution, return and filing of the commission herein issued on January 27, 1919, was legal, and that the depositions of witnesses examined by the commissioner appointed were admissible in evidence on behalf of the Crown?

"Was there error:

"2. In finding fraudulent intention on the part of the accused in respect to the alleged theft, conversion or omission, in view of the settlement effected between the principal, viz.: J.A. Guillemette Limited, and the present accused?

"Was there error:

"3. In deciding that it was not necessary to obtain the sanction of the Attorney-General before commencing and prosecuting the present proceedings?

"Considering that by the judgment rendered on January 27, 1919, ordering the issue of a commission regatoire, it was among other things ordered and enjoined, that three days' previous notice in writing of the day, hour and place at which the examination of said witnesses will begin to be made should be given counsel for accused. It was further stated in said judgment: "It is recommended that the Crown should pay the reasonable fees and expenses of counsel for the accused, the amount of such fees to be arranged by counsel representing the parties. Failing such arrangement reserve is made to make such further order respecting the same as to law and justice may appertain";

"Considering that no notice was given by the Crown to the accused or to his counsel, in writing or otherwise, of the day, hour and place at which the examination of the witnesses examined under the said commission would take place, and, as a matter of fact, neither the said accused nor his counsel were present at the said examination, and no opportunity was given the accused or his counsel to cross-examine said witnesses;

"Considering, moreover, that the Crown never offered any amount of money to the accused or his counsel to cover the reasonable fees and expenses of the accused and his counsel in connection with the execution of said commission, and no arrangement was arrived at touching the amount thereof or the payment thereof;

"Considering that the consent of the accused to dispense with interrogatories and cross-interrogatories was induced and given upon the understanding that the Crown would provide funds to enable the accused or his counsel to be present at the examination of the witnesses for the purposes of cross-examination;

"Considering, moreover, that failing an agreement or arrangement being made, the accused would have the right to withdraw and cancel his consent to an open commission and obtain a further order respecting the same;

"Considering that the execution, return and filing of the commission herein was illegal, and the depositions of the witnesses examined by the commissioner appointed were inadmissible in evidence on behalf of the Crown:

"The Court of Our Sovereign Lord the King, doth adjudge and declare that the conviction of the accused by

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MEYER v. AMERICAN EXPRESS CO.

Adolphe Bazin, esquire, Judge of the Sessions of the Peace, was illegal, and doth cancel and annul the same, and doth order a new trial."

MEYER v. AMERICAN EXPRESS CO.

Quebec Superior Court, Archer, J. March 16, 1921.

Carriers (§III.C—392)—Goods in Warehouse—Awaiting Documents to be Supplied by Shipper—Damage Caused by Rats—Liability of Carrier.

An express company is liable as a warehouseman for damage to goods while in its warehouse awaiting documents to be furnished by the shipper before the goods can be shipped. This liability does not include damage caused by rats.

ACTION to recover the amount of damages caused to goods while in the warehouse of an express company, awaiting documents to be supplied by the shipper before the goods could be shipped. The goods were delivered in good condition. Upon arrival at Malone, N.Y., the consignment was held up by the United States Government authorities owing to the lack of a war trade export license which was then necessary. The damage complained of was caused during this delay at Malone.

The defendant pleads that as the cause of the delay was beyond its control, it could not be legally held responsible in damages.

Markey, Skinner and Co., for plaintiffs.

Fleet, Falconer and Co., for defendants.

Archer, J.:—Considering it is proven that during the month of February, 1918, the plaintiff purchased from Thos. Wolstenholme Sons & Co., of Philadelphia, certain quantities of woollen yarns, which were delivered in good order to the defendant for shipment to plaintiff, and in particular three cases which were shipped on February 2, 4, and 7, 1918, respectively; that upon arriving at Malone, N.Y., the cases were held by the U.S. Government authorities owing to lack of necessary War Trade Export License, a cause of delay which was entirely out of the control of defendant; that when said cases arrived in Malone, their contents were in good condition; that upon the cases being held up for the above reasons, the defendant placed said goods in their warehouse; that it is only at the end of December, 1918, that the defendant received the documents necessary to obtain the authorisation to export the cases from the United States; that said goods were then taken out of the warehouse and reshipped to the plaintiff at Montreal, and the

goods received by him on or about January 9, 1919; it is proven that whilst said goods were in defendant's warehouse awaiting the documents which were to be furnished by either plaintiff or the shippers, said goods were damaged which damages amount to $112.61; that when the goods were so damaged, said goods were in possession of the carriers as warehousemen only and defendant's liability is not as common carriers but as warehousemen; that art. 1805 C.C. (Que.) enacts: "1805. The depositary is only held to restore the thing deposited, or such portion of it as remains, in the condition in which it is at the time of restoration. Deteriorations not caused by his fault upon depositor"; that under the circumstances proven defendant cannot be held liable for the damages caused by rats, but must be held liable for the other damages which amount to $50.88;

Doth condemn defendant to pay plaintiff the sum of $50.88 with interest and costs.

Judgment accordingly.

NATHANSON v. CAMPBELL.

Nova Scotia Supreme Court, Russell, J., Ritchie, E.J. and Mellish, J. April 2, 1921.

Covenants and Conditions (§II.B—10—Vendor and Purchaser — Lien Against Land for Sewerage Rates — Lien an Incumbrance—Implied Undertaking on part of Vendor that he will Discharge—Liability to Purchaser for Amount of—Right to Pay Amount into Court and Apply for Stay of Execution on Judgment for.

A lien attaching by statute to lands for sewerage rates is an incumbrance against the land and there is an implied undertaking on the part of the vendor that he will discharge such liens to the exoneration of the purchaser, and such vendor is liable to the purchaser for the amount of the lien. If he fears that he will still continue liable to the city notwithstanding that he pays the amount to the purchaser, he has a right to pay the sewerage rates to the city and the costs of the action to the plaintiff whereupon he can apply to the Court for a summary process equivalent to the old procedure of audita querela to stay execution on the judgment.

APPEAL from the trial judgment in an action on a covenant in a deed that the lands were "free from incumbrance.". Allowed in part.

W. F. Carroll, K.C., for appellant.

T. R. Robertson, K.C., for respondent.

Russell, J.:—I concur in the opinion of Mellish, J. If the law holds the owner who has parted with his property liable nevertheless for sewerage rates the defendant could

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have discharged the lien by paying them. If he fears that he will still continue liable notwithstanding he pays the amount of the plaintiff I think he has a right to pay the sewerage rates to the city and the costs to the plaintiff whereupon he can apply to the Court by a summary process equivalent to the old procedure of audita querela to stay execution on the judgment.

Ritchie, E.J.:—The covenant is that the lands are free from all incumbrances. The sewerage rates in question are by the express words of the statute made a lien on the property. It is quite impossible to hold that this statutory lien is not an incumbrance. It is an incumbrance and charge upon the property just as a mortgage would be a charge and incumbrance. The legal result, in my opinion, is that the plaintiff is entitled to recover the $60, though he has not yet paid it. I would allow the appeal with costs.

Mellish, J.:—This is an action on a covenant in a deed from the defendant to the plaintiff that the lands conveyed are "free from incumbrances."

The "incumbrance" complained of is a lien attaching by statute to the lands for sewerage rates in the City of Sydney.

There appears to have been a written agreement for sale which was not put in evidence and the defendant sets up an oral agreement by which the plaintiff undertook to discharge the lien before the deed passed. If he made any such undertaking one would naturally expect that the amount necessary to discharge the lien would be deducted from the price to be paid by the purchaser, which does not appear to have been done. I take it that the trial Judge finds that no such agreement was made; consequently the admissibility of the evidence going to establish it need not be considered. The action, however, was dismissed presumably upon the ground—although it is not very clear—that the lien created by the statute was not an "incumbrance." I am inclined to think it is such, and am further of opinion that there is an implied undertaking on the part of a vendor of real estate that he will discharge such liens to the exoneration of the purchaser and the property. Stock v. Meakin, [1900] 1 Ch. 683, at p. 694. It was contended, however, on behalf of the defendant that the plaintiff can only recover nominal damages, as it does not appear that he has himself discharged the lien. This

might, perhaps, on principle be a valid contention, especially if the defendant is personally liable to the city for the sewerage charge amounting to $60.10. I cannot discover that such personal liability does not exist. There is a provision in the Halifax City Charter, para. 654, by which an owner of land "subject to a lien payable by instalments" ceases to be personally liable for instalments becoming payable after a sale of the land by such owner, but I do not find any such provision applicable to the City of Sydney. And the defendant's contention is supported by American authority. But admittedly it does not hold good in the case of a covenant to pay off incumbrances. Barrowman v. Fader (1898), 31 N.S.R. 20. And the English rule adopted in the case just cited appears to be uniform. In Mayne on Damages (9th ed.), p. 214, there is the following statement:—"A covenant against incumbrances does not seem to differ in principle from a covenant to pay them off." For this proposition is cited the observations of Lord Tenterden, C.J., and Patteson, J., in the case of Lethbridge v. Mytton (1831), 2 B. & Ad. 772, 109 E.R. 1332.

The incumbrance here is not a contingent one and consequently I think the plaintiff should recover the amount claimed with costs including the costs of this appeal.

Appeal allowed.

RE WONG SUEY MONG.

British Columbia Supreme Court, Macdonald, J. August 3, 1921.

Aliens (§I—3)—Chinese Boy—Admission into Canada—Domicile of Father Not to be Appropriated to—Review of Decision of Board of Inquiry by Court.

The domicile acquired under the Chinese Immigration Act, R.S.C. 1906, ch. 95, gives only a personal right, and the domicile acquired by a Chinese father cannot be appropriated to his son, 12 years old, who has lived all his life in China, so as to give him a right to enter Canada under the Act.

A decision of the Board of Inquiry refusing to allow a Chinese boy to enter Canada cannot under the Immigration Act be reviewed by the Court.

[See In re Wong Sit Kit, (1921), 36 Can. Cr. Cas. 36.]

APPLICATION for writ of habeas corpus to obtain a discharge of a Chinese boy claiming to enter Canada as the son of a merchant. A Board of Inquiry at the City of Vancouver, B.C., under the Immigration Act, 1910, ch. 27 (Can.), ordered him deported as a prohibited immigrant

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under P. C. 1202. It was contended that the boy's father, having resided for some years at Sydney, Cape Breton, had obtained domicile in Canada, and that this domicile inured to the benefit of the son, who thereby had Canadian domicile. Application dismissed.

F. T. Congdon, K.C., for applicant.

R. L. Reid, K.C., for Dominion Government.

Macdonald, J.:—It is contended that this boy, 12 years of age, is illegally being detained and that his admission to Canada should be allowed. The principal point in support of that contention, as I understand it, is that his father resided for some years at Sydney in Cape Breton, and that this boy coming here is entitled to enter Canada: in other words, that the domicile which his father gained in Canada can be appropriated, as it were, to this boy, who has lived his lifetime in China. I dealt with an argument of this nature in Victoria a short time ago; I think it unnecessary to repeat what I then said. Shortly, I consider this portion of the Chinese Immigration Act, R.S.C., 1906, ch. 95, gives only a personal right; in other words, that it is restricted to the statutory domicile there described. It creates the right of certain parties to enter Canada, or being in Canada to obtain such right through domicile and thus allow re-entry afterwards. As far as the nature of the employment in which this boy might be engaged is concerned, I do not think, in view of my remarks in the case of Re Wong Sit Kit (1921), 36 Can. Cr. Cas. 36, that it has any application so as to affect the decision of the authorities, acting under the Immigration Act, 1910, ch. 27, and who refused his admission. As I have already remarked, I think their decision is not subject to review by this Court. As to the form of the Order in Council, it is not material under the aspect of the case. I consider that the Immigration Act applies and the applicant has been refused under its terms by the authorities.

Judgment accordingly.

FORBES v. JEAN K. GIT.

Judicial Committee of the Privy Council, Lord Buckmaster, Lord Atkinson, Lord Sumner, Lord Wrenbury, and Lord Carson. December 20, 1921.

Contracts (§IID—188)—Construction—Irreconcilable Clauses.

If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails, but if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole.

[Furnivall v. Coombes (1843), 5 Man. & G. 736, 134 E.R. 756 referred to as an illustration of the former case; Williams v. Hathaway (1877), 6 Ch. D. 544, as an illustration of the latter.]

APPEAL by special leave from the judgment of the Supreme Court of Canada (1921), 59 D.L.R. 155, 62 Can. S.C.R. 1. The appeal involved the construction of a contract for altering a building so that it could be used as a restaurant. The County Court Judge by whom the action was tried, held that certain clauses were repugnant and gave effect to the earlier one; this decision was reversed by the Supreme Court of Ontario (Appellate Division), which decision was in turn reversed by the judgment of the Supreme Court of Canada, and this decision is now reversed by the Privy Council, the judgment of the Appellate Division of Ontario being restored. Their Lordships did not find that the Judges of the Supreme Court of Canada differed on the point of law as set out in the headnote, or doubted that the principle to be applied was as stated, but four of them found while the Chief Justice and Duff, J., did not find repugnancy between the clauses.

The judgment of the Board was delivered by

Lord Wrenbury:—The appellant is a building contractor. The respondents are restaurant keepers, who may be called the building owners. The question on the appeal is as to the construction of a contract between these parties for works of alteration, construction and fitting up in a restaurant and public dining room on the first floor over 119½ King St. East, in the City of Hamilton. The contract is dated March 5th, 1919, and is made between the building owners of the first part and the contractor of the second part. The relevant clauses are three in number, and for convenience will be referred to as the first, second and third clauses.

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After a recital that the contractor has agreed to supply certain materials and perform certain services, the deed proceeds by the first clause as follows:—

"Now this agreement witnesseth that in consideration of the sum of three thousand dollars ($3,000.00) to be paid as follows: One thousand dollars ($1,000.00) on the signing of this agreement, further sum of one thousand dollars ($1,000.00) when it appears to the satisfaction of all of the parties hereto that materials have been furnished and services performed to the extent of twenty-five hundred dollars ($2,500.00) and the balance or sum of one thousand dollars ($1,000.00) thirty days after the completion of this agreement, the party of the second part covenants, promises and agrees to and with the parties of the first part that he will furnish the materials hereinafter mentioned and will perform services as hereinafter set forth."

The deed then details the work to be done and the materials to be supplied. These leave such things as the size of a mirror, the size and location of a private sleeping room and the size and location of two public dining rooms "to be agreed upon between the parties."

The deed then proceeds by the second clause as follows:—

"The parties of the first part covenant with the party of the second part that if it is ascertained upon the removal or the attempting to remove the partition or partitions that the construction of the building will not permit such removal without serious damage to same then this agreement is to be at an end and the parties of the first part will reimburse the party of the second part for labour expended up to such time and the party of the second part covenants that he will return so much of the one thousand ($1,000.00) payment as remains after satisfying his claim for labour performed.

Next follows the third clause which runs as follows:—

"The parties of the first part covenant with the party of the second part that in the event of the materials to be supplied and the labour performed amounting in value to more than three thousand ($3,000.00) then the parties of the first part will reimburse the party of the second part for such excess. The party of the second part covenants that in the event of such labour and materials being less in value than three thousand ($3,000.00) then the final payment will be the actual amount expended by the party

of the second part over two thousand ($2,000.00) plus twelve and one-half per cent. instead of one thousand as above stated. In estimating the value of the materials to be supplied and the labour performed the party of the second part on the final settlement of the amount due under this agreement shall produce all accounts paid by him for labour and materials and shall be entitled to the amount ascertained as paid by him for labour and materials plus twelve and one-half per cent."

The work to be done as described in the contract was very largely varied, added to and departed from, not merely by the addition of extras, but by substantial and extensive alterations in the scheme.

A dispute arose between the parties as to the amount payable by the building owners. The contractor brought an action against the building owners in the County Court at Hamilton to recover $3,830.36, being as he alleged the amount due to him on the footing that under the third clause he was entitled to the difference between a sum of $7,010.36, which he said was due under the third clause, and the sum of $3,180, which had been paid him on account. The County Court Judge held that the third clause was repugnant to and inconsistent with the first clause and was to be rejected, and he gave judgment only for the $3,000 under the first clause, with the addition of the value of certain changes (that is to say, additional work) which he identified.

The Supreme Court of Ontario reversed this judgment, holding that the first and third clauses were to be read together and effect was to be given to the third clause.

On appeal the Supreme Court of Canada (1921), 59 D.L.R. 155, 62 Can. S.C.R. 1, reversed the judgment of the Supreme Court of Ontario and restored the judgment of the County Court Judge. By special leave the case is brought on appeal to this Board.

The principle of law to be applied may be stated in few words. If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails. In this case the two clauses cannot be reconciled and the earlier provision in the deed prevails over the later. Thus if A covenants to pay £100 and the deed subsequently provides that he

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shall not be liable under his covenant, that later provision is to be rejected as repugnant and void, for it altogether destroys the covenant. But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole. Thus if A covenants to pay £100 and the deed subsequently provides that he shall be liable to pay only at a future named date or in a future defined event or if at the due date of payment he holds a defined office, then the absolute covenant to pay is controlled by the words qualifying the obligation in manner described.

Furnivall v. Coombes (1843), 5 Man. & G. 736, 134 E.R. 756, is an illustration of the former case: Williams v. Hathaway (1877), 6 Ch. D. 544, is an illustration of the latter.

In the latter case there could be no question if the later provision of the deed were introduced by the word "but" or the words "provided always nevertheless," or the like. But there is no necessity to find any such words. If a later clause says in so many words or as matter of construction that an earlier clause is to be qualified in a certain way, effect can be given and must be given to both clauses.

Their Lordships do not find that any of the Judges in the Supreme Court of Canada differed upon this point or doubted that the principle to be applied is such as stated above. But four of them found, while Davies, C.J., and Duff, J., did not find, repugnancy between the first clause and the third. To ascertain whether such repugnancy exists it is necessary to scrutinise the deed.

The first clause provides that in consideration of a certain sum payable in certain instalments the contractor will furnish certain materials and perform certain services. The second clause says that in a certain event that sum is not to be paid, that the agreement is to be at an end and payment is to be made only for labour expended. The operation of the first clause is therefore obviously qualified by the second clause. The first clause, therefore, does not prevail in every event. It falls to the ground in the event named in the second clause.

Then comes the third clause, on which the question arises: If this were introduced by the word "but" or the words "provided always nevertheless" there would be no

room for argument. Their Lordships cannot find that the absence of such words makes any difference. The third clause does not destroy the first, but qualifies it. Its effect may be said to be to make the $3,000 of the first clause an estimated sum whose accuracy is to be tested and controlled by taking the accounts for which provision is made in the third clause. The obligation of the first clause is qualified not only by the second clause (as it obviously is), but by the third clause also. Their Lordships find no difficulty in reading the first and third clauses together and giving effect to the intention disclosed by the deed as a whole.

There is another consideration leading to the same result which their Lordships desire to add. If the first clause stood alone it may well be that the contractor bound himself to do certain work and to accept as payment an agreed sum of $3,000 payable in certain instalments. But the clause does not necessarily bear that meaning. It may mean that in consideration of $3,000 payable by certain instalments he binds himself to do certain work for a sum which you will presently find defined. If one farmer says to another, "In consideration of your inviting me to your Christmas dinner I will make your hay for you next summer," he does not necessarily mean that the dinner will be accepted as the price of making the hay—he may mean that if he is invited to dinner he will bind himself to find the time and the necessary implements and the labour for making the hay when the summer comes, leaving the amount to be paid for the work to be determined later. When Anglin, J., says, at p. 163 (59 D.L.R.):—"By the first clause of a contract under seal the plaintiff 'covenanted, promised and agreed' to do certain specified work in the nature of alterations to a building for the sum of $3,000 payable in three instalments of $1,000 each"; and when Mignault, J., says, at p. 168: "The first Court considered absolutely irreconcilable the clause in the contract that the respondent would for the sum of $3,000 perform the work and furnish the materials specified"; and again, at p. 168: "The work by the first clause is to be performed for a fixed price"; neither of those Judges is correctly quoting the contract. There is no contract in the first clause to do the work for $3,000. The contract is that in consideration of $3,000 he will do the work. It is necessary to read the con-

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tract as a whole to see whether the $3,000 is to be the contract price for the work, or is to be a payment for undertaking the obligation to do the work. If there were no third clause it may well be that the $3,000 would be the contract price, but looking at the third clause their Lordships do not find that it is.

For these reasons their Lordships are of opinion that the judgment of the Supreme Court of Ontario was right —that this appeal should be allowed and the order of the Supreme Court of Ontario should be restored and that the appellant should have his costs here and in the Supreme Court of Canada, 59 D.L.R. 155, 62 Can. S.C.R. 1. They will humbly advise His Majesty accordingly.

Appeal allowed.

RE TRADEMARK OF GRAY DORT MOTORS LTD.

(Annotated)

Exchequer Court of Canada, Cassels, J. November 19, 1920.

Trademark (§II—9)—Particular Words—Long Use of—Right to Registration.

The words "Gray Dort" forming a prominent feature of a trademark and being such that had the applicants used it alone they would have been entitled to have it registered, the Court held that the words at the top "Own a" and the words underneath "You will like it" should not vitiate their right and that they were entitled to registration with these words included.

[Standard Ideal Co. v. The Standard Sanitary Mfg. Co., [1911] A.C. 78; Perry Davis & Son v. Lancaster Harbord (1890), 15 App. Cas. 316; In re Burfords & Co. Limited's Application [1919], 2 Ch. D. 28, referred to. See also Annotation following this case.]

PETITION of the Gray Dort Motors, Ltd., praying for an order of this Court directing the registration of the words "Gray Dort" in the middle of a circle on the border of which are words "Own a" at the top, and "You will like it," at the bottom as a trademark to be used in the sale of their motors. Petition granted.

M. G. Powell, for petitioners.

No one appearing for the Minister of Trade and Commerce.

The President of the Court:—The petitioners, Gray Dort Motors, Limited, are a Canadian corporation having their head office in the city of Chatham. They were incorporated on October 25, 1915. They ask for registration of a specific trademark consisting of a "round circle" in the

centre of which are the words "Gray Dort," the border of the said trademark bearing the words "Own a" at the top, and the words "You will like it" at the bottom.

The advertisement required before the application is made states that notice is given that a petition of "Gray Dort Motors, Limited," etc., that a certain trademark described in said petition consisting of a circle in the centre of which are the words "Gray Dort," the border of the said trademark bearing the words "Own a" at the top, and the words "You will like it," at the bottom, be registered.

A large number of affidavits have been filed shewing that a large business has been built up, and that this specific trademark, including the words above the circle, has been attached to every motor sold.

For a considerable time I had doubts whether a trademark, such as I have described, contained the essentials of a trademark, having regard to the fact of these words "Own a," and "You will like it," being included as part of the trademark.

The Privy Council, in the case of the Standard Ideal Co. v. The Standard Sanitary Mnfg. Co., [1911] A.C. 78, 80 L.J. (P.C.) 87, 27 R.P.C. 789, have practically stated that under the subsequent sections of the Trademark Act, R.S.C. 1906, ch. 71, there must be the essentials of a trademark, and that our decisions followed the line of decisions in England.

In the case of Perry Davis & Son v. Lancaster Harbord (1890), 15 App. Cas. 316, the application was made for the registration of the words "Pain Killer." It is true the cases differ to a certain extent, but on one point their Lordships agree that what was used as the trademark was not the words "Pain Killer" alone, but "Perry Davis' Vegetable Pain Killer." Lord Halsbury, for instance, at p. 320 states as follows:

"Now, finding this difficulty in his way, the learned counsel ingeniously contended that the word 'pain killer' alone, dissociated from everything else, was what had been used. As a matter of fact I find against him on that, as each Court in turn has found against him. The evidence negatives it. It appears to me that that which was registered as a trademark was used as a trademark together with the words 'Perry Davis,' and 'vegetable,' the one set of words forming, to my mind, just as much part of the trademark as the other."

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Lord Herschell says at p. 322:

"Now, how has the appellant in this case marked, identified or distinguished his goods? Not merely by putting upon them the words 'Pain Killer,' but by putting on them the words 'Perry Davis' Vegetable Pain Killer.' It seems to me impossible to say that he has used the words 'Pain Killer' as his trademark."

And Lord Macnaghten's words are to the same effect (at p. 322): "It seems to me also, upon the evidence to be perfectly clear that the appellant did not use the words 'Pain Killer' separately and alone as his trademark."

In this particular case on the face of the petition and by the advertisement, the words "Gray Dort" have not been used alone, but always with the words "Own a" at the top, and underneath it "You will like it." The reason I mention it is that on the argument before me, Mr. Powell contended that if the applicant be not entitled to a trademark as prayed, that at all events they should be entitled to register the words "Gray Dort."

There is no question about it, that on the trademark as shown by the petition, and in the affidavits, the words "Gray Dort" form the prominent feature of the trademark and one which would strike the eye. Had the applicants used as their trademark the words "Gray Dort" alone, I think on the evidence of 5 years user they would have been entitled to registration.

The decision in the Court of Appeal in the case of In re H. G. Burford's & Co. Limited's application, [1919] 2 Ch. D. 28, 88 L.J. (Ch.) 186, 36 R.P.C. 139, might be referred to. That was an application for registration of the word "Burford." In that case the trademark had been used for only 3½ years, but notwithstanding that, the Court of Appeal overruled the decision of Sargant, J., who had refused to allow the registration.

A considerable amount of stress is laid upon the fact that a large amount of capital is necessary to be expended in the construction of works to turn out automobiles, and in this respect it differs from articles of a small kind.

I have come to the conclusion that on the evidence before me the petitioners have brought themselves within the decision I have just quoted if the trademark was "Gray Dort" alone. After some doubt I have come to the conclusion that their trademark should not be vitiated by the use

of the words above and below the scroll. For a considerable time I thought taking the whole trademark as claimed it was merely an advertisement. ANNOTATION.

I have come to the conclusion, not without doubt, that the fact that they have above the circle "Own a," and below "You will like it" should not have the effect of vitiating their right.

Also, as I have said on more than one occasion, the owner of a trademark cannot bring an action unless his trademark is registered. The registration does not make it a valid trademark if contested in the Courts. It merely has the effect of shifting the onus.

I think that an order should go directing the registration of the trademark as applied for.

Judgment accordingly.

ANNOTATION

by

Russel S. Smart, B.A., M.E., of the Ottawa Bar.

REGISTRABILITY OF SURNAME AS TRADEMARK.

An annotation on the registrability of a surname as a trademark may be found at 35 D.L.R. 519.

Since the date of that annotation, a considerable number of surnames have been registered by Order of the Exchequer Court in Canada, and in England the Courts have indicated a somewhat greater degree of liberality in registering surnames upon proof of extensive use.

In the case of Re Lodge Sparking Plug Co., Ltd. (1918), 35 R.P.C. 222, Neville, J., ordered the word "Lodge" registered, holding that, while not particularly rare, it was not a common surname. The word "Burford" was refused registration by the lower Court but was allowed on appeal although its use had dated only from 1915. It was shewn, however, that a large business in motor cars had been built up within a short time and that it was the common practice to distinguish vehicles by a surname. The evidence included a number of affidavits from competitors (In re H. G. Burford & Co., Limited's Application, [1919] 2 Ch. D. 28, 88 L.J. (Ch.) 186, 36 R.P.C. 1, 139). The word "Winget" was held by Astbury, J., to be a rare surname and registration allowed upon proof of extended use. In re Wingets Limited's Application (1919), 36 R.P.C. 75. The word "Avery" was also allowed to be registered upon proof that

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it was the only surname in the business, which was established in 1730. W. J. Avery, Limited (1919), 36 R.P.C. 89. On a similar ground, "Eno's Fruit Salt" was registered. In re Eno, Limited (1919), 37 R.P.C. 1.

The foregoing judgment also deals with the situation where a trader uses other material than the tradename sought to be registered.

Many cases have come before the Courts in which a trader has owned and used in his business several different trademarks upon the same article. Independent Baking Powder Co. v. Boorman (1910), 175 Fed. Rep. 448, at p. 453; International Cheese Co. v. Phenix Cheese Co. (1907), 103 N.Y. Supp. 362, 118 App. Div. N.Y. 499; Manufacturing Co. v. Trainer (1879), 101 U.S. Sup. Ct. Rep. 51 at p. 54; Columbia Mill Co. v. Alcorn (1893), 150 U.S. Sup. Ct. Rep. 460, at p. 463; Burton v. Stratton (1882), 12 Fed. Rep. 696, at p. 700; United States Playing Card Co. v. C. M. Clark Publishing Co. (1907), 30 App. D.C. 208, 132 Off. Gaz. Pat. Off. 681.

In Loonen v. Deitsch (1911), 189 Fed. Rep. 487, the Court held where complainant, a manufacturer of toothbrushes, used as trademarks on the back a star-inclosed "L" and the word "Comilo," and thereafter placed on the front of the handle a red cross and the legend "Red Cross Brush," and the latter mark was shewn to have been accepted by the public as indicating brushes made by complainant, it was no objection to complainant's use thereof that he had previously adopted and still used the marks on the back. In principle, there is no possible ground for refusing to recognise any number of trademarks which are really such. That is to say, if a man can shew that the public has in fact come to recognise six marks each as separately indicating his manufacture, even though they are used together, it should be no concern of the Court to interfere.

RE McCABE ESTATE.

Saskatchewan King's Bench, Embury, J. July 23, 1921.

Descent and Distribution (§I.A—4)—Intestacy—Only Nephews and Nieces Surviving—Distribution of Estate.

Where an intestate dies leaving him surviving only children of deceased brothers and sisters, the estate should be distributed amongst these nephews and nieces per capita and not per stirpes.

[Re Smith Estate (1919), 48 D.L.R. 434, followed.]

APPLICATION for directions as to the distribution of the estate of an intestate.

H. Fisher for official guardian; A. C. Ellison, contra.

Embury, J.:—The deceased died intestate leaving surviving him his nephew John Barrett, only son of a deceased sister, and Helen Heagy (before her marriage Helen McCabe), G. F. McCabe, V. W. McCabe, A. J. McCabe, R. M. McCabe, A. P. McCabe, J. E. McCabe and J. R. McCabe, all the children of a deceased brother.

The executors apply to the Court for direction as to whether the estate should be distributed per stirpes or per capita. In the former event John Barrett would receive one half of the estate as a sole heir of a sister of the deceased, and the other eight nephews and nieces one-sixteenth each as the heirs of a brother of the deceased. In case of distribution per capita, the nephews and nieces would share equally.

I do not think that I could do better than adopt the reasoning of Mathers, C.J.M., in the Manitoba case of re Smith (1919), 48 D.L.R. 434, which is directly in point here.

The distribution should be per capita.

Judgment accordingly.

RE ROCKLAND CHOCOLATE AND COCOA CO. LTD.

Ontario Supreme Court in Bankruptcy, Orde, J. March 4, 1921.

Bankruptcy (§IV.—39)—Claim for lien under The Mechanics and Wage Earners' Lien Act—Leave to File Statement of Claim to Enforce and Realise Claim in Accordance with the Bankruptcy Act—Necessity of Obtaining.

In so far as lienholders seek by proceedings under the Mechanics and Wage Earners' Lien Act R.S.O. 1914 ch. 140 to enforce and realise their lien, no leave appears to be necessary under the Bankruptcy Act to file a statement of claim to enforce and realise the lien either in the case of an authorised assignment or when a receiving order has been made. The assignment vests in the trustee only what property the debtor has and the trustee takes it subject to existing liens. A person holding a lien is a secured creditor under sec. 2 (gg) of the Act. It is however desirable that leave should be given in such cases so that the whole amount of the claim of each lienholder may be adjudicated upon in one proceeding and it is proper that it should be obtained in all cases where a lienholder is seeking to enforce his claim to a personal judgment.

[See Annotations, 53 D.L.R. 135, 59 D.L.R. 1.]

APPLICATION for leave to file a statement of claim under the Mechanics and Wage Earners Lien Act, R.S.O. 1914, ch. 140, to enforce and realise a lien in accordance with the Bankruptcy Act, 1919 (Can.), ch. 36, and application to continue an action already commenced.

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RE ROCKLAND CHOCOLATE AND COCOA CO. LTD.

G. Hamilton, for Purdy, Mansell, Ltd.

H. W. Maw, for J. H. Champion.

R. B. Whitehead, for G. T. Clarkson, authorised trustee.

Orde, J.:—Rockland Cocoa and Chocolate Co. Ltd. are insolvent debtors who made an authorised assignment to G. T. Clarkson, an authorised trustee under the Bankruptcy Act, 1919 (Can.), ch. 36. Subsequent to the assignment Joseph H. Champion claimed a lien under the Mechanics and Wage Earners' Lien Act, R.S.O. 1914, ch. 140, filed a statement of claim to enforce and realise his lien in accordance with that Act. This was done without any application for leave under the Bankruptcy Act.

Purdy, Mansell Ltd., another lienholder, now desires to file a statement of claim and applies to the Court for leave, and Champion makes application for leave to continue the action already commenced.

In so far as the lienholders seek by their proceedings under the Mechanics and Wage Earners Lien Act to enforce and realise their lien, no leave appears to be necessary either in the case of an authorised assignment or where a receiving order has been made. The right of a secured creditor to realise his security is fully preserved by sub-sec. (1) of sec. 6. Although sec. 6 deals only with the case of receiving orders, the same rule must a fortiori apply where the debtor has only made an authorised assignment. In any case, an assignment would only vest in the trustee what property the debtor had, and the trustee would take it subject to the existing liens. A person holding a lien is a "secured creditor" under the Act: sec. 2 (gg).

But in mechanics' lien proceedings, it is customary for the lienholder to seek a personal judgment for the amount of his claim, which he can enforce in the event of his lien not realising the full amount which he is entitled to be paid. It would not be expedient that the lienholders in a mechanics' lien action should be restricted in their proof to the amount of the value of the lien, and perhaps be called upon by the trustee to establish their claim to rank as ordinary creditors for the surplus of their claim, especially as the trustee is necessarily a party to the lien actions and they are adjudicated upon by the Supreme Court of Ontario.

It is, therefore, desirable that leave should be given in such cases so that the whole amount of the claim of each lienholder may be adjudicated upon in one proceeding. Is such leave necessary in the case of an authorised assign-

ment? It is undoubtedly necessary if a receiving order has been made against the debtor: sec. 7 sub-sec. (2). But there is no similar provision in the Act in the case of an authorised assignment. But notwithstanding the absence of any express provision to that effect the whole spirit of the Act seems to be opposed to any such proceeding on the part of the creditor without the leave of the Court. Without holding that such leave is really required by the Act, I am of the opinion that it is proper that it should be obtained in all cases where a lienholder is seeking to enforce his claim to a personal judgment under the Mechanics and Wage Earners' Lien Act, and an order will issue accordingly upon each of the applications before me.

A lienholder so seeking to enforce his claim is placed in a difficult position by the provisions of sec. 46 of the Bankruptcy Act, which requires him to file his claim with the trustee and to value his security within 30 days after the making of the authorised assignment, [sec. 46, sub-sec. (3)] with the penalty of being deprived of his right to rank as an ordinary creditor for failing to do so: sub-sec. (10).

Owing to the precarious nature of his security and the difficulty as to valuing it by reason of the uncertainty as to other liens, the time for filing his proof with the trustee and for valuing his security ought to be extended until 15 days after the final adjudication upon the claims of the lien holders in the mechanics' lien actions, and the realisation of the security thereunder, and the orders in the present matters will direct.

The costs of these applications will be costs in the cause.

HATTON v. MORTON.

Alberta Supreme Court, A. Macleod Sinclair, K.C. June 21, 1921.

Damages (§III.I—165)—Remoteness of—Injury by Trespassing Animal—Negligence of Plaintiff—Proximate Cause.

A plaintiff who was injured by a steer which was trespassing on his land not enclosed by a lawful fence, and which he was attempting to drive from his premises, was held not entitled to recover damages. The injury not being an ordinary result of the trespass and not being such as was likely to arise from such an animal, the damages were therefore too remote; but assuming that a steer when heated is likely to attack a human being on foot, the proximate cause of the injury was the negligence of the plaintiff in approaching the animal on foot in his endeavor to drive it from his land.

ACTION for damages in respect of injuries alleged to have been sustained by being attacked by a steer belonging to the defendant. Action dismissed.

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HATTON v. MORTON.

A. A. MacGillivray, for plaintiff.

A. H. Clarke, K.C., for defendant.

A. Macleod Sinclair, K.C.:—This is an action for damages in respect of injuries which the plaintiff alleges he sustained by being attacked by a steer belonging to the defendant.

On the day fixed for the trial of this action, counsel and witnesses for both parties attended at the Court House, when it was found that no Judge was available, and, in order to obviate the expense and inconvenience of securing the attendance of the witnesses at a later date, it was agreed between the parties that I should hear the evidence and determine the matters in issue.

The plaintiff is a relief agent in the employment of the Canadian National Railways. He owns a half section of land within the Municipal District of Grasswold No. 248. This half section is fenced on three sides. On the fourth side the road allowance passes through the farm, there being gates at each end and the fence of the adjoining proprietor runs along his boundary line.

On January 14 or 15, 1920, about 12 head of cattle were found in one of the plaintiff's fields. They remained there until January 23, when one of the plaintiff's sons, who was on horseback, proceeded to turn the said cattle out of the plaintiff's lands. He succeeded in getting 10 head off the land, and was in the act of attempting to chase the other two out when the plaintiff, seeing one steer near the gate, proceeded on foot to drive this steer through the gateway. The steer turned towards the plaintiff and charged him. The plaintiff turned to run away and fell. The steer overtook him and injured him, causing a fracture of the left leg. The plaintiff was taken to the hospital, and the steer was allowed to remain in the field until the following day, when it was driven into a barn and examined by two of the plaintiff's sons.

The plaintiff bases his claim on the following grounds:—1. That the steer in question was of a bad tempered and vicious nature and was liable and accustomed to attack and injure persons to the knowledge of the defendant, his servants and agents. 2. That the steer, at the time of the attack on the plaintiff, was a trespasser on the plaintiff's land and that the defendant is liable for the injuries sustained by the plaintiff. 3. That the defendant does not live nor occupy any land within the Municipal District of Grasswold No. 248, and that under the provisions of By-law No. 5 of

the said Municipal District, sec. 3a, the defendant is liable. The said sec. 3a is as follows:—"Animals not the property of residents, shall not be permitted to be at large within the Municipal District, and further provided, that animals the property of non-residents shall not be brought into the Municipal District for grazing purposes, on open lands."

The defence consists of a general denial and an averment that the injuries sustained by the plaintiff were caused by and attributable solely to the plaintiff's own negligence. The defendant also counterclaims for $185, being the price of a horse purchased by the plaintiff from the defendant, but this matter is not in issue, the plaintiff consenting to judgment for the amount claimed in the counterclaim.

I find the following facts:—

1. That the plaintiff was injured by a steer belonging to the defendant. 2. That the defendant occupied lands within the Municipal District of Grasswold No. 248. 3. That the defendant had no knowledge that the said steer was of a bad tempered and vicious nature, or liable to or accustomed to attack or injure persons. 4. That the plaintiff's lands were not enclosed by a lawful fence.

In the absence of evidence that the animal was of a vicious nature to the knowledge of the defendant, if the plaintiff is to succeed he must either prove that the injury was caused through negligence on the part of the defendant, or shew that the steer in question was a trespasser on the plaintiff's land and that the damage done by the animal was of such a nature as is likely to arise from such an animal. The decisions on the question of liability of the owner of a trespassing animal for damages caused by such animal, are collected and discussed by Middleton, J., in Street v. Craig (1920), 56 D.L.R. 105, 48 O.L.R. 324.

To entitle the plaintiff to recover on the ground of negligence, there must be some affirmative proof of negligence, of the defendant in respect of a duty owing to the plaintiff. In this case there is no such evidence. That being so, the plaintiff is limited to the ground that the defendant is responsible for the injury caused by his trespassing steer. At common law there is a duty on a man to keep his cattle in, and if they get on another man's land it is a trespass and that is irrespective of any question of negligence, whether great or small. Per Coleridge, C.J., in Ellis v. The Loftus Iron Co. (1874), L.R. 10 C.P. 10.

The plaintiff relies on By-law No. 5 of the Municipal District of Grasswold 248, and submits that the plaintiff

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is not a resident within the meaning of the by-law. There is no definition of "resident" contained in the by-law itself, but sec. 206 of the Municipal District Act, 1911-12 Alta., ch. 3, which is the authority for the enactment of the said by-law, provides as follows:—"'Resident' in this section includes any person living in the municipality, or any person occupying any land in the municipality."

The defendant being a resident of the municipality within the meaning of the by-law, it is unnecessary to consider whether a contravention of the by-law gives rise to a cause of action in respect of damages caused by an animal at large in contravention of the said by-law.

The plaintiff also relies on sec. 7 of the Fence Ordinance, C.O.N.W.T. 1915, ch. 77, which is as follows:—"The owner of any domestic animal which breaks into or enters upon any land enclosed by a lawful fence shall be liable to compensate the owner of such land for any damage done by such animal."

If the plaintiff is to get any assistance from the provisions of the Fence Ordinance he must establish that his lands were enclosed by a lawful fence. I am of opinion that they were not, because the land abutted upon a highway without any fence, lawful or otherwise, separating the lands from the said highway.

Counsel for the defendant relies on sec. 4 of the said by-law which is as follows:—

"Except as prescribed or restricted by law or by this by-law or other by-law or by-laws of the Municipal District, it shall be lawful for animals to run at large within the said Municipal District, and no person shall be liable to an action for trespass in respect of any animal at large under the provisions of this by-law, unless the lands or premises trespassed upon are enclosed by a lawful fence."

While I think this section is ultra vires of the municipality because it deals with matters which are not authorised by sec. 206 of the Municipal District Act, I am of opinion that it is unnecessary to decide this in view of my finding that the lands in question were not enclosed by a lawful fence.

The only question then to be decided is whether the injury to the plaintiff is an ordinary consequence of the trespass by the defendant's steer. There is evidence that a range steer, if heated and excited, will attack a human being on foot. The steer in question undoubtedly was

heated as the result of the efforts of the plaintiff's son in trying to drive the animal from his father's lands.

The test to be applied in arriving at the conclusion as to whether the damage be of such a nature as is likely to arise from the animal, is whether, according to common knowledge, the animal will act in this way. If everybody knows that a heated steer will act in this way, the plaintiff knew it and he should have taken care to avoid the danger. Heath's Garage Ltd. v. Hodges, [1916] 1 K.B. 206 at 214, affirmed, [1916] 2 K.B. 370.

I am of opinion that the damage done by the steer is not of such a nature as is likely to arise from such an animal and that the damages are too remote. But even assuming that a steer, when heated, is likely to attack a human being on foot, I am of opinion that the proximate cause of the injury was the action of the plaintiff in approaching the animal on foot in an endeavour to drive it off his land.

In my opinion the action should be dismissed with costs, and the defendant should have judgment on his counterclaim for $185 without costs.

Action dismissed.

GINSBERG v. MATTHEWS BLACKWELL CO. LTD.

Quebec Court of Review, Archibald, Acting C.J., Demers and Weir, JJ. March 19, 1921.

Subrogation (§III.—10)—Collision—Payment of Damages by Accident Insurance Company—Action by Owner of Car Against Person Responsible for Damages—Necessity of Stating that Action brought for Benefit of Insurance Company.

The owner of an automobile who is insured against accident and suffers damages in a collision, and is paid the amount of damages by the insurance company, may maintain an action for the benefit of the insurance company against the person causing the damage, and is not obliged to state in his declaration that he is suing for the benefit of the insurance company, as the defendant, not having received any notice of the transfer of the claim to the insurance company could validly discharge his obligation by payment to the plaintiff, and by art. 1156 of the Civil Code (Que.) the insurance company would by the mere fact of payment be subrogated in the rights of the plaintiff.

APPEAL by plaintiff from the judgment of the Superior Court dismissing an action for damages caused to plaintiff's automobile by defendant. Reversed.

An automobile belonging to plaintiff was struck by the express wagon of the defendant on a public street. The plaintiff sued the company defendant for $470.98 damages.

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Defendant admitted the collision, but denied it was caused by any fault or negligence of their driver. Further, they pleaded that plaintiff had no interest in the action, inasmuch as his claim had been paid by an insurance company.

The plaintiff filed an inscription in law to defendant's second plea. Preuve avant faire droit was ordered.

The Superior Court dismissed the inscription in law and plaintiff's action on the following grounds:—

"Without expressing any opinion on the evidence in support of the allegations of negligence, I find that the claim has been paid and satisfied, and that the action has been brought by plaintiff in his name for the benefit of the insurance company.

The plaintiff's action therefore fails and is dismissed with costs."

Duff and Merrill, for plaintiff.

Cook and Maggie, for defendant.

Archibald, Acting C.J.:—There can be no question that a cessionnaire of a creance could sue in the name of the cedant. Apparently that is not put in doubt in this case, but it is said that the plaintiff sues personally, in his own name and he has been paid, but if it were intended that the benefit of the action should be for the insurance company that that ought to have appeared in the action itself and the document signed by plaintiff authorising the insurance company to take the action in plaintiff's name ought to have been filed of record.

There might be a good deal to be said in favour of that position, but it does not receive approval from our jurisprudence. Two cases which have been cited on behalf of defendant are manifestly inapplicable, defendant does not establish any good ground for relief by shewing that although he may be responsible, it is not towards plaintiff but towards somebody else, unless at the same time he shewed that if he pays the plaintiff he will be expected to pay somebody else afterwards.

Article 1156, of the Civil Code provides that subrogation takes place by the sole operation of law, and without demand in favour of a party who pays a debt for which he is held with others, or for others, and has an interest in paying it. In this case the insurance company was held to pay the loss which plaintiff had suffered by damage to his automobile, in virtue of a contract of insurance. The defendant

was held to pay the same debt in consequence of his fault in causing the damage, so that under the article I have cited the insurance company would by the mere fact of payment be subrogated in the rights of plaintiff against defendant.

In this case defendant had not received any notice of the transfer of the claim to the insurance company, and could discharge himself of his obligation validly by paying to plaintiff. I am of opinion therefore that the ground of the judgment fails.

Judgment:—"Considering that the proof establishes that the plaintiff's automobile was at rest against the curb on St. Lawrence Boulevard on the right side of that street with its head towards the south; that defendant's waggon was descending on the same side of the street and when about 10 ft. away from the plaintiff's automobile turned to the left and entered upon the tracks of the tramway company and was immediately struck by a descending tramway, and forced against the plaintiff's automobile and caused the damage in question; that it also proved that the driver of the defendant's carriage did not look behind when he entered upon the tracks of the tramway company and if he had, he would not have entered upon the tracks and that he was in fault in so acting; that the accident to the plaintiff's motor car was caused by the fault of the employee of the defendants for whom defendants are responsible; that plaintiff has proved the amount of his damages to wit $470.98; there is error in the judgment of the Court below; doth reverse said judgment and proceeding to render the judgment which the Court below ought to have rendered, doth maintain the plaintiff's action and condemn the defendant to pay the sum of $470.98 with costs of both Courts."

Appeal allowed.

WESTHOLME LUMBER CO. LTD. v. THE CITY OF VICTORIA.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin and Galliher, JJ.A. March 19, 1920.

Contract (§II.D—145)—Mandamus—Judgment of Privy Council—Undertaking of Counsel—Dispute as to Meaning of.

After partial completion of a contract to construct a waterworks system between the plaintiff company and the defendant corporation, the defendant owing to non-compliance with the terms of the contract took over and completed the work. An action by the plaintiff to set aside the contract for fraudulent misrepresentation, damages and a quantum meruit was dis-

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missed, this decision being affirmed by the British Columbia Court of Appeal and also by the Privy Council, but as matters of account remained to be settled, counsel for the respondent before the Privy Council undertook that any question which would have been left to the engineer by the contract should be left to an independent engineer. The parties having agreed on an independent engineer, a dispute arose as to whether progress estimates made by the former engineer were binding and whether the new engineer had only power to determine the liability without re-opening such estimates. An application for a mandamus to compel the City to proceed with the reference before the engineer agreed upon was granted by Macdonald, J. On appeal from that order the Court held that neither the contract nor the undertaking contained any provision for a reference to the engineer or to anyone else in the broad terms of the order. It was the City's water commissioner who under the contract was to account to the plaintiff and while incidentally the engineer might be called upon to decide matters referred to him by the contract for his decision, that fact did not justify the order in question here, when it was not alleged that some concrete question which ought to have been submitted for his decision had not been so submitted, and the order appealed from should not have been made.

APPEAL by defendant from the order of Macdonald, J., of September 30, 1919, on a motion by the plaintiff for a mandatory order to compel the defendant to proceed to arbitration in pursuance of defendant's undertaking given the Judicial Committee of the Privy Council on the hearing of the appeal in the action in connection with the construction of the waterworks system from Sooke Lake to the City of Victoria.

The judgment of the Privy Council (1917), 39 D.L.R. 805, at p. 808, recited that inasmuch as the respondent's engineer was personally mixed up in the controversies which arose under the contract, counsel for the respondent undertook that a neutral engineer would be named in his place to decide such questions as by the contract were referred to the determination of the engineer. Subsequently Bell was agreed upon as an independent engineer, but the city then claimed that all progress estimates made by the former engineer should be binding on the parties. To this the plaintiff company would not agree. The order was that the defendant proceed with the reference by way of arbitration before Bell as provided in the contract.

Harold B. Robertson, for appellant.

W. J. Taylor, K.C., for respondent.

Macdonald, C.J.A.:—The plaintiff's action appears to me to be the result of a misconception on its part of the char-

acter of an undertaking given by the late Mr. Ritchie, K.C., counsel for the defendant in an appeal before the Privy Council in a former action between the parties (1917), 39 D.L.R. 805.

The plaintiff was contractor for the construction of pipe lines which were to form part of the water supply system of the City of Victoria. Disputes arose, and the city took over and completed the lines pursuant to powers enjoyed under the agreement between the parties. The said appeal to the Privy Council was dismissed simpliciter, but at the close of the argument, Lord Parker of Waddington, addressing Mr. Ritchie, said:—

"The second question I wanted to ask you is this. There is a good deal on the evidence to shew that the engineer under the contract is not in a position to exercise fairly, as between the Corporation and the contractors, his discretion on the questions which would devolve upon him for decision. What we want to know is whether you will undertake that, in future proceedings, the person to decide those questions which are referred by the contract to the engineer shall be an independent person?

Mr. Ritchie: That the person to make up this final statement under clause 15 of the contract should be an independent engineer?

Lord Parker of Waddington: Yes.

Mr. Ritchie: Yes, I am willing to undertake that.

Lord Parker of Waddington: That questions arising on the final account should be referred, not to engineer under the contract, but to an independent engineer.

Mr. Ritchie: Yes, my Lord, I will undertake that.

Lord Parker of Waddington: Questions arising in making up the accounts.

Mr. Ritchie: Those are the accounts under clause 15 of the contract?

Lord Parker of Waddington: Yes . . . We shall embody those admissions on your part in the order which we will advise His Majesty to make. Subject to that we need not call upon you."

And again, addressing Mr. Taylor, counsel for appellant, his Lordship said:—"And in deciding the final adjustments of accounts any questions which would have been left to the engineer by the contract will now be left to an independent engineer."

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The undertaking, as I read it, amounts to no more than this, that an indifferent person shall thereafter act in matters referable to the engineer under the contract. Such a person has been agreed upon between the parties and therefore, in my opinion, there has been up to the present time no breach of the undertaking. I do not think it is the duty of the Court in these proceedings to make a declaratory order, when no concrete issue has arisen.

While the final judgment of His Majesty in Council contains no reference to the said undertaking, their Lordships, in their reasons, refer to it in these words:—

"It was agreed by counsel for the respondents that nothing decided in this action will affect any claims which the appellants may have under the contract, or the respondents' counterclaim (sic). But inasmuch as the respondent's engineer, Mr. Meredith, seems to have been personally much mixed up on the controversies which have arisen under this contract, counsel for the respondents undertook that a neutral engineer would be named in place of Mr. Meredith, to decide such questions as by the contract are referred to the determination of the engineer."

There is, in my opinion, nothing in this inconsistent with the undertaking given by Mr. Ritchie, and it seems to me entirely consistent with what I have said, that all that was contemplated was the substitution of one engineer for the other, but in no other particular were the rights of the parties under the contract to be affected.

The present action is for mandamus to compel the defendant "to proceed to arbitration" before the new engineer, "pursuant to the defendant's undertaking," and the order complained of peremptorily directs defendants to proceed to such arbitration. Neither the contract nor the undertaking contains any provision for a reference to the engineer, or to anyone else in the broad terms employed in this order. The taking of the accounts is matter between the parties to the contract. It is the City's water commissioner who, under the contract, is to account to the plaintiff, and while, incidentally, the engineer may be called upon to decide matters referred to him by the contract for his decision, that fact does not justify the order in question here, when it is not alleged that some concrete question which ought to have been submitted for his decision has not been so submitted.

The appeal should be allowed.

Martin, J.A., would allow the appeal.

Galliher, J.A.:—I agree with the Chief Justice.

Appeal allowed.

REX v. MANCINI.

Nova Scotia Supreme Court, Russell and Longley, JJ., Ritchie, E.J., and Mellish, J. April 16, 1921.

Summary Convictions (§II—20)—Hearing before Magistrate—Question as to Whether Prima Facie Case Made Out—Adjournment of Case—Magistrate Obtaining Opinion of Lawyer Not Interested in the Case—Validity of Conviction.

If a Magistrate after adjourning a case to consider whether or not a prima facie case has been made out, delegates his judicial functions to a lawyer whose opinion he adopts, and does not decide the question for himself, his conviction is invalid, but if he bona fide takes the opinion of a lawyer not concerned in the case as to the proper legal construction of the statute or as to any other legal question arising in the case, the conviction is not thereby invalidated. It is a question of fact which course the Magistrate has adopted.

MOTION for a writ of certiorari to remove and to quash a conviction made before the Stipendiary Magistrate for North Sydney, C. B. convicting defendant for unlawfully selling intoxicating liquor contrary to the provisions of the Nova Scotia Temperance Act and amendments thereto.

T. R. Robertson, K.C. in support of motion.

W. J. O'Hearn, K.C. contra.

Russell, J., concurs with Ritchie, E.J.

Longley, J.:— The point that was taken by the applicant that the adjournment to June 3, being a public holiday, made the trial void, was dispelled entirely by reference to Foster v. Toronto R. Co. (1899), 31 O.R. 1.

The question of whether the Magistrate in choosing to accept the opinion of a lawyer utterly disinterested in the case, on the question of whether there was a prima facie case made out, is in my judgment no question at all. Any Magistrate has a perfect right to obtain light from any quarter that he chooses in regard to the disposal of a point of law in the case; therefore, in my judgment the application should be dismissed with costs.

Ritchie, E.J.:— The defendant was convicted by the Stipendiary Magistrate for the town of North Sydney of having unlawfully sold intoxicating liquor in violation of the Nova Scotia Temperance Act, 1918 (N.S.) ch. 8. This application is for the removal of the conviction into this Court by certiorari in order that it may be quashed.

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At the close of the case for the prosecution before the Magistrate the question arose as to whether or not a prima facie case had been made out under the statute. The Magistrate adjourned to consider the case, and it was arranged that counsel should furnish him with briefs. The chief attack on the conviction is made on the ground that the Magistrate did not decide the question himself but delegated his judicial functions to a lawyer whose name is not given. If he did so, the objection would, in my opinion, be fatal to the validity of the conviction, but if what he did was to bona fide take the opinion of a lawyer not concerned in the case as to the proper legal construction of the statute or as to any other legal question arising in the case, I am of opinion that the conviction is not thereby invalidated. It is a question of fact. Which of the two courses that I have mentioned did the Magistrate take? I find that it was the course last mentioned. The burden of proof certainly rests on the defendant to satisfy this Court that the Magistrate abdicated his judicial functions and handed the case over to another to decide. This burden is attempted to be sustained by an affidavit of Mr. McMillan, the defendant's solicitor, in which he says that when he went to the Magistrate to draw his attention to an authority he was told by him "that he would not undertake to deal with the case himself and for that reason had submitted the briefs furnished by the prosecution and defence to a lawyer to determine the matter and said lawyer had told him he should find that a prima facie case had been made out."

The Magistrate in his affidavit says that what he did say to Mr. McMillan was "that I had taken the opinion of a lawyer not connected with this case on the matter of law cited in the briefs submitted to me and that I was satisfied I should find a prima facie case."

On a careful analysis of the two statements there is not, I think, much difference in the real meaning, and that difference is, I assume, due to misunderstanding. I accept the statement of the Magistrate.

The other objection urged was that the Magistrate lost jurisdiction because he adjourned the case to June 3, the King's Birthday, a public holiday. With this contention I am unable to agree. I refer to Foster v. Toronto R. Co 31 O.R. 1, cited by Mr. O'Hearn, K.C.

In that case the distinction between Sundays which are

dies non juridici and other public or statutory holidays is pointed out. If there was anything in this objection it has, I think, been waived. On June 3, the defendant's solicitor in effect told the Magistrate over the telephone that he would not insist on the objection and consented to a further adjournment and subsequently he asked for still further adjournments.

The application should in my opinion be dismissed with costs.

Mellish, J. concurred with Ritchie, E.J.

Application dismissed.

SCOTT AND SHEPPARD v. MILLER.

Saskatchewan King's Bench, McKay, J. August 18, 1921.

Damages (§III.A—70)—Agreement for Sale of Business—Failure of Vendor to Deliver Goods—Measure of Compensation—Breach of Agreement to Lease Homestead—Right to Recover Damages—Wife not Joining in Agreement.

Where there has been a valid agreement entered into for the sale and purchase of a general merchant business, including the good will, stock in trade and fixtures in connection therewith, and for a lease of the premises, and the agreement is subsequently repudiated by the vendor, the purchasers are entitled to recover the damages they suffered by reason of such repudiation. Prima facie the damages for refusing to deliver the goods is the difference between the contract price and the market price of the goods at the time they should have been delivered. Damages may also be recovered for breach of the agreement to lease the premises although such agreement could not be enforced, the premises being the homestead and the wife not joining in the agreement.

ACTION to recover damages for breach of an agreement partly written and partly verbal for the sale and purchase of defendant's business of a general merchant, and for the lease with option to purchase the premises on which the business was being carried on.

P. E. Mackenzie, K.C., for plaintiffs.

H. M. Allan, for defendant.

McKay, J.:—The defendant in his statement of defence raises the following defences:—

(1) Denies the making of the agreement. (2) That he repudiated the agreement. (3) Says that there was no memorandum in writing sufficient to satisfy sec. 6 of the Sale of Goods Act. (4) That the contract was abandoned by mutual agreement. (5) That the plaintiffs did not pay the promissory note payable 3rd June, 1918, and plaintiffs were not ready and willing to do so. (6) That the alleged

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agreement does not comply with the 4th section of the Statute of Frauds. (7) That the agreement is void for uncertainty. (8) That the agreement was and was intended to be only in the way of negotiation and the parties never were ad idem as to the terms and subject matter of the said agreement. (9) That the said agreement is in violation of the requirements of the Bulk Sales Act. (10) That the lands to be leased were the defendant's homestead, and, as his wife did not sign, the agreement is void. (11) That the whole agreement was conditional upon the consent thereto of the defendant's wife, and that such consent was not given.

The facts are shortly as follows:—

The defendant, carrying on business as a general merchant at Biggar, Saskatchewan, was desirous of selling his said business, and one J. H. Francis, a traveller for Robinson Little & Co., informed the plaintiffs that the defendant's business was for sale. Plaintiff Scott having made certain inquiries as to the defendant's business had an agreement prepared with a number of blanks, and came to Biggar on May 1, 1918, with the intention of buying the defendant's business with plaintiff Sheppard. Plaintiff Sheppard arrived there on May 2, 1918. The plaintiffs met defendant and his wife, Mrs. Miller, on May 2, 1918. During the negotiations for the purchase of the business the only persons present were the plaintiffs and defendant. On the evening of May 2, after defendant expressed his willingness to sell, the plaintiffs thoroughly inspected the stock, taking from one to two hours to do so. Plaintiff Scott estimated the stock at $70,000, and plaintiff Sheppard at $80,000 to $85,000. Defendant's annual turnover was $112,000. After the inspection of the stock and premises the plaintiffs and defendant then proceeded to discuss the terms upon which the defendant would sell. It was agreed that the purchase-price of the business would be arrived at on the basis of one hundred cents on the dollar on the invoice prices of all goods, except damaged or shop worn goods and certain articles of ladies wear, which were to be taken at a price to be agreed upon by the parties, and, failing to agree upon a price, the price to be fixed by some third party to be appointed by the parties themselves. The price to be paid: $10,000 on June 3, 1918 (a Monday), and the balance $10,000 yearly secured by promissory notes with interest at

6% per annum until paid. The price of the fixtures were to be $905.

The premises were to be leased at $75 per month for 10 years, beginning on June 1, 1918; the rent payable in advance; plaintiffs to have the option of terminating the lease at end of 5 years, with right to purchase within the 5 years at $9,000. The plaintiffs were to get possession one hour before closing time on Saturday night, June 1, 1918.

After the basis of the agreement had been arrived at plaintiff Scott produced the blank written agreement he had had prepared, and, after making alterations and additions, both copies were executed by plaintiffs and defendant, plaintiffs keeping one copy, and defendant the other.

Just prior to the execution of the agreement, plaintiffs paid to defendant $100 in part payment, and, after the execution of the agreement, defendant remarked "There goes my business."

As the agreement signed had certain erasures and additions, it was suggested by plaintiff Scott that a clean agreement embodying the terms of the one signed should be drawn next day by Mr. Rodman, defendant's solicitor. The new agreement being ready, plaintiffs went to Mr. Rodman's office at 2 p.m. the next day, May 3. The defendant was sent for, but shortly after he arrived he was called from the office by telephone, and on his return he informed the plaintiffs that he must have $20,000 cash and the balance in 2 or 3 years. The plaintiffs objected to this, saying they could not do better than the terms agreed upon, but defendant said those terms were too easy. The plaintiffs gave him until 5 p.m. that day to consider the matter. They returned to Mr. Rodman's office at 5 p.m. but defendant did not appear. The plaintiffs returned to their respective homes, and later defendant sent to plaintiff Scott an accepted cheque dated May 7, 1918, as return of the $100 paid to him by plaintiff Scott, but plaintiff Scott did not cash the cheque.

The defendant did not give evidence at the trial.

As to defences above indicated as 1 and 2, I find from the evidence that defendant did make the agreement and he repudiated it on May 3, 1918.

As to 3: It was not necessary to have any memorandum in writing to satisfy said sec. 6, as a part payment of $100 was made.

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As to 4: I find from the evidence the plaintiffs did not abandon the contract.

As to 5: In view of the defendant's expressed repudiation of the contract to sell, the plaintiffs, in my opinion, were excused from giving or paying the note. Owing to such repudiation, the time for giving and paying the first note never arrived. The evidence of the plaintiffs shews that they were ready and willing to give and pay the note if defendant did his part by delivering the stock and giving possession to plaintiffs as agreed.

As to 8: The plaintiffs were the only persons who gave evidence as to the agreement, and this evidence shews that the terms of the agreement were arrived at satisfactorily and consented to by plaintiffs and defendant. After the terms were agreed upon, plaintiffs paid and defendant accepted the $100 as part payment and signed the agreement to sell, etc. That defendant accepted it as a concluded agreement to sell is shewn by his remark after signing "there goes my business."

As to 9: By this, the defendant refers to the non-compliance with sec. 5 of the Bulk Sales Act, ch. 34, of the statutes of Saskatchewan 1913. Non-compliance of this section does not make the agreement void between the vendor and purchaser. See sec. 7 of this Act.

As to 10: The defendant agreed to lease the lands, and if he cannot fulfil his agreement he is liable to the plaintiffs. It is quite true that plaintiffs could not enforce the agreement to lease or sell the land, as it was defendant's homestead, and his wife did not join in the agreement. But the plaintiffs are not seeking specific performance in this action; they are asking for damages against defendant for failing to do what he agreed to do. In Halldorson v. Holizki (1919), 47 D.L.R. 613, 12 S.L.R. 498, where the defendant agreed to sell 400 acres of land which included his homestead, which he could not convey without his wife's consent, the plaintiff purchaser was held entitled to specific performance of the balance of the land with an abatement of the price. So in the case at Bar, in my opinion, the defendant is liable in damages to plaintiffs for breach of his agreement to sell and lease, notwithstanding that his wife did not join in the agreement.

As to 11: The only parties present when the agreement was made on May 2 were plaintiffs and defendant. The

defendant did not give any evidence, and there is no evidence of any such condition in the plaintiffs' testimony or in any of the evidence produced.

The only remaining defences are 6 and 7, and these may be dealt with together.

The description of the lots, block and plan to be leased with option to purchase is not given in the agreement signed. But in clause 5 of the agreement it says the defendant is to grant a lease "of the whole premises used by the vendor in connection with the said business," and other portions of the agreement shew it is the defendant's business carried on by him in the town of Biggar that is referred to. That is, the written agreement clearly shews that the premises to be leased by defendant to plaintiffs are the lots on which he carries on business in the town of Biggar.

In my opinion this is a sufficiently definite description of the premises to be leased to enable the Court to receive parol evidence of what the premises consisted, and that the Statute of Frauds is no defence. Shardlow v. Cotterell (1881), 20 Ch. D. 90.

The parol evidence shews that all the land on which he did business was to be leased, and the reason the blanks were not filled in, was because the plaintiffs did not know the description or numbers.

The blanks for the notes were not filled in because the amount of the purchase-price was not known, as there first had to be a stock-taking, and the parties to the purchase and sale had agreed this was not to be done till June 1, 1918 (Saturday night). In my opinion the agreement is sufficiently definite to be binding. And any of the blanks could be supplied by parol evidence, as they were agreed upon.

In my opinion then a valid agreement was arrived at on May 2, 1918, and defendant repudiated the agreement on May 3, 1918, and plaintiffs are entitled to recover the damages they suffered by reason of such repudiation.

Prima facie the damages for refusing to deliver the goods would be the difference between the contract price and the market price of the goods at the time they should have been delivered on June 1, 1918. See R.S.S. 1909, Sale of Goods Act, ch. 147, sec. 49.

Plaintiff Scott was the only witness who gave evidence of these damages. He estimated the stock at $70,000, but

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also stated that the defendant estimated it at $60,000. I think the defendant was in a better position to arrive at the amount of the stock. Plaintiff Scott also estimated that three-quarters of the stock would be bought before the advance in prices, and that such advance would be at least 10 per cent.

The defendant agreed to sell the stock at 100 cents on the dollar, invoice price, except damaged or shop worn goods and certain articles of ladies wear, which were to be taken over at a price to be agreed upon. That is, these latter goods were to be taken over at their then value. Consequently, plaintiffs would not get the benefit of the difference between the price at which these goods were bought and the advance in price had the agreement been carried out. There is no evidence what these goods amounted to, but I am satisfied from the evidence that they would not at any rate amount to more than half the amount of the total stock. Taking the stock at $60,000, less half for the goods to be taken over at their then value would be $30,000, and 10 per cent. advance on ¾ of this would be $2,250, which I allow for all damages.

I cannot allow anything for special damages, as the evidence with regard to these were for expenses incurred before the agreement was entered into, and not as a result of the breach of contract.

There will be judgment for plaintiffs for $2250 with costs.

Judgment accordingly.

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RE CHADWICK AND KERSCHSTIEN.

Saskatchewan King's Bench, Embury, J. July 23, 1921.

Landlord and Tenant (§II.D—32)—Lease—Breach of Covenants—Eviction—Landlord & Tenant Act, R.S.S. 1920, ch. 160 sec. 9, and 42—Notice Necessary under the Act.

Under the Landlord & Tenant Act, R.S.S. 1920, ch. 160, sec. 9, which gives the landlord a right of re-entry for non-performance of covenants in a lease, it is not necessary for the landlord to serve a further notice in the nature of a notice to quit. After he has given the tenant a reasonable time under sec. 10 in which to remedy the breach he may take summary proceedings for eviction under sec. 42 of the Act without any further notice.

[Re Snure v. Davis (1902), 4 O.L.R. 82 distinguished.]

APPEAL from the order of a Judge of the District Court

granting relief to a tenant under sec. 10, sub-sec. 3 of the Landlord and Tenant Act, R.S.S. 1920, ch. 160. Affirmed.

H. Taylor, for appellant.

P. H. Gordon, for respondent.

Embury, J.:—The tenant was in default under a written lease for not breaking 12 acres of land in 1920. The lease contains no proviso for re-entry, but the Landlord & Tenant Act, sec. 9, applies to give a right of re-entry among other things for non-performance of covenants.

On May 3, 1921, the landlord served a notice, giving the tenant one week within which to remedy the breach or make compensation in money; i.e. at the rate of $7 per acre amounting to $84. Another ground is set out in the notice, but does not appear to have been raised at the hearing. This notice is given in compliance with sec. 10, sub-sec. 2 of the Landlord and Tenant Act.

On June 1, 1921, the tenant had not paid the $84, nor yet commenced the breaking, and the landlord took summary proceedings for eviction under sec. 42 of the Landlord and Tenant Act.

Before the hearing took place, however, the breaking was done, and the presiding Judge granted the relief under sec. 10, sub-sec. 3 as aforesaid, but ordered the tenant to pay the costs, holding him responsible for the proceedings by reason of his delay in remedying his breach.

It is urged that the landlord had no right to commence proceedings without giving a further notice in the nature of a notice to quit or a demand for possession following the failure to remedy the breach complained of, and therefore that he should pay the costs of the proceedings.

The authorities cited do not support this contention: i.e. Bell on Landlord and Tenant, at p. 638 et seq., and Re Snure v. Davis (1902), 4 O.L.R. 82. Indeed, from the latter decision, it is to be inferred that under our statute no further notice would be required. The conditions precedent to the original proceeding under the Ontario statute are set out in Bicknell and Kappele Practical Statutes at p. 836. Among other conditions precedent it is necessary to make a demand in writing for possession and there must be a refusal to vacate. The Ontario provision under consideration is similar to the Saskatchewan Landlord and Tenant Act, sec. 42, except that the Ontario Act, R.S.O. 1897, ch. 170, sec. 3, says:—"wrongfully refuses upon demand made in writ-

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ing" to go out of possession, whereas in sec. 42 of the Saskatchewan Landlord and Tenant Act the words used are "wrongfully refuses or neglects to go out of possession."

Accordingly I cannot see that there was necessity for a further notice and the order appears to be perfectly proper.

Appeal dismissed.

Note.—An appeal to the Saskatchewan Court of Appeal was quashed on November 14, 1921.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. April 6, 1921.

Debtor and Creditor (§I.—5)—Action in Debt—Defendant Not Directly Indebted to Plaintiff—Undertaking to Collect Money and Hold as Trustee—Necessity of Proving Money Collected and not Paid Over.

In order to succeed in an action for debt where the only obligation upon which the defendant can become liable to the plaintiff is an undertaking that he will hold any money collected as trustee for the plaintiff, the plaintiff must prove that the money has been collected and held in trust and that it has not been paid over.

APPEAL by defendant from the judgment at the trial of an action in debt. Reversed; action dismissed.

E. D. H. Wilkins, for plaintiff.

K. C. Mackenzie, for defendant.

Harvey, C.J. (dissenting):—I would dismiss this appeal with costs.

Without considering any question of liability on the ground of the plaintiffs relying to their prejudice upon the defendant's assurance that he would collect $500 from the accounts and pay this claim of only about two fifths that amount out of the moneys collected, because it is stated by counsel that the original debtor has now disappeared. I think there is quite sufficient in the last letters, particularly the last one, to warrant the inference that the defendant was no longer depending on the collection of the accounts to pay the plaintiffs. There seems to me to be quite sufficient in them to cast the burden on the defendant who has all the means of knowledge, of shewing that the condition of his promise of payment had not been fulfilled, assuming as I do that his promise to pay was only to pay out of moneys collected.

I see no difficulty on the ground of absence of consideration. The plaintiff could have taken garnishee proceedings

in respect of the accounts and perhaps other steps which would have prejudiced the defendant. His forbearance is surely sufficient consideration.

Stuart, J.:—I think this appeal should be allowed with costs and the action dismissed with costs.

The plaintiff company sues in debt. It claims that the defendant is indebted to it. In its explanation in the statement of claim of how the alleged debt arose it does not allege any facts which even if true would create a debt. That was the action which the defendant defended.

But disregarding the form of the action, does the plaintiff make out in the evidence any ground for giving it judgment against the defendant for a sum of money? With much respect to any different view I think not. The plaintiff company must have known from the letter of June 23 that the only obligation towards it that the defendant was undertaking was to collect certain debts due to Draganoff and out of the money thus collected to pay the plaintiff's account against Draganoff. All subsequent letters should have been read by the plaintiff in the light of and as based upon that first letter and the obligation there undertaken. The only ground therefore upon which the defendant could become liable to the plaintiff was that he had promised that he would hold any money collected as trustee for the plaintiff. In order to establish this ground of liability the plaintiff was I think bound to shew that money had been collected and held in trust which was not paid over to it. I can see nothing in the subsequent letters to shift this burden of proof. There is not even an implied admission that money had been collected which was not paid over. The promises to pay considered as mere promises, are without consideration, and could easily have been made upon a quite mistaken view as to the legal liability of the writer. The plaintiff company knew all along that the defendant was not directly indebted to it. If it had remembered, as it should have done, that all the defendant undertook to do was to collect the accounts and hold the money in trust and pay it over it would not have been misled into any misunderstanding of the position, and, instead of merely pressing for payment and ultimately suing, would have made enquiries as to how collections were getting along, and if the condition was not satisfactory, would have and should have investigated the accounts and if necessary garnisheed them. There

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is nothing even to shew that the defendant was entitled to sue Draganoff's debtors although from the evidence one can make some sort of surmise to that effect.

It appears that the plaintiff company did not really know who was the proprietor of the store when credit for the money sued for was given. Apparently they did not know Draganoff at all, but merely gave credit to some one who called himself "Ellscott General Store."

The plaintiff cannot I think complain of being deceived or misled or prejudiced. It knew or ought to have known the situation all along and it was its own carelessness and nothing that the defendant did which kept it quiescent and without curiosity as to a situation in which it was much concerned.

Beck, J.:—This is an appeal by the defendant from a judgment at trial of Crawford, Co. Ct. J.

One Draganoff was carrying on business at a place called Ellscott under the style of the "Ellscott General Store." He was indebted to the plaintiff company for goods sold and delivered during the years 1917, 1918 and 1919. Some time in May, 1919, Draganoff sold out his business to the defendant who continued it under the same name. The evidence of the defendant by way of examination for discovery put in by the plaintiff shews: That the defendant took over unwillingly the business from Draganoff for a debt of $1,500. The defendant knew of the debts—including the plaintiff company's—owing by Draganoff; but he was not asked and did not say that even as between him and Draganoff he was to pay these debts.

The plaintiff company bases the liability of the defendant on the fact of two payments made by the defendant on account — $9.66 on August 16, 1919, made by sending them some eggs or other farm produce, and $10, mentioned in one of the following letters; and upon the four following letters:—

"P. Burns & Co. Ltd., Ellscott, Alta.,
Calgary, Alta. June 16th, 19.

Dear Sir,—

Your letter on hand. Regarding the account that Ellscott Trading Co. owes you I will write you a letter with the next train and explain how the matter stands about this account.—Yours truly,

D. R. Cooley, Ellscott Gen. Store."

"P. Burns Co. Ltd. Ellscott, Alta.,
Calgary, Alta. June 23rd, 19.

Dear Sir,—

I have bought the Ellscott Gen. Store from Mr. James Draganoff recently and I agreed to collect all the old store accounts what's on the books given on credit out here, and as soon as this money is collected the which will come to about $500.00 and then with this money will pay up all the old bills that the store owes. Of course your bill is coming first because its the oldest. The lard that Mr. Draganoff got from you he let it go on credit last summer and as you know that the frost killed all the crop last summer and the farmers around here fail in paying their bill. But now I am taking this matter up and will collect this money and as soon is collected will pay your bill. Mr. Draganoff had the Alberta Credit Association at Calgary to collect some of his bills but they fail on it. But now I am suing some of these people and will get the money sometime, and as soon as it come will turn it over to you. Hope this will be satisfactory to you, that's the best I can do.—I remain yours respectfully,

D. R. Cooley, Ellscott, Alta."

"Ellscott, Alta.,
Dec. 30, 1919.

Dear Sir,—

Your letter just received and I am sure you are tired of waiting for this amount but if you will just wait till abount the middle of Jan. I will try and have you some money by that time, but I can't pay you all of it at once but I will do my best from now on.—Yours truly,

Ellscott Gen. Store."

Ellscott, Alta.,
Jan. 13, 1920.

"Dear Sir,—

Please find enclosed postal note for $10.00. Now this isn't very much but I will keep paying a little right along so it will run the bill down a little all the time. Please send a receipt for this amount.—Yours truly,

Ellscott Gen. Store."

I think that the proper inference from these letters is that the defendant had agreed with Draganoff to collect the moneys owing to Draganoff and out of the proceeds to pay

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Draganoff's debts—and nothing more; that there is not enough in them and the circumstances to establish a novation which would include the discharge of Draganoff. (See 29 Cyc. tit. Novation, at p. 1129 et seq.) and that the moneys paid and promised must be taken to have been paid and promised in pursuance of that agreement.

The plaintiff may possibly find that the defendant has constituted himself a trustee for it and other creditors of some unascertained amount of moneys collected and not disbursed; but that situation is not before us. For such a remedy a very different form of action would be necessary, and would be based upon the equitable doctrine of trusts which would not involve the common law doctrine of a consideration for the promise to pay.

It is suggested that the last letter of the four is an absolute promise, but even if it is, I think it ineffective for want of a consideration.

It is also suggested that it is an admission that the condition of collecting sufficient moneys owing to Draganoff has been fulfilled and hence an admission of absolute liability, sufficient at least in the absence of evidence to the contrary on the defendant's behalf, but, besides necessarily putting, as I think a different aspect on the case than could reasonably suppose was brought to the defendant's counsel's notice by the pleadings and conduct of the case, I think it is drawing an unjustifiable inference from the terms of the letter.

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

Appeal allowed.

REX v. ZESS.

Saskatchewan King's Bench, Brown, C.J.K.B., November 12, 1920.

Courts (§IIA—176)—Application by Way of Certiorari—Jurisdiction of Judge to Extend Time—Sask. Rule 704—Rule 44 of Crown Practice Rules.

A Judge of the Court of King's Bench, Saskatchewan, has power under Rule of Court 704 which is made applicable by Rule 44 of Crown Practice Rules to extend the time for bringing an application by way of certiorari to quash a conviction.

Certiorari (§IA—3)—Infringement of By-law—No Penalty Provided.

An application by way of certiorari to quash a conviction for infringement of a by-law will be granted where the by-law does not state any penalties for such infringement and no by-law is in evidence which imposes a penalty.

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REX v. ZESS.

APPLICATION by way of certiorari to quash a conviction by a Justice of the Peace for non-compliance with a by-law of the Town of Gravelbourg requiring him to take out a license and pay a fee before selling certain goods at retail.

The affidavits on which the motion was launched were filed in Gravelbourg 2 days before the expiration of 6 months after the date of conviction, and during long vacation. The motion was returnable in Moose Jaw and on its return an enlargement was asked for and obtained by the respondent. On the argument the respondent objected: (1) that the motion was too late; (2) that it should not have been launched during vacation without an order; (3) that the affidavits supporting the motion should have been filed with the Registrar at Regina. As to the second and third objections it was answered that they were waived by respondent obtained the enlargement without reserving the right to take preliminary objections. On the merits of the application, the part principally dealt with was that By-law 111 was filed, but the by-law did not state any penalties for its infringement; the penalties were contained in By-law 134 which was not filed.

J. R. B. Graham, for applicant.

W. G. Ross, for respondent.

Brown, C.J.K.B.:—The objection as to proceedings being taken during vacation was clearly waived, and I am of like opinion as to the objection that application was not made within the 6 months. I am of the opinion, however, that in any event the time should be extended. This I have power to do under Rule of Court 704, which is made applicable by Rule 44 of Crown Practice Rules. In this connection see 10 Hals. p. 208, note (r).

This conviction is wholly bad. There was no power to order payment of the $100 license fee and as to the balance of conviction whereby a fine and costs were imposed no by-law was offered in evidence justifying such fine and costs.

The conviction is therefore quashed, but without costs, on account of the many irregularities.

Conviction quashed.

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HALES v. THE TOWNSHIP OF SPALLUMCHEEN.

HALES v. THE TOWNSHIP OF SPALLUMCHEEN.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and Eberts, JJ.A. June 7, 1921.

Municipal Corporations (§IIC—66)—Local Improvement—Work commenced under Municipal Act—Election to Continue under Municipal Act—Procedure under By-law to levy Rate—By-law Defective—New By-law passed under Municipal Act—Validity—Action to Quash—Action barred under sec. 180 of Municipal Act 1914, ch. 52.

Where a local improvement has been commenced before the passing of the Local Improvement Act 1913, B.C. Stats., ch. 49 the municipality is given by sec. 55 (2) of the Act, the option of completing the work either under the Local Improvement Act or under the Municipal Act, R.S.B.C. 1911, ch. 170 under which the work was formerly authorised, and where such municipality elects to proceed under the Municipal Act the procedure under this Act must be followed and sec. 82 of the Act after its repeal is still in force by virtue of sec. 55 (2) of the Local Improvement Act as regards all undertakings which were being carried on to completion under it, and under this section the municipality has jurisdiction to pass a new by-law to embody the essential features of an old one passed in conformity with this section which was found to be so defective that payment of the rate levied under it was successfully resisted by one of the rate payers; in any case the by-law being registered under the Act, sec. 180 of the Municipal Act 1914, ch. 52, prohibits the quashing of such by-law unless the application is made within one month from the registration.

APPEAL by plaintiff from the judgment of Murphy, J., in an action to quash a by-law passed to levy rates for a local improvement or for the recovery of the rates paid. Affirmed.

F. A. McDiarmid, for appellant.

A. H. McNeill, K.C., for respondent.

Macdonald, C.J.A.:—It is admitted that the local improvement was commenced before the passing of the Local Improvement Act, 1913 (B.C.), ch. 49, prior to which the legislation concerning local improvements was embodied in the Municipal Act, R.S.B.C. 1911, ch. 170. By sec. 55 (2) of the Local Improvement Act, a municipality was given the option to complete the undertaking under either Act where it was commenced before the passing of the Local Improvement Act. It is quite manifest that the defendant elected to complete under the Municipal Act, since its By-law 170 was passed in conformity with sec. 82 of the Municipal Act.

In proceedings prior to this action, By-law 170 was held to have been so defective that payment of the rates levied under it was successfully resisted by the plaintiff. The defendant then passed By-law 224, relying upon the power

conferred upon municipalities by sec. 44 of the Local Improvement Act which enacts that when a debt has been incurred by a municipality for work undertaken before the passage of the Act and the by-law or the assessment under it is found defective, a new by-law may be passed or a new assessment may be made. The present action was brought to quash By-law 224. The argument for the appellant (plaintiff) hinged mainly on the failure of the defendant to follow the procedure laid down in the Local Improvement Act or alternatively in the Municipal Act in respect of special assessment rolls and revision thereof by a Court of Revision.

The Local Improvement Act has, in my opinion, nothing to do with this case, except so far as it authorised a new assessment to take the place of the defective one. It is apparent to me that it authorises a new by-law or assessment not only when the proceedings are under the Act itself but when they are being carried on under the Municipal Act. The methods set forth of raising the costs of improvements when they are being carried out under the Local Improvement Act are quite different from those provided by the Municipal Act. Under sec. 82 of the latter the costs of the work is to be levied upon the lands and upon 50% of the assessed value of the improvements, while under the Local Improvement Act the rates are levied on the frontage plan. No doubt had the undertaking in question been proceeded with under the Local Improvement Act, as I think it might have been by virtue of sec. 50, then the procedure of that Act would be applicable. There is nothing anomalous, as is shewn by the context of the Act, in applying the foot frontage rule to undertakings of the character of the one in question, but while this may be true the fact remains that the undertaking in question was proceeded with under said sec. 82 and I think the new by-law was passed in professed conformity with it. It could not well be otherwise since the work had been carried to completion under a scheme which, while authorised by sec. 82, had no apt counterpart in the Local Improvement Act. To make the new by-law one on the frontage basis would therefore overturn the scheme of payment of the costs of the work prayed for by the petitioners and adopted and acted upon by the municipality throughout.

Now, while sec. 82 was repealed it remained by virtue of

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said sec. 55 (2) in force as to all undertakings which were being carried to completion under it, and is, I think, in force to-day for all purposes essential to the final completion, not only of the actual work of construction but of all other matters incidental thereto. It was right therefore that the new by-law should embody the essential features of the old without its defects.

This disposes of the appellant's complaint that By-law 224 was not passed in accordance with the provisions of the Local Improvement Act or that the assessments were not made in the manner there specified. The alternative ground of the attack on the by-law and the assessments is founded on the assumption that it had been passed under said sec. 82 and was governed by the procedure of the Municipal Act applicable thereto and counsel relied upon sec. 259 of that Act as shewing that a special assessment roll or special schedules in the general role should have been made up and revised under the same procedure as is applicable to the annual assessment roll of the municipality. By said sec. 44 the Council is to "cause a new assessment to be made," and said sec. 82 of the Municipal Act authorises the passing of by-laws for "assessing, levying and collecting in the same manner as municipal taxes are assessed, levied and collected." The manner in which municipal taxes are assessed is the preparation of an assessment roll by the assessor, specified notice to the ratepayers, the holding of a Court of Revision to which appeals, if any, may be taken, resulting in the final revision and confirmation of the roll.

The contention of the appellant's counsel, as I understand it, is that because this formality was not gone through in respect of this assessment, the by-law ought to be quashed or if that relief cannot be had, owing to the fact that this action was brought too late to permit the Court to quash the by-law, then it is a good defence to the defendant's counterclaim for the recovery of the rates.

It is conceded that the by-law in question was duly registered and therefore, I think sec. 180 of the Municipal Act, 1914 (B.C.), ch. 52, is a bar to the application to quash.

Then with regard to the counterclaim, said sec. 180 prohibiting the quashing of a by-law except within the specified time, proceeds:—

"Nor shall any person assessed under or subject to a rate under such by-law be entitled to plead any defect in such by-law as a valid defence against a claim for payment of

such rate except by application to quash the by-law made within the time aforesaid."

It is contended on behalf of the appellant that the irregularities, if any, in connection with the assessment roll and its revision were not mere defects, but render the assessment illegal and void. In my opinion the procedure provided by sec. 259 is directory and the assessment is merely defective by non-compliance therewith. In fact I am not sure that it could, upon a reasonable construction of the different statutes, and sections of statutes, which have come under consideration in this case, be said that what was done by the municipality was not a sufficient compliance with the Acts. Section 259 is easy to understand in its application to frontage assessments to which it was originally applicable, but when the rate is to be levied on the assessed value of land and improvements and these values have already been ascertained and entered upon the general assessment roll of the municipality, it would seem to be a work of supererogation to go over the same ground twice when the valuations must, of necessity, coincide. Technically, perhaps the provisions of sec. 259 might be said to have been violated, or rather not complied with, but whatever may be the true construction of this section as applicable to the facts of this case, I am satisfied that the omissions in procedure, if any, created only a defect and cannot be pleaded as an answer to the counterclaim.

The appeal should be dismissed.

Martin, J.A., would allow the appeal.

Galliher, J.A.:—I agree with the trial Judge.

Eberts, J.A., would allow the appeal.

Appeal dismissed by an equally divided Court.

CITY OF ST. BONIFACE v. CANADIAN PACIFIC R. CO.

Board of Railway Commissioners, February 13, 1921.

Highways (§VB—255)—Application to Open Across Railway Track—Tracks Dangerous on Account of Heavy Travel—Opening of Highway Necessary—Order Granted on Conditions.

On an application by a city municipality for an order for leave to open up a highway across the tracks of a railway at a point where heavy travel existed over the tracks, the crossing being necessary and the elements of danger in connection with the proposed crossing which would attach to it from its inception having been pointed out to the municipality, the order was made subject to the municipality bearing the full burden of cost of such protection as might from time to time be found to be necessary.

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CITY OF ST. BONIFACE v. C.P.R. Co.

APPLICATION of the City of St. Boniface, Man., for an order directing and ordering the Canadian Pacific Railway Company to remove immediately any and all lines of railway improperly, illegally, and without due and lawful authority laid by the C.P.R. Co., or any person or corporation on its behalf, on or near Rue Messier in the City of St. Boniface, either on the property of the railway or on the property of the City or any other person or corporation. File 16028. And application for an order giving leave to the City of St. Boniface to construct Rue Messier across the rails of the Canadian Pacific Railway (Emerson Branch).

H. P. Blackwood, K.C., for the City of St. Boniface.

L. J. Reycraft, K.C., for the C.P.R. Co.

J. B. Coyne, K.C., and A. T. Hawley, for Western Wheel Foundry Co.

Carvell, Chief Commissioner, agrees with McLean, Assistant Commissioner.

McLean, Ass't Chief Com'r:—In the application as launched, request was made that the C.P.R. Co. be directed to remove such tracks as have been laid by it without lawful authority on or near Rue Messier in the city of St. Boniface, Man. In the course of the hearing, Mr. Blackwood, who appeared for the City of St. Boniface, withdrew this portion of the application, it being recognised that at the point in question no right of crossing exists.

The application is one which is primarily concerned with the affording of access to the plant of the Western Wheel Foundry Co. It was testified on behalf of this company that the general industrial situation had been carefully canvassed by it in regard to locations, and that the location which it now possesses adjacent to the point where the crossing is asked for was chosen only after careful balancing up of the industrial advantages of different sites.

The C.P.R. Co. at the hearing objected strongly to the crossing being granted, and in this connection pointed out the heavy travel which existed over the tracks across the point where the proposed crossing would be located. One of these is the main line to St. Paul and Minneapolis, and another is the main lead which runs down to serve many industries as well as the stock yards.

The Canadian Pacific proposes a diversion of Rue Messier to a point approximately 330 ft. north, and then running west across the tracks to connect with Archibald street.

Rue Plinquet is 1200 ft. from the proposed crossing on Rue Messier. The diversion, as proposed, would bring the crossing within 850 ft. of Rue Plinquet.

The Canadian Pacific plan, dated November 14, 1919, shews at the proposed point of crossing 6 tracks within the right of way. These consist of—(a) three tracks running south-westerly across the southern boundary of the proposed street. From these tracks other leads run off. From the plan, two of these tracks shew crossings serving the plant of the Foundry Co. The other track runs south-westerly beyond the plant in question; (b) two main-line tracks; and (c) one through siding. The through siding is 1500 ft. long, 550 ft. of it being south of the southern boundary of proposed crossing. There are no spur tracks leading off the portion of this siding south of proposed crossing. North of the proposed crossing there are two spur tracks,—one for the Continental Oil Co., 850 ft. from the point of crossing, and one for the North West Grain Dealers, 300 ft. from the point of crossing. The spur track serving the North West Grain Dealers is 700 ft. long, some 310 ft. of it being on the property itself. It crosses Rue Messier 70 ft. west of the western boundary of the right of way.

At the diverted crossing, there are in place four tracks, viz., the spur track to the North West Grain Dealers, the two main tracks, and the track from which the leads run south-westerly across the southern boundary of the proposed crossing as already referred to. That is, the switching movements referred to would be common to both crossings, and apparently the train movements at the diverted crossing would be as great as at Rue Messier.

In connection with the tracks in place at Rue Messier to serve the Foundry Co., there is a switch in the middle of the crossing. At the hearing, the Foundry Co. stated its willingness to bear the expense of moving the switch away from the point where the proposed crossing would be, thus enabling moving the tracks closer to the plant; and also to bear the cost of such re-arrangements.

This has been checked by the board's engineer and a plan has been submitted dealing with the south switching tracks already referred to as running south-westerly. Under this plan, the switch can be taken off the street; there will be only one crossing for the tracks serving the Foundry Co., the lead therefrom being moved south-west of the crossing,

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and, in addition, the longer track running south-westerly past the plant of the applicant company's plant instead of having a separate crossing as at present. This re-arrangement will leave four tracks within the right of way, the same number as at the proposed diverted crossing.

The crossing is necessary. At the hearing, the attention of counsel for the City of St. Boniface was fully directed to the elements of danger in connection with the proposed crossing and to the burden in respect of protection which the municipality would have to assume.

In various cases where a highway has been opened up across the tracks of a railway and the question of protection is one which it has not been necessary to deal with at the outset, no pronouncement has been made in the order on the division of cost, thus leaving it open to the board, at a later date, to consider the matter from the standpoint of the respective volumes of traffic on the highway and on the railway, and to deal with the matter accordingly.

A different situation exists where it is recognised that features of danger will attach to the crossing from its inception. In Town of St. Pierre v. G.T.R. Co. (1911), 13 C.R.C. 1, what was before the Board was the conversion of a farm crossing into a highway crossing. This was allowed. At the same time, on account of the features of danger existing, the burden of protection by gates and watchmen was imposed upon the municipality.

The order in the present case goes, subject to the municipality bearing the full burden of cost of such protection as may from time to time be found necessary. The limitations in regard to contribution from the Grade Crossing Fund are such that no contribution can be made in the present instance. For the present, protection by a watchman, between the hours of 7.30 a.m. and 5 p.m., is to be provided for, at the expense of the municipality.

The matter will be kept checked up so that the question of additional protection may be dealt with from time to time as the need arises. The cost of construction and maintenance of the crossing, under the Board's practice, will be upon the municipality, as it is junior at this point.

The order will also provide for the re-arrangement, at the expense of the Foundry Co., of the switch and tracks as above referred to, and as set out on the plan, copy of which will accompany the order.

Rutherford, Ass't Com'r, agrees.

IN RE BOCK.

Saskatchewan King's Bench, Taylor, J. April 27, 1921.

Mechanic's Liens (§11.—8)—Material Purchased for Building—Purchaser not Owner of Land on which Building Erected—Intention to Preserve Building as a Chattel—Claim of Lien on Building—Assignment for Benefit of Creditors—Application for Directions.

Where material has been supplied for the erection of a building, the person who erects the building not being the owner of the land on which it is erected, and it being apparent from the nature of the building that it was never intended to become a fixture, but was to be preserved as a chattel, the person who supplies the material for such building can have no lien under the Mechanic's Lien Act, upon the building itself.

[Galvin Walston Lumber Co. v. McKinnon (1911), 4 S.L.R. 68, followed. See Annotation, What persons have a right to file a Mechanic's lien, 9 D.L.R. 105.]

APPLICATION by a trustee company, assignees for the benefit of creditors for advice and directions, as to whether certain persons who supplied material for the erection of a building, are secured creditors or not.

P. G. Hodges, for the assignee.

P. H. Gordon, for the unsecured creditors.

L. McK. Robinson, for the lumber companies.

Taylor, J.:—The assignor erected a building on certain lands to which he had no title and on which he was a mere trespasser. The lumber therefor was procured from three firms to whom he misrepresented his title, claiming to have purchased the lands. Counsel for these firms admits this to be the fact and expressly states that they could not hope to establish title to the land or that the assignor had any interest therein. These firms at the time filed mechanic's liens. The building it is stated was not permanently affixed to the soil, but was erected on skids.

The lien claimants are represented by counsel, and the other creditors of the estate are represented under order of the Court. The question is whether these lien claimants can claim lien upon the building, which is an asset of the estate, and priority over the other creditors to that extent. Practically are they secured or unsecured creditors?

I was at first inclined to the view that as actions for realisation of mechanic's liens are under the decisions binding upon me required to be brought in the District Courts that the question was not one which I could answer. But on further consideration it seems to me that there is ample jurisdiction to advise the trustees.

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The owners of the land make no claim to the buildings. From the statements of counsel as to the manner of erection on skids I would infer that it would appear from the degree of annexation and the method thereof that it was the intention to preserve the building as a chattel and not to affix it to the realty, and it is only on this basis that it can be treated as an asset of the estate. If so affixed as to become a fixture, the interest therein would have passed to the owner of the land.

As between the lien claimants and the owners of the land the former are met with the decision in The Galvin Walston Lumber Co. v. McKinnon (1911), 4 S.L.R. 68, holding that no liens would attach, and once it is admitted that the building is a chattel and not a fixture it is obvious that there can be no claim of lien upon the building itself.

The assignee should therefore be advised and it be declared that the alleged lien claimants are not secured creditors or entitled to priority over other creditors in the distribution of the assets of the estate and have no charge upon the building in question.

All parties should have costs out of the estate, to be taxed on the King's Bench low scale, those of trustees to be taxed as between solicitor and client.

Judgment accordingly.

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British Columbia Supreme Court, Macdonald, J. February 22, 1921.

Evidence (§XIII.—995a)—Criminal Law—Disorderly House—Prosecution Under Sec. 228A of Criminal Code—Sec. 986 as to Prima Facie Evidence—Applicability—Certiorari—Right to When Appeal Exists.

Section 986 of the Criminal Code which deals with prima facie evidence as to disorderly houses, only applies to prosecutions under secs. 228 and 229 of the Code and where there is no evidence before a Magistrate on which he can convict on a charge laid under sec. 228A unless he invokes the provisions of sec. 986, the conviction will be quashed on certiorari.

The right to certiorari exists as a protection to a party considering himself aggrieved, by a conviction, to quash the conviction, although a right of appeal exists and no exceptional circumstances are shewn unless the right to such a writ is expressly taken away.

APPLICATION by way of certiorari to quash convictions by a Police Magistrate for unlawfully and knowingly permitting premises to be used for the purpose of a disorderly house, to wit, an opium joint, contrary to sec. 228A of the Criminal Code.

R. L. Reid, K.C., for applicants.
J. L. G. Abbott, for the Crown.

Macdonald, J.:—Toy King and Toy Hing were convicted on November 4, 1919, by the Police Magistrate of the city of Merritt, that they did unlawfully and knowingly permit their premises situated in that city to be used for the purpose of a disorderly house, to wit, an opium joint, contrary to sec. 228A of the Criminal Code. They seek through certiorari proceedings to set aside the conviction on various grounds. The principal one is that there was no evidence before the Magistrate upon which he could convict, unless he invoked the provisions of sec. 986 of the Code. He applied such provisions and it is contended that, in so doing, he was wrong. The difficulty is that it only applies to prosecutions under secs. 228 and 229 of the Code. It has been held that sec. 985 of the Code should be construed strictly in its application and the same reasoning would apply in the application of the following section, viz., 986.

If this objection be fatal, then the convictions can only be upheld through amendment, as I do not think, without discussing details, that there was evidence before the Magistrate upon which he could convict under sec. 228A, unless he applied sec. 986.

Then as to the power of amendment under sec. 1124 of the Code, it has been discussed in a number of cases which have been carefully collected by counsel. I refer particularly to Rex v. Leahy (1920), 61 D.L.R. 333, 35 Can. Cr. Cas. 358, 28 B.C.R. 151, where an amendment was made and the evidence discussed. It was there thought proper to so amend the conviction, as to shew the commission of one offence instead of two, as was indicated by the conviction.

The case of Rex v. Toy Moon (1911), 19 Can. Cr. Cas. 33, 21 Man. L.R. 527, goes very far in supporting the view that where there has really been an offence committed, and it is shewn by the evidence, the Court should amend so as to cover in proper terms the offence so disclosed; the reason being that where the crime has been committed the accused should not, through some oversight or irregularity, escape punishment.

Perdue, J.A. (now C.J.M.), in this connection, in his judgment, said as follows, 19 Can. Cr. Cas. at p. 37, in referring to the power of amendment under such section:—"Under these provisions, therefore, the Court should, in the

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present case, look at the evidence to ascertain if an offence of the nature described in the conviction was committed for which the accused might have been convicted by the Magistrate, and if the Court is of opinion that there is no evidence to warrant it, the conviction may be modified or a new conviction may be made, so as to declare the accused guilty of the offence so warranted by the evidence."

I bear in mind, however, in applying this power of amendment, a portion of the judgment of Killam, J., in The Queen v. Herrell (1898), 1 Can. Cr. Cas. 510 at p. 523, 12 Man. L.R. 198:—

"Now it is one thing to say that upon the face of the depositions there appears to have been evidence which might have satisfied the mind of the Magistrate hearing the witnesses, and quite a different thing to satisfy one's own mind by perusal of written depositions, that an accused person has been guilty of an offence against the law. Not only have we not the advantage of seeing and hearing the witnesses, but we have only the substance of their evidence, or what the Magistrate considers as he goes along to be its substance.

In many cases this might be sufficient to satisfy the Court; but here there was directly contradictory evidence, without such collateral circumstances as might enable one to decide between the witnesses. The minds of the members of the Court must be satisfied from a perusal of the depositions and we cannot tamely adopt the opinion of the convicting justice. We have in a measure to try the accused upon the depositions, giving him the benefit of any reasonable doubt."

As the Police Magistrate, in coming to a conclusion, applied the provisions of sec. 986, and in so doing was, as I believe, wrong, then throwing aside such evidence, can one come to any other decision than that the convictions were improperly rendered?

It is contended that there is sufficient evidence, aside from the indication of opium smoking, to support the conviction. Still I am met with the position, that the Magistrate, as I have indicated, did not proceed upon this basis but upon a false assumption, and thus his judgment was in error.

Then another ground is taken, in an endeavour to support the convictions, and that is, that as a matter of fact either

sec. 228 or 228A could have been utilised in alleging the charge. This may be so, but the charge that these accused met was one specifically under sec. 228A.

The first principle of a fair trial is that the party accused shall know the nature of the charge. Here, counsel acting for the accused, having in mind doubtless the terms of the particular section of the Code, directed his defence solely to the charge thus covered. He is also entitled to have such charge proved "as precisely and by evidence of as high a degree in a Police Court as in an Assize Court." Vide Osler, J.A., in Reg. v. Bassett (1884), 10 P.R. (Ont.) 386, at p. 389.

I think it would be an improper extension of the powers of amendment, under these circumstances, to amend, even although only few words are required to alter the convictions, so that the charges laid under 228A should result in convictions under 228. Such a course is quite different to amending when upon proper evidence there is a double offence alleged in a conviction.

Then again the distinction is quite clear between a party who knowingly allows his premises to be used as an opium joint, and where he is the keeper of such a joint. I think it was intended by sec. 986 of the Code that where a person is proved to be the keeper of certain premises and in those premises there be found indications of opium smoking, this should create a prima facie case against such keeper as to the place being an opium joint; but where a party rents his premises to another and such indications be found, the same result would not follow.

Before closing the question of evidence, I wish to add that sec. 986 not being properly applied, I do not think satisfactory evidence was afforded that these premises were an opium joint within the definition of the Code. I do not think there was evidence to shew that persons resorted there for the purpose indicated, which is necessary to constitute such a joint.

It has been submitted that there is a line of authorities supporting the position that certiorari should not be granted or a conviction quashed, where a right of appeal exists, and it has not been exercised. It is true that there are decisions to this effect, but I refrain from following them, even although the parties applying for certiorari have not shewn any exceptional circumstances, such as are required to create the right, under these decisions, to certiorari. I

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think that unless the right to such a writ is expressly taken away, it still exists as a protection to a party considering himself aggrieved by the conviction or judgment of a lower Court.

In my opinion the two convictions should be quashed. Applicants are entitled to their costs.

Convictions quashed.

GOEBEL v. CANADIAN BANK OF COMMERCE.

Saskatchewan King's Bench, Brown, C.J.K.B., March 29, 1921.

Banks (§VIIIC—184)—Security Taken by Bank for the Purchase of Seed Grain—Bank Act, 1913, (Can.) ch. 9 as Amended by 1915, ch. 1, sec. 1—Priority of Claim Over that of Vendor Selling on Crop-payment Agreement—Right of Bank to Enter Premises and Take Possession of the Grain.

Where a bank advances money for the purchase of seed grain and takes security on the crop to be grown on the land under the provisions of sec. 88 sub-secs. 8-11 of the Bank Act as amended by 1915, ch. 1, registration of the security is not necessary to protect the claim against third parties, and it takes priority over that of a vendor who has sold the land under a crop-payment agreement, and the bank has a right to enter upon the land and take possession of the grain. The bank's right as to the manner in which it may dispose of the grain is however limited by sec. 89 of the Bank Act and where it has not proceeded in accordance with the provisions of this section it may be deprived of certain costs or expenses of the sale.

ACTION and counterclaim for wrongful conversion.

Plaintiff claimed that in January, 1920, he had sold certain land to Hirschmiller, under an agreement of sale providing for payment by delivery of a one-half share of the crops of grain to be grown thereon, that delivery was made by Hirschmiller of plaintiff's share of the threshed grain on October 1, 1920, and that on the same date Hirschmiller agreed to leave on the land his one-half share of the oats grown thereon and assigned to plaintiff all his interest in his one-half share of the wheat grown thereon and at that time stored in the elevator of the Security Elevator Co., and quitted claim to plaintiff of all his interest in the land, and that in pursuance of said agreement plaintiff entered into possession, and that subsequently defendant wrongfully seized the threshed oats on the land and also the said wheat.

Defendant claimed under a security dated March 19, 1920, taken from Hirschmiller for moneys advanced for the purchase of seed grain, on the crop to be grown on said land,

under the provisions of sub secs. 8-11 of sec. 88 of the Bank Act (Can.), ch. 9, of 1913, as amended by ch. 1 of 1915; that on or about October 5, 1920, it made a seizure thereunder of a certain quantity of threshed oats on said land and sold same receiving therefor $242.75, and had credited the same less costs and charges in connection therewith; and, in respect of the wheat stored in the elevator which defendant alleged had been shipped and an advance thereon obtained by plaintiff from the elevator company, the defendant counterclaimed against the plaintiff for damages to the extent of the amount still owing under its security.

H. F. Thomson, for plaintiff.

H. E. Ross, for defendants.

Brown, C.J.K.B.: — The plaintiff states in his evidence that he did not know that Hirschmiller secured a loan from the defendants for seed grain. I am satisfied under the evidence and find that in this respect the plaintiff is not telling the truth and that he did know. I am also prepared to hold that the plaintiff knew, or at least ought to have known, that the defendants took the usual security for the advance. The circumstances were such that he should at least have been put upon enquiry.

As I view the case however it is immaterial that the plaintiff should have had the knowledge aforesaid. When the defendants advanced the money and took their security they had all the rights given under sub-sec. 10 of sec. 88 of the Bank Act, 1913, ch. 9, as enacted by sec. 1 of ch. 1 of the statutes of 1915. This sub-section reads as follows:

"The bank shall by virtue of such security acquire a first and preferential lien and claim for the sum secured and interest thereon upon the seed grain purchased and the crop covered by the security, as well before as after the severance of the crop from the soil, and upon the grain threshed therefrom, and the bank shall by virtue of such security acquire the same rights and powers in respect of such seed grain and of the grain so threshed as if it had acquired such rights and powers by virtue of a warehouse receipt."

Sub-sec. 2 of sec. 86 of the Bank Act indicates the right of a bank under a warehouse receipt in the following language:—"Any warehouse receipt or bill of lading so acquired shall vest in the bank, from the date of the

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acquisition thereof (a) all the right and title to such warehouse receipt or bill of lading and to the goods covered thereby of the previous holder or owner thereof; or (b) all the right and title to the goods, wares and merchandise mentioned therein of the person from whom such goods, wares and merchandise were received or acquired by the bank, if the warehouse receipt or bill of lading is made directly in favour of the bank, instead of to the previous holder or owner of such goods, wares and merchandise."

The defendants' claim therefore extended to all the grain grown including that portion to which the plaintiff would become entitled under his crop-payment agreement. The plaintiff therefore had no title and could not acquire any title from Hirschmiller which took priority to or could defeat the defendants' claim.

In Maclaren on Banks and Banking, 4th ed. 1914, p. 248, I find the following:—

"Sub-section 2 provides that when a bank acquires a warehouse receipt or bill of lading as aforesaid it shall vest in the bank from the date of the acquisition thereof all the right and title to the instrument and to the goods covered thereby of the previous holder or owner; and if the instrument is issued directly in favour of the bank all the right and title to the goods mentioned therein of the person from whom the same was received or acquired by the bank."

After the acquisition by the bank of the instrument the previous holder or owner cannot give to any third party, nor can any creditor of such previous holder, or other person acquire any claim upon the goods that will have priority over the claim of the bank.

The defendants were not called upon to register their security in order to protect their claim against third parties. See Tennant v. Union Bank of Canada, [1894] A.C. 31, 63 L.J. (P.C.) 25; Maclaren on Banks and Banking, 4th ed. 1914, p. 249.

The defendants therefore had a right to enter upon the land and take possession of the oats and were not guilty of trespass in anything they did in that connection. They had, however, no right to dispose of the oats in the manner which they adopted. Their rights in this respect are limited by sub-sec. 3 of sec. 89 of the Bank Act and, apart from the consent of the owner, the sale must be made by

public auction and after proper advertisement. Hirschmiller did give his consent in writing but at the time of sale by the defendants the plaintiff, to the knowledge of the defendants, had become the owner of whatever interest Hirschmiller still had in the grain and his consent was not secured. I cannot therefore allow the defendants to charge $45 or any amount for haulage of the oats. They must account for the full proceeds of the oats sold, namely, $242.75, which I find to be their market value at the time.

The defendants are entitled to the balance unpaid by the Security Elevator Co., Ltd., on the wheat sold to them. See Traders' Bank v. Goodfallow (1890), 19 O.R. 299.

After allowing the $242.75 to be credited as of October 7, the date when the oats were marketed, and further allowing the sum owing by the Security Elevator Co. Ltd. aforesaid to be credited as of the date of this judgment the defendant will have judgment against the plaintiff for the balance due on their note.

Under the circumstances there will be no costs of claim but the defendants will have their costs of the counterclaim against the plaintiff.

In order to ascertain the correct balance due the defendants on the aforesaid findings there will be a reference to the Local Registrar for that purpose.

Judgment accordingly.

CLEARY v. HITE.

Saskatchewan King's Bench, McKay, J., May 24, 1921.

New Trial (§IV—33)—District Courts Act R.S.S. 1920, ch. 40 sec. 55 (1)—Power of Judge to Order—Trial of New Issues—Amendment of Pleadings after Trial of Issues on Pleadings as They Then Stood.

The power to grant new trials conferred upon District Court Judges by the District Courts Act R.S.S. 1920, ch. 40 sec. 55 (1) is not an absolute power to be exercised upon any grounds which the Judge may think fit, but is subject to the same limitations as are imposed upon Judges of the Superior Courts. A District Court Judge has no jurisdiction to direct a new trial and allow new issues to be raised by amendment of the pleadings, after the trial has been held on the issues raised on the pleadings as they then stood and the evidence has been heard on those issues.

[Murtagh v. Barry, (1890) 24 Q.B.D. 632; Brown v. Dean [1910] A.C. 373 followed.]

APPEAL by defendant from an order of a District Court Judge ordering a new trial in an action for damages to the plaintiff's crop alleged to have been done by the defendant's cattle. Judgment for defendant.

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T. D. Brown, K.C., for appellant.

D. A. McNiven, for respondents.

McKay, J.:—This is an appeal from the order of the District Court Judge of the Judicial District of Estevan whereby he ordered a new trial herein.

The action was brought to recover payment for damages alleged to have been done to plaintiff's crop of flax by defendant's cattle. After the trial at which evidence was heard but no argument the trial Judge adjourned the hearing of the argument sine die. Subsequently the argument was heard, and the counsel for defendant contended that the action should be dismised as their was no evidence that there was a by-law in force in the municipality in which the alleged damage was done, restraining animals from running at large.

It appears that no evidence was submitted at the trial as to the existence of any by-law. The trial Judge thereupon intimated that, in his opinion, the plaintiffs could not recover unless there was a by-law in force in the municipality in which the damage was done restraining animals from running at large at the time such damage was done. Notwithstanding such intimation however the counsel for plaintiffs contended that in order for plaintiffs to succeed it was not necessary to prove any by-law, and the Judge adjourned the hearing of the said argument to permit plaintiffs' counsel to produce authorities in support of his contention.

Upon resuming the argument the plaintiffs' counsel applied for leave to tender evidence as to the existence of such a by-law as above referred to, and thereupon the trial Judge made the order appealed from.

Counsel for appellant contends that the trial Judge had no jurisdiction to make the said order.

In his reasons for making the said order the Judge states:—

"It appears to be within the discretion of the trial Judge at any period in a case to allow further evidence to be called for his own satisfaction on application for leave by either party even though he is doubtful whether the party is entitled to put in such evidence as a matter of right. Budd v. Davison, 29 W.R. 192."

In this Budd case (1881), 29 W.R. 192, the action was for the execution of a lease of a house. The defence set up was misrepresentation on the subject of drainage of the

house which defendant said had been stated to him by the plaintiff to be very good, whereas the drainage was so bad and ineffective as to render the house unfit for residence. At the trial a large amount of evidence on the subject of drainage was given on each side and among others the defendant called several scientific witnesses in support of his case. On the conclusion of the defendant's case the counsel for the plaintiff applied for leave to adduce scientific evidence to rebut the evidence of the experts who had been called by the defendant's counsel. The application was opposed. In allowing the application Malins, V.C., stated at p. 192: "It is doubtful whether the plaintiffs are entitled to call further evidence or not, but that there is no doubt the Judge may allow them to do so to assist himself."

It is to be noted this case is entirely different from the case at Bar. In the Budd case the issue to be tried was clearly set out in the pleadings and evidence was called on each side, and the application was made at the close of defendant's evidence to call scientific evidence to rebut the defendant's scientific evidence. But in the case at Bar the application is to have a new trial on new issues, as the order appealed from allows certain amendments to be made to the claim, namely, the pleading of the existence of the by-law, etc.

The trial was held on the issues raised on the pleadings as they then stood, and the evidence was heard on these issues, and now when plaintiff is of the opinion he cannot succeed on said issues and evidence, he desires to amend and have a new trial. This, in my opinion, is altogether different from the question which arose in the Budd case, and I do not think the principle or practice referred to by Malins, V.C., would apply in the case at Bar.

Neither could the said order be made, in my opinion, under sec. 55 (1) of the District Courts Act, R.S.S. 1920, ch. 40. This section reads as follows:—

"Every Judge of the District Court, in any action at the trial of which he has presided, may on application set aside all orders made by him at the trial, and review and set aside his judgment, and order a new trial and rehear all matters argued before him."

In Murtagh v. Barry (1890), 24 Q.B.D. 632, 59 L.J. (Q.B.) 388, it was held that "The power to grant new trials con-

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ferred upon the Judges of county courts by sec. 93 of the County Courts Act, 1888, is not an absolute power to be exercised upon any grounds which the Judge may think fit, but subject to the same limitations as to the grounds on which a new trial may be granted as are imposed upon Judges of the Supreme Court."

Section 93 of the County Courts Act, 1888 (Imp.), ch. 43, above referred to, is in part as follows:—"The Judge shall in every case whatever have the power, if he shall think just, to order a new trial to be had upon such items as he shall think reasonable and in the meantime to stay proceedings.

In Sklar v. Borys (1917), 10 S.L.R. 359, Elwood, J., held that above sec. 55 does not go any farther than the above quoted section of the County Courts Act, 1888, and that, therefore, there would be the same limitations upon this power of the District Court Judges with regard to granting new trials as are upon the County Court Judges in England, and I agree with this.

The Murtagh case was decided in 1890 and the same question again arose in Brown v. Dean, [1910] A.C. 373, 79 L.J.(K.B.) 690, where the House of Lords held that the power given by said sec. 93 to a County Court Judge is a judicial not an arbitrary discretion and the Judge is bound by the Rules binding upon the High Court.

It seems to me that the effect of the decision in the Murtagh case is that if the plaintiff could not succeed in appeal then the District Court Judge should not grant a new trial.

If the District Court Judge in the case at Bar had dismissed the application and the plaintiffs appealed, I fail to see how they could succeed in getting a new trial, because what the plaintiffs now want is to amend their pleadings so as to raise new issues and thus be enabled to call new evidence; it is not a case of finding new evidence after the trial. The affidavit of counsel for plaintiffs clearly shews this. In Brown v. Dean, Lord Loreburn, L.C., in refusing the application for a new trial stated in part, at p. 374:—"My Lords, the chief effect of the argument which your Lordships have heard is to confirm in my mind the extreme value of the old doctrine 'Interest rei publicae ut sit finis litium,' remembering as we should that people who have means at their command are easily able to exhaust the resource of a poor antagonist."

In my opinion then the District Court Judge had no power to make the order appealed from, and the said order will be set aside, and there will be judgment for the defendant dismissing the plaintiff's action with costs.

The defendant will be entitled to the costs of this appeal.

Judgment accordingly.

CAMPBELL v. CAMPBELL

Alberta Supreme Court, Simmons, J., June 30, 1921.

Divorce and Separation (§IIIE—38)—Parties Married and Domiciled in Canada—Wife Obtaining Divorce in Foreign Country—Grounds not Sufficient to Support Decree under Canadian Law—Subsequent Marriage of Wife—Right of Husband to Dissolution of Marriage—Legal Adultery.

Where a wife, married and domiciled in Canada, obtains a divorce in the United States of America on grounds which would not support a decree under Canadian law, the husband not taking any part in the proceedings and not submitting to the jurisdiction of the foreign Court, such foreign proceedings cannot affect the legal status of the Canadian marriage, and the subsequent marriage and cohabitation of the wife in the United States constitutes legal adultery which entitles the husband to dissolution of the marriage in an action instituted in Canada.

[See Annotation, Divorce Law in Canada, 48 D.L.R. 7.]

ACTION for dissolution of marriage on the ground of legal adultery. Judgment for plaintiff.

G. C. Valens, for plaintiff.

Simmons, J.:—The plaintiff sues for dissolution of the marriage made with the defendant on February 1, 1916, at Wainwright, Alberta. The defendant went to Minnesota in November, 1917, and on or about June, 1919, she instituted divorce proceedings in the Minnesota Courts and obtained a decree of divorce from her husband on the ground of cruelty, and subsequently married F. R. Richards in the State of Minnesota. The husband plaintiff took no part in said proceedings in Minnesota, and did not submit to the jurisdiction of the foreign Court.

The plaintiff claims that the defendant's marriage and cohabitation under said marriage in Minnesota constitutes legal adultery furnishing grounds for his claim for dissolution of the Canadian marriage.

The domicile of the wife is the husband's domicile and the foreign proceedings could not affect the legal status of the marriage in Canada. The grounds supporting the foreign decree would not support a decree under Canadian law. In Briggs v. Briggs (1880), 5 P.D. 163, two English

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persons married in England. The husband went to Kansas, and after an interval of a year obtained a divorce on the ground of his wife's desertion and subsequently he re-married.

On the facts the Court held that the husband had not acquired a foreign domicile and that he had contracted a bigamous marriage, as the Kansas divorce was granted on the ground of desertion alone which was insufficient under English law.

Judgment for plaintiff for dissolution of marriage to be made absolute in 3 months unless cause shewn contrary. Plaintiff to have custody of the child, issue of the marriage.

Judgment accordingly.

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Saskatchewan King's Bench, Bigelow, J., April 27, 1921.

Appeal (§VIIL—470)—From Dismissal in Summary Conviction Proceedings—Illegal Sale of Intoxicating Liquor—Sask. Temperance Act, R.S.S., 1920, ch. 194.

An appeal by the prosecution against the dismissal of a charge for illegally selling intoxicating liquor should be dismissed if there was evidence before the Magistrate on which he could reasonably reach the conclusion to which he came.

Intoxicating Liquors (§IIIG—85)—Unlawfully Keeping for Sale—Statutory Presumption—Possession by a Liquor Export Company—Sask. Temperance Act, R.S.S., 1920, ch. 194 and 1920, Sask., ch. 70.

On a charge of unlawfully keeping liquor for sale brought against a company incorporated for the purpose of importing liquor into Saskatchewan for exportation outside of Saskatchewan, no statutory presumption arises under sec. 73 of the Temperance Act, R.S.S. 1920, ch. 194, as amended by 1920, Sask., ch. 70, sec. 38 on account of its possession of intoxicating liquor. The onus is on the prosecution to prove the unlawful purpose or intent in such case.

Intoxicating Liquors (§IIIG—85)—Unlawful Keeping for Sale—Unauthorised Acts of Employees—Master and Servant—Saskatchewan Temperance Act.

On a charge against a company of unlawfully keeping liquor for sale in contravention of the Sask. Temperance Act, the company will not be held responsible for the acts of its employees done without the authority, connivance, approval or knowledge of an officer of the company.

[Emary v. Nolloth, [1903] 2 K.B. 264, 72 L.J. (K.B.) 620, and The King v. Quirk, (1910), 16 Can. Cr. Cas. 391, applied.]

APPEAL by the Provincial Director of Prosecutions from the dismissal of a charge against defendant company for unlawfully selling intoxicating liquor in contravention of the Saskatchewan Temperance Act, R.S.S. 1920,

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ch. 194 and 1920, Sask., ch. 70; and an appeal by the defendant company from a summary conviction made against it under the same Act on a charge of unlawfully keeping intoxicating liquors for sale.

The two appeals were heard together, and, by consent, the evidence taken in both was to be taken as the evidence in each appeal. The appeal of the prosecution was dismissed and the appeal of defendant company was allowed and the conviction quashed.

P. E. Mackenzie, K.C., and J. W. Estey for the Director of Prosecutions (Sask.).

J. F. Frame, K.C., and F. F. MacDermid, for Lee Wine Co., Ltd.

Bigelow, J.:—The Lee Wine Co., Ltd., is a company incorporated under the provincial Companies Act, R.S.S. 1920, ch. 76, on May 10, 1920. Among the objects of the company described in its memorandum of association are: "(a) To import into Saskatchewan for exportation outside of Saskatchewan as wholesalers and retailers any spirituous and any fermented or unfermented and any malt liquors," etc.

On January 18, 1921, a search warrant was issued by a Justice of the Peace, and on the same date, under this warrant, a large quantity of liquor was seized, to the value of about $150,000. On January 21, 1921, an information was laid against the company for unlawfully keeping intoxicating liquor for sale on or about January 5, 1921. On January 28, 1921, the company was convicted of that offence and fined $1,000 and costs; and from that conviction the company appeals.

On January 24, an information was laid against the said company for unlawfully selling intoxicating liquor on January 5, 1921. That charge was dismissed by the Magistrate on February 7, 1921.

The evidence for the Crown in the selling case was practically the same as in the charge for unlawfully keeping, but for the defence, Lee and Cameron denied the alleged sales sworn to by Campbell and Wurn. From the order dismissing the charge for selling the prosecution appeals.

The two appeals were argued together, and it was agreed by counsel that all the evidence taken before the Magistrate in both cases should be taken as the evidence in each appeal. I have not had the advantage of seeing the witnesses or of forming any conclusion as to their demeanour

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or manner of giving evidence. The Magistrate gave oral reasons for dismissing the charge for selling, and if these reasons were before me they might be of some assistance.

The only conclusion I can come to as to why he convicted for keeping and acquitted for selling, all on the same evidence for the Crown, is that in the second case, namely the one for selling, after hearing the evidence of Lee and Cameron for the defence, he did not believe the witnesses for the Crown, or at least that there was sufficient doubt about it to entitle the company to an acquittal. I am strongly of the opinion that the judgment in both cases should be the same, that if the witnesses for the Crown are to be believed the company was guilty of both keeping for sale and selling, and if the witnesses for the Crown are not to be believed the company should be acquitted on both charges. I must conclude that if the Magistrate had before him in the first case the evidence for the defence which he had in the second, that he would have acquitted in the first case.

As to the appeal by the prosecution against the dismissal of the charge for selling, there was evidence before the Magistrate on which he could reasonably reach the conclusion he did. He has had the considerable advantage of seeing the witnesses, and I am not disposed to interfere with his decision.

This appeal is therefore dismissed with costs.

As to the appeal of the company from the conviction for unlawfully keeping for sale, as I have said before, I think both judgments should be the same, but the importance of this case requires that I should go into the matter further.

The company was incorporated for a lawful purpose—"to import liquor into Saskatchewan for exportation outside of Saskatchewan." There is no question about this. The Legislature of Saskatchewan recognised this when they enacted ch. 35, R.S.S. 1920, The Liquor Exporters' Taxation Act.

The company then had a right to keep liquor in the Province for a lawful purpose. Section 73 of the Saskatchewan Temperance Act (1920, Sask. ch. 70, sec. 38), referring to the burden of proof, does not apply.

In Rex v. Nat. Bell Liquors Ltd. (1921), 56 D.L.R. 523, 35 Can. Cr. Cas. 44, 16 Alta. L.R. 149, Beck, J., said at p. 569:—

"Once however that it was proved—and it was proved by the Crown—that the company was carrying on a regular liquor export business, then I think that the presumption arose in its favour that its stock of liquor was kept for legitimate purposes, and the force of the statutory presumption raised by section 54—which has no element of a natural inference—was spent."

And Stuart, J., says at p. 557:—

"They were legally entitled to have liquor in their possession, and there was no statutory presumption against them therefore on account of that possession. They were entitled to have it in possession for a certain lawful purpose. But it was possible that there might exist an unlawful purpose. The essential charge against them therefore was the existence of this unlawful purpose or intent, not the mere physical fact of possessing. It was this purpose or intent that had to be proved."

The onus then is on the prosecution to prove this unlawful purpose or intent. The evidence offered to prove this is as follows:—

Bowdridge, an officer under the Saskatchewan Temperance Act, engaged a man named Craig to buy liquor from the company: $25.00 was furnished him for this purpose Bowdridge went with him along the street, but did not enter the company's premises. Craig came back with a bottle of liquor. Craig was not called as a witness. He may or may not have got this liquor from the company.

Then Gardner, an officer under the Saskatchewan Temperance Act, says that on January 4 he watched Craig go into the premises of the company, and he came out with a bottle of liquor. As Craig was not called, we do not know from whom this was obtained, or whether it was sold, given away or stolen.

Then on January 5 Gardner employed one Campbell to go with Craig to buy liquor. Gardner did not see them entering the premises, but on the following morning Campbell and Craig gave Gardner two bottles of liquor.

Campbell says that he and Craig each bought a bottle of liquor from Lee. Lee was manager of the company. He denies Campbell's evidence.

Woodcock, another witness for the prosecution, says that he bought a bottle of rum for $6 on October 14 from Hines, an employee of the company. There is nothing to

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shew that Lee had any knowledge of this.

Wurn said that on January 5, about 2 o'clock in the morning, he bought a bottle of whiskey from Cameron, the night watchman, for 6 dollars, and that a friend of his bought a bottle for 6 dollars also; and about a week later they went back and saw two others buying whiskey from the same man. This is denied by Cameron.

Not having seen these last two witnesses, but only reading their evidence as taken before the Magistrate, I see no reason for disbelieving them, and I accept their testimony as against Cameron.

"The expression 'unlawfully keeping for sale' or keeping for unlawful sale refers to some habitual or continuing purpose." Stuart, J., in Rex v. Nat Bell Liquors Ltd. supra, at p. 557; and Jayes v. Harris (1908), 99 L.T. 56, cited by Stuart, J.

The Crown offers Woodcock's evidence to assist in proving the habitual and continuing purpose. Mr. Frame objected to the reception of this evidence as being too remote from the date of the charge. I doubt whether the evidence was admissible, but even if admissible it does not help. An illegal sale by Hines, an employee of the company, without the authority, connivance, approval or knowledge of an officer of the company, would not in my opinion prove that the company kept liquor for unlawful purposes; and even if the company did have that unlawful intent on October 14, it does not prove that they had the same unlawful intent on January 5. There was plenty of time for repentance, and a change of mind would seem reasonable, especially because between these two dates the Saskatchewan Temperance Act, ch. 194 (as amended 1920, Sask., ch. 70), came into force (I think the date was December 15, 1920), an Act much more stringent against illegal sales than the previous Act.

Then let us consider Wurn's evidence. I believe his evidence that he and a friend bought two bottles from Cameron late at night on January 5, and about a week later he saw Cameron sell liquor to two others. Cameron was the night watchman. He had some other duties, but no authority to sell, legally or illegally. I am of the opinion that the company is not responsible for the acts of its employees unless the act is done with the authority or connivance or approval or knowledge of an officer of the company.

Emary v. Nolloth, [1903] 2 K.B. 264, 72 L.J. (K.B.) 620; The King v. Quirk (1910), 16 Can. Cr. Cas. 391, 44 N.S.R. 244. I cannot find here that any of the officers of the company had knowledge of Cameron's acts or that they approved or that they authorised them or connived at them.

That brings the case down to Campbell's evidence, who says that he and Craig each bought a bottle of liquor from Lee, the manager of the company. Lee denies this. Lee is a very interested witness, but so is Campbell. See Stuart, J., in Rex v. Nat Bell Liquors Ltd., supra, at p. 555:—

"It is nevertheless the case that, being an interested witness, his evidence should be received with caution. Erie, J., in charging the jury in Reg. v. Dowling (1848), 3 Cox C.C. 509 at p. 516, told them that they 'would do well to receive his (a spy's) evidence with caution, seeing that it was probable on the face of it, and borne out so far as it could be by the other circumstances of the case.' He meant, of course, that as the spy's evidence was probable, i.e., not improbable on the face of it, and was borne out by other circumstances, the jury would do well to receive it, but with caution."

Stuart, J., refers also to Wigmore, paras. 969 and 2060, and Rex v. Despard (1803), 28 How. St. Tr. 346, at p. 489.

Although Campbell's evidence should be received with caution, it may be that if I had seen him on the witness stand I would come to the irresistible conclusion that he was telling the truth. I did not see him; the Magistrate did, and must have disbelieved him as against the evidence of Lee when he acquitted the company on the charge of selling.

Under these circumstances I cannot accept Campbell's evidence as against Lee's. This appeal is allowed, and the conviction quashed; no costs.

As to costs: as I said before, I must conclude that if the Magistrate had before him in the first case the evidence for the defence which he had in the second, he would have acquitted in the first case. This appeal would then have been unnecessary. As the accused chose to take this course and not put in all its evidence, and thus made this appeal necessary, it should not have any costs.

Mr. Frame, for the company, requested that if I quashed the conviction I should order the liquor seized to be re-

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stored, as was done in the Nat Bell Liquors Ltd. supra. But in that case there had been an order freeing the liquor which was the subject of the appeal. Here there has been no such order, or if there was one, it is not before me.

Mr. Frame also argued that the Saskatchewan Temperance Act, or in the alternative that portions of it, are ultra vires of the Provincial Legislature. In view of my decision on the facts I do not deem it necessary to go into that question.

Prosecutor's appeal dismissed.
Defendant's appeal allowed.

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British Columbia Supreme Court, Macdonald, J. July 22, 1921.

Constitutional Law (§IA—20)—B.C. Government Liquor Act 1921 ch. 30—Validity—B.N.A. Act, sec. 92 sub-secs. 16 & 13.

The B.C. Government Liquor Act 1921 B.C. Stats. ch. 30 which gives the Province control of the liquor trade is within the powers of the Provincial Legislature, under sec. 92 (16) of the B.N.A. Act, its subject being merely of a local or private nature within the meaning of the section.

A writ of prohibition to prevent a Police Magistrate from further proceeding with a charge should be granted as of right where relief is sought upon defects appearing on the face of the proceedings before the Magistrate. The application should not be affected by the prospect of any change being made to the information in the future.

[See Canadian Pacific Wine Co. v. Tuley (1921), 60 D.L.R. 315; 520.]

APPLICATION for a writ of prohibition to restrain a Police Magistrate from proceeding with a charge of infraction of the B.C. Government Liquor Act, on the ground that the Act is ultra vires the Province. Dismissed.

C. H. Tupper, K.C., for the applicant.

E. C. Mayers, for the Provincial Government.

Macdonald, J.:—The "Army and Navy Veterans in Canada" were, by Dominion Statute, 1917, ch. 70, incorporated as an association and became vested with certain rights including that of establishing branches at any place in Canada. The Victoria unit of such association applies for a writ of prohibition to prevent the Police Magistrate of Victoria from further proceeding with the trial of a charge that the applicant "not being a Government vendor, did unlawfully sell liquor known and described as beer, contrary to the Government Liquor Act."

The particular section of such Act, which covers the offence is as follows:—

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"46. No person other than a Government vendor shall sell or deal in any liquid known or described as beer or near-beer or by any name whatever commonly used to describe malt or brewed liquor."

The ground taken in support of the application is that the Government Liquor Act, 1921, (B.C.) ch. 30, is ultra vires of the Province, and that the Magistrate is thus without jurisdiction.

Counsel opposing the application contends that, aside from the question of the validity of the Act, the writ should not be granted, as a portion of the description of the offence alleged in the information might be considered surplusage, and in any event, if the Act were held to be invalid, the British Columbia Prohibition Act, 1916 (B.C.), ch. 49, would cease to be repealed and, upon its revival, the applicant might, by proper amendment, be brought within its provisions. Even if such result ensued, I do not think this contention should prevail, as the section under which the information was laid deals with any kind of beer irrespective of it containing any percentage of alcohol or being simply what is called "near beer," and there was no similar section in such Prohibition Act. Further, redress is sought upon defects claimed to now exist upon the face of the proceedings and, if this is a good objection, then the application should not be affected by the prospect of any change being made in the future. The proper procedure has been pursued where such a defect appears and the issuance of a writ of prohibition would, in that event, be as of right and not simply discretionary. See Rex v. Jack (1915), 25 D.L.R. 700, 49 N.S.R. 328, 24 Can. Cr. Cas. 385, referring to Farquharson v. Morgan, [1894] 1 Q.B. 552, 63 L.J. (Q.B.) 474, where Lord Halsbury felt bound to grant the writ, although the applicant had no merits. Cf. Rex. v. McAuley (1918), 30 Can. Cr. Cas. 145, where Mathers, C.J.K.B. granted a writ of prohibition with respect to a charge under the Criminal Code. He bore in mind the prospect of amendment and reserved such right to the prosecution and further gave it the liberty of proceeding upon the information after it had been properly amended and re-sworn or upon a new information being laid properly stating the offence. An information should not only contain every ingredient to properly describe an offence but it should be an offence supported by common law or valid legislation. If neither of these exist a party charged is entitled to seek the assistance and interference of a Superior Court.

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Then is the Act in question invalid? It was submitted that its prohibitory provisions, so termed, were separable from the balance of the legislation and being clearly within the powers of the Province might be held valid and render the applicant liable for an infraction. Can they be taken as a distinct declaration of the legislative will? To determine this point, one should consider the Act in its entirety, coupled with the trend of liquor legislation in the Province. The British Columbia Prohibition Act [1916 B.C. ch. 49 and amendments] had been in force for a period and in 1920 the Legislature, by B.C. Statute, ch. 93, authorised the taking of a referendum at which questions were submitted for an expression of opinion by the electorate. Following the result of such referendum, the Act in question, termed "An Act to provide for Government Control and Sale of Alcoholic Liquors," 1921 (B.C.) ch. 30, was passed. It was intended to implement the vote of the people and did not purport to be prohibitory legislation. The scope of the Act appears quite clear. It is apparent the Legislature was making a new departure in liquor legislation. It had abandoned the license system in 1916 and adopted prohibition [1916 (B.C.) ch. 49]. This, in turn, was to be ousted and the government authorised to control and carry on the liquor business in the Province. A Board was to be appointed by the Government to accomplish this object and, by ample and exclusive powers of purchase and sale, effectually carry out the intent of the Act. These may be called the prescribing clauses of the Act, and indicated its general purpose. It would not, however, be sufficient to simply control or regulate the sale, but was deemed necessary to prevent other persons from engaging in the business. So the Act, after providing for the establishment and conduct of government liquor stores and the issuance of permits to persons desirous of purchasing liquor from the Government, prohibited sales in the Province, except from such government stores. I think this was the sole object in enacting such prohibitory provisions, and that they were intended to be, and are, only effective in conjunction with the Act. In other words, they should not stand and constitute valid legislation by themselves. If the Act, as a whole, be invalid, individual clauses which, "if separately enacted would be intra vires, must fall unless clearly to be taken as independent substantive enactments." See Clement's Canadian Constitution, 3rd ed., 1916, p. 491, and cases there cited.

Then is the Act unconstitutional? It is stated, by counsel that there is no concrete case which bears upon this question. In considering the matter, the validity of the impugned Act should be presumed, and such a meaning given to the statute, if possible, as will uphold its validity "for a legislative body must be held to intend to keep within its powers." Clement's Canadian Constitution 492. Cf. Macleod v. Att'y-Gen'l for N.S.W., [1891] A.C. 455, 60 L.J. (P.C.) 55. Also, I should bear in mind a portion of the judgment of Idington, J., in Re Alberta Railway Act (1913), 12 D.L.R. 150, 48 Can. S.C.R. 9, 15 C.R.C. 213, as follows [12 D.L.R. 159]:

"Any legislative enactment under our federal system, which partitions the entire legislative authority, ought to be approached in the spirit of assuming that the legislature did not intend to exceed its powers; and if an interpretation can reasonably be reached, which will bring it within the power assigned the legislature in question, and given operative effect, then that meaning ought to be given it. Of course, if the plain language is such that to give it operative effect must necessarily involve doing that which is beyond the power assigned the legislature, then the Act must be declared null."

The legislation purports to be purely local and does not in terms apply to any matter outside the Province or between the Provinces. The applicant should, under such circumstances, in addition to the presumption referred to, assume the onus of shewing its invalidity. It is contended, that the Province has no right to embark in the liquor business and create a monopoly for itself by restrictive and prohibitory provisions of the nature there outlined. Further, that it cannot, by such business, attempt to enhance its revenues through prospective profits. It is submitted, that the liquor traffic is not of itself illegal, except as it may be regulated or prohibited by statute, so if this legislation were held valid the Province might engage in any business. It could buy and utilise property for that purpose. It might aside from any contention that might be made as to not being liable for customs or excise duties, pursue wholesale and retail business to such an extent as to seriously impair the revenues of the Dominion. It might successfully contend that, not only the property used in any such business, but the revenues derived therefrom, were free from taxation on the ground that, by sec. 125 of the B.N.A. Act, "No lands or property belonging to Canada or any Province

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shall be liable to taxation." This is a situation, however, with which, it is submitted, I should not be concerned, as the question to be determined is, whether the Province has exceeded its powers, in the passage of such an Act, irrespective of any result from a Dominion standpoint or otherwise. See Bank of Toronto v. Lambe (1887), 12 App. Cas. 575, at p. 587, 56 L.J. (P.C.) 87:

"If . . on the due construction of the Act a legislative power falls within sec. 92 it would be quite wrong . . to deny its existence because by some possibility it may be abused or may limit the range which otherwise might be open to the Dominion Parliament."

The extensive powers exercisable by a Province, under the B.N.A. Act, is referred to by Boyd, C., in Re McDowell & Town of Palmerston (1892), 22 O.R. 563, at p. 564, as sufficient to deprive a party of his property even without compensation. In that case a portion of the judgment of Day, J., in Ex parte Gould (1854), 2 R.J.R. (Que.) 376, at p. 378, was quoted with approval. In such case, decided before Confederation, reference was made to the powers of the Provincial Parliament, within statutory limits, being as extensive as those of the Imperial Parliament, at p. 565, "even if they were to interfere with the Magna Charta." Then again, in Liquidators of Maritime Bank of Canada v. Receiver-General of New Brunswick, [1892] A.C. 437, at p. 442, 61 L.J. (P.C.) 75, the B.N.A. Act was considered and the authority of the Local Legislature, within the limits of sec. 92 of the Act, defined as follows:—

"In so far as regards those matters which, by sect. 92 are specially reserved for provincial legislation the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act. In Hodge v. The Queen (1883), 9 App. Cas. 117, Lord Fitzgerald, delivering the opinion of this Board said: 'When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area, the local legislature is supreme and has the

same authority as the Imperial Parliament or the Parliament of the Dominion.' The Act places the constitutions of all provinces within the Dominion on the same level."

Is the power then to pass this impugned Act contained within sec. 92 of the B.N.A. Act? If such power is not derived from the exclusive right, "to make laws in relation to the matters coming within the class of subjects" enumerated in the section, a Local Legislature cannot obtain aid to support its legislation outside its provisions. The residuum of legislative power, under the scheme of Confederation has been repeatedly declared by the Privy Council to be vested in the Dominion. See Lambe's case, 12 App. Cas. 575, at p. 588, where this point is referred to as follows:—

"They adhere to the view which has always been taken by this Committee, that the Federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the provincial legislatures rests with the parliament."

Section 92 enumerates 16 different classes of subjects concerning which the Province may legislate. None of these specifically, or inferentially, indicate that a Province would be entitled to pass laws for the purpose of itself establishing a retail trade in any commodity. The nearest approach to such an authority might be permissible, or necessary, in a measure under No. 5 — allotting to the Province "the management and sale of the public lands belonging to the Province and of the timber and wood thereon."

Counsel for the applicant contends that this express power of management and sale, as to provincial lands and timber, strengthens the submission, that a like power should not be held to exist under any other portion of sec. 92, so as to include the subject covered by the Act in question. Further, that a decision to that effect, in favour of the Province would conflict with the provisions of No. 2 of sec. 91 of the B.N.A. Act, giving the Parliament of Canada exclusive legislative authority as to the regulation of trade and commerce. It is, on the contrary argued, that there has been no invasion of the legislative field, that may be, or has been, in any way occupied by the Dominion under any part of sec. 91, and that authority is given to the Province to thus legislate under Nos. 10, 13 and 16 of sec. 92.

Number 10 deals with "local works and undertakings." There are exceptions to this "subject" which should aid in its

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construction and throw light upon the power, intended to be conferred upon the Province. This number would not ordinarily be considered, as applicable to the carrying on of the liquor business. The works intended to be dealt with, would seem to indicate that they were to be of a physical or tangible nature, as the exceptions refer to extra-provincial means of transportation or communication and works which, "before or after their execution" might be declared to be for the general advantage of Canada.

The case of Smith v. City of London (1909), 20 O.L.R. 133, at p. 153, is cited as an authority that a Province may, under No. 10, support the passage of an Act, authorising contracts by a municipality for transmission of electricity, as being a local work or undertaking. I think on this branch it only supports a contention that the Provincial Legislature has power to establish "electrical works" under No. 10 of sec. 92 and to delegate such power to a competent municipal body. See Boyd, C., at p. 154—"The installation of an electric plant in the City of London would be per se 'a local work or undertaking.'"

The case, however, is of importance and gives strength to the validity of the Act under Nos. 13 and 16 of sec. 92.

Number 13 deals with the subject of "property and civil rights in the Province" and it may be considered in conjunction with No. 16, the last-enumerated class of subjects in sec. 92, viz., "generally of matters of a merely local or private nature in the Province." In this connection, Lord Watson, in Att'y-Gen'l for Ontario v. Att'y-Gen'l for Canada, [1896] A.C. 348, 65 L.J. (P.C.) 26, while not referring to No. 10, expressed a decided opinion that provincial legislation for the suppression of the liquor traffic could only be supported under either No. 8 or 9 of sec. 92 and that the only enactments of that section which appeared to have any relation to such legislation were to be found in Nos. 13 and 16. He did not deem it necessary for the purposes of the appeal to determine whether such legislation was authorised by the one or the other of these heads. In Att'y-Gen'l for Manitoba v. Manitoba License-Holders' Ass'n, [1902] A.C. 73, 78, 71 L.J. (P.C.) 28, Lord Macnaghten, in referring to the judgment in the case just mentioned says:—

"Although this particular question was thus left apparently undecided, a careful perusal of the judgment leads to the conclusion that, in the opinion of the Board, the case

fell under No. 16 rather than under No. 13. And that seems to their Lordships to be the better opinion."

With reference to the liquor Act here in question, both numbers might with advantage be utilised to support the legislation.

As I have mentioned, the power of the Local Legislature as to property is ample even to the extent of confiscation. The words of No. 13 are used in their largest sense. See Citizens Insurance Co. v. Parsons (1881), 7 App. Cas. 96, 51 L.J. (P.C.) 11.

Does No. 13, coupled with No. 16, enable a Local Legislature not only to deprive other persons of the right to engage in a particular trade, but to appropriate such trade exclusively to the Government of the Province? It was stated by counsel that the British Columbia Prohibition Act containing provisions for Government sales under certain conditions, had been attacked unsuccessfully in the Court on this ground. Assuming that the clauses in such Act as to sale were considered, and that it was decided that they did not affect the validity of the Act, I think there is a marked difference between the provisions under reasonable conditions in the British Columbia Prohibition Act, and those prescribed by the Act in question. In the latter Act, generally speaking, the only restrictions on the sale and use of intoxicating liquor is the purchase of a permit, while the British Columbia Prohibition Act purported to prevent the purchase of liquor save under exceptional circumstances. In one case the provisions as to sale were the main features to carry out the object of the Act, while, in the other, they were only ancillary or incidental to the prohibitory legislation.

In pressing the argument that the Act was an interference with trade and commerce other situations were outlined in addition to those to which I have referred, but Boyd, C., in Smith v. City of London, 20 O.L.R. 133, at p. 153, indicates what should be considered in determining the constitutionality of Canadian Legislation as follows:—

"In considering all legislation in Canada and the Provinces touching its constitutional aspect, the question is not of policy or expediency or reasonableness, but simply of competence, i.e., whether the particular statute can be brought into or under the class of subjects assigned by the Imperial Act of Confederation to the enacting assembly, whether it be Legislature or Parliament."

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In the Manitoba Liquor Case, [Att'y-Gen'l for Manitoba v. Manitoba License-Holders' Ass'n, supra] the effect that the Prohibition Act passed in that Province might have upon trade, as well as its interference with the revenue of the Dominion, was considered by the Privy Council as substantially the ground upon which the Manitoba Court had declared the Act unconstitutional. In discharging the judgment of that Court, Lord Macnaghten, [1902] A.C. 73, at p. 79, refers to the previous judgment in Att'y-Gen'l for Ontario v. Att'y-Gen'l for Canada, [1896] A.C. 348, supra, deciding that a Provincial Legislature has jurisdiction to restrict the sale in the Province of intoxicating liquors, so long as the legislation did not conflict with any legislative provision within the competence of the Parliament of Canada in force in the Province, and then reaffirms the opinion of the Privy Council that "matters which are 'substantially of local or of a private interest' in a Province —matters which are of a local or private nature 'from a provincial point of view,' to use expressions to be found in the judgment—are not excluded from the category of 'matters of a merely local or private nature,' because legislation dealing with them, however carefully it may be framed, may or must have an effect outside the limits of the province, and may or must interfere with the sources of Dominion revenue and the industrial pursuits of persons licensed under Dominion statutes to carry on particular trades."

So that, even if prohibition had the effect indicated, it was not considered as a violation of the jurisdiction given to the Dominion to regulate trade and commerce.

It is contended that in principle it makes no difference if, instead of prohibiting the sale of liquor, the Province approves of and undertakes the sale of it as being a matter of a merely local nature. Similar objection was made to provincial legislation in the case of Smith v. City of London, supra. There the validity of certain statutes was attacked. Boyd, C., at p. 153 (20 O.L.R.), after referring to the duty of the Court to adjudicate and determine upon the validity of such statutes, states that the solid residuum of objection was left at the close of the argument, within a narrow compass, as follows:—

"It may be thus put: Electric current is a commodity, and as such the subject of 'trade and commerce,' this is an attempt to engage in municipal trade; and the law, rightly construed, does not permit a municipal body to interfere

with the rights of individual inhabitants as to private lighting. Something also was suggested as to the undertaking savouring of monopoly and claiming exclusive rights, unfavourable to free trade and self-government. It was urged also that the electors, even by unanimous vote, could not warrant such legislation. It is admitted (perhaps reluctantly) that, as far as regards supplying light to public buildings and streets and the like, the legislation was permissible. No doubt, the statute contemplates that light, heat, and power may be supplied (at a proper charge) to individual inhabitants and families. And the evidence is that the defendant corporation intends to go into this line of business."

He held, that the supply of light was a proper function of municipal administration and that the City of London might undertake exclusive powers of trading in such a commodity. Reference is also made, at p. 157, to the comment of Lord Herschell on the case of Citizens Insurance Co. v. Parsons, 7 App Cas. 96, viz., that it "allowed to the Provincial Legislature a very considerable power of dealing with trade within its own limits—within its own borders. . . You may give a very broad construction to 'Trade and Commerce' and yet it may be that it would still leave open a very large power of dealing in such a way as to incidentally affect trade without its being a part of the regulations made within such meaning."

The case of Hull Electric Co. v. Ottawa Electric Co., etc., [1902] A.C. 237, 71 L.J. (P.C.) 58, was also referred to in Smith v. City of London, at p. 157. There the validity of legislation was attacked on the ground that an electric light contract could not be properly legalised by a statute of the Province of Quebec, "that electric light was a commercial commodity and as such fell within the exclusive competence of the Dominion Parliament to regulate trade and that a monopoly had been created beyond the municipal power."

The attack upon the by-law and statute was abandoned before the Privy Council, [1902] A.C. 237, and Lord Macnaghten, in his judgment, in referring to such abandonment, said, at p. 247:—

"It is obviously untenable. The scheme in favour of which By-law No. 61 was passed was a purely local undertaking. As such it came within the exclusive jurisdiction of the provincial legislature, and not the less so because in such cases it is usual and probably essential for the

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success of the undertaking to exclude for a limited time the competition of rival traders."

I have, in the manner indicated, considered the impugned legislation and, in view of the decisions which I have shortly outlined, concluded that the passage of the Act in question was within the power of the Local Legislature and is valid. I think such legislation was of the local or private nature intended by sec. 92 of the B.N.A. Act to be within the jurisdiction of the Province.

The application for a writ of prohibition is, therefore, dismissed.

Prohibition denied.

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Alberta Supreme Court, Scott, J. March 3, 1921.

Specific Performance (§IE—30)—Agreement for Sale of Land—Land in Possession of Tenant under Lease—Purchaser Unable to Obtain Possession for Year—Damages for Breach of Covenant as to Possession—Measure of Compensation.

An agreement for the sale of land contained a covenant on the part of the vendor that he would suffer and permit the purchaser to occupy and enjoy the premises until default made in payment of the purchase-money. The land was then in possession by a tenant under a lease and the purchaser was unable to obtain possession for about a year from the date of the agreement. The Court held that if the vendor had intended that his covenant should be subject to the tenant's right of possession he should have so provided in the agreement, and that he was only entitled to specific performance of the agreement on payment of the damages sustained by the purchaser by reason of his being deprived of the possession of the land.

ACTION claiming specific performance of an agreement for the sale of land.

R. W. Manley for plaintiff.

A. Bisset, for defendants.

Scott, J.:—The plaintiff claims specific performance of an agreement for sale of land.

On November 19, 1917, the defendants entered into an agreement in writing to purchase from him the north east quarter of sect. 12, and the south east quarter of sect. 10, tp. 51, r. 17, west of fourth meridian, for $6,400, payable $1,000 cash and the remainder in four equal annual instalments of $1,350, payable on December 1st in each of the years 1919, 1920, 1921 and 1922, with interest at the rate of 8% per annum, payable annually. The agreement contained a covenant on the part of the plaintiff that he would

suffer and permit the defendants to occupy and enjoy the premises until default made in payment of the purchase-money.

The defendants paid the cash payment of $1,000 and shortly after the execution of the agreement they entered upon the south east quarter of sect. 10, and began to erect a dwelling house thereon. One Bedford, who was then in possession, thereupon commenced an action of trespass against them and the plaintiff, claiming that he was entitled to possession under a lease from the plaintiff and that under the provisions of the lease he was entitled to purchase upon certain terms. It was held in that action that he was entitled to possession under a lease from the plaintiff, which would expire on November 19, 1918, being a year after the date of the agreement for sale to these defendants, but that he was not entitled to claim under an agreement to purchase. By reason of the judgment in that case the defendants were compelled to withdraw from possession and to remove the dwelling house which they had partially erected.

While the plaintiff and the defendants were negotiating for the sale and purchase of the property, the former and defendant W. H. King went to the premises to interview Bedford and ascertain from him the nature of his claim to the property. As the plaintiff cannot speak English he took with him his brother, Vaclav Matejka, to act as his interpreter. Bedford then shewed them the documents which, in the action referred to, were held sufficient to establish his claim as lessee and the defendants were therefore aware of the nature and extent of his claim before they purchased.

Vaclav Matejka states that at that interview one of the defendants stated that Bedford could not do anything and that he was willing to buy the land at the price he offered and that he was not afraid of any trouble with Bedford, but W. H. King denies that any such statement was made by either of the defendants and states that he then told the plaintiff and his brother that the plaintiff was taking his own chances with Bedford. He further states, and it is not denied, that he and his brother dropped the matter of the purchase after that interview and that it was not until the plaintiff had sought a renewal of the negotiations that they agreed to purchase.

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Notwithstanding the fact that the defendants were aware of the nature and extent of Bedford's claim to possession. I am of opinion that they are entitled to rely upon the plaintiff's covenant to give them possession. Had he intended that his covenant should be subject to Bedford's right to possession he should have so provided in the agreement.

The defendants admit that the plaintiff is entitled to specific performance of the agreement subject to the payment by him or the allowance thereof on account of the purchase-money of the damages sustained by them by reason of their being deprived of the possession of the land to which Bedford in the action referred to was held to be entitled to possession, for the loss occasioned by the removal of their building and for the costs incurred by them in the action referred to, for which damages they now counterclaim.

The defendants state that it was their intention to break in 1918 from 70 to 80 acres of the land held by Bedford, so that it might be ready for crop in 1919, that the season of 1919 was too dry for breaking and that by reason of their not obtaining possession in 1918 they were thus unable to crop the land in either 1919 or 1920 and they claim damages for the loss thereby occasioned.

I hold that the damages claimed for the loss of the crop of 1920 are too remote and I therefore disallow them.

It is shewn that during Bedford's occupation of the land he brought 14 acres under cultivation upon which the defendants had a crop of wheat in 1919. It yielded 12 bushels per acre, which they sold at $1.89 per bushel. The cost of raising, harvesting and marketing was 72c per bushel and the defendants' net profit was therefore $1.17 per bushel. Had the defendants obtained possession in the season of 1918 and had broken the remaining 56 acres of the 70 acres which they intended to break that year, their profit would therefore have amounted to $786.84. It is shewn, however, that in 1919 they obtained 20 tons of hay from the portion they intended to break in 1918 which was worth $30 per ton during the following winter, which reduced their loss of crop for that year to $186.20.

I find that the damages which the defendants sustained by reason of the removal of their partially constructed building amounted to $20.

The defendants counterclaim also for the taxes paid by them for the year 1918. If they are awarded damages for

the failure of the plaintiff to give them possession during that year, they are not entitled to claim the repayment of the taxes for that year.

In the action brought by Bedford he was awarded the costs thereof against both the plaintiff and the defendants. The latter counterclaim for these costs and also for solicitor and client costs incurred by them in defending that action. In my opinion the plaintiff is bound to indemnify the defendants against the payment of the costs awarded to Bedford and should also pay them any costs as between solicitor and client incurred by them in defending that action, but they have not shewn that they have paid the costs awarded to Bedford nor have they shewn the amount of the solicitor and client costs which they have paid or for which they are liable.

I hold that the defendants are entitled to credit on account of the purchase-money and interest due the plaintiff for the sum of $206.20 for the damages sustained by them by reason of the loss of crop for 1919 and for the removal of their building, such credit to be treated as a payment made on December 1, 1919.

If within one month from this date the defendants procure the taxation of their solicitor's bill of costs, as between solicitor and client, for services rendered in defending the Bedford action, the defendants will be entitled to a further credit for the amount thereof upon the amount due to the plaintiff. The plaintiff must have notice of such taxation of the bill and shall be entitled to appear thereon.

If within one month from this date the defendants shew that they have paid the amount of the costs awarded to Bedford, or any moneys on account thereof, they shall be entitled to credit on the amount due to the plaintiff for the amount so paid. If during that period they have not shewn to have paid the full amount thereof, their counterclaim will be withdrawn in respect of the amount remaining unpaid.

At the expiration of one month from this date, there will be a reference to the clerk to ascertain the amount due to the plaintiff under the agreement sued upon and he will be entitled to judgment for specific performance thereof upon the usual terms. In the taking of the account the plaintiff will not be entitled to compound interest claimed by him, as the agreement sued upon does not entitle him to so claim.

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The plaintiff will have the costs of the action and the defendants will have the costs of their counterclaim.

Judgment accordingly.

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Saskatchewan King's Bench, Macdonald, J. March 18, 1921.

Executors and Administrators (§IIA—35) — Agreement by Executrix for Sale of Estate Property—Agreement for benefit of Estate when Made—Delay in Applying for Order Confirming Sale—Delay not Caused by Executrix—Increase in Value of Property before Application Made—Hardship to Parties in not Making Order.

Where an executrix has entered into an agreement for the sale of land belonging to the estate, which agreement was in the best interests of the estate at the time it was made, the Court will not refuse to make an order confirming the sale because of delay in making the application, owing to the negligence of the solicitor of the executrix, and because the lands have increased in value before the making of the application, where refusal to make the order would cause hardship upon the purchaser of the property who has entered into possession and continued to make the payments due under the agreement.

Statutes (§IID—125)—Devolution of Estates Act—R.S.S. 1920, Ch. 73 Secs. 24 to 34—Construction.

Section 34 of the Devolution of Estates Act, R.S.S. 1920, ch. 73 which limits the time for an application under sec. 24 of the Act, for relief by a widow of a man who dies leaving a will by the terms of which she receives less than if he had died intestate, is not expressly made retroactive and to come within the terms of the Act of 1920 the death of the husband must have occurred subsequently to the date when the Act came into force.

APPLICATION by an executrix for (1) an order confirming the sale of lands belonging to the estate, (2) relief under the Devolution of Estates Act to the widow, and, (3) allowance for the maintenance of the infant children.

J. W. Hill, for the executrix.

H. Fisher, for the official guardian.

Macdonald, J.:—1. The late E. F. Hanna died on or about October 23, 1912, having first made his last will whereby he appointed his wife sole executrix to his will, directing her to pay all debts, funeral and testamentary expenses out of his estate. He bequeathed $1,500 to his mother, and $1,000 each to his 2 infant daughters, Beatrice Isabel and Edna Frances, and then his will concludes as follows:—"(5). The remainder of my property whatsoever I bequeath to my wife Catherine Adeline for her sole use during her natural life and upon her decease to my children and their heirs respectively, share and share alike."

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On January 30, 1918, the executrix entered into an agreement for the sale of two quarter sections of land belonging to the estate to one W. H. Keys for the sum of $11,520, and very shortly thereafter her solicitor at that time prepared affidavits with a view to an application to the Court to confirm said sale. Through negligence, however, of her solicitor—who by the way has since been disrobed—no application was made at the time. There has since been a change of solicitors, and her present solicitors apply for the confirmation of the sale.

The evidence abundantly satisfies me that the price mentioned in the agreement of sale was all that the land was worth at the time, and that it was in the best interests of the estate that the sale should take place, as the widow who was left with two infant children was unable to carry on farming operations, and was therefore unable to pay the legacies in question unless the land is sold. There is, however, evidence that since the said date the price of land in that vicinity has considerably increased, and counsel for the official guardian opposes the confirmation of the sale. I may mention that it appears that after the execution of the agreement between the executrix and Keys, the purchaser, the latter went into possession of the land and has been farming the same ever since and has apparently made the payments called for by the agreement. It would therefore work incalculable harm and confusion if I refused to confirm the sale now, and as the price obtained was a fair and reasonable price at the time the agreement was entered into and it was in the best interests of the estate to sell the land, and the delay in making the application was not due to any neglect on the part of the executrix herself but on that of her solicitor, I am of opinion that in view of the peculiar circumstances of this case it is only just that the sale should be confirmed, and I confirm the sale accordingly.

Counsel for the official guardian asked that in case I confirmed the sale of the land I should appoint a trustee to act jointly with the executrix with respect to the share of the purchase-price to which the infant would be entitled. Counsel for the executrix has no objection to this. Upon filing the consent of an approved trust company to act as such trustee, the appointment will be made accordingly.

2. The executrix, as the widow of the deceased, further applies for relief under the Devolution of Estates Act as

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she claims that she has obtained under the will less than what her share would be if the deceased had died intestate. I am however of opinion that her right to make any such application is barred. As already stated, the deceased died on or about October 23, 1912, and at that time sec. 11k of the Devolution of Estates Act, as enacted by ch. 13 of the statutes of 1910-1911 (Sask.) was in force and read as follows:—

"11k. No application shall be entertained under sections 11a to 11k, both inclusive, of this Act after six months from the death of the husband."

The sections of the Act referred to in said sec. 11k were those which gave the widow the right to apply to the Court for relief when her husband died leaving a will by the terms of which she would in the opinion of the Judge before whom the application was made receive less than if he had died intestate leaving a wife and children,—and regulated the procedure. Accordingly, the power of a Judge to entertain the application—under said sec. 11k—ceased 6 months after the death of the deceased.

Counsel for the executrix, however, argues that under sec. 34 of the Devolution of Estates Act, being ch. 73, R.S.S., 1920, the widow is entitled to the relief sought. Said sec. reads as follows:—

"34. No application shall be entertained under sections 24 to 34 after six months from the grant of probate of the husband's will or of administration with the will annexed, unless the Judge before whom the application is made is of opinion that in view of all the circumstances such application may be proceeded with and such relief granted to the extent provided for in said sections, or to any lesser extent, without causing injustice or undue hardship to the other parties interested in the estate."

By ch. 20 of the statutes of 1918-1919 (Sask.), the Devolution of Estates Act in force theretofore, and all amendments thereto, were repealed, and said ch. 20 of the statutes of 1918-1919 was enacted instead. Before this, however, sec. 11k of the Devolution of Estates Act as enacted by ch. 13 of the statutes of 1910-1911 was repealed by ch. 19 of the statutes of 1917 (Sask.), second session, and the following substituted therefor:—

"11k. No application shall be entertained under sections 11a to 11k, both inclusive, of this Act after six months from

the grant of probate of the husband's will or of administration with the will annexed, unless the death of the husband has occurred subsequently to the first day of January, 1917, and the judge before whom the application is made is of opinion that in view of all the circumstances such application may be proceeded with and such relief granted to the extent provided for in sections 11a and 11g hereof, or to any lesser extent, without causing injustice or undue hardship to other parties interested in the estate."

It is clear that under sec. 11k as enacted by ch. 19 of the statutes of 1917, second session, the application could not be entertained as the death of the husband had not occurred after the first day of January, 1917. Said ch. 19 became law on December 15, 1917, and was made retroactive so as to apply in any case where the death of the husband had occurred after the first day of January, 1917. Section 34 of the Act now in force is not expressly made retroactive at all, and it would be anomalous if it had a wider application than the one that was to a limited extent made retroactive.

I am of opinion that in order to come within the terms of the Act, R.S.S. 1920, ch. 73, in force at present, the death of the deceased must have occurred subsequently to the date when the Act came into force; that is, subsequent to April 5, 1919, when the former Act was repealed and the Act presently in force originally enacted by said ch. 20 of the statutes of 1918-1919. Section 24 provides:—

"The widow of a man who dies leaving a will by the terms of which his said widow would, in the opinion of the Judge before whom the application is made, receive less than if he had died intestate leaving a widow and children, may apply to the Court of King's Bench for relief."

It seems to me patent that when the Act speaks of "a man who dies," it necessarily means dies after the commencement of the said Act, and therefore I am of opinion that I have no right to entertain the application for relief under the Devolution of Estates Act.

3. The widow further applies for maintenance in respect of her two infant children. The child Beatrice Isabel died on January 13, 1915, and, accordingly, the legacy of $1,000 to which she was entitled under the will of the deceased devolved on the mother. So that, to allow any maintenance to her in respect of said child during her lifetime would

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be merely to take the same out of monies to which the widow has herself become entitled in any event and would be a useless proceeding.

So far as maintenance wtih respect to the other child is concerned, under sub-sec. 2 of sec. 3 of the Infants Act, ch. 155, R.S.S. 1920, "the Court may also make an order for the maintenance of the infant by payment by the father or mother out of any estate to which the infant is entitled of such sum from time to time as, according to the pecuniary circumstances of the father or mother or the value of the estate, the Court deems reasonable."

The widow shews that she had actually disbursed on behalf of said infant from December, 1913, to December, 1918, the sum of $650, and there is evidence that the maintenance at the rate of $15 per month since the latter date is a reasonable amount to allow.

There will be an order for payment of maintenance to the mother accordingly.

Costs of both parties out of the estate, high scale.

Judgment accordingly.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford, Middleton and Lennox, JJ. February 25, 1921.

Contracts (§IIIC—215)—Agreement to Procure Orders for Munitions from British Government—Supposed Influence of Person Employed—Validity—Public Policy—Collection of Commission.

An agreement employing a person solely because of his supposed influence with a member of the British Government and other persons in positions of authority in England, to assist in endeavouring to procure from the British Government orders for munitions to be manufactured and supplied by the party employing such person is illegal and void as contrary to public policy and commissions earned under such an agreement cannot be recovered.

[Montefiore v. Menday Motor Components Co., [1918] 2 K.B. 241 followed.]

APPEAL by plaintiff from the judgment of Kelly, J. (1920), 55 D.L.R. 506, 48 O.L.R. 231.

G. W. Mason, for appellant.

Wallace Nesbitt, K.C., and H. W. Shapley, for respondents.

Meredith, C.J.C.P.: — The judgment directed to be entered in this action, and now appealed against, is, in my

opinion, and as I find, right and should be confirmed on the ground on which it is based; that the Court will not enforce, or give any effect to, such a contract as that upon which this action is brought: indeed it seems to me to be manifest that, if even the most favourable way in which the plaintiff's case can, in view of indisputable facts, be stated, be accepted, the contract cannot be within the law.

That which the plaintiff desired, sought, and contracted to sell, and which alone was of any use to the defendants and so the only substantial consideration for their contract to buy, was the influence of one of the highest Ministers of the Crown in the British Government, and of other persons in high official standing in Great Britain; an influence to be procured, in the one instance, through the ties of family connection, and in the other those of personal acquaintanceship.

To test the character of the bargaining, to concentrate the attention upon the actual purpose of the contract, let me ask what should be thought of it if it were not a second dealing with the "commodity" but were a purchase and sale of it, consciously, by those who were to supply the desired influence and who were to be paid for it?

The character of the transaction was subjected to a not unfair test in the question asked during the argument: what would have happened if the plaintiff had told to the Minister, or to the soldiers in high office, the whole, or any substantial part, of the truth respecting the contract in question? The answer on all hands was: swift ejectment; the answers differing only as to the methods that would have been employed. That, need it be said, does not define or settle the law applicable to the case; but it may, at the least, come near to it; for those things which are commonly condemned with severity are more than likely to be against law.

The most that the plaintiff has, or indeed the defendants have, been able to urge for himself, or they for themselves, in extenuation, is that the influence for which he was to be paid amounted only to the procurement of a speedy introduction to the buyers for the British Government, who should exercise their own judgment upon the defendants' effort to procure Government contracts.

Even if so, can it be that such a thing is lawful and right?

To that contention, however, I am tempted to say, as a juryman, "Tell that to the Marines." To me it seems

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ludicrous to assert that the defendants, capable of manufacturing ammunition in enormous quantity, needed any assistance from the plaintiff to get an immediate, an attentive, and an anxious hearing from those who were engaged in obtaining such things at a time in a great war when British arms were in imminent danger of disastrous defeat for want of them; and, even if the circumstances had not been so urgent, that a company, such as the defendants, headed by the capable and persistent president they had, and one who was both a member of the Upper House of the Canadian Parliament and an officer of high rank—even only what is called "honorary"—in the Canadian militia, should need any introductory assistance from the plaintiff or from any one else. The telegram which the defendants' president procured from the Prime Minister of Canada, addressed to those in England having control of such things for the British Government—which is among the exhibits filed at the trial of this action—makes very plain the potency of the defendants' own influence in such matters, and how utterly useless the plaintiff was, if his influence extended no farther than an introduction to the buyers.

Then the plaintiff was a man unconnected with the defendants' business, and without any knowledge or experience of or in that business, or any like, or indeed any, business: and in the same condition regarding the making, or buying, or selling of anything the defendants desired to make and sell; he had nothing that the defendants could need except family and friendship or acquaintanceship ties, and what, if anything, could be gained by playing upon them: and need I add that it takes time and experience and ability of a kind to be even moderately successful in minor ways in the work of those who are commonly called mercantile "drummers?"

The plaintiff might have been within the law if those whose influence he undertook to sell had not been public officers. But, being such officers, and being concerned in a matter of such momentous public concern, the contract in question is, in my opinion, entirely defenceless from any point of view.

More need not be said, but it may be advisable to add my dissent from the view which was pressed upon us: that which the plaintiff got from the Minister, and of which benefit was had, was a mere introduction to the buyers and controllers in England of munition for the British Empire.

Need it be said that an introduction such as the plaintiff had obtained, in connection with some family ties known to exist between introducer and introduced, might well have more and far-reaching effect; it would naturally carry with it an implied if not expressed approval of the man and his mission, and no one could be much to be blamed if he thought it was intended to bring something substantial to the man or his mission, for few, if any, would hesitate to have faith in that which such a one as the introducer had endorsed. The whole deplorable state of affairs is attributable to want of frankness in the plaintiff in not stating his true position to the Minister: a frankness which must have saved all concerned from a very disagreeable and deplorable state of affairs, arising from altogether too widespread grasping impulses to make money out of the war, which result it made possible to many.

It is not necessary to refer to any cases: indeed they may mislead by confusion of facts. The question involved is one of fact—facts of this case and not another. If the facts be such as they seem to me manifestly to be, none can contend reasonably that the contract in question is within the law.

But it may be added that, if it is unlawful to seek the clemency of the Crown for another for a money consideration for personal services, how much more to be condemned must it be to obtain Government contracts by means of family connection or friendship or acquaintanceship with governmental officers of the highest rank and having the widest influence and power, and to make a share of the profits the price of the misconduct.

That one who commits a crime or wrong is to be paid out of the spoils, instead of in money down, for committing it, does not change the character of the act, but it assuredly makes the wrongdoer a more dangerous one; and the character and extent of the reward may afford convincing evidence of the real nature of the transaction.

This case affords an apt illustration: if the plaintiff were, like his companion in England, a very capable employee of the defendants, paid just what his services as such were worth and just as he had been paid before, the case would be a different one; but, instead of that, he was quite useless to the defendants except in so far as he could work upon the strings of influence to which I have referred, a work for

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which he now seeks $100,000 out of the profits of contracts of the defendants with or for the British Government.

In all such cases as this there are likely to be asservations of innocence, and strong assertions that the influence bought was meant to be, and really proved to be, only a little one. That, as I have said, is, as I find, manifestly not so; such companies as the defendants, and such men as its president, do not agree to pay tens of thousands of dollars for penny whistles, or even $1,000 for expenses, to a wholly inexperienced salesman, and the less so when they have such competent men as his companion, the witness Milne.

But, however little it might be that is bought and sold in this reprehensible way, I must firmly resist any kind of intrusion of any kind of a thin end of a wedge of it into the law. I am accordingly in favour of dismissing the appeal.

It may, however, be proper to add a few words upon the other branch of this case which also was discussed at very great length; and the more so as it necessarily brings out other facts affecting the branch of it with which I have just dealt.

In my opinion, the plaintiff could not recover upon the contract if it were within the law, because it has never been performed on his part.

The plaintiff, as I find, upon the whole evidence, was to be paid only upon direct orders from the British buyers to the defendants.

The British Government was dealing in Canada only through the Canadian Government, each having appointed a "Board" of the best men procurable for the purpose. The defendants' president was dissatisfied with the manner in which the Canadian Board was acting, especially in respect of, and altogether as their plans affected, the defendants. He was anxious to get large orders from England, which he could not get in Canada in the way he desired. At that junction he was approached by the plaintiff with the scheme of obtaining such orders from England; a scheme based upon the fact of an influential family connection and influential friends or acquaintances, all in high public positions in England. What his and the defendants' purpose was he made plain to the Minister, and in the testimony of the Minister given in this action it is stated with clearness and accuracy thus:—

"I instantly said: 'Why do you not go to the Shell Committee?' He said it was no use going to the Shell Committee because the Shell Committee had made a mistake . . . it was quite obvious that something had prevented him from working through the Shell Committee . . . In those circumstances it was of course obvious to anybody that if I had not taken the opportunity of letting this order get into the proper channel I should have neglected my first and most obvious duty."

That the Minister was wrong in this seems to me to be manifest; and must have been to him if he had been dealing with the matter judicially.

That which this inexperienced and publicly unknown young man was seeking the aid of the Minister in, was a condemnation and overriding and an ignoring of the Canadian Shell Committee, acting for the Canadian Government, in respect of an Imperial matter which was, and could not but be, under the control and management of the Canadian Government, the making and supplying from Canada of munitions of war for the Empire's armies. Sending such a man, with a letter of introduction, and the approval which it to some extent necessarily carried, as well as the weight which any such letter from such a quarter must always carry, to one not concerned in matters of the policy of the Imperial Government, but concerned, and having great power, regarding the purchase of such munitions; the purpose of the carrier of it being such as I have mentioned, and his real purpose underlying that purpose being the making of money for himself, and for those who were to pay him out of, and in proportion to, the money made by them out of his efforts, was assuredly unwise and indiscreet. Again, test it by that which would have happened if the plaintiff had been a stranger to the Minister. Can it be doubted that the impropriety of thus dealing with the Canadian Government and their representatives would have been obvious; and that this should have been made very plain to the self-gain seeking critic, politely, if possible, but in any case very plainly? All of which goes to shew how very insidious, far-reaching and powerful such influence, quite unconsciously, in matters such as that in question, may be; and that the man who employed the plaintiff had far greater knowledge of the world and its ways in war time than some of us have; for I cannot but think that most

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of us, except for the result, should have thought his purchase of the plaintiff's influence a useless, vain and futile thing, without even a forlorn hope in it. (Anyway no such direct orders, nor anything like them, were obtained). Everything continued till the end to be done through the "no good to go to and mistaken Shell Committee," and assuredly orders obtained through it, as before, could not have been such as the plaintiff was to be paid for; orders respecting which things remained as they had been, and of which the defendants got, just as before, only such part in competition with all other Canadian manufacturers as the Canadian Shell Committee deemed to be right and in the public interests.

But, though the plaintiff could not recover upon the contract, it may be that he might—but for the illegality upon a quantum meruit: because, after the inevitable became apparent to every one—that the British Board could not and would not ignore the Canadian Board—his services were continued and for some of them he was paid at the rate of one-half of that which he was to get under the contract; just what those services were and their value is not made at all plain, but an outstanding one seems to have been bringing the president into personal contact with the Minister by means of the family ties.

Riddell, J.:—An appeal by the plaintiff from the judgment at the trial of Kelly, J., 55 D.L.R. 506, 48 O.L.R. 231.

The main objections to the plaintiff's case are two: (1) that the contract sued upon is against public policy; and (2) that the contract was not performed on the plaintiff's part.

In the view I take of the matter, there is no need of passing upon the first ground of defence, and I say no more of it than to express my total and emphatic dissent from much that was said as to the inherent villainy and illegality of "payment according to success," "payment by results," "conditional fee," or by whatever name it may be known.

This is a case of "give a dog a bad name and hang him." The evil associations surrounding the conditional fee to a lawyer have been invoked to damn a perfectly proper and very usual system in payment of agents, commercial travellers, etc. Call it a "conditional fee" and it is all wrong; call it a "payment by results" and it is all right. The commercial traveller who leaves Toronto this morning to sell

on a commission basis would be startled to find that such a thing might lead to evil practices on his part.

The well-established rule in our law against conditional fees to lawyers, officers of the Court, stands on quite other grounds, not necessary to be here discussed.

But I cannot find that what the defendants agreed to pay for was actually performed. They wanted to get away from the Board in Canada and to deal directly with the authorities in England.

Even if the agreement could be interpreted as covering contracts obtained from the Board in Canada, which the Board were enabled to let through the results of the efforts of the plaintiff, it is not proved that there were any such results. The plaintiff was at the most but a fly on the wheel.

I would dismiss the appeal with costs.

Latchford, J.:—In my opinion, the evidence fully warrants the conclusions of fact and of law arrived at by the trial Judge. I therefore think the appeal should be dismissed.

Middleton, J. (dissenting):—The evidence of the plaintiff is:—"I merely said I knew a great many people in England—mentioning different people—I said I am quite satisfied I can go to the proper authorities and the proper departments and meet at once or see at once who the proper people are to negotiate with."

Nicholls, with whom the contract was made, says:—"He said there was a great deal of difficulty in securing orders then, but owing to some family connections he had he thought he could get the entrée very quickly to the fountain-head of the distribution of orders for munitions. He explained the circumstances, and that appealed to my judgment."

The situation was that the defendants had a very large factory, adapted to make munitions, and were ready to spend much in further equipment. The Shell Committee at Ottawa was the sole channel by which contracts could be obtained from the Imperial Government, and that committee, it is said, had adopted the policy of obtaining different parts of completed shells from different factories, the result being that when one concern making an essential part failed to live up to its obligations no delivery could be made, and the large and efficient works were idle owing to the de-

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fault of the small and inefficient. All protests and all endeavours to obtain direct contracts came to naught because they were referred to the Shell Committee and no advance was made.

As put by Mr. Nicholls, the mission of Carr-Harris was "to facilitate matters by getting many introductions, cutting red tape, getting many introductions to people in authority in the Munition Board, to see the person who really had to do with those matters, and lay the case before him."

Lord Buckmaster was to be seen, to get "rapid introductions which he might be weeks in trying to get otherwise"; no influence was to be used in obtaining contracts—"except the influence of our ability to give service to the Empire in a time of need."

As put by Lord Buckmaster, what he did was not only within the bounds of propriety, but "I could not have done anything but what I did without breaking my quite plain duty to the country."

There can be nothing more plainly vicious and more clearly against public policy than any attempt to induce a Minister of the Crown, or any public officer, to depart in any degree from his first and only duty, his obligation to the public or the Crown. Any attempt to influence or sway any such public officer by considerations of friendship or kinship, or anything which comes under the words "position and influence," is reprehensible, and any agreement by which remuneration is to be paid to attain any such end is void in law.

Mr. Nesbitt spoiled the effect of his most excellent argument on this question by basing his position on too narrow a ground. He assumed, as has been assumed in some of the American cases, that the fact that the remuneration was in the nature of a commission, and so in a sense contingent upon the result, was the keynote of the evil. To me the evil is just as great in the case of an agreement to pay a fixed as a contingent sum. The evil is not in the payment of the remuneration, but in the tampering with the public officer. True the only case in which the question can be discussed in a Court is one in which an action is brought to recover upon a promise to remunerate, and that promise is regarded as void and against public policy, but this is because the thing to be done is against public policy.

I do not mean that in every case it is contemplated that

the official to be approached is to be conscious of wrong doing: far from it; he may be, and generally is, unconscious that the pernicious influence is being exercised upon him. The vice is that he may be drawn from the path of duty as unconsciously but as surely as a comet may be diverted from its path by the unseen influence of a distant planet.

The doctrine of the Montefiore case, [1918] 2 K.B. 241, is stated in the headnote: "It is contrary to public policy that a person should be hired . . . to use his position and influence to procure a benefit from the Government, and a contract for that purpose is therefore illegal and void."

Shearman, J., I think, puts the matter better in his judgment (p. 245):—

"A contract may be against public policy either from the nature of the acts to be performed or from the nature of the consideration. In my judgment it is contrary to public policy that a person should be hired for money or valuable consideration when he has access to persons of influence to use his position and interest to procure a benefit from the Government."

Later on he adds (pp. 245, 246):—

"It is well settled that in judging this question one has to look at the tendency of the acts contemplated by the contracts to see whether they tend to be injurious to the public interest."

The criticial thing is "the nature of the act to be preformed" and the "tendency of the acts contemplated."

It is obvious that a failure on the part of the contracting parties to apprehend the true nature or tendency of the thing contemplated is quite beside the mark, but it is equally obvious that it is most important to ascertain precisely what was contemplated so that its true nature and tendency may be understood.

It is true that to any sensitive mind the fact that payment is stipulated for makes an agreement to do something which is against public policy more odious and rouses greater indignation, but it seems to me that when rightly considered this is not the essential thing.

Judas agreed to betray, this was his crime, the stipulation for the 30 pieces of silver exhibited the depravity of his nature, but the crime would have been the same even if there had been a less sordid motive. In some of the cases this seems to have been lost sight of. Shearman, J.,

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quotes Lord Eldon in Norman v. Cole (1801), 3 Esp. 253, at pp. 253, 254, where he says:—"Where a person interposes his interest and good offices to procure a pardon, it ought to be done gratuitously, and not for money: the doing an act of that description should proceed from pure motives, not from pecuniary ones."

There a man was condemned to death. The plaintiff put £30 in the defendant's hands to be used to procure a pardon. "One Morland being a person of good connections, and having access to persons of interest, the money was to be given him for so using his interest, by representing, in favourable terms, the case and character of Tunstall" (at p. 253). What became of the unfortunate prisoner is not said, but the plaintiff failed to get his money back, for the reason given. Clearly the character and tendency of the acts stipulated for were contrary to public policy.

The case has never been supposed to prevent a solicitor or counsel from receiving money from a client who employs him to seek clemency. There the thing contemplated was lawful and had no improper tendency. The vice is not the seeking of executive action by way of pardon, nor the remuneration of those who render service looking to that end, but the "using of interest" to influence executive action.

In the Montefiore case the plaintiff was a member of the "Air Fleet Committee." The defendant promised to pay him out of the money which he expected to make from contracts awarded by that committee. As found by the Judge (p. 244) "the true consideration for the giving of the note was that the plaintiff should use his alleged position, and the value of his good word, in favour of the defendants in getting Government assistance in the form of money or contracts." No more elementary form of corruption could well be imagined.

I have found no other English case dealing with the precise contention.

In the case in hand I can find nothing in the acts contemplated or in the tendency of such acts to offend against public policy. No one in authority was to be improperly influenced, no public servant was to be called upon to depart from his primary obligation to the public. I am glad to reach this conclusion, because it is not a pleasant thing to listen to an able counsel denouncing the infamy of conduct

to which his client is a party, as a means of escaping liability.

If the matter were at large, public policy would seem to demand an accounting for the public benefit by the defendants before allowing them "in the public interest" to assert the common misconduct as a defence.

This, however, will not avail the plaintiff, as, in the opinion of the majority of the Court none of the contracts were within the terms of the agreement, so as to entitle the plaintiff to commission. I should have been content to accept the opinion of Nicholls that the contract in respect of which the $17,000 commission was paid was within the agreement and to have awarded a further sum of $17,000 upon the ground that the agreement to reduce the commission to ½ of 1% was obtained by an untrue statement, the contract having been actually arranged before the request to reduce the commission was made.

Lennox, J. (dissenting):—With very great ability, if I may say so, and very earnestly, counsel for the defence insisted upon the duty of the Court to guard the public interest by upholding the judgment in appeal. With respect, I cannot quite see that this branch of the argument, in itself, presents any clear-cut issue. I am not aware that here or in Great Britain, or in the Courts of the United States for that matter, there is any conflict of opinion as to the proper judicial attitude where it is shewn—or is even incidentally disclosed—that the parties to the contract stipulated for, or contemplated, that which is contrary to public policy. Whether the action is to enforce the contract by obtaining judgment for the consideration-money or to obtain repayment of money paid under it, or both, the rule of law is not indefinite; the guiding principle is I think invariable, namely: the Court leaves the parties to the vicious contract, and those who claim under them, just where it finds them. Canadian decisions are not numerous. The unreported decision of the late Chief Justice of the King's Bench in Garfunkel v. Hunter referred to in Yeomans v. Knight (1919), 45 O.L.R. 55, and the Yeomans case itself being the most recent; and of English decisions, to which we so frequently and profitably look for help there are not very many. But I am far from thinking that there is any mystery as to the underlying principles upon which Courts in Great Britain and here have acted and will con-

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tinue to act in determining actions involving the question of public policy.

That there are so few cases, perhaps goes to shew uniformity of judicial opinion, and that it is generally realised that a bargain for the exercise of influence with a servant of the Crown or tending to pervert the course of justice is not to be tolerated and absolutely unenforceable. The latest English decision, I think, is Montefiore v. Menday Motor Components Co., [1918] 2 K.B. 241, 87 L.J. (K.B.) 907, and there, as here, the impeached contract arose out of the conditions connected with the war. Counsel for poth parties referred to American cases, state and federal, and in particular counsel for the defence read very copious extracts and dwelt upon decisions and dicta of many eminent Judges in supposedly similar cases, many, possibly all of them—helpful in cases of doubt as illustrations of a principle. But there is no room for doubt as to the meaning of the decisions here, or in Great Britain—the natural and proper sources of primary inspiration in this country.

With a commendable desire to confine his argument within the shortest reasonable limit, Mr. Nesbitt did not include more than a passing reference to the facts basing the United States decisions, and it seems to me that in actions of this class, and emphatically in the case at Bar, the initial question is not so much "What is the law?" as "What are the facts?"

The trial Judge based his decision upon the Montefiore case, as I did, in the main, in Yeomans v. Knight. In principle here the three cases are indistinguishable, and, in my opinion, the Montefiore case embraces all the considerations relevant to the decision of this appeal. What I said in reference to Yeomans, I repeat, as the key of the decision of this appeal (45 O.L.R. at p. 58). "The whole question is covered and the authorities reviewed in Montefiore v. Menday Motor Components Co. Ltd., [1918] 2 K.B. 241, where it is declared that it is contrary to public policy that a person shoud be hired for money or valuable consideration to use his position and influence to procure a benefit from the Government and a contract for that purpose is therefore illegal and void; and that where it appears from the evidence during the hearing of a case that the contract sued on is contrary to public policy, it is the duty of the Judge to refuse to proceed with the trial."

I have not changed my opinion; but, although it is a truism, it is essential to keep in mind that each action is to be determined upon its own facts. In the Yeomans case, I found, on the plaintiff's admission on oath, that the defendants' promise to pay was "in consideration of political influence which the plaintiff was supposed to possess, agreed to exert, and asserts that he successfully exerted, in obtaining a contract from the servants of the Crown . . . for the defendants or some of them" (p. 57).

On the preliminary question of public policy, the question of whether the plaintiff succeeded or failed does not arise.

In the Montefiore case, Shearman, J., after pointing out that the plaintiff, at the date of the contract, was a man without any regular occupation except a questionable species of financing, that he was still, however, a member of the Imperial Air Craft Committee, and that the proposal and the effort was to use this (I assume honorary) position to secure unwarranted advantages for the defendants in connection with air craft contracts, although he knew that the defendants were then in a very bad financial position, at p. 244 sums up with this crucial finding:—

"I am satisfied . . . that what was bargained for between the plaintiffs and defendants was the recommendation by the plaintiff of the merits of the defendants and the exercise of the influence of the plaintiff with servants of the Crown in order to induce an advance of public money to the defendants for the securing or the obtaining of Government contracts. The true consideration for the giving of the note was that the plaintiff should use his alleged position, and the value of his good word in favour of the defendants in getting Government assistance in the form of money or contracts. I do not propose to decide the question whether the plaintiff was the effective cause of the capital being found for the defendants by the Government. In my judgment the contract sued upon is illegal and void as contrary to public policy."

And at p. 246:—

"In my judgment it is both in accordance with precedent and with public interest that I should declare this contract void as against public policy, with the result that both the action and the counterclaim are dismissed with costs."

The essential facts in this case are not in dispute. Before the making of the contract in question, the defendant com-

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pany, a wealthy, well-established, prosperous, and thoroughly responsible concern, had equipped their factories in a way that enabled them materially to assist in supplying the War Office with one of the most urgent needs of the time—munitions of war—and were prepared to invest further large sums of money in installing additional plants and enormously increasing their output. They had received orders through the Shell Committee, but not in sufficient volume, or of a character, fully to utilise their manufacturing facilities. Other factories in a similar way, and for the same general purpose, had been similarly equipped. The Shell Committee was doing all it could; speaking generally, everybody was working to win the war.

The date I am referring to is the spring and summer of 1915. It is no use to speak of "the crisis" of the war, it was always critical until the Germans laid down their arms. It is idle to attempt to point to Britain's "greatest need" at any period of the war. It is enough to say that at the time I refer to everything was needed, and thoughtful men everywhere realised that every resource of the Empire must be dedicated or commandeered for the safety and welfare of all; and every really loyal citizen was bending his energy to this end. Food, clothing, guns, ammunition, communication, man power, and all the countless paraphernalia of defence, were essential; but at all events, conspicuously one imperative and insistent demand of the War Office at that time was for munitions and ordinances of war. Without these the men in the field were defenceless targets for the enemy's guns. The Shell Committee at Ottawa, acting under directions of the War Office, had been in operation for about 9 months. I have no doubt it had done well, but it was new to the work, as were the manufacturers also. To systematise, allot, and co-ordinate the work required time, and it was inevitable that there would be mistakes, misunderstandings, and delays; and some dissatisfaction. For efficient service and satisfactory results it was essential that orders should continue to be placed with the Shell Committee with approximate regularity — otherwise the army of workmen assembled in the factories had to be discharged; otherwise, too, expenditure for increased output would not be made. At this time the Press of Canada announced that the Shell Committee had no more orders to place in Canada and that large orders were being placed in the United States.

It is not to the point to inquire how much ground there was for this statement—there was some ground. There was dissatisfaction, and even before this the president of the Canadian General Electric Co. was not well satisfied, and apparently believed the newspaper statements and acted on his belief. At this time, when a murmur of disappointment and dissatisfaction was becoming audible, the plaintiff, a gentleman of good family, well educated, of unblemished character, for anything that appears, and of considerable business experience, as I judge from statements appearing at the beginning of his examination, was engaged by the defendant company to go to London as its agent or representative and bring to the attention of the War Office the plant, equipment, and facilities for production, the financial standing of the company, and its desire and ability to furnish large quantities of what the War Office so urgently needed, munitions of war. To get a prompt hearing and an opportunity to go fully into the merits of the company's plans and proposals was the object of the proposed trip. Delay and uncertainty were obstacles to be overcome, and, at such a time of stress, a prompt hearing could not be counted on as a matter of course.

In an informal way, by letter, the defendants outlined the terms on which they were prepared to engage the services of the plaintiff, namely, a stated sum for travelling expenses and 1% commission on the amount of his sales; and the plaintiff, as he said, regarding this as reasonable, accepted the proposal. In outline, as I read and interpret it, this is the whole story of a contract now alleged—despite Nicholl's evidence that all he contemplated, looked for, or wanted, was to engage their factories and to sell their munitions on their merits—to be void of grounds of public policy. No, it is not quite all; there is the additional fact that the plaintiff had the honour to be remotely connected with Lord Buckmaster, and of the acquaintance of two or three prominent men in England, and that he obtained an introduction to Booth through the courtesy and sense of duty of Lord Buckmaster. This is all. There is not a word or syllable of evidence to establish or suggest that any thing unfair, dishonest, tricky, or underhand was arranged for or contemplated, or that anything of the kind occurred.

The manager of the defendant company was thoroughly convinced that his company was in a position to serve the

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State by continuing and increasing the output of munitions from the company's factories; he was unduly impressed as to the relative importance of what he had to offer to the War Office, I think. He was looking to profit as well as public service, no doubt; but reasonable profit, I should think, would be a legitimate incident. I trust my sense of the importance of preserving the well-established rule of law touching public policy is not blunted, but I find no evidence here, nor anything to suggest, that there was an intention or effort to do more than supply a part of what the War Office was strenuously endeavouring to obtain, in a thoroughly legitimate course of business. I find nothing to suggest that there was either an effort or purpose to deceive, mislead, or entrap any servant of the Crown, or to induce him to swerve from the path of public duty. I think this ground of defence has not been made out.

And as to the second line of defence, I think the plaintiff is entitled to recover at least $17,639.66, in addition to a total of moneys amounting to this sum, paid him before action; that is a commission of 1% instead of ½ of 1% on the sale of primers and cartridge cases, amounting to $3,527,-934.20, as set out in the defendants' letter to the plaintiff of Sept. 5, 1917 (Ex. 13). The right of the plaintiff to recover a commission on any of the other sales, according to the evidence for the defence, has never been recognised. The right to a commission in respect of this sale had always been admitted, and the only question for decision as to this is whether he is entitled to be paid at the rate he claims, 1%, or only half this amount; it is the one or the other; if the latter he has been paid in full.

The plaintiff, accompanied by Milne, went to England as an agent of the defendant company and was to be paid a commission of 1 per cent. upon sales that he and Milne were instrumental in bringing about. That they did a great deal in promoting the company's interests is not open to dispute; but, for one alleged reason or another, the company contends that the services of the plaintiff, if any, except in connection with this one transaction, were not within the scope of the agreement; and on the other hand, until about October 9, 1915, the company always recognised and admitted, and—subject to an agreement of that date—admit, that the plaintiff is entitled to a commission on this sale at the rate of 1%. See the evidence of Milne

generally, and particularly at pp. 239, 240, 241, 242, and Ashworth at p. 266, of the notes of evidence. These gentlemen were two of the executive officers of the defendant company, and the only witnesses for the defence, I think, who gave direct evidence. The defence is that when the prices for the goods in this order to be paid by the War Office had been fully discussed and settled between Nicholls and Thomas at Ottawa, on October 6, 1915, and it was open to the company to accept or reject, Nicholls decided, on account of the low prices set by Thomas, to return to Toronto and consult with Ashworth, and that, after talking the matter over with Ashworth, he decided to cable Milne before finally deciding.

He thereupon, on October 7, cabled Milne: "Can close for cartridge cases and primers at reduced price. Feel inclined to accept *if Harris will reduce commission one half of 1%*." This was shewn to the plaintiff on October 8 or 9, and, believing it to be true and sent in good faith, the plaintiff agreed to the reduction asked. On October 9 Nicholls received a cable from Milne: "Harris willing to accept suggested reduction of commission." Nicholls says that the contract with the War Office was still open, and that upon receipt of this cable he decided to accept and telephoned an acceptance. He was not able to say to whom he spoke over the telephone. I need not have been at pains to point out that until October 6 or October 9 the plaintiff was entitled to 1% or nothing. The words I have italicised in the outgoing cable and the company's statement of account are conclusive of this.

The issue is clear-cut. If it is a fact that the acceptance or rejection of the War Office contract was an open question when the outgoing cable was shewn to the plaintiff, and that the company, undecided until then, closed the contract upon the faith and basis of the reply, the plaintiff is not entitled to further payment, and if it is not a fact, the plaintiff is entitled to recover the balance of that commission as claimed. Nicholls was examined for discovery two years before the trial, and at a time when, as he admitted, his memory "would presumably be better" than later on. I regard the questions and answers upon discovery, put in upon his cross-examination at the trial, as explicit and unqualified admissions that on October 6 (not 9) he definitely and finally agreed to manufacture and deliver the cartridge

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cases and primers in question. I cannot at all reconcile his evidence at the trial, to the effect that the agreement stood open until October 9, with his very full and explicit account given on oath at the earlier date.

At the trial his evidence suggested that Lord Rhondda (then Mr. Thomas) proposed to treat his company unfairly by cutting the prices, and, as he says, "I left in a temper." I know nothing relative to prices, but why angry, and why take chance of losing by delay? His company got the entire order for primers and more than 55½% of the cartridge case contracts, at an advance of 5 cents on each above the Montreal company's contract, or a total of $125,000. There was still a margin of profit, but not so large as it had been, as Ashworth testified, and his company was still doing "fairly well." It is notorious that during the war there were instances of scandalous profiteering, but there were generous financial sacrifices as well. The transaction being fair in other respects, a reasonable profit on the manufacture of munitions of war, as in all else, was of course legitimate; but, in their strenuous effort to meet the Empire's need, with many of our manufacturers, profit was, I think, a subordinate consideration. Like other companies, no doubt the defendant company looked to profits as an incident; but in two letters at least of Nicholls the dominant note is the earnest desire and ability of his company to serve the Empire in a large way, and I should be doing him an injustice if I interpreted them as meaning less than is said. He knew and realised, of course, that a halt in the steady service of munitions for an hour might involve the sacrifice of thousands or tens and tens of thousands of lives, or lead to ultimate disaster. Well, then, is it likely that this enormous contract hinged on the question of one half of one half of 1%; is it possible that Nicholls, knowing what had happened and contemplating what might happen in Europe any hour, was halted for half a week and liable to be finally turned back by the paltry consideration of $17,000 in profits, more or less? I cannot think so.

Nicholls went back to Toronto to consult with Ashworth as to whether he should accept or reject the contract. There is nothing on the evidence of this witness about a consultation on this question. The only consultation seems to have been how to make the best of it by cutting

down the plaintiff's commission. He did not even know of the telephone message to Ottawa accepting the contract, and, as far as he knew, there was not any communication between Nicholls and any one connected with the war office by way of closing the contract subsequent to October 6. One would think he would feel some interest in the plaintiff's reply, upon which the fate of an enormous contract depended, and in knowing whether the contract was ever concluded, but he knew nothing. It is worth while to note what Ashworth says as to the result of the discussion of October 7, namely: "In view of the fact that we had estimated originally on a price of $2.40 each as being a fair price for the cases, and it had come down from that to $2, and then we had received an offer for the same thing at $1.80, it was thought the margin of profit would be very narrow, and that it would be only a reasonable thing to do to ask Carr-Harris to split his commission and help us to that extent." Nicholls says it is quite a common thing to close a transaction, involving millions, by a telephone conversation. Perhaps so; I do not know, but I do know, from constantly hearing or reading evidence, that in matters requiring immediate communication business people almost universally communicate by telegram, and that even when this comparatively accurate and reliable method is resorted to the message is immediately followed by a confirmatory letter. There was a telephone conversation from the company's office in Toronto by some one, with some one in Ottawa, on October 9, that is all; not an unusual occurrence, I should imagine. I should be disposed to think that, as a matter of book-keeping, or record, or both, the conversation referred to, whatever it was about, and to whomsoever it was addressed, could easily have been traced in the company's books. A large business could hardly be carried on otherwise. There was no attempt to draw from this source of information. If this had been followed up, the company's records would probably have confirmed or contradicted Nicholls' statement; and there was another obvious means of confirmation available to the defence, if confirmation there could be. Many witnesses were examined in England. I presume the evidence of Lord Rhondda could have been obtained. There were more formidable obstacles in the way. Tenders were asked for on this occasion, and in addition to the defendant company half a dozen other large manufacturing concerns, including the Canadian Pacific

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Railway Co., put in tenders. Thomas was in Ottawa, and, for the time being, the placing of contracts, without an hour's avoidable delay, was his chief concern. It was not a time for dickering or dallying. Hours, even moments, were of consequence. The demand for action—immediate action, was imperative. It is not conceivable that all the other manufacturers were to be halted or turned aside, and Thomas tied up in Ottawa to enable Nicholls to mitigate the hardship of low prices by re-bargaining with the plaintiff; and it did not occur. The public records prove it. On October 8 the militia department at Ottawa cabled the Imperial Munitions Board that: "After considering tenders 18 pr. cartridge cases from" (several companies) "we have placed the following orders: 2½ million with Canadian General Electric Company....2 million with Montreal Locomotive Company....Tenders for primers received from following companies....and we have placed order for 2½ million with Canadian General Electric, &c....Mr. D. A. Thomas concurs, &c." Comment is idle. Kelly, J., said (55 D.L.R. 511):—

"Having thus declared the contract void, I refer to the part the plaintiff took in procuring contracts for the defendants, only as that affects my judgment on the question of costs. That the defendants believed that the plaintiff was the means of procuring some contracts at least for them is evidenced by the very substantial sum already paid to the plaintiff for commission; though, if he were legally entitled to any commission upon the contracts in respect of which that sum was paid, it should, as I find it, have been one per cent. and not one-half of one per cent."

I entirely agree with this conclusion of the Judge. The plaintiff, by a misrepresentation of the facts concerning the contract in question, was mislead; and was thereby induced to agree to surrender a part of his commission. This cannot bar his way to recovery of the amount owing him.

I have already said that he is at least entitled to commission upon this sale. He may be entitled to a good deal more. In going over the evidence I have found nothing which to my mind shews that to earn his commission the contract would have to be made directly with the defendant company or "ear-marked" as contended. The agreement, in so far as it is in writing, does not bear that interpretation. I did not discover any evidence to the effect that this

was ever suggested or discussed. It is possible that I have overlooked something, for I was not directing my attention to this question, and, having regard to the opinion of a majority of the Court, there is no object in pursuing this matter further.

I would reverse the judgment appealed from and direct judgment to be entered for the plaintiff for $17,639.66, with interest thereon from September 5, 1917 (the date of the final payment referred to), with costs to the plaintiff in the Court below and without costs of appeal to either party.

Appeal dismissed.

BACON v. THE KING.

Exchequer Court of Canada, Audette, J. May 19, 1921.

Gratuity (§I—1)—Contract—Officer in Military Service—Nature of—Discretion of Executive Officer—Appeal.

Held: 1. That a gratuity to a military officer is in its very nature a matter depending entirely upon the grace and bounty of the Crown, and that no action will lie against the Crown to recover the same.

2. That the word "entitled" used in Orders in Council relating to such a gratuity should not be construed as setting up a contractual relation between the officer and the Crown, which would give rise to a right of action.

3. Where there is a discretion vested in an executive officer by Order in Council having the force of law, no appeal lies to the Courts from the exercise of such discretion.

PETITION OF RIGHT seeking to recover a certain amount representing military gratuity provided for under certain Orders in Council for services in the Imperial Medical Corps.

R. Guay, K.C., and J. C. Fremont, K.C., for suppliant.

J. P. A. Gravel and H. H. Ellis, for the Crown.

Audette, J.:—The suppliant, by his petition of right, seeks to recover the sum of $1,503.75, as the amount representing the military gratuity he claims to be entitled to recover under the Orders in Council No. 2389 and No. 3165 respectively filed herein as Exs. No. 6 and No. 1, for services in the Imperial Medical Corps.

After having obtained leave of absence, and having temporarily severed his connection with the Canadian military forces, the suppliant obtained service in the Imperial forces, and as a result of such service he claims to be entitled, under the above mentioned Orders in Council, to a Canadian military gratuity for which he now sues.

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The Crown, by its statement in defence, avers, inter alia, that the petition of right does not disclose a right of action; but that if it does a bonus paid to suppliant in England should be deducted therefrom and moreover calls upon him to account for deficiencies in accoutrement and equipment under his control during service in his Canadian brigade. The Attorney-General furthermore, by way of set off and counterclaim, asks that before any moneys be paid, if any should be found due by the suppliant, that an account be taken of the moneys received by the suppliant between April 15, 1915, and September 10, 1915—that is before he left to take service in the Imperial force—being canteen funds of the 41st Battalion, Canadian Expeditionary Force, amounting to $19,948.70.

That all-important question which is met with in limine is whether or not a right of action exists for the recovery of a military gratuity under the Orders in Council, Exs. 1 and 6.

As a prelude, it might be said it would seem that the payment of such gratuity is absolutely discretionary—that it is left entirely to the discretion of the executive or of the officer charged with the administration of the matter. Para. 4 of the Order in Council, ex. 6, says: "It is further recommended when application for gratuity is approved" ....It is, therefore, not paid de plano. That is, it is subject to approval by the officer in charge, the Paymaster General, Militia and Defence, as defined in clause 15 of the Order in Council, ex. No. 1, which also contains by itself another discretionary clause. The application for the recovery of such gratuities would therefore appear to be subject to approval, involving a discretion to be exercised and under clause 15, there is a particular person (persona designata) who is charged with exercising that discretion. If the Crown, by its proper officer, has thus exercised a discretion, the Court would have no jurisdiction to sit on appeal or in review from the exercise of such discretion. Before the suppliant could recover any gratuity, must not his application receive approval, under Order in Council, ex. No. 6?

It was contended at Bar that the word "entitled" made use of in the Orders in Council gave a right of action, but this word by itself should not be construed as setting up a contractual relation between the officer and the Crown,

which would give rise to a right of action. Matton v. The Queen (1897), 5 Can. Ex. 401, at p. 407; The King v. Halifax Graving Dock Co. Ltd. (1920), 56 D.L.R. 21, 20 Can. Ex. 44, and cases therein cited.

However that may be, the controlling question to be here determined is whether an action at law will lie against the Crown to recover such a military gratuity.

Does not the word "gratuity" contain in itself its very meaning and definition and primarily denote a grant of money ex gratia? It implies an act of generosity, beneficence, munificence, a gift out of kindness, free from any valuable or legal consideration. It is a voluntary gift of beneficium—the donation of it being absolutely unilateral and depending entirely upon the inclination or will of the giver. It would seem of the very essence and character of a gratuity not to be bilateral; otherwise it would cease to be a gratuity.

A military gratuity is, in its very nature, a bounty or a gift. That is its accepted meaning in the dictionaries. See Bouvier, Law Dictionary, 3rd ed. Verbo Gratuity-Bounty, and cases therein cited. If it be a bounty, it is, therefore, depending entirely upon the grace and benevolence of the Crown, for its recovery and an action at law will not lie for the recovery of the same.

The whole question involving the right of a military officer to recover money from the Crown in respect of his pay, half-pay, or pension is very fully discussed in the case of Grant v. Secretary of State for India (1877), 2 C.P.D. 445, at pp. 455 et seq. The result of that case, which was an action by a military officer serving in the Indian Forces, against the Secretary of State for India, representing the Crown, in which he claimed that he was improperly retired from the service, without being paid the proper pension due to him at the time of his retirement, is that in the opinion of the Court, the Crown has a general power of dismissing a military officer at its will and pleasure, and that the defendant "Secretary of State for India" could not make a contract with a military officer in derogation of the prerogative in such a case exercisable by the Crown. Furthermore, the case decided that any military customs, or regulations, must be taken to be always subject to this prerogative right of the Crown to dismiss at its will and pleasure.

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There is another important case, namely, In re Tufnell, reported in (1876), 3 Ch. D. 164. That was a petition of right by an army surgeon claiming compensation from the Crown, not for dismissal from any office, but for being put on half-pay instead of continuing to hold his office, owing to alterations in the establishment. Malins, V.C., pointed out that although the Crown might order an officer to retire on half-pay, and prescribe that the half-pay should be of a certain amount, as the Crown thought fit to withhold that half-pay, it was absolutely impossible to recover it. The doctrine laid down in that case may be summarized as follows, at p. 177: "Every officer in the army is subject to the will of the Crown, and can be removed and put on half-pay or dealt with as the Crown, with a view to the public convenience, thinks best. It is a power which is always considered to lie in the Crown, a rule which has never been departed from."

In the case of De Dohsé v. The Queen (1886), 3 Times L.R. 114, which was a petition of right by an ex-Captain of the British German Legion formed during the Crimean war, alleging that after the disbanding of the Legion, the government had promised him other employment, but has not provided him with any. The case was carried to the House of Lords, the Crown having succeeded in the Courts below on demurrer. Lord Halsbury, L.C., was of the opinion that, even had there been such a contract it must have been subject to a reserve of the right of the Crown's prerogative to dismiss the officer at pleasure and that a contract which purported to override that prerogative would be unconstitutional and contrary to public policy.

In Mitchell v. The Queen, [1896] 1 Q.B. 121 note, it was held by Fry, L.J., at p. 123: "I am clearly of opinion that no engagement between the Crown and any of its military or naval officers in respect of services either present, past or future can be enforced in any Court of law." And per Lord Esher, M.R., in the same case, at p. 122: "I agree with Mathew, J., that the law is as clear as it can be and that it has been laid down over and over again as the rule on this subject that all engagements between those in the military service of the Crown and the Crown are voluntary only on the part of the Crown and give no occasion for an action in respect of any alleged contract."

In Scotland a similar result was arrived at in

the case of Smith v. Lord Advocate, [1897] 25 R. (Ct. of Sess.) 112; it was held there that no action would lie against the Lord Advocate representing the Crown, for the recovery of military pay. Summing up the result of several Acts relating to pensions to civil servants and military officers, in which the term "shall" occurs, but differing very importantly from Canadian legislation in such matters by having a distinct provision that the decision in any case of the executive authority would be final, Malins, V.C., in Cooper v. The Queen (1880), 14 Ch. D. 311 at p. 315, says: "The Crown in fact, says, 'This is what we intend to give you, but as a matter of bounty only, and you shall have no legal right whatever, and it is not intended to give any person an absolute right of compensation for past services or for allowances under this Act.' He must therefore depend upon the bounty of the Crown whether he is to have the whole amount or any part which the Commissioners may think fit."

Then we have the recent decision of Leaman v. The King, [1920] 3 K.B. 663, where, under a well argued and well considered judgment, it was held that the rule that all engagements between those in the military service of the Crown and the Crown are voluntary only on the part of the Crown, applies as well to private soldiers as to officers and that a petition of right will not lie for military pay.

Under sec. 18, ch. 10, of the Imperial "Manual of Military Law" it is enacted that "The enlistment of the soldier is a species of contract between the Sovereign and the soldier." Commenting upon the nature and character of this engagement or enlistment, the case of Leaman v. The King (ubi supra) decided that the nature of the engagement or enlistment is the same in the case of officers as well as of soldiers.

The expression "contract" used in this manual has been qualified as a loose expression which is not to be construed too literally—much more so now since it has been held in the Leaman case that it could not give a legal right of action.

Should the same view be taken with respect to the engagement of officers and soldiers in the Canadian Forces? The King's Regulations and Orders for the Canadian Militia does not appear to contain a similar enactment to sec. 18 above referred to of the Imperial Manual of Mili-

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tary Law; however, among the several sections thereof dealing with enlistment—from paras. 288 et seq,—it is found under para. 307 that "When a man is enlisted, etc., he will after passing the medical examination be attested by the officer commanding the unit. Attestation will be recorded in duplicate on Form B-235, etc." Item 12 of this attestation paper contains the question: "12. Are you willing to be attested in the Permanent Military Forces of Canada?" And in form M.F.W.-51, used with respect to the attestation of officer, item 10 contains this question: "10. Are you willing to serve in the Canadian Over-seas Expeditionary Force?" These are the only two clauses under which an engagement could be derived.

Would it not appear, therefore, that these attestation papers, read in the light of sec. 10 of the Militia Act, R.S.C. 1906, ch. 41, which says that "all the male inhabitants of Canada, of the age of eighteen years and upward, and under sixty, not exempt or disqualified by law, and being British subjects, shall be liable to serve in the Militia," cannot any more under the Canadian law and regulation than under the Imperial enlistment create a right of action for the recovery of pay, pension, etc? If so, then the Leaman case would conclude all actions in Canada in respect to similar matters.

If a petition of right will not lie for the recovery of the pay of an officer, a fortiori will it not lie for the payment of a gratuity?

See also Gibson v. East India (1839), 5 Bing. (N.C.) 262, 132 E.R. 1105; Robertson, Civil Proceedings, at pp. 611, 359, 35, 643; Dunn v. The Queen, [1896] 1 Q.B. 116; Balderson v. The Queen (1898), 28 Can. S.C.R. 261; Gould v. Stuart, [1896] A.C. 575; Yorke v. The King, [1915] 1 K.B. 852, 84 L.J. (K.B.) 947, 31 T.L.R. 220.

I have come to the conclusion that a petition of right will not lie to recover the military gratuity mentioned in this case.

I am relieved from labouring the other questions raised by the pleading and at trial, counsel at Bar for the Crown having stated that if it were found that the petition of right would not lie at law, that the Crown would not ask any pronouncement upon the counterclaim.

There will be judgment ordering and adjudging that the suppliant is not entitled to the relief sought by his petition of right. Judgment accordingly.

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This case is another instance of the failure of Government officers, whether military or civil, to establish that their employment with the Crown is contractual in its nature, and not something that is terminable at the pleasure of the Executive Government, lacking the legal rights and obligations that would attach to the relations of master and servant. It is, of course, open to Parliament to change the character of the employment, but up to the present the Exchequer Court of Canada has not been able to find that this has been done. Hodgins v. The King (1921), 60 D.L.R. 626, 20 Can. Ex. 454.

In De Dohsé v. The Queen (1886), 3 Times L.R. 114, 66 L.J. (Q.B.) 422, it would appear to be the opinion of the Judicial Committee of the Privy Council that a contract which purported to make the tenure of such an office permanent would be contrary to public policy.

The rule laid down by the English Courts has been generally followed by the Courts in the colonies. (See Shenton v. Smith, [1895] A.C. 229). But this is where there has been no express statutory provision in derogation of the rule. Gould v. Stuart, [1896] A.C. 575; Young v. Adams, [1898] A.C. 469; Young v. Waller, [1898] A.C. 661.

In Dunn v. The Queen, [1896] 1 Q.B. 116 it was definitely decided that both civil and military servants of the Crown hold their offices during pleasure unless the contrary is provided by statute.

The same rule seems to prevail in the United States between the Government and its officers. (See Ex parte Hennen (1839), 13 Pet. (U.S.) 230, at pp. 259, 260).

MARCUS v. BROWMAN.

Quebec Superior Court, Surveyer, J. January 19, 1921.

Automobiles (§IIIC—315)—Automobile Taken out of Garage without Owner's Knowledge or Permission—Car being Operated by Licensed Chauffeur—Accident—Damages—Liability of Owner—C.C. (Que.) art. 1053.

The owner of an automobile which is taken out of its garage without his knowledge or consent is not liable in damages for damages caused by the machine while being used by the person taking it out of the garage. If such owner has given express or implied permission to take out the car he is only liable if he has given such permission to a person without experience; he is not liable where the car is being operated by a licensed chauffeur.

[See Annotation, Law of Motor Vehicles, 39 D.L.R. 4.]

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ACTION against the owner of an automobile for damages caused while the car which had been taken out of its garage without the knowledge or consent of the owner was being operated by a licensed chauffeur. Action dismissed.

The facts of the case are as follows:—

One Browman, defendant's brother, took defendant's car out of its garage without his permission or his knowledge. An accident took place, by the fault of the driver, according to plaintiff's allegations. He was struck and injured by the automobile and he claims from the defendant, the owner of the machine, the sum of $3,500.

The defendant pleads that his automobile was taken out of his garage against his instructions and without his consent; that it was not under his control at the moment of the accident, and that he is not liable. He further alleges that the person who was in charge of the machine was competent and was not guilty of any fault or imprudence.

The evidence shews that the defendant's brother took the car from the Central Garage, without his permission or knowledge that the two men, Ménard and Singer, boarded the automobile, Ménard, who had a license, acting as chauffeur.

The Superior Court dismissed the action by the following judgment:—

Bercovitch, Lafontaine & Gordon, for plaintiff.

L. Fitch, for defendant.

Surveyer, J.:—Considering that the statute 3 Geo. V., ch. 19 art. 3, amending art. 1406 R.S.Q., 1909, puts upon the defendant the onus of proving that the accident did not happen through any improper conduct on his part or on the part of these for whom he is made liable by law;

That the defendant swears positively that on the day in question he had not allowed or authorised anyone to use his car; that he only heard of the accident long after it had happened; that defendant's brother, Benjamin Browman, swears that he took defendant's car, without permission from the Central Garage; that Ménard and Singer boarded the car with him, Ménard acting as chauffeur; that Ménard swears that he has had a chauffeur's license for five years; that if it could be stated, in the face of the positive statements made by defendant and his brother, that the latter was using defendant's car with the latter's auth-

orisation, expressed or implied, the defendant could only be made liable for the acts of the driver if he had loaned his car to a person without experience, which is not the case here. (Imbrecq, L'automobile devant la justice, No. 70; Responsabilité des propriétaires d'automobiles, No. 201); that in view of the facts as disclosed, it is unnecessary to consider whether the defendant has successfully rebutted the legal presumption existing against the driver of his car, since plaintiff has failed to prove that such driver was defendant's representative (préposé); that plaintiff has failed to establish the essential allegations of his declaration, and that defendant has proved the essential allegations of his plea; doth maintain defendant's plea, and doth dismiss plaintiff's action with costs.

Action dismissed.

DUNFORD v. LEICESTER.

Saskatchewan King's Bench, Bigelow, J. May 7, 1921.

Mortgage (§VIIC—156)—Order for Sale Made and Time for Redemption Fixed—Mortgagee Subsequently Receiving Rents under Attornment Clause—Right of a Mortgagor to Reopen Sale Order and Have New Date for Redemption Fixed and a New Account Taken.

Where an order for sale gives the defendant a certain time from the date of service in which to redeem and after obtaining the order for sale and before the time for redemption, rents are collected on plaintiff's behalf on account of a notice of attornment, the defendant has a right to have the sale order reopened and a fresh account taken and a new date fixed for redemption.

Mortgage (§VI. E—90)—Judgment of Master Staying Proceedings in an Application to Confirm a Sale under a Mortgage—Judgment Based on Misrepresentation on Part of Plaintiff—No Misrepresentation in Fact Made—Reversal.

A judgment of a Local Master in which he refused to confirm a sale under a mortgage and further ordered that all proceedings in the action be stayed, because in his opinion the plaintiff in obtaining an order dispensing with the restrictions of the Volunteers and Reservists Relief Act, 1916 (Alta.), ch. 6, made misrepresentations as to the value of the property, will be reversed as to the staying of proceedings, where the misrepresentations are simply a difference of opinion between the plaintiff and the defendant as to the value of the property, the plaintiff's valuation being based on what the property would bring at a forced sale and the defendant's valuation being what the property and buildings cost him.

APPEAL from a judgment of the Local Master at Swift Current in which he refused to confirm a sale under a mortgage, and further that all proceedings in the action be

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stayed. Reversed as to that part staying proceedings.

H. Fisher, for plaintiff; C. W. Hoffman, for defendant.

Bigelow, J.:—The mortgage is dated January 2nd, 1914, and is for $4,000. On April 22, 1920, the amount due plaintiff was $6,250.90, and taxes of $927.05 were unpaid. No payment had been made on the mortgage except $160 interest, December, 1914. The order for sale is dated July 28, 1920. The certificate of reference is dated July 14, 1920, and certifies that the amount due plaintiff is $6,626.62, all in arrears. The order for sale gives the defendant 3 months from the time of service on defendant's solicitor to redeem. That order was served on defendant's solicitors, Buckles & Co., on July 29, so defendant had up to October 29, 1920, to redeem.

Some arrangement by correspondence was made in 1916 whereby the solicitors for the plaintiff were to get the rents to apply on the mortgage, but apparently this was not carried out, as one Heminway collected the rents and paid them to defendant, until April, 1920, when the plaintiff caused notice of attornment to be served on Heminway. Since then, beginning May 15, 1920, Heminway collected $375 rents. In one affidavit he says he paid these rents to the plaintiff, and in a later affidavit he says he has placed these amounts to the credit of Bothwell & Co., solicitors for the plaintiff, except $62.10 paid for an insurance premium. $175 of this amount was collected before the time for redemption expired, and the balance from November 12, 1920, to April 13, 1921. It does not appear whether the agent paid the $62.10 insurance premium out of the $175 or afterwards. In any event, after plaintiff had obtained the order for sale, and before the time for redemption, rents were collected on plaintiff's behalf on account of the notice of attornment. The result of that is, in my opinion, that new accounts must be taken and a new date fixed for redemption. See Fisher on Mortgages, 6th ed., para. 1803, at p. 906:—

"After the amount due has been ascertained and certified, the proper course for the mortgagee in possession appears to be to retain the possession but to abstain from receiving the profits. For in general, and subject to a few exceptions (as to which see infra (1963)) if the mortgagee varies the amount found due by receiving before default (i.e., before the day fixed for redemption) rent or other

moneys in the nature of income on account of the estate, the accounts must be carried on and a new day . . . fixed for redemption."

And see para. 1963, at p. 982:—

"Where the mortgagee or the receiver appointed in the action receives rents between the date of the certificate and the date fixed for redemption, the foreclosure will be reopened as a matter of course, and a fresh account will be taken and a new day fixed for redemption."

Mr. Fisher urged me to give the defendant 2 months more to redeem, and in default to confirm the sale. I think the defendant has a right as a matter of course to have the sale order reopened. I therefore refuse to confirm the sale, and order that a fresh account be taken and that the defendant have 2 months from this date to redeem; in default, sale proceedings to continue.

I will now deal with the other part of the Local Master's judgment, staying all proceedings in the action. This part of the judgment is based on the Local Master's opinion that in obtaining an order dispensing with the restrictions of the Volunteers & Reservists Relief Act, 1916, (Alta.), ch. 6, the plaintiff made misrepresentations as to the value of the property. That order was obtained ex parte, and was granted by Smyth, J., May 3, 1920. As to the value, Whiddington, plaintiff's agent looking after this matter, the plaintiff being in England, swore "that it is my opinion that the said land, together with all improvements thereon, is not presently valued at more than the sum of $3,000.00 and I verily believe, if brought to sale, would not bring as much." Arthur Webber, a real estate agent of Swift Current, swore that he was well acquainted with the property in question and that in his opinion the buildings and improvements were not worth more than $3,000.

Why this order was granted ex parte it does not appear. I would not have granted it ex parte without some good reason, such as that it was impossible to serve the defendant. This could not have been the case, as the defendant was served personally with the writ on May 25, 1920; an appearance was entered for defendant on June 18, 1920, and the notice of motion for order for sale was served on defendant's solicitor.

It seems to me that defendant cannot attack the order

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made under the Volunteers & Reservists Relief Act in collateral proceedings such as this. The order was made, and rightly or wrongly is good until set aside. With due deference to the Local Master, I cannot agree that the order was obtained on misrepresentation. As to the value, the defendant comes in now and says that the land is worth $3,500 and the building cost $6,500 and is worth that now; and Mr. Buckles, a solicitor, swears the property is worth much more than $3,000. Against that the plaintiff now brings in an affidavit of W. W. Smith, a real estate agent in Swift Current, who swears that he is well acquainted with the financial values in the city of Swift Current and in his opinion the buildings and improvements are worth not more than $3,000.

The real value of a parcel of real property is very hard to determine. It is to a large extent a matter of opinion. Experts are more qualified to give opinion evidence than others. The fact that when the property was put up for sale there were no bidders above the sum of $3,000 would seem to confirm the evidence of Webber and Smith. After all, the real value of a parcel of property to a mortgagee is what it will bring at a forced sale, and not what it might have cost the mortgagor or what the mortgagor might value it at himself. The case of Republic of Peru v. Dreyfus Bros. & Co. (1886), 55 L.T. 802, referred to in the argument is based on the fact that the affidavit contained misstatements of fact. I cannot find any misstatements of fact or misrepresentation in this case.

The appeal is allowed, then, as to that part of the judgment which stays all proceedings. As each party is partially successful on the appeal there will be no costs to either party. Appeal allowed in part.

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Ontario Supreme Court, Logie, J. April 26, 1921.

Bankruptcy (§III—25)—Assignment by Insolvent under the Assignments Act R.S.O. 1914, ch. 134—Bankruptcy Act in Force at Time Assignment Made—Validity of Assignment.

The Bankruptcy Act (1919) ch. 36 as amended by (1920) ch. 34, makes every assignment other than an authorised assignment made by an insolvent debtor for the general benefit of creditors null and void, and an assignee under such an assignment has no status to bring an action to set aside a chattel mortgage given by the insolvent as fraudulent and void as against such assignee.

[Bartley's Trustee v. Hill, post 473, referred to. See Annotations, 53 D.L.R. 135; 59 D.L.R. 1.]

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TRIAL of action brought by T. L. Hamilton, assignee for the benefit of creditors of A. G. Crocker under the Assignments Act, R.S.O. 1914, ch. 134, against E. Vipond and R. Ronald, defendants, to set aside a chattel mortgage given by insolvent to the defendant Ronald and by him assigned to the defendant Vipond as fraudulent and void as against plaintiff.

J. C. Makins, K.C., for plaintiff.

F. H. Thompson, K.C., for Ronald.

J. M. Riddell, for Vipond.

Logie, J.:—One Crocker, being in insolvent circumstances made on December 17, 1920, an assignment for the benefit of his creditors under R.S.O. 1914, ch. 134, to the plaintiff who brings this action.

The Bankruptcy Act (1919), ch. 36, as amended by (1920), ch. 34, was then in force.

Section 9 of the Bankruptcy Act makes every assignment other than an authorised assignment made by an insolvent debtor for the general benefit of his creditors null and void.

Crocker was an insolvent debtor on December 17, 1920.

His assignment to plaintiff is therefore void and the plaintiff has no status to bring this action. Att'y-Gen'l of Ontario v. Att'y-Gen'l for Canada, [1894] A.C. 189, at p. 200, 63 L.J. (P.C.) 59, as explained in Att'y-Gen'l for Canada v. Att'ys-Gen'l for the Provinces of Ontario, Quebec and Nova Scotia, [1898] A.C. 700, at p. 715, 67 L.J. (P.C.) 90. See also Bartley's Trustee v. Hill (1921), 61 D.L.R. 473.

As the point is new, the action will be dismissed without costs.

Ronald's course throughout was full of trickery and sharp practice. By threatening to dampen the sale of Crocker's chattels by the production of his doubtful chattel mortgage he induced Vipond, a friendly neighbour of Crocker, to give him (Ronald) his note for the amount of the chattel mortgage.

This note was only given as temporary accommodation for the purpose of assisting the sale and was to be paid by Ronald taking approved notes of those who purchased chattels at the sale immediately thereafter. After the sale he not only refused to carry out his bargain but, in an effort to pull his chestnuts further out of the fire, he on the next

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day, the day of Crocker's assignment, sold or endorsed the Vipond note to another.

He thus saddled in the worst of faith the unfortunate Vipond with two lawsuits—this one and a suit at the instance of the holder of the note.

His demeanour in the box was shifty and his evidence calculating and unworthy of belief.

To mark my disapproval, I direct him to pay Vipond's costs of defence and also the costs of the third party notice.

Action dismissed.

REX v. MARK PARK.

Ontario Supreme Court, Orde, J. December 30, 1920.

Intoxicating Liquors (§IILG—86)—Unlawful Possession—"Private Dwelling House," Meaning of—Same Person With More Than one Dwelling House—Ontario Temperance Act, 6 Geo. V. 1916, ch. 50, sec. 41.

If a person rents a house and either by himself or through a member of his family enters into possession intending to make it his residence, and it is used for no other purpose, the house is within the permissive clauses of the Ontario Temperance Act, as to the possession therein of intoxicating liquors by such tenant. The same person may have more than one "private dwelling house" within the meaning of sec. 41 of the Act.

[See Annotation, the Ontario Temperance Act, 61 D.L.R. 177.]

MOTION to quash a conviction of the defendant by one of the Police Magistrates for the City of Toronto, for having intoxicating liquor in a place other than the private dwelling house in which he (the defendant) resided, contrary to sec. 41 of the Ontario Temperance Act.

N. S. Macdonnell, for defendant.

F. P. Brennan, for the Magistrate.

Orde, J.:—The accused was convicted under the Ontario Temperance Act, by one of the Police Magistrates for Toronto, on November 9th, 1920, of having liquor in a place other than the private dwelling house in which he (the accused) resided, under the following circumstances:

Prior to the acquisition of the liquor in question, the accused lived with his family at 16 Elizabeth St., in apartments over his shop. He had ordered some liquor from China, and, being informed that he could not keep the liquor in the apartments because of their connection with his shop, he rented a house, No. 130 Elm St, on August 1, 1920, intending to move into it with his family. The house required some repairs because the roof was leak-

ing, and for that reason the accused did not move in immediately.

The liquor arrived from China and passed the Customs and was delivered to the accused at 130 Elm St. on or about August 6 or 7, and at the same time the accused sent one of his sons to sleep in the house. It is probably safe to assume that the object in having the son sleep there was to safeguard the liquor, but the purpose is immaterial, if the fact that the son was there at all has any real bearing upon the point raised here.

Before the accused and the other members of his family moved from Elizabeth St. to 130 Elm St, the liquor was seized, and the magistrate convicted the accused, under sec. 41 of the Act, of the offence of having liquor in a place other than the private dwelling house in which he resided. The Magistrate's decision as reported makes it clear that he had no doubt as to the good faith of the accused, and he found the accused guilty because he felt that the Act compelled him to do so.

The point raised is of some importance, namely, whether under the Act a man can be residing in two places at the same time; and also, when residence in a place acquired with the intention of occupying it actually begins.

On the argument numerous authorities were cited by counsel for both sides, as to the meaning of the words "residence" and "resides," but I do not find them very helpful. What the authorities do establish clearly, however, is that the words have a variety of meanings according to the statute or document in which they are used. The words are ambiguous and may receive different meanings according to the position in which they are found: Naef v. Mutter (1862), 12 C.B. (N.S.) 816, 142 E.R. 1363; Ex parte Bruell (1880), 16 Ch. D. 484.

"Private dwelling house" is defined by para. (i) of sec. 2 to mean "a separate dwelling with a separate door for ingress and egress, and actually and exclusively occupied and used as a private residence." What is the meaning of the words "actually and exclusively occupied and used?" Do they mean that there must be at all times a continuous physical occupancy of the house by some person? If so, then the family could not leave the house and lock the door, in order to go to church, because while absent the house would not be "occupied." Nor could the family

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close the house for the summer months. The key to the meaning of this definition is the word "exclusively." The intention is that the place, to come within the definition, shall not be occupied or used otherwise than as a private dwelling house. There must be an actual occupation and user in the sense that the only use to which the dwelling is put is that of a private residence. It must not be used for purposes of business, or as a storeroom or warehouse, or for any other colourable or questionable purpose. The question whether or not the place comes within the definition is largely a question of fact, and in case of doubt the element of good faith is a material factor in determining its character.

If a man purchases or rents a house, and either by himself or through some one else enters into possession, intending to make it his residence, and it is used for no other purpose, then, in my judgment, so far as its character is concerned, it is a "private dwelling house" as defined by the Act, though at the time he may not have commenced to sleep and have his meals there.

Section 41 makes it an offence for a person to have liquor in any place wheresoever "other than in the private dwelling house in which he resides." Now, notwithstanding that the house here may be a "private dwelling house" within the meaning of the Act, is it the private dwelling house in which the accused resided at the time the liquor was seized? I think it is important, in determining this question, to keep in view the intention of the Act. While it is, speaking broadly, a general prohibitory law, it intends to exempt from its operation liquor kept in a private house for private consumption. To seek to destroy that broad distinction between what is forbidden and what is permitted by striving to interpret the Act so as to limit what is intended to be permitted, is just as vicious as it would be to endeavour to minimise the explicit prohibitions of the Act. Except for one purpose, sec. 41 might have been worded as to permit the having of liquor in "a private dwelling house," the words "in which he resides" really add nothing so far as the residential character of the house is concerned. That characteristic is already fully covered by the word "dwelling." The purpose of the addition of the words "in which he resides" is to limit the private dwelling house in which a person may have liquor

to one in which he resides and to prohibit his having it in a dwelling house in which he does not reside. In other words, a man may keep liquor in his own residence and in his own residence only. But I do not think that the words " in which he resides" in any other respect qualify the definition of a private dwelling house, or are intended to mean an actual physical occupancy of the place, if the bona fide residential character of it is otherwise established. It is argued that to hold this means that a man may have two or more residences. But is it not the fact that many men have two or more residences? Take the common case of a man living half the year in the city and the other half at his home in the country. Was it intended by the Act that he must choose one of those places as his "residence" where he might have liquor and that he is prohibited from having it at the other place? That a man may legally have more than one residence for some purposes, such as taxation, is not unusual. I can see no reason for holding that the Act intends to restrict a man's possession of liquor to one of his private dwelling houses and no more. The use of the word "the" in the phrase "the private dwelling house" might be interpreted to mean "that one," and so to restrict the place to "that one private dwelling house in which he resides;" but, having regard to the context, and to the intention of the Act, I do not think it should be given any such meaning. If a man resides in more than one dwelling house, then each of such dwelling houses is "the" dwelling house in which he resides, in so far as the commission of any offence under sec. 41 is concerned.

Looking at the whole matter broadly and fairly, I think that the accused was in fact actually occupying and exclusively using 130 Elm St. as his private residence at the time of the alleged offence. His occupation was actual, the house was being used as a private residence and for no other purpose, and the residence was his residence and not that of some other person. The whole proceeding on his part was in good faith, which I think in such cases as this is a material element in determining the character of the use to which the person charged is putting the place.

The conviction must therefore be quashed, with the usual order for the magistrate's protection.

Conviction quashed.

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RAISBACK v. RAISBACK.

RAISBACK v. RAISBACK.

British Columbia Supreme Court, Murphy, J. January 17, 1921.

Jury (§IB—10)—Action for Divorce—Right to Summon Jury. B. C. Jury Act, 1913, ch. 34.

A jury summoned under the Jury Act, B.C. Stats. ch. 34, as amended by subsequent statutes, to try issues of fact in a divorce action is properly summoned.

[See Annotation, Divorce Law in Canada, 48 D.L.R. 7.]

QUESTION as to whether the Divorce Court has any power or machinery to call a jury in a divorce action.

C. J. Lennox and J. A. Fletcher, for petitioner.

W. E. Burns, for co-respondent.

Murphy, J.:—The statute, under which juries, in divorce proceedings are directed to be selected by sec. 22 of the Divorce and Matrimonial Causes Act, as the Act appears in R.S.B.C. 1911, ch. 67, was, in so far as it relates to the qualification, summoning and retaining of jurymen repealed in the former colony of British Columbia (which included the territory now embraced in the City of Vancouver) by proclamation, dated March 8, 1860, known as the Jurors' Act, 1860. By the English Law Ordinance Act, 1867, it was provided that all legislation of the former colony of British Columbia was to continue effective within the territorial limits of the former colony of British Columbia in so far as such legislation had modified and altered the civil and criminal laws of England. This seems to have been the state of the law at the time British Columbia entered Confederation. If, therefore, it is to be held that from that time onward British Columbia could not legislate on the question of juries to try actions under the Divorce and Matrimonial Causes Act, recourse must be had (if the trial occurs within the territorial limits of the former colony of British Columbia) not to the English Jury Act of 1825, ch. 50, but to the British Columbia Jurors' Act of 1860. But, it is now beyond question that the Province of British Columbia can, and has, created a Court which has divorce jurisdiction in the absence of any divorce legislation by the Dominion. Watts v. Watts, [1908] A.C. 573, 77 L.J. (P.C.) 121. If it can create such a Court, it can a fortiori fix the qualifications of jurors to serve therein at any rate within the territorial limits of the former colony of British Columbia where, as stated, the provisions of sec. 22 of the Divorce and Matrimonial Causes Act, as to qualifications of jurors, were not in force at the time of Con-

federation, and, therefore, no question of changing an Imperial statute can arise. Even, if it did arise, however, see judgment in Sheppard v. Sheppard (1908), 13 B.C.R. 486, at p. 507. This judgment was referred to, with approval by the Judicial Committee in Watts v. Watts, supra. One of the reasons relied upon in both cases, if I read them aright, was the long continued exercise of the jurisdiction in question. This reason equally applies to the matter of jury qualifications as numerous trials through a long series of years have taken place by juries whose qualifications had been fixed by the provincial legislation. The latest British Columbia Legislation on juries is the Jury Act, 1913, ch. 34, as amended by subsequent statutes. The jury herein is summoned under this legislation and is, in my opinion, properly summoned to try the issues of fact therein.

Judgment accordingly.

BARTLEY'S TRUSTEE v. HILL.

Ontario Supreme Court, High Court Division, Middleton, J. April 11, 1921.

Bankruptcy (§III—28)—Void Assignment by Debtor—Action by Authorised Assignee to have Instrument declared Void—Proper Procedure by Summary Application under Rule 120—Action Dismissed with Costs—Allowance of Costs to Assignee out of Trust Estate.

An assignment for the benefit of creditors under the Assignments and Preferences Act, R.S.O. 1914, ch. 134, executed after the coming into force of the Bankruptcy Act, 1919, (Can.) ch. 36, to an unauthorised trustee, is null and void under sec. 9 of the Bankruptcy Act, but the remedy of an authorised assignee under the Bankruptcy Act is by summary application under Rule 120 of the Act and not by an action instituted for the purpose of having the offending instrument declared null and void, and where an authorised trustee improperly brings such an action he will not be allowed his costs out of the trust estate.

[See Hamilton v. Vipond, ante p. 466, also Annotations, 53 D.L.R. 135, 59 D.L.R. 1.]

ACTION instituted by an authorised assignee under the Bankruptcy Act to have an assignment made under the Assignments and Preferences Act, R.S.O. 1914, ch. 134, declared null and void. Action dismissed with costs.

H. B. Nelly, for plaintiff.

B. H. L. Symmes, for defendant.

Middleton, J.:—It appears that one Bartley, finding himself in insolvent circumstances, and being none too familiar with the provisions of the law, made an assignment for the benefit of his creditors, to the defendant, adopting the form

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of assignment under the Ontario statute. This assignment was duly registered, and a meeting of creditors called.

The plaintiff, who is an authorised assignee under the Bankruptcy Act, 1919 (Can.), ch. 36, was not slow to appreciate the encroachment upon his preserves, and through his solicitor made known the invalidity of what had been done. The penitent debtor executed an assignment in his favour under the provisions of the Bankruptcy Act 4 days later than his abortive attempt under the Ontario Act. A meeting of creditors was held under the earlier assignment, when the situation was explained, and a resolution was passed, in assumed compliance with the Ontario Act, changing the assignee to the plaintiff. This it was thought, would serve to vest in him a good title, but the plaintiff was not satisfied, and instituted this action for the purpose of having the offending instrument declared to be null and void, under the provisions of the Bankruptcy Act, and to have the same set aside, and above all for costs.

In his statement of claim, the plaintiff sets forth verbatim the two documents with their affidavits of execution, and other incidental appendages, and, referring to the Bankruptcy Act, claims the relief indicated. The defendant in answer sets up the good faith of the original bungled attempt by the debtor to provide for his creditors, and the attempt at the meeting of creditors to comply with the law, and vest the estate in the true assignee, and the fact that the defendant has not in any way interfered with, or intermeddled with the plaintiff in the administration of the estate, and his readiness to execute any deed or document necessary to vest the title in the true assignee. Upon this a motion is made for judgment.

Former Bankruptcy Acts came to grief owing to the enormous incidental expense connected with the administration of the estates of insolvents, and this Act has been framed with the deliberate purpose and intention of, as far as possible, preventing the exploitation of estates for the benefit of assignees and their solicitors. It is therefore a matter of keen regret to find that in this, one of the earliest cases to come before the Court, the ancient evil still exists, and is apparently unchecked. Fortunately, however, in this case the assignee and his advisers have overlooked the provisions of the Act and rules which, I think, govern the case. There can be no question that under sec. 9 of the

Act the first assignment was absolutely void. Upon the facts there is no doubt that the original assignee would have joined in any conveyance necessary to enable the estate to be disposed of, and it is hard to see why any formal declaration such as that sought is in any way necessary. But, assuming that the authorised trustee is really convinced of the necessity of removing this filmy cloud from his title, his proper remedy is found in an application under Rule 120 [See 53 D.L.R. 222] which provides for a summary application by the trustee to set aside any conveyance which is void under the Act as against his title. It is clear that the plaintiff has mistaken his remedy and the action is entirely misconceived; and I, therefore, dismiss it, with costs to be paid by the trustee to the defendant.

At one time I had the view that in litigation between a trustee and one who is not a cestui que trust it was improper for the Court to express any opinion upon the question whether the trustee should be allowed his costs out of the trust estate. In Lazard Bros. & Co. v. Union Bank of Canada (1920), 55 D.L.R. 618, 47 O.L.R. 608, the Appellate Division apparently took the contrary view; and, acting upon the assumption that my former opinion was erroneous, I think that I should in this case direct, so far as I have any power to do so, that no costs (either of the plaintiff or defendant) be allowed to this trustee out of the trust estate. It is only by adopting a course which will make it plain that the estates of debtors are not to be frittered away in useless and purposeless litigation that this Act will be saved from the disaster which overtook its predecessors.

Action dismissed.

RE WONG SIT KIT.

British Columbia Supreme Court, Macdonald, J. August 3, 1921.

Aliens (§I—3)—Admission into Canada—Chinaman—Chinese Immigration Act Amendment 1921 — Effect — Immigration Act—Right of Court to Interfere with Decision of Board of Enquiry.

Since the amendment of the Chinese Immigration Act by statutes of 1921 (Can.), ch. 21, a person of Chinese origin seeking to enter Canada is in no better position than any other immigrant seeking to be landed in Canada, and comes within the Immigration Act 1910, ch. 27 (Can.). Under sec. 23 of this Act the Court has no jurisdiction to sit in review upon any decision of the Board of Inquiry concerning his admission into Canada.

[In Re Munshi Singh (1914), 20 B.C.R. 243, referred to. See also Re Wong Suey Mong; (1921), 61 D.L.R. 351, 35 Can. Cr. Cas. 383.]

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RE WONG SIT KIT.

APPLICATION for writ of habeas corpus to obtain the discharge of a Chinese boy claiming to enter Canada as the son of a merchant. His application was heard by a Board of Inquiry at the City of Vancouver, B.C., under the Immigration Act (Can.) and he was ordered deported as a prohibited immigrant under P.C. 1202. Application dismissed.

W. S. Buell, for applicant.

R. L. Reid, K.C., for Dominion Government.

Macdonald, J.:—As to the application in Re Wong Sit Kit, counsel for the applicant seeks to obtain an order for habeas corpus, on the ground that the applicant, seeking admission to Canada, being a Chinaman, is not in the same position as any other party desiring to obtain admission into Canada. In other words, it is contended that the provisions of the Chinese Immigration Act, R.S.C., 1906, ch. 95, and its regulations give such applicant an advantage over such immigrants. This contention is a very important one, and would be far-reaching if tenable. It hardly needs to be commented on to shew the position in which matters would stand if the Chinese Immigration Act were to be considered a code or statute alone governing entry of persons of Chinese origin. Section 7 of the Chinese Immigration Act is amended by statutes of 1921, (Can.), ch. 21, so that no distinction, to my mind, now exists between the entry of a person of Chinese origin and any other person seeking to be landed in Canada. There might be some strength in the right of a party, who had been admitted to Canada under the Chinese Immigration Act, to invoke its provisions as a protection, but as the immigrant comes to the border seeking admission, I think that all immigrants are in the same position. If so, they all come within the provisions of the Immigration Act. In that event, it is contended, that sec. 23 of the Act prevents this Court from reviewing, restraining or otherwise interfering with the decision that may be made by a Board of Inquiry concerning the application of any party to enter Canada.

The wording of the section is very comprehensive in its terms and, with the time at my disposal this morning, I do not propose to discuss it further. I simply refer to the case of In re Munshi Singh (1914), 20 B.C.R. 243, where the right of a British subject entering Canada was discussed and the effect of sec. 23 determined. Irving, J.A.,

referred to the duty of the Court in that case not being, to determine whether or no Munshi Singh ought to be admitted, and then adds, at pp. 260, 261:—

"We are not a Court of Appeal from the decision of the Board of Inquiry. Assuming, then, that he complains that he is illegally restrained under the warrant of deportation of the Board of Inquiry, I am of opinion that his appeal is hopeless."

Without referring at greater length to this decision I simply draw attention to the concluding portion of McPhillips, J.A.'s, judgment as follows, at p. 292:—

"But in so holding, I am not to be understood as holding that there is any power of review, or the right to invoke habeas corpus proceedings to effect the discharge of the appellant, as my opinion is that section 23 is an absolute inhibition upon the Court, and that there is no jurisdiction in the Court to grant a writ of habeas corpus and thereupon discharge the appellant from custody."

In view of this section of the statute, the application will be refused. Apparently, it was the intention of the Parliament of Canada to leave matters of immigration completely within the control of the authorities. It would be assumed that the officials would act properly and exercise their functions with reason, and that in any event no Court should sit in review upon their decision.

Application refused.

REX v. BRYDEN.

Nova Scotia Supreme Court, Russell and Longley, JJ., Ritchie, E.J., and Chisholm and Mellish, JJ. April 6, 1921.

Criminal Law (§IIB—42)—Indictment Found by Grand Jury—Right of Prisoner to Elect for Speedy Trial—Criminal Code Secs. 696 and 825 (4).

Where a prisoner has been indicted by a grand jury on a charge for which he may be tried in the County Judges Criminal Court, upon facts, which were placed directly before the jury by the Judge in Bankruptcy, having come to his notice shortly before the criminal sittings opened, and the accused has been called upon the indictment and has surrendered himself into custody, he has a right to be brought before the Judge of the County Court for election as to whether he will be tried before the Judge of that Court without a jury or whether he will be tried in the ordinary way with a jury.

[Giroux v. The King (1917), 39 D.L.R. 190, 29 Can. Cr. Cas. 258, 56 Can. S.C.R. 63, followed.]

CASE RESERVED by the Judge of the Criminal Sittings of the Supreme Court of Halifax under the following circumstances:—

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The prisoner was indicted for unlawfully stealing the sum of $5,800, the property of the Eastern Canada Savings and Loan Co., Ltd., and also, having made an assignment under the Bankruptcy Act, 1919 (Can.), ch. 36, for having failed to fully and truly discover to the trustee all his property and how and to whom and for what consideration and when he had disposed of the sum of $7,000 a part thereof. There was no preliminary examination before a magistrate in either case. The facts upon which the indictments were founded came to the notice of Chisholm, J., as Judge in Bankruptcy shortly before the sittings opened and he placed the matters directly before the grand jury, who found the indictments as above stated. The accused was called on the indictments and surrendered himself into custody. Counsel for the accused then applied to the Judge for an order directing the sheriff to bring the accused before the Judge of the County Court for election as to whether he would be tried before the Judge of that Court without a jury or whether he would be tried in the ordinary way with a jury.

As, in the opinion of the Judge, there was some doubt as to the right of the prisoner to make an election under the circumstances, he reserved for the full Court the question whether the prisoner was entitled to have his trial for the said offences in the County Court Judge's Criminal Court.

L. A. Forsyth, for the prisoner.

A. Cluney, K.C., for the Attorney-General.

Russell, J.:—The grand jury at the March Criminal Sittings of the Court found two indictments against the prisoner. There had been no preliminary examinations before a Magistrate in either case. The facts had come before Chisholm, J., as a Judge in Bankruptcy shortly before the sittings, and he had placed them directly before the grand jury with the result that indictments were found as already stated. The accused was called on the indictments and surrendered himself into custody, whereupon an application was made for a direction to the sheriff to bring him before the Judge of the County Court to enable him to make an election to be tried in the County Court Judge's Criminal Court. The right of the prisoner to so elect seemed questionable to the Judge presiding and was referred to the Court for determination.

I think the question was a fairly debatable one. The

policy of the Act providing for speedy trials can have no reference to such a case. The Judge and the jury are present and ready to proceed with the trial. The effect of an election is to delay rather than expedite the matter and if the precise issue had presented itself to the Legislature it would probably enough have been determined by expressly excepting such cases from the provisions of the Speedy Trials Act (Part XVIII of the Crim. Code).

But the question comes before us as a question of construction and it is not without its difficulties as such, or, rather, it would present difficulties if it had not been decided by the Supreme Court in a case to which neither of the counsel called the attention of the Judge before the question was referred. The case of Giroux v. The King was discovered at a later date and is reported in (1917), 39 D.L.R. 190, 29 Can. Cr. Cas. 258, 56 Can. S.C.R. 63. In that case three of the Justices held against the dissenting opinions of Idington and Duff, JJ., that where the prisoner had been indicted as in the present case, at the instance of the presiding Judge, he was entitled to make his election. The counsel for the Crown admitted that he was unable to distinguish the present case, although in that case there had been a consent of the prosecuting counsel. The admission was, nevertheless, quite proper, in my opinion, because consent could not give jurisdiction to try a case to a Court on which the statute does not confer the jurisdiction. All that consent could have done in the case referred to was to waive any procedural steps necessary as conditions to the exercise of jurisdiction.

The decision of the majority must therefore be taken to be an authority that it is not necessary to the right of election that the prisoner should have been committed for trial or bound over under the provisions of sec. 696.

It has been suggested that the decision of the Supreme Court referred to is not conclusive because in that case there was a consent on the part of the counsel for the Crown which there was not in the present case. Possibly this view may be correct as to the binding authority of the case mentioned. And it may be necessary to consider the question that has been raised. Let us, therefore, assume that we are free to construe the section.

Sub-section 4 is obviously introduced for the purpose of saying that there are cases in which an election may be

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made although the accused has not been committed. These are cases in which he is to be "deemed to be committed." The person who is bound over under sec. 696 has not been committed. For the purposes of the statute allowing him to elect he is, if in custody, deemed to be committed. The person who is "otherwise in custody awaiting trial on the charge" is in the same category. What charge? That is the whole question. It must be some charge on which he has not been committed. Otherwise there was no need for the provision. "The charge" in the phrase referring to the person "who is otherwise in custody" cannot be "the charge" mentioned in the next preceding phrase. There is no "otherwise" that the person in contemplation can be in custody, than the way mentioned in the first phrase. The words must refer to some other charge and I agree with Anglin, J.'s, interpretation of the words in the Supreme Court case already mentioned. He said in that case, 39 D.L.R. at p. 199, 29 Can. Cr. Cas. at p. 267: "I read 'the charge' as meaning the charge mentioned in sub-sec. (1), i.e., a charge cognisable by the Court of Sessions." As applied to this Province I read the words "the charge" as referring to a charge cognisable by the County Court Judge's Criminal Court.

The answer to the question referred to us, whether the prisoner is entitled to have his trial for the offence with which he is charged in the County Court Judge's Criminal Court must, in my opinion, for the reasons given, be answered in the affirmative.

Longley, J., concurred with Mellish, J.

Ritchie, E.J.:—Two indictments have been found against Bryden for offences which the County Court Judge has jurisdiction to try provided the accused has the right of election.

The question reserved is as to whether or not he has such right. I answer the question in the affirmative. There was no preliminary examination; the facts upon which the indictments are founded were placed before the grand jury by the Judge presiding at the criminal term.

Bryden was in Court when the indictments were found and surrendered himself when called on the indictments; he is now in custody awaiting trial on the charges set out in the indictments. I quote sec. 825, sub-sec. 1, 1907 (Can.), ch. 45, sec. 6 (g), and sub-sec. 4, R.S.C., 1906, ch. 146:

"825. Every person committed to jail for trial on a charge of being guilty of any of the offences which are mentioned in section five hundred and eighty-two as being within the jurisdiction of the general or quarter sessions of the peace, may, with his own consent, be tried in any Province of Canada, and, if convicted, sentenced by the judge."

"4. A person who has been bound over by a justice or justices under the provisions of section six hundred and ninety-six, and has been surrendered by his sureties, and is in custody on the charge, or who is otherwise in custody awaiting trial on the charge, shall be deemed to be committed for trial within the meaning of this section."

I follow the judgment of Anglin, J., in Giroux v. The King, 39 D.L.R. 190 at p. 199, 29 Can. Cr. Cas. 258, where he said:—"Under sec. 825 of the Code, every person committed for trail for an offence within the jurisdiction of the General or Quarter Sessions of the Peace, may, with his consent, be tried under Part XVIII. A person in custody awaiting trial, however he may so find himself, is under sub-sec. 4 to 'be deemed to be committed for trial within the meaning of the section.' The defendant, in my opinion, was in custody awaiting trial on the charge when he had surrendered himself for trial on the appointed date. Re Walsh, 16 D.L.R. 500, 23 Can. Cr. Cas. 7 at p. 9; The King v. Thompson, 14 Can. Cr. Cas. 27 at 30, I read 'the charge' as meaning the charge mentioned in sub-sec. (1) i.e., a charge cognisable by the Court of Sessions.

Chisholm, J., concurred with Mellish, J.

Mellish, J.: — I think the case of Giroux v. The King, supra, is conclusive as to what our decision should be on the present application. The majority of the Court in that case seem to have been of the opinion that the accused had at least before plea the right of election. Apart from authority I should be of opinion that sec. 825 (4) of the Code had no application to this case and that the accused was not committed for trial within the meaning of that section. This is merely mentioned in case I may misapprehend the ratio decidendi of the above decision by which we are bound.

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PARKE v. FRASER BRACE & CO. LTD.

PARKE v. FRASER BRACE AND CO. LTD.

Quebec Superior Court, Maclennan, J. January 13, 1920.

Libel and Slander (§IIE—75)—Solicitor—Words used in Pleadings—Good Faith—Lack of Malice—Fair Comment—Relevant to Matters in Issue.

Words used by an attorney at the trial of a case which are fair comment upon the evidence placed before the Judge, and which are relevant to the subject matter in issue in the action and made with reasonable and probable cause, there being no proof of malice on the part of the defendant or his counsel, is not defamatory in its terms and is privileged and does not give rise to a claim for damages.

ACTION against an attorney for damages for libel, the words complained of having been used in the argument in an action. Action dismissed.

The present defendant was sued by a man named Goudreault claiming damages which, he alleged, he had suffered by the fault of the defendant. At the inquiry the present plaintiff was heard as a witness expert in his quality of medico-legal doctor. The case was taken en delibere by Marechal, J., without argument, but it was agreed that the attorneys at record were to send to the Judge a memorandum of argument. About October 23, 1919, the attorney for plaintiff in that case sent his memorandum where he said: "Drs. Parke, Handfield and Read are mistaken about there being a permanent incapacity due to accident. They are contradicted by Dr. Marien, whose high standing as a surgeon is sufficient guarantee for the correctness of his evidence. Dr. Parke, when first examined, spoke of the ordinary callus due to fracture, and it is only in rebuttal that he completely changes his ground and talks about these loose particles of boney matter adhering to the tendons which Dr. Marien attributes to other causes than the accident. Dr. Marien is moreover the only specialist in surgery heard in the case, and when a surgeon of Dr. Marien's standing speaks, surely he is not to be gainsaid by all the Parkes that ever specialised as medical witnesses."

The plaintiff then instituted the present action for libel demanding a sum of $25,000 for damages to his reputation and to his practice.

The defendant pleaded that the words objected to were used in the argument of a case and were fair comment upon the evidence placed before the Judge; that they imputed no disreputable conduct to the plaintiff and were a privileged communication by reason of the occasion upon which they

were used. Moreover only two copies of said memorandum were made, one for the Judge and one for the plaintiff attorney.

The Court dismissed the action for the following reasons:—

Considering that paras. 6 and 8 of the amended defence were properly pleaded as part of the defence and the said inscription in law is unfounded and should be and is hereby dismissed with costs; that plaintiff having been examined as an expert witness in the said case of Goudreault v. Fraser Brace & Co. Ltd., his evidence was subject to the criticism and comment of counsel either in open Court or in the written argument filed with the consent of the trial Judge; that the evidence given at the trial of said case shews that the matter in the memorandum complained of by plaintiff was relevant to the subject matter in issue of said action, was fair comment made with reasonable and probable cause and that there is no proof of malice on the part of the defendant or its counsel who prepared said written argument; that the statement complained of is not defamatory in its terms and moreover was and is privileged and does not give rise to a claim for damages; that plaintiff's action is wholly unfounded and that the material allegations of the defence have been duly established; doth dismiss plaintiff's action with costs.

L. Barry, for plaintiff.

Dewitt, Tyndole and Howard, for defendant.

Maclennan, J.: — The statement complained of was a criticism of plaintiff's evidence by defendant's counsel whose right and duty it was to comment freely and fairly upon everything that was pertinent to the question then before the Court. The plaintiff was examined as an expert witness; he was the only witness who claimed to be an expert. Dr. Marien, a surgeon of great repute, ability and experience, made no such claim.

The attitude of Courts of Justice towards the evidence of experts is well known, and experts need not be surprised if their statements are criticised.

Powell on Evidence, ed. 8, p. 91; Taylor on Evidence, ed. 10, vol. 1, p. 63; Lord Abinger v. Ashton (1873), L.R. 17 Eq. 358, at p. 373.

Moore on Facts, vol. 2, p. 1385, says: "It was said by a distinguished judge in a case before him that if there was any

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kind of testimony not only of no value but even worse than that, it was, in his judgment, that of medical experts."

It must be admitted that the evidence of the plaintiff, who poses as a medical expert devoting a considerable part of his time to Medico-Legal work and frequently appearing before the Courts as an expert witness, was a proper subject of comment in the written argument placed before the trial Judge. A copy of the evidence given by plaintiff and the other doctors and surgeons examined in the case has been filed herein and shews that there were marked contradictions between the doctors, and the argument containing the alleged libelous statement very properly called the attention of the Court to these contradictory statements. It was plainly the duty of defendant's counsel to call the attention of the trial Judge to the discrepancies between the evidence of Dr. Marien, a surgeon of repute, and that of plaintiff, and that the latter as a medico-legal specialist and expert belonged to a class whose evidence must be received with caution and distrust.

The jurisprudence of this Province fails to shew a single case where comment by counsel has ever been made the subject of damages. One of the few actions of the kind ever taken is that of Gauthier v. Saint-Pierre, 7 Legal News 44, in 1884, the defendant being the late Mr. Justice Saint-Pierre. In that case French and English authorities are quoted by Jette, J., who rendered the judgment dismissing the action. The charge made there was one of perjury by a witness.

In the recent case of Upton v. King (1919), 57 Que. S.C. 1, the Court of Review, Montreal, confirmed the judgment of the Superior Court dismissing an action for libel in a factum filed in the Court of Review, in which it was stated in the headnote that:

"A perusal of his deposition would show that it is a tissue of mis-statements and evasions, in many instances a deliberate attempt to mislead justice."

In France, the greatest latitude is given to a party put upon his defence, as will be seen from the French authorities referred to in the foregoing cases.

In England, no action will lie against a barrister for defamatory words spoken as counsel in the course of any judicial proceeding with reference thereto, even though they were unnecessary to support the case of his client and were uttered without any justification or excuse and from per-

sonal illwill or anger towards the plaintiff arising from some previously existing cause and are irrelevant to every question of fact which is in issue before the tribunal: Odger on Libel and Slander, ed. 5, p. 238; Munster v. Lamb (1883), 11 Q.B.D. 588; Folkard on Slander and Libel, ed. 6, p. 205.

The statements complained of by plaintiff were pertinent to the issue before the Court, were made with reasonable and probable cause, in good faith and in the exercise of the right and duty of defendant's counsel in presenting his defence in an action alleged to have been unfounded. The plaintiff alleges the statements were made with malice and with the sole intent to destroy his reputation as a Doctor in Medicine and Surgery, as well as specialist in medico-legal practice, but the evidence fails to establish malice or any such intent.

Public policy demands that counsel should not be interfered with in their duty to comment and argue upon the facts of the case and that for such comment or argument neither they nor their principal can be held in damages. If every word of comment which counsel might feel it necessary to make in defending their clients' interests before the Courts were to be the possible subject of endless litigation involving their clients in as many lawsuits as there were witnesses, it would be impossible for counsel to comment frankly upon the evidence of such witnesses and, to say the least, the administration of justice would be seriously hampered.

For the foregoing reasons plaintiff's action fails and must be dismissed with costs.

Action dismissed.

McDONALD v. MONTREAL TRUST CO.

Quebec Superior Court, Maclennan, J. February 10, 1921.

Appeal (§VIIM—655)—Accident—Allegation—Verdict of Jury Founded on Facts not Alleged in Declaration—Dismissal of Action Non Obstante Veredicto.

A verdict of a jury of common fault in an action for damages which is founded on facts not alleged in the declaration will be set aside and the action dismissed.

MOTION for judgment non obstante veredicto.

De Witt, Tyndale and Co., for plaintiff.

Foster, Mann and Co., for defendant.

Plaintiff sued the defendant for $1,150 damages. He alleged that the attendant in charge left the elevator with

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McDonald v. Montreal Trust Co.

plaintiff inside the car, and as the latter was about to leave the elevator, it suddenly fell from the ground floor towards the basement, with the result that plaintiff was seriously injured.

The defence was that as the plaintiff entered the elevator the operator became aware that the switch controlling the electric current was open and had to be closed before the elevator could be started. The operator told plaintiff he would go into the basement, close the switch, lower the elevator to the basement and then take plaintiff to the floor he wished to reach. He furthermore admonished plaintiff to remain in the back of the car until the switch had been connected and the elevator lowered to the basement, which Macdonald agreed to do. Nevertheless, defendant said the plaintiff opened the door of the elevator and attempted to leave it as the operator started to lower the car to the basement level. Hence, if the plaintiff was injured, defendant said it was due to his own fault and negligence in failing to respect his undertaking and agreement to remain in the rear of the elevator until it had been lowered to the basement level.

The case was submitted to a jury who found common fault. The plaintiff's fault consisted in violating the arrangement he made with the elevator man to stay in the car; and the defendant's fault consisted in his employee operating the car from the basement without assuring himself of the plaintiff's safety before starting the elevator.

The Court granted the motion for judgment non obstante veredicto and dismissed the plaintiff's action on the following grounds:

"Considering plaintiff by his action alleges that he was the victim of an accident causing him bodily injuries caused by a thing belonging to the defendant and in its care, to wit, an elevator in a building on St. James Street, in Montreal, owned by defendant; that no fault or negligence on defendant's part is alleged in plaintiff's declaration as the cause of said accident; that the defendant in its defence denies that said accident was caused by its elevator and alleges that the plaintiff's injuries were due to his own fault and negligence in not remaining in said elevator as he had agreed to do until it had been lowered to the basement; that the jury have found that said accident was not caused by the defendant's elevator, but that it was caused by the joint fault of plaintiff and defendant, the fault of the defendant

being that its servant, the elevator man, lowered the car to the basement without assuring himself of plaintiff's safety before starting the car; that the fault found on the part of defendant's servant as found by the jury is not alleged in plaintiff's declaration as a cause of said accident; that plaintiff's motion for a judgment in his favour in accordance with the verdict cannot be granted; that the defendant has moved that notwithstanding the verdict of the jury plaintiff's action be dismissed with costs; that the negligence found by the jury requires a judgment in favour of defendant: doth dismiss plaintiff's action with costs."

Action dismissed.

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Ontario Supreme Court in Bankruptcy, Orde J. June 2, 1921.

Bankruptcy (§III—26)—Sale under the Bulk Sales Act—Assignment to Authorised Trustee under the Bankruptcy Act.—Right of Creditors at the time of the Bulk Sale to Retain Securities in Hands of the Trustee under the Bulk Sale.

A trustee under an authorised assignment for creditors under the Bankruptcy Act, 1919 (Can.) ch. 36, is not entitled to share in the fund which came into the hands of a trustee under a bulk sale of part of the assets made four months before the assignment, as against those who were creditors at the time the bulk sale was made. The Bulk Sales Act, 1917, (Ont.), ch. 33, being applicable to all bulk sales by solvent as well as insolvent debtors, a sale under that Act is not necessarily an act of bankruptcy under the Bankruptcy Act, and the fact that the consideration for the sale is to be distributed in like manner as moneys are distributed by an assignee under the Assignments and Preferences Act, R.S.O. 1914, ch. 134, does not make it a distribution under that Act. It is still a distribution under the Bulk Sales Act, and the provisions of this Act are unaffected by the Bankruptcy Act. If there should be a surplus it should be paid over to the authorised trustee and if a deficiency the creditors at the time the bulk sale was made are entitled to prove in the bankruptcy proceedings for the balance due them.

[Re White (1920), 61 D.L.R. 261 referred to. See Annotations, Bankruptcy Act, 1920, 53 D.L.R. 135; Bankruptcy Act Amendment Act, 1921, 59 D.L.R. 1.]

MOTION on behalf of the trustee under an authorised assignment for creditors made under the Bankruptcy Act 1919 (Can.), ch. 36, for an order that the trustee under a bulk sale of part of the assets made four months before the assignment deliver up the securities to the authorised trustee. The motion was opposed by the creditors as of the date of the bulk sale made under the Bulk Sales Act, 1917 (Ont.), ch. 33, and supported by subsequent creditors. Motion dismissed.

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H. W. A. Foster, for the authorised trustee.

R. Forsyth, for those who were creditors at time of alleged bulk sale.

C. St. Clair Leith, for those who became creditors subsequent to alleged bulk sale.

E. Bayly, K.C., for the Attorney-General of Ontario.

The Attorney-General of Canada though notified under sec. 33 of the Judicature Act, was not represented.

Orde, J.:—As it has been suggested that the question of the constitutionality of the Bulk Sales Act, 1917 (Ont.), ch. 33, had been affected by the Bankruptcy Act, 1919 (Can.), ch. 36, I directed that notice of this application be given to the Attorney-General of Canada and of Ontario under sec. 33 of the Judicature Act, R.S.O. 1914, ch. 56.

On or about September 30, 1920, St. Thomas Cabinets, Ltd., entered into an agreement with Canadian Edison Phonographs, Ltd., for the sale to the latter of certain assets, the agreement purporting to be made under the provisions of the Bulk Sales Act. The agreement was in the form of an offer in writing dated September 23, 1920, by the vendor to the purchaser, covering the following: (1) A parcel of real estate in the city of St. Thomas; (2) The machinery and equipment mentioned in the schedule "A" to the agreement, consisting of a large number of fixed and loose machinery, tools, office furniture and equipment; (3) All the vendors' coal on hand on October 1, 1920, together with all lumber, veneer, paints, varnishes, and other raw materials used in the manufacture of cabinets, on hand after the completion of the vendor's contracts together with certain machinery and other equipment not mentioned in schedule "A."

The consideration for item (1) was to be $100,000, and for item (2) $85,000, making $185,000 in all, of which $30,833.40 was to be paid in cash, and the remaining $154,166.60 was to be represented by a series of 20 promissory notes for $7,708.33 each payable with interest at intervals of 3 months. The notes were to be secured by two mortgages, one upon the real estate and the other upon the machinery, equipment and chattels. The consideration for item (3) was to be the fair market value of the articles and was to be paid in cash. The vendor was to be at liberty to continue to use certain portions of the building, but not later than January 1, 1921, paying therefor to the purchasers a rental per square foot of the floor space so occupied.

The offer provided that all payments thereunder should be made in accordance with the provisions of the Bulk Sales Act of Ontario, and required acceptance on or before September 30, 1920. The offer was duly accepted.

The vendors furnished the purchasers with a written statement setting forth the names and addresses of their debtors as required by sec. 3 of the Bulk Sales Act and the purchasers paid the instalment of cash payable in respect of the machinery and equipment and delivered the chattel mortgage and the promissory notes which are secured by the chattel mortgage to R. F. A. Gilbert, a bank manager in St. Thomas, as trustee under sec. 5 of that Act. The chattel mortgage and promissory notes are made in favour of St. Thomas Cabinets, Ltd. The purchasers also subsequently paid certain further sums to the trustee for the additional chattels covered by the sale.

St. Thomas Cabinets, Ltd., continued its operations after the sale and contracted further liabilities.

On January 27, 1921, the company made an authorised assignment under the Bankruptcy Act to D. E. Gerrard of St. Thomas, and questions have now arisen as to the respective rights of the trustee appointed under the Bulk Sales Act, and the authorised trustee under the Bankruptcy Act, and also as between those who were creditors at the time of the alleged bulk sale (whom for the sake of brevity I shall refer to as "the original creditors") and those who became creditors afterwards (who may be shortly referred to as "the subsequent creditors"). The subsequent creditors claim that the funds and securities now in the hands of Gilbert, the bulk sales trustee, form part of the estate of the insolvent company and should be handed over to the authorised trustee for distribution ratably among all the creditors. The original creditors say that they are solely entitled to this fund and that the subsequent creditors are not entitled to any share in the distribution thereof, except in the event of the fund being sufficient to pay the original creditors in full, when of course the surplus would become payable to the vendors of the authorised trustee.

The authorised trustee now moves for an order directing Gilbert, the bulk sales trustee, to account for and deliver to the authorised trustee all moneys, promissory notes and other property in his possession or control as such bulk sales trustee; and also for an order declaring what creditors of

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the insolvent company are entitled to participate in the fund in the hands of the bulk sales trustee. The Canadian Edison Phonographs, Ltd., the purchasers under the alleged bulk sales agreement, though served were not represented on the motion; but, as there was no desire to have the sale declared void as against such purchasers, their interests are in no way affected by this motion.

The authorised trustee and the subsequent creditors base their claim to the proceeds of the sale upon several grounds: (1) That the Bankruptcy Act has superseded the Bulk Sales Act and that the provisions of the latter Act are therefore no longer effective. (2) That if not superseded as to the validity of the bulk sale, those provisions of the Act which deal with the distribution of the proceeds of the sale are in conflict with the Bankruptcy Act and are no longer effective. (3) That the sale itself was not due to one which the provisions of the Bulk Sales Act were applicable, and that consequently the bulk sales trustee has no power to hold the moneys or to distribute them in accordance with the provisions of that Act.

The question whether or not the Bulk Sales Act is to be considered as wholly superseded by the Bankruptcy Act can be disposed of in a few words. At the time it was passed, it was undoubtedly valid. Even if it were treated as in the same category with an assignment for the general benefit of creditors, the judgment in Att'y-Gen'l of Ontario v. Att'y-Gen'l for the Dominion of Canada, [1894] A.C. 189, 63 L.J. (P.C.) 59, had declared that such legislation was within the competence of a provincial Legislature so long as it did not conflict with any existing bankruptcy legislation of the Dominion Parliament.

There is nothing in a bulk sale, as such, which brings it within the field of bankruptcy legislation or which deprives a provincial Legislature from providing for such safeguards in the making of bulk sales for the protection of creditors and others as it may see fit. It might as well be suggested that, because the Legislature has enacted that bills of sale and chattel mortgages not registered within a certain time shall be deemed void as against subsequent purchasers and mortgagees, and as against creditors, such legislation had been superseded by the Bankruptcy Act and was, therefore, no longer effective. Quite apart from this, there is the provision in the Bankruptcy Act itself—sec. 3, para. (h)—

which makes a bulk sale of goods, not made in compliance with the provisions of any Bulk Sales Act in force in the particular Province, an act of bankruptcy, so that the Bankruptcy Act clearly contemplates the continued validity of provincial Bulk Sales Acts as such.

But it is urged that, while a bulk sale act made in compliance with the provisions of the Bulk Sales Act may be valid, those provisions of the Act which deal with the distribution of the proceeds among the creditors of the vendor are in conflict with the Bankruptcy Act, and, even if valid before, are no longer effective now that the Bankruptcy Act is in force. It is argued that as a voluntary assignment for the general benefit of creditors under the Assignments and Preferences Act, R.S.O. 1914, ch. 134, is no longer valid, by virtue of sec. 9 of the Bankruptcy Act (see Re White (1920), ante p. 261, 19 O.W.N. 26), the scheme of distribution among the vendor's creditors provided by the Bulk Sales Act must be treated in the same manner and be declared invalid. But this argument misses, in my judgment, the fundamental distinction between the two cases. An assignment for the general benefit of creditors is in its very nature an acknowledgment of insolvency or of inability to pay debts as they become due, and is expressly declared to be an act in bankruptcy by para. (a) of sec. 3 of the Bankruptcy Act. By such an assignment the debtor divests himself of his whole property (except such as is exempt from seizure under execution). But a bulk sale is not necessarily a sale of all the vendor's assets, nor is it in any sense an assignment for the benefit of the vendor's creditors. Prior to the Bulk Sales Act, there was nothing in itself illegal in a bulk sale, and the vendor was entitled to deal with the proceeds of the sale as his own. But to protect creditors against the effect of a secret though valid sale of the debtor's stock and the possible unfair distribution or dissipation of the proceeds, the Bulk Sales Act was passed making it incumbent upon a purchaser under such circumstances to take certain steps to protect the creditors, if any, at the risk of finding his purchase void if he failed to comply. For this purpose the Act provides for the payment of the purchase-price to a trustee, who upon receipt thereof holds it for the purpose of distribution among the creditors of the vendor. When the purchaser has done all this, his title is complete. The property in the things sold

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becomes his and has passed completely from the vendor. Then whose is the purchase-money in the hands of the trustee?

Apart from the Act, the proceeds would be absolute property of the vendor, to be used as he pleases, either towards paying all or any of his creditors or otherwise. But the Act by sec. 5 expressly provides that the consideration for the sale shall be paid or delivered "into the hands of a trustee for distribution pro rata among the creditors of the said vendor" and then goes on to provide that subject to any preferences provided for by law or by previous contract, "such distribution shall be made in like manner as moneys are distributed by an assignee under the Assignments and Preferences Act, and in making such distribution all creditors' claims shall be proved in like manner . . . as in the case of a distribution under the said Act, etc."

What is the effect of this provision? Counsel for the authorised trustee and for the subsequent creditors argue that it is to all intents and purposes a provision for ratable distribution amongst the vendor's creditors under the Assignments and Preferences Act and as such is insolvency legislation. I cannot so regard it. It is true that in many such cases the vendor may prove to be insolvent, but the Act is applicable to all bulk sales even by a solvent vendor. The fact that the method of distribution under the Assignments and Preferences Act is adopted is immaterial. It is not a distribution under that Act but under the Bulk Sales Act. By the Act a trust fund is created upon which those creditors entitled to share in the proceeds of the sale have the paramount claim. The vendor thenceforward has only a qualified interest in the fund, extending in reality only to the surplus after the creditors are paid in full, if the fund should prove sufficient for that purpose. The vendor has no control over the fund and cannot direct how it shall be dealt with. I cannot see how these provisions conflict with the Bankruptcy Act or are in any way superseded by it. The Bulk Sales Act does just what the vendor himself could probably have lawfully done prior to that Act, that is, he could have received the proceeds of the sale and turned them over to all his then creditors for ratable distribution among them. The trustee holds the fund in the first instance for those who are the creditors of the vendor when the sale is made. To the amount of their claims the fund is to

all intents and purposes theirs. The legal estate is vested in the trustee, but the creditors have an equitable estate which is superior to the claim of any other person, subject of course to such priorities as are preserved by sec. 5. I am unable to see anything in these provisions which constitute an invasion into the field of "bankruptcy and insolvency." This, of course, is not to say that the Dominion Parliament might not, if it should see fit, enact that a bulk sale, whether made under a Bulk Sales Act or otherwise, would be invalid as against subsequent creditors or that the proceeds thereof should be available for subsequent creditors, but the Bankruptcy Act has not gone this length, and, in my judgment, the provisions of the Bulk Sales Act remain unaffected by it.

It was further argued that the sale in question did not come within the provision of the Bulk Sales Act and that consequently neither the bulk sales trustee nor the original creditors had any status or rights thereunder. It was claimed that the things covered by the agreement did not constitute "stock" as defined by sec. 2 (c) of the Act. The things sold here do not form part of what is ordinarily known as "stock in trade" but the term "stock" is given a much more extended meaning by sec. 2 (c). Had the definition been confined to para. (i) of sec. 2 (c) there would be good ground for that argument, but para. (ii) extends the definition to "the goods, wares, merchandise or chattels in which any person trades, or which he produces or which are outputs of, or with which he carries on any business, trade or occupation." Reference was made to Barthels, Shewan & Co. v. Sloane (1914), 19 D.L.R. 547, 7 S.L.R. 376, where it was held that the furniture of a hotel was not goods, wares or merchandise, ordinarily the subject of trade and commerce under the Bulk Sales Act of Saskatchewan, 1910-11 (Sask.), ch. 38. But that Act did not contain any provision corresponding to para. (ii) of sec. 2 (c), so that the case is not applicable here. My brother Middleton has recently held in Interlakes Tissue Mills Co. v. George Everall Co. (1921), 20 O.W.N. 130, that a sale of part of the vendor's plant and machinery not in the ordinary course of business came within the provisions of sec. 2 (c) and of sec. 7 and was therefore a "sale in bulk" within the Act. I entirely agree with that opinion, and hold that the sale in the present case was within the Act.

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I am, therefore, of the opinion that the original creditors are entitled, to the extent of their claims, to share in the fund which came to the hands of the bulk sales trustee under the agreement, to the exclusion of the subsequent creditors. If there should be any surplus, it will, of course, be paid over the authorised trustee. If there is any deficiency the original creditors are entitled to prove in the bankruptcy proceedings for the balance due them.

It was suggested that some of the moneys subsequently paid to the bulk sales trustee covered not only those things which were to be taken over under item (3), but also the value of certain work done or materials procured after the sale, and that this value ought not to go to the original creditors but to the subsequent creditors, especially as it was the money of the subsequent creditors which helped to make such value or to provide the materials. If this is the fact, then it is clear that the original creditors are not entitled to any preference in respect thereof, and any moneys so paid ought to be paid over to the authorised trustee. If there are any such moneys and there is any difficulty in ascertaining them, then the order should direct a reference to the County Judge at St. Thomas to determine the amount.

The authorised trustee claimed that even if the original creditors are entitled to priority, the fund in the hands of the bulk sales trustee should be delivered up to him for distribution, but I see no ground for this, unless the original creditors consent.

The costs of all parties ought to be paid out of the estate in the hands of the authorised trustee.

Motion of authorised trustee refused; costs of all parties out of estate.

Motion dismissed.

BIELITSKI v. ORADIAK.

Saskatchewan King's Bench, McKay, J. July 21, 1921.

Damages (§III.I—165)—False Report that Person has Hanged Himself—Repetition by Persons who Believe Story to be True—Shock and Illness of Mother on Hearing Report—Liability.

One who circulates a false report that a member of the community has hanged himself which report is repeated by others and finally is told to the mother of the supposed suicide, who believing the report to be true suffers a violent shock and becomes ill, is liable in damages for the injury so caused.

[Wilkinson v. Downton, [1897] 2 Q.B. applied.]

ACTION to recover damages for slander.

G. T. Killam, for plaintiff.

S. P. Petersen, for defendant.

McKay, J.:—The facts in this case are shortly as follows:—

The defendant falsely stated to Kazio Titula and others that Steve Bielitski, a son of the plaintiff who was temporarily absent from home, hanged himself on a telephone pole. Titula believing this report, repeated it to Annie Sliva. Annie Sliva repeated it to Francis Sliva, and Francis Sliva to Katerina Sliva, a daughter of the plaintiff, and Katerina Sliva believing the report to be true repeated it to her mother, the plaintiff. The plaintiff believing this statement to be true suffered a violent shock and became ill.

The plaintiff now brings this action to recover damages from the defendant.

In Wilkinson v. Downton, [1897] 2 Q.B. 57, where the defendant by way of a practical joke falsely represented to the plaintiff, a married woman, that her husband had been seriously injured in an accident, and the plaintiff, believing the statement to be true, suffered a violent shock and became seriously ill, it was held that she was entitled to damages.

Mr. Petersen, counsel for the defendant, contends on the authority of Ward v. Weeks (1830), 7 Bing. 211, 131 E.R. 81, that the defendant is not liable, as the damage if any, was caused not by what the defendant said, but by the unauthorised repetition of what he said.

It seems to me the case at Bar is distinguishable from the Ward v. Weeks case. The latter was an action for slander in which special damages had to be proved. The case at Bar is not an action for slander but an action for a malicious wrong in which general damages are claimed.

In Addison on Torts, 8th ed. p. 202, the author in discussing unauthorised repetition of slanderous words states as follows:—

"The unauthorised repetition of slanderous words is not necessarily the natural or reasonable consequence of the original uttering; it may be the voluntary act of a free agent over whom the defendant had no control. But where the utterer of a slander authorises or intends its repetition, or mentions it to a person whose known duty it is to repeat it, he is liable for the damages caused by the repetition.

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There may be other cases in which the repetition is the natural and reasonable consequence of the original uttering; in considering this question it is suggested that the real test is that laid down by Lord Wensleydale. To make words actionable by reason of special damage 'the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking of the words, not what would reasonably follow, or we might think ought to follow.'"

The above remarks refer to slander, but the case at Bar, as above stated, is not one of slander, but is an action for a malicious wrong in that "the defendant has..... wilfully done an act calculated to cause physical harm to plaintiff—that is to say, to infringe her legal right to personal safety." Wilkinson v. Downton, pp. 58, 59. While "the unauthorised repetition of slanderous words is not necessarily the natural or reasonable consequence of the original uttering," it seems to me the repetition of what the defendant in the case at Bar said is necessarily the natural or reasonable consequence of the original uttering. He stated that Steve Bielitski, a young man, living in the community hanged himself on a telephone pole. Is it not natural and reasonable that this would be repeated to the mother of Steve? It seems to me it is. And no doubt that is the reason the report was repeated to the plaintiff's daughter Katerina in order that she should break the news to her mother, which she did—not in the way of repeating the slander, but in sorrow and grief, announcing the death of the son to the mother.

Even in cases of slander, the author above quoted, after referring to authorised or intended repetition says, "there may be other cases in which the repetition is the natural and reasonable consequence of the original uttering," etc. In my opinion the latter quotation is much more applicable to such cases as the case at Bar than those of slander. When the defendant circulated the false report he must surely have known that it would be repeated to the mother, and, in my opinion, he is liable for damages suffered by the mother on account of the false report he started, just as much as if he personally made the false statement to her the plaintiff.

The plaintiff was ill for 3 weeks as a result of this false report and had to consult a doctor, and continued to be in ill-health for some time. I allow her $200 damages, with costs, King's Bench scale, low column. No costs to the defendant.

Judgment for plaintiff.

RE COWAN AND BOYD.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. February 18, 1921.

Contracts (§ID—60)—Landlord and Tenant—Renewal of Lease—Offer by Landlord—Request to Tenant to Modify Terms—Subsequent Acceptance of Terms as First Offered—Sufficiency of.

During negotiations for the renewal of a lease, the landlord wrote to the tenant saying that he would renew the lease for one year at an advance of $5 per month. The tenant in reply wrote as follows: "We received from . . . a letter to the effect that a renewal of lease would be satisfactory at an advance of $5 per month. We are paying now as high a rent as we feel we should pay, so if you do not see your way clear to renew at the present rental, we would appreciate an early reply as we purpose buying and would like time to decide upon a house . . ." To this letter the landlord replied that he would be in Toronto . . . at which time he would call upon the tenant. Subsequently the tenant wrote as follows: "As it has become necessary for us to arrive at a decision at once with regard to re-renting your house and cannot wait for Mr. C's visit, I have decided to accept your terms of $75 per month . . ." The Court held that in view of the landlord's letter that he would be in Toronto, the tenant's letter left the matter open and that he had a perfect right to accept the offer when he did, and that the landlord was not entitled to the demised premises.

[Hyde v. Wrench (1840,) 3 Beav. 334, 49 E.R. 132 distinguished. Stevenson v. McLean (1880), 5 Q.B.D. 346 applied.]

APPEAL by the landlord from an order of Widdifield, Co. Ct. J., dismissing the appellant's application, under Part III. of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, for an order for possession of the demised premises.

The judgment appealed from was as follows:—

"No oral evidence was taken before me, it being admitted that the facts were set forth in the tenant's affidavit filed in the case, a copy of which has been delivered to the landlord's solicitor.

The tenant was in possession of the demised premises under a written lease for one year, which expired on August 31, 1920, at a monthly rental of $70. At the time this lease was entered into, there was some oral understanding that

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the tenant should be allowed to remain on for a further period of one year if the landlord did not require the premises for her personal use. She resides in Brooklyn, N.Y., and there is a suggestion that she does not so require the premises.

On March 17, 1920, the tenant wrote the landlord to ascertain if the lease was to be renewed. Then followed the letters set out verbatim in the tenant's affidavit. The letters from the landlord are by R. G. Cowan, the landlord's husband. There is no contention that he was not the duly qualified agent of the landlord.

The contention of the tenant is that his letter of April 19 is an unconditional acceptance of the landlord's offer contained in the letter of March 24 to renew the lease for one year at $75 per month.

The contention of the landlord is that the tenant's letter of March 31 constitutes a refusal of her offer contained in the letter of March 24, and contains a written offer, and therefore the acceptance on April 19 is too late.

There is no doubt that, in order to constitute acceptance, the assent to the terms of an offer must be absolute and unqualified. If the acceptance is conditional, or any fresh term is introduced, by the person to whom the offer is made, his expression of assent amounts to a counter offer, which in turn requires to be accepted by the person who made the original offer, 7 Hals. p. 350.

In my opinion, it cannot be said the letter of March 31 contains any counter offer. There is no such counter offer as in Hyde v. Wrench (1840), 3 Beav. 334, 49 E.R. 132, was held sufficient to put an end to the original offer. The original offer was left open. Cowan's letter of April 5 shews it was open as far as he was concerned. It must have been this offer he intended to discuss in Toronto.

The most that can be said of this letter of March 31 is that it is a request to the landlord to modify the terms of her offer; he asks her to reconsider his proposition. I think this brings it within the law as laid down in Stevenson v. McLean (1880), 5 Q.B.D. 346. Referring to this case, the editor of the last edition (15th) of Anson on Contracts says at p. 49:—"An offer once refused is dead and cannot be accepted unless renewed; but an inquiry as to whether the offeror will modify his terms does not necessarily amount to a refusal."

In my opinion, the offer of the landlord contained in the letter of March 24 was still open on April 19, and the letter of the last-named date was an unconditional acceptance of the offer, and constituted a binding agreement for a renewal of the lease for one year. The acceptance was within a reasonable time.

The landlord's application will, therefore, be dismissed with costs fixed at $25.

J. P. White, for appellant.

William Proudfoot, K.C., for respondent.

The judgment of the Court was read by

Meredith, C.J.O.:—This is an appeal by the landlord from an order of the County Court of the County of York, dated September 30, 1920, made under the overholding tenants' provisions of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, dismissing his application for an order for possession.

The respondent was tenant of the appellant of the premises in question, and, his term being about to expire, he wrote, on March 17, to the appellant, or her husband, with reference to an extension of the term. In reply to that letter, the husband of the appellant wrote, on March 24, saying that he would renew the lease for one year from the end of the present year, at an advance of $5 per month.

On March 31, the respondent replied to that letter as follows:—

"We received from Mr. Cowan a letter to the effect that a renewal of lease would be satisfactory at an advance of $5 per month. We are paying now as high a rent as we feel we should pay, so if you do not see your way clear to renew at the present rental, we would appreciate an early reply, as we purpose buying and would like time to decide on a house. We never received from you an answer to our question re the price at which you were willing to sell."

To this letter the appellant's husband replied on April 5, 1920, saying that he would be in Toronto between April 26 and May 1, at which time he would call on the respondent.

On April 19, 1920, the respondent wrote to the appellant the following letter:—

"As it has become necessary for me to arrive at a decision at once with regard to re-renting your house, and cannot wait for Mr. Cowan's visit to Toronto, I have decided to accept your terms of $75.00 per month, beginning September 1st next."

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To that letter the appellant's husband replied as follows:—

"Your letter to Mrs. Cowan received, and I wish to inform you we cannot renew your lease under ($100.00) per month. I will be in Toronto on or about April 30th or May 1st. Under the high cost of taxes, repairs, etc., you will understand the necessity of this advance."

On April 27 the respondent wrote to the appellant the following letter:—

"Mr. Cowan's letter of April 26 has been received. In his letter of March 24th he made a definite offer of renewal of lease at an advance of $5.00 per month. In my letter of April 19th I definitely accepted that offer, which I must now regard as definitely binding on both parties."

The question for decision is, whether or not the respondent's letter of March 31 was a rejection of the offer of the appellant.

The Court is of opinion that, in view of the letter of the appellant's husband of April 5, in reply to the respondent's of March 31, it left open the offer of March 24 for further discussion, and that, that being the case, the respondent had a right to accept the offer when he did so by the letter of April 19.

Appeal dismissed.

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Quebec King's Bench, Appeal Side, Lamothe, C.J., Greenshields, Martin, Tellier and Howard, JJ. December 30, 1920.

Conspiracy (§II—5)—Three-card Monte—Not Essentially a Cheating Game—Liability for Playing, under sec. 442 of Criminal Code.

The element of fraud and cheating is not essential to the game of "Three-card Monte" and the game if played according to its rules is not an offence under sec. 442 of the Criminal Code.

APPEAL by defendants from a conviction for conspiracy to defraud the public in general and the complainant in particular, by playing Three-card Monte. Conviction quashed.

The defendants stood indicted for conspiracy to defraud the public in general and the complainant in particular. The defendants accept Bazin, J.'s, statement of fact.

It is clear from the terms of the question submitted by the trial Judge, that the conviction will fail if it be held that the game of cards known as "Three Card Monte" be not a fraud in itself.

What is the "Three Card Monte" game, and how is it played?

In this case there is no proof of the rules or conventions, guiding the "Three Card Monte," but a careful perusal of the depositions will show amongst other things that the game consists in the shuffling or manipulating of the cards, and that it is for one of the players to find the location of the red one.

The trial Judge based his decision on French precedent and declared the game of "Three Card Monte" illegal per se, as being, per se, an "escroquerie." It is true that "Bonneteau," the game as it is known in France, has been declared an "escroquerie" by the French Courts. Sirey, 1882, No. 252.

But this arrêt was undoubtedly largely coloured by the fact that the game lies under the ban of a "loi," as a public nuisance. That ban is not found in our law.

The Belgian Court, a few years later, refused to follow French precedents and held that "Bonneteau" was exclusively a game of skill, and not a fraud or cheat if played according to its rules. Posicrisie Belge, 1885, Vol. 3, No. 224.

But we are dealing with a criminal code, based on a British statutory enactment. The conspiracy alleged is one to commit the offence defined by Criminal Code sec. 442. This section is derived from the English "Gaming Act," 1845, ch. 109, sec. 17:—

"Every person who shall by any fraud or unlawful device or ill practise in playing at or with cards ..... win from any other person to himself or any other or others any sum of money or valuable thing shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence with intent to cheat or defraud such person of the same."

It is to be noted that the ingredients of art. 442 are all contained in the article just quoted and it is expressly declared that our article is derived from such source. See Tremeear's Criminal Code 1919 under art. 442. But we have to admit that the English law is even more drastic than our art. 442.

In a case of The King v. Governor of Brixton Prison, 1912, reported in, [1912] 3 K.B. 568 at p. 570, 29 Times L.R. 10, where the "Three Card Monte" is considered at some length, there is to be found the opinion of Lord

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Alverston, the presiding Judge of the Court of Appeal of England. On the legal aspect of that "Three Card Monte" game, what does he say?

"What is known as the three card trick, is a game in which one player backs his ability to indicate the position of a particular card, and the other player by sleight of hand and quickness of movement in manipulating the cards in such a way as to deceive the eye, induces the former to indicate the wrong card. That in my opinion does not amount to fraud or unlawful device or ill practise, it is sleight of hand and nothing more."

It is also said in the report of same judgment by Mr. Herbert Smith that there is no case in which the three card trick has ever been made the subject of an indictment, under the Gaming Act, 1845.

I think that this legal opinion coming from the highest tribunal passing on a law, quite similar to ours, should be the only one followed by our Courts.

Wherefore we submit that "Three Card Monte" is not the illegal game contemplated by sec. 442; and that, in consequence, the agreement together to play it against third parties is not a conspiracy. As a holding contrary to these submissions is the essence of the judgment a quo, the conviction herein should be quashed.

Martin, J.:—The charge against the accused was in the following terms:

"It is presented upon oath, that at the city of Montreal, said district, December 7, 1919, David Rosen, and Rene alias Raoul Lavoie conspired together by deceit, falsehood and other fraudulent means to steal from one Joseph Leclerc forty-five dollars."

It was laid under sec. 442 of the Criminal Code which says that:

"Everyone is guilty of an indictable offence and liable to three years' imprisonment who, with intent to defraud any person, cheats in playing at any game or in holding the stakes or in betting on any event."

The special character of the crime charged was that they played with the prosecutor what is commonly known as the "Three-card Monte" game, a game played with three cards, say, two black ones and a red one, shuffled or manipulated by the dealer and placed face down and the opponent backs his ability to spot the position of a particular card. By sleight of hand or quickness of movement, the dealer

endeavours to induce the person backing his opinion to put his hand on the wrong card.

The Judge of Sessions decided that this operation was a fraud and trickery amounting to cheating and convicted the accused, and on the latter's application a reserved case was stated for our opinion as to whether or not the Judge of Sessions was right in so deciding.

The act of determining the location of the red card, always assuming that no fraudulent substitution has been made, depends upon the exercise of judgment, observation and mental effort. One may question the wisdom of attempting to beat another at the latter's own game. It has oft been tried but nearly always fails. The gist of the offence here charged is "cheating," that is to say, perpetrating some fraud or ill-practice or making use of some unlawful device in the act of playing. Mere sleight of hand is neither and does not come within the terms of the article. The operation of manipulating cards calls for judgment, skill and adroitness. The other player attentively follows the movement of the cards and imagines he can designate the required card out of the three. He backs his judgment with his money and loses.

It is true that the French Courts have held that such a manipulation of the cards destined to create a hope of success in the mind of the other party essentially constituted a fraud, but in my opinion that operation per se does not amount to cheating within the terms of the statutory provision of our Criminal Code. It is not necessary to consider whether the accused might not have been convicted of keeping a common gaming house under art. 226 and following of the Criminal Code.

In so far as the charge imports or includes a conspiracy to defraud, the case is one of fact upon which we are not called upon to answer and one upon which we have no jurisdiction to pronounce. Evidence of the pre-arranged plan to get the prosecutor's money or of some improper method of inducing him to become a victim would support a charge of conspiracy, but that is different from cheating at playing the game.

I concur in the view so expressed by Lord Alverstone in The King v. Governor of Brixton Prison, [1912] 3 K.B. 568, 29 Times L.R. 10, and I would answer the question submitted in the negative.

Was I right? A. No.

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Howard, J.:—The question reserved for the decision of this Court by the Judge of the Court of the Sessions of the Peace is in effect, whether the game known as "Three Card Monte" is essentially a cheating game, so that playing it constitutes per se the offence of cheating within the meaning of art. 442 of the Criminal Code?

The Judge does not describe the game very fully but his remarks taken in connection with the proof made at the trial show that it consists in the manipulation by one player of three cards, two black and one red, while the other player endeavours to indicate which of the three is a named card, Lord Alverstone, C.J., in the case of The King v. The Governor of Brixton Prison, [1912] 3 K.B. 568 at p. 570, defines the game thus: "What is known as the three-card trick, is a game in which one player backs his ability to indicate the position of a particular card and the other player by sleight of hand and quickness of movement in manipulating the cards in such a way as to deceive the eye, induces the former to indicate the wrong card."

From these descriptions of the game it is clear to me that the element of fraud is not essential therein. On the contrary, it is fundamentally a game of skill, he whose part it is to indicate the stated card pitting his quickness of eye against the quickness of hand of him who manipulates the cards. That is a fair contest, and there is no reason in the world why it might not be played. I have no difficulty, therefore, in answering the question of the Judge of Sessions in the negative.

Of course, the game presents obvious opportunities for cheating, but that has nothing to do with the question submitted to us.

Lamothe, C.J., and Tellier, J., concurred in the opinion of Martin, J. Conviction quashed.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Middleton and Lennox, JJ. February 25, 1921.

Constitutional Law (§IIA—221)—Criminal Code, 1920 (Can.), ch. 43, sec. 6—Book-making, Pari-mutuels, or Pool-selling Permitted on certain Race-tracks—Provincial Legislation Prohibiting Racing on such Tracks—Validity.

It is not within the legislative competence of the Legislative Assembly for Ontario to empower the Lieutenant-Governor in Council to insert in racing licenses issued by the Provincial Treasurer, conditions prohibiting racing on race-tracks on which race-track gambling . . . is carried on, and thus prohibit racing upon race-tracks to which the Criminal Code, sec. 235, sub-secs. 2 and 3 as enacted by 1920, (Can.) ch. 43, sec. 6 applies.

QUESTIONS REFERRED to the Court by the Lieutenant-Governor in Council, pursuant to the Constitutional Questions Act, R.S.O. 1914, ch. 85.

The questions were as follows:—

"1. Has the Lieutenant-Governor in Council power, under the provisions of the Corporations Tax Act, sec. 4, sub-sec. 15, to impose as a condition in the license therein referred to, that race-track gambling, that is to say, book-making, pari-mutuels, or pool-selling, will not be carried on by the incorporated company, association or club to which or upon the race-track in respect of which, the said license is issued?

2. In the event of the answer to question 1 being in the negative, is it within the legislative competence of the Legislative Assembly for Ontario (a) to empower the Lieutenant-Governor in Council to insert in racing licenses issued by the Provincial Treasurer conditions prohibiting racing on race-tracks on which race-track gambling..... is carried on, and thus to prohibit racing upon race-tracks to which the Criminal Code, sec. 235, sub-secs. 2 and 3, as enacted by 10 & 11 Geo. V. ch. 43, sec. 6 (Dom.), applies."

Edward Bayly, K.C., and J. M. Godfrey, for the Attorney-General for Ontario.

H. J. Scott, K.C., for the Kenilworth Jockey Club.

J. W. Curry, K.C., for the Western Racing Ass'n, and D. L. McCarthy, K.C., for the Ontario Jockey Club.

W. S. Montgomery, for the Thorncliffe Racing Ass'n.

Meredith, C.J.C.P.:—A categorical answer to these questions might be sufficient for those who are familiar with the matters really involved; and those who are thus familiar are doubtless all or nearly all of the inhabitants of Ontario who take an interest in such things; but beyond the "atmosphere" of this Province, whither this case may go or where that which is advised in it may be overhauled at some time, and as it is also always well to leave as little as possible in such a plight that it may be misunderstood, I deem it advisable to state in a general way what the real object of these questions is and what the effect of our answers to them may be.

That which is to be affected mainly, if the Province have power to affect it, is horse-racing; also, more directly, but less effectually, it is betting at horse-races: but no betting no racing; a killing of two birds with one stone.

There are in the Province three classes of persons con-

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cerned, or who concern themselves, mainly in the matter; (1) Those who are opposed to betting and desire to prevent all others from determining for themselves whether to indulge in it or not; (2) those who desire to bet, and those who desire the freedom to bet or not as they please; and (3) those, mainly owners of race-courses and race-horses, whose businesses should be ruined by the suppression of betting.

The starting point is therefore a consideration of what horse-racing is: and, having that in mind, the only other point in the matter is: whether it, and its necessary accompaniment, betting on the races, come under sec. 91, or under sec. 92, of the B.N.A. Act, 1867.

In almost all parts of the world horse-racing is and always has been a pastime and business of much importance; it is less so in Canada than in England and in Ireland; but it is the same thing in all its qualities; therefore it is something which, by itself, must fall within some of the divisions of legislative power set out in the Act: it is not a mere ingredient in some other subject-matter.

Then, does it come within any matter specifically assigned to the Provinces under sec. 92? If not, it is assigned to the Dominion.

Those who, with utmost care and great experience and knowledge, constructed the legislation in question, having before them the results, up to that time, of the working of the Constitution of the United States of America, and being yet quite near to its great civil war, deemed it essential to the welfare of the about-to-be united Provinces, to reverse the rule under that Constitution and to put the general power to legislate in Parliament, and power in respect of only specified things in the Provincial Legislatures; yet, strange it is, the judicial mind in the United States ran contrary to "States Rights," whilst that ultimately ruling in Canada has generally been in favour of provincial contentions notwithstanding the purpose of the makers of the Act and the general power conferred on Parliament only.

It was, I think, pretty generally admitted upon the argument that to secure an affirmative answer to the second question, the subject-matter of the question must be brought within some of the specified powers conferred upon the Legislatures by sec. 92; and Mr. Bayly, acting for the Provincial Attorney-General, placed the assertion of legislative power on (8) municipal institutions (13) property

and civil rights; and (16) matters of a merely local or private nature. Mr. Godfrey, representing the same class, and all of the counsel on the other side, generally, but unfortunately I think, left the enactment and turned to the cases to support their contentions.

No adjudication can alter the lines of demarcation in the Act: lines which are, and must be always legislative, not judicial; nor can the lines be shifted under cover of a judicial delimitation or fixing of them; all that the Courts should, and rightly can, do is determine within which lines each particular case lies.

I shall now deal with Mr. Bayly's contentions; and decline to follow other counsel into the jungle of cases, where, if there is not great danger of losing oneself, there is of losing the point of the case and sight of the real purposes of those who made the B.N.A. Act, 1867; and shall take those contentions in the order in which they were discussed by him.

(1) Doubtless the Legislatures have power to legislate, in regard to racing, in constituting and controlling municipal bodies; that the creators of them may fashion them so that they may or may not have power to carry on racing, and carry it on in such manner, and subject to such restrictions as the Legislatures may prescribe: an instance of such a character is contained in ch. 47, sec. 26, of the latest Revised Statutes of this Province* (see also the Municipal Act, R.S.O. 1914, ch. 192, sec. 398, sub-sec. 9)†
But all that has nothing to do with the question under consideration—that question has not even the remotest connection with municipal institutions.

(2) Property and civil rights are more or less involved in almost all, if not all the subjects of legislation; but it would be absurd to contend that that alone brings such subjects within the exclusive legislative powers of the Provinces.

*The Agricultural Societies Act, R.S.O. 1914, ch. 47, sec. 26: "(1) Horse racing other than trials of speed under the control and regulation of the officers of the society shall not be carried on during the days appointed for holding any exhibition by any society at the place of holding the exhibition or within five miles thereof." By the following sub-sections provision is made for the prosecutions, convictions, fines, and in the event of a conviction debarring the society proven to have permitted horse racing, from receiving any portions of the legislative grant in the next ensuing year.

†398. "By-laws may be passed by the councils of all municipalities (9) For prohibiting racing, immoderate or dangerous driving or riding on highways or bridges."

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Property must be held and contracts must be made even in matters which are most directly, and necessarily, Dominion concerns; but the general power regarding property and civil rights cannot, reasonably, be made even an excuse for invading race-courses for the purpose of only legislating regarding a subject of Dominion Legislation only; and that ought to be the more evident when Parliament has already legislated upon the matter. Section 94 of the Act throws much light upon the real meaning of these words, "property and civil rights." Whether a general provincial law against betting — an enactment such as the Gaming Act, R.S.O. 1914, ch. 217—and making the money lost recoverable in a civil action, should cover betting such as that in question, in view of the Parliamentary legislation now in force, need not be considered; though I may say that at present I do not perceive how it could; it would be in direct conflict with Dominion legislation upon a subject in the exclusive power of Parliament.

(3) That racing, or betting, is not a matter of merely a local or private nature is very evident; they both over run, not only a Province, but the whole world; they are ingrained in human nature; and in substance are the same wheresoever they are exercised and by whatsoever means. I am asked what then of public health, have not the Provinces legislative power as to it? I should have thought the answer obvious: Yes, mainly under (8) municipal institutions, as pages of provincial legislation shew. Public health must be one of the most important matters of municipal care and control; and, besides that, one of the subjects especially assigned to the Provinces comprises (7) the establishment, maintenance, and management of hospitals, asylums, charities and eleemosynary institutions, other than marine hospitals; and again some diseases, and so health legislation may be of a merely "local nature in the Province."

But I am quite unable to agree in the contention almost altogether relied on by counsel who argued against Provincial power, that the proposed legislation should trench on Parliament's exclusive power in respect of the criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters: sec. 91 (27).

The criminal law may occupy a field of its own which can-

not be invaded: all crimes are within that field—murder, theft, and the whole calendar, including, according to well-known decisions, Sunday desecration: but the criminal law is not limited to that field: it may go into others—Dominion or Provincial—and bring into the field of crime any matter or thing, however otherwise innocent or beneficial it may have been. But, in making a crime of something not before a crime, it should hardly be needed to say that the whole of the class of the subject of legislation out of which the one thing is taken is not brought under parliamentary powers by virtue of sec. 91 (27). The thing is taken into the field of criminal law; that field is not extended over the whole field from which the one thing has been taken. So, too, the ban of crime may be removed from any thing by Parliament, and thereupon it drops to its proper place in the constitutional plan and map; power over it as a crime ends necessarily.

Racing is not a crime; betting is not a crime; keeping a common betting place is made a nuisance and a crime by the Criminal Code; as also were those things commonly called "pool-selling" and "book-making"; but certain things which came, or were supposed to come, under this condemnation have been—subject to some "provisions"—released by Parliament from it; but that release, as I have said, did not, and could not, confer any power to control them otherwise; the subject-matter, in so far as it is not still a crime, has dropped back into its proper sphere—a civil matter of contract which the Province could control if it controlled racing, but it does not, and race-betting is all we are considering: see Thomas v. Sutters, [1900] 1 Ch. 10. The Sunday desecration case illustrates this: it was based upon the consideration that all such offences are crimes: whilst the decision of this case must be upon facts the very opposite of that: neither horse-racing nor gambling is a crime unless and until, and to the extent only, that by Parliament it is made a crime.

The Province does not ask whether it can deal with horse-racing or gambling as a crime: it knows that it cannot: it asks only whether, in so far as Parliament has not made it a crime, it can deal with it otherwise than as a crime: as, obviously I should have thought, it might if horse-racing were within any of the subjects assigned to the Provinces in sec. 92: the case of Thomas v. Sutters is much in point.

The onus, as it were, of establishing provincial legisla-

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tive power over the matter in question is upon those who ask these questions with the purpose of exercising such legislative power; and that onus they have not only failed to satisfy, but, on the contrary, it has been, in my opinion, made plain that there is no such power. And, I may add, the more carefully each legislative body keeps, and is kept, within its defined boundaries, the better must the purposes of confederation be attained and maintained.

My answer to the second question is therefore: No.

The first question must also be answered in the same way; indeed, to those who are not in the "atmosphere" of common knowledge of the subject, it might be deemed a senseless question; but there is method in the madness. There are those of the first mentioned class so vehement and earnest in their objection to betting that even the plain words of the enactment may not be sufficient to convince them that that power does not exist in those they may imagine to be in agreement with them or subject to their control.

Relief from importunity, not to take into account condemnation or contumely, has its uses; it is a gain to those in provincial office to be able to say to those who would drown the cry of the betting machine—Never venture never Win—with the cry of Never venture never Sin, that that can be done only in the waters of Parliament—the Parliament of Canada or the Parliament of Great Britain and Ireland.

The answer of the Court is: No, to each question, for the various reasons given, as the Act—R.S.O. 1914, ch. 85 (The Constitutional Questions Act) sec. 3—requires.

Middleton, J.:—In my opinion, the only answer that can be given to these questions is that the Provincial Legislature has not the power claimed.

To the Dominion has been given exclusive jurisdiction over "criminal law." It alone can define crime and enumerate the acts which are to be prohibited and punished in the interests of public morality. The Province may prohibit many things when its real object is the regulation of and dealing with property and civil rights, or any of the subjects assigned to its jurisdiction. Parliament may deal with the same things from the standpoint of public morality, so there may be in many cases room for discussion as to the apparent conflict between the two legislative fields.

In the case in hand the proposed legislation is not in any

way within the ambit of the provincial jurisdiction, but it is an attempt by the Province to deal with the question of public morals.

Gambling is regarded as an evil. Parliament has undertaken, in the exercise of its powers, to lay down rules in the interest of public morals to regulate it. It has considered the question of gambling in connection with horse-races, and has declared that on certain race tracks betting by means of pari-mutuel machines shall not be unlawful. The Province, thinking this does not sufficiently guard public morals, seeks, in an indirect way, to accomplish that which it thinks the Dominion should have done, and so proposes to prohibit racing on all tracks upon which it is lawful under the Dominion Act to operate pari-mutuel machines.

This is in no sense a conflict between the two jurisdictions by reason of the overlapping of the fields, but it is a deliberate attempt to trespass upon a forbidden field.

The case is governed by the Lord's Day case Attorney-General for Ontario v. Hamilton Street R. Co., [1903] A.C. 524.

This view of the case is in no way in conflict with the decisions upon various liquor laws. This legislation has never been attacked or upheld as dealing with criminal law. The Dominion has from the first treated such sumptuary laws as essentially local, bringing them into operation upon local votes. The Province clearly has jurisdiction to deal with the same matters under its local jurisdiction unless the provincial law would conflict with the enactment of Parliament, in which case the will of Legislature must give way.

Lennox, J.:—The conclusions I have reached upon the constitutional question submitted are clearly and concisely expressed in the opinion of Middleton, J., and it is desirable to avoid a multiplicity of words and phrases in answering the questions.

I agree that the Provincial Legislature has not the power claimed, and this for the reasons assigned by my brother.

Riddell, J. (dissenting):—I have the misfortune to differ from my brethren on the real question—which is, has the Province the power to prevent racing being accompanied with betting?

The Province does not propose to deal with racing or betting anywhere but in the Province; and I cannot agree that

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legislation on such subjects would necessarily be excluded from the category of legislation of a local and private nature, for the reason that racing and betting are widely spread—spread beyond the limits of the Province and the Dominion. So is small-pox, so are thistles, and burdock: and no one can doubt the power of the Province to protect its people from either—to forbid every one in the Province to use land within the Province for fostering either—and this quite irrespective of municipal legislation.

I make no pretence to determine judicially the advantages or disadvantages of horse-racing, or of betting on horse-races. I have here nothing to do with either—all I am concerned with is the power of the Ontario Legislature.

I am unable to see why that Legislature cannot forbid the use of any and every place—of any and every acre of land—in the Province in a manner which Legislature thinks harmful to the people of the Province.

The Legislature may forbid and has forbidden any one to sow grain infected with smut on his land: the Noxious Weeds Act, R.S.O. 1914, ch. 253, sec. 12, has forbidden every occupant of land to allow wild oats and other noxious weeds to grow on the land: ib. sec. 3—and I can see no valid reason why the Legislature may not forbid the use of land for betting upon, which some at least consider a metaphorical form of wild oats more noxious than the other.

The Legislature may and does forbid land being allowed to remain in a condition which may be injurious or dangerous to physical health, or to be used in a way whereby what is done upon it may be dangerous to physical health. Why may it not forbid a use of a condition dangerous to the moral health of the community?

The allocation to the Dominion of "criminal law" has, I think, no relevancy—there is no thought of prohibiting betting or making betting a crime—it is not proposed to reach the individual at all, but to reach the owners of the land upon which races are run or of the land adjoining or near thereto.

Nor can I agree that the Dominion can, by occupying a corner of a whole field, oust the Provinces from not only the rest of the field but also from all near thereto.

I would put the proposed legislation squarely on the ground of "property and civil rights"—such legislation, if opposed to the policy of the Dominion, might be vetoed; but, if not vetoed, I think it would be valid.

There seems to be a disposition developing in certain quarters (which are worthy of all respect) to question the motives of Legislatures—it seems to me that all we are concerned with is the legal power, not the virtue or capacity or even the ultimate intention, motive, or object of the Legislature.

Like my brethren, I do not find the cases at all conclusive in this matter, and I have given my view without reference —although by no means without regard—to them.

Questions answered in the negative.

REX v. GANGE.

Quebec Special Sessions of the Peace, Mulvena, District Magistrate, May 23, 1921.

1. Criminal Law (§II.C—50)—Preliminary Enquiry—Re-reading of the Depositions to the Accused.

The terms of sec. 684 of the Criminal Code are imperative and the depositions on a preliminary enquiry must be read again to the accused after the evidence of the witnesses for the prosecution is closed, unless the accused waives the re-reading of such depositions. Failure to comply with this requirement is a ground for quashing an indictment founded on the irregular depositions.

2. Indictment (§IV—70)—Quashing—Irregularity in Depositions Before Committing Justice.

It is ground for quashing an indictment founded on a committal for trial that the justice presiding at the preliminary enquiry heard testimony given in a language he did not understand in reliance upon the interpretation given to him by the clerk of the Court but without the latter being sworn as an interpreter.

MOTION to quash an indictment founded on a commitment on a preliminary enquiry.

Giroux and Bowles for accused, referred to The Queen v. Lepine (1900), 4 Can. Cr. Cas. 145 at p. 148, Rex v. Beaulieu (1917), 28 Can. Cr. Cas. 336, Rex v. McDonald (1916), 30 D.L.R. 738, 26 Can. Cr. Cas. 175, 25 Que. K.B. 332.

John P. Noyes, K.C., for the Crown.

Mulvena, D.M.:—The defendant, James Gagne, is charged with having had carnal connection with Antoinette Brunelle, a girl under the age of fourteen years, and of previous chaste character.

Before pleading to the merits, the defendant by his attorneys, moved to quash the indictment principally on two grounds:—

1. Because at the preliminary hearing the accused, con-

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trary to sec. 684 of the Criminal Code, was not asked whether he wished that the depositions taken be read again to him or whether he consented to dispense with the reading of same; and as a matter of fact such depositions were not read or the re-reading dispensed of by the accused.

2. That the evidence in this case was taken wholly in French, and was translated into English for the benefit of the presiding Magistrate who has no knowledge of French, by the Clerk of the Court, who was not sworn as interpreter thereof.

With the existing jurisprudence, I have no hesitation whatever in granting the motion and quashing the indictment on both grounds and discharging the defendant.

Indictment quashed.

CARSWELL CONSTRUCTION CO. v. CITY OF SYDNEY.

Nova Scotia Supreme Court, Russell, J., Ritchie, E.J., and Mellish, J. April 2, 1921.

Municipal Corporations (§IIE—134)—License Granted Construction Company—Provision as to Cancellation at any time—Construction of Clause.

The defendant corporation having granted a license or permit to the plaintiff, subject to a provision that it might be cancelled at any time thereafter, the Court held that the clause in the permit providing for the cancellation was only intended to reserve the right to cancel, upon the holder failing to comply with some rule or regulation under which it was granted, or when in the opinion of the engineer the public good required that it should be cancelled, and that after the plaintiff had incurred expense on the faith of its continuance, the license could not be cancelled for a purpose having no relevancy whatever to the purpose for which it was given.

[Re Hamilton Powder Co., etc., (1909), 13 O.W.R. 661 applied.]

APPEAL from the judgment of Longley, J., and from the order granted thereon making permanent the interim injunction granted to prevent defendant from removing a scaffolding erected by plaintiff for building purposes by permission of defendant. Affirmed.

F. McDonald, K.C., and J. McG. Stewart, for appellant.

A. D. Gunn, K.C., and T. R. Robertson, K.C., for respondent.

Russell, J.:—An injunction was issued to prevent the defendants from removing a scaffold erected by the plaintiff company under license or permit granted by the city engineer of the City of Sydney. The merits of the action in which the injunction was issued were brought to trial before Longley, J., at Sydney, who held that the defendants

were not warranted in their proceedings. An appeal is asserted and it is contended among other things that the plaintiffs took their license from the engineer subject to all the provisions therein contained, one of which was that it might be cancelled at any time thereafter, such right being reserved to the city. I cannot agree that the engineer had any such right to cancel the permit at his own mere will without cause. I agree with Chisholm, J., who granted the injunction, that the clause in the permit providing for the cancellation was only intended to reserve the right to cancel under the provisions of the ordinance; that is upon the holder failing to comply with any rule or regulation under which it was granted or when in the opinion of the engineer the public good required that it should be cancelled. The cases cited by Mr. Stewart to the effect that a licensee is bound by the terms of his license were not cases of permits issued pursuant to any statute or any by-law or ordinance founded upon a statute and I do not think they should govern the present case. In re Hamilton Powder Co., etc. (1909), 13 O.W.R. 661, Britton, J., held that a by-law granting a permit to the company to store gunpowder could not be repealed, after they had incurred expenses on the faith of the by-law. I think the same principle should apply in the present case and that even the engineer acting on his own motion could not arbitrarily cancel the permit after the construction company had incurred expenses on the faith of its continuance.

But it is clear that the engineer did not cancel the permit of his own motion. He did so at the dictation of the city solicitor and for a purpose having no relevancy whatever to the purpose for which the permit was given; to enforce by this means the payment of a disputed claim for taxes due by the plaintiff company.

I fully adopt the reasoning and the conclusions of law on which the application for the injunction was granted and think that the appeal from the decision of the trial Judge should be dismissed with costs.

Ritchie, E.J.:—I agree.

Mellish, J.:—I agree in dismissing the appeal.

Appeal dismissed.

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REX v. LEE TAN AND LEE HIM.

REX v. LEE TAN AND LEE HIM.

British Columbia County Court, Cayley J. March 18, 1920.

Appeal (§IIIC—80)—Damage to Club Property—Information Laid by President in Private Capacity—Charge Dismissed by Magistrate—Party Aggrieved—Cr. Code sec. 749.

A person who lays an information in his private capacity for injury done to the property of a Club of which he is president, cannot, on the dismissal of the charge by a magistrate appeal as a person aggrieved under sec. 749 of the Criminal Code; not being aggrieved as a private person, he has no legal status as an aggrieved person for the destruction of another person's property.

[Harrup v. Bayley (1856), 6 El. & Bl. 218, 119 E.R. 845; The Queen v. Justices of London (1890), 59 L.J. (M.C.) 146; Canadian Society v. Lauzon (1899), 4 Can. Cr. Cas. 354; Minister of Inland Revenue v. Thornton (1917), 28 Can. Cr. Cas. 3, considered and applied.]

APPEAL from the decision of the Police Magistrate of the City of Vancouver dismissing a charge brought by one Sam Lock against Lee Tan, Lee Him and Lee Chong Hung, for damages to personal property. The information recites that the informant suspects and believes that the accused did, on November 4, 1919, at the city of Vancouver "wilfully commit damage to certain personal property of the Dart Coon Club at their premises situate at Number 5 Pender Street, West, in the city of Vancouver, to wit, a wooden sign, such property not exceeding $20 in value."

The Magistrate dismissed the charge. Notice of appeal was served on Lee Tan and Lee Him but not served on Lee Chong Hung. Counsel for the accused admitted that the notice of appeal and necessary preliminaries were in order The notice of appeal reads as follows:—

"Take notice that I, the undersigned, Sam Lock, of the City of Vancouver in said County and Province, thinking and believing myself aggrieved by the dismissal and order of dismissal hereinafter mentioned, intend to enter and prosecute an appeal at the next sittings of the County Court at Vancouver."

Upon the appeal coming on for argument on February 27, 1920, counsel for the defence took the preliminary objection that "no appeal lies because in these cases the informant and appellant are not persons aggrieved under section 749 of the Code, R.S.C. 1906 ch. 146."

A. H. MacNeill, K.C., for appellant.

C. H. Tupper, K.C., for respondent.

Cayley, Co. Ct. J.:—The first point to settle is, what meaning the Courts have attached to the word "aggrieved."

Trotter's Convictions Appeals, 2nd ed., p. 9, says, "there should be some special and peculiar personal grievance to the appellant himself" and that "parties aggrieved must mean parties who have sustained some damage by reason of the act done for which the penalty was fixed." Rex v. The Justices of Essex (1826), 5 B. & C. 431, 108 E.R. 161, is authority that it must be stated in the notice if appellant were aggrieved. In this respect the notice of appeal complies with the rule. In Harrup v. Bayley (1856), 6 El. & Bl. 218, at pp. 223, 224, 119 E.R. 845, Lord Campbell, C.J., says:—

"The Act [The Town Improvement Act,] by sec. 181, gives an appeal to any person who may think himself aggrieved; but that does not mean to any person who says he fancies he is aggrieved. Giving it a reasonable construction, the enactment means to give an appeal to any one who has legal grounds for saying that he is aggrieved."

At p. 225 of same case, Crompton, J., says:—

"I agree that the appellant has no locus standi unless bona fide aggrieved by the order complained of."

There are other cases explaining the word "aggrieved" in the same way and amounting to this, that the person aggrieved must have sustained some pecuniary damage by the decision of the Magistrates. It is true that these cases do not fully apply, because the Judges inclined to the view that the right of appeal was scarcely given to a prosecutor at all, while sec. 749 of the Code gives that right distinctly. In The Queen v. Justices of London (1890), 59 L.J. (M.C.) 146, Lord Coleridge, C.J., says, at p. 148:—

"Giving an appeal against an acquittal is something which is prima facie not favoured by the law. The general principle of law is that a person must not be a second time vexed for the same cause."

The same Judge at p. 149 says:—"What is the fair meaning of this provision, can it be said to contemplate an appeal by a person who has not got, and cannot get, a conviction?"

Wills, J., at p. 149 says:—"Having looked into the books, I fail to find any instance in which an appeal has been successfully prosecuted upon an acquittal." Section 749 of the Criminal Code, however, provides "that the prosecutor or complainant" is to be included amongst those parties who can claim to be "aggrieved."

This settles the point as to whether the prosecutor can

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be considered an aggrieved person, but it does not do away with the old decisions as to what constitutes an aggrieved person. The grievance must be some injury suffered by the appellant by the acquittal to give him the legal status of an aggrieved person.

It will be noticed that the informant, in this case, lays the information as a private person and in his information he described the property not of himself but of another person, to wit, a certain club. How can a man be said to have the legal status of a person "aggrieved" with reference to the destruction of another person's property? But it is alleged, by counsel for the informant, that this private person, Sam Lock, is president of the Club whose property was destroyed and this fact was admitted by counsel for the accused, and as president of the Club, whose duty it is to protect the Club property, he becomes a person aggrieved. But in this notice of appeal, he still acts as a private person, and to say that the appeal is really taken by him in his public capacity as president of the Club is something he cannot do. In Canadian Society v. Lauzon (1899), 4 Can. Cr. Cas. 354, it is decided that an information laid in the name of an individual does not give a locus standi to the society to appeal from the Justices' order dismissing the charge. But that is really what the prosecution in the present case desires to do. Sam Lock is not aggrieved as a private person. He is aggrieved for the Club, which means that he takes an appeal on behalf of the Club in respect of a charge laid by him as a private person. As a private person, I hold that he cannot be said to be aggrieved for the destruction of another person's property, within the meaning of the decisions, and, therefore, he has no right to appeal. It is the Club which is the "aggrieved" person, but as the Club did not lay the information and as the complainant did not lay it in the name of the Club, it cannot appeal under the decision last cited.

In Minister of Inland Revenue v. Thornton (1917), 28 Can. Cr. Cas. 3, it was held that an information under the Special War Revenue Act, 1915, Can. ch. 8, may be laid in the name of the Minister of Inland Revenue by an authorized revenue officer and an appeal from the dismissal of the charge may thereupon be taken in the name of the Minister as the "prosecutor." This case was relied on by counsel for the appellant.

Judd, Jun. Judge, says at p. 4:—"The informations,

however, shewed that they were laid in the name of the Minister, though signed and sworn to by Dager" (an inland revenue officer).

The information in the present case does not shew that it was laid in the name of the Club. It was laid by Sam Lock as a private individual. I have assumed that the word "aggrieved," as it occurs in sec. 749 is used distributively and applies to the prosecutor, to the complainant and to the defendant. The language of Forbes, Co. Ct. J., in Rex v. Hatt (1915), 27 D.L.R. 640, 25 Can. Cr. Cas. 263, is open to an expression of doubt as to whether he held this view. He says, at p. 642:—"It is presumed that no one not aggrieved could appeal; therefore, it is limited to three classes: (1) any one aggrieved; (2) if a dismissal, the prosecutor or complainant, and (3) the defendant."

He says he feels constrained to that view by the line of reasoning adopted by Abbott, C.J., in Rex v. The Justices of Essex, supra.

Section 749 of the Code says:—"Any person who thinks himself aggrieved by any such conviction or order or dismissal, the prosecutor or complainant, as well as the defendant may appeal."

Here the words "as well as" have the effect of giving the prosecutor or complainant the same right of appeal, in case of dismissal, as the defendant always had in case of conviction. The defendant is presumed to be a person aggrieved in case of conviction (19 Hals., p. 647), but the prosecutor and complainant are not so presumed in case of dismissal, so they must allege it in their notice. Forbes, Co. Ct. J., could not have meant that any stranger to the case, who might as a ratepayer or otherwise, be said to be aggrieved, could come in after dismissal and carry a case, to which he was not a party, to appeal.

The objection of the defence is sustained.

TALAWINSKI v. THE GRAND TRUNK R. CO.

Quebec Superior Court, Archer, J. March 1, 1921.

Carriers (§IIO—329a)—Passenger Taking Delivery of Trunk—Subsequent Deposit of Trunk in Check Room—Voluntary Deposit—Loss of Trunk without Fault of Railway Company—Liability.

A passenger who after taking delivery of his trunk brings it back and has it checked in the baggage room of the railway company, is considered as having made a voluntary deposit and the railway company is only obliged to act as a prudent administrator and is not liable for the loss of the trunk where no fault on its part is proven.

[See also Pequegnat v. C.P.R. post. 645.]

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TALAWINSKI v. G.T.R. Co.

ACTION for damages for loss of plaintiff's trunk while in the check room of the defendant company. Action dismissed.

The facts of the case are as follows:—

The plaintiff claims from the defendant the sum of $104 and alleges that, on or about July 21, 1919, he deposited with defendant at Bonaventure station, Montreal, a box containing effects; that the following day he presented himself to said Bonaventure station to receive said box which could not be found; that defendant did not take the necessary precautions and allowed said effects to be taken away when they were under its care; that the defendant is responsible for same.

The defendant denies any negligence and alleges that the trunk in question arrived from Boston on July 21, 1919, and plaintiff took delivery thereof and attempted to board a street car with the same, but was put off; he then brought said trunk back to defendant's baggage room and asked permission to leave it; he was given station identification check No. 97541, as indicating the conditions upon which the defendant would accept said trunk; that notwithstanding the fact that defendant took all reasonable and proper care of said trunk left with them under the conditions set forth to prevent the same from being stolen or taken away by any unauthorised person, the same disappeared from their keeping and they have been unable to find it again; that under the said conditions, defendant is in no way responsible to plaintiff for the loss of said trunk.

The Court dismissed the action as follows:—

G. A. Goyette, K.C., for plaintiff.

A. E. Beckett, K.C., for defendant.

Archer, J.:—Considering that as alleged in the defence, the plaintiff took delivery of the trunk or box in question and subsequently brought back said trunk to the defendant's baggage room, and was given an identification check No. 97541 which reads as follows:—"Station Identification Check.—Notice to passengers.—This check is issued as an identification check on which to claim baggage for proper checking. This check must be presented with baggage ticket at Montreal station, and baggage re-checked to destination otherwise same will be held and only forwarded by express or freight. Storage will be charged on baggage covered by this check after same has been stored 24 hours.

Baggage for which this check is issued is held entirely at owner's risk, and the company will not be responsible therefor under any circumstances;" that plaintiff, when he made the deposit in question, was not a passenger and did not intend to become a passenger on the Grand Trunk Railway System, but intended to come back and get his trunk or box so as to proceed by Canadian Pacific Railway; that the deposit in question is to be considered as a voluntary deposit; that art. 1802 C.C. (Que.) enacts: "The depositary is bound to apply in the keeping of the thing deposited the care of a prudent administrator"; that it is proven that the trunk or box in question was stolen, but through no fault of defendant; that it is proven that the company defendant, under the circumstances proven, acted as a prudent administrator and that there is no fault proven; doth dismiss said action with costs.

Action dismissed.

MASSEY-HARRIS CO. LTD. v. McDIARMID.

Saskatchewan King's Bench, Maclean, J. July 20, 1921.

Limitations of Actions (§IIIA—105)—Account—Money Paid to Bank under Agreement to pay Indebtedness—Property given to Bank as Security for Debt—Person making Payment to take Transfer and hold Land as Security—Payments by Debtor on two accounts—Payments Applied on only one Account—Creditor holding Unregistered transfer. Statute of Limitations.

An account which represents a sum of money paid by the plaintiff to a bank under an agreement or arrangement with the defendant whereby the plaintiff was to pay off the defendant's indebtedness to the bank, and in return obtain from the bank a transfer of certain property, which the defendant had previously transferred to the bank as security for his indebtedness to the bank, the arrangement being that the plaintiff should take transfer of the land and hold it as security for the defendant's indebtedness to the plaintiff, the plaintiff after obtaining the transfer, holding the unregistered transfer, comes within sec. 8 of the English Real Property Limitations Act, 1874, and is not barred for a period of twelve years after the last payment or acknowledgment. Also held that payments made by the defendant which he intended to be applied to this account, although, in fact applied to another account took the account out of the operation of the Real Property Limitations Act, R.S.S. 1909, ch. 50, sec. 1.

ACTION on an account.

A. D. Carrothers, for plaintiff.

E. W. F. Harris, for defendant.

Maclean, J.:—In this action the plaintiff claims against the defendant payment of the sum of $1,503.35 with interest

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on $1,155.04 from January 23, 1918. The last named sum is made up of two accounts that have been kept separate in the plaintiff's books, one known as the agency account, amounting to $843.65, and the other known as the land account, amounting to $311.39. The balance of the $1,503.35 is made up of interest. There is no dispute about the amount of the agency account. The defendant in giving evidence admitted his liability and the plaintiff is entitled to recover that amount.

The so-called land account was incurred on March 23, 1910. The correctness of the amount is not disputed, but the defendant contends that the account is barred by sec. 1 of ch. 50, R.S.S. 1909, the Real Property Limitation Act. The account represents a sum of money paid by the plaintiff to the Northern Crown Bank under an agreement or arrangement with the defendant whereby the plaintiff was to pay off the defendant's indebtedness to the bank, and in return obtain from the bank a transfer of the north-east quarter of sect. two, tp. nine, range thirty-four, west of the first meridian in the Province of Saskatchewan. The defendant had prior to that time transferred that land to the bank as security for the defendant's indebtedness to the bank. The arrangement between the plaintiff and the defendant was that the plaintiff should take transfer of the land and hold the same as security for the defendant's indebtedness to the plaintiff, including the sum paid to the bank. The plaintiff obtained from the bank a transfer of the land dated March 8, 1910. The plaintiff held this transfer unregistered and it is still unregistered. It appears that the duplicate certificate of title was held at the land titles office for the land district in which the land is situate, and the land was at the time subject to a mortgage in favour of the Toronto General Trusts Corporation.

On January 29, 1913, the defendant signed a memorandum addressed to the plaintiff setting out the terms on which the plaintiff was to hold the land. That memorandum reads in part as follows:—

"In order that you may not be prevented from making the best use of the title to this property as security for my indebtedness to you and in order that you may realise payment of my indebtedness or part thereof from such security, I hereby release your company from any responsibility to comply with any conditions which there may be attaching

to the transfer or title to this land which you hold, and hereby give your company authority to deal with the above property in any manner which you may think advisable, provided, of course, that you account to me for full proceeds of any money you realise from it after having first settled any claim you may have against me."

The evidence shews that the plaintiff had not at any time since 1910 asked for payment of any portion of the land account, and all payments made by the defendant were allocated to the agency account. On the other hand, the defendant was under the impression that the two accounts were amalgamated, and that his payments were applied generally on the total of both accounts. I am of opinion that the land account comes within sec. eight of the English Real Property Limitations Act, ch. 57, 1874, and as such is not barred for a period of 12 years after the last payment or acknowledgment; I am also of opinion that even if the account did not come within sec. 8 of that Act, the fact that the defendant intended his payments to apply on the total of both accounts takes the land account out of the operation of the statute.

The plaintiff will therefore have judgment for $1,503.35, together with interest on $1,155.04 from November 30, 1920.

Early in 1920, the defendant, while having a search made of the title to certain other of his lands, discovered that the land in question was still registered in the name of the Northern Crown Bank, and he asked for and received from the bank a transfer to himself, which transfer was registered by him on or about February 16, 1920. On the same date there was registered against the land a mortgage for $1,000 in favour of the Hamilton Provident and Loan Society. The earlier mortgage referred to had been discharged. On June 16, 1920, the plaintiff filed a caveat based on the unregistered transfer.

The memorandum of January 29, 1913, above referred to charges the north-east of sect. 2, tp. 9, r. 34, west of the 1st meridian, as security for the defendant's indebtedness to the plaintiff, and the plaintiff is entitled to have the amount of his judgment charged as an encumbrance against that land. The plaintiff asks in his statement of claim that the existing certificate of title be cancelled, and that the Registrar be ordered to issue a new certificate of the title in the name of the defendant. I think the same result will

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follow if I order, and I do order, that the land in question be charged in favour of the plaintiff with the payment of $1,503.35, together with interest on $1,155.04 from November 30th, 1920, and that the Registrar of Titles in the Cannington Land Registration District file this order and endorse a memorandum thereof on the certificate of title of the said land. The plaintiff will have costs.

Judgment accordingly.

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Nova Scotia Supreme Court, Russell, J., Ritchie, E.J., and Mellish, J. April 16, 1921.

Contracts (§IID—187)—Excavation of Material—Solid Rock—Construction.

A contract to excavate and dispose of certain material contained the following clause: "'Solid rock' means solid rock in beds or masses in its original position, which cannot be removed without blasting, and boulders and detached rock measuring one cubic yard or over. Blasting of dirt cover and loose shale rock shall not constitute a solid rock classification." Held that rock in situ in beds or masses was to be regarded as solid rock if in removing it blasting would be the reasonably necessary method to adopt, at the same time material was not to be regarded as solid rock by reason of the mere fact that it had been blasted.

The contractor having objected to the dumping ground agreed on being changed, and no new location having been settled, paid off his men and left the work in December. After fruitless correspondence, he wrote the defendant in the following March that unless a location were given him within 5 days he would quit and claim damages. A location was subsequently agreed upon and the contractor resumed work about the end of March. Held that if he intended to claim damages for his plant being idle all winter he should have given this notice in the previous December.

APPEAL from the judgment and findings of Longley, J., and from the order for judgment granted thereon in an action on a contract for excavating and disposing of material overlying limestone on the property of the Nova Scotia Steel and Coal Co., Ltd., and for special damages for failure on the part of defendant to fulfil provisions of the contract. There was a cross appeal as to damages and from the allowance of various claims of the plaintiff. Varied.

D. A. Cameron, K.C., and R. D. McCleave, for appellant.

T. R. Robertson, K.C., and Joseph McDonald, for respondent.

Russell, J.:—I agree in the conclusion expressed in the opinion of Mellish, J. I should have preferred to interpret the definition "solid rock" in the agreement in a slightly

different form. I think we must keep as near as possible to the terms of the agreement, but we cannot adhere to the literal reading of the definition without rendering it absurd. There is no kind of rock "which cannot be removed without blasting." As the Justice already named suggested in the course of the argument the stone for the pyramids was removed without blasting. On the other hand it would not be correct to say that the solid rock includes any material that can be more easily or more conveniently removed by blasting. Frozen earth, it is suggested by some of the witnesses, might be more easily removed by blasting. I think we must include in "solid rock" any material which it would not be reasonable to expect the contractor to remove without blasting.

As to the dump, I think the meaning of the provision is that it is to be located once for all, as the evidence shews it could well have been done in the first location. The "dumping ground" is referred to in the contract and is to be not more than 4000 ft. from the point of loading. A trestle is to be built by the contractor to the dumping ground and is not to exceed in cost $100. If the dumping ground could be changed from time to time by the company it could easily exceed in cost the maximum amount.

The provision as to daily reports in writing where solid rock is removed seems to me to be analogous to directory provisions in a statute. The contractor was under obligation to make such reports and if loss was occasioned to the company by omission to do so, it could be made the ground for a claim, but it is not in the nature of a condition.

Ritchie, E.J., concurred with Mellish, J.

Mellish, J.:—On May 30, 1918, the plaintiff and defendant entered into a written contract by which the plaintiff agreed to excavate and dispose of 75,000 cubic yards of material overlying limestone at Point Edward Quarry, Cape Breton county, Nova Scotia.

The defendant, Jones, had a similar contract with the Nova Scotia Steel Co. to do the same work, and the contract between the plaintiff and defendant provided that the contractor (i.e. the plaintiff) should have and dispose of the excavated material "as directed by the company's engineering department; total length of haul not to exceed four thousand feet from point of loading."

The price to be paid the contractor was 43c per cubic yard for material other than solid rock, and $1.25 per cubic yard

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for the latter. As to the classification of the material excavated the contract has the following provisions:—

"'Solid rock' means solid rock in beds or masses in its original position, which cannot be removed without blasting, and boulders and detached rock measuring one cubic yard or over. Blasting of dirt cover and loose shale rock shall not constitute a solid rock classification. When solid rock is to be removed the contractor in each instance must notify the company's engineering department in writing, in order that daily measurement of quantity and agreement as to classification may be arrived at. Daily reports will be made out, covering each day's operation and the quantity, and signed by the engineer of the contractor and by representative of the engineering department of the company."

The contract further provides that the contractor is to be furnished by the company with the material necessary to construct a trestle from the "most convenient point of stripping operations to dumping ground. Trestle is to be built by contractor at a cost not exceeding one hundred dollars."

Plaintiff claims:—

1. That in the month of August, 1918, and while the work was being performed the dumping ground was changed and that by reason of such change his shovel plant and crew were kept idle for 14 days and that he lost thereby wages to crew at $40 per day, $560; use of plant at $61 per day, $854; total, $1,414.

2. That in November, 1918, the dumping ground was again changed and that he was put to loss and expense by reason of such change amounting to 1¼ days, $224.49; and 13 days, $683.82; total, $908.31.

3. That plaintiff's tracks were shattered and his operations delayed by reason of blasts fired by the company's employees by which he lost the wages of his employees and the use of his plant for 5 days at $175 per day; total, $875.

4. That by reason of the delay in not locating dumping ground he lost the use of his shovel plant for 91 days, i.e. from a date in December, 1918, to a date in March, 1919, before dumping ground located. 52 days at $61 per day, $3,172; 39 days at $61 per day, $2,379; total, $5,551.

5. Lost time for shovel plant and crew—13 days while making change in dumping ground at $101, $1,313; less deducted for crew by consent, 13 days at $40, $520; total, $793.

6. For time lost by reason of trestle material not being supplied according to contract—Loss of use of shovel plant at $61 per day, 5 days, $305; wages of crew at $40, $200; total, $505.

7. For price of rock excavated—5892 yards at $1.25 but allowed as common excavation at 43c; 5892 yards at 82c (the difference), $4831.44.

8. For 500 yards common excavation at 43c, $215.

9. Lost time from destruction of trestle by company's blasts—3¼ days at $61, for loss of use of plant, and wages at $114; 3¼ days at $175—$568.75.

10. For increased expense by reason of change in dumping ground, $1,901.59; total claim, $17,563.09.

The action was tried before Longley, J., who disallowed the following of the foregoing items:—

No. 4, $5,551; No. 5 (one half), $656.50; No. 6, $505; No. 7 (one half), $2,415.72; total disallowed, $9,128.22; total claim as above, $17,563.09; balance, $8,434.87.

For which judgment was given in favour of the plaintiff.

From this defendant has appealed and plaintiff has cross appealed and asks to have the damages increased by adding thereto the above items so disallowed, amounting in all to $9,128.22.

In my opinion the trial Judge allowed too much (viz.: $61 per day) for the time when the plant was kept idle. This amount was apparently calculated on a rental basis, which is, I think, a wrong one. The plant in use is evidently subject to great wear and tear, and it is unreasonable to expect that the contractor could always keep it busy: indeed, the evidence disproves this. It was kept idle for purposes of repairs and for other reasons. Upon the whole, if the allowance be reduced by one half there will thereby be in my opinion no injustice done at least to the contractor.

For this reason I would therefore reduce the items allowed as follows, viz.:—No. 1 by $427; No. 2, which involves a charge of $55 for such loss of time, excepting the cars which were in use, $27.50. As to items Nos. 3 and 9, these claims are for loss arising from the neglect of the Nova Scotia Steel Co., and in my opinion the defendant is not liable therefor. It may make no practical difference to plaintiff if the company is liable for this loss. Therefore I would deduct item No. 3, $875; and item No. 9, $568.75; making in all reductions amounting to $1,898.25.

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On the other hand, I would allow item No. 6, but allowing for loss of use of the plant one half the amount claimed, $152.50; and for wages, $200. In respect of item No. 7 I would allow the full amount claimed which involves an increase in the amount allowed of $2,415.72. Total increase, $2,768.22; reductions, $1,898.25; leaving a balance of $869.97; by which the judgment appealed from should be increased.

As to the other items I do not think the findings of the trial Judge should be disturbed.

A good deal was said by the defendant's counsel on the appeal in respect of the rock classification under the contract. In my opinion it means that rock in situ in beds or masses is to be regarded as solid rock if in removing it blasting would be the reasonably necessary method to adopt. At the same time it guards against material being classified as solid rock by reason of the mere fact that it has been blasted.

The trial Judge's apparent findings as to the nature of this material I agree with, but I am unable to find any good reason for reducing the quantity and I think none was suggested to us on the hearing.

Item No. 4 is a large one. As I above indicated, I agree with the trial Judge in disallowing it. In regard to this claim it may be noticed that plaintiff objected to the second change of dumping ground. No location being settled he paid off his men about December 5, 1918, and left the work with his engine and cars cut off on the northern side of the ravine over which the broken trestle had been built and the shovel on the other side. The plant was left there for the winter.

After fruitless correspondence as to the terms on which the dumping ground should be changed the contractor met defendant and representatives of the company on the ground about the end of March, 1919, when he was given No. 3 dumping ground and resumed work. He had previously given defendant notice by letter dated March 27 that unless the location were given him within 5 days he would quit and claim damages. If he intended to claim damages for his plant being idle all the winter he should, I think, reasonably have given this notice in the previous December.

In my opinion under all the circumstances there should be no costs on the appeal to either party.

Judgment below varied.

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Supreme Court of Canada, Idington, Duff, Anglin, Mignault JJ. and Cassels, J., ad hoc. November 21, 1921.

CANADIAN PACIFIC R. CO. v. HATFIELD & SCOTT.

Carriers (§III C—392)—Of Goods—Bill of Lading—Terms and Conditions—Construction of—Injury to Goods in Warehouse—Liability.

One of the conditions in a bill of lading provided that "in the case of shipment from one point in Canada to another point in Canada where goods are shipped under a joint tariff, the carrier issuing this bill of lading shall be liable for any loss, damage or injury to such goods from which the other carrier is not by the terms of the bill of lading relieved, caused by or resulting from the act, neglect or default of any other carrier to which such goods may be delivered in Canada or under such joint tariff or over whose line or lines such goods may pass in Canada, or under such joint tariff. The onus of proving that such loss was not so caused or did not so result being upon the carrier issuing this bill of lading."

The Court held affirming (1921), 57 D.L.R. 453, that the intention of this condition was to fix the original carrier issuing the bill of lading with liability from which the ultimate carrier was not relieved by the bill of lading, not only during, but after, transit, and that the onus of proof was on the original carrier who was liable for damage caused by the connecting carrier failing to promptly notify the shipper of the arrival of the goods at their destination and of storing them in an improper and unsuitable warehouse whereby they became unfit for use and had to be destroyed.

APPEAL by defendant from a judgment of the Supreme Court of New Brunswick Appeal Division (1921), 57 D.L.R. 453, in an action to recover damages for the loss of 5 car loads of potatoes shipped over the defendants' railway. Affirmed.

F. R. Taylor, K.C., for appellant.

W. P. Jones, K.C., for respondent.

Idington, J.:—The appellant and those for whom it is, by the terms of its contract, responsible, disregarded the conditions imposed upon it thereby and placed the goods in question where such goods never should have been placed and caused thereby the destruction of said goods.

The Judge in a fair and lucid charge to which no objection of any kind was taken by counsel submitted to the jury questions to which no exception was taken.

Upon the answers thereto and the admitted facts the trial Judge for the reasons that appear in his opinion judgment directed judgment to be entered for respondent.

The Appeal Division of the Supreme Court of New Brunswick (1921), 57 D.L.R. 453, upon an appeal taken thereto by appellant herein, for reasons assigned by it, covering,

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correctly so far as I understand, some points of fact not expressly mentioned by the trial Judge, upholds his reasons and thus leaves me, agreeing as I do in all said reasons, unable to add anything useful thereto.

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

Duff, J.:—The contract provides that where goods are shipped under a joint tariff (which is the present case) "the carrier issuing this bill of lading * * * shall be liable for any loss, damages or injury from which the other carrier is not, by the terms of the bill of lading, relieved caused by or resulting from the act, neglect or default of any other carrier to which such goods may be delivered * * * under such joint tariff * * * the onus of proving that such loss was not so caused or did not so result, being on the carrier issuing this bill of lading." This language is clear and the effect of it is that on proof that goods were received by a carrier under "a joint tariff" the appellant company is "liable" for the loss, damage or injury to such goods unless it establishes one of two things, 1st, that such loss, damage or injury is something in respect of which, by the terms of the bill of lading, "the other carrier" is not to be responsible, or 2nd, that such loss, etc., was not caused or did not result from the act, neglect or default of "the other carrier."

The onus resting upon the company is the onus probandi in the strict sense, that is to say, the company is the actor in the litigation in respect of these two issues and in so far as they involve questions of fact the company must fail unless it establish affirmatively by reasonable evidence that upon them it is entitled to succeed. The company relies upon article 6 of the conditions which is in these words:

"Section 6 (part). Goods not removed by the party entitled to receive them within forty-eight hours (exclusive of legal holidays), or in the case of bonded goods within seventy-two hours (exclusive of legal holidays), after written notice has been sent or given, may be kept in car, station or place of delivery or warehouse of the carrier, subject to a reasonable charge for storage and to the carrier's responsibility as warehouseman only, or may at the option of the carrier, after written notice of the carrier's intention to do so has been given), be removed to and stored in a public or licensed warehouse at the cost of the owner and there

held at the risk of the owner and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage."

Now it is undisputed that the goods were not "kept in car, station or place of delivery or warehouse of the carrier" and therefore that branch of this article limiting the carrier's responsibility in such a case to that of warehouseman has no application and the company's sole recourse must be to the provision which entitles the carrier, upon giving written notice, to remove the goods to a public or licensed warehouse. I have no doubt that written notice here means written notice to the owner and it is admitted that such notice was not given; such notice is an essential condition and accordingly it follows that this branch of the article is also without application.

As to damages, I concur in the view taken in the Court below that sec. 4 of the contract fixes the damages. The trial Judge was therefore right in instructing the jury as he did. The sole issues were issues in respect of which as already mentioned the company was actor. There is no evidence upon which the jury could properly have found for the company upon those issues. The case appears to be a peculiarly simple one although it has perhaps been obscured by the accumulation of irrelevancies which it has attracted during its progress through the Courts. It is proper however to observe that the argument advanced to the effect that the New York Central Company's responsibility ceased after the expiration of 48 hours after the arrival of the goods in New York is really beside the point. The conditions prescribed by the second section impose responsibility for loss unless that loss is something in respect of which the bill of lading itself relieves the carrier; and these conditions are not satisfied unless such release is to be found in express language or by necessary implication from the language of the document. Section 6 provides for exemption from liability in certain specified cases and the facts of the present case do not bring it within any of these exemptions.

Anglin, J.:—The material facts of this case are sufficiently stated in the opinion of the trial Judge and in that of Hazen, C.J., delivering the unanimous judgment of the Court of Appeal, 57 D.L.R. 453.

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If findings of the jury were necessary to maintain the judgment which the plaintiff holds, I incline to think it could not be sustained. But I agree with the trial Judge and the Court of Appeal of New Brunswick that upon the conditions of the bill of lading under which the plaintiffs' goods were shipped their loss raises a presumption of liability on the part of the defendant as the primary or issuing carrier and that there is no evidence in the record on which a finding could be based that would rebut that presumption.

By clause 1 of the conditions the issuing carrier (the defendant) assumes liability for any loss of, or damage to, the goods, except as otherwise therein provided.

By clause 2 where goods are shipped under a joint tariff (admittedly this case), the issuing carrier assumes liability for loss, damage or injury to such goods caused by, or arising from, any act, neglect or default of any other carrier to whom the goods may be delivered under such joint tariff (in this case the New York Central R. Co.) from which such other carrier is not relieved by the terms of the bill of lading. The issuing carrier also assumes the onus of proving that such loss was not so caused or did not so arise.

By clause 3 a number of possible causes of loss or injury are categorically excepted from those entailing liability on the carrier. None of them was the cause of the loss of the plaintiff's potatoes. The only one of these excepted causes relied on by counsel for the appellant was "inherent vice in the goods." There is nothing in evidence to suggest the existence of such a vice—nothing to shew that the potatoes would have become unfit for sale if given reasonable care and attention.

Clause 3 further provides for the carrier's liability being that of a warehouseman in the event of the goods being destroyed by fire more than 48 hours (72 hours in the case of bonded goods) after written notice of arrival of the goods at destination—making it clear that responsibility as carrier does not terminate when actual transit is completed and also that it continues as to other causes of loss even after expiry of the 48 hours "free time."

Clause 6 provides two methods by which the carrier may be relieved of this responsibility. By adopting one its responsibility may be reduced to that of a warehouseman; by pursuing the other it may entirely escape further res-

ponsibility. In this case neither of the prescribed courses was taken. The New York Central R. Co. placed the goods in a public or licensed warehouse, but without giving notice of intention to do so. The goods became unfit for sale while in this warehouse and still under the control of the carrier to whom they had been transferred by the original carrier who issued the bill of lading, and whose responsibility had not been either reduced to that of a warehouseman or extinguished because of non-compliance with the conditions prescribed by clause 6 for effecting one or other of these results.

There is no evidence to negative the presumption arising under the bill of lading that the loss of the potatoes is ascribable to some neglect or default of such transferee-carrier. Indeed there is not a little pointing to the conclusion that its selection of a public or licensed warehouse unsuited for the storage of potatoes was the direct cause of their loss. Had the jury found negligence of the New York Central R. in this respect, in the absence of the notice of intention requisite to bring the defendant within the protection of clause 6, a judgment against it based on that finding would have been unassailable. But without such a finding the failure of the defendant to discharge the onus which it assumed by the bill of lading of disproving that the loss of the plaintiff's goods was due to some act, neglect or default of its transferee-carrier justifies a judgment upholding its responsibility. I agree with the reasoning on which Crocket, J., founded his conclusion that the defendants remained liable in respect of the shipment in question as common carriers under the terms of the bill of lading.

The full value of the consignment at the point of shipment, plus freight charges, etc., paid by the plaintiff, has been allowed as damages. There is evidence that the price of potatoes had declined before the plaintiff's potatoes had suffered deterioration attributable to any act or omission of the New York Central R. Co. But clause 4 of the bill of lading provides that the amount of the loss for which the carrier shall be liable shall be computed on the basis of the value of the goods at the place and time of shipment (including freight and other charges, if paid, and duty, if paid or payable and not refunded), unless a lower value has been represented in writing by the

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shipper or agreed upon, or is determined by the classification or tariff on which the rate charged for carriage is based. None of these exceptions is invoked but it is said that from the value of the goods at the time and place of shipment should be deducted any decline in price before the happening of the event which entails liability on the carrier. The amount of the damages awarded is admitted to have been the value at the time and place of shipment. The total loss of the shipment is conceded. I agree with the trial Judge and the Court of Appeal, 57 D.L.R. 453, that clause 4 deprives the defendant of any advantage which it might otherwise have had from falling prices in the potato market just as it would preclude the plaintiff from claiming the benefit of an advance in the price of potatoes. The clause was no doubt inserted to avoid difficulty and uncertainty in the assessment of damages. The value of the goods at the place and time of shipment would probably be known to the carrier when assuming responsibility and it would be in its interests to have this value fixed as the basis of that responsibility rather than the uncertain and unknown future value at the place and time of delivery. This stipulation probably operates in the interest of the carrier more often than in that of the shipper.

The appeal in my opinion fails and should be dismissed with costs.

Mignault, J.:—I concur with Mr. Justice Anglin.

Appeal dismissed.

STARKEY v. STARKEY.

Saskatchewan King's Bench, Brown, C.J.K.B. March 9, 1921.

Parties (§IIB—119)—Action for Dissolution of Marriage—Adultery—Action as Framed Sufficient for Granting of Relief if Proved—Application to add Additional Parties as Co-respondents—Material on which Application based Hearsay Evidence Indefinite and Remote—Refusal of Application.

An application to add further parties as co-respondents in an action for dissolution of marriage on the ground of adultery on the part of the defendant, will be refused where the action as framed entitles the plaintiff to the relief sought on proof of any one of many acts of adultery alleged, and where the material on which the proposed amendment is based, is not sufficient as being too indefinite, or hearsay evidence, or being so remote as to be worthless.

APPLICATION to add further parties as co-respondents in an action for dissolution of marriage on the ground of

adultery on the part of the defendant. Application refused.

P. H. Gordon, for plaintiff.

E. B. Jonah, for defendant.

Brown, C.J.K.B.:—This is an application for leave to add further parties as co-respondents in the action and to insert new paragraphs in the claim alleging acts of adultery on the part of the defendant with the respondents, so sought to be added.

As to the proposed amendment to add Henry G. Bird as a co-respondent, the proposed plea with reference to the alleged adulterous conduct of the defendant and the said Bird is too indefinite to be allowed. See Dixon on Divorce, 3rd ed., p. 127; Wells v. Wells (1853), 17 Beav. 490; note in 32 L.J. (Mat.) 65, 51 E.R. 1124. The affidavit material on which this proposed amendment is based is not sufficient. The affidavit of Thomas Martin is hearsay evidence, and Martin does not pledge his belief in the accuracy of the statements made to him. The affidavit of the plaintiff is based on information so remote as to be quite worthless.

As to the proposed amendment to add Charles Macgregor as a co-respondent, the material shews that the plaintiff knew of the alleged misconduct with Macgregor long before the commencement of this action. The reason given for not including the charge is that he did not know until recently the whereabouts of Macgregor. That is scarcely a good reason, especially in the absence of evidence that he made any attempt to ascertain Macgregor's whereabouts. See Dixon p. 122; B. v. B. (1860), 29 L.J. (Mat.) 53.

Moreover the relief sought in the action is a dissolution of marriage on the ground of adultery on the part of the defendant. In the action as now framed there are 5 co-respondents with whom it is alleged the defendant had adulterous intercourse and several times on different occasions with each co-respondent. If the plaintiff succeeds in proving any of the many alleged adulterous acts he would be entitled to the relief sought and there would no necessity for an amendment adding further allegations. On the other hand, if the plaintiff is unable to prove any of the many charges already made I would be disposed to doubt the bona fides of the further charges that are sought to be made, especially in view of the weakness of the material supporting same.

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Again, this matter in one form or another has been hanging over the defendant's head for a long time. It appears that an application was in the first place made to the Parliament of Canada for relief on the part of the plaintiff, but when the committee of the Senate having the matter in hand required the plaintiff to pay the expenses of the defendant and her witnesses so that they could attend at Ottawa and give evidence before the committee, the plaintiff apparently withdrew the application. This action was then launched, and after pleadings were closed and examinations for discovery made on both sides, the case was set down for trial at the last sittings of the Court at Melfort. The plaintiff, for some reason unknown to me, made application at that time to have the trial adjourned till the next regular sittings of the Court at Melfort which was 6 months hence and which takes place on April 12 next. Counsel for the defendant stated on the argument before me—and it was not disputed—that the adjournment of the trial was made peremptory. It is clear that if the amendments sought are allowed the action cannot be tried at the sittings of the Court on April 12, and the next sittings of the Court at Melfort after April 12 would not take place for a further period of 6 months.

Under all the circumstances of the case I am of opinion that the application should be dismissed, and with costs.

Application dismissed.

LEVY AND SONS, LTD., v. WEINISH.

Quebec Superior Court, Lane, J. April 20, 1920.

Limitation of Actions (§IVC—167)—Judicial Abandonment of Property—Curator—Powers of—Acknowledgment of Claim in Dividend Sheet—Interruption of Prescription.

Where a debtor has admitted a claim in his bilan, there is no necessity for the filing of a claim. The acknowledgment of the debt in the dividend sheet by the curator where the creditor files a claim, or where the insolvent acknowledges the claim in his bilan binds the insolvent, just as a payment of a dividend would do, and interrupts a prescription.

The facts of the case are as follows:—

The plaintiff claims $143.40 for food sold and delivered and a bill of exchange for $71.70. He alleges that defendant made judicial abandonment of his property and filed a bilan which contained an acknowledgment of the debt sued upon, and that the curator prepared a dividend

sheet in which it admitted that the defendant was indebted to plaintiff in the amount claimed.

The defendant pleads that the action is prescribed and that the prescription was not interrupted by the acts of his curator who had no authority to bind him.

The plaintiff inscribed in law against this last plea. The Court ordered preuve avant faire droit.

The Superior Court maintained both the inscription in law and the action on its merits, by the following judgment:—

M. Goldstein and J. A. Engel, for plaintiff.

L. C. Meunier, for defendant.

Lane, J.:—Considering that said inscription in law is well founded because the curators under the circumstances set forth in plaintiff's declaration had the power and authority, by including plaintiff in the dividend sheet as creditors of defendant, by virtue of their office as curator and without any special authorisation to that effect from defendant to interrupt prescription of the debt in question; that sec. 2 of defendant's plea is unfounded in law; doth maintain plaintiff's said inscription in law with costs, for the above reasons, and doth reject sec. 2 from defendant's plea; adjudicating on the merits: Whereas it appears from the documents of record and the written admissions of the defendant that the defendant made an abandonment of his property for the benefit of his creditors on January 5, 1914, the plaintiff filed its claim with the curator on January 15, 1914.

The curators prepared a dividend sheet on May 15, 1914, in which they acknowledged the indebtedness of defendant to plaintiff. The action was served on May 10, 1919. It is admitted that the plaintiff's claims amount to $143.40. The only issue between the parties at the present time is the question of costs. Plaintiff's motion to amend its declaration, made at the opening of the trial by adding a clause that it filed its sworn claim against the defendant and his insolvent estate amounting to $143.40, was granted. Defendant admits that such amendment has perfected plaintiff's action, and reduces the issue to the matter of costs. Defendant admitted at the argument that with the action in the form in which it now appears and has appeared since plaintiff's amendment to his declaration at the opening trial, whereby he alleged the filing of his claim with the curators, the plaintiff must succeed and is entitled to judgment against defendant for the amount claimed.

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But defendant contends that had plaintiff not been permitted to amend its declaration by including an allegation that it had filed its claim, plaintiff's action would have been bad in law, and must have failed, and that the action was only valid in law by reason of the amendment, and as this was only made at the trial, that the defect in plaintiff's action existed up to that time, and that defendant should not be condemned to costs against him, but on the contrary that defendant is entitled to costs against plaintiff.

Plaintiff on the other hand contends that even without the amendment to its action which is made at the trial, that its action was good in law, because it is alleged that the curators to the estate, on May 15, 1914, included plaintiff's claim against defendant in the dividend sheet of that date which they prepared and that such including by the curators of plaintiff's claim against defendant in said dividend sheet on said date, and seeing that defendant had plaintiff's claim in his bilan, interrupted prescription of plaintiff's claim, and that plaintiff's action was taken within 5 years from date of such act of interrupting prescription, and hence the action as originally taken was well founded in law, and that plaintiff is entitled to costs.

Considering that with the declaration in its original state, before the amendment, provided all the allegations were true, and they are admitted to be so, they are sufficient to entitle plaintiff to judgment. It has been held time and again that the payment by a curator, where a claim has been filed, interrupts prescription. It has been held that where a debtor has admitted a claim in his bilan, as has been done in the present instance, there is no necessity for the filing of a claim: La Banque d'Hochelaga v. Richard (1908), 18 Que. K.B. 252.

The acknowledgment of the debt in the dividend sheet by the curator where the creditor files a claim, or where the insolvent acknowledges the claim in his bilan binds the insolvent, just as a payment of a dividend could do, and the present acknowledgment interrupted prescription, and hence plaintiff's action is not prescribed; that plaintiff's demand was sufficient without its amendment, and that plaintiff has established its demand entitling it to judgment against defendant for costs as well as for debt; doth condemn defendant to pay to plaintiff the sum of $143.40, with interest on $71.70 from date of service of process, to wit, from May 10, 1919, and on the sum of $71.70 the amount of

the note in question from its due date, to wit, from March 4, 1914, and costs.

Judgment accordingly.

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BIGELOW AND KINSMAN v. WESTMAN.

BIGELOW AND KINSMAN v. WESTMAN.

Saskatchewan King's Bench, Embury, J. July 22, 1921.

Courts (§IIA—151)—District Court Judge—Jurisdiction to make Charging Order—District Courts Act R.S.S. 1920 ch. 40, sec. 45.

Section 45 of the District Courts Act, R.S.S. 1920, ch. 40, gives the District Court Judge jurisdiction to make a charging order on share certificates which entitles a judgment creditor to all the remedies he would have been entitled to, if the charge had been made in his favour by the judgment debtor.

APPLICATION to enforce a charging order made by Hannon, Co. Ct. J., on March 28, 1919.

W. R. Kinsman, for plaintiff.

C. H. J. Burrows, for defendant.

Embury, J.:—It is objected that the Judge had no jurisdiction to make the order. I am of the opinion that under the District Courts' Act, R.S.S. 1920, ch. 40, sec. 45, he had jurisdiction.

The effect of the order is to create a charge on the share certificates and to entitle a judgment creditor to all the remedies he would have been entitled to if the charge had been made in his favour by the judgment debtor. See the Executions Act, R.S.S. 1920, ch. 52, sec. 10, sub-sec. 2.

This application is made to realise under the charge created by the order. In enforcing the order care should be taken that the charge created does not operate so as to create a preference to the disadvantage of the other creditors of the defendant. This would be contrary to the provisions of the Assignments & Preferences Act, R.S.S. 1909, ch. 142. The only way that I can see that it can be assured that the charge could not operate so as to create a preference would be that an order be made for sale by the sheriff; that the proceeds of the sale be paid into Court; that such proceeds be paid out on application to be made after notice shall have been given to all parties interested, and particularly to all execution creditors, and there will be an order accordingly.

This judgment is not to be taken as holding that this application might not have been properly made to the Master in Chambers, nor yet to the Judge of the District Court,

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under sec. 45 of the District Courts' Act, but a Judge of the Court of King's Bench undoubtedly has jurisdiction under sec. 22 of the Executions Act above referred to.

Terms and conditions of sale will be settled by the Master.

Judgment accordingly.

ADAMS v. SUPRENANT.

Nova Scotia Supreme Court, Russell and Longley, JJ., Ritchie, E.J. and Mellish, J. April 2, 1921.

Trover (§IA—6a)—Landlord and Tenant—Termination of Tenancy—Delivery of Key—Chattels Stored in Shed—Distraint for Rent—Illegality—Damages—Tenancies and Distress for Rent Act, R.S.N.S. 1900, ch. 172, sec. 13.

Where a tenant vacates the premises and gives up the key, the symbol of possession he ceases to be in possession and the fact that chattels are left in a shed on the premises at the time they are vacated, cannot prolong the possession, so as to give the landlord a right to distrain such chattels for rent under R.S.N.S. 1900, ch. 172, sec. 13, the Act Respecting Tenancies and Distress for Rent which requires that the distress be made during the possession of the tenant from whom such rent is due.

APPEAL from the judgment of Wallace, Co. Ct. J., dismissing with costs plaintiff's action claiming damages for the wrongful conversion of plaintiff's goods. Reversed.

J. B. Kenny, K.C., for appellant.

J. M. Davison, K.C., for respondent.

Russell, J., agrees with Ritchie, E.J.

Longley, J.:—There is much reading in this case to enable one to justify the findings of the Judge below. The evidence is mostly predominating with the defendant. The plaintiff left some furniture in a barn nearly 3 years before this action and paid no attention to it since. Mrs. Moore also placed some of her goods in this place and they were there when the goods were taken. She left before this, but I think that any goods of hers remaining on the premises would be liable to distraint.

In regard to the plaintiff's goods, it is difficult to find that they were, in view of the plaintiff's statement that he left them there with an understanding with the defendant that they would be all right. I do not think that strictly speaking, according to law, they could be distrained upon. Therefore, I am compelled to concur with my brother Judges in fixing the penalty; that is, $25 for the plaintiff.

Ritchie, E.J.:—This is an action to recover for the conversion of personal property. The defence set up is that

the property was taken under a legal distraint for rent due and in arrears. The plaintiff originally owned the premises and a Mrs. Moore was his tenant. He sold to the defendant during the occupation by Mrs. Moore. The judgment appealed from is as follows:

"I cannot find from the evidence in this case that the distraint was illegal.

I find that the tenant's possession was prolonged for some months, and the effect of such extension of possession permitted the landlord to distrain on the goods in question.

Although the agreement made between Mrs. Moore and the defendant was to expire on March 1, it cannot be successfully contended that Mrs. Moore ceased to be in possession.

If it were necessary to determine the other questions raised, I would find that the value of the goods distrained would not exceed a reasonable charge for the use and occupation of the shed.

The teamster's evidence as to the value of the goods, must be given special weight, in view of the fact that it was to his interest to take everything of any value.

I accept the version of the defendant and his witnesses on all material points."

With respect, I think that the Judge below was mistaken in holding that "it cannot be successfully contended that Mrs. Moore ceased to be in possession." The defendant, whose testimony was accepted by the Judge, says:—

"She was there for December, January, February and until the 20th of March when I got the key." He also says: "I think she moved out a few days before the 20th of March." And he also says: "That was a little before the 20th of March. Mrs. Moore was out of the house at that time; nobody was living there at that time."

The personal property in question was in a shed on the premises; the greater part of it belonged to the plaintiff and the remainder to Mrs. Moore; when she vacated the premises and gave up the key, the symbol of possession, she left this property in the shed, and it is contended that she was therefore in possession long afterwards when the alleged distress was made.

The unsoundness of this contention is so obvious that I do not discuss it.

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The Judge accepted the evidence of the defendant and his witnesses: I, therefore, accept their evidence and upon that evidence it is, in my opinion, very clear that Mrs. Moore was out and the defendant in possession of the premises at the time of the alleged distress. This being the fact, the alleged distress could not legally be made as sec. 13 of Tenancies and Distress for Rent Act, ch. 172 of the R.S., N.S. 1900, requires that it be made "during the possession of the tenant from whom such rent is due." The attempted justification on the ground of the alleged distress in my opinion fails.

In regard to the set off and counterclaim for use of the shed, a careful perusal of the defendant's evidence convinces me that there never was any intention to charge the plaintiff for allowing the goods to remain in the shed; I think it is an afterthought to meet the plaintiff's claim for damages for the conversion of his goods, but, however this may be, there was no privity of contract between the plaintiff and the defendant in respect of the use of the shed. The defendant was dealing with Mrs. Moore in respect of the shed, without any reference to the plaintiff. He says: "As to Mrs. Moore's statement that she told me that Adams owned the furniture in the shed she never told me that, I never knew of anybody other than Mrs. Moore."

The only remaining question is as to damages. The evidence of disinterested witnesses shows that the goods were of small value.

I would allow the appeal with costs and order judgment to be entered for the plaintiff for $25, damages and costs of the action.

Mellish, J.:—I agree. Appeal allowed.

LA CORPORATION des OBLIGATIONS MUNICIPALES v. VILLE de MONTREAL NORD.

Quebec Superior Court, Maclennan, J. January 25, 1921.

Bonds (§IIIB—100)—Interest Coupons Payable in Foreign Country—Character of Money in which Payment is to be made not Specified—Right to be Paid in Money of Country Making Payment.

Where interest coupons of a Canadian corporation are made payable in the United States of America and the character of the money in which payment is to be made is not specified, the holder of such coupons being a Canadian corporation is entitled to be paid in United States currency, and where payment in United States currency has been refused, it is entitled in an action in Quebec to judgment for an amount in Canadian currency equal to what it would have received in United States currency if the payment had been made in the United States when it was due.

ACTION to recover the amount due on interest coupons of a municipal corporation, such coupons being payable in a foreign country and the currency in which they were to be paid not being specified.

Maclennan, J.:—The plaintiff, a Canadian corporation, sues the Town of Montreal North on 15 interest coupons of the face value of $213, which had been detached from bonds or debentures issued by defendant. These coupons were signed by the mayor and secretary-treasurer of the defendant, and one of them is in the following terms:—

"On the first day of May, 1920, the Town of Montreal North, in the Province of Quebec, Canada, will pay to the bearer thirty dollars in gold coin at the holder's option at the chief office of the Bank of Hochelaga, in the city of Montreal, Canada, or at the office of the National Park Bank, in the city of New York, State of New York, U.S.A., or at the office of the Clydesdale Bank, Ltd., in the city of London, England, payments in London, England, to be made at a fixed rate of exchange of $4.86 2-3 to the pound sterling, being six months' interest due on the debenture No. 1194 dated the first day of May, 1918."

The others are similar except as to amount and number. Plaintiff, as the holder, presented the coupons on May 1st, 1920, for payment at the National Park Bank, in the city of New York, and payment was refused. The present action is now brought for $242.82, composed of the face value of the coupons, and the further sum of $29.82 being the exchange payable on the Canadian currency in order to provide the face value of the coupons in New York in American currency. Defendant confessed judgment for $213, and, on July 21, 1920, a judgment was rendered in its favour against defendant for that sum with interest and costs, reserving to plaintiff the right to continue the action for the balance, $29.82, being the cost of exchange. The defendant by its defence denies its responsibility for the cost of the exchange, alleging that its coupons were payable in Canadian currency.

The amount in dispute is not large, but the matter involves a question of considerable importance owing to the great variety of exchange rates and their rapid fluctuations between the countries of the world since the war. The contract here is contained in the coupons which gives the holder the right to present them for payment in the city of New York. The plaintiff exercised that option. The con-

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tract therefore was entered into in Canada for performance in the United States of America, and the question arises:—Are the coupons, under these circumstances, payable in Canadian currency or in American currency?

Taney, C.J., in delivering the judgment of the Supreme Court of the United States, in Andrews v. Pond (1839), 13 Pet. 65, at pp. 77, 78, said:—"The general principle in relation to contracts made in one place to be executed in another is well settled. They are to be governed by the law of the place of performance."

In the case of Crawford v. Beard (1864), 14 U.C.C.P. 87, it was said:—"That the place where the money is payable governs the question as to how it is to be paid, and, as the goods were to be delivered at Cleveland, it is to be presumed they were also to be paid for there on delivery, and that therefore the plaintiff must accept American currency in payment thereof."

The rule in France is stated in 29 Fuzier-Herman verbo Paiement No. 133 as follows:—"C'est a lex loci executionis qui déterminera les espèces dans lesquelles le paiement doit être effectué; ce sera donc, à moins de stipulations contraires, la monnaie légale du pays de l'exécution qui devra être fournie en paiement."

22 American and English Encycl. of Law, ed. 2, p. 542:—"Where the indebtedness is payable in a particular country and the character of the money in which payment is to be paid is not specified, the money used should be the currency of the country where the payment is to be made though the contract is entered into in a different country."

Story on Conflict of Laws, ed. 8, sec. 272a, at p. 368:—"One of the simplest cases to illustrate the rule is the case of a promissory note made and dated in a particular country payable in a currency which has the same name but is of a different value in different countries. The question is, what currency is presumed to be intended by the parties? The answer would seem to be equally certain, the currency of the country where it is payable."

Chitty on Contracts, ed. 16, p. 111, says:—"Where money is due upon a contract, it is to be paid according to the currency of the place or country in which it is stipulated that the payment should be made."

See also Foote's International Law, ed. 4, p. 459.

In view of the foregoing authorities from Canadian, French, American and English sources, it appears to be

settled that the defendant was obliged to pay its coupons in American currency when presented in New York. It did not do so and there remains the question, is the defendant liable for the cost of exchange between Canadian and American currency on the day when the coupons were payable? There is a long line of authorities on this question in England.

In 1805, in Cash v. Kennion, 11 Vesey 314 at p. 316, 32 E.R. 1109, Eldon, L.C., said:—"I cannot bring myself to doubt that where a man agrees to pay £100 in London upon the 1st of January he ought to have that sum there upon that day. If he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had if the contract had been performed."

The question again arose in 1831, in the case of Scott v. Bevan (1831), 2 B. & Ad. 78, 109 E.R. 1073, which was an action brought in England to recover the value of a given sum of Jamaica currency upon a judgment obtained in that island, and it was held that the value is that sum in sterling money which the currency would have produced according to the actual rate of exchange between Jamaica and England at the date of the judgment.

These two cases were approved by the Court of Appeal, in 1898, in Manners v. Pearson & Son, [1898] 1 Ch. 581, 67 L.J. (Ch.) 304. They were followed in 1920 by Bailhache, J., in Barry v. Van Den Hurk, [1920] 2 K.B. 709, 89 L.J. (K.B.) 899, on an American claim; by McCardie, J., in Lebeaupin v. Richard Crispin & Co., [1920] 2 K.B. 714, 89 L.J. (K.B.) 1024, on a Canadian claim, and by the Court of Appeal, Bankes, L.J., Scrutton, L.J., and Eve, J., in Di Ferdinando v. Simon Smits & Co., Ltd., [1920] 3 K.B. 409, 89 L.J. (K.B.) 1039, on an Italian claim, which were all decided on the principle that a creditor who brings action in an English Court, to enforce payment of a claim for a fixed amount due abroad, is entitled to recover in English currency whatever sum, at the actual rate of exchange prevailing at the due date of the debt, would produce the amount of the claim in the currency of the place where it was due and payable. This principle is founded on justice. It gives the creditor just as much as he would have had if the contract had been performed. By the Civil Code (1152 and 1153) payment must be made at the place indicated in the contract and the debtor must pay the expenses attend-

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ing payment. The words "expenses attending payment" are broad enough to include the cost of exchange in the conversion of Canadian into American currency when a Canadian debtor has to make payment of his debt in the United States. In the absence of any provision in the contract providing for a fixed rate of exchange; there is none here regarding payments in New York, although there is as to England, the rate which prevailed when the debt became payable must be applied.

In the present case it is admitted that it would take $242.82 in Canadian currency on May 1, 1920, to produce $213 in American currency in New York, and it follows therefore that plaintiff's action for $242.82 Canadian currency, the only currency in which this Court can give judgment, should be maintained. The plaintiff has already obtained judgment for $213, and there will now be judgment in its favour for the balance, $29.82, with interest and costs.

Judgment:—The Court, having heard the parties by their respective counsel, and their witnesses, upon the merits of the cause; having examined the pleadings and documents of record, and deliberated:—

Whereas plaintiff alleges in its declaration that it is the holder of 15 coupons of the defendant on bonds or debentures issued by defendant, said coupons amounting to the sum of $213 each payable to holder on May 1, 1920, and at the option of the holder payable at the office of the Bank of Hochelaga, in the city of Montreal, or at the office of the National Park Bank, in the city of New York, in the United States of America; that plaintiff presented the said coupons at the National Park Bank, at New York, on May 1, 1920, and that payment of the said coupons was refused; that payment of the said coupons in New York, in view of the rate of exchange on May 1, 1920, would have given plaintiff an additional sum of $29.82 in addition to the face value of said coupons, forming a total sum of $242.82 which plaintiff claims from defendant and for which amount it prays for judgment with interest and costs;

Whereas the defendant by its defence relies upon the terms of said coupons and alleges that it is only liable for the face value thereof, $213, with interest thereon in Canadian currency; that it never intended and has not contracted to pay more than the face value of the said coupons and is not liable for the exchange which would have the effect of

increasing the claim of the plaintiff, and the variations in the rate of exchange do not deprive defendant of the right to pay its debt in Canadian currency and in bringing action in this Court the plaintiff has made its option for payment in Canadian money; that defendant has confessed judgment for the face value of said coupons with interest and costs, the whole in Canadian currency, and said confession is sufficient and should be maintained, and the defendant prays that said confession of judgment be declared sufficient and maintained and the action of plaintiff for the surplus be dismissed with costs; the plaintiff by its answer denies certain of defendant's allegations and alleges that it has refused to accept the confession of judgment and that plaintiff, as the holder of the coupons, had the absolute right to require payment in New York, and plaintiff concludes for the dismissal of said defence with costs;

Considering that plaintiff, on May 1, 1920, was the holder of 15 interest coupons of defendant of the face value of $213, payable at the holder's option at the Bank of Hochelaga, in the city of Montreal, or at the office of the National Park Bank, in the city of New York, in the State of New York, U.S.A., or at the Clydesdale Bank Ltd., in the city of London, England; that plaintiff presented said coupons for payment, on May 1, 1920, at the National Park Bank, in the city of New York; that plaintiff was entitled to receive for said coupons, on May 1, 1920, in the city of New York, $213 in American currency; that plaintiff is not entitled to have and receive from defendant, in Canadian currency, a sum of money which, at the actual rate of exchange prevailing between Montreal and New York on May 1, 1920, would produce the amount of said coupons in American currency on the date when they were due and payable; that it is established that it would take $242.82 in Canadian currency on May 1, 1920, to produce the face value of said coupons in New York, and that plaintiff by the present action is entitled to have and recover from said defendant said sum of $242.82; that on the confession of judgment filed herein judgment was rendered in favour of plaintiff against defendant for $213, reserving to plaintiff its right to continue the action for the balance of its claim; plaintiff is entitled to judgment for the balance of $29.82;

Doth adjudge and condemn defendant to pay to plaintiff the sum of $29.82, with interest and costs.

Judgment for plaintiff.

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Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. November 4, 1921.

Constitutional Law (§IA—20)—Inquiries Act. R.S.C. 1906 ch. 104—Order in Concil and Commission to Inquire into Handling and Marketing of Grain—Validity—Injunction to Restrain—Apprehension that Commission will Exceed Jurisdiction.

The Dominion Inquiries Act R.S.C. 1906 ch. 104 by which the Governor-in-Council is empowered to cause inquiry to be made into and concerning any matter connected with the good government of Canada is intra vires the Dominion Parliament, but only gives the Governor-in-Council authority in regard to matters within the jurisdiction of the Dominion Parliament as enumerated in sec. 91 of the B.N.A. Act; In regard to matters exclusively assigned to the Provincial Legislatures by sec. 92 of the B.N.A. Act, the Act does not confer on the Governor-in-Council any jurisdiction.

Where the Dominion Parliament has undoubted authority to deal with part of the subject matter of the inquiry such as the grading and weighing of grain under head 17 sec. 91 of the B.N.A. Act, the Governor-in-Council has jurisdiction to appoint the Commission, and an Order in Council appointing the commission is valid, but an attempt on the part of the Commission to encroach upon matters coming exclusively within the jurisdiction of a Province cannot be enforced.

[Kelly & Sons v. Mathers (1915), 23 D.L.R. 225, 25 Man. L.R. 580, followed; Att'y Gen'l for Australia v. Colonial Sugar Refining Co., [1914] A.C. 237, 83 L.J. (P.C.) 154, distinguished.]

Injunction (§II—75)—Commission to Inquire into Handling and Marketing of Grain—Inquiries Act R.S.C. 1906, ch. 104—Apprehension that Commission will Exceed Jurisdiction.

Where a Commission has been validly appointed under the Inquiries Act R.S.C. 1906, ch. 104, mere apprehension that the Commission will attempt to deal with matters outside the proper scope of its authority is not sufficient to justify an injunction restraining the whole inquiry.

APPEAL by defendant from a judgment of Curran, J., making permanent an injunction restraining the Commission appointed by Order in Council under the Inquiries Act, R.S.C. 1906, ch. 104, to inquire and report on the handling and marketing of grain, from proceeding with the inquiry. Reversed.

E. L. Newcombe, K.C., and C. P. Wilson, K.C., for the Minister of Justice.

J. P. Foley, K.C., for the Commissioners and other appellants.

A. B. Hudson, K.C., for the North West Grain Growers Ass'n.

H. J. Symington, K.C., for United Grain Growers Ltd.

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Perdue, C.J.M.:—A summary of the pleadings and of the questions raised in these actions is given in the judgment of Cameron, J.A., post 556. An interim injunction had been ordered by Galt, J., and the application in each case to continue the injunction made to Curran, J., was on the consent of the parties turned into a motion for judgment. The decision from which this appeal is brought turned upon the constitutional validity of the Inquiries Act, R.S.C. 1906, ch. 104, the Order in Council and the commission issued in pursuance of it.

The Order in Council, which was passed on April 12, 1921, recites that the Committee of the Privy Council had before them a report of the Minister of Trade and Commerce submitting that he had had under consideration the present methods and system of handling and marketing grain, particularly wheat, in Canada and the possibility of improvements therein, etc., and recommending an inquiry into the whole matter. The Order in Council was therefore passed under the provisions of Part 1 of the Inquiries Act, R.S.C. 1906, ch. 104. Pursuant to this a commission was issued appointing Hon. J. D. Hyndman, W. D. Staples, J. H. Haslam and Lincoln Goldie commissioners to conduct the inquiry directed by the Order in Council.

Section 2 of the Inquiries Act, above referred to, is as follows:—"The Governor-in-Council may, whenever he deems it expedient, cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof."

Curran, J., quoted this section and then proceeded:

"The question what is 'a matter connected with the good government of Canada' is sometimes a difficult one to answer. If it can be shewn that the matters authorised by this Order in Council to be inquired into are really connected with the good government of Canada or to the conduct of any part of the public business thereof, unquestionably the Order in Council could be supported in law as a valid exercise of the powers legally vested in the Federal executive by the Inquiries Act."

With this I agree, but I would go further and say that if any matter authorised by the Order in Council to be inquired into is connected with the good government of Canada, the Order in Council is valid as to that inquiry.

The judgment proceeds:—

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"I take it this statute cannot confer on the Governor-General in Council any powers of investigation into matters over which the Parliament of Canada has not jurisdiction under sec. 91 of the B.N.A. Act. Power to make laws for the peace, order and good government of Canada is given to the Parliament of Canada by sec. 91, but that power is restricted and relates only to all matters not coming within the classes of subjects assigned by the Act exclusively to the Provincial Legislatures, amongst which are, notably, 'property and civil rights in the Province.' If, then, any inquiry is attempted or proposed under the Inquiries Act by the Federal powers into a matter ostensibly connected with the good government of Canada, yet if it relates to property and civil rights in the Province, can it be supported? I think not."

If the matter falls within any of the subjects enumerated in sec. 91 of the B.N.A. Act, it comes under Dominion jurisdiction. That section assigns to the Dominion Parliament the power to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the Provinces, and for greater certainty, but without restricting the generality of the foregoing terms of the section, the exclusive legislative authority of the Parliament of Canada is extended to the 29 classes of subjects enumerated. I do not think that there is much difference in effect between the expression "peace, order and good government" and "good government" simply. An inquiry in respect of any matter coming under one of the 29 classes of subjects enumerated in sec. 91 would be a "matter connected with the good government of Canada."

The trial Judge gives his reasons for answering in the negative the question he propounded. He says [referring to Re The Board of Commerce Act, etc. (1920), 54 D.L.R. 354, 60 Can. S.C.R. 456]:—

"I incline to the view expressed by Duff, J., [54 D.L.R. 354 at p. 390] upon the power of the Parliament of Canada under the introductory clause of sec. 91 to make laws for the peace, order and good government of Canada. He says:—'Two conditions govern the legitimate exercise of this power: First—it is essential that the matter dealt with shall be one of unquestioned Canadian interest and importance as distinguished from matters merely local in one of the Provinces; and, secondly, that the legislation shall

not trench upon the authority of the Province in respect of the matters enumerated in sec. 92.' "

Att'y-Gen'l of Ontario v. Att'y-Gen'l for Canada, [1896] A.C. 348, at p. 360, 65 L.J. (P.C.) 26, is quoted as one authority for the foregoing proposition, to which I might add the further dictum of Lord Watson at p. 360:—

"But to those matters which are not specified among the enumerated subjects of legislation, the exception from s. 92, which is enacted by the concluding words of s. 91, has no application; and, in legislating with regard to such matters, the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by s. 92."

The Judge also refers to Montreal v. Montreal Street R. Co., 1 D.L.R. 681, at pp. 686, 687, [1912] A.C. 333, 13 C.R.C. 541, 81 L.J. (P.C.) 145, and John Deere Plow Co. v. Wharton (Annotated), 18 D.L.R. 353, at pp. 356, 357, [1915] A.C. 330, 84 L.J. (P.C.) 64. But in the cases he cites the legislative authority of the Dominion to enact certain laws was questioned. In considering the Order in Council and commission issued in pursuance of it, we are not dealing with a legislative act of the Parliament of Canada the constitutional validity of which is questioned, but only with an inquiry in regard to certain matters connected with the good government of Canada. If the inquiry extended to matters not strictly within the legislative powers of Parliament the commission might have no power to enforce the attendance of witnesses, but this would not necessarily render the whole inquiry invalid. See the comments of Howell, C.J.M., in Kelly v. Mathers (1915), 23 D.L.R. 225 at pp. 231, 232, 25 Man. L.R. 580; also Clough v. Leahy (1904), 2 Com. L.R. 139.

If the inquiry relates to any of the classes of subjects assigned to the Dominion Parliament by sec. 91, authority for the inquiry is given by sec. 2 of the Inquiries Act. Even if, as I have above intimated, the Order in Council and commission covered only one of these subjects it would be valid, but the powers of the commission to compel witnesses to attend and give evidence should be limited to that subject.

The purpose of the Order in Council and commission appointed under it is expressed to be "an enquiry . . . into and for a report upon the subject of handling and marketing of grain in Canada and in particular and without restricting

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the generality of the foregoing terms upon the following matters:"

No. 1: "The grading and weighing of grain." The weighing of grain comes under head 17 of sec. 91 of the B.N.A. Act. Grading is intimately connected with weighing. The higher grades of grain weigh more to the measured bushel than those of the lower grade: See the Canada Grain Act, 1912 (Can.), ch. 27, secs. 105-107, where the weight of the measured bushel is made an element in fixing grades. No. 2: "The handling of grain in and by country elevators and from country points." This involves the weighing or measuring of grain, head 17, sec. 91. It might also involve the giving of warehouse receipts (banking), the furnishing of cars and loading and unloading of them (railways). No. 3: "The Grain Exchanges." This might come under head 2 of sec. 91, "The Regulation of Trade and Commerce." No. 4: "Financing of grain." This would come under head 15 of sec. 91, "Banking," in particular the issue of warehouse receipts; see Tennant v. Union Bank of Canada, [1894] A.C. 31, 63 L.J. (P.C.) 25. Or it might fall to some extent under heads 18 and 19 of sec. 91. No. 5: "The handling of grain at terminals and the charges therefor." This would involve heads 15, 17 and probably 29 (Railways). No. 6: "The operation of public and private elevators and Eastern public elevators." This would come under the general power conferred by sec. 91, read together with head 2 of that section. It would also involve the weighing of the grain into and out of the elevators, and the giving of warehouse receipts. No. 7: "Lake shipments" is covered by head 10 of sec. 91, "Navigation and Shipping." No. 8: "The shipment of grain to Atlantic and Pacific ports." This would come under head 10 of sec. 91, and perhaps also under Dominion railway law, head 29.

It would appear, therefore, that there are matters set out in the Order in Council and commission concerning which the Governor in Council might cause an inquiry to be made under Part 1 of the Inquiries Act. In that view, the Order in Council and commission are valid.

I have no doubt as to the power of the Dominion Parliament to enact the Inquiries Act, R.S.C. 1906, ch. 104. The main objection taken is that the expression "good government of Canada" in sec. 2, taken in its widest sense, includes provincial subjects of legislation. The expression was intended to apply to acts and matters coming within the legis-

lative jurisdiction of the Parliament of Canada as that jurisdiction is defined in the B.N.A. Act and interpreted by authoritative judicial decisions. We must assume that Parliament did not intend to exceed its powers in passing the Act. The intention was that commissions appointed under the Act should confine their inquiries to matters into which the Government of the Dominion might lawfully inquire.

The origin of the Manitoba Inquiries Act, and incidentally of the present Dominion Act, is discussed by Howell, C.J.M., in a case decided by this Court: Kelly v. Mathers, 23 D.L.R. 225, 25 Man. L.R. 580. An Act of the Province of Canada, 1846, ch. 38, was the foundation of the present Act. The original Act is also found in the consolidation: Con. Stat. of Canada, 1859, ch. 13. In 1868, the Act was reframed and re-enacted by (Can.), ch. 38, as a law of the Dominion of Canada. The expression "the good government of this Province" in the older Act was changed to "the good government of Canada," shewing that the inquiry was to be directed to a matter of Dominion interest and jurisdiction. The statute, 1846 (Can.), ch. 38, did not in express words empower the executive Government to issue a commission of inquiry. It assumed that the power already existed and it conferred power to summon witnesses, to require them to produce documents, to enforce the attendance of witnesses and to compel them to give evidence. The Manitoba Act is in similar form. See R.S.M., 1913, ch. 34.

In the absence of a general statute empowering the issue of commissions of inquiry, it would appear that the Governor in Council might, in the exercise of the prerogative of the Crown, issue a commission directing inquiries to be instituted in the public interest: Ex parte Leahy (1904), 4 S.R. (N.S.W.) 401, at p. 417; Clough v. Leahy, 2 Com. L.R. 139. The statute, however, greatly enlarges this power, so that witnesses may be compelled to attend and give evidence.

For the reasons stated in the judgments given by the majority of the Court in Kelly v. Mathers, above referred to, the judgment of the Privy Council in Att'y-Gen'l for Australia v. Colonial Sugar Refining Co., [1914] A.C. 237, 83 L.J. (P.C.) 154, is not, by reason of the difference between the powers possessed by the Dominion Parliament and those conferred on the Parliament of the Commonwealth, applicable to the present case as an authority for the issue of an

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injunction. Kelly v. Mathers, supra, was approved and followed by the Court of Appeal for British Columbia in Re Public Inquiries Act (1919), 48 D.L.R. 237, 33 Can. Cr. Cas. 119, 27 B.C.R. 361.

The present Dominion Act, R.S.C. 1906, ch. 104, gives power to the Governor in Council to cause inquiry to be made and to appoint commissioners to make it. The inquiry may be concerning any matter connected with the good government of Canada; or as provided in Part II., an investigation of any department of the civil service of Canada may be directed. The manifest intention of the Act is that its powers should only be exercised in inquiring into matters of Dominion jurisdiction. I think, however, that an attempt upon the part of the commissioners unwarrantably to encroach upon matters coming exclusively within the legislative jurisdiction of a Province would be in excess of their powers and could not be enforced by them. Each case of alleged encroachment on private rights or of acting in excess of authority may be dealt with as it arises. In Clough v. Leahy, 2 Com. L.R. 139, at pp. 162, 163, Griffith, C.J., in giving the judgment of the High Court of Australia, said:—

"The purpose in the present case has been shewn to be not unlawful. The only question then is, the Commission having been issued for purposes not unlawful, did the respondent give any reasonable excuse for refusing to be sworn? This was the charge against him; and of it he was clearly guilty. If the charge against him had been that, having been sworn, he refused without reasonable excuse to answer questions put to him, an entirely different set of considerations would arise, upon which it would be unwise to speculate. What is a reasonable excuse for refusing to give information is a matter which may well be dealt with when it arises."

Curran, J., made the injunction permanent upon the ground that the inquiry as directed was beyond the powers of the Federal Government. For the reasons I have stated I am of the opinion that the injunction cannot be upheld upon that ground. If, during the progress of the inquiry, questions are asked or investigations are attempted concerning matters outside the proper scope and authority of the commission, these can be dealt with as they arise. But the mere apprehension that they will arise and that the commissioners will attempt to exceed their powers in en-

forcing unwarranted demands is not sufficient to justify an injunction restraining the whole inquiry.

It will be ordered that the appeal be allowed. There will be a declaration that the Order in Council and the commission are valid. The injunction therefore must be dissolved. The defendants, other than the Minister of Justice, are entitled to the costs of this appeal.

Cameron, J.A.:—In the first-mentioned action the plaintiffs are certain corporations and firms carrying on the business of elevator operators, grain dealers, grain commission merchants and otherwise dealing in grain in the Province of Manitoba and elsewhere. The defendants are Hyndman, Staples, Haslam and Goldie, the commissioners named in the Order in Council hereafter referred to; Birkett, the secretary of the said commissioners; Price, Waterhouse & Co., chartered accountants, and C. J. Doherty, Minister of Justice and Attorney-General for Canada.

The statement of claim sets out that, purporting to act under the authority of the Public Inquiries Act, Statutes of Canada, and amendments thereto, the Governor in Council on April 12, 1921, passed an Order in Council which is recited in full. It is therein recommended by the Minister of Trade and Commerce that a commission be issued to the commissioners above named, "to inquire into and report upon the subject of handling and marketing of grain in Canada and in particular, but without restricting the generality of the foregoing terms, upon the following matters: (1) The grading and weighing of grain; (2) the handling of grain in and by country elevators and from country points; (3) the grain exchanges; (4) financing of grain; (5) the handling of grain at terminals and the charges therefore; (6) the operation of public and private elevators and Eastern public elevators; (7) lake shipments; (8) the shipment of grain to Atlantic and Pacific ports.

The commissioners were therein authorised by the letters patent to be issued to engage the services of accountants, engineers and other technical advisers, clerks and other assistants to aid them in such inquiry, and to depute such accountants, engineers and technical advisers or other qualified persons to inquire into any matter within the scope of the commission with the same powers as those of the commissioners, and the commissioners were further directed to report to the Governor-General in Council the results of

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their investigation, the evidence taken by them and any recommendations they might choose to make thereon.

A commission was accordingly issued to the commissioners for the purposes set forth in the Order in Council, giving the commissioners the powers, under the said Act, of summoning witnesses, requiring them to give evidence on oath or affirmation and to produce such documents and things as the commissioners should deem requisite and generally clothing them with all the powers specified in the said Act.

It is alleged in the statement of claim that the commissioners gave public notice of their intention to exercise their said powers of summoning and examining witnesses and compelling production, and that they were authorised to employ accountants and other assistants to aid them and to depute to them their own powers with respect to procuring the attendance of witnesses and the production of documents.

The following allegations further appear in the pleadings:

The defendant Birkett proceeded to make an inquiry at Fort William, where he administered an oath to a certain witness and received his evidence in a certain manner.

The commissioners have publicly announced their intention of holding public meetings in Manitoba and elsewhere to prosecute their inquiries and have carried out such intention, and on or about May 16 last they delivered to such of the plaintiffs as are described as country elevator operators and others a printed list of questions with directions that the same should be answered in writing and on oath and return the same so answered to the commissioners at Winnipeg before June 1, 1921. These questions are set forth fully in the statement of claim.

On May 16 last, the commissioners requested the North West Grain Dealers Ass'n to furnish them with certain information as to their history and internal management, financial dealings and instructions to agents from September 1, 1920, to April 30, 1921.

On May 17, 1921, the commissioners delivered to such of the plaintiffs as are called "track buyers" a printed list of questions to be answered in writing and verified on oath, and this questionnaire, with the instructions, is set out in full.

On the same day the commissioners sent out to such of the plaintiffs as are described as "commission merchants"

a printed list of questions to be answered in writing and verified, and this questionnaire is set out in full.

Shortly after the last-mentioned date the commissioners announced their intention of sitting to make the inquiries directed and for the purpose of hearing matters of complaint on the part of any persons against the plaintiffs and others.

The commissioners have already held public meetings for the purposes aforesaid at certain places in this Province and elsewhere and compelled and procured certain persons to give evidence and compelled servants and agents of the plaintiffs and others to appear and submit to examination touching the affairs and business of the plaintiffs and to produce the books and records of the plaintiffs.

The commissioners and the defendant Birkett have invited and allowed persons to appear before them and prefer charges against some of the plaintiffs.

The defendant Birkett on behalf of the commissioners issued a written order and demand to the plaintiffs requiring the production of all correspondence in connection with their elevator business and stating that Price, Waterhouse & Co. had been authorised to make certain investigations and that Price, Waterhouse & Co. had made a demand for such correspondence and that it was the intention to remove such correspondence to the custody of the commissioners.

The commissioners have publicly stated their intention to subpoena the officers and servants of the plaintiffs to appear before them and give evidence as to the plaintiffs' business, including the private details thereof, and threaten to compel the plaintiffs to produce their books, documents and papers of every kind.

The commissioners have further proclaimed their intention of exercising the power of punishment of any person who fails to comply with their demands and have invited persons to lodge complaints with them against the plaintiffs.

The plaintiffs assert that the said Order in Council and commission are wholly illegal and without lawful authority and that the commissioners are proceeding illegally and without lawful right to injure the plaintiffs in their business and cause them irreparable loss in compelling them to disclose their private affairs to the public and their competitors.

The plaintiffs claim they are carrying on their respective businesses within the Province of Manitoba according to the laws of the Provinces of Manitoba, Saskatchewan and

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Alberta relating to their respective properties and civil rights. It is asserted that the Parliament of Canada has illegally and without lawful power interfered with the businesses of the plaintiffs by the Canada Grain Act, 1912, ch. 27, and amendments thereto by their restrictions and limitations on the free enjoyment of their properties and civil rights within the said Provinces and that the rules and regulations of the commissioners affect the said properties and rights and are therefore illegal and ultra vires of the Parliament of Canada.

The Governor-General in Council, it is claimed, in passing the said Order in Council, has erroneously assumed powers of dealing with the plaintiffs' businesses as being matters affecting the good government of Canada.

It is charged that the defendants other than the Minister of Justice threaten to continue to do the unlawful matters and things alleged, which are declared to be wholly illegal and an unlawful interference with the plaintiffs' properties and civil rights to the irreparable loss and injury of the plaintiffs.

The plaintiffs ask for a declaration that the Canada Grain Act and amendments are ultra vires of the Parliament of Canada, that the Order in Council and the said commission are illegal and unlawful, wholly or to the extent that they interfere with the plaintiffs' properties and civil rights or to the extent that they purport to authorise the defendants other than the Minister of Justice to commit any of the acts complained of.

They also ask for an injunction to restrain the defendants other than the Minister from compelling the plaintiffs to answer the said questionaires, and to produce the plaintiffs' books and papers; from compelling the plaintiffs' servants and agents to attend before them to give evidence on oath; from removing from the possession of the plaintiffs their books and papers; from continuing their interference with the properties and civil rights of the plaintiffs; from hearing complaints on oath against the plaintiffs, and from hearing such complaints without giving due notice to the plaintiffs.

The above allegations of fact set forth in the statement of claim were verified by affidavits made on information and belief.

The statement of claim in the action brought by the

United Grain Growers, Ltd., is in substance identical with the foregoing and the two actions can be treated as one.

On this material a motion for an injunction was made before Galt, J., who, on June 12, 1921, made a restraining order, which was to remain in force until such time as the motion to continue the same should be made.

A motion was accordingly made later in June before Curran, J., upon the hearing of which there were read the statement of claim, the minutes of the various meetings held by the commissioners, which were filed, and the statement of the commissioners, also filed, and counsel for all the defendants admitted all the allegations of fact contained in the statement of claim excepting those charging them (other than the Minister of Justice) with acts alleged to be unwarranted, illegal and beyond the powers conferred by the Order in Council, and thereupon it was agreed by all parties that the hearing of the said motion should be treated as a motion for judgment.

On July 11, Curran, J., gave judgment in favour of the plaintiffs, declaring the said Order in Council and commission unlawful and invalid and continuing and making permanent the restraining order of Galt, J., and formal judgment was entered accordingly, from which the defendants, other than the Minister of Justice, and the Minister of Justice separately appeal.

In his reasons for judgment Curran, J., refused to deal with the question raised on the pleadings involving the validity of the Canada Grain Act and that subject was not pressed on our consideration. He held "that the Order in Council is illegal for the reason that it is beyond the powers of the Governor in Council to pass. The commission is consequently illegal and invalid also, and the commissioners ought to be restrained from further acting in the premises."

An examination of the pleadings and material before the Court leads to consideration of the question whether or not there are presented sufficient grounds on which the Court should exercise its discretion and grant the relief asked. The jurisdiction to grant an injunction is one that is, and must necessarily be, exercised in the discretion of the Court. What legal rights of the plaintiffs in this case have been violated or threatened with violation? In considering the allegations in the statement of claim it is difficult to see

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what these are or in what respect the plaintiffs could suffer more than inconvenience from the actions or declared intentions of the commissioners and the remedy for any excess of jurisdiction by them is one readily available. The plaintiffs can, if they are so advised, refuse to answer the questionnaires, to attend to be examined or to produce documents and their rights in so doing can be adequately maintained in subsequent and appropriate proceedings.

The plaintiffs rely strongly on Att'y-Gen'l for Australia v. Colonial Sugar Refining Co., [1914] A.C. 237, 83 L.J. (P.C.) 154, where it was held that the royal commission in question was invalid because the Acts under which it was constituted were ultra vires. In the Commonwealth Courts, 15 Com. L.R. 182, it had been held by a majority of the Court that the Acts were valid but that the commission should be construed as limited to matters within the powers of the Commonwealth Parliament and that the plaintiffs were entitled to an injunction to restrain the commissioners accordingly. In the Privy Council their Lordships agreed that if the plaintiffs were entitled to succeed it was, under the circumstances of the case, right to grant an injunction. Distinctions can be drawn between the facts in that case and the constitutional provisions relevant thereto and those involved in the case before us; but, in the view I take of it, it is not necessary to dwell on them.

In this case a declaration of right is asked as in the Colonial Sugar case and other cases referred to. If the Commission now in question and the legislation on which it was issued are valid the question of an injunction is no longer of any importance. Is this a case where the Court should make such a declaration?

The Court has the power to make a mere declaratory judgment and in the exercise of its discretion will have regard to all the circumstances of the case: per Cozens-Hardy, M.R. in Dyson v. Att'y-Gen'l, [1911] 1 K.B. 410, 80 L.J. (K.B.) 531.

"It is admitted that while the Court has jurisdiction to make a declaration in such a case as the present the exercise of the jurisdiction is discretionary," as was stated by Peterson, J. in Smeeton v. Att'y-Gen'l, [1920] 1 Ch. 85, at p. 96, 88 L.J. (Ch.) 535, who distinguished the case before him from the Dyson case on the ground that the proceedings of the officials to which objection was therein

taken affected great numbers of persons and were of widespread interest. The discretion, he said, must be exercised with great care and the granting of a declaration is by no means a matter of course.

The difficulties in the way of considering and deciding abstract questions of law have been frequently pointed out, and emphasised by our own Supreme Court and by the Judicial Committee of the Privy Council. But the different issues and matters that are raised by the pleadings and were discussed at length on the argument seem on reflection and analysis to become much simplified. We are not called upon to consider the question of the validity of the Canada Grain Act or to lay down in advance principles to guide the commissioners in the exercise of their powers. The real issue involved lies not in trying to ascertain the line of division between secs. 91 and 92 Constitutional Act but in determining in the validity or invalidity of the commission and the statutory authority under which it is issued. If the Dominion Inquiries Act is intra vires of the Dominion Parliament and the Order in Council is within its provisions it must follow that this appeal is well taken. It is not to be denied that a final decision on the validity of the Act and Order in Council would be at least highly convenient for the parties and of undoubted public interest as well. The circumstances appear to be such as to justify the Court in making a declaratory order.

It was argued that the Inquiries Act is ultra vires of the Dominion Parliament. It was contended that the Act is so inclusive in its terms that it can and must be read as authorising inquiries into matters reserved for the exclusive jurisdiction of the Provincial Legislatures by the B.N.A. Act. Section 2 of ch. 104, R.S.C., 1906, (The Inquiries Act) says [See judgment of Perdue, C.J.M. ante, p. 549.]

The presumption surely is that Parliament intended to confine the provisions of the Act to subjects within its legislative powers. That presumption gathers force from the use in sec. 2 of the words "good government of Canada." What constitutes Canada is defined by sec. 3 of the B.N.A. Act. By sec. 91 the powers of the Dominion Parliament comprise those of making laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces.

It was argued, however, that this presumption does not

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arise in the case of the Inquiries Act in view of the decision of the Privy Council in Att'y-Gen'l for Australia v. Colonial Sugar Refining Co., supra, reversing the judgment of the High Court of Australia (1912), 15 Com. L.R. 182. That decision was fully discussed before this Court in Kelly v. Mathers, 23 D.L.R. 225 at p. 229, 25 Man. L.R. 580, where the validity of a commission issued under the Provincial Inquiries Act (R.S.M. 1913, ch. 34) was impeached. It was there held by a majority of the Court that the Act was intra vires of the Provincial Legislature and the injunction sought was refused. In the judgments delivered by the majority members of the Court the decision in the Colonial Sugar case was distinguished on the grounds that the provisions of the constitutional Acts of Australia and Canada were fundamentally different. The commission in question in that case was one issued under Acts of the Commonwealth and purported to enable the commissioners to compel answers generally to questions, to order the production of documents or otherwise compel compliance with their requisitions. It was held by the Privy Council, [1914] A.C. 237, that "The Royal Commissions Act, 1902, and the Royal Commissions Act, 1912, are ultra vires and invalid so far as they purport to enable a Royal Commission to compel answers generally to questions or to order the production of documents or otherwise to compel compliance by members of the public with its requisitions. The power to impose new duties on the subjects of, or on people residing in, any individual State was, before the Federation, vested in the Legislature of that State, and the above Acts in the form in which they were passed by the Commonwealth Parliament cannot be brought within the powers which are by clause 51 of the Constitution, exclusively vested in that Parliament.

The principle of the Constitution of the Commonwealth embodied in the Act of 1900, is federal in the strict sense of that term, namely, in that the federating States, while agreeing to a delegation of a part of their powers to a common government, preserved in other respects their individual Constitutions unaltered."

Viscount Haldane, L.C., points out, at pp. 252 et seq., that the Australian constitution is Federal in the strict sense of the term, whereas the Canadian constitution, according to the true view, constitutes, not a federation of hitherto self-contained states but a fresh departure, and establishes new Dominion and Provincial Governments with defined

powers and duties both derived from the Imperial Act which was their legal source. Viscount Haldane's judgment declaring the Commonwealth Inquiries Act invalid is therefore to be read as holding that that statute, read in its ordinary and clear language, while in some respects within the legislative power of the Commonwealth, yet in chief and mainly giving rights far beyond its legislative power was ultra vires, and that the case, therefore, is not an authority for the proposition that the Act must set forth in specific language the subject upon which the commissioners may enforce the attendance of witnesses. Such was the conclusion of the late Howell, C.J.M., in Kelly v. Mathers, supra, shared by the other members of the Court with the exception of the late Richards, J.A., and, in my opinion, nothing was advanced on the argument before us in this present case to unsettle the soundness of that view, which was adopted by the British Columbia Court of Appeal in Re Public Inquiries Act, (1919), 48 D.L.R. 237, 27 B.C.R. 361, 33 Can. Cr. Cas. 119. Where a Dominion Act is involved that view is strengthened by the assignment in the B.N.A. Act of residuary powers to the Dominion Parliament. The words in the Inquiries Act, "good government of Canada," are broad, general and designedly used, and extend to all matters and considerations that come within the Federal jurisdiction. In my judgment the Act, which has stood so long unquestioned is unimpeachable and the Order in Council and the commission are within its authority. If there be any attempt on the part of the commissioners to exceed their proper authority or to trespass on the strictly provincial field it can be met as the occasion arises. There is nothing to prevent the issue of a Dominion commission of inquiry or to prevent such commission from gathering information on almost any conceivable subject, such, for instance, as that of our provincial land titles system and its administration; but the power to compel the attendance of witnesses on such an inquiry would be another matter entirely. That there are subjects of investigation expressly covered by the terms of the Order in Council and commission which come within sec. 91 of the B.N.A. Act is clear beyond question. This branch of the subject has been dealt with by the other members of the Court, whose judgments I have read. That being the case the Order in Council and commission are valid and this injunction order, based on their alleged invalidity, cannot stand.

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An objection was taken that one of the commissioners was disqualified and that, as the commission was issued to four persons, the whole commission became ineffective and inoperative. It is, in my opinion, impossible to give effect to this argument.

The appeal must be allowed, a declaration of the validity of the Order in Council and commission must be made and the injunction must be dissolved.

Fullerton, J.A.—The application to continue the injunction in this case was by consent turned into a motion for judgment. The formal judgment from which this appeal is taken declares:—that the said Order in Council and the commission issued thereunder. . . were and are unlawful and invalid, and then proceeds to grant an injunction in the widest possible terms.

The trial Judge who heard the motion was of the opinion that the subject-matter of the inquiry related not to the "good government of Canada" but to property and civil rights and that it was therefore not within the competence of the Dominion to make such inquiry.

The commission authorised an inquiry into "the subject of handling and marketing of grain in Canada, and in particular, but without restricting the generality of the foregoing terms, upon the following matters: 1. The grading and weighing of grain; 2. The handling of grain in and by country elevators and from country points; 3. The Grain Exchanges; 4. Financing of grain; 5. The handling of grain at terminals and the charges therefor; 6. The operation of public and private elevators and Eastern public elevators; 7. Lake shipments; 8. The shipment of grain to Atlantic and Pacific ports."

The main argument before us was on the constitutional question whether or not the marketing and handling of grain came within sec. 91 or sec. 92 of the B.N.A. Act.

Counsel for the Attorney-General contended that the Dominion had sole jurisdiction under the general words of sec. 91 and under sec. 91 (2), while counsel for the plaintiffs urged that the whole subject-matter of the grain trade was for the Province under sec. 92 (13) and sec. 92 (16).

In the view I take it is unnecessary to decide this question. Some at least of the matters involved in the inquiry are clearly within the Dominion jurisdiction, for example, subjects 1, 4, 7 and 8, above referred to. The fact (if it be the fact) that subjects of inquiry are mentioned in the com-

mission that are not proper subjects of inquiry, cannot have the effect of rendering the commission invalid.

The further contention was made that the Inquiries Act itself was ultra vires of the Dominion Parliament.

Section 2 of the Inquiries Act, ch. 104, R.S.C., 1906, provides: [See judgment of Perdue, C.J.M., ante p. 549.]

The contention of the plaintiffs, as I understand it, is that the words "any matter connected with the good government of Canada" are too general and might include matters assigned exclusively to the Provinces.

I think this contention is answered by the application of the well-known rule for the interpretation of the language of Legislatures of limited authority, namely, that the legislation will be presumed to apply only to matters within the jurisdiction of the Legislature.

"Another general presumption is that the Legislature does not intend to exceed its jurisdiction." Maxwell on Statutes, ed. 6, 255; Macleod v. Att'y-Gen'l for N.S.W., [1891] A.C. 455, 60 L.J. (P.C.) 55.

The only case referred to on the argument which appears to militate against this principle is Att'y-Gen'l for Australia v. Colonial Sugar Refining Co., [1914] A.C. 237, 83 L.J. (P.C.) 154, which was strongly relied on by the respondents.

In that case the validity of the Royal Commissions Act, 1912, passed by the Parliament of the Commonwealth of Australia was in question. This Act authorised an inquiry into "any matter specified in the Letters Patent and which relates to or is connected with the peace, order and good government of the Commonwealth or any public purpose or any power of the Commonwealth," and empowers the commissioners to summon witnesses and impose penalties for failure to attend or to give evidence, and also to arrest for disobedience to a summons to attend. Under the Constitution of the Commonwealth of Australia the central Parliament only possesses such powers as were transferred by the federating States. Section 51 gives that Parliament power to make laws for the peace, order and good government of the Commonwealth with respect to certain named subjects.

The Privy Council held the Royal Commissions Act invalid apparently on the ground that the powers which they affect to exercise, of imposing, under penalties, new duties on the

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subjects of or people residing within the individual states which before federation vested in the Legislatures of those states had not been transferred to the Commonwealth Parliament. No reference is made in the judgment to the rule of interpretation above referred to, and it is hardly conceivable, therefore, that the Privy Council had any intention of interfering with that well-known rule.

The effect of Att'y-Gen'l for Australia v. Colonial Sugar Refining Co. was fully considered by this Court in the case of Kelly v. Mathers, 23 D.L.R. 225, 25 Man. L.R. 580, in which the validity of the provincial Inquiries Act was in question.

The contention was there made that this case decided that a general Act authorising inquiries and empowering the commissioners to enforce the attendance of witnesses was invalid and that to be valid the Act must specifically state the subject of inquiry.

The Court declined to take that view and held the provincial Act valid.

The provincial Act is substantially the same as the Dominion Act. In the face of Kelly v. Mathers, supra, I fail to see how we can consistently hold the Dominion Act invalid.

The next question to be determined is whether or not the respondents are entitled to maintain the injunction. From the terms of the judgment appealed from it appears that counsel for all of the defendants admitted "all of the allegations of fact contained in the statement of claim excepting those charging the defendants (other than the Minister of Justice) or some of them with acts alleged to be unwarranted, illegal and beyond the powers conferred by the said order-in-council."

The first nine paragraphs of the statement of claim contain introductory matter only.

The substantial charges against the defendants may be briefly summarized as follows:

(1) Submitting questionnaires to plaintiffs; (2) Inviting the public to make complaints against plaintiffs; (3) Compelling the servants and agents of the plaintiffs to produce the books and records of the plaintiffs and to give evidence touching the business and affairs of the plaintiffs; (4) Threatening to repeat the alleged unlawful acts.

The submission of questionnaires to the plaintiffs cannot

possibly be a ground for the interference of the Court by injunction. The commissioners have the same right as other individuals to ask questions and the plaintiffs have the same privilege of refusing to answer.

As to the second ground, namely, inviting the public to make complaints, I know of no law which forbids it. If such complaints turn out to be defamatory the plaintiffs have their remedy by action.

If the plaintiffs have any cause of action here it must be in respect of the attempt of the commissioners to compel disclosure by the plaintiffs of their private business affairs. We have here 30 or more plaintiffs joining in one action, alleging generally that the defendants have compelled their servants and agents to appear before them and to submit to examination under oath touching the business and affairs of the plaintiffs and to produce the books and business records of the plaintiffs and the intention of the defendants to repeat the alleged unlawful acts.

The affidavits filed contain allegations of the same general character and the injunction granted restrains in the broadest possible terms all and every of the acts complained of. The injunction in its present form completely ties the hands of the commission and in my opinion is not justified either by the pleadings or the material filed in support.

The language of Viscount Haldane, L.C., in Att'y-Gen'l for Australia v. Colonial Sugar Refining Co. shews clearly that in his opinion an injunction should not be granted which would have the effect which the injunction in this case has, of deciding in advance that certain questions are not relevant.

Referring to the opinions of Isaacs and Higgins, JJ., in the Court below, he said ([1914] A.C. at p. 251):—

"They were further of opinion that since, as the rest of the Court agreed with them in holding, the Royal Commissions Act were not ultra vires, it was impossible to pronounce in advance that the questions sought to be put might not prove relevant to matters which were held by all the judges to be proper subjects of inquiry. Their Lordships think that this last conclusion is entitled to weight . . . . it is hardly possible for a Court to pronounce in advance as to what may and what may not turn out to be relevant to other subjects of inquiry on which the Commonwealth Parliament is undoubtedly entitled to make laws."

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After referring to the fact that the information sought in that case extended to the entire field of the company's affairs including the internal management, he continued, at p. 252:—

"To be compelled to answer them is a serious interference with liberty. But if there exists a right in the Government of the Commonwealth to put them, so far as relevant to a merely possible exercise of its actual legislative powers, the policy of doing so is something on which their Lordships are neither at liberty nor competent to express an opinion, and it seems to them impossible to say in advance which of these questions, if they can be insisted on at all, may not turn out in the course of a prolonged inquiry to be relevant or even necessary for the guidance of the Legislature in the possible exercise of its powers."

It appears to me that this language is directly applicable to the present case. There the commission was appointed "to inquire into and report upon the sugar industry in Australia" and the commissioners proposed to inquire into the internal affairs of one particular company. The Privy Council held the Act under which the commission was appointed ultra vires but it is clear from the language of the Lord Chancellor quoted above that if the Act had been held valid the case would not have been one for an injunction.

If the commissioners attempt to exercise powers which the Dominion Parliament cannot confer this Court can undoubtedly restrain such proceedings or grant such other relief as the parties may be entitled to, but until such a concrete case arises, it would, in my view be an improper and unjustifiable exercise of discretion on our part to grant an injunction.

I would allow the appeal with costs and dissolve the injunction.

Dennistoun, J.A.:—By the terms of the judgment appealed from the validity of the Public Inquiries Act, and of the Order in Council and commission made and issued thereunder is the only question for immediate determination by this Court. Other questions raised by the statement of claim may call for consideration hereafter, but are not now before us.

In the reasons for judgment of Cameron, J.A. (ante p. 555), there are set forth the circumstances and admissions under

which these proceedings arise and I will not attempt to restate them.

That the Parliament of Canada has power to pass an Inquiries Act needs no laboured demonstration. Governments, like individuals, have an undoubted right to ask questions in respect to all conceivable subjects, but it does not follow that they have a right to compel answers to these questions. It is therefore, the scope of the Act which has been passed in respect to its compulsory and punitive clauses which is to be examined, and not the general powers of Parliament of the executive to put questions which may or may not be answered at the option of the person interrogated.

Provincial rights in respect to public inquiries were discussed by this Court in Kelly v. Mathers, 23 D.L.R. 225, 25 Man. L.R. 580, and the late Howell, C.J.M., says at p. 231 of that case:—

"It is apparent after this brief review of legislation that in Canada, practically ever since the establishment of responsible government, and for many years past in Australia and New Zealand, the Legislatures have assumed that the Governor or Lieutenant-Governor-in-Council has power to issue commissions of inquiry, and on this assumption powers are by statute given to the Commissioners to call and enforce the attendance of witnesses."

The Dominion Act under consideration goes much farther than the provincial Act discussed by the late Chief Justice and enacts:—

"2. The Governor in Council may, whenever he deems it expedient, cause inquiry to be made into and concerning any matter connected with the good government of Canada, or the conduct of any part of the public business thereof."

Notwithstanding the fact that the Manitoba Act, R.S.M. 1913, ch. 34, did not authorise inquiries to be made, it was decided in Kelly v. Mathers, supra, that the Lieutenant-Governor in Council had that power arising either from the prerogative of the Crown, or by implication from the Act itself, for by that Act the commissioners appointed were authorised to summon witnesses, and to require their attendance, and the production of documents, and relying upon the reasoning set forth in that case amplified as it is by the positive words of the statute in this case, I am satisfied that the Inquiries Act is valid provided it does

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not overstep the bounds as to jurisdiction indicated by the Judicial Committee in Att'y-Gen'l for Australia v. Colonial Sugar Refining Co., [1914] A.C. 237.

That decision was strongly relied upon by respondents' counsel in this case, who urged, as in Kelly v. Mathers, supra, that the Judicial Committee had decided that, to make such legislation good, the Act must in specific language set forth the subjects in respect to which the commissioners may enforce the attendance of witnesses, so that it may appear upon the face of the Act that the jurisdiction of the Dominion Parliament has not been exceeded.

I refer again to the judgment of Howell, C.J.M., at pp. 234, 235, 236, 237, (23 D.L.R.) as setting forth the view which this Court has previously taken, and to which it must adhere, until overruled, that Att'y-Gen'l for Australia v. Colonial Sugar Refining Co., by reason of the fundamental differences between the Australian and Canadian constitutions, does not in its broad general language necessarily impose restrictions upon the Dominion Parliament which were intended by that judgment to apply only to the Parliament of the Commonwealth.

An inquiry into any matter connected with "the good government of Canada" has a much wider field of operation than "an inquiry into any matter which relates to or is connected with the peace, order and good government of the Commonwealth or any public purpose or any power of the Commonwealth."

The field is in fact so much wider that it would make necessary a reproduction of secs. 91 and 92 and of other sections of the B.N.A. Act if a legislative attempt should be made to specify in an Inquiries Act all the subjects over which the Dominion has jurisdiction, and as to which it may make compulsory inquiry.

The words "the good government of Canada" must be taken to indicate an inquiry into subjects in respect to which the Dominion Parliament has clear and undoubted jurisdiction. They should not be taken to include subjects as to which the powers of the Dominion have been expressly excluded, and I am prepared to assume that the Act deals, and was intended to deal, only with matters which are within the legislative competence of the Dominion Parliament and is therefore a valid Act.

Looking now at the Order in Council and the commission

to ascertain if they direct an inquiry into matters which are beyond those powers, we find that they are enumerated as follows, and that the Dominion has the powers which I will attempt to indicate seriatim in respect to the subjects set forth in the commission.

"The handling and marketing of grain in Canada" is the omnibus which carries the seven subheads of inquiry.

It is urged that the obtaining of information by the Government in its executive or legislative capacity in respect to a matter which is of Dominion-wide importance, which involves storage and transportation, interprovincial trade, marketing in all Provinces, and export to foreign countries is beyond the effective control of the several Provinces by concurrent legislation, and may be justified under the general power of the Dominion to make laws for the peace, order and good government of Canada in respect to matters which are not local or private and therefore not exclusively under provincial control: Att'y-Gen'l for Ontario v. Att'y-Gen'l for the Dominion, [1896] A.C. 348, at pp. 360-362, 65 L.J. (P.C.) 26. That may be so, but I prefer to base my judgment upon the less debatable ground that this inquiry is justified by the enumerated heads of sec. 91 which assign express powers to the Dominion in respect to specific subjects.

The Parliament of Canada has legislative authority in respect to: (2) The regulation of trade and commerce.

With a view to the general regulation of trade and commerce it may make inquiries in respect to the whole subject, and it is apparent that a series of commissions each to inquire into a specific trade or a group of trades, might prove to be more expeditious and satisfactory than one commission which would investigate and report upon the whole subject.

What may be the ultimate use to which the information now sought will be put cannot be foretold, but it is apparent in the meantime that it will be available for the making of regulations in respect to trade and commerce as a whole and not necessarily confined to the regulation of the grain trade to the exclusion of all others. It is premature to say that the Dominion intends to invade the jurisdiction of the Provinces in respect to property and civil rights in respect to the grain trade; it will be time enough when Parliament proposes to take further action to raise that point.

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1. The grading and weighing of grain: By sec. 91 (17) of the B.N.A. Act, Parliament has exclusive legislative authority in respect to "Weights and Measures." For many years the Dominion has assumed jurisdiction in respect to inspection and sale of certain staple commodities such as grain, hay, flour, meal, beef, pork, leather, hides, pot-ashes, pearl ashes, fish, fish oils, butter, cheese, apples, fruits, and binder-twine, of which R.S.C. 1906 ch. 85, and amending Acts and Acts which have replaced it in part are evidence. The grading and weighing of grain is part of a wide policy of setting standards in respect to commodities in general when they come into prominence as part of the general trade of the country and inquiries into the subject may very properly be made without any infringement or threatened infringement of provincial rights.

2. The handling of grain in and by country elevators and from country points: This involves weighing, "dockage" for shortage in weights, or by reason of dirt, or foreign seeds, and particularly the supply of railway cars upon Dominion railways, over which the Dominion exercises undoubted control. Moreover in most cases country elevators, are situated upon the right-of-way of such railways and are the starting points from which the grain sets forth on long journeys across Provinces, through terminal and Government elevators, until it finally reaches the seaboard and is ready for export to foreign markets. There must be a large amount of information useful to the Dominion Government which may be obtained on this subject which is within the various specific powers conferred by the B.N.A. Act.

3. The Grain Exchanges, and

4. Financing by grain: By sec. 91 (15) the B.N.A. Act, banking and the issue of paper money are within the exclusive jurisdiction of the Dominion. Warehouse receipts, bills of lading, securities taken under sec. 88 of the Bank Act, 1913, (Can.), ch. 9 all come within the scope of Dominion jurisdiction: Tennant v. Union Bank of Canada, [1894] A.C. 31, 63 L.J. (P.C.) 25.

The financing of the Canadian wheat crop is a matter of national concern and by co-operation between the Government of Canada and the chartered banks steps are taken annually to increase the paper money in circulation at the time of the general crop movement by temporary issues of Dominion notes.

A large portion of the crop is dealt with and financed through the agencies of the grain exchanges and the allied clearing houses, and through such agencies the export grain trade of the country is mainly conducted. This subject is not confined to Canada but may well include grain exchanges and financial operations in foreign countries.

5. The handling of grain at terminals and the charges therefor. 6. The operation of public and private elevators and Eastern public elevators: Some of these elevators are the property of the Dominion and are engaged in the public business of the country. Others might under sec. 92 (10) (C) be declared by Parliament to be for the general advantage of Canada and so become subject to Dominion jurisdiction.

All of them are engaged in the same class of business and a comparison of methods may result in public economies and increased efficiency of public service.

7. Lake shipments, and 8. The shipment of grain to Atlantic and Pacific ports: These subheads have to do with navigation and shipping, sec. 91 (10), with railways, canals, and telegraphs under Dominion jurisdiction, and with export to foreign countries which is in no way a matter of local or private nature in a province.

Moreover, there is to be kept in mind the jurisdiction of the Dominion in respect to the criminal law which already includes a number of offences connected with and arising out of the grain trade.

In my humble opinion there is undoubted jurisdiction in the Dominion Parliament and in the commissioners appointed by this Order in Council to ask questions and to compel answers in respect to the subjects specified. It is not suggested that such jurisdiction is unlimited so as to justify an inquisition into the private and personal affairs of all and sundry who may be summoned as witnesses, nor is it to be assumed in advance that the commissioners will overstep the bounds of their jurisdiction or seek unwarrantably to invade the civil rights of residents of the Provinces. They should restrict the exercise of their compulsory powers to a search for information which may properly be made use of in a legislative or administrative capacity by the Government of Canada in respect to matters over which it has statutory jurisdiction. It is not possible for a Court to formulate a code of regulations for the conduct of this

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commission. We must not assume any miscarriage of justice in the course of the inquiry; In re Long Point Co. v. Anderson (1891), 18 A.R. (Ont.), 401, reversing (1890) 19 O.R. 487; and there is nothing before us on this appeal to shew improper conduct on the part of any person concerned, as by the terms of the judgment appealed from all questions of improper conduct have been reserved for further argument before the trial Judge, and it is only necessary to say now that the Inquiries Act, the Order in Council, and the commission are valid, and that the injunction which has been granted cannot be continued on the ground of their invalidity.

The appeal should be allowed.

Appeal allowed.

ROY v. RECORDER'S COURT.

Quebec Court of King's Bench, En Banc, Lamothe, C.J., and Lavergne, Pelletier, Martin and Greenshields, JJ. March 8, 1920.

Certiorari (§IA—3)—Jurisdiction in Quebec—Municipal By-law in Quebec as to Disorderly Houses—No Original Jurisdiction in Court of King's Bench to Review on Certiorari.

The Court of King's Bench for Quebec has no original jurisdiction to order the issue of a writ of certiorari (not being an ancillary writ in habeas corpus proceedings) to bring up a summary conviction made by a city recorder under a municipal by-law or ordinance, although it is sought for the purpose of attacking the validity of the latter on the ground that it deals with the criminal law and is in conflict with the federal Criminal Code. The jurisdiction to issue a certiorari to a recorder's court in Quebec purporting to act solely under a provincial enactment and in respect of an offence charged under a municipal by-law is vested in the Superior and Circuit Courts of the Province of Quebec.

[R. v. Marquis (1903), 8 Can. Cr. Cas. 346; R. v. Mercier (1901), 6 Can. Cr. Cas. 44, and Drapeau v. City of Quebec (1917), 27 Que. K.B. 182, referred to. See also, on the question of jurisdiction of the Quebec Courts, the amending Act respecting the organization of the Courts passed February 14, 1920, 10 Geo. V., Que., ch. 79. By amended sec. 43, C.C.P. Que., matters of certiorari decided in the Superior Court are not subject to appeal to the King's Bench unless otherwise provided by statute; see also amended art. 1306, C.C.P. Que.]

MOTION for a writ of certiorari to bring up to be quashed a summary conviction of the applicant made by the Recorder of Quebec City for keeping a common house of prostitution in contravention of a city by-law of the City of Quebec. The motion was refused for want of jurisdiction, the following opinions being handed down, in which the facts are stated.

Taschereau and Mayrand, for applicant.

Chapleau and Theriault, for respondent; Hon. L. A. Taschereau, K.C., counsel.

Pelletier, J.:—We have here a petition for a writ of certiorari to order the transmission of a record from a lower Court, and then to set aside the sentence of the Recorder of Quebec, on the ground of illegality and nullity apparent in the record.

This petition was presented in Chambers. As I was far from certain as to my jurisdiction to grant it, and as, moreover, even if I had the power, the Court in banco had it as well, I deemed it advisable in view of the importance of the question, to recommend the petitioner that he give notice of presentation to the Court which was then on the eve of sitting, and at the same time to give notice to the Attorney-General seeing that the constitutionality of a provincial law was called in question by the petition.

In consequence, this petition was presented to us at the last term and we are now called upon to dispose of it.

The petitioner was accused before the Recorder of Quebec of having illegally kept a house of public prostitution contrary to the by-laws of the City of Quebec. She was found guilty, but she alleges that the offence in question is now provided for by the Criminal Code, and that the condemnation against her is more severe in character in virtue of the recent provincial legislation, and that therefore this law is ultra vires for the reasons given in the well-known case of Drapeau v. City of Quebec (1917), 27 Que. K.B. 182.

I dissented in that case, and as no higher Court has settled the point in accordance with the opinion of the majority of this Court, I retain, for the time being, my opinion on this subject.

In any event I do not think it necessary to discuss this question in the present case, for even if the recent provincial law on which this Quebec city by-law is based is ultra vires, the proper legal remedy is not to be obtained by the petition before us.

The condemnation against the petitioner was pronounced in virtue of the city by-laws; these same by-laws and the city charter declare that such a judgment as the one now complained of can be attacked within eight days by way of certiorari to the Superior Court.

That is the procedure which should have been followed. The petitioner might also have proceeded by writ of pro-

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hibition, as was done in the case of Drapeau v. City of Quebec (1917), 27 Que. K.B. 182, in which case an appeal would have been possible from the judgment of the Superior Court, but in my opinion the Court of Appeal has not original jurisdiction to order the issue of a writ of certiorari in such a case as the present one.

The Code of Civil Procedure itself declares that the petition for certiorari is presented either to the Superior or the Circuit Court.

On a petition for habeas corpus, a writ of certiorari may be demanded to order transmission of the record, but in that case the writ is merely ancillary or auxiliary. I know no text and none has been shewn us, by which we have the power to do what the petition prays for, namely, to order the issue of a writ of certiorari alone.

I am therefore of the opinion that this appeal should be dismissed.

Greenshields, J.:—On the 24th of December, 1919, the appellant appeared before the Recorder of the city of Quebec on a charge of having on the 23 December, within the limits of the said city of Quebec, illegally, kept a disorderly house, the whole in contravention and violation of the by-law of the said city enacted by the council of that city.

Upon the appellant's appearance, represented by counsel, she objected (a) To the jurisdiction of the Recorder's Court; (b) That the information and complaint disclosed no offence, was vague in terms and lacking in specific statement.

Notwithstanding these objections, the Recorder, as such Recorder, fixed the case for hearing on the 5th of January, 1920, upon which date the trial was had.

On the 9th of January, 1920, the Recorder found the appellant guilty of the offence as charged, and proceeded to impose the sentence in accordance with the by-law under which the prosecution was laid.

On the same day, the 9th of January, a petition was presented in Chambers to Mr. Justice Pelletier, one of the Judges of this Court. In her petition the appellant attacks the summons, conviction and the sentence. She alleges: (a) That the by-law in virtue of which the prosecution was laid is ultra vires; (b) That the testimony should have been taken in writing; (c) That the information and complaint discloses no offence, is vague and deals in generalities; (d)

That the Recorder of the city of Quebec has no jurisdiction, nor quality, to hear and determine the said offence, having only the authority of one justice of the Peace.

By the conclusion or prayer of the petition, the appellant prays, that a writ of certiorari do issue from this Court ordering and enjoining the recorder to transmit all documents in the case to this Court; that recorder should be enjoined from passing sentence, or executing the sentence; that after an examination of the proceedings, they should be declared null and void and without effect.

At the argument before this Court, the learned counsel for the appellant submitted, in effect, that inasmuch as the Parliament of Canada alone, and to exclusion of the Provincial Legislature, had legislative authority in criminal matters, and has by legislation made the offence charged against the appellant an indictable offence under the Criminal Code, that the by-law passed by the city of Quebec, and the statute of the Provincial Legislature authorising the enactment of such by-law, are ultra vires. For that reason, says the learned counsel for the appellant, the Recorder as such had no jurisdiction whatever to hear and determine the charge against appellant.

The question is not without interest, and is not entirely free from difficulty.

It is fully and readily conceded, that under the British North America Act the Parliament of Canada has exclusive legislative authority to enact the whole body or corpus of the Criminal law. In like manner, it has exclusive legislative authority to enact rules of procedure to enforce its criminal law enactments. Where, and so soon as the Federal Parliament has created or enacted a criminal offence, the Provincial legislature may not legislate upon the same matter. If a Provincial statute has created an offence upon which the Federal Parliament subsequently proceeds to legislate, the legislation of the Federal Parliament must prevail. But there is much to be said whether a statute delegating to a city corporation power to pass by-laws for the peace, good order and good government of its city, is legislation in criminal matters repugnant to the general legislation of the Federal Parliament touching such matters.

In the present case, however, with much regret be it said, I do not think this Court can pass upon that question.

There is a preliminary question which would seem to

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me fatal to the success of the appellant's petition. It is the question of the jurisdiction of this Court to order the issue of a writ of certiorari to examine, revise and quash the conviction and sentence rendered and imposed by the recorder, acting as such, for the punishment of an offence against a city by-law.

In the city of Quebec the Court of King's Bench is no doubt the superior court of criminal jurisdiction, and I am of opinion that, under part 22 of the Criminal Code, when any person is charged with a criminal offence, he may take proceedings by way of certiorari in aid or ancillary to an habeas corpus, to test the legality of this conviction or detention as the case may be. But I have yet to find the power and jurisdiction of the Court of King's Bench or a Judge thereof to issue in the first instance a writ of certiorari from a verdict or sentence of a recorder.

Whether or not the by-law which the recorder seeks to enforce by its sanction is ultra vires or not, he does act in his capacity of recorder and not as a magistrate. He does not in the present case assume to interpret or enforce any provision of the criminal law. He does not sit as a Court having jurisdiction in criminal matters as defined and regulated by the Criminal Code.

The Provincial Legislature has exclusive power in the constitution of the Courts. It has delegated to the city of Quebec the power to constitute a Court for the purpose of enforcing its by-laws. The city of Quebec constituted the Recorder's Court for that purpose, and it proceeded to create rules of procedure to govern that Court, and among other rules it enacted that writs of certiorari to review the decisions of its recorder should be applied for and issued by Judges of the Superior Court of civil jurisdiction, and within a delay of eight days from the rendering of the judgment.

In 1903 the late Mr. Justice DeLorimier decided in a fairly well reasoned judgment, that the Superior Court in the Province of Quebec had no jurisdiction to quash by way of certiorari, decisions rendered by magistrates sitting for the summary trial of indictable offences: The King v. Marquis (1903), 8 Can. Cr. Cas. 346.

The very reverse was held by Mr. Justice Andrews in 1901: The King v. Mercier (1901), 6 Can. Cr. Cas. 44.

Whichever of the two holdings may be correct, I have been unable to find any decision that went the length of

holding, that the Court of King's Bench of the Province of Quebec, sitting either as a Court of appeal in civil matters or as a Court of original jurisdiction in criminal matters, has any jurisdiction to order the issue of a certiorari to review a judgment or conviction based on a Provincial penal statute. With greater force could it be said, that this Court is without jurisdiction to review by certiorari a conviction by a special officer known as a recorder acting as such in virtue of the charter of the city of Quebec.

A very comprehensive collection of jurisprudence on this question is to be found in 11 Can. Cr. Cas., commencing at p. 57.

The question seems to me so elementary that I refrain from further comment.

I should reject the application.

Certiorari refused.

IMPERIAL TRUSTS CO. v. THE SHIP "LE QUESNOY" AND N. S. TRANSPORTATION CO.

Exchequer Court of Canada, Hodgins, L.J. in Adm. March 11, 1921.

Admiralty (§I—1)—Jurisdiction of Exchequer Court over Ship not Under Arrest or within Power of Court—Right to order Sale—Transfer by Person Authorised by Court—Validity.

The Exchequer Court of Canada has authority by virtue of R.S.C. 1906 ch. 141 over any claim in respect of a mortgage duly registered in the proper registry whether the ship is within the power of the Court by arrest or not, and if the ship is not under arrest the remedies to be given must be these enabling the mortgagee to effectually realise his claim and the Court may order the sale of the ship to satisfy the claim of the mortgagee in which case it shall vest in some person the right to transfer the ship and the transfer will be as effectual as if made by the registered owner.

[See Finnigan v. S.S. Northwest, 61 D.L.R. 597.]

MOTION by mortgagee for an order for the sale of the defendant ship lying in a port in England. Motion granted.

A. C. McMaster, for plaintiffs.

Hodgins, L.J.A.:—I reserved judgment to determine whether an order for sale of the above named ship should be made. The ship is said to be in the port of West Hartlepool in England and the plaintiffs have paid or are in process of paying all claims upon her which have priority over their mortgage deed. They desire to sell her in Canada or the United States and to have leave to bid at the sale.

The writ claims possession and sale and has been duly served on the defendant company who are the mortgagors.

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This demand of possession is an act equivalent to taking possession in the case of a mortgagee. Gardner v. Cazenove (1856), 1 H. & N. 423 at p. 435, 156 E.R. 1267, 26 L.J. (Ex.) 17, 5 W.R. 195; Willis v. Palmer (1859), 7 C.B. (N.S.) 340 at p. 358, 141 E.R. 847, 29 L.J. (C.P.) 194, 6 Jur. (N.S.) 732, 2 L.T. 626, 8 W.R. 295; Rusden v. Pope (1866), L.R. 3 Ex. 269.

The plaintiffs' mortgage is made by the owner of the whole 64 shares in the ship and covers the ship etc. It is duly recorded in the proper registry here in Toronto. Under the Imperial Statute, 1861, ch. 10, jurisdiction is given to the High Court of Admiralty over any claim in respect of a mortgage duly registered according to the provisions of the Merchant Shipping Act, 1894 (Imp.), ch. 60, whether the ship or the proceeds thereof be under arrest of the said Court or not. The Exchequer Court in Canada exercises these powers by virtue of R.S.C. 1906, ch. 141, a reproduction of the Imperial Admiralty Act, 1891, ch. 67, and amending Acts. Cope v. Ship Raven etc. (1905), 9 Can. Ex. 404.

If the Court has jurisdiction over the claim of a mortgagee when the ship is not under arrest, it seems to follow that the remedies to be given must be those enabling the mortgagee to effectually realise his claim. One of these remedies is set forth in sec. 35 of the Merchant Shipping Act, 1894, as follows: "Every registered mortgagee shall have power absolutely to dispose of the ship or share in respect of which he is registered and to give effectual receipts for the purchase money." Where there is more than one mortgage, a subsequent mortgagee must apply to the Court to order a sale, unless he has the consent of every prior mortgagee. And where the Court, under sec. 29 of that Act, has power to order a sale, "under the preceding sections ....or otherwise," it shall vest in some person the right to transfer the ship and that transfer is to be as effectual as if it were made by the registered owner.

I can see no reason why, in pursuance of the statutory power giving jurisdiction in mortgage cases, notwithstanding that the ship is not within the power of the Court by arrest, the plaintiff should not have the right and power to sell the ship and why the Court should not so order. The order will name a person pursuant to sec. 29, already quoted, to make the transfer, which can then be recorded in the

registry here, after the sale has been had and that will be effectual to vest the title in the purchaser.

The sale of the ship will naturally carry with it the right of possession and the plaintiffs will have to see that, before the sale actually takes place, they are in a position to deliver actual possession to the purchaser. The advertisement for the sale should state that the vendors will arrange for the delivery of the ship at a named port or at some convenient place to be announced at or before the sale. It would be well before proceeding to sell, that the plaintiffs should satisfy themselves that no complications can arise by reason of the engagements or charters made by the mortgagors before the notice that they required possession was given or the writ served. As to this see the following cases:—Collins v. Lamport (1865), 34 L.J. (Ch.) 196, 11 Jur. (N.S.) 1, 11 L.T. 497, 13 W.R. 283; Johnson v. Royal Mail etc. (1867), L.R. 3 C.P. 38; The Fanchon (1880), 5 P.D. 173, 50 L.J. (Adm.) 4, 42 L.T. 483, 29 W.R. 399, 4 Asp. M.C. 272; The Cella (1888), 13 P.D. 82, 57 L.J. (Adm.) 55, 59 L.T. 125, 36 W.R. 540, 6 Asp. M.C. 293; The Celtic King, [1894] P. 175, 63 L.J. (Adm.) 37, 70 L.T. 562, 7 Asp. M.C. 440; The Heather Bell, [1901] P. 272, 70 L.J. (P.) 57, 84 L.T. 794, 49 W.R. 577, 9 Asp. M.C. 206, 17 Times L.R. 541; Law Guarantee & Trust Society v. Russian Bank for Foreign Trade, [1905] 1 K.B. 815.

The order for sale may go, and the sale will be under the supervision of the marshal of the Court or some one authorised by him if the vessel is to be sold outside this jurisdiction. The plaintiff may have leave to bid.

Judgment accordingly.

The formal decree is as follows:—

"This action coming on for trial on Saturday the fifth day of March, 1921, at a special sittings of this Honourable Court, held at Toronto, in the presence of counsel for the plaintiff, no one appearing for the Nova Scotia Transportation Company, Limited, although duly served, pursuant to the order herein bearing date the second day of March, 1921, upon reading the proceedings in this action, the affidavit of John Arthur Withrow, manager of the plaintiff company, proving the amount of the claim herein, the affidavit of Mae Ross, filed, and upon hearing what was alleged by counsel for the plaintiff and judgment having been reserved to this day.

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1. This Court doth order and adjudge that the sum of $267,957.51 is due to the plaintiff in respect of its claim, together with the costs of this action, to be taxed.

2. This Court doth further order and adjudge that the ship Le Quesnoy, be and is hereby condemned in the said sum of $267,957.51, with costs, as aforesaid, and doth order that a commission of appraisement and sale of the said ship, do issue to the Marshal of this Court, or to such other person as may be authorised by such Marshal, and that the said sale shall be subject to a reserve bid to be fixed by this Court and to such conditions of sale as shall be settled by this Court.

3. And this Court doth further order and adjudge that, for the purpose of carrying the sale directed by this judgment into execution that the right to transfer the sixty-four shares of the said ship Le Quesnoy in the shipping register for the port of Toronto, be and is hereby vested in the Marshal of this Court, and such Marshal shall upon a sale of the said ship approved of by this Court, be entitled to transfer the said sixty-four shares of the said ship Le Quesnoy, in the same manner and to the same extent as if he were the registered owner thereof, and the registrar of shipping for the port of Toronto, shall obey the requisition of the said Marshal so named, approved by this Court in respect of any such transfer, to the same extent as if the said Marshal were the registered owner.

4. And this Court doth further order and adjudge that the plaintiff, and any bond holder whose bond is secured under the hereinafter mentioned mortgage shall be at liberty to bid at the sale of the said ship Le Quesnoy, or any adjournment thereof, as directed by the judgment herein, and that the conditions of sale may contain a provision whereby any purchaser of the said ship for the purpose of making settlement or payment for the property purchased, shall be entitled to turn in any bonds secured under the mortgage to the plaintiff bearing date 1st November, 1918, and any matured and unpaid coupons thereby secured, in order that there may be credited thereon the sums payable out of the net proceeds of such sale to the holder of such bonds or coupons, as his ratable share of such net proceeds, after allowing for the proportion of the total purchase price required to pay the costs and expenses of the sale or otherwise, and the purchaser shall be credited

on account of the purchase price of the property purchased with the sums payable out of such net proceeds on the bonds and coupons so turned in.

5. And this Court doth further order and adjudge that the plaintiff be at liberty to pay any claims against the said ship Le Quesnoy, which may have priority over the said bond mortgage herein, and that upon such payment the plaintiff be and is hereby authorised to add such payments to their mortgage debt, with liberty to apply to add the same to the amount of the judgment herein. In case of any such payment the plaintiffs shall notwithstanding the addition of the amount or amounts to the mortgage debt, or to this judgment if ordered, be entitled to be subrogated to the right of the person or corporation, so paid off.

6. And this Court doth further order and adjudge that upon the sale of the said ship Le Quesnoy, the purchaser thereof shall pay his purchase money to the said Marshal, who shall forthwith pay the same into Court, to remain there until further order of this Court."

SLOBODIAN v. KNIGHT et al.

Alberta Supreme Court, Appellate Division Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. November 3, 1921.

Contracts (§IE—110)—Verbal Agreement for Sale of Mining Props—Subsequent Letter Ordering Delivery of a Part of Goods—Delivery and Payment for Goods Delivered—Sufficiency of Contract to Satisfy the Statute of Frauds.

A contract for the purchase of a quantity of mining props may be made verbally between the parties by a direction from one to the other as follows—"You go ahead and cut it and I will send the order, you do not need any contract" and a subsequent letter requesting shipment at once of part of the goods, which order is filled and paid for is sufficient to satisfy the requirements of the Statute of Frauds, not only as to the goods delivered but also as to all the goods covered by the verbal agreement.

[See Annotation, Statute of Frauds, Oral Contract, 2 D.L.R. 636.]

APPEAL by the defendants Charles Knight and Knight & Co., from the judgment of the District Court of the district of Calgary rendered by McNeill, J., awarding the plaintiff $249.28 and costs against all the defendants.

C. A. Wright, for plaintiff; W. S. Morris, for defendants.

The judgment of the Court was delivered by

Clarke, J.A.—After a careful perusal of the evidence I am of opinion that the judgment appealed from is right and should be affirmed.

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As I view the matter the contract for the purchase of the car of mining props in question was made verbally between the defendant Westaway, representing Knight & Co., and the plaintiff at the office of Knight & Co. in Calgary in June, 1920. The plaintiff's evidence of what occurred on that occasion is as follows:—

Q. Did Mr. Westaway give you the order then? A. No, he did not give me an order, but just told me to go ahead and cut it. I asked him for a contract. Q. You asked him for a contract, and did he give you a contract then? A. No, he told me to go ahead. You don't need any contract, you go ahead and cut it and I will send you the order. Q. Did you agree to do that? A. Yes. Q. You agreed to go ahead and cut it? A. Yes. Q. Cut what? A. Cut mining props. Q. What sizes? A. All over 4 inches, ten cars he told me. Q. What? A. 10 cars all to be 4 inches tops. Q. What else did he tell you? A. And he not send me nothing in. He just said to go ahead and cut it and you do not need any contract, but we will send you them orders. Q. What? A. He told me to go ahead and cut it and you do not need any contract, all to be 4 inches and different in length. Q. Different lengths? A. Yes. Q. And you were to cut 10 car loads of timber all to be 4 inches but different lengths? A. Yes. Q. Did you go on cutting them? A. Yes."

In his examination for discovery Westaway was asked:—

"Q. You ordered a carload of timber from Slobodian on or about November 14, did you not? A. No, I did not, it was either June or July I ordered the timber."

I think upon this evidence there was a completed agreement on the part of plaintiff to get out 10 car loads of props and on the part of Westaway to send the plaintiff orders for their delivery, for breach of which either party would be liable to damages subject to the defence of the provision of the Statute of Frauds now embodied in sec. 6 of the Sale of Goods Ordinance, C.O. N.W.T. 1915, ch. 39, if raised.

By a letter of August 17, 1920, sent to the plaintiff, signed by Knight & Co., per J. J. Westaway, the plaintiff was requested to ship at once a car of mine props of 6 and 8 foot lengths to "our mine The Great West Coal Co. Ltd., Rosedale, Alta., and send your bill direct to us and upon receipt of the props and check of same, we will send you your money."

This order was filled and paid for prior to the shipment

of the car now in question and I think it operated to satisfy the requirements of the Statute of Frauds, not only as to that car but as to the remaining 9 cars covered by the verbal agreement of June.

A letter of either October 10 or 20 (the date being indistinct), addressed to the plaintiff and signed by Westaway, the letter being typewritten on letter paper containing a printed heading "Knight & Company" and the name "Chas. Knight" printed on the left hand corner and the name "J. J. Westaway" printed in the right hand corner, after some reference to the car previously ordered contains the following words: "Can you put us in a car of props, 8 foot." On November 14 following, the plaintiff shipped the car load of 8 foot props in question in this action to Calgary and billed it to Knight & Co. He stated in his evidence that he thought he had another letter asking him to send this car to Calgary but it was not produced. He said he did not keep his letters. Westaway in his examination for discovery gave this evidence:—

"Q. You gave him the order. That represents the car that was in question in the action? A. I suppose, I guess it would. Q. You received it all right? A. Yes, it came here. Q. Was the order made by letter or orally? A. How do you mean, in the first place it would be made by letter. Q. Have you a copy of the letter in which you ordered, in which the order was made? A. No, I have not."

My impression is that there was some such letter for without some direction the plaintiff would not have known where to bill the car.

Shortly after the shipment of the car in question on November 14, Westaway went to Lake Louise and saw the plaintiff. I would judge this was on the 16th.

The plaintiff says that on this occasion he told Westaway of the shipment of the car to Calgary and the dimensions of the contents and that he had sent a bill of lading to Knight & Co., to which Westaway replied "That is all right." He is corroborated by Hansen who cut and helped to load the props.

Westaway's version is that he supposed the car shipped on November 14, was the one ordered for Rosedale, which he was not aware had been shipped and that all he had to do was to re-ship the car to Rosedale, on his return. He states that he had no use for props at Calgary, and that on

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his return he telephoned to The Great West Co., and it did not want any props, and he presumed the order was cancelled on account of delay in being filled. I think Westaway is mistaken. This evidence is entirely inconsistent with his letter to the plaintiff written on November 17 after his return from Lake Louise, in which he says "I got home all O.K. and I had the party who ordered the mine props to see them and he says they are not what he ordered as they will not average over four inches and are no good to him." On his cross-examination he admitted he did not remember who the party was, referred to in his letter, who ordered the mine props and at any rate it was not The Great West Coal Co.

My impression is that after receiving this car Westaway found it was on his hands without a purchaser and he then took the position in his letter of November 17 for the first time that he was selling it on commission for the plaintiff. This the plaintiff denies and insists it was a sale to the defendants. There follows some correspondence which is difficult to understand. The plaintiff on November 22, wrote Westaway as follows: "If you can't sell that last car of 4 inch 8 ft., let me know at once because I got a place where I can send it to."

Knight & Co. telegraph plaintiff on November 24: "Can do nothing with the car props. Will I sell as wood, railway selling for demurrage," and receive a telegram in reply dated November 27: "Sell the car for wood." This lends some color to the theory that the car was being sold by defendants for the plaintiff on commission, but is not, I think, sufficient to warrant such a finding in view of his express denial and of his evidence that his instructions to the operator were to wire the defendant to do what he liked with the stuff.

As pointed out by the trial Judge, the defendants, after selling the car, did not account to the plaintiff. At the trial Westaway admitted having $22 left over after paying demurrage and freight, which he never offered to pay. He never furnished a statement of his application of the money realised from the sale of the carload and was unable to give the particulars at the trial. This is not the conduct of a man who acts as agent for another, even if, as he contends, he claimed to keep the surplus for commission on other car loads. He should at least have accounted.

The trial Judge has found that the props shipped com-

plied with the description of the goods ordered and the evidence supports the finding.

I think when the carload was shipped it became the defendant's property and they became liable for its price, and the subsequent correspondence referred to did not have the effect of changing the rights of the parties. The props being the defendant's property, it was not for the plaintiff to say what they should do with them.

Regarding the defence of the Statute of Frauds, I think it does not avail the defendants for the reason I have already given.

I am also inclined to the view that apart from the receipt and acceptance of the Great West Co. car there was a sufficient receipt and acceptance of the car in question within the meaning of the Sale of Goods Ordinance to take the case out of the statute.

I agree with the trial Judge that defendant Knight is liable as a partner, although he took no part in the dealings with the plaintiff. Admittedly the business in which both were engaged was carried on in the name of Knight & Co. The defendant Knight did not register himself as carrying on business alone under that name. He admits that from March to September in any deals that went through that there was a commission, Westaway got 45% and he 55%, and that the expenses of the office were paid out of the fees. He says he left the office on September 15 and Westaway stayed there and continued to do business for himself but he does not say the partnership was dissolved. Westaway does not agree that Knight ceased to have anything to do with the business on September 15. Certainly the old firm name was continued afterwards. It was not till November 30 that the plaintiff was notified of any change, for which reason and also for the reason that the liability dated back to the making of the agreement in June, I think the defendant Knight cannot escape liability. Even if the partnership were dissolved in September it would continue for the purpose of winding up partnership business, which includes the matter involved in this action.

I would dismiss the appeal with costs.

Appeal dismissed.

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WESTERN CANADA SAWMILL YARDS, LTD. v. McCANN et al.

Saskatchewan King's Bench, McKay, J. August 27, 1921.

Contracts (§IID—145)—Construction—Agreement as to Settlement of Action—Holders of First and Second Mortgage and Chattel Mortgage—"Matters in Controversy"—Second Chattel Mortgage Included in Term—Rights under Given up by Agreement—Subsequent Action on—Dismissal of Action.

The defendants Thompson et al had taken a first mortgage on hotel property and also a chattel mortgage on the furniture and furnishings of the hotel as security for moneys advanced by them to pay off liens against the property, other than the plaintiff's. The plaintiff agreed to take a second mortgage on the land and also a second mortgage on the chattels as security for his claim. The judgment entered in an action brought by Thompson et al on their two mortgages, was amongst other things as follows, "And it is further ordered and adjudged that the terms of this judgment with regard to the chattel mortgages will be reserved to be spoken to on appointment to be served by either party as well as the question of the several rights and liabilities arising out of the guarantee of lien holders" . . . "And it is further ordered that the Northern Trust Co. shall be appointed receiver under the terms of the agreement of the 19th day of February A.D. 1914 and that the defendants do forthwith give up possession to the said receiver and refrain from interfering with the said receiver in any way except for the matters reserved for further direction."

The then Supreme Court of Saskatchewan sustained this judgment and pending an appeal to the Supreme Court of Canada the parties to the present action entered into an agreement of settlement which provided that Thompson et al were to proceed under their judgment and secure a final order of foreclosure and get title to the lands vested in their names and thereafter sell the said premises, if the plaintiff herein did not avail itself of a certain option to purchase the hotel premises. The agreement begins as follows: "It is agreed between the defendant company and plaintiff herein that this appeal and the matters in controversy between the defendant company and the plaintiff be and the same are hereby settled in the manner following." The Court held that this agreement must be construed as covering the chattels as otherwise it could not be said to settle the matters in controversy between the parties, and that each party to the agreement gave up as between themselves all their former rights in exchange for what this agreement gave them, and the defendants having sold the lands and chattels together, which they were authorised to do, the plaintiff had no right to claim said chattels under its mortgage or otherwise and its action must be dismissed.

ACTION claiming among other things, possession of certain chattels under a chattel mortgage, with liberty to sell same in payment of the chattel mortgage and for judgment against the defendants for the amount due under the chattel mortgage, the defendants having sold the chattels under a prior chattel mortgage to them.

H. J. Schull, for plaintiff;

P. H. Gordon, for defendants other than the McCanns and Mumford.

A. Brehaut, for Mumford.

No one appearing for the McCanns.

McKay, J.:—The defendants Thompson, the two Ridsdales, Knowles and Cotterall are hereinafter referred to as Thompson et al.

The facts in this case are shortly as follows:—

The defendants McCanns erected and furnished an hotel, known as the Auditorium Hotel, on the most southerly ten feet throughout of lot numbered twenty (20) and all of lot numbered twenty one (21) in block numbered six (6) in the city of North Battleford, in the Province of Saskatchewan, according to a map or plan of the said city of record in the Land Titles Office for the West Saskatchewan Land Registration District as Plan B. 1929, which said land they agreed to purchase from one Roberge, but had not paid for it in full.

There were liens against both the said land and the furniture; among the former liens were two of the plaintiff's.

Mumford acting as agent for Thompson et al agreed to advance money to pay off these liens other than plaintiff's, and also pay some of the McCanns' other liabilities, and certain agreements were entered into between the McCanns, Thompson et al, and plaintiff, among which was the one dated February 19, 1914, whereby it was agreed that Thompson et al were to get first mortgages on the said land and furnishings for their loans.

Thompson et al made the loans and took a first mortgage on the said land, dated January 14, 1914, for $53,000 with interest, and also a chattel mortgage dated February 18, 1914, on the chattels in the said hotel, as security for the said $53,000 and interest.

The plaintiff took a second mortgage on said land, and a second chattel mortgage on said chattels.

In 1914, Thompson, et al brought an action against the defendants the McCanns and the plaintiff on their two mortgages to recover the amount due thereon. Amongst other things asked for in this action was, "That a receiver be appointed forthwith to take possession of said hotel premises on behalf of the plaintiff." In this action the judgment entered, amongst other things, was as follows:—

"And it is further ordered and adjudged that the terms of this judgment with regard to the chattel mortgages will

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be reserved to be spoken to on appointment to be served by either party as well as the question of the several rights and liabilities arising out of the guarantee of lien holders. . . ."

"And it is further ordered, that the Northern Trust Co. shall be appointed receiver under the terms of the agreement of the 19th day of February A.D. 1914 and that the defendants do forthwith give up possession to the said receiver and refrain from interfering with the said receiver in any way except for the matters reserved for further direction."

The plaintiff herein appealed from the said judgment to the then Supreme Court of Saskatchewan en banc. The Court en banc sustained the judgment of the trial Judge with some variations. The plaintiff thereupon appealed from said judgment to the Supreme Court of Canada. Pending this appeal, the plaintiff herein and Thompson et al entered into negotiations resulting in the settlement of said appeal, and the matters in controversy between them according to an agreement made between them dated September 10, 1915, put in at the trial as Ex. P. 11. This agreement provides that Thompson et al were to prceed under their judgment and secure final order of foreclosure and get title to the lands vested in their names, and, thereafter, sell the said premises, if the plaintiff herein did not avail itself of a certain option it had to purchase said hotel premises. Thompson et al got title to said lands, and the plaintiff herein did not avail itself of said option, and Thompson et al. sold said lands and the chattels for $62.179.92 to defendant Codd, on terms, Thompson et al to remain in possession until the second payment was made, which said payment was never made. The plaintiff thereupon claimed said chattels under its chattel mortgage and demanded possession of the same from the defendants other than the McCanns, which demand was refused.

Plaintiff now brings this action claiming, among other things, possession of said chattels, with liberty to sell same in payment of its chattel mortgage, and for judgment against the McCanns for amount due under the chattel mortgage.

The plaintiff contends that:—

(1) When Thompson et al agreed to give plaintiff the option contained in agreement P11, they thereby rendered themselves unable to make restitution of said lands to the

said McCanns and thereby discharged the McCanns' debt to them.

(2) That Thompson et al having sold the land covered by the land mortgage after they got the foreclosure order, they cannot restore the land to the McCanns if the latter wish to redeem, and the debt due from the McCanns to them secured by said land mortgage and chattel mortgage is thereby discharged, and the said chattels released from the chattel mortgage of Thompson et al, and plaintiff is now entitled to same as first mortgagee.

The law on which plaintiff bases above contentions is that where a mortgagee has put it out of his power to reconvey the property mortgaged, or part of it, he is not entitled to sue the mortgagor for the mortgage money. See Gowland v. Garbutt (1867), 13 Gr. 578; Mutual Life Ass'ce Co. v. Douglas (1918), 44 D.L.R. 115, 57 Can. S.C.R. 243.

At the trial objection was taken that the plaintiff was not entitled to demand the goods or bring this action under its chattel mortgage because it had assigned said chattel mortgage to the Canadian Bank of Commerce and it had not been re-assigned to it before this action was begun. The evidence showed that the bank had agreed to re-assign the chattel mortgage to plaintiff before it made the formal demand on defendants for the goods and before the action was begun, and plaintiff produced the re-assignment dated November 2, 1920, at the trial. I hold plaintiff was, in effect, the holder of the mortgage at the time it made the demand and entered this action and was the proper party to make the demand and bring this action. Canadian Bank of Commerce v. La Brasch (1917), 39 D.L.R. 398, 10 S.L.R. 408.

It was also objected that, as Mumford acted as agent throughout the matters in dispute herein to the knowledge of the plaintiff, the action should be dismissed as against him, as he never claimed any interest in these chattels and should not be made a party to the suit with his principals. I think this contention is right, and the action is dismissed with costs as against Mumford.

As to the main questions: I will first deal with contention No. 2.:—

The action commenced in July 1914 by Thompson et al was taken on both the land and the chattel mortgages, and it was their claims on these mortgages and the claims of the plaintiff herein on its two mortgages, among other things,

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that were the matters in controversy between defendant company and the plaintiff in that action, and intended to be settled by the agreement of September 10, 1915, Ex. P11.

In my opinion, the intention of the plaintiff and Thompson et al was that this agreement was to settle their claims with regard to the chattels as well as the land. That is, the intention was that when Thompson et al got title to the lands, the plaintiff was to have option to purchase the land and the chattels, and if plaintiff did not purchase, Thompson et al were to have the right to sell the land and chattels free of all plaintiff's claims except as to Gigot's lien.

It must be borne in mind that when this agreement was drawn, both parties were cognisant of the then situation.

The matters in controversy in connection with the chattel mortgages had not been settled by the judgment of the trial Judge; these were held in abeyance, but a receiver, the Northern Trust Co., had been put and was in possession of the hotel including land and chattels, and operating the same.

The agreement Ex. P 11 begins:—

"It is agreed between the defendant company and plaintiff herein that this appeal and the matters in controversy between the defendant company and the plaintiff be and the same are hereby settled in the manner following:"

Unless this agreement be construed to cover the chattels, I fail to see how it can settle the matters in controversy between the said parties concerning the same. It seems to me each party to this agreement gave up, as between themselves, all their former rights in exchange for what this agreement P 11 gave them.

The agreement P 11 as drawn gives plaintiff two kinds of options. (1) The plaintiff is to have the exclusive option for twelve months from the issue of title to defendants Thompson et al to purchase "the interest of Thompson et al in the said lands." (2) If the said first option was not exercised and upon certain conditions as set forth in the said agreement the defendants Thompson et al are to extend the plaintiff's option for another 12 months, but if defendants Thompson et al during such second 12 months obtained a bona fide offer for the purchase of the said premises, that is, the lands and chattels, the defendants Thompson et al might require plaintiff to purchase the lands and chattels at the same price and upon the same terms as contained in such offer, and if within 14 days thereafter the plaintiff

did not agree to purchase the said lands and chattels at the said price and upon the said terms, Thompson et al could, notwithstanding the option granted to plaintiff (to purchase the interest of Thompson et al in the said lands) sell the said lands and chattels to the person who made said offer.

On reading said agreement P11, it will be noticed that para. 4 thereof refers to "the said lands" meaning the lands covered by the land mortgage on which the hotel was erected.

The first part of para. 5 says that when Thompson et al obtained title, the plaintiff herein was to have the option of purchasing "the interest" of Thompson et al in said lands, "less such sum, if any, as may have been received by the plaintiffs (meaning Thompson et al) "from the operation of the hotel erected upon the premises in question herein," etc. The words "the premises" evidently refer to the lands upon which the hotel is erected, and, further down in said paragraph, the words "operation of the said hotel" are again used. "The operation of the hotel" referred to was the operation by the Northern Trust Co., which was in possession of the hotel and chattels, and, in my opinion, the word "hotel," as used in those two places, means the hotel building and its fixtures and furnishings, etc.; that is, the hotel building and the chattels covered by Thompson et al chattel mortgage, and when the words "said premises" are next used in the clause "Further, if the proceeds of operation of the said premises" etc. they refer to the land, hotel and chattels, and are so used throughout the balance of the agreement, except in clause 6, where the word "lands" is used as well as "premises," and in this clause "premises" evidently refers to the hotel and chattels. Said clause 6 reads as follows:— "6. If the option to purchase hereinbefore set out, is not exercised by the defendant company, the plaintiffs shall hold the said lands and premises freed and discharged from all claim thereon or thereto of the defendant company save as to the amount due the said company in respect of the Gigot lien as hereinbefore stated."

The result is that, in my opinion, by this agreement P11, the plaintiff agreed that if the option to purchase was not exercised by the plaintiff, Thompson et al would, thereafter, hold the said lands and chattels freed and discharged from all claim thereon or thereto by the plaintiff save as to the Gigot lien, and that, as far as plaintiff was concerned, they

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were authorised to sell the lands and chattels together, which they did.

The question as to whether Thompson et al could sell as they did, in view of the statute dealing with extra-judicial seizures was not raised, but, in any event, I think that in view of agreement P11 plaintiff would be precluded from raising this question.

Thompson et al received a bona fide offer to purchase, and plaintiff did not exercise its option to purchase within 14 days after demand to do so by Thompson et al, and clause 6 of P11 thereafter took effect, and Thompson et al held the said lands and chattels freed and discharged of all plaintiff's claims, save as to amount due on the Gigot lien, and plaintiff, in my opinion, had no right to claim said chattels under its mortgage or otherwise, and plaintiff's action should be dismissed as against all the defendants other than the McCanns.

There is another reason why plaintiff's action should be dismissed as against all the defendants other than the McCanns.

Even if said agreement P11 did not authorise Thompson et al to sell the chattels, they could do so under their chattel mortgage. They were in possession of the chattels, and, the evidence shews they did sell the chattels with the land, in other words, they realised on both their mortgages at the same time. And, under these circumstances, it cannot, in my opinion, be successfully urged that the selling of the land covered by the land mortgage discharged the chattels covered by the chattel mortgage. Even if Thompson et al had no right to sell the chattels in the manner they did, on which I do not express any opinion, they did sell, and the sale of the chattels is not attacked. Plaintiff simply alleges the land was sold, and the chattel mortgage was thereby discharged. The plaintiff bases its claim on the assumption that the land only was sold and not the chattels. It may be that it was misled by the wording of the notice it received with regard to Codd's offer and the agreement that followed that, which both followed the wording used in the first part of agreement P11. The manner in which the sale was made to Codd and the notice the plaintiff received of said sale, may or may not entitle plaintiff to revive its option, but I have nothing to do with that in this action, and express no view thereon.

As to contention No 1:

In view of my construction of the agreement P11, and particularly clause 6 thereof, the plaintiff thereby agreed that, in consideration of said option, and if it did not exercise said option, Thompson et al would, thereafter, hold the said lands and chattels freed and discharged from all claim of the plaintiff save as to the amount due on the Gigot lien. The plaintiff did not exercise its option, and it is now estopped by said agreement from urging this contention and claiming said chattels.

Owing to the views above expressed, I do not think it is necessary to deal with the other matters raised in this action except as to plaintiff's claim for judgment against the McCanns.

The plaintiff claims $28,810. with interest thereon from February 18, 1914 at the rate of 8% per annum compounded yearly. There is nothing in the mortgage saying that plaintiff is entitled to compound interest yearly, but I think it does provide for the interest to be paid at the end of 12 months from the date of the mortgage with the principal and compound interest is to be paid monthly in case of default. Nothing has been paid on the mortgage, and as the plaintiff's claim as to yearly compound interest is less than what it is entitled to, I will allow the interest to be compounded yearly.

The plaintiff will, therefore, have judgment against the McCanns for $28,810 with interest thereon from February 18, 1914, at the rate of 8% per annum compounded yearly, with costs. The defendants, other than the McCanns, will have judgment against the plaintiff dismissing the plaintiff's action, and declaring that the said chattel mortgage of the plaintiff is null and void in so far as it affects the said goods and chattels covered by Thompson et al chattel mortgage, and these defendants are concerned, with costs.

Judgment accordingly.

LA CIE DES BOIS DU NORD v. S. S. "ST. LOUIS."

Exchequer Court of Canada, Maclennan, D.L.J. in Admiralty. December 6, 1920.

Admiralty (§I—1)—Exchequer Court—Jurisdiction—Action for work and necessaries supplied to ship—Owner domiciled in Canada—Ship not under arrest.

The Exchequer Court of Canada has under sec. 5 of the Admiralty Court Act, 1861, (Imp.) ch. 10, no jurisdiction over an action for work done and necessary disbursements supplied to a ship, where the ship is not under arrest and its owner is domiciled in Canada.

[Stack v. The Barge "Leopold" (1918), 45 D.L.R. 595, 18 Can. Ex. 325, followed. See Annotation, Liability of a ship or its owners for necessaries supplied, 1 D.L.R. 450.]

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ACTION claiming $1,562.99 for work done and necessary disbursements made to defendant ship. Action dismissed for want of jurisdiction.

J. A. Gagne, K.C., for plaintiff.

A. C. M. Thomson and Lucien Moraud, for defendant.

Maclennan, D.L.J.A.:—This is an action in rem and by the endorsement on the writ of summons the plaintiff claims the sum of $1,562.99 for work done and necessary disbursements made for the vessel St. Louis at Amos, Quebec, during the period within April and August, 1920, inclusively, and for costs. On a warrant issued from the Court the vessel was arrested in due course. The writ is addressed to the owners and others interested in the vessel St. Louis. An appearance was filed on behalf of Julius Francis House, lumber merchant and agent residing in Amos, Quebec, owner of the vessel St. Louis and under reserve. Both parties have taken some incidental proceedings in the action. The defendant now moves the Court to order that the writ of summons, the warrant and the arrest be set aside and be annulled, the vessel released from seizure and the action dismissed with costs, for want of jurisdiction, on the ground that the registered owner or owners were domiciled in Canada before, at the time and since the work claimed to have been done and materials claimed to have been furnished were so done and furnished and, in any event, that the warrant and the arrest should be set aside on the ground that the allegations of the affidavit for the warrant are insufficient and irregular; the whole with costs.

It was admitted by the parties that at the time of the institution of the action the vessel was not under arrest of the Court, and it would not therefore have jurisdiction over a claim for building, equipping or repairing under sec. 4 of the Admiralty Court Act, 1861 (Imp.) ch. 10. Section 5 of that Act gives jurisdiction to the Court over any claim for necessaries supplied to any ship elsewhere than in the port where the ship belongs, unless it is shewn to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner is domiciled in Canada. This vessel was registered at the Port of Montreal, on July 3, 1902, and at the date when the cause of action arose and the case was instituted the vessel was registered in the name of John F. Sherman, of Smiths Falls, Ontario, and since April, 1919, House has had an interest in the

vessel under agreement to purchase her. It is settled law that a claim for the supply of necessaries does not give a maritime lien on a ship. Johnson and others v. Black, The "Two Ellens" (1872), L.R. 4 P.C. 161, at p. 166.

The registered owner Sherman being domiciled in Canada at the time of the institution of the action, and House, who claims to be interested in the vessel under agreement to purchase, being also domiciled in Canada since many years, it is manifest that the Court is without jurisdiction over the claim upon which the action is based and that the action must therefore be dismissed.

The defendant, as a second ground for the setting aside of the warrant and arrest, alleges that the affidavit to lead warrant is insufficient and irregular inasmuch as it does not state, as is required by Rule of Practice and Procedure 37, the national character of the ship and to the best of respondent's belief no owner or part owner of the ship was domiciled in Canada at the time of the institution of the action. The plaintiff submits that the objection raised by defendant to the sufficiency of the affidavit is a mere technical objection which has been waived by the appearance and other proceedings in the action.

It is unnecessary for me to decide the question raised as to the sufficiency of the affidavit, as I have come to the conclusion that under the statute there is absolute absence of jurisdiction. Stack v. The Barge "Leopold" (1918), 45 D.L.R. 595, 18 Can. Ex. 325. The defendant could have raised the question of jurisdiction immediately after appearance; this would have saved some expense for both parties. There will therefore be judgment setting aside the writ, warrant and arrest, and dismissing the action with costs up to and including the appearance and defendant's motion to dismiss for want of jurisdiction, and as to all other proceedings in the action, each party will pay his own costs. Judgment accordingly.

FINNIGAN v. S. S. "NORTHWEST."

Exchequer Court of Canada, Maclennan, D.L.J. in Admiralty.
November 11, 1920.

Admiralty (§I—1)—Exchequer Court—Action on Mortgage—Mortgage not Registered under Merchant Shipping Act—Jurisdiction of Court.

The Exchequer Court of Canada has no jurisdiction to entertain an action based on a mortgage which is not registered under the Merchant Shipping Act, 1894 (Imp.) ch. 60.

[See Imperial Trusts Co. v. The Ship "LeQuesnoy" and N.S. Transportation Co. Ante page 579.]

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ACTION in rem against S.S. Northwest claiming the sum of $76,997.62, balance due on a deed of mortgage executed and registered in Buffalo according to the laws of the State of New York.

The matter came before Maclennan, J., Deputy Local Judge in Admiralty, by way of motion to dismiss for want of jurisdiction, at Quebec, on September 25, 1920.

Thomas Vien, K.C., for plaintiff.

Louis S. St. Laurent and A. C. M. Thomson, for defendant.

Maclennan, D.L.J.A.:—This is an action in rem against the S.S. Northwest and by the endorsement on the writ of summons the plaintiff claims the sum of $76,997.62 for the balance due on a certain deed of mortgage executed at Buffalo, on November 19, 1918, payable in American funds at Buffalo on July 1, 1919, with interest at 6% and for costs. The ship was arrested and released on bail, pleadings were filed and some other proceedings were had in the cause. The defendant now moves for an order to set aside the writ of summons, the service thereof and the warrant and the seizure thereon, the defendant's bail released and the action dismissed with costs on the ground of want of jurisdiction of this Court to hear and decide the present cause. On hearing of this motion the plaintiff moved for leave to amend the endorsement on the writ of summons by adding the following words:—"the whole as completed and amended by a memorandum of terms of settlement of mortgage claim of Charles A. Finnigan against the steamer Northwest and John F. D'Arcy, dated November the 10th, 1919, by which the defendant Charles A. Barnard undertook to have the said steamer Northwest placed on the Canadian register, and a first mortgage on such vessel registered on the Canadian Register against the said steamer Northwest, to secure in favour of the plaintiff in this case the payment of the above mentioned mortgage"; and by adding certain paragraphs to statement of claim alleging at greater length the matters referred to in the proposed amendment of the endorsement of the writ.

The Admiralty Court possessed no original jurisdiction over mortgages of ships, but by the Admiralty Court Act, 1840 (Imp.), ch. 65, sec. 3,—the Court was given jurisdiction over claims or causes of action in respect of any mortgage of a ship whenever such ship or the proceeds thereof were under arrest by process issued from the Court of Admiralty, and by the Admiralty Court Act of 1861 (Imp.),

ch. 10, sec. 11, the High Court of Admiralty shall have jurisdiction over any claim in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act, 1854 (Imp.), ch. 104, whether the ship or the proceeds thereof be under arrest of the said Court or not. The Merchant Shipping Act, 1854, is now replaced by the Act of 1894 (Imp.), ch. 60. The jurisdiction of the Exchequer Court as a Court of Admiralty in cases of mortgages is derived from the Imperial Statutes of 1840 and 1861 above referred to. The mortgage upon which the present action is brought was executed at Buffalo, N.Y., on November 9, 1918, and was registered in the office of the Collector of Customs for the Port of Buffalo, N.Y., on November 19, 1918, according to the law and regulations of the State of New York. The pleadings and mortgage on their face shew that the mortgage upon which this action is based is not a mortgage registered according to provisions of the Merchant Shipping Act, but is a mortgage registered according to the law and regulations of the State of New York. The ship was not under arrest or seizure at the time of the institution of this action, and, unless the plaintiff is entitled to amend by alleging a new cause of action over which the Court has jurisdiction, the defendant's application for dismissal of the proceedings will have to be granted. The plaintiff's proposed amendment is in substance an allegation that Charles A. Barnard undertook to have the ship placed under the Canadian register and to mortgage the ship in favour of the plaintiff and that he has failed so to do. Any claim which might be based on the failure of the owner to carry out an agreement to grant a new mortgage must necessarily be in the nature of damages for the non-execution of the agreement, or, in other words, for the breach of a contract by which the owner of the ship undertook to grant a mortgage after the ship had been registered in Canada. The ship was brought from Buffalo to Quebec where certain repairs were made and the ship was registered on the Canadian register under a new name, but a new mortgage has not been executed in favour of plaintiff. The question therefore arises as to the jurisdiction of the Court to deal with a claim for the breach of a contract to grant a mortgage. If the Court has no jurisdiction in such a claim, the plaintiff's motion to amend should not be granted. The Admiralty Court has never exercised a general jurisdiction over claims for damages

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and its jurisdiction was originally confined within well defined limits which have been extended by the Admiralty Court Acts of 1840 and 1861. Neither of these statutes give jurisdiction on a claim for damages arising from breach of contract.

In the case of Bow, McLachlan & Co. v. The Ship Camosum, etc., [1909] A.C. 597, 79 L.J. (P.C.) 17, 101 L.T. 167, 25 Times L.R. 833, it was held in the Privy Council that the Admiralty Court had no jurisdiction in a claim for the breach of a contract to build a ship whether there was an arrest or not, although the Court, under sec. 4 of the Imperial Statute of 1861, had jurisdiction over any claim for the building of a ship if, at the time of the institution of the action, the ship or the proceeds thereof were under arrest of the Court. In my opinion, the same principles apply on a claim for damages for breach of a contract to grant a mortgage and, holding that opinion, I must come to the conclusion that the plaintiff is not entitled to amend the endorsement on the writ and statement of claim.

At the hearing plaintiff submitted that defendant's motion to dismiss for want of jurisdiction came too late and should not be entertained. The defendant's objection is that under the statute there is absolute absence of jurisdiction which is quite a different thing from a mere technical objection which could be waived by appearance and other proceedings—in the action. In the case of Stack v. The Barge "Leopold" (1918), 45 D.L.R. 595, 18 Can. Ex. 325, I held that an objection to the jurisdiction could be raised at the trial and, upon the authorities cited in that case, I am of opinion that this objection to defendant's motion is unfounded.

As I have come to the conclusion that the record shews that the action is based upon a mortgage not registered under the Merchant Shipping Act, the Court is without jurisdiction. Defendant's motion to dismiss could have been made at an earlier stage which would have saved some useless proceedings and expense to the parties.

There will therefore be judgment dismissing the action, setting aside the arrest and releasing the bail, with costs of defendant's motion to dismiss and with the general costs in the action up to and including the release of the ship on bail; and the plaintiff's motion to amend the endorsement on the writ of summons and the statement of claim will be dismissed with costs.

REX v. WEBER.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford and Middleton, JJ. and Ferguson, J.A. November 4, 1921

Trial (§VC—290)—Verdict—Form of—"Obtaining Money under false pretences without intent to Defraud"—Effect and mode of recording—Acquittal—Crown's Application for new Trial refused—Cr. Code secs. 405, 1018.

A verdict of "guilty of obtaining money under false pretences without intent to defraud," is in effect a verdict of "not guilty" and should have been so recorded at the trial. The Court of Appeal on an appeal by case reserved will in the exercise of its discretion under Cr. Code sec. 1018 decline to order a new trial on amending the record of the verdict as if it had been properly recorded the accused could not have been tried again on the same charge.

CASE received by the Chairman of the General Sessions of the Peace of the County of Simcoe for the purpose of being determined by the Court, a question arising upon the trial of the defendant upon an indictment for obtaining money by false pretences.

The trial was by the Chairman and a jury of the county. The jury found the defendant "guilty of obtaining money under false pretences without intent to defraud." The Chairman considered the finding to be a verdict of "guilty," but reserved for the consideration of the Court the question whether the defendant should be convicted, or acquitted, or whether there should be a new trial.

W. H. Wright, K.C., for the prisoner, contended that the finding of the jury, that the accused was "guilty of obtaining money under false pretences without intent to defraud," amounted in fact and in law to a verdict of "not guilty." Regina v. Gray (1891), 17 Cox C.C. 299, is authority to shew that upon the law there should be an acquittal, and the facts in this case demanded the application of the law more completely than in that one. He also referred to Rex v. Hunt (1918), 13 Cr. App. R. 155; Rex. v. Secombe (1917), 12 Cr. App. R. 275; Rex v. Ferguson (1913), 9 Cr. App. R. 113.

Edward Bayly, K.C., for the Crown, urged that there should be a re-trial under sec. 1018 of the Criminal Code, contending that under that section even an acquittal could be set aside. He further contended that, upon consideration of the facts in this case, the jury's verdict could not be considered an acquittal. On the question of the jury's verdict, he referred to Rex v. Betchel (1912), 5 D.L.R. 497, at p. 498, 19 Can. Crim. Cas. 423, at p. 425, 4 Alta. L.R. 402.

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REX v. WEBER.

Meredith, C.J.C.P.:—The verdict of the jury, "Guilty of obtaining money under false pretences, without intent to defraud," was in law a verdict of "not guilty," and it should have been so recorded, but was not.

The record in the Court of General Sessions of the Peace must be amended accordingly, and the accused acquitted of that particular charge; there are other charges yet untried.

A new trial is out of the question, if there were any power to grant it. The man has been once in jeopardy, and has been found "not guilty" because he had no intent to defraud.

The case was not a common one of that which is commonly called "padding a pay-sheet." According to the finding of the jury, the misrepresentation in the pay-sheets as to the person entitled to the money in question was not meant to defraud, because there was another person or persons entitled, or to become entitled, to it, and it was paid, or to be paid, to them.

Though it has been found to be no crime in this case, it was a very irregular and improper thing to do; and one which was more than likely to put the doer of it in the jeopardy which the accused has passed through unconvicted; but, it is to be hoped, with an experience which may keep him and others from putting themselves in any like jeopardy in the future.

Riddell, J.:—A case reserved, under sec. 1014 of the Criminal Code, by His Honour the Judge of the County Court of the County of Simcoe, as Chairman of the General Sessions of that county.

The defendant was indicted for obtaining money under false pretences, the jury found him "guilty of obtaining money under false pretences without intent to defraud," and the learned Chairman construed the verdict as one of "guilty."

It is apparent that, unless there was something, in the Judge's charge or elsewhere, shewing that the words of the jury are not to be taken in their ordinary and common meaning, the finding was one of "not guilty": one and an essential element, the intent to defraud, is negatived: sec. 405 of the Criminal Code.*

*405. Every one is guilty of an indictable offence and liable to three years imprisonment who, with intent to defraud, by any false pretence, either directly or through the medium of any contract obtained by such false pretence, obtains anything capable of being stolen, or procures anything capable of being stolen to be delivered to any other person than himself.

But it is suggested that the charge of the Judge gives a different meaning to these words, and it is therefore necessary to scrutinise with care his precise language.

He begins by defining the crime alleged as including "having fraudulent intent," and dwells somewhat upon the intent; then pointing out the contention of counsel for the defendant "the element of fraud, the intent to defraud, is absent," and says, "It is for you to say whether Weber was honest and believed that he was doing right," and adds: "Paying the money back afterwards would not help him, if the act of obtaining the money by false pretences was committed with intent to defraud." He says, "It is a matter of law what the intention was, whether the intention was to defraud," and, "I would be glad to receive your views as to whether Weber....had the intention of defrauding the county." Then he adds: "I would ask you to consider your verdict, and if your opinion is that Weber actually acted in good faith and got this money for the purpose of paying these men afterwards, that there be a recommendation for leniency in sentencing the accused, I will deal with him considering the matter....If you think that Weber got the money in good faith, and make a recommendation to mercy, it will be duly considered in passing sentence."

This seemed to leave it as a charge to the jury that the offence was complete on the defendant obtaining the money by false pretences, that the intent to defraud was a question of law, that nevertheless they were to find the intent for the assistance of the Court in determining the sentence. The jury retired, and, while counsel for the defence was raising some objections, the following occurred:—

"The Chairman: In Rex. v. Weber, the jury have handed me a note asking for further instruction (To the jury). I received your note from your foreman, Mr. McLean, asking for instructions in giving the verdict, in the case of obtaining money without intent to defraud.....If your unanimous view is that the accused has obtained money under false pretences, without intent to defraud, if that is your view, will you so state?"

The jury followed instructions and returned with a verdict: "Guilty of obtaining money under false pretences without intent to defraud."

I can find nothing to indicate that the jury did not say precisely what they meant under the charge; and the error of the Chairman in supposing that the intent to defraud

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is a matter of law for him, and not a matter of fact for them, should not prejudice the defendant.

I think the verdict was a verdict of acquittal, and can find nothing to justify a re-trial on this charge.

Latchford, J.:—I agree that the verdict is in effect a verdict of "not guilty." Had it been so recorded, as it should have been, the accused could not again be tried on the same charge. Therefore a new trial should not be ordered.

Middleton, J., agreed with Riddell, J.

Ferguson, J.A., agreed in the result.

Verdict of acquittal to be entered.

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Quebec King's Bench, Appeal Side, Lamothe, C.J., Carroll, Guerin, Dorion and Howard, JJ. January 22, 1921.

Appeal (§IIIF—98)—Insolvent Company—Action by Liquidator to Set Aside Payment Made—Appeal—Extension of Time for—Discretion of Judge—Winding-up Act sec. 104—C.C.P. art. 1209.

The delay for appeal from an order made under the Winding-up Act, R.S.C. 1906, ch. 144, may be extended by a Judge of the Court which rendered the judgment appealed from, although the fourteen days provided by sec. 104 of the Act has passed before application for the extension is made, or even after two months, the limit fixed by art. 1209 of the Code of Civil Procedure having no application.

APPLICATION to quash an inscription in appeal and dismiss the appeal on the ground that the leave to appeal was not granted until after the delay allowed by the Winding-up Act, R.S.C. 1906, ch. 144, and under the Code of Civil Procedure, art. 1209. Application dismissed.

Foster, Mann & Co., for appellant.

Markey, Skinner & Co., for respondent.

Howard, J.:—The Paige Motors of Montreal, Ltd., a company incorporated by Letters Patent of the Province of Quebec, was put into liquidation under the Winding-up Act, R.S.C. (1906), ch. 144, by a Winding-up order made by the Superior Court, Montreal, on September 3, 1918, and the respondent, Burnett, was in due course appointed liquidator of the company.

Subsequently the liquidator entered suit in the said Superior Court against the Canadian Bank of Commerce, now appellant, which came on for trial before Surveyer, J., and he, by judgment rendered on April 24, 1920, maintained the liquidator's action in part, condemning the appellants in the sum of $4,067.70 and costs.

On May 22, 1920, the appellants filed an inscription in appeal to this Court from that judgment and, after due notice to the respondent, furnished the requisite security on May 25. This inscription in appeal was entered without previous judicial authorisation.

The respondent, by motion dated August 30, 1920, challenged the appellants' right to thus inscribe in appeal and asked that the inscription be quashed and the appeal dismissed. There does not appear to have been any action taken on that motion, but it apparently prompted the next proceeding on the part of the appellants, which was the presenting of a petition in the Superior Court asking that the delay to appeal from the judgment of April 24 be extended until three days after the date of judgment to be rendered on the petition, and for authorisation to appeal. This petition was presented to the Superior Court on September 17 and was granted by an order dated November 3 following. The appellants thereupon made a new inscription in appeal from the judgment of April 24, 1920, which was perfected on November 6, and on the same day they filed a desistment from their former inscription in appeal.

The respondent by his present motion attacks this new inscription in appeal and asks that it be quashed and the appeal dismissed with costs.

I have stated all the salient facts for the sake of clearness, but it is obvious that, since the appellants have withdrawn their first inscription in appeal, neither the fact that it was entered nor anything arising therefrom can in any way affect the issue now before this Court.

Whether this litigation comes under the Winding-up Act and whether the proceedings now attacked are governed by its provisions have been questioned both before the Superior Court and at Bar. But a glance through the record of the case does not leave room for serious doubt that the act applies. The plaintiff (respondent) at the very outset makes it perfectly clear that his action was instituted under the provisions of that act and, though subsequent pleadings are not marked in the caption as being under the act, as is sometimes done, there is nothing in the record to justify any doubt that the litigation was proceeding under the act.

The first ground upon which the respondent bases his challenge is that the appellants have not obtained leave to appeal as required by art. 101 of the Winding-up Act.

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The appellants answer that the order of November 3, 1920, gives that authorisation.

It will be noted that that order contains only a brief recital of the appellants' petition and a dispositif in the briefest possible terms granting the petition "à toutes fins que de droit." The effect is that the conclusions of the petition are granted in full and, as they include a prayer that the appellants be authorised to enter the appeal, the authorisation is given by the order.

The relevant facts may be succinctly stated thus: (a) the provisions of the Winding-up Act and its amendments apply; (b) the judgment from which appeal is taken was rendered on April 24, 1920; (c) the delay to appeal from that judgment was extended and the appellants authorised to appeal by the order of the trial Court of November 3, 1920, granting the petition of the appellants to that effect, presented September 17 preceding; (d) the appellants have entered and perfected the appeal within the delay thus extended.

The respondent contends that the appellants did not take proceedings to perfect their appeal in time.

It is, of course, not pretended that the appeal was taken within the period of 14 days from the judgment a quo, for, as already stated, the undisputed fact is that almost 5 months elapsed after the judgment was rendered before the appellants made their petition for an extension of delay and leave to appeal (from April 24 to September 17) and more than 6 months when that petition was granted. It is now settled that the delay for appeal from an order made under the Winding-up Act may be extended by a Judge of the Court which rendered the judgment appealed from, although the 14 days provided by sec. 104 of the Act had passed before application for the extension was made. Calumet Metals, Ltd. v. Eldridge (1913), 15 D.L.R. 461, 20 Rev. de Jur. 21; Ross v. Ross (1915), 16 Que. P.R. 303.

"But," says the respondent—and this is the substantial point in the case—"though sec. 104 of the Winding-up Act gives the Judge of the Court appealed from power to extend the delay within which to perfect the appeal, there being no limit fixed by the Act upon such extension, art. 1209 of the Code of Civil Procedure applies to limit it in cases in this Province to two months from the date of the judgment, and no Judge or Court has power to extend the delay beyond that time; and so the order of November

3, purporting to extend the delay, not only after the period provided in the Winding-up Act has elapsed but after the delay fixed by art. 1209 C.C.P. had expired, is unfounded and void, and the order being bad, the inscription entered under its authority is without foundation and should be rejected."

The respondent relies upon the decision of the Supreme Court of Canada in re Great Northern Construction Company: Ross v. Ross (1916), 53 Can. S.C.R. 128, representing that the line of reasoning adopted by the majority of the Judges of that Court is applicable here and supports his contention.

In that case the majority held that the appeal to the Supreme Court of Canada given by sec. 106 of the Winding-up Act must be brought within 60 days from the date of the judgment appealed from, as provided by sec. 69 of the Supreme Court Act, R.S.C. 1906, ch. 139, and that, after the expiration of the 60 days so limited, neither the Supreme Court of Canada nor a Judge thereof can grant leave to appeal. The respondent argues that, inasmuch as the Supreme Court thus had recourse to the act by which that Court is governed to determine the time within which an appeal can be taken to that Court, so this Court of King's Bench is bound to take cognisance of the law by which it is ordinarily governed with regard to appeals, viz., art. 1209 et seq., C.C.P., and give application to the maximum delay therein provided, seeing that the Winding-up Act is silent on the point.

But this argument loses sight of the all-important fact that appeals to the Supreme Court of Canada are dealt with specifically by the Winding-up Act (sec. 106) and that Fitzpatrick, C.J., who formed one of the majority of the Court, bases his decision upon that fact and the opinion that sec. 104 of the Winding-up Act has no application to appeals to the Supreme Court of Canada. Duff, J., and Anglin, J., who dissent, apparently agree with this opinion, but they would interpret the relevant sections of the Supreme Court Act to permit an extension of the time for appealing even after the lapse of 60 days from the date of the judgment appealed from. Thus it appears that the Supreme Court, not only did not read into sec. 104 of the Winding-up Act, the limit imposed by sec. 69 of the Supreme Court Act, but they did not attempt to construe that section at all. It is a fair inference from the reported

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opinions of the majority of the Judges that, if the Winding-up Act had not contained special provisions governing appeals to the Supreme Court of Canada, sec. 104 of the Act would have been considered as governing appeals to the Supreme Court to the exclusion of the Supreme Court Act, and that consequently the appeal in that case would have been allowed. This judgment, therefore, fails to support the respondent's contention.

The Winding-up Act was enacted by the Parliament of Canada under the exclusive legislative authority given to it with regard to bankruptcy and insolvency by sec. 91 of the B.N.A. Act. Now, Parliament has seen fit to enact (sec. 104) that an appeal from a judgment of a trial Court must be entered within 14 days from the rendering of the order appealed from "or within such further time as the Court or Judge appealed from allows," but it has not seen fit to fix any limit upon the extension of time which the Court or Judge, in the exercise of the discretion thus conferred, may grant. It must be assumed that this omission was intentional, for the statute must be considered complete in respect of all matters dealt with thereby. This is in keeping with the general scheme of the Act, by which the winding-up of a company is left under control of the Superior Court and its Judges, and very wide powers are conferred upon them in all the winding-up proceedings. It is reasonable to assume that Parliament intended to give a broad discretion to the trial Court in this matter, and, to use the expression of Bowen, J., In re Manchester Economic Building Society (1883), 24 Ch. D. 488, at p. 503, 53 L.J. (Ch.) 115, it would be very inexpedient from the point of view of justice to introduce any hard and fast line into the working of this rule. Indeed, the whole of the judgment in the case last-mentioned is very instructive on the point.

It is also well settled that it is within the discretion of the Judge of the trial Court to decide for or against granting the extension and that the Court appealed to will respect an order made in the exercise of that discretion, except when it is shewn that there was disregard or oversight of a legal principle. In this connection the concluding paragraph of the reasons handed down by Cross, J., in Calumet Metals v. Eldridge, 15 D.L.R. 461, at p. 463, may appropriately be quoted:—

"It is true that this extension of the delay, for a period more than twice the length of the time which Parliament

in its wisdom, has mentioned in the Act, involved a wide exercise of judicial discretion in a matter which was intended to be proceeded with expeditiously, but that does not shew that there has been error. Upon the whole, the motion must be dismissed."

For these reasons, I consider that the inscription in appeal is valid, and the respondent's motion to quash it should be dismissed with costs.

There remains the further question, whether the appellants' inscription can be dismissed on motion, seeing that it has been taken under authority of a judgment of the Court below. In order to grant the respondent's prayer, that judgment must be set aside or ignored.

Now, it can be set aside only on an appeal entered in the ordinary way, and no appeal has been taken.

Neither can it be simply disregarded, for it is a judgment of a competent Court apparently within the scope of the powers conferred upon it by the governing statute, and it purports to decide the very questions now in issue between the parties.

Application dismissed.

SANSCHAGRIN v. ECHO FLOUR MILLS CO. LTD.

Manitoba King's Bench, Mathers, C.J.K.B. September 7, 1921.

Contracts (§IID—145)—Contract to Purchase Particular Brand of Flour—Right of Purchaser to be Supplied with that Brand and no Other.

Where a purchaser has bargained for a flour and by-products manufactured by the vendor under a distinctive tradename, he is entitled to refuse to accept flour or by-products manufactured by any other millers although the other flour may be equal to that ordered in all respects.

Contracts (§IVB—330)—Contract for the Purchase of Flour—Provision Against Accidents—Burning of Mill within Contemplation of Parties—Extension of Time in which to Make Delivery.

An agreement for the purchase of flour contained the following statement which was known to the parties at the time the contract was entered into: "All agreements herein contained or implied are contingent upon strikes, accidents and other delays unavoidable or beyond control." The Court held that the burning of the mill was an accident within the meaning of this condition which the parties had provided for, and that by the condition the vendors were not discharged from their obligation under the contracts by the burning of the mill but were entitled to a reasonable extension of time for their performance, in order to repair the damage and resume production.

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SANSCHAGRIN v. ECHO FLOUR MILLS CO. LTD.

ACTION for damages for alleged breach of contract to supply a particular brand of flour and wheat by-products.

J. T. Thorson, for plaintiff.

A. B. Hudson, K.C., and H. V. Hudson, for defendants.

Mathers, C.J.K.B.:—The plaintiff is a wholesale dealer in flour and feed at Three Rivers, in the Province of Quebec. The defendants are a flour-milling company with mills at Gladstone in the Province of Manitoba, manufacturing a brand of flour called "Gold Drop."

First contract: On July 26, 1919, the plaintiff, who had theretofore bought a few carloads of the defendants' products, sent them a telegram the concluding sentence of which was: "Wire quick largest proportions feed in about ten more mixed carloads, state earliest shipment."

On the same day the defendants replied:—"Your wire twenty-sixth, thirty-five per cent., feed bran and shorts equal quantities not over two tons feed flour in each car shipment, three cars per week after fifteenth August."

On July 28, 1919, the plaintiff sent the defendants a code telegram which meant: "Referring your telegram of 26th book ten carloads more with the same proportion flour and millfeed as the last three carloads for shipment as stated."

The three cars referred to were ordered by a telegram dated July 26, to be shipped to Three Rivers, two August 1, and one August 15, each to contain 400 sacks Gold Drop flour, 50 sacks feed flour, and 150 sacks shorts, the last car to be preferably in cotton sacks and the others in jute. It was this telegram which concluded with the inquiry about 10 cars more above quoted.

It appears that the defendants sent a reply by wire at the plaintiff's request to book 10 carloads more but it was not received by the plaintiff and on August 12 he wrote saying:—"I wired you on the 28th asking you to book ten carloads, more with the same proportions of flour and millfeed as the three carloads ordered out July 26th for Three Rivers for shipment three cars per week beginning August 15th."

And he added a postscript saying:—"I understand my order of the 28th also booked as instructed and am preparing to give you shipping directions in due course."

No shipping instructions were sent because the plaintiff had not been notified of the defendants' acceptance of his 10-car order and on August 26 defendants wired to him:—

"Referring your letter August 12th, can you send specifications for the ten cars booked July 29th."

This telegram fixes the date on which the plaintiff's order of July 28 for 10 cars was booked for the defendants. On the same day the plaintiff wired from Three Rivers:—"Answering yours, ship one here Canadian Pacific, one each Long Pointe for order and Notre Dame Canadian Northern with specifications given paragraphs three and eight of letter of twelfth. Wire numbers when these three shipped will then give instructions another bunch but don't forget quality expected equal any in Canada. Writing about this."

Paragraph 3 of the letter of August 12 is quoted above and para. 8 said:—"I rely upon the flour being made from old wheat and quality fully up to any made in Canada."

On August 26, the plaintiff wrote a letter quoting the defendants' telegram of that day and drawing their attention to the fact that the three Three Rivers carloads referred to in his booking order called for 400 bags Gold Drop flour, 50 bags feed flour, and 150 bags shorts in each car. He confirmed the shipping instructions given by wire for 3 cars of the 10 ordered and continues:—"Each of them must be shipped according to specifications given in paragraphs 3 and 8 of my letter of August 12th, each must contain 400 bags Gold Drop in jutes, 50 bags feed flour, and 150 bags shorts. If you find it impossible to load as much as 50 bags feed flour in each car you may replace some of the feed flour with shorts though I cannot authorise any considerable departure from the above instructions."

On August 29, the defendants requested permission to substitute bran for the feed flour but the plaintiff refused to authorise a decrease of feed flour unless replaced with shorts. On the same day the defendants, after receipt of plaintiff's letter of refusal, wrote him a letter, the last paragraph of which says:—"Referring again to the matter of feed flour, you will get all we make from this till we clean up the ten cars booked, this is approximately 25 sax per day but never exceeds that. You can therefore depend that we will not depart from your specifications more than we can help."

The 3 cars ordered out on August 26 were shiped on September 1, 3 and 4. It appears that on September 12, the defendants wired the plaintiff for shipping instructions for the balance of the 7 cars (see defendant's letter of Sep-

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tember 22) but none were given until September 25. The plaintiff was on that day at Gladstone and personally gave an order for 2 more cars, one for Ste. Tite and one for La Perede, and on October 5 by wire 2 more were ordered for St. Prosper and Lac Aux Sables respectively. These cars were shipped, 2 on October 8 and one each on October 17 and 20.

No further orders were sent until November 27, when by letter the plaintiff gave shipping instructions for 3 more cars, making 10 in all. On the following day and before the letter was received by the defendants their mill was so damaged by fire that there was nothing but the walls left and the order was unfilled. Damages are claimed for the non-delivery of these last 3 cars.

Second contract: On September 25, the plaintiff, while at Gladstone, entered into a verbal contract with the defendants for the supply of 50 more mixed cars of flour and feed, which contract was confirmed by the defendants on the same day by letter, as follows:—"We enclose herewith memo of four cars (our order Nos. 52, 53, 54 and 55) given by your Mr. J. L. Sanschagrin personally to-day and hereby confirm purchase of fifty carloads of flour and feed, forty per cent. feed to flour at the following prices: Flour, $5.35; Feed Flour, $3.20; Shorts, $2.25; Bran, $2.02½, per sax basis: Three Rivers, freight, terms sight draft on arrival of goods."

Two of the above orders are booked on the above contract and two on a previous contract not yet complete.

We thank you for your order and trust that shortly be able to double this sale to you. Yours truly (Sgd.), Echo Flour Mills Co. Ltd., per F. B. McKenzie.

No stipulation was made as to the time within which the 50 carloads were to be shipped. The plaintiff says they were to be shipped when wanted by him. He says that in his conversation with the defendants' manager he told him 50 cars would only supply his requirements for 6 months and suggested the inference that the whole number of 50 cars were to be supplied within that period of time. Before November 28, 12 cars had been ordered and shipped. Two others had been ordered but not shipped and one more was ordered in the plaintiff's letter of November 27 already referred to.

The plaintiff claims damages for the non-shipment of 38 carloads under the second contract.

The only defence raised in the pleadings in addition to a general traverse was the condition hereafter mentioned, printed in red at the top of the defendants' letter paper.

At the trial an application was made to amend which I then reserved but which I now allow by alleging as alternative defences (1) That the contracts were abandoned and new contracts made in respect of each car the same as ordered, all of which new contracts have been fulfilled; (2) That the plaintiff need not have suffered any damage had he used reasonable diligence to minimise it; (3) That the contracts were for supply of a specific article manufactured by the defendants, viz., Gold Drop flour, and the by-products thereof, and by the destruction of the mill by fire it became impossible to fulfil same; and (4) that the contracts were made void by an order of the Canadian Wheat Board with respect to any deliveries after such order.

The plaintiff knew that the defendants were manufacturers of flour and other wheat products and that they did not otherwise deal in these articles. I think it is a fair inference that the plaintiff knew the defendants had but the one mill in which to manufacture their goods, viz., the one located at Gladstone. The goods which both contracts called for were goods of the defendants' manufacture. The defendants had for some time been selling their flour under the distinctive trade name "Gold Drop Flour" and the plaintiff had previously bought flour from them under that name. By orders of the Wheat Board, flour was standardised so that the product of all mills was supposed to be of the same quality. Nevertheless there were known to be differences in quality as evidenced by the plaintiff's stipulation in his letter of August 26 that that supplied to him should be equal to the best produced in Canada and to his statement that he was having the defendants' flour compared with "Five Roses," the product of another manufacturer. The evidence also shews that there were very considerable differences in the quality of the by-products from different mills. Both the first and second contracts were for Gold Drop Flour and its by-products manufactured by the defendants. Throughout the correspondence the flour is not referred to by generic name but as "Gold Drop," or merely "Drop." It seems to me fairly clear that the plaintiff, having contracted with the defendants for the supply of flour manufactured by them under a distinctive trade name, would have been entitled to refuse to accept flour or

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by-products manufactured by any other millers. It may be that other millers produced as good or an even better grade of flour but the point is that the plaintiff had bargained for a flour known by a particular name manufactured only by the defendants and the defendants could not have forced upon him the goods of any other manufacturer. That, it seems to me is the principle of the decision in Johnson v. Raylton et al (1881), 7 Q.B.D. 438, 50 L.J. (Q.B.) 753; and Randall v. Sawyer-Massey Co. (1918), 43 O.L.R. 602. It follows that the plaintiff could not insist on being supplied with flour of any other manufacture.

If it became impossible in the legal sense without any default on the defendants' part for the defendants to fulfill their contracts by the manufacture and supply of their own goods, or if they are absolved from liability by any condition attached to the contracts, they have been guilty of no breach of contract; and whether or not the plaintiff after the fire expressed a willingness to have his orders filled by another mill or mills, or the defendants could have procured the goods of other manufacturers for that purpose, is beside the question. Any arrangement of that kind would have constituted a new contract and not a mere execution of the existing contracts. The defendants rely upon both grounds of defence as well as some others to which I shall hereafter refer.

At the top of each sheet of the defendant's letter paper there is printed in red ink this statement:—"All agreements herein contained or implied are contingent upon strikes, accidents and other delays unavoidable or beyond our control."

The plaintiff was aware of these conditions and it is not contended that he is not bound by them. He argues that the burning of the mill was an "accident" within the meaning of this condition but that the condition itself does not absolve the defendants from the fulfilment of their contract but only entitles them to the reasonable delay necessary to carry out the contract.

If the destruction of the mill was an "accident" within the meaning of this condition then the parties themselves have by their contract made provision for the very contingency which has happened and any implied condition inconsistent with such expressed provision would be excluded. As said by Lord Parmoor in Metropolitan Water Board v. Dick, Kerr & Co., [1918] A.C. 119, at p. 137, 87

L.J. (K.B.) 370:—"Care must always be taken not to imply a condition which would be inconsistent with the expressed intention of the parties."

The case referred to related to a contract dated July, 1914, for the construction of a reservoir within 6 years. The contract contained provision for extension of time for completing of the work by the engineer if, in his opinion, the contractor had been delayed, impeded or obstructed in the completion of the work. In 1916 the Ministry of Munitions stopped the work and caused the removal of a large portion of the plant to Government works. In an action to have it declared that the contract still subsisted, Bray, J., held that it did because the Government's action came within the terms of the stipulation made by the parties and consequently he was not at liberty to infer that there was attached to the contract an implied condition that the parties should be released if anything unforeseen happened which rendered its performance impossible. The Court of Appeal and the House of Lords however held that the action of the Ministry of Munitions was a contingency which was not covered by the express provisions of the contract and that the implied term as to performance becoming impossible was not excluded and that the contract was at an end.

Then was the destruction of the mill by fire an "accident" within the meaning of the printed condition? It was undoubtedly an accident in the ordinary acceptance of that term but was it such an accident as the parties had in contemplation when the contracts were made. What the parties provided against were accidents which would cause delay in carrying the contracts out. Nothing is said about the duration of the delay. The language used is wide enough to comprehend a delay of the duration necessary to rebuild the mill and I can see nothing in the circumstances to justify giving it a more restricted meaning. I come, therefore, to the conclusion, though with some hesitation, that the parties have provided for the contingency which has happened and that all conditions which might otherwise be implied are therefore excluded. By the condition the defendants were not discharged from their obligation under the contracts by the burning of their mill but were entitled to such extension of time for their performance as was reasonably necessary to repair the damage and resume production.

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The case relied upon by the defendants, New England Concrete Construction Co. v Sheppard & Morse Lumber Co. (1915), 107 N.E. 917, is, I think, distinguishable. The contract which the Court had to construe in that case was "contingent upon strikes, fires, breakage of machinery and other causes beyond our control." The contract was for the supply of a quantity of maple flooring which the Court inferred was to be manufactured at the defendant's mills. Before the time for delivery arrived the mill was burned down. The Court said the agreement was not an absolute contract but was contingent upon fires. "That is to say the defendant was excused from performance in the event of the happening of any of the contingencies set forth in the contract." . . . . . "The effect of this clause was not to extend the time of performance beyond the time limit but wholly to relieve the defendant from the obligation to furnish the flooring called for by the contract."

In that respect it differs from the condition of this contract, the fair construction of which is, I think, that it provided only against delay caused by strikes, delay caused by accidents, and delays caused by other unavoidable causes.

The defendants further contend as to both contracts that each order constituted a separate contract and that no obligation to deliver arose until orders for individual cars with shipping instructions and specifications were received.

I agree that the defendants were under no obligation to ship any cars until specifications and shipping instructions therefor had been received but I cannot agree that the orders for cars given from time to time constituted the only contracts between the parties. I can see no evidence that the contracts as originally made for 10 cars and 50 cars, respectively, were abandoned.

With respect to the first contract it seems to me that its meaning was this. The defendants contracted with the plaintiff to manufacture and deliver to him 10 cars of Gold Drop Flour and its by-products at the rate of 3 cars per week, the plaintiff to give the necessary shipping instructions and specifications in order that the defendants might do this. It was, however, a contract for 10 cars and the stipulation as to specifications and shipping instructions related to the method of carrying it out. There was some miscarriage in the delivery of the defendants' acceptance of the plaintiff's telegram of July 28, ordering these 10 cars.

and it was not until August 26, that the plaintiff was apprised of the fact that his offer had been accepted. It was not therefore possible for him to order 3 cars per week after August 15, but the parties treated the contract as commencing on August 26, and 3 cars were ordered out the first week and delivered. No further order however was given until September 25. Between the delivery on September 4 of the last of the 3 cars ordered on August 26, over 2 weeks had elapsed without any order being given. On September 25, only 2 cars were ordered and again on October 5, 2 cars more. By this time the orders for the balance of the 10 cars were overdue. From October 5 to November 27 no further order was given.

Upon the principle of Doner v. Western Canada Flour Mills Co. (1917), 41 D.L.R. 476, 41 O.L.R. 503; Sierichs v. Hughes, (1918), 43 D.L.R. 297, 42 O.L.R. 608; and Gerow v. Hughes (1918), 43 D.L.R. 307, 42 O.L.R. 621, it seems to me that the plaintiff has now lost the right to claim damages for the non-delivery of the 3 remaining cars on the first contract. The contract was for the delivery at the rate of 3 cars per week. If the plaintiff did not order 3 cars in any particular week he lost the right to require delivery to be made of that particular instalment in any subsequent week, unless there was an extension of time for ordering as to which I see no evidence. It is quite true that the defendants further than asking for shipping instructions made no complaint about the delay and when the belated order came, filled it. I think they were under no obligation to do this, and their filling the order is not to be construed as a waiver of their right to raise the objection when asked to fill any subsequent orders sent in out of time, or subject them to a claim for damages for breach of contract, if eventually they refused to fill orders that were not sent in in due time. For this reason I think that the action fails with respect to the 10-car contract.

With respect to the 50-car contract, the matter is in a somewhat different situation. There was no express stipulation so far as I can gather from the evidence that this contract should be filled at the rate of 3 cars per week or that any time limit was placed upon it. The plaintiff says the cars were to be delivered as he ordered and that statement is not contradicted. That does not mean that he would have the right to spread his orders over any period he saw fit. He says 50 cars would only serve his requirements for

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6 months and that he so informed the defendants. The inference is that the whole 50 cars would be ordered within that time which would be at the rate of about 2 cars per week. I therefore find that this contract was that the defendants should manufacture and ship to the plaintiff 50 cars mixed Gold Drop flour and feed as ordered by him, such orders to be given at the rate of about 2 cars per week. That such was the understanding of the parties is further shewn by the manner in which this contract was carried out insofar as it was performed before the fire. Up to November 28 the defendants had received orders, for 14 cars, which was only 2 less than 2 per week, and had actually shipped 12 of them. The shipment of 2 had been delayed by a request from the plaintiff to include oats in the shipments. The contract did not call for oats and had the sending forward of these 2 cars not been delayed by an attempt to comply with the plaintiff's request to include oats these 2 cars would also have been delivered before the fire. For that reason I do not think the plaintiff is entitled to claim damages for the non-delivery of these 2 cars. That leaves 36 cars which remained to be delivered upon the second contract. These the defendants were unable to deliver until after the mill had been restored and the plaintiff had given the necessary specifications and shipping instructions. As already pointed out it would have required from 8 to 12 months to make the necessary repairs and for that purpose the defendants were entitled to an extension of time for the fulfilment of their contract. Had they proceeded to carry out the requisite repairs with reasonable diligence they could not have been regarded as defaulters under their contract until after the work had been completed and they had thereafter failed to comply with the plaintiff's shipping instructions. The defendants, however, did not proceed to rebuild the mill and after a period of hesitation and uncertainty finally, on May 15, 1920, they, through their solicitors, repudiated all liability under either contract. At that time they were not in default. The shortest time estimated for repairing the mill would have carried it up to about August 1, with a possibility of its extending to December. Their refusal to be further bound by the contracts constituted a breach upon which the plaintiff was entitled to pursue one of three courses: (1) He had the right to go at once into the market and make a contract to take the place of that which the defendants had broken at the best price

and on the best terms that he could then reasonably obtain and sue for the difference between what he had to pay and the contract price; (2) He might wait until after the time had elapsed in which the defendants should have delivered the goods and then brought his action for the difference between the contract price and the then market price; or (3) He might at once sue for damages without either buying against the defendants or waiting for the expiration of the time for delivery to elapse.

It was this latter course which the plaintiff pursued. He neither bought in as against the defendants nor did he wait for the delivery date to expire by effluxion of time. Under these circumstances, to what damages is he entitled? As the defendants have before the arrival of the time for performance repudiated the contract the plaintiff is entitled to at least nominal damages for that breach. Whether or not he is entitled to anything more will depend upon the date with reference to which damages is to be assessed. If the date of repudiation is to be adopted the damages are no doubt substantial because at that time the price of flour and feed were considerably higher than the prices fixed by the contract. If, on the other hand, damages are to be assessed as of the dates when delivery should have been made had the contract been carried out, allowing for the delay necessary to reconstruct the mill, the amount will depend upon the market prices at that time as to which there has been no evidence given.

The chief consideration to be borne in mind is that the object in awarding damages is to place the other party to the contract as nearly as possible in as good a position as he would have been in had the contract not been broken. It was not intended that the defendants' breach of obligation should put the plaintiff in a better position than he would have been in had there been no breach. It seems to me that full justice would be done the plaintiff by giving him as compensation for the defendants' breach of contract the difference between the contract price and the market prices at the time or times when delivery should have been made had there been no breach. If the date of repudiation were adopted and the prices then prevailing were higher than when delivery was due the plaintiff would be placed in a better position than he would have been in had the contract been carried out. On the other hand, if at the later period the prices were higher than at the time of the

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breach the plaintiff would not be in as good a position as if the defendants had fulfilled their contract.

These conclusions are supported by the decided cases as well as by the Sale of Goods Act, R.S.M. 1913, ch. 174. In Melachrino v. Nickoll, [1920] 1 K.B. 693, 89 L.J. (K.B.) 906, Bailhache, J., said, at p. 699:—

"In my opinion the true rule is that where there is an anticipative breach by a seller to deliver goods, for which there is a market at a fixed date the buyer, without buying against the seller may bring his action at once, but that, if he does so, his damages must be assessed with reference to the market price of the goods at the time when they ought to have been delivered under the contract. If the action comes to trial before the contractual date for delivery has arrived, the Court must arrive at that price as best it can. To this rule there is one exception for the benefit of the defaulting seller—namely, that if he can show that the buyer acted unreasonably in not buying against him the date to be taken is the date at which the buyer ought to have gone into the market to mitigate the damages."

In this case there was no complaint that the plaintiff had not gone into the market subsequent to the breach and he was under no obligation to do so before. Reference may also be made to Brown v. Muller (1872), L.R. 7 Ex. 319, 41 L.J. (Ex.) 214, and Ex. parte Llansamlet Tin Plate Co., In re Voss (1873), L.R. 16 Eq. 155.

I think this contract is one in which the time for delivery was fixed within the meaning of sec. 50, sub-sec. 3 of the Sale of Goods Act, and therefore that the measure of damages is the difference between the contract price and the market price at the time or times when delivery ought to have been made. The time was not definitely fixed, but as in Melachrino v. Nickoll the commencement of delivery was fixed by the happening of an event—the completion of repairs to the mills. The plaintiff had before the breach given specifications for the whole number of remaining cars and had ordered them delivered at the rate of 3 cars per week so that when the mill was repaired deliveries were due at that rate.

The time within which the mill might have been rebuilt was stated to be from 8 to 12 months. It seems to me that for the purpose of fixing the earliest time at which the defendants can be regarded as defaulters for the purpose of assessing damages against them I should take the maxi-

mum length of time estimated. On that basis they might have recommenced operations about November 28, 1920, or 12 months after the fire. If deliveries were made at the rate of 3 cars per week thereafter the whole 36 cars would have been shipped in 12 weeks.

In my opinion, the plaintiff is entitled to judgment for the difference between the contract prices and the market prices estimated on 3 cars on the last day of each week commencing with December 5, 1920, for 12 consecutive weeks.

The plaintiff's letter of October 6, 1919, shews that each car was to contain 400 sacks Gold Drop Flour, 125 bags shorts and bran, and 10 sacks feed flour. The proportions of shorts to bran is not stated, consequently it must be presumed that they were to be in equal quantities.

As already pointed out there was no evidence of prices subsequent to May 15, 1920, and the best the plaintiff is entitled to on the evidence now before me is a verdict for nominal damages. If, however, he desires a further opportunity of giving evidence as to market prices at the various times with respect to which I have indicated damages ought to be assessed, I will refer the matter to the Master for that purpose, reserving further directions and costs. In default of so electing within 30 days there shall be a verdict for the plaintiff for nominal damages of one shilling without costs.

Judgment accordingly.

PETERS v. SANDERSON.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. June 13, 1921.

Appeal (§VIII—340)—Interlocutory Order—No Appeal from to Court of Appeal—District Courts Act R.S.S. 1920, ch. 40, secs. 55 and 56.

At the trial of an action the District Court Judge gave judgment for the plaintiff, with costs of the action up to the time of payment into Court by the defendant and allowing the defendant his costs subsequent to the payment in. The plaintiff subsequently made an application under sec. 55 of the District Courts Act, R.S.S. 1920, ch. 40, to review the question of costs, and in the alternative for leave to appeal from the judgment on the question of costs. The application was refused with costs but leave to appeal was granted. The Court held that the order dismissing the application to review, was an interlocutory order, and under sec. 56 of the District Courts Act an appeal did not lie to the Court of Appeal.

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PETERS v. SANDERSON.

APPEAL from an order refusing to review the question of costs on an application made under sec. 55 of the District Courts Act, R.S.S. 1920, ch. 40.

T. D. Brown, K.C., for appellant.

E. B. Jonah, for respondent.

Haultain, C.J.S.:—On the trial of this action in the District Court the trial Judge gave judgment for the plaintiff with costs of the action up to the time of payment into Court by the defendant, and allowing the defendant his costs subsequent to the payment in.

The plaintiff subsequently made an application under sec. 55 of the District Courts Act, R.S.S. 1920, ch. 40, to review the question of costs, and in the alternative for leave to appeal from the judgment on the question of costs. The application was refused, with costs, but leave to appeal was granted.

The present appeal is taken from the order dismissing the application to review, and the preliminary objection is taken that the order appealed from is an interlocutory order, and that the appeal should, therefore, have been taken to a Judge of the King's Bench and not to this Court.

The right of appeal from the District Court is given by sec. 56 of the District Courts Act. The section is as follows:—

"56. (1) In every civil action in the district court where the amount in controversy is over fifty dollars an appeal shall lie:—(a) in the case of an interlocutory order, judgment or decision, to a judge of the Court of King's Bench in Chambers; (b) in the case of a final order, judgment or decision, to the Court of Appeal.

(2) The procedure on appeal from such interlocutory order, judgment or decision shall be the same as is or may be provided in the case of an appeal from a Master of the Court of King's Bench.

(3) The order or decision of a judge upon appeal from such interlocutory order, judgment or decision shall not be subject to further appeal except by leave of the Judge."

The order in question is clearly an interlocutory order. By it the Judge refuses to review and set aside that portion of his judgment relating to costs. The result is that the original judgment stands. An appeal from the order refusing review would not affect the original judgment pending appeal, and it is difficult to imagine what sort of order the appellate tribunal would make in such a case. The

decisions in Pole v. Bright, [1892] 1 Q.B. 603, 61 L.J. (Q.B.) 139; Gilson & Sons v. Kilner (1893), 69 L.T. 310; Re Jerome, [1907] 2 Ch. 145, 76 L.J. (Ch.) 432, and Wilson, etc., v Statham, [1891] 2 Q.B. 261, do not deal with exactly similar statutory provisions, but are very much in point on the question whether the order appealed from is an interlocutory or final order.

The appeal should be dismissed with costs.

Lamont, J.A.:—I concur.

Turgeon, J.A.:—I concur. I was at first inclined to the opinion that the order appealed from was a final order, but I think the contrary is established by the English decisions cited by the Chief Justice in his judgment. Therefore sec. 56, sub-sec. 1, clause (a) applies, and, the order being an interlocutory one, no appeal lies to this Court.

Appeal dismissed.

REX v. BARNES.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford, Middleton and Lennox, JJ. February 25, 1921.

Witnesses (§IIC—45)—Person Awaiting Trial on Charge of Manslaughter in Causing Death of Person Killed on Highway—Competency and Compellability as Witness before Coroner's Court in Investigation as to the Death.

In September, 1920, one Rossiter was injured upon the Toronto-Hamilton highway and died in the city of Toronto on the same day. An associate coroner for the county of York thereupon proceeded to conduct an inquest upon the body of Rossiter, and appellant Barnes, who resides in the county of Lincoln, was subpoenaed by the coroner to attend the inquest and give evidence on behalf of the Crown touching the death of Rossiter. Prior to the issue of the subpoena Barnes was charged before a Magistrate of the county of Peel with manslaughter in having caused the death of Rossiter, and was committed by the Magistrate for trial upon that charge, being subsequently released on bail to await his trial. At the inquest Barnes appeared and upon the advice of counsel refused to give evidence or to hold himself bound by the subpoena on the ground that a charge of manslaughter was then pending upon which he had been committed for trial, and that he was neither a competent nor a compellable witness at the inquest at the instance of the Crown. The inquest was adjourned to a later date, but Barnes entered into no recognisance to appear thereat, and no further subpoena was served upon him requiring his attendance at the inquest upon that date. On that date, Barnes not appearing, a warrant was issued to arrest him and bring him before the coroner's Court to give evidence. Barnes moved before Orde, J., to quash the warrant, or for an order to prohibit the coroner or any officer of his Court or any peace officer from executing the warrant or arresting Barnes thereunder, and for an order prohibiting the coroner from issuing any other process, subpoena or warrant to compel him to attend and give evidence

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at the inquest or to arrest him for such purpose. The motion was refused. On appeal the Court held that the order appealed from was right and that the appellant was a competent and compellable witness, Meredith, C.J.C.P., holding, however, that, although he might be examined in the coroner's Court in regard to the guilt of any other person, it was not lawful or proper to examine him in any way regarding the charge which was pending against him.

APPEAL from an order of Orde, J., on a motion by H. G. Barnes for an order quashing a warrant for his apprehension, issued by a coroner, or prohibiting the coroner, or any officer of his Court or any peace officer, from executing the warrant or arresting the applicant thereunder, and prohibiting the coroner from issuing any further process, subpoena, or warrant to compel the applicant to attend and give evidence at a certain inquest or to arrest him for such purpose. The order appealed from is as follows:—

On September 19, 1920, one W. E. Rossiter was injured upon the Toronto-Hamilton highway, in the county of Peel, and died the same day, in the city of Toronto. Dr. W.A. Young, an associate coroner for the county of York, thereupon proceeded to conduct an inquest upon the body of Rossiter; and, on or about October 2, 1920, Henry G. Barnes, who resides in the township of Louth, in the county of Lincoln, was subpoenaed by the coroner to attend the inquest on October 4, 1920, and give evidence on behalf of the Crown touching the death of Rossiter.

Prior to the issue of the subpoena, Barnes was charged before the Police Magistrate at Port Credit, in the county of Peel, with manslaughter in having caused the death of Rossiter, and was on September 27, 1920, committed by the Magistrate for trial upon that charge. He was subsequently released on bail to await his trial.

At the inquest on October 4, 1920, Barnes appeared with counsel, and, upon the advice of counsel, refused to give evidence or to hold himself bound by the subpoena, on the ground that a charge of manslaughter was then pending against him upon which he had been committed for trial, and that he was neither a competent nor a compellable witness at the inquest at the instance of the Crown.

The inquest was adjourned to November 12, 1920, but Barnes entered into no recognisance or undertaking to appear thereat, and no further subpoena was served upon him requiring his attendance at the inquest upon that date.

On that date the associate coroner issued a warrant in the following words:—

"Canada, Province of Ontario, County of York, to the Chief Constable of the City of Toronto, in the County of York, and to all others His Majesty's Officers of the Peace, in and for the said city, whereas, I have received credible information that Henry G. Barnes, of Barnesdale, in the County of Lincoln, can give material evidence on behalf of our Sovereign Lord the King touching the death of William J. Rossiter, now lying dead in the said city of Toronto, in the county of York, and whereas the said Henry G. Barnes, after having been duly served with a summons to appear and give evidence before me and my inquest touching the premises, at the time and place in the said summons specified, has refused and neglected so to do to the great hindrance and delay of justice; and whereas proof of such service has been duly made before me on oath: These are, therefore, by Virtue of my office, in His Majesty's name to charge and commend you or one of you without delay to apprehend and bring before me one of His Majesty's Associate Coroners in and for the said city of Toronto, in the county of York, now sitting at the city of Toronto, in the county of York, the said Henry G. Barnes, that he may give evidence and be examined on His Majesty's behalf before me and my inquest touching the premises, and for so doing this is your warrant.

"Given under my hand and seal, this 12th day of November in the year of our Lord one thousand nine hundred and twenty. W. A. Young, M.D., Associate Coroner in and for the City of Toronto."

It is sworn that peace officers have attempted to execute the warrant at or near the residence of Barnes, and that instructions have been given to peace officers at the various bridgeheads over the Niagara river to arrest him.

Barnes now moves to quash the warrant, or for an order to prohibit the coroner or any officer of his Court or any peace officer from executing the warrant or arresting Barnes thereunder, and for an order prohibiting the coroner from issuing any further process, subpoena or warrant to compel Barnes to attend and give evidence at the inquest or to arrest him for such purpose, upon several grounds. The notice of motion and the documents are styled "In the Supreme Court of Ontario, Rex v. Henry G. Barnes," and the notice is directed to Dr. Young as

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associate coroner, and to the Attorney-General for Ontario. The Deputy Attorney-General appears for the coroner.

The status of a coroner's Court was very fully discussed in The Queen v. Hammond (1898), 29 O.R. 211, and it was there held that a coroner's Court, though constituted under Provincial legislation is a criminal court. Section 642 of the Criminal Code of 1892, ch. 29, (sec. 940 of the present Code, R.S.C. 1906 ch. 146), deprived the coroner and his jury of the power, which had theretofore existed, of committing for trial the person declared by the coroner's jury to be guilty of murder or manslaughter; but sec. 568 (now 667) of the Code empowers the coroner to apprehend the person charged and convey him before a Magistrate.

There were certain technical points argued before me; but before dealing with them, I think it will be well to explain the real question raised by the motion. Counsel for Barnes admitted that, if he had been called upon to give evidence at the inquest before the criminal charge had been laid against him, he would have been bound, by reason of the provisions of sec. 5 of the Canada Evidence Act (R.S.C. 1906, ch. 145), to answer any questions put to him notwithstanding that his answers might tend to criminate him, the only protection afforded him being that his answers could not be used or received in evidence against him in any criminal trial or criminal proceeding, as provided by that section. But he says that, as the criminal charge had already been laid against him, the provisions of sec. 5 do not apply to him, and he is not bound to answer.

Sec. 5 of the Canada Evidence Act, as it stood in the Act of 1893 (Can.) ch. 31, read, "No person shall be excused," etc. In 1898 the section was repealed, and the section substantially in its present form, except for a further amendment in 1901 (Can.) ch. 36, was substituted. The substituted section commences, "No witness shall be excused," etc., and Mr. Kingstone argues that the change of the word "person" to "witness" is significant as indicating that the person who is not to be excused from answering under sec. 5 must be one who is otherwise a compellable witness; and that, as Barnes cannot be compelled by the Crown to give evidence in the criminal proceedings now pending against him, he is not a "witness"

to whom sec. 5 is applicable. He also points out that sec. 5 follows immediately after sec. 4, which deals with the competency and compellability of certain "persons" to give evidence, and argues that the use of the word "person" in sec. 4, and of the word "witness" in sec. 5 adds force to his contention. I do not think that any significance whatever is to be attached to the juxtaposition of these two sections, nor can I see that the use of the word "person" in sec. 4 and of the word "witness" in sec. 5 is intended to give to the latter word any special meaning. Where the word "person" is used in sec. 4 with regard to that person's evidence, the section deals with the question whether or not that person is a competent or compellable "witness," that is, whether or not that "person" can be allowed or compelled to be called as a witness at all. That is an entirely different question from that dealt with in sec. 5. That section does not deal with the competency or compellability of a person to be called as a witness, but merely with the obligation of the person who has been sworn as a witness to answer certain questions. There is nothing to indicate why Parliament in 1898, when re-enacting the section in its more extended form, substituted the word "witness" for "person," but I am unable to see that the change is of any real consequence. If in any proceeding a person is not compellable to be called as a witness at all, the section would be applicable to him, whether the words were "no person" or "no witness."

We are dealing here with the proceedings in the coroner's Court, and not with the criminal prosecution pending against Barnes. In the latter he cannot be compelled to give evidence; but if he should see fit to do so, then he would be bound under sec. 5 to answer all questions put to him, whether his answers tended to criminate him or not. Does the fact that he is not a compellable witness in the criminal proceedings exempt him from being compelled to give evidence before the coroner? I am unable to discover upon what grounds any such exemption can be claimed. Although the coroner's Court is a criminal Court, no one is there on trial or charged with any offence. It is conceivable that, notwithstanding that Barnes is committed for trial upon the charge of having killed Rossiter, his evidence before the coroner might point to the guilt of some other person. It does not necessarily follow that the proceedings are directed against him. This

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is of course a technical view of the matter, I must confess that, in view of the fact that an inquest is primarily intended to get early evidence as to the persons responsible for the death of the deceased, when as here the authorities have already determined that the evidence points to Barnes's guilt, and he is formally committed for trial upon the charge, to endeavor to compel him to give evidence in another proceeding, and thereby virtually to examine him for discovery, comes with a shock to one's sense of fair play, and seems to be a serious inroad upon the principle that the burden of establishing the guilt of a person charged with a crime falls upon the Crown. To say that the incriminating answers cannot be used against the accused upon his trial really begs the question. The Crown may, by means of this oppressive power, extract evidence from an accused which, while not admissible in evidence against him upon his trial, may nevertheless furnish the Crown with certain information which might enable the Crown by means of other evidence to convict the accused. Of course, a person suspected of but not yet charged with the crime is in exactly the same position if called upon to give evidence before the coroner's jury when afterwards prosecuted for the offence, but the fact that in the one case, the authorities have already fixed upon the alleged guilty party, and in the other are merely seeking to discover him, impresses upon one's mind the lengths to which section 5 may go if resorted to by the Crown. For example, the Ontario Evidence Act (R.S.O. 1914, ch. 76) contains, in sec. 7, substantially the same provisions as those in sec. 5 of the Canada Evidence Act. Unless the word "witness" is to be deemed to exclude one who cannot be compelled to give evidence in some other pending proceeding, then there is nothing apparently to prevent the Crown from instituting some civil proceeding against a person who is charged with a criminal offence, and, by compelling him to give evidence in the civil proceedings, extract from him certain information which, while not admissible in evidence in the criminal proceeding, may greatly strengthen the position of the Crown against the accused.

It is not for me, however, to deal with the propriety or otherwise of these provisions of both the federal and provincial Evidence Acts. The competency or the compellability of a person to be called as a witness must be gov-

erned by the nature of the proceeding in which that question arises. There is here no real connection between the proceedings before the coroner and those before the Magistrate or the Supreme Court of Ontario in the criminal proceedings. The proceedings therein are entirely distinct. If a civil action were now proceeding, in which the question of the responsibility for the accident in which Rossiter was killed was involved, Barnes could be compelled to give evidence and to answer even though his answers tended to criminate him: Re Ginsberg (1917), 38 D.L.R. 261, 40 O.L.R. 136. And I am unable to see how the fact that he is a defendant in certain criminal proceedings, in which he is not a compellable witness, can entitle him to exemption in all other proceedings. The question of competency or compellability must be determined with reference to the particular proceeding in which it is proposed to call the person as a witness, and not with reference to some other proceeding. And I can see no distinction in principle between the coroner's Court and any other Court in this respect. I cannot, therefore, discover any ground upon which Barnes is entitled to claim exemption from giving evidence upon the inquest now pending.

The warrant is also attacked upon the ground that the coroner had no authority to issue a warrant to apprehend the accused beyond the limits of the County of York.

It was held in Re Anderson and Kinrade (1909), 18 O.L.R. 362, that a coroner was a Court officer and could only act within his own municipal jurisdiction, and that a warrant to arrest issued by him could not be validly executed in another county.

By sec. 35 of the Coroners Act (R.S.O. 1914, ch. 92), it is provided that, "in addition to any other powers which he may possess, a Coroner shall have the same power to issue summonses to witnesses, Form 8, to enforce their attendance and to punish for non-attendance or refusing to give evidence as is possessed by the Supreme Court." This section was first passed in 1911, and was probably adopted to meet the very difficulty which arose in Re Anderson and Kinrade. Mr. Kingstone contends that this section, while it gives the coroner the same power to deal with witnesses as that possessed by the Supreme Court, does not enable the coroner to exercise those powers beyond the limits of his territorial jurisdiction. I cannot agree with

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this view. While the coroner is limited to his own municipality in holding the inquest, the process of his Court is intended by the section to run throughout the Province. His position in that respect is analogous to that of a County Court, whose jurisdiction is limited to its own county, but whose process runs throughout Ontario. I must hold, therefore, that the warrant is enforceable beyond the limits of the County of York.

I may add that, so far as the quashing of the warrant is concerned, even if Re Anderson and Kinrade still applied, there is nothing on the face of the warrant to shew that it is intended to be executed beyond the limits of the county of York.

No objection was taken to the fact that this application is apparently made in the criminal proceedings not pending against Barnes. The warrant in question is not issued in those proceedings at all, and it may be that upon this application as framed, the Court could not or ought not to assume to quash a warrant issued out of the Coroner's Court. But I have preferred to treat the application upon its merits.

The motion will be dismissed with costs.

A C. Kingstone, for appellant.

E. Bayly, K.C., for respondent.

Meredith, C.J.C.P.:—Though it is unlikely that such a case as this shall recur, it is quite an important one, requiring careful consideration so that the fundamental principles of the criminal law applicable to it may not be ignored or misapplied.

The real and the single question involved is, whether the appellant can be compelled to give evidence of his guilt of a crime of manslaughter—with which he is charged—if he be in fact guilty.

The charge against the man has passed its first stage: he has, after the usual preliminary investigation before a Magistrate, been duly sent for trial.

But, running concurrently with that charge, a coroner's inquest is being held upon the body of the man whose death is the subject of the criminal charge.

The Crown seeks an examination of the appellant at the inquest; the appellant resists because charged by the Crown with having caused the death of the man by a criminal act amounting to manslaughter. Which is right?

It is a fundamental principle of the law of England, very

commonly called British justice, that all confessions of guilt must be free; also that, generally speaking, no person, nor the husband or wife of such person, can be compelled to give evidence against himself or herself upon a criminal charge; and also that no witness can be compelled to answer when the answer would tend to expose the witness to any kind of criminal charge; and this protection extends not only to questions which may tend directly to incriminate but also to every link in the chain.

That which the Crown seeks is obviously quite a violation of these principles; and for the appellant it is contended also that the examination sought can be only for discovery in aid of the pending prosecution.

For the Crown it is contended that the Parliament of Canada has by enactment expressly given the power, which it seeks to enforce, in these words of the Canada Evidence Act:—

"No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him....." but "the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him....." (sec. 5 R.S.C. 1906, ch. 145).

It is to be observed, and borne in mind, that that provision immediately succeeds another in the same Act, giving, generally, to persons charged with crime the right to give evidence in their own behalf: providing also that, if they do not, that fact "shall not be made the subject of comment by the judge, or by counsel for the prosecution" (sec. 4).

The outstanding features of this legislation are: a widening of the protection which the law afforded to a person charged with crime; and a charge of the opposite character as to that affecting a witness, according to the decision of Ginsberg's case (1917), 38 D.L.R. 261, 40 O.L.R. 136, though one may think that the new kind of protection, which the Act gives to the witness himself, was intended to be as full as that which was taken away.

So that, in so far as this legislation affects the common law, the person charged with crime is more effectually protected; and that is the appellant's position; he does not come under the other provisions which apply only to a "witness."

It ought to be manifest, to those who are familiar with

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the criminal law, that it is not possible that by sec. 5 of the Canada Evidence Act Parliament meant to abolish all the protection the law always, since very early days, afforded persons charged with crime; and it ought to be equally manifest that Parliament did not inadvertently do so. If the respondent's contention be right, it has: for, though you cannot apply the thumbscrews in the case in which the accused is tried, you can in some collateral proceeding, in a coroner's court or in a civil action; and in such a manner as to make the protection afforded by sec. 5 of no substantial or real effect. A sham Parliament never meant to enact any such farce as that.

If the proceedings in the Coroner's Court are now carried on for the purpose only of extracting from the appellant a confession, or information such as should lead to his conviction of the crime he is charged with, they would be not only illegal but also inexcusable: it would be an abuse of the purposes of a coroner's inquest; and a violation of the fundamental principles of the criminal law to which I have referred. Coroners' Courts cannot be made use of as figurative thumbscrews or racks—in the substantial form of imprisonment in the common goal—to extract confessions or admissions. They must be confined to their lawful purposes and within their real limits: see the Coroners Act, R.S.O. 1914, ch. 92. If carried on in good faith, they would be equally a violation of those principles; and, instead of being warranted by the enactment relied upon, would be also a violation of its principles in extending the protection thrown around an accused person.

The later section as to witnesses is not to be brought into conflict with the earlier one extending such protection; the former relates to persons charged, the latter to witnesses only.

And all this legislation—need it be said—has no special relation to coroners' courts, it applies to all courts and proceedings alike.

Ginsberg's case 38 D.L.R. 261, is not a decision against the appellant's contention. The real question involved in this case was not decided, and does not seem to have been discussed or raised, in that case. Ginsberg was throughout treated as a "witness" within the meaning of that word contained in sec. 7, of the Ontario Evidence Act, upon which enactment that case was decided; and, al-

though that section of that enactment is like the later section of the Canada Evidence Act to which I have referred, it is not, it could not be, accompanied by the earlier section to which I have also referred, and upon which a good deal depends. Then in this case the whole question is one under the criminal law, and the main subject-matter involved in each Court was the same; was the cause of Rossiter's death manslaughter? Is the appellant, or is some other person, guilty of manslaughter by reason of it? Ginsberg's case was altogether different.

On the highest principles of the common law, and of the enactment in question, the Crown is precluded from forcing from the appellant any evidence upon the question whether he is guilty of the crime with which he is charged: if he were not, an amendment to the law respecting witnesses only, and an amendment which was intended to afford former protection only in another form, might be made an instrument for extorting confessions as effectual, perhaps, as thumbscrews and the rack were in former days.

To say that in a civil action an accused person might be made to divulge is quite beside the question, if it were true: but it is not, if for no other reason, because no Court or Judge should allow such an abuse of civil proceedings, Since the law has permitted concurrent proceedings (see Criminal Code, sec. 13) it has been the common practice, for more than one reason, to postpone the civil proceedings till the criminal proceedings are concluded.

On principle, therefore, it is not lawful, or proper, to examine the appellant in the coroner's Court in any way regarding the charge which is pending against him, as long as he is in jeopardy in respect of it. But he may, in my opinion, be examined as a witness in regard to the guilt of any other person, so long as the examination does not touch in any way the charge against him.

Having considered the question on principle only, let me now deal with it according to the cases, though none were relied upon, or referred to, on the argument of this appeal.

There are a good many quite in point: and all of them seem to me to be quite in accord with the conclusion I have stated.

Before the decision of the case of Wakley v. Cooke (1849), 4 Exch. 511, 154 E.R. 1316, 19 L.J. (Ex.) 91 it was the common practice of Middlesex coroners to refuse to examine persons when their evidence might tend to the crimination of themselves, but in that case the practice

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was condemned: and the proper practice was declared to be, to examine all witnesses after informing them of their right to refuse to answer any question, the answer to which might tend to incriminate them. And why was this declared to be the proper practice? Because those witnesses were not charged with any crime in connection with the matters under investigation. By necessary implication it followed that, if they were so charged, they could not be compelled to give evidence: they were more than witnesses: they were "persons charged with an offence."

In the case of The People v. Taylor (1881), 59 Cal. 640, it was held that a person in the position of this appellant was not a witness within the meaning of that word in a penal code.

And in the case of Hendrickson v. The People (1854), 10 N.Y. 13, the subject was fully considered and many cases referred to, the result being that a person not in custody and not charged with crime was a witness; but impliedly if, as is the case of this appellant, held in custody and charged with crime, he cannot be a witness. This case deals fully with the decisions in England down to the time when it was decided.

The result of the cases in the United States of America down to the present time seems to be pretty accurately stated in Corpus Juris, vol. 13, title "Coroners", thus:—p. 1251 note [b.]

"A person suspected of the commission of a crime is not a witness (1) within the meaning of a statute providing for punishment of a witness for refusing to testify; his statements must be made of his own volition; (2) Where made, however, of his own volition, they may be used in evidence against him."

The result is that the appellant was wrong in disobeying his subpoena: he may be examined as to the guilt of others so long as the examination does not encroach upon his rights as a person charged with crime.

The appellant's persistent and vigorous resistance of the coroner's effort to bring him to the book to be sworn cannot but create a suspicion that he is really endeavoring to protect some one, not himself: but a perusal of all the evidence adduced upon the criminal charge and at the inquest lends no weight to such a suspicion: it all points to a car, the number of which is given, in which there were

only three persons, a man and two women, which car the man was driving.

For the reasons which I have given, and for the purpose I have indicated, I am in favour of dismissing the appeal.

Riddell, J.:—H. G. Barnes, subpoenaed as a witness at a coroner's inquest in Toronto concerning the death of one Rossiter, appeared and refused to be sworn on the ground that he had been committed for trial for manslaughter in respect of this death. The sittings of the coroner's Court adjourned; Barnes not appearing, a warrant was issued to arrest him and bring him before the coroner's Court to give evidence. Barnes moved before Orde J., in Chambers to quash the warrant, or for an order to prohibit the coroner or any officer of his Court or any peace officer from executing the warrant or arresting Barnes thereunder, and for an order prohibiting the coroner from issuing any further process, subpoena, or warrant to compel him to attend and give evidence at the inquest or to arrest him for such purpose, upon several grounds. The notice of motion and the documents are styled, "In the Supreme Court of Ontario, Rex v. Henry G. Barnes," and the notice is directed to Dr. Young, associate coroner, and to the Attorney-General for Ontario. The Deputy Attorney-General appeared before Orde, J., (and before us) for the coroner. The motion was refused. Barnes now appeals.

The coroner had some jurisdiction by the ancient statute law, which we would now call civil; the statute De Officio Coronatoris (1276), 4 Edw. I.: Statute 2, sec. 2 directs the coroner to inquire of treasure trove: Att'y-Gen'l v. Moore, [1893] 1 Ch. 676: Our Coroners Act, R.S.O. 1914, ch. 92, sec. 27, gives jurisdiction in certain cases of fire, but, notwithstanding these facts, a coroner's inquisition super visum corporis is a criminal Court: Blackstone's Comm. Bk. IV, p. 274; The Queen v. Hammond, 29 O.R. 211, especially at p. 234. "The coroner's Court is a Court of record of very high authority," Thomas v. Churton (1862), 2 B. & S. 475, at p. 478, 121 E.R. 1150.

Being a criminal Court, a "court of criminal jurisdiction" while its constitution is a matter of provincial control, B.N.A. Act, sec. 92 (14)—its practice and "procedure" come under the Dominion—British North America Act, sec. 91 (27), "as does all procedure in criminal matters." The Parliament of Canada, having full power and responsibility in the matter, have, with great care, and,

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if I may venture to say, skill, formulated the practice: and we have no right to inject our own views (if we had any) of what should, could, or might be directed—our whole duty is performed when we determine and declare what the law is.

I can find nothing in our legislation preventing the calling of any one as a witness before the coroner—had Parliament intended to make an exception in the case of one accused or supposed to be accused in some other Court or thought to be guilty of causing the death, no doubt such a provision would have been made in the Code.

It is the common law duty of every one who knows anything of the circumstances to appear before the inquest as a witness: Sewell on Coroners, p. 169; and, contrary to the opinion in the remote past common in the profession, the coroner must receive the evidence of any one claiming to know anything of the circumstances attending the subject of his inquiry. In the case of Michael Barclees Case, (1658), 2 Sid. 90, 132 E.R. 1273, the coroner had refused to examine or admit witnesses to give evidence against the hypothesis that he had committed suicide, and that consequently his goods were escheated. The Court of Upper Bench quashed the inquisition and held that the coroner should have heard all the witnesses, and upon a second hearing the Court held, 2 Sid. 101, 132 E.R. 1279, that the coroner must hear counsel and witnesses on both sides: 1 Hale P.C. 415; 2 Hale P.C. pp. 60, 157. Sir Matthew Hale says (2 Hale P.C. 157.) "The coroner's inquest may and must hear evidence of all hands, if it be offered to them, and that upon oath, because it is not so much an accusation or an indictment as an injunction or inquest of office quomodo J.S. ad mortem suam devenit, tho it be also true that the offender may be arraigned upon that presentment." Hale (2 Hale P.C. 60, 61) combats the proposition that "if a person be killed by another person, and it be certainly known that he killed him, the jury must hear evidence only for the King"—his first reason being "Because the coroner's inquest is to inquire truly quomodo ad mortem devenit and is rather for information of the truth of the fact as near as the jury can assert it, and not for an accusation," and his second "because tho the prisoner may be arraigned upon the coroner's inquest..... neither the court nor the prosecutor is concluded by it, but a bill of murder may be preferred to the grand inquest....." At pp. 61, 62, Hale says "I do not conceive the

coroner's inquest ought in all cases to hear the evidence upon oath, as well that which maketh for as that which maketh against the prisoner." And this was expressly held in Rex v. Scorey (1748), 1 Leach C.C. 43.

There was no exception in the case of one accused of causing the death.

In Hawkey's case, mentioned in Baker's Office of Coroner pp. 96, 296, Hawkey had killed Seton in a duel at Gosport. At the inquest on the body of Seton, counsel (Mr. Payne) offered the evidence of Mrs. Hawkey, wife of Hawkey. The coroner objected—"The whole principle of evidence was that a wife could not be evidence either for or against her husband." Counsel argued "This is a court of inquiry, not a court of accusation," and that "until the jury have returned their verdict.....there is no party before you. .....and no party ought to be excluded from giving evidence.....before the jury had returned their verdict every person had a right to give evidence, and.....the coroner was bound to receive such testimony if tendered to him." The coroner held that he was bound to take the evidence (pp. 97, 98).

The well-known surgeon Wakley of "The Lancet," when coroner for Middlesex, was accustomed not to examine witnesses whose evidence might criminate themselves. This practice came up for consideration in the libel action Wakley v. Cooke, 4 Exch. 511, 154 E.R. 1316, 19 L.J. (Ex.) 91, where Parke, B., said (p. 93) "Without doubt, the practice is incorrect, and will be discontinued for the future. It is manifestly contrary to law. It is not right to assume that any man is guilty, and on that account to exclude him from giving evidence before the coroner." Alderson, B., said (p. 94) "The practice.....of not allowing parties to be examined on oath whose conduct might afterwards become the subject of a criminal proceeding..... was improper, and I trust will not exist any longer, but that the coroner will allow anybody to be examined on an inquest who has any material information to communicate.....A party who comes before a coroner cannot be considered as a party accused; he is not in that situation until a verdict is found. The practice is therefore bad... and I trust will be discontinued. ....." See also Regina v. Taylor (1840), 9 Car. & P. 672; Jervis on Coroners, 4th ed., p. 218. Indeed a coroner who should refuse such evidence would be liable to have proceedings taken against him: Rex v. Scorey, 1 Leach C.C. 43.

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Such is the state of the law in England where an accused is "charged" with an offence once a coroner's inquisition is found against him: Rex v. Maynard (1812), Russ. & Ry. 240; Rex v. Cole (1813), 3 Camp. 371, 2 Leach C.C. 1095; and no one has the right to have his own evidence or that of his wife heard on any charge against him.

The fact, then, that it is possible, probable, or certain that one has caused the death of another does not take away his right to give evidence of the facts before the coroner, and at the common law the right and duty to give evidence are correlative. If one who had the right to give evidence should for any reason refuse, he could be compelled; Chitty's Criminal Law, p. 164: Jervis on Coroners, 4th ed. pp. 206, 217-8.

Section 4 of the Canada Evidence Act has no application to the present case: that simply extends to a person "charged with an offence" the right to give evidence and have the wife or husband give evidence "for the defence" without the correlative duty—such evidence is on a prosecution: sec. 5.

I can find nothing in common law or statute upon which to found prohibition—the coroner is proceeding regularly, and we should not interfere.

It was not from any doubt of the soundness of my brother Orde's judgment that I have examined the law anew. I entirely agree with him in all he has said—but the case is novel and of some importance, and it seemed well to go into the foundations of the law.

Much has been said as to the alleged hardship upon Barnes in being compelled to give evidence—it is, however, to be hoped that we have not yet arrived at the point that one accused of crime has so many and so high rights that the people have none. The administration of our law is not a game in which the cleverer and more astute is to win, but a serious proceeding by a people in earnest to discover the actual facts for the sake of public safety, the interest of the public generally. It is the duty of every citizen to tell all he knows for the sake of the people at large, their interest and security, and I am not inclined to stretch in any way rules which are directed to permitting any one to escape from the duties which all others admit and perform—it is for Parliament to frame rules and exceptions, not for the Court.

I would dismiss the appeal.

Middleton, J.:—In my view, the question presented for our determination lies within very narrow compass, and can be determined without any investigation into the origin of the jurisdiction of the "coroner."

The coroner, being convinced that the death of a man found injured on the highway, and who subsequently expired in the hospital was caused by the culpable and negligent conduct of some one, as yet unknown, caused a subpoena to be served upon Barnes as a witness. Barnes attended but refused to be sworn, and subsequently failed to attend upon the date to which the inquest was adjourned while still under his subpoena. The coroner then issued his warrant of commitment, and this motion on prohibition was then made.

Barnes in the meantime had been accused of manslaughter in connection with the death of this man, and had been committed for trial. This he makes the foundation for this motion.

Even if the applicant is right in his contention, his procedure here is wrong. He should have attended in obedience to the subpoena, and submitted to be sworn, and then claimed his privilege. As the case has been argued upon a wider basis, I think it advisable to express my opinion upon the matters discussed.

The coroner's Court is undoubtedly a criminal Court: The Queen v. Hammond, 29 O.R. 211; and so the provisions of the Canada Evidence Act apply. This is perhaps not very material, because the provisions of the Ontario Act are substantially identical.

The argument proceeded upon what I think is a misunderstanding of the statute. Section 4 and sec. 5 deal with two entirely distinct matters. At common law the accused was not a competent or compellable witness in the trial of a criminal matter to which he was a party. This is amended by sec. 4, which makes the accused a competent witness for the defence. It could have no application to this case, for a coroner's inquest is in no sense a trial, and the party suspected of the crime giving rise to the inquest is not a party. In Wakley v. Cooke, 4 Exch. 511, 154 E.R. 1316, the Court was called upon to discuss a practice which was said to prevail in the coroner's Court of the county of Middlesex, where the coroners refused to examine persons whose evidence might tend to criminate themselves. This practice was strongly condemned, and

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it was pointed out that it was the duty and the privilege of all those having knowledge of any matter relating to the death under investigation to give evidence upon the coroner's inquiry, and it was also pointed out that "a person who comes before a coroner cannot be considered as being a party accused." The witness before the coroner might then be excused from answering by claiming his common law privilege, for he could not be compelled to criminate himself.

Section 5 deals with this common law privilege and changes the law, and now no witness shall be excused from answering any question put to him upon the ground that his answering might tend to criminate him. He is, however, granted some degree of protection, for the evidence that he may give shall not be used or receivable in evidence against him.

That this protection is by no means as wide as that under the common law rule is obvious, and the change in our law no doubt shocks those whose mental inclination and training leads them to regard the common law privilege as a sacred thing. See, for example, the statement of the late Chief Justice of the King's Bench in Re Ginsberg, (1917), 27 Can. Cr. Cas. 447 where he points out that the protection afforded by the Legislature does not in his view, afford sufficient immunity, as the prosecutors are enabled to get information from the accused which would enable them to get convicting evidence aliunde without using his own evidence against him at all—that in fact the proceedings amount to an examination for discovery in a criminal case, "which cannot be." The Appellate Division, 38 D.L.R. 261, did not agree with this view, and in very fully considered judgments upheld not only the validity but the effectiveness of the change in the law.

In my view, the order in review is clearly right, and the appeal must be dismissed.

Latchford, J., agreed with Middleton, J.

Lennox, J.:—It is regrettable, but inevitable, that the "ninety and nine guilty men" have already "gone free" and the "one innocent man" has been "found guilty" more than once, despite the steady aim of Courts of Justice so to administer the law that the innocent shall not be punished, and the guilty shall not escape. That instances of miscarriage of justice in criminal Courts are of comparatively rare occurrence is of inestimable importance; but the result of a trial, the question of whether in the end the trial

results in a verdict of "guilty" or "not guilty," has never been the paramount consideration in any British Court of criminal jurisdiction. The fundamental and dominating consideration and purpose has always been, and if the proud traditions of our Courts are to endure must always be: a fair trial for the accused, and a fair chance to the accused to defend himself. Not only is he not bound to incriminate himself, but, immediately he is in custody of the law, he is under the protection of the Crown, and cannot until warned be encouraged to make evidence against himself, although he should perchance utter incriminating statements. So, too, when he became, by statute, a competent witness, it was studiously provided that neither the Court nor the Crown should make use of his silence as an admission, inference, or consciousness of guilt.

As the fountain of justice, it is for the Crown within the provisions of the Coroner's Act, and the common law, to supervise and direct the proceedings and procedure of the coroner's Court. It is a criminal Court of record. There are, of course, stages in criminal proceedings when, for the time being, the supreme direction passes from the Crown to the Courts of the Province, but of this the pending appeal is not an instance. While acting within its jurisdiction we have no power to restrain the coroner's Court or its jury.

Mr. Bayly, for the Attorney-General, took part in the argument of the appeal. He did not say that the Attorney-General's Department regards the proposal to examine Barnes and force him into a position calculated to prejudice him (when he is put upon his trial) as contrary to British justice and fair play, and I have no right to advise or comment upon the action or attitude of the Crown. I repeat that the guarantee of a fair trial, in its broadest sense, is the thing above all other things to be kept steadily in view in the administration of criminal justice. It may be that the Canada Evidence Act requires amendment. I must follow the law as I interpret it. I find no reason to doubt the correctness of the order appealed against. It is not my duty to point out what the accused man, Barnes, should do, or at what point, if any, he should halt when the appeal is disposed of. I will not attempt to pronounce a priori judgment, or declare the law in advance. The appeal should be dismissed with costs.

Appeal dismissed.

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C.A.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Turgeon and McKay, JJ.A. November 14, 1921.

Assault and Battery (§III—20)—Assault inflicting Grievous bodily Harm—Criminal Prosecution—Punishment—Protection from Civil Action—Criminal Code secs. 274, 734, 773, 792.

Section 734 of the Criminal Code is to be read along with secs. 732 and 733. It was intended to take away the civil remedy in cases where the assault complained of was a mere common assault, not resulting in any serious injury or accompanied by any other aggravating circumstances, and which might properly be dealt with summarily by a single Justice of the Peace. The party aggrieved in such case has the option of proceeding either civilly or under the Criminal Code. Code section 734 does not apply to the more serious offence of inflicting grievous bodily harm tried summarily by two Justices under Code sec. 773.

[Green v. Henneghan (1918), 43 D.L.R. 272, 30 Can. Cr. Cas. 256, 14 Alta. L.R. 106, followed.]

APPEAL by defendant from the judgment at trial in favour of the plaintiff in a civil action for damages for assault, on the ground that he was protected from such civil action by sec. 734 of the Criminal Code. Defendant's appeal dismissed. Plaintiff's cross-appeal as to the damages allowed in part by allowing a sum for general damage in addition to the special damage awarded in the Court below.

R. Robinson, for appellant.

F. A. Sheppard, for respondents.

The judgment of the Court was delivered by

Turgeon, J.A.:—We have to deal only with that portion of the trial Judge's judgment herein which disposes of the claim of the respondent William Henry Withers against the appellant for damages for assault. The appellant appeals from the finding of the Judge in the respondent's favour upon the ground that the respondent's right of action on this head is barred by sec. 734 of the Criminal Code of Canada, which is as follows:

"734. If the person against whom any such information has been laid, by or on behalf of the person aggrieved, obtains such certificate, or, having been convicted, pays the whole amounts adjudged to be paid or suffers the imprisonment, or imprisonment with hard labour, awarded, he shall be released from all further or other proceedings, civil or criminal, for the same cause."

Section 732 of the Crim. Code provides that when any person is charged with common assault, a Justice of the Peace may hear and determine the charge summarily, un-

less the assault complained of appears, from the attendant circumstances, to be a fit subject for prosecution by indictment. Section 733 provides that when the Justice deals summarily with a charge of common assault laid by the person aggrieved under the provisions of sec. 732 and dismisses the complaint, he shall deliver to the accused a certificate of such dismissal. And sec. 734 provides that if the accused obtains this certificate of dismissal or is convicted and pays his fine or undergoes his term of imprisonment, as the case may be, he shall be released from all further or other proceedings, civil or criminal, arising out of the said assault.

The effect of these three sections, it seems clear to me, is that the accused, in order to avail himself of the protection from civil proceedings provided by sec. 734 must shew (1) that the charge against him was one of common assault the punishment for which is provided by sec. 291; (2) that it was laid under the provisions of sec. 732; (3) that the Justice in the exercise of the jurisdiction conferred upon him by sec. 732 tried the case summarily on its merits, and (4) that he obtained a certificate of dismissal or suffered the sentence imposed upon him, as the case may be.

In the case at Bar the first three conditions aforesaid do not apply. The charge laid against the appellant was not of common assault, but of an assault occasioning actual bodily harm under the provisions of sec. 295 of the Code. This charge was subsequently changed to one of inflicting grievous bodily harm (Criminal Code sec. 274) and was laid under sec. 773 (c). The charge was then dealt with by two Justices of the Peace under the provisions of Part XVI. of the Code which provides for the summary trial of indictable offences. The only protection which, in my opinion, is afforded to the appellant under these circumstances is that provided by sec. 792 of the Code, which reads as follows:—

"792. Every person who obtains a certificate of dismissal or is convicted under the provisions of this Part, shall be released from all further or other criminal proceedings for the same cause."

The respondent's right of action is consequently not barred by any provision of the Crim. Code. Upon this point I agree with the opinion expressed by Walsh, J., in Green v.

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Henneghan (1918), 43 D.L.R. 272, 30 Can. Cr. Cas. 256, 14 Alta. L.R. 106.

In my opinion the provisions of the Code are not open to any more extended construction. At common law a party's civil rights were not taken away by the fact that the wrong complained of amounted to a criminal offence or that the defendant had been convicted under criminal proceedings. On the contrary, the rule which prevailed prior to the passing of the Criminal Code was that when the wrong amounted to a crime the civil remedy could not be pursued until the defendant had been prosecuted. (See cases cited in notes to sec. 13 in Tremeear's Cr. Code, 1919, at pp. 28, 29).

To what extent then does sec. 734 alter the common law right of the party who has been the victim of an assault? In my opinion the intention of Parliament in enacting 734 (which must be read along with secs. 732 and 733) was that this civil remedy should be taken away only in cases where the assault complained of is a mere common assault, not resulting in any serious injury or accompanied by any other aggravating circumstances, and which might properly be dealt with summarily by a single Justice of the Peace, and where in the public interest the matter should be disposed of once and for all, the party aggrieved being allowed the option of proceeding either civilly or under the Crim. Code. The section was not intended, in my opinion, to apply to the more serious cases covered by secs. 274 and 295 of the Code, where grievous wrong may have been inflicted upon the complainant, but where, nevertheless, the public interest would demand the punishment of the offender. It would surely seem a hardship to say in such cases that because the offender had to be punished the victim of his aggression must be deprived of his rights, and I can find nothing in the language of the Code to justify such a harsh conclusion. I think, therefore, that the appeal must be dismissed.

The respondent W. H. Withers cross-appeals upon the ground that the trial Judge should have allowed him general damages for the assault committed upon him as well as special damages, in addition to those allowed, for transportation and hotel expenses, and $7, being the value of the respondent's eye-glasses broken by the appellant when he struck the respondent in the face with his hand. As to special damages, the Judge has allowed $105, which covers the amount claimed for medical treatment and damage to the

respondent's clothing, and no other special damages should be allowed now except $7 for the eye-glasses, an amendment as to this item having been made at the trial. As to the items for transportation and hotel expenses, I think the trial Judge was right in refusing them. As to general damages, I think, however, that the trial Judge acted upon a wrong principle in not allowing any, as there is no doubt that the respondent suffered severely from the assault committed by the appellant, although, in a measure, this assault was provoked by his own vile and abusive language. Under all the circumstances I would allow the respondent $25 as general damages, which with the item of $7 for the glasses will increase the amount allowed at the trial by $32. The judgment below should be varied accordingly. The respondent should have his costs of appeal.

Judgment below varied.

PEGUEGNAT v. CANADIAN PACIFIC RAILWAY.

Quebec Court of Review, Demers, Weir and Panneton, JJ.
October 9, 1920.

Bailment (§III—17)—Parcel Room at Railway Station—Parcels Checked for Fee of Five Cents—Delivery of One Person's Parcel to Another on Wrong Check—Liability of Railway Company.

Where a railway company maintains a parcel room in one of its stations where for a charge of five cents it undertakes the care of articles left with it, it must exercise the care of a prudent administrator in regard to goods left in its care, and if it hands out to one party the property of another on a wrong check it is liable for gross negligence.

The company is liable for the full amount of the value of the property, notwithstanding an inconspicuous notice printed in very small type on the back of the check limiting its liability to a certain amount and to which the depositor's attention has not been drawn. The word "loss" includes misdelivery.

[See also Talawinski v. G.T.R. Co., ante p. 519.]

APPEAL by defendant from the judgment of the Superior Court in an action to recover the value of property deposited in the check room of the defendant and delivered to another party on a wrong check. Affirmed.

The judgment appealed from is as follows:—

Lane, J.:—Considering that the following would appear to result from the proof of record. Plaintiff's wife and daughter were about to visit friends at Kingston, Ont., and they required to take an evening train from the Windsor station of defendant. As plaintiff and his family were re-

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siding for the summer at Hudson, plaintiff brought into town with him on the morning of July 30, 1917, a suit case containing wearing apparel which his wife and daughter intended to take with them on the above mentioned visit. He deposited said suit case and contents at the parcel office of the defendant at its Windsor station, to await the arrival of his wife and daughter in Montreal, on the evening in question, it being his intention to apply at the parcel office for the said suit case in the evening in time for his wife to take it with her on the train. On depositing the said suit case and contents, he received from the defendant's employee in charge of the parcel office a card board check No. 736608, and it is admitted that he paid a charge of 5 cents to the defendant for their services in storing the said suit case and its contents. The defendant's employee tore the check from the counterfoil and kept the latter, which he presumably attached to the suit case. The check has some printing at the top, with the company's name, its crest, parcel room and Montreal (W. st.) Que. and close to this printing is printed "subject to conditions on back." On the back in very small type is the condition defendant invokes in its defence which in part is as follows:—"The company shall not be liable for more than $10 in respect of loss or damage to any one package whether such loss or damage be occasioned through negligence of the company, its agents or employees, or otherwise." On returning in the evening for the suit case, it appears that on tendering the check, he could not get possession of the article in question, that defendant's employee stated there had been a mistake on his part, had mismatched the check in question with another check and had handed out and delivered to some other person plaintiff's suit case and contents, through the mistake of mismatching referred to. The value of the suit case and contents are estimated by plaintiff and his wife at $281.60. They consisted of certain articles of feminine wearing apparel such as a lady would require on a trip of this kind. The great majority of the articles were absolutely new. It is true a few articles such as sweaters had been worn for a short time, but seeing there is no proof as to what was the diminution of value of those articles which had been worn, and as defendant's wife deposes it would cost more than the amount claimed for the worn articles to replace them, the amount claimed by plaintiff is accepted as the real value, and for which sum defendant would be responsible, if at all.

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The number of the check appears in bold and striking figures and which at once strike the attention whereas the reference to the conditions on the back is in the same coloured ink as the formal heading of the check, and in smaller type than the formal heading but close to the latter and would not attract the attention of the depositor to such reference to conditions which do not appear on the face of the check but on the back, unless the attention of the depositor was specially directed to the condition. In the present instance, it is not so directed. The plaintiff just took the check without reading it from defendant's employee, and at once put it in his wallet. There is no proof that any notice was put up at the parcel office, directing that attention of the plaintiff to any conditions connected with the deposit. Under the foregoing circumstances, the defendant cannot invoke the limitation of its liability as provided by the condition on the back of the check. It has been argued on one hand that the matter comes under the Railway Act, and on the other that the transaction was a voluntary deposit. The parcel office was open to the use of any person whether a traveller on defendant's lines or not. Defendant in conducting its parcel office was acting as a depositaire salarie, or paid depositary, and as such was bound to exercise the care of a prudent administrator. Its duty was to see that the depositor got back what he had deposited. It could easily do so by comparing or matching the figures on each check presented with those of the counterfoil attached to the parcel. It was gross negligence to hand out to a third party plaintiff's property on the presentation by that person of a check which did not correspond with the counterfoil on plaintiff's suit case. To properly and correctly match the figures on check and counterfoil was not a subsidiary operation in connection with the work of defendant's employee. It was his principal work, and besides putting away articles deposited, in their places, taking them from their places to return to their owners, and collecting the charges, would appear to be his only duty. To fail in that duty, was not to use the care required by law of the depositary, was a gross negligence and for the result of which defendant is responsible; that in view of the foregoing, defendant's tender and deposit of $10 and costs by defendant is insufficient and should be rejected, and its plea unfounded and should be dismissed; doth reject defendant's tender and deposit; doth dismiss defendant's defence; doth order

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defendant to return plaintiff within 15 days from the date of the present judgment the said suit case and contents failing which doth condemn defendants to pay to plaintiff the sum of $281.60 the value of said suit-case and contents, with interest and costs.

R. T. Stackhouse, K.C., for plaintiff.

Meredith, Holden & Co., for defendant.

Demers, J.:—The contention of the company is that there has been misdelivery.

The plaintiff argued that the misdelivery is not included in the word "loss." I think that the answer to that contention is satisfactorily given in the case of Skipwith v. Great Western R. (1888), 59 L.T. 520.

The only question left is: was there an agreement relating to indemnity in case of loss? The contention of the company is that the plaintiff is bound by the check, and many cases have been quoted on the point. But I think the question has been settled in favour of plaintiff, in the case of Parker v. South Eastern R. Co. (1876), 1 C.P.D. 618; (1877), 2 C.P.D. 416.

This case has been approved by the House of Lords, in the case of Richardson, etc., v. Rowntree, [1894] A.C. 217. In that case, the House of Lords has decided, at p. 220:—

"That they could not say as a matter of law that by reason of taking that ticket in exchange for the goods the plaintiff was bound by the condition; that there were questions to be determined by the jury and that upon their determination would depend the liability of the defendants."

The company in this case alleges a special agreement, and it was for the company to prove that express or implied contract.

The judgment a quo held that they had failed to do so, and it is not argued that there is error on facts but in law.

The company alleges that by the recent decisions of the Privy Council, in the case of Grand Trunk R. v. Robinson, 22 D.L.R. 1, [1915] A.C. 740, 19 C.R.C. 37, and C.P.R. Co. v. Parent, 33 D.L.R. 12, [1917] A.C. 195, 20 C.R.C. 141, 23 Rev. Leg. 292, the Privy Council has overruled these cases. In these last cases the party had signed a special contract and as it is well pointed out in the case of Parker and South Eastern Ry., there is a difference between a document and a ticket of check. A man who signed a contract should know its contents, but says Lord Coleridge, at p. 626 (1 C.P.D.)—"it seems to be reasonable that a man receiving such a

ticket as this should look upon it as a mere voucher for the receipt of the package deposited, and as a means of identifying him as the owner when he sought to reclaim it; and I think the jury were quite right in finding that the plaintiff in this case did not read the special condition nor was he, under the circumstances, under any obligation to read it."

For these reasons, I am of the opinion to confirm the judgment a quo and dismiss the inscription with costs.

Appeal dismissed.

TUSON v. THE DOMINION EXPRESS COMPANY.

Alberta Supreme Court, Walsh, J. November 1921.

Carriers (§IIIF—433)—Of Animals—Neglect During Transit—Death after Arrival—Disease not Induced or Aggravated by Treatment of Carrier—Liability—Insurance Taken by Carrier for Benefit of Consignee—Right of Consignee to Assignment of Policy.

While a common carrier ,which accepts an animal for carriage is, in the absence of a special contract to the contrary, an insurer of its safety, such liability does not extend to cover the death of the animal from a disease probably contracted before shipment and in no way induced or aggravated by anything the carrier did or failed to do while the animal was in its care.

Where insurance has been effected for the consignee by the carrier, the carrier is not required to do more than put the consignee in a position to realise from the underwriters and cannot be held liable for the amount of the policy because of failure to assign it to the consignee where no request or demand for assignment has been made.

ACTION claiming damages for the death of an animal which the plaintiff claimed was due to the defendant's negligent treatment. Action dismissed.

D. H. Elton, K.C., and W. Beattie, for plaintiff .

D. W. Clapperton, for defendant.

Walsh, J.:—A bull-dog valued at £130 was accepted by the defendant at its office in London, Eng., for carriage to the plaintiff at Lethbridge in this Province. The dog reached Lethbridge in due course but in such poor condition that it could not walk. The plaintiff at first refused to take delivery of it because of this, but as a female dog of the same breed which she was exceedingly anxious to get at once for show purposes reached her from the same consignor by the same shipment and the defendant's agent at Lethbridge refused to let her take one without the other she did eventually take delivery of it, protecting herself as far as possible by signing for it as being received in poor condition. The dog

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never recovered. After being treated by the plaintiff's husband at first and later by a veterinary surgeon it died about 3 weeks after its arrival at Lethbridge. The plaintiff, claiming that its death was due to the defendant's negligent treatment of it, sues to recover its value.

The dog after leaving London first came into the hands of the defendant at Quebec being brought that far by carriers other than itself. At that time this dog and its female companion who travelled the whole route together were in excellent condition; they did not appear to be thin or hungry but to be normal, healthy dogs. Their trip by rail from Quebec to Lethbridge is described with clearness partly by the evidence of the commission witnesses and partly by that taken orally before me. Every link in the chain of that journey is covered by this evidence. I think that the attention given to the dogs in the matter of their feeding was exceedingly casual. They were taken off the boat at 4.30 p.m. on July 1, the butcher in whose care they were on the boat having reported that they had been fed and watered immediately before. They left for Montreal at 11.30 p.m. There is nothing to shew that they were fed or watered in Quebec unless that can be implied from the answer of the witness Monsell that whilst they were in Quebec they were given "every attention possible." They were neither fed nor watered on the way to Montreal, because, as the express messenger James, who had them in charge, puts it, "it was not necessary as it was only a six hour trip." They reached Montreal early in the morning of July 2, and remained there until 10.15 p.m. of the same day. There is no evidence as to whether or not they were fed and watered there, the only witness who covers this period being Walcott, who could not say whether or not they had been. There was no feed for them on the train out of Montreal, and so they got none until they reached North Bay. The run for this train from Montreal to North Bay took about 12 hours, as it left North Bay at 10.30 a.m. on July 3. These dogs therefore went from 4.30 in one afternoon until after 10 in the morning of the second day after, a matter of about 42 hours, without, so far as the evidence discloses the facts, being fed. They seem to have been well fed between North Bay and Fort William, but for the rest of the trip to Lethbridge they subsisted practically on the charity of the different express messengers in whose care they were, as all that they got in that interval, with the exception of some bread sup-

plied to them during their 15 hour stay in Winnipeg, was a part of the lunch of each of these men, of which they generously deprived themselves so that the dogs might not starve. However one may be disposed to condemn this inattention upon humane grounds, and it certainly strikes me as being worthy of severe condemnation, it is impossible for me upon the evidence of the two expert witnesses who were called, one by the plaintiff and the other by the defendant, to find that the ailment which seized this dog on his journey and of which he afterwards died, was due in the slightest degree to this lack of food. Its death was due to gastro-enteritis, which is inflammation of the bowels and stomach, according to the evidence of the plaintiff's veterinary who attended him in the last two days of his life and afterwards held a post mortem examination. Both he and the defendant's veterinary say that this disease is not caused by starvation, and so they eliminate the only ground of complaint of the dog's treatment by the defendant, which the evidence suggests as a possible factor in its death. My opinion is that the dog died from natural causes as the result of a disease which may have been contracted in England but which was neither induced nor aggravated by anything which the defendant either did or failed to do. I am assisted to this conclusion by a consideration of the condition of the female dog on arrival at Lethbridge. The two animals were constantly together in the journey from Quebec. Each received identically the same treatment as the other in the matters of exercise and feeding. They fed and they starved from the same food and the same lack of food, sharing equally in the distribution of both. The female reached Lethbridge in such excellent condition that she was forwarded to Calgary by the same train which brought her there so that she might take part, as I understand from the evidence she did, in a show which was held the following week either in Calgary or Edmonton. If the treatment which these animals received was so harsh as to have brought about the death of the dog, one might reasonably expect to have found some evidence f it upon the female. The entire absence of any marks of ill-treatment upon her and the excellence of her condition upon arrival at Lethbridge confirm me in the opinion that the dog's death resulted from something for which the defendant is not to blame.

Upon this finding it was impossible for me to impose lia-

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bility upon the defendant for the plaintiff's loss. While as a common carrier it was in the absence of a special contract to the contrary an insurer of the dog's safety, its liability as such did not extend to such a cause of injury as this. So that even if its liability had not been limited by the contract of carriage I could not have imposed upon it any liability as an insurer of the animal. The contract of carriage was however subject to certain conditions which have been approved by the Railway Board and are therefore binding. The effect of these conditions so far as they apply to this case is to limit the defendant's liability to loss suffered through its negligence. The only negligence which I have been able to convict the defendant of is in the matter of the feeding of the dog, but as I have found that the dog's death did not result from that negligence I cannot, simply because of it, make the defendant pay for the dog.

The plaintiff makes an alternative claim. A policy of insurance was taken out by and in the name of the defendant in the sum of £150 covering this dog from London to Lethbridge, risk to continue "without interruption until safely delivered to the consignees at final destination, including risk of mortality for three days after arrival at destination." There is nothing in the evidence to shew how it came that this policy was taken out. The statement of claim alleges that the defendant took it out, either as principal or as agent for an undisclosed principal which allegation is denied in the statement of defence and that is all the help that the pleadings give on the question. The parcel receipt as the contract of carriage is termed contains a clause under which the shipper if desiring to be protected can on written request be insured through the defendant (as agent only) against marine and fire risks by payment of a moderate premium. There is nothing to shew that this policy was issued upon such a request, and the above is the only provision of the contract bearing upon the question of insurance. The premium of insurance was included in the charges which the plaintiff was asked to pay and did pay before delivery of the dog was made. The defendant of course had as carrier an insurable interest in the dog so that the policy might very well have been taken out for its own protection. I think however from the only fact that is available to assist me, namely the inclusion of the premium in the carrying charges and the payment of the same by the plaintiff, apparently without

protest, the only inference I can draw is that the insurance was effected by the defendant as the plaintiff's agent.

Although the risk of mortality covered by the policy only continued for 3 days after the dog's arrival at its destination and it did not lie within that limit the plaintiff contends that under another clause of the policy, liability for the loss attached to the underwriters because the dog could not walk when it reached Lethbridge. That clause reads as follows:—

"Animals walking on arrival at destination to be deemed safely arrived (animals unable to do so to be sold for underwriters' account) but including risk of mortality for three days after arrival at destination."

It is not necessary for me to express any opinion as to what liability if any this clause imposed upon the underwriters in the facts of this case and so I will not attempt it. From a letter written by the defendant to the consignor just four months after the dog's death which was produced and put in by the plaintiff, it seems that a claim was made under the policy by the defendant but the claim was rejected by the underwriters who claimed that the animal walked on arrival. The plaintiff's claim under this head is that it was the duty of the defendant to collect the loss under this policy or at least to assign the policy to her so that she could have collected it and that having done neither she is entitled to be paid by the defendant its face value, namely £150.

I am quite unable to find any ground upon which I can hold the defendant liable under this alternative claim. If I am right in my view that this insurance was effected for the plaintiff she was entitled to take action for its recovery, and she was the proper one to do so. If an assignment to her of the policy was necessary to entitle her to sue in her own name there is no evidence of any demand for one or of any refusal of the defendant to give it or of any demand for or refusal of delivery of the policy. There is nothing to indicate any request to the defendant to do more towards the collection of the money than it did or any refusal upon its part to do anything that was necessary to put the plaintiff in a position to realise from the underwriters. It is now more than 3 years since the dog died. I do not know whether or not the right of action on the policy has become barred. There is no limit of time fixed by the policy itself for the bringing of an action upon it. It was issued in

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England by an English company and I have made no effort to find out whether or not there is any statutory limit of time applicable to such a cause of action. The plaintiff's consignor knew that liability under the policy was disputed within 4 months of the dog's death and as the letter intimating that fact was produced from the plaintiff's possession it would seem that it was communicated to her, though when does not appear. If the right of action has become barred I think that she is as much to blame for that as the defendant, and apart from that there is nothing suggestive of prejudice to the plaintiff arising out of the defendant's action or inaction in the matter. The defendant must assign the policy to the plaintiff if she so wishes.

I must dismiss the action with costs.

Action dismissed.

BRUNSWICK-BALKE COLLENDER CO. v. DOMINION EXPRESS CO.

Quebec Superior Court, Archer, J. March 16, 1921.

Carriers (§IIIG—460)—Delivery for Shipment—Conditions as to Claims for Loss—Notice—Failure of Shipper to Comply With—Liability of Carrier.

When a carrier receiving goods for shipment gives a receipt on which is printed a condition approved by the Board of Railway Commissioners, that "The Company shall not be liable for non-delivery or loss or destruction of the shipment .....unless written notice thereof is given at any office of the company within four months from the time delivery should in the ordinary course of transit have been made," the shipper has reasonable notice of the condition, which forms a contract between the parties and failure to comply with the conditions will prevent recovery.

ACTION for damages for loss of goods delivered to the defendant for shipment. Dismissed.

Murphy, Gouin, and Parent, for plaintiff.

Meredith, Holden, and Howard, for defendant.

On November 8, 1919, delivery was made by the plaintiff to defendant of three phonographs to be forwarded to New Brunswick. The declaration says that, through the defendant's fault these objects were not delivered and it claims $276.10 value of the goods.

The defendant, amongst other pleas, says it incurred no liability towards the plaintiff for this reason: Under the contract of carriage, it was agreed by a clause printed on the back of the receipt given by the defendant that it should not be liable for non-delivery or loss or destruction of ship-

ments in Canada unless written notice thereof is given within four months from the time delivery should, in the ordinary course of transit, have been made. The goods in question were alleged to have been shipped on November 8, 1918, and notice of loss was not given to defendant until June 11, 1919. For this reason based on a law of contract sanctioned by the Board of Railway Commissioners it was submitted that plaintiff's case must fail.

The plaintiff answers that the receipt in question is not a contract; that it never agreed to said condition and never had any knowledge of it; that however the above notice was duly given.

The Superior Court dismissed the action by the following judgment:—

Archer, J.:—Considering it is proven that on November 8, 1918, the company defendant, received at Montreal, from the company plaintiff a shipment of three phonographs which the defendant undertook to forward to Moncton, New Brunswick, and deliver same to the New Brunswick shops there, and that said phonographs were never delivered; it is proven that when the company defendant received said goods it gave through its agent a receipt the heading of which reads as follows. "Read the receipt. Merchandise receipt. Approved by the Board of Railway Commissioners for Canada by Orders &c.," a few lines lower: "Received from....of....(herein called the shipper), the undermentioned articles valued and addressed as follows, which the Dominion Express Co., agrees to carry and deliver upon the following terms and conditions to which the shipper hereby agrees and, as evidence of such agreement, accepts the shipping receipt. Terms and Conditions." Amongst the terms and conditions we find the following: "The company shall not be liable: (N) for non-delivery or loss or destruction of the shipment in Canada, unless written notice thereof is given at any office of the company within four months from the time delivery should, in the ordinary course of transit, have been made"; it is proven that the terms and conditions in the above mentioned receipt were duly approved by the Board of Railway Commissioners for Canada; it is proven that the goods shipped on November 8, 1918, in the ordinary course of transit, have been delivered on November 9, 1918, and it is proven that notice of the loss thereof was not given to defendant until June 11, 1919,

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a period of seven months from the time delivery should in the ordinary course have been made; it is proven that the plaintiff is an experienced shipper by the company defendant and that as a matter of fact 90% of its shipments are made through the company defendant; that the company plaintiff had at Montreal a book containing the receipt forms of the company defendant and that from October 31, 1918, up to November 18, 1918, there were 29 shipments for which receipts were given; that under the circumstances proven the company plaintiff had evidently reasonable notice that the receipts contained conditions and it must have known of the conditions mentioned in the said receipt, though the local manager and the shipper swear that they did not know of the special conditions mentioned in sub-sec. "N" above referred to; that under the circumstances proven there was a contract between the parties and that plaintiff was bound by its terms and conditions; that plaintiff having failed to give a notice within the time specified in sub-section "N" above referred to cannot now recover from defendant the amount claimed; doth dismiss said action with costs."

Action dismissed.

REX v. HANDLEY.

Nova Scotia Supreme Court, Russell and Longley, JJ., Ritchie, E.J., and Mellish, J. April 16, 1921.

Prohibition (§IV—17)—Information Laid before Magistrate—Application to Restrain Magistrate from Proceeding with—Reasonable Apprehension of Bias.

The fact that a Stipendiary Magistrate, within a month before an information is laid before him against an accused for unlawfully selling intoxicating liquor, contrary to the Nova Scotia Act, had a violent altercation with the accused and struck him in the face, is ground for at least a reasonable apprehension of bias, and such Magistrate will be prohibited from proceeding with the hearing of the information.

[The King v. Justices of Sunderland, [1901] 2 K.B. 357; The Queen v. Huggins, [1895] 1 Q.B. 563, followed.]

MOTION for a writ of prohibition addressed to Mathew McLean Esq., Stipendiary Magistrate in and for the Town of Sydney Mines, to prohibit him from taking any further proceedings in the matter of an information laid before him by one Thomas Clarkson against Edward C. Handley, charged with unlawfully selling intoxicating liquor in the Town of Sydney Mines contrary to the provisions of Part I. of the Nova Scotia Act and amendments. The application

was made on the ground of bias and the belief of the defendant that he would not get a fair trial, the defendant having been assaulted by the said Magistrate on or about February 15, 1921.

T. R. Robertson, K.C., for the application.

L. A. Forsyth and W. E. Haverstock, contra.

Russell, J.:—I agree with Ritchie, E.J.

Longley, J.:—In my judgment the Magistrate should in all cases be above reproach as to matters relating to his judicial functions, and the fact in the present case that he struck the defendant in the face within a month of the beginning of the action causes me to believe it would be safer and better for all parties concerned that he did not touch or deal with the case.

Ritchie, E.J.:—This is an application for a writ of prohibition to prevent Mathew McLean, the Stipendiary Magistrate for the Town of Sydney Mines, from proceeding with the hearing of an information against the defendant for an alleged violation of the Nova Scotia Temperance Act, 1918, (N.S.) ch. 8.

Mr. Forsyth, for the Magistrate, properly drew a distinction between cases where the Magistrate had a pecuniary interest and cases of alleged bias from other causes. If the Magistrate has any pecuniary interest, no matter how small, he will be disqualified; in such cases the mere suspicion of bias from pecuniary interest is sufficient to disqualify. In this case there is no pecuniary interest, and in my opinion the question which the Court has to decide is one of fact, namely, is there substantial reason for reaching the conclusion that the Magistrate is likely to be biased, or is there a reasonable apprehension of bias. The King v. Justices of Sunderland, [1901] 2 K.B. 357 as pointed out by Vaughan Williams, L.J., was not a case of pecuniary interest, and Stirling, L.J., at p. 375 said :—"We have to apply our minds like jurymen to the question of fact, whether there was a real likelihood that the Justices were biased."

Wills, J., in The Queen v. Huggins, [1895] 1 Q.B. 563, at p. 565, puts the question to be decided as follows:—

"Here there is no question of Martin having had any pecuniary interest in the result of the litigation, nor is it suggested that he had any actual bias against the defendant. The question is whether there was reasonable apprehension of bias."

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I understand the duty of the Court to be to decide the question of fact as to whether there is any real likelihood or reasonable apprehension that the Magistrate will be biased either consciously or unconsciously. The information was laid against the defendant on March 22, 1921. According to the affidavit of the Magistrate the defendant on February 4, 1921, came into his office and began to violently abuse him. Whereupon the Magistrate struck the defendant in the face. There must of course at that time have been intense hostility between the two men, but it is alleged in the affidavit used in shewing cause that there was an almost immediate reconciliation; this is contradicted. I do not think so speedy a peace is likely. The Magistrate must have had very strong feelings against the defendant or he would not have forgotten his position as a Magistrate and committed a violent breach of the peace. He may and probably had great provocation which would be some extenuation though no justification for the breach of the peace.

I have reached the conclusion of fact that there is at least a "reasonable apprehension of bias" and I therefore would grant the order for prohibition but without costs.

The Legislature has thought proper to make the decisions of Stipendiary Magistrates, final, and it is impossible to over-rate the importance of having justice as administered by them command the respect of the public. From this point of view it is in my opinion far better that the Stipendiary Magistrate for Sydney Mines should not try this case.

Mellish, J., agrees.

Application granted.

PARRISH v. GRAFFUNDER.

Alberta Supreme Court, Scott, J. September 17, 1921.

Chattel Mortgage (§VI—55)—Agreement between Mortgagor and Mortgagee that Mortgagee to sell for Certain Amount—Sale for less Amount—Liability to Mortgagor for Amount Less Than Agreed Price.

Where the mortgagor of chattels has authorised the mortgagee to sell the chattels under an express undertaking that he will not sell them for less than a certain sum over and above the amount then due on the mortgage, and the mortgagee sells them for less than the amount due on the mortgage, he is liable to the mortgagor for the balance of the amount due on the mortgage which he should have obtained and the amount over and above that amount which he agreed to obtain from the sale.

ACTION by plaintiff to recover the difference between the price received for the sale of cattle and the price which should have been received if the plaintiff's instructions had been carried out, the authority of the plaintiff to sell, being subject to a condition that they should not be sold by private sale for less than a certain amount.

N. D. Maclean and A. F. Duncan, for plaintiff.

H. R. Milner and H. H. Munro, for defendant.

Scott, J.:—On November 5, 1919, the plaintiff gave to one John R. Smith a chattel mortgage upon certain cattle to secure the payment of $1,807.92 with interest thereon at 8% per annum payable on November 5, 1920.

The mortgagee died in May, 1920, having first made his will whereby he appointed one Frank Jackson his executor.

The plaintiff advertised a sale of the cattle by auction to be held on November 9, 1920. On that day the defendant who was the duly authorised agent of Jackson appeared at the sale and forbade the sale of the cattle, with the result that the attempted sale did not take place.

Shortly after the attempted sale the solicitor for Jackson, the executor, issued and delivered to the defendant a distress warrant directed to the sheriff of the district in which the cattle then were, directing him to seize them under the chattel mortgage. The defendant procured the sheriff to appoint him his bailiff to make the seizure and thereupon he seized them and removed them to Cadsby, about 20 miles from the plaintiff's farm.

On November 13 the plaintiff gave the defendant authority in writing to sell the cattle privately or by auction sale at his direction. The plaintiff states that he gave this authority upon the express undertaking given at the time that he would not sell them for less than $200 over and above the amount then due upon the mortgage. The defendant denies that he gave such an undertaking.

After seizing the cattle the defendant instructed one Hitchner to sell them by auction. Printed posters advertising the sale were issued for the auction sale to be held on November 23, but the defendant sold them by private sale on November 22, to one Rich, for $1537.50, of which only $1,470.05 reached the hands of the solicitor for the executor. Out of the proceeds Hitchner received $12.50 for advertising, $250 for driving cattle, $35 for feed and $16 for board bill, amounting in all to $60. It is not shewn what

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disposition was made of the remaining $7.45.

On November 22, the day of the sale to Rich, an injunction was issued out of the Supreme Court in an action brought by Colin Smith against Jackson the executor, restraining the latter, his servants and agents from selling or disposing of the assets of the deceased or from collecting any moneys due to his estate. The purport of this injunction was communicated by telegraph to the defendant on the date of its issue. He states that he did not receive the telegram until about 3 o'clock in the afternoon and that he made the sale to Rich during the forenoon.

He states that the reason he sold the cattle by private sale was that he thought that the price offered by Rich was greater than what he would receive at the sale by auction.

Had the defendant sold the cattle by auction he and his principal would doubtless have been relieved from liability even if the price realised were less than the market value of the cattle, as the latter appears to have had the right under the provisions of the mortgage to take possession of and sell them. Notwithstanding the denial of the defendant that he received notice of the injunction before the sale, the fact that he sold them by private sale on the eve of a duly advertised auction sale I entertain a strong suspicion that he was aware of the injunction at the time he sold and that he deliberately ignored it.

I hold upon the evidence that the authority given by the plaintiff to the defendant to sell by private sale was subject to the condition that the latter should not so sell unless he received $200 in excess of the amount due upon the mortgage and that a private sale for less than that amount was unauthorised.

The evidence as to the value of the cattle was conflicting. The plaintiff places their value at over $3,300. He states, and it is not denied, that shortly before the sale Rich the purchaser offered him 4c per pound for them and that they weighed about 47,000 or 48,000, which would make their value at least $1,880, and that he refused his offer. Grover, a butcher, states that he went to plaintiff's sale with the object of buying the cattle, examined them at the time and made a memorandum in writing of the amount he was prepared to pay for them, which was $2,551 less a discount of 5% for cash. Hitchner, the auctioneer, and Rich, the purchaser, place their value at about the amount the latter paid for them.

The amount due upon the mortgage at the time of the sale of the cattle was $1,959.35. Deducting the amount of purchase-money applied upon it leaves a balance of $489.30. I hold that the value of the cattle at the time of the sale was at least $2,159.35 and that the authority given by the plaintiff to sell by private sale was subject to a condition that the defendant should not thus sell unless he realised at least $200 in excess of the amount due upon the mortgage.

I, therefore, give judgment for the plaintiff for $689.30 with costs under the second column of the schedule of costs, including costs of examination for discovery.

Judgment accordingly.

McBRIDE v. S.S. "AMERICAN" AND JOHN S. DARRELL CO.

Exchequer Court of Canada, Audette, J. December 20, 1920.

Admiralty (§I—1)—Exchequer Court—Sale of Ship for Wages—Conflicting Equities—Equitable Jurisdiction—When Exercised.

The Exchequer Court will not exercise its equitable jurisdiction to set aside the sale of a ship for the payment of wages and disbursements at the request of the party at fault, where conflicting interests have arisen since the sale which make it apparent that to do so would do an injustice to the purchaser whose rights were acquired in a perfectly legal and unimpeachable manner.

[Montreal Dry Docks etc. Co. v. Halifax Shipyards (1920), 54 D.L.R. 185, 60 Can. S.C.R. 359, judgment of Anglin J. referred to.]

APPEAL from the decision of the Deputy Local Judge in Admiralty for the Nova Scotia Admiralty District dismissing the application of the owners to set aside the sale of a ship made under authority of justice. Affirmed.

Geo. Henderson, K.C., for appellant.

R. V. Sinclair, K.C., for respondent, John S. Darrell Co.

Audette, J.:—This is an appeal from the judgment or order of the Deputy Local Judge in Admiralty for the Admiralty District of Nova Scotia, pronounced on the 25th September, 1920.

This is an action for wages and disbursements in which the plaintiffs obtained judgment for $1,871.83 and costs after the owners of the ship had made default to appear; but when John S. Darrell & Co., the owners of the cargo, had been allowed to intervene and contest the plaintiff's claim.

After judgment the vessel was seized and advertised for sale. On the application of the shipowners, the sale was adjourned for 2 days and on the expiration of the 2 days the vessel was sold at auction by the sheriff and purchased by Darrell & Co. on Saturday, September 18, 1920, through

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their Halifax agent, when the necessary deposit was paid and the balance tendered on the following Monday—and refused on account of the present application of the shipowners to set aside the sale, and allow them to pay the amount due the plaintiffs and redeem the vessel.

It appears that the necessary monies to discharge the claim of the plaintiffs in the action came too late to Halifax,—about the time of the sale,—but not in time to stop the sale.

There is spread upon the record the further fact that the purchasers of the vessel on the Monday following the sale had made arrangements with the Halifax Shipyard to have the "American" go in the dry dock on the following Monday for repairs. Moreover, it appears from an affidavit on record that negotiations had already been entered into for the sale of the vessel at the time the application was originally presented, and a long time has elapsed since the sale. Where is the vessel at present, was asked at the hearing of the appeal, and counsel for the intervenors answered she was travelling on the high seas. She may well have been sold for all is known of her. If that were so, it would hardly be practicable to attempt at this stage, to restore the parties to pre-sale conditions.

From my first impression gathered at the hearing of the case I thought, to do justice among the parties interested, that the application ought to be granted and the vessel restored to the original owners upon paying the plaintiffs' claim and all costs occasioned by their neglect, upon the ground that "much is to be said in favour of a principle which does justice to one party without doing injustice to the other;" however, so many conflicting interests have arisen since the time of the sale, which was made in a perfectly legal manner, that it becomes apparent that to extend an equity to the party in default would be to do an injustice to the other party whose rights were acquired in an unimpeachable way.

It is true the Admiralty Court, as said by Lord Stowell, exercises an equitable jurisdiction. The Court is not absolutely ministerial, and it is at liberty to hold its hand when it appears equitable to do so. See also The Montreal Dry Dock and Ship Repairing Co. v. Halifax Shipyards, Ltd. (1920), 54 D.L.R. 185, at pp. 193, 194, 60 Can. S.C.R. 359.

However, vigilantibus et non dormientibus jura subveniunt; the equitable arm of the Court is extended to the

vigilant and not to the negligent. The sale was adjourned for 2 days to allow the shipowners to come in and cure their negligence and they failed to do so. The indulgence of the Court has already been extended to them and they failed to take due advantage of it.

While the Admiralty Court exercises this unquestionable equitable jurisdiction, it must not be expected to peddle small equities. The case presents equities on behalf of both sides and they seem equally balanced. The burden was upon the appellant to shew a superior equity which I fail to discover on the facts before me.

There were ample reasons for the local Judge, after delaying the sale for 2 days at the request of the shipowners, to refuse their application and I am unable to find sufficient reasons to vary his pronouncement. And as said per Lord Loreburn, L.C., in Brown v. Dean, [1910] A.C. 373 at p. 374:—

"When a litigant has obtained a judgment in a Court of Justice, whether it be a county court or one of the High Courts, he is by law entitled not to be deprived of that judgment without very solid grounds." There is ample reason to support the judgment appealed from, which, under the circumstances gives substantial justice to all concerned.

There will be judgment dismissing the appeal.

Judgment accordingly.

REX v. DENNY.

Ontario Supreme Court, Middleton, J. October 18, 1921.

Certiorari (§IB—11)—Limitation where an Adequate Remedy by Appeal is available—Ontario Summary Convictions Act, R.S.O. 1914, ch. 90, sec. 10 (3)—Ontario Temperance Act, sec. 92 (as amended 1921 Ont., ch. 73.)

Under the amendment of 1921 Ont. ch. 73, sec. 6, to the Ontario Temperance Act, there is an appeal from a Summary Conviction for illegal possession of intoxicating liquor, and where such appeal if taken would afford an adequate remedy, a summary motion to the Supreme Court of Ontario to quash the conviction as upon certiorari is barred by the Ontario Summary Convictions Act, R.S.O. 1914, ch. 90, sec. 10 (3).

[R. v. Warne Drug Co. Ltd. (1917), 37 D.L.R. 788, 29 Can. Cr. Cas. 384, applied.]

Certiorari (§IB—10) — Discretion of Court to refuse where Applicant has another adequate Remedy.

Apart from the operation of restrictive statutes, the extraordinary supervisory jurisdiction of a Superior Court by certiorari proceedings over the process of an inferior Court ought not to be exercised if another adequate remedy, as by appeal, is open to the applicant.

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REX v. DENNY.

MOTION by the defendant for an order quashing a conviction made by two Justices of the Peace for illegal possession of liquor contrary to sec. 41 of the Ontario Temperance Act.

James Haverson, K.C., for the defendant.

F. P. Brennan, for the magistrates, objected that the motion could not be entertained, because by an Act of 1921, amending the Ontario Temperance Act, an appeal now lies from a conviction made under that Act.

The amending Act is 11 Geo. V. ch. 73, by sec. 6 of which secs. 92, 93, 94 and 95 of the Ontario Temperance Act, as previously amended, are repealed and new sections are substituted therefor. The new section 92 (1) is as follows:

"Any person convicted under this Act may, subject to the provisions hereinafter mentioned, appeal from the conviction to the Judge of the County or District Court of the county or district in which the conviction or order is made, sitting in Chambers without a jury, if a notice of such appeal is given to the prosecutor or complainant and to the convicting magistrate within 10 days of such conviction."

Middleton, J.:—Motion for an order quashing a conviction made by two Justices of the Peace on the 29th August, 1921, whereby the applicant was convicted of a breach of sec. 41 of the Ontario Temperance Act in having liquor, on the 29th July, 1921, in a place other than a private dwelling.

A preliminary objection was taken by Mr. Brennan, and this alone was argued.

It is contended that, since the passing of the amendment to the Ontario Temperance Act of 1921, 11 Geo. V. ch. 73, sec. 6, providing for an appeal from a conviction under the Act to the Judge of the County Court, certiorari will not lie.

The Ontario Summary Convictions Act, R.S.O. 1914, ch. 90, sec. 10, sub-sec. 3, provides:—

"No such order or conviction shall be removed into the Supreme Court by writ of certiorari or otherwise except upon the ground that the appeal provided by any act under which the conviction takes place or the order is made or by this Act would not afford an adequate remedy."

If this section applies to the conviction in question, Mr. Haverson admits that the objection is well taken. He argues that the opening words, "No such order or conviction," indicate that the provision is only applicable to cases falling within the first two sub-sections of the section in

question. I think that this contention is not well-founded.

Sub-section 1 provides that, where there is no other provision in the Act under which the conviction takes place, an appeal shall lie to the General Sessions of the Peace in certain cases and in other cases to the Division Court.

Sub-section 2 provides that where by any statute an appeal is given to the Judge of the County or District Court from a summary conviction, and no special provision is made, the appeal shall be to the Division Court.

I do not think that it necessarily follows that sub-section 3 is confined to cases in which the right to appeal is conferred by the first sub-section, for sub-section 3 speaks not only of the appeal provided by the Summary Convictions Act, but also of the appeal provided by "any Act" under which the conviction takes place, and I would read the words "such conviction" as referring to any conviction made under and by virtue of any Act of the Province.

Sub-section 2 appears to me to be colourless so far as this question is concerned, for it merely points out the proper forum where the right of appeal is given in a certain way. This view has been accepted in all earlier cases. See Rex v. Warne Drug Co. Limited (1917), 37 D.L.R. 788, at p. 790, 29 Can. Cr. Cas. 384, 40 O.L.R. 469, where they are collected.

Even if I should be wrong in thinking that this is the true construction of the statute, I should still hold the objection to be well-taken, for it is fundamental law that the extraordinary supervisory jurisdiction of the superior court over the process of the inferior courts ought not to be exercised where another remedy is open to the applicant. The certiorari is for the purpose of enabling more sure and certain justice to be done in the premises, and this end can be best attained by following the channel indicated by the Legislature and in taking the appeal which has been provided.

Speaking generally, the right of appeal is a far more satisfactory remedy than certiorari. Upon certiorari the Court can only determine whether there is any view of the evidence which would justify the conviction. Upon an appeal the Court has the right to weigh the evidence, and to interfere where the conviction is against the weight of evidence. I am satisfied that in the past many a conviction has been maintained where it has in truth proceeded upon some erroneous view of the law entertained on the

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part of the magistrate, but the Court has been powerless to relieve because upon some possible view of the law conviction might properly be made.

The motion will, therefore, be refused, but, as this is the first case under the new statute, I do not award costs.

Motion dismissed.

SHAW v. HYDE et al.

British Columbia County Court, Swanson, J. October 6, 1921.

Companies (§IVF—100)—Sale of Goods to—Company Struck off Register under Companies Act—Restoration to Register—Company unable to Meet Liabilities—Action against individual Shareholders—Right and Liabilities of Parties.

An action against individual defendants alleged to have been carrying on business together and admitted to be shareholders of a limited company, for goods sold and delivered to the company after it has been struck off the register of companies and dissolved pursuant to the provisions of sec. 268 of the Companies Act R.S.B.C. 1911 ch. 39, and before its restoration to the register pursuant to the Act, the goods being supplied not to the defendants personally but to the company, all the parties apparently being in ignorance of the proceedings, striking the name off the register, will be dismissed where the whole proceedings are simply an attempt to get at the assets of an individual shareholder to pay for a debt of the company against which bankruptcy proceedings have been commenced.

[See Annotations, Bankruptcy Law of Canada, 53 D.L.R. 135, 59 D. L. R. 1.]

ACTION for the price of goods sold and delivered to the individual defendants alleged to have been carrying on business together and to shareholders and directors of the Peachland Lumber and Manufacturing Company Ltd. Action dismissed.

H. C. DeBeck, for plaintiff; D. C. Tuck, for defendant.

Swanson, Co. Ct. J.:—The plaintiff's claim (as amended) is for $139.20 for goods sold and delivered to the five individual defendants alleged to have been carrying on business together at Peachland in county of Yale. It is admitted that the defendants were both shareholders and directors of the Peachland Lumber and Manufacturing Co., Ltd., a company duly incorporated under the laws of the Province of British Columbia on August 31, 1911.

The defendants and one James Michel (since deceased) were during the life of the said company its sole members and shareholders. The said Peachland Lumber and Mfg. Co. Ltd. was on February 19, 1919, struck off the register of companies and dissolved pursuant to the provisions of

the Companies Act R.S.B.C. 1911, ch. 39, sec. 268. The goods, as a matter of fact, were sold not to the defendants personally but to the said Peachland Lumber and Mfg. Co. Ltd. The said company was pursuant to an order made by Morrison, J., dated June 24, 1921, restored to the register of joint stock companies, pursuant to the Companies Act, ch. 39, of R.S.B.C. 1911, and amending Acts, and by said order, the said company is to be deemed to have continued in existence as if the name had never been struck off. The account for goods sold and delivered herein (beef and beans) was incurred between October 25, 1919, and November 8, 1920, during the period of interregnum, when the name of the company having been struck off the register the company was "dissolved." The company was run apparently in a slip-shod way, as a sort of family concern. No returns were ever made to the registrar from time of its incorporation. The members of the company were apparently in ignorance of the proceedings, striking the company's name off the register. No meetings of the directors were ever held since the initial meeting except in March and July, 1921. Hyde was manager and Mills secretary, the latter figuring as a "Johannes factotum"—night watchman, fireman and handling lumber. No special authority was ever given to Hyde and Mills by the company, beyond the fact of their respective positions originally given them. During the time the company was struck off the register they continued to "carry on" for the company as usual, neither they nor the plaintiff knowing of the dissolution of the company.

Plaintiff undoubtedly sold the goods to the company and looked to the company in good faith for payment, not to the individuals. He never expected to be paid in any other manner than through the corporate entity, bearing the above name.

Apparently the company is unable to pay the plaintiff, and proceedings respective the company (in which the plaintiff has joined) have already been taken under subsec. 12 of sec. 13 of the Bankruptcy Act, 1919 (Can.), ch. 36, and an order now made by the Judge in Bankruptcy. The terms of this latter order were not before me. The plaintiff's counsel has been diligently exploring the law as to companies, and his search has been rewarded by a ruling of Buckley, J., in In re Brown Bayley Steel Works, Ltd. (1905), the only record of this decision in narrative

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form being found in vol. 21 of the Times L.R. at pp. 374 and 375. The plaintiff's counsel has built his client's case, apparently on the dictum of Buckley, J., in that case, fortified by a reference to the same case in Hals. vol. 5 ("Companies"), p. 611. The ruling of Buckley, J., is apparently the sole and only decision on the point in the English or Canadian Law Reports as far as I have been enabled to ascertain; now, that decision looks rather formidable at first blush.

The case before Buckley, J., was simply an application to restore the company's name to the register, the parties concerned having neglected to make the returns required by the Act. There was no question there of the company being unable to meet its proper obligations. In fact it was abundantly solvent. Buckley, J. (who was an eminent authority on company law), was apparently very much perturbed at the frequency of such applications. The Judges of British Columbia apparently have not been over-much disturbed over such applications, which are constantly coming before our Courts, and orders are made without any such strictures as those called forth by Buckley, J. I quote from the above report, p. 375:—

"His Lordship said that if he had jurisdiction to do so he should mark his disapproval by ordering some penalty to be paid as a condition of making a restoration order, but a careful examination of the Acts showed that he had no power to do this. Section 7 (5) of the Act of 1880 said that the Court might 'order the name of the company to be restored to the register, and thereupon the company shall be deemed to have continued in existence as if the name thereof had never been struck off' and also said: 'And the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had never been struck off.' If his Lordship altogether refused to make the order he would be doing an injustice to many persons. What was the result of striking the name off the register? By section 7 (4) the effect was that the company was dissolved, but that the liability of every director, managing officer and member of the company was continued and might be enforced."

If I may be pardoned for interrupting the sequence of this judgment I would point out here that his Lordship

omitted two very important little words found in the Imperial Act itself after the word "liability," namely, "if any." These words are in our own British Columbia Companies Act, sec. 268 (3), "Provided, &c. &c," R.S.B.C. ch. 39 (1911). To continue with his Lordship's judgment:

"From the time when the company was struck off there was no corporation and its officers were personally liable for the engagements made as its agents. By simply making an order to restore the name to the register his Lordship would not relieve them—the personal liability would still remain."

As far as the facts before Buckley, J., were concerned these words were purely "obiter dicta" as there was not even a suggestion that any one should be held personally liable, the company having abundance of assets, and only failing through inadvertence to make the returns. Then the judgment adds:—

"The Court could make an order under section 7 (5) giving such directions that the officers would be relieved from this liability. His Lordship would not make that order, but would make an order which would not relieve them, by simply ordering the name of the company to be restored on the terms of its making the proper returns and paying the costs of the Board of Trade."

Halsbury vol. 5, pp. 611, 612, para. 1054, makes this statement solely on the authority of the above decision to which it alludes in the footnote.

"The restoration of the name does not relieve directors or others from any liability, to relieve them from the personal liability incurred by carrying on business after the company has been dissolved, the Court must make a special order, and this order will not be made in a flagrant case."

Now I find in carefully comparing the Imperial Act (under which the above decision was given) with our own Act that the power to make the "special order relieving from liability" provided for in sec. 7 (5) of the Imperial Act of 1880, ch. 19—now found in the Imperial Companies (Consolidation) Act 1908, ch. 69, sec. 242 (6), was provided for in sec. 268 (4) of R.S.B.C. 1911, ch. 39. This sub-sec. (4) of our Act I find was repealed in 1913 by ch. 10, sec. 21 (4), which also provides for the power to make such orders alluded to by Buckley, J. It says that "the Court..... may.....order the name of the company to be restored to the register, and thereupon the company, being an in-

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corporated company as aforesaid, shall be deemed to have continued in existence.....as if its name in either case had not been struck off, and the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off." Reading the proviso to sub-sec. 3 of sec. 268 (aforesaid) of our own Act:—

"Provided that the liability (if any) of every director, managing officer and member of any such company shall continue and may be enforced as if the name of said company had not been struck off the register"—I am of the opinion that the "liability, if any, of every director, etc," which is kept alive despite the dissolution of the company by its being struck off the register is the "liability" existing at the very time of the dissolution of the company. Now in the case before me the company was struck off the register, and accordingly dissolved, on February 19, 1919, and the cause of action herein could not accrue (nor a claim for any part of the amount sued for) until October 25, 1919. After February 19, 1919 there was no "company" whatever in existence, and there could be no "directors" no "managing officer" in existence. The "liability" kept alive at the time of "dissolution" I think, must be clearly some antecedent liability in connection with a "company" which up to "dissolution" had a legal existence. Such "liability" is preserved by the Act, notwithstanding the "dissolution," and vanishing into thin air of the company with the "restoration" to the register of the "company" by the order of Morrison, J., the full corporate liability of the company itself "ipso facto" comes into existence, just as if the "company had continued in existence." The plaintiff is thereby fully protected in his contractual rights with the company. He has all the legal rights which he originally bargained for; which he believed in very truth he had, that is his right to look to the company, and only the company, with whom he dealt for payment of his debt. Why should he now get more? Everyone has apparently been acting in good faith in believing in the legal existence of the company, all being honestly ignorant of its "dissolution." Why this desire to now forsake his claim against his real debtor, the company? It is because the plaintiff has concluded that the company in its corporate capacity is unable to pay, and because, one individual member, whether Mrs. Hyde or

Mrs. Mills (I am not sure now which) is the only one in the whole company who is financially in a position to liquidate this debt. The whole proceedings then are an attempt to get at this individual woman (who took no active interest whatever in the company from its very inception) her assets to pay for what is undoubtedly a debt of the company, now resurrected (but apparently not possessing very much financial vitability) under the shelter of the judicial authority of Buckley, J.'s "obiter dictum," above quoted by me. In my opinion, it is pressing the judicial authority much too far.

As the pleadings are framed, this is a specific claim for "goods sold and delivered" to the defendants. It is not an action for "damages" for breach of authority on the part of Hyde or Mills (or their associates in the company to represent a supposedly legal company (which was in fact defunct) nor is it framed as an action against these individuals as agents for the company.

This is, I take it, a highly technical action and if it was the intention of the plaintiff to found his action in damages his pleadings as they stand cannot cover such a claim, and no application was made to amend the "plaint."

The point involved is one of great interest, and if more were at stake in the action, the case might well be brought before the Court of Appeal.

After careful consideration of the whole matter, I am of the opinion that the plaintiff must fail in his action.

Action is accordingly dismissed with costs.

Action dismissed.

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THE KING v. G.T.R. CO RE GRAND TRUNK ARBITRATION.

THE KING v. GRAND TRUNK R. CO. RE GRAND TRUNK ARBITRATION.

Sir Walter Cassels, Sir Thomas White, Hon. W. H. Taft.
September 7, 1921.

Railways (§VII—140)—Acquisition by Government—Valuation of Preference and Common Stock—Basis of Valuation.

The Board of Arbitrators held, Honourable William Howard Taft dissenting, that the actual earning power of the Grand Trunk Railway Company of Canada, before, during and since the war, and so far as could be estimated for the future did not justify the assumption that any profits would from the date of the acquisition by the Government of the preference and common shares, viz., May, 1920, ever have been available for distribution to the holders thereof, after providing for the contingent liability of the company in respect of Grand Trunk Pacific securities, guaranteed by the company and dividends upon the "guaranteed stock"; its own contriving heavy deficits, the necessity for making provision for deferred and extraordinary maintenance and capital construction and its heavy liabilities in respect of securities of the Grand Trunk Railway Company of Canada, but for the financial support of the Government since May, 1920, must have been forced into a receivership, and upon these conclusions the Arbitrators held, Hon. William Howard Taft dissenting, that the Preference and Common stock of the Grand Trunk Railway Company of Canada was of no value.

[See also Re Grand Trunk Arbitration (1921), 57 D.L.R. 8.]

AWARD of arbitrators as to the value of the preference and common stock of the Grand Trunk Railway Company of Canada, in pursuance of an agreement whereby the Government of Canada was to acquire the said stock, the value of which to the holders thereof should be determined by a Board of Arbitrators as therein stated.

The facts and circumstances are fully set out in the reasons of Sir Thomas White.

Sir Walter Cassels (after setting out the surrounding circumstances leading to the execution of the agreement under which the entire capital stock of the Grand Trunk was acquired by the Government and under which the arbitration to enquire into the value of such stock was authorised):—

Before dealing with the correspondence leading up to the agreement and the meaning of the agreement, it may be well to refer to what is called "The Budget." It throws light on the financial position of the Grand Trunk Railway System. The Budget is contained in Ex. 475. It is headed:—

"The Grand Trunk Railway System.

"Estimated Cash Requirements including Capital.

"Expenditure, meeting obligations, etc.

"January 1, 1921, to March 31, 1922."

The grand total is $89,687,633.39.

It is only necessary to consider the enormous outlays necessary, to understand how futile it is to expect a railway to pay dividends unless material outside assistance is furnished.

It is unnecessary to set out in detail the items of requirements for the fifteen months from January 1, 1921, to March 31, 1922. Exhibit 475 contains the information in full.

I proceed now to give my views as to the construction to be given to the agreement. In the opinion pronounced on February 7, 1921, I declined to acquiesce in the argument of Mr. Lafleur that the statute in question was a forcible expropriation of the three preference stocks and the common stock.

After hearing further argument by counsel for the Grand Trunk Railway and the Crown, I am convinced that the view I formed is correct. The correspondence printed regarding the G.T.R. acquisition, and the facts leading up to the agreement, demonstrate that the shareholders were quite free to enter into an agreement or not as they thought best in their own interests. It is apparent that the G.T.R. were at the end of their tether and without assistance could not carry on; and, aware of this fact, the company endeavoured to obtain the best price possible for the sale of their undertaking.

In 1919, ch. 17, 2nd sess., was enacted, which authorised the Government and the G.T.R. to enter into an agreement by which the Crown would acquire and the G.T.R. of Canada would sell the whole G.T.R. System to the Crown on the terms set out in the statute.

There was no compulsion or forcing of the G.T.R. shareholders to enter into the agreement; they were free agents and as such voted in favour of the agreement, and thereupon the agreement of March 8, 1920, was entered into by the Crown and the company.

Under the terms of this agreement the Crown assumed large liabilities of the G.T.R. System from the date of the appointment of the Committee of Management, May, 1920.

The contention on the part of the Crown was that they had agreed to pay full and adequate compensation, and that there was no value in the first, second and third preference

stocks or in the common stock of the Grand Trunk Railway Company of Canada.

The G.T.R. of Canada, on the other hand, contended that there was value to the holders of the first, second and third preference and common stocks, and the agreement provided for this Arbitration to determine what, if any, sum should be paid to the stockholders.

If the Board of Arbitrators find any sum due this amount is to be satisfied by guaranteed stock bearing interest at 4%, such interest dating back to the date of the appointment of the Committee of Management, namely, May, 1920, the date when practically the sale and purchase was completed.

It is a common form of agreement for a vendor to agree to sell and a vendee agree to buy for a price to be settled by arbitration. In the Court of Chancery in Ontario and I think in England it is common practice to obtain a vesting order where a vendor refuses to carry out the terms of a judgment ordering him to convey the property.

In this case, whether any amount is awarded or not, the four classes of stockholders have agreed to assign their stock.

Coming now to the construction of Clause 6 of the agreement of March 8, 1920:—"The value, if any, to the holders thereof"; I am of the opinion that "value" means the "intrinsic value."

The cases cited by counsel for the Crown, Peeke v. Derry (1887), 37 Ch. D. 541, etc., are very much in point. All the negotiations are based on earning power, and it was the intrinsic value the parties evidently had in view. Watcham v. Att'y Gen'l of E.A., [1919] A.C. 533 at p. 538. And for the reasons given the quotations of the stock market would form no criterion.

I now proceed to deal with the important question, the subject matter of the decision of February 7, which decision seemed to afford considerable dissatisfaction to the counsel for the G.T.R. Co. I see no reason whatever to doubt the correctness of the view I then formed, and I do not wish to repeat the reasons I then gave.

Throughout the proceedings counsel constantly referred to this decision as "the majority decision." This is incorrect. So far as the principle or basis of compensation is concerned, the Board are unanimous. My friend Mr. Taft, who is quoted as "the dissenting Arbitrator," is, if the

record is correct, fully in accord with the views expressed by Sir Thomas White and myself. I quote his language:—

"Without saying that market quotations may not be submissible, it is clear that we must look for other means of determining the issue here. The whole stock of the railway is valuable or otherwise as the ownership and control of the physical property of the railway as a going concern in the discharge of its public duties will enable it to earn a sufficient amount to pay dividends on the stock. We are, therefore, to capitalise its net earning capacity, present and potential, and fix the value of the stock on that basis. Its earning capacity, present and potential, is what is now earned and what it may be expected to earn under reasonable probable conditions. Net earnings are the revenue received less the operating expenses. What determines the revenue of a going railway are the amount of its business and the rates it can charge."

During counsel's argument for the Crown, the following remarks of Mr. Taft indicate a complete accord with the views of the majority:—

"Hon. Mr. Taft: We are here to determine the value of this road, this company's property, and we are using these accounts to find out what its earning capacity was during these various years. We also have to take into consideration what its liabilities are; what its permanent liabilities are. These seem to be, so far as the Grand Trunk Pacific is concerned, something like $3,700,000." . . .

"The question of the operating income; the net operating income is the basis on which we must calculate the value of this road, reduced by what its liabilities may be in the future."

The point of difference was to the reception of certain evidence. This evidence, according to the view of Mr. Taft, might be of value as indicating a probable increase of rates by the Interstate Commerce Commission.

Under Clause 7 of the agreement, the Arbitrators, or a majority, have sole discretion as to the admission of evidence, and if the majority are of opinion that no amount of evidence of the character offered would effect their opinion, surely it was their duty to rule it out and save an enormous amount of expense and delay. Besides, if what the Board consider is the correct principle upon which the valuation has to be made, namely, earnings, how can it possibly affect the case what the reproduction cost might be? The ques-

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tion that might come up before the Interstate Commerce Commission is not merely the value of the G.T.R. System, but the value of the group of railways of which the G.T.R. is but one, and how could we go into these questions? It would be a pure guess, not based upon any accurate knowledge.

In the case of the United States v. The Boston Cape Cod and New York Canal Co. (1921), 271 Fed. Rep. 877, elaborate reasons are given. A petition had been filed on behalf of the United States for condemnation against the Boston, Cape Cod and New York Canal Co., and this was an appeal on behalf of the United States from the judgment of Morton, J. In this case it must be borne in mind that under the statute the actual cash value of the canal had to be appraised. Evidence had been given by a Professor Johnson as to the probable future revenue based on an increase of the tolls.

The Court at p. 886 used the following language:—"Then, again, the tolls which the Canal Company could charge on the interstate traffic passing through the canal were subject to governmental regulations and the opinion of Professor Johnson as to the probable future revenue based on an increase of tolls was in any aspect nothing more than a mere guess."

This case is also of value in dealing with the roseate views expressed by counsel for the Grand Trunk as to the future. In the headnote on pp. 877, 878, under sec. 3, Evidence, it is said:—"Future earnings of a canal not proper subject of opinion evidence. In a suit by the United States for condemnation of a canal used for interstate traffic, the probable future towage [tonnage] of the canal and the additional revenue to be derived in view of such increased tonnage, held not a proper subject of opinion evidence."

And in the Reasons for Judgment the following language is used on p. 886:—

"Tested by this rule, was the opinion of Professor Johnson as to the probable future tonnage of the canal and the additional revenue to be derived in view of such increased tonnage a proper subject of opinion evidence? We think it was not. It seems to us that the jury might well be supposed to be able to determine the future increased tonnage of the canal from a statement of the facts upon which the witness might found his own opinion. In this case it could

be shown what the tonnage passing through the canal was at the time of the taking, and the increase in the tonnage that had taken place from the time the canal was opened to the time of taking. It could also be shown what the tonnage going round the Cape was at the time of taking, and what the increase was over a reasonable period antedating that time, and, from this and from other competent evidence bearing on the question, we think the jury could form a correct judgment of the probable future increase of the tonnage through the canal without the opinion of an expert."

I agree with Mr. Lafleur's statement of law laid down in the Cedar Rapids case, 16 D.L.R. 168 at p. 171, [1914] A.C. 569: "For the present purpose it may be sufficient to state two brief propositions: 1. The value to be paid for is the value to the owner as it existed at the time of the taking; not the value of the taker. 2. The value to the owner consists in all the advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined. Where therefore the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in the adaptability for a certain undertaking (although adaptability is really an unfortunate expression), the value is not a proportional part of the assumed value of the whole undertaking."

It is the present value alone of such advantages as falls to be determined. The stocks are acquired as of May, 1920. The value must be ascertained as of that date. The potential value would be reflected—to use a happy expression of Sir Thomas White—in the value as of May, 1920.

In the case of land, with a market value ascertained, the potential value would form part of the market value, and no difficulty arises. In the case of these stocks, there is no market value. If we were to look ahead—which I do not think would be proper—it will be seen that notwithstanding the increased rates for a portion of the year there was a deficit of earnings, outstanding, of about $11,000,000 in 1920. It is argued that working expenditure would be lessened. If so, the rates allowed will likely be lowered. It is impossible to forecast what may take place. In dealing with the questions of potential value certain facts must be carefully kept in mind.

The value of these four classes of stock has to be ascer-

tained as of the month of May, 1920, the date of the appointment of the Committee of Management.

Any potential value that can be attributed to these stocks must be ascertained as if the Government had not come to the relief of the railway. After the Government entered into the agreement and the Committee of Management was appointed the policy of the management altered; opposition of competing lines would cease, etc.

If therefore the value of these four classes of stock, including their potential value, is to be ascertained on the basis of the G.T. System continuing to operate as theretofore, could any sane business man with a knowledge of the facts, come to any conclusion different from that come to by Mr. Chamberlin that a crash was inevitable, and insolvency and receivership the sequel, and would there be any reasonable chance of these four classes of stockholders ever receiving a cent on their investments? I think not.

By the agreement in question of March 8, 1920, what the G.T.R. Co. of Canada were agreeing to convey, and what His Majesty the King was purchasing, was the entire System, necessarily as a going concern. The Crown has assumed obligations amounting to a very large sum of money. The earning of a sufficient amount to pay the interest on, and subsequently the principal of these obligations, depends upon the continued operation of the System as a going concern.

The schedule set out in detail the various properties comprising this System.

The first clause of the Agreement reads as follows:—

"1. Statement of Control.—The Grand Trunk represents that the companies, properties and interests comprised in the Grand Trunk Railway System are correctly and fully set forth in the first schedule to this Agreement, and that it has in such schedule correctly and fully shown how the various companies and their undertakings are controlled by the Grand Trunk, whether by stock ownership and to what extent, and whether by leases, agreements or otherwise, distinguishing in these the direct ownership and control by the Grand Trunk from the indirect ownership and control through companies included in the System."

Clause 4 provides for the appointment of the Committee of Management of the G.T. System.

Clause 10, headed "Undisclosed Liabilities," is also important in this connection.

Clause 17 as to the "Superannuation and Pension Funds" is also important, indicating a continued operation of the System.

To my mind it is impossible to reasonably contend that "reconstruction value" can have any bearing on the matters to be determined by the Board. At the time of the Agreement all the properties mentioned in the schedules formed part of and were operated as a part of the System, and were passed to the Crown as an operating System, and no part of these properties has been severed from the System or any attempt made to sell them separately. If hereafter the Crown adopts the view that certain properties might be disassociated from the System and sold, and the assent of those having charges, and the necessary authority obtained, it is something these shareholders have no concern with.

I have given the best consideration I am capable of giving to the important question submitted for our consideration and am of the opinion that our Award should be that there is no value in any of the four classes of stocks.

If equitable or moral considerations are to be considered, those who control the public funds must deal with the question, not the Board.

Sir Thomas White, K.C.M.G., P.C.:—The reference to arbitration herein arises under and by virtue of an Agreement dated March 8, 1920, between the Government of Canada (hereinafter called "the Government") and the G.T.R. Co. of Canada (hereinafter called "the Grand Trunk"), ratified and confirmed by an Act of the Parliament of Canada assented to on May 11, 1920.

The purpose of the agreement was to provide for the acquisition by the Government, upon the terms set out in the Agreement, of the "entire capital stock of the Grand Trunk except the four per cent. guaranteed stock of the Grand Trunk amounting to £12,500,000." As part consideration for such acquisition the Government agreed to guarantee the payment of:—(a) Dividends payable half-yearly at four per cent. per annum upon the said four per cent. guaranteed stock. (b) The interest upon outstanding debenture stock of the Grand Trunk as and when payable in accordance with the terms thereof, consisting, as stated in the Agreement, of the following:—

Five per cent. Grand Trunk debenture stocks ..	£ 4,270,375
Five per cent. Great Western debenture stocks.	2,723,080

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Four per cent. Grand Trunk debenture stock..	24,624,455
Four per cent. Northern debenture stocks	308,215
Total	£31,926,125

It was provided that the above-mentioned guarantees should be signed on behalf of the Government, and, forthwith, after the appointment of the Committee of Management referred to in the Agreement, should be deposited with the High Commissioner for Canada in London, Eng., "for the benefit and information of all parties concerned," and that concurrently with the deposit of the guarantees the voting powers at meetings of shareholders of the G.T., vested in or exercisable by the holders of the guaranteed stock and the debenture stocks, should cease and determine absolutely. The Committee of Management was formed on May 21, 1920.

The capital stock (other than the guaranteed stock) which was to be acquired by the Government (and is hereinafter referred to as the preference and common stock) is described in the Agreement as follows:—

First preference stock, five per cent.	$ 3,420,000
Second preference stock, five per cent.	2,530,000
Third preference stock, four per cent.	7,168,055
Ordinary or common stock	23,955,437
	£37,073,492

With reference to the price to be paid by the Government for these stocks, the Agreement expressly provides:—"The value, if any, to the holders thereof of the preference and common stock shall be determined by a Board of three arbitrators."

By sec. 11 of the Agreement a maximum limit is placed upon the amount which may be determined by the arbitrators as the value of these stocks. It is expressly stipulated that the fixing of this limit shall not be taken by the arbitrators as "any admission or indication that the value to be determined is the amount so fixed or any other amount."

Upon the value of the preference or common stock being finally determined, provision is made for payment to the holders thereof through an issue to them of non-voting 4% fully paid capital stock of the Grand Trunk, upon which payment of dividends at the rate of 4% per annum, payable

half-yearly from the date of the appointment of the Committee of Management above referred to, is to be guaranteed by the Government.

Sections 12 and 13 of the Agreement set forth particulars as to this new guaranteed stock, its distribution to the holders of the preference and common stock which is being acquired by the Government, and as to the transfer of the said preference and common stock to the Government.

From the foregoing it would appear that the date as of which the value of the preference and common stock should be determined was the date of the appointment of the Committee of Management. Counsel for the parties were in accord as to this. The question to be determined is, therefore, "the value of the preference and common stock" to the holders thereof as of May, 1920.

It is to be observed that not all the capital stock of the Grand Trunk is the subject of the submission to arbitration. The £12,500,000 of "guaranteed" stock is not included. Furthermore, the existing debenture stocks aggregating £31,926,125 possessed certain voting powers which, with those pertaining to the guaranteed stock, have ceased and determined since the deposit of the guarantees of the Government in respect of these stocks.

The various subsidiary companies controlled by the Grand Trunk through stock ownership or lease, and also those companies controlled in turn by such subsidaries, are set out in the first schedule of the Agreement. There are more than 70 in all of these companies which, with the parent company, the G.T.R. Co. of Canada, are designated in the Agreement as the Grand Trunk System. In presenting its case before the Board, counsel for the Grand Trunk used the expression "Grand Trunk System" as not including the Grand Trunk Pacific R. Co. and its subsidiaries and the Central Vermont Railway Co. and its subsidiaries. They did, however, submit evidence as to the condition, earnings, and prospects of both these companies and their subsidiaries. With respect to the entire System (as designated in the Agreement, including the Grand Trunk Pacific and Central Vermont Railway Cos. and their subsidiaries), there was presented evidence covering in great detail and particularly its extent, alleged advantages and defects, condition of roadbed, terminals, plant, equipment and rolling stock and other property, its past, present and estimated future revenues

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and expenditures, its fixed charges, and the indirect or contingent liability of the Grand Trunk in respect of its guarantees of securities of the G.T. Pacific and Central Vermont R. Cos. The volume and character of business transacted, the outlook for future business, present and prospective rates and earnings were all made the subject of exhaustive evidence and argument before the Board.

With regard to the G.T.P.R. Co., all of whose issued capital stock is held by the Grand Trunk, counsel for the latter took the position that, as the stock was fully paid, the Grand Trunk was liable in respect of the G.T.P.R. Co. (and its subsidiaries) only to the extent of its guarantees of that company's bonds and debentures as that liability might appear, and subject, of course, to the ability of the Grand Trunk Pacific to meet its obligations in respect thereof. This appears to me to be the strictly legal view of the situation as between these two companies, and I have adopted it as correct for the purposes of this finding.

As to the Central Vermont Railway Co. and its subsidiaries, counsel for the Grand Trunk urged that deficits in the operation of these should not be taken into account in estimating the value of the stock of the Grand Trunk. The reason put forward in support of this contention is the fact that the Grand Trunk owns only 70% of the stock of the Central Vermont R. Co., which is a corporation separate and distinct from the Grand Trunk. As opposed to this view, it was contended that as important traffic originates upon the Central Vermont Railway, and as it has been operated as part of the Grand Trunk System, the financial results of such operation should be included in the accounts of the system for the purposes of evidence as to net earnings which should be taken into consideration by the arbitrators.

During the proceedings exception was taken by counsel for the Government to certain classes of evidence tendered by the Grand Trunk counsel, and judgment upon the points in issue was given by the Board. This may now be briefly referred to. The first exception taken related to evidence tendered as to the cost of locomotives owned by the Grand Trunk and employed in the operation of its system. The question of the admissibility of this evidence necessarily raised the larger question as to the admissibility of evidence as to the reproduction or replacement cost, or so called physical value, of the right-of-way, terminals, rolling stock, and other tangible property ex-

clusively used for railway purposes. The judgment of the Board as to the question of evidence involved was rendered on February 7, 1921, 57 D.L.R. 8, a majority holding that for the purposes of this inquiry evidence as to reproduction or replacement cost, or so-called physical value, was valueless for the purpose of ascertaining the value of the preference and common stock of the Grand Trunk and therefore inadmissible. By the same judgments it was declared that the essential fact to be ascertained was the earning power, actual and potential, of the system and that all evidence bearing upon this was relevant and useful. With reference to this decision it may be observed that it related to property needed for railway purposes, which it was agreed by counsel for both parties could not be sold piecemeal and which it was not suggested should be dealt with in any way save as part of a going railway undertaking. It was pointed out in the judgments of the majority of the Board that no connection could be established between such valuation of the railway property of the Grand Trunk System and traffic rates likely to be established in Canada or United States.

The principal cases cited in support of the objection of counsel for the Government to this class of evidence were:—Great Central R. Co. v. The Banbury Union, [1909] A.C. 78; London County Council v. London Street Tramways Co., [1894] 2 Q.B.D. 189 et seq; Dewsbury and Heckmondwike Waterworks Board v. Assessment Committee of the Penistone Union (1885), 16 Q.B.D. 585 at p. 596.

Since the judgments of February 7 were delivered a decision has been rendered in the Appellate Division of the Supreme Court of Ontario which has a close bearing upon the point in issue. The case was that of Re Cobourg and Grafton Toll Road Co. (1921), 20 O.W.N. 39. In this case the toll road in question was taken by the Government of Ontario under the compulsory powers conferred by the Provincial Highway Act (1917), ch. 16, and the question was as to the compensation to be made to the owner of the road. The Ontario Railway and Municipal Board, in giving reasons for its award, which was based upon a capitalisation of the earning capacity of the road, rejected the principle of replacement value. Following is a quotation from the opinion of the Board:—

"The value of the land forming the highway cannot be estimated on the basis of the value of adjoining lands,

since its only possible use is as a highway and its only productive value as such arises from the fact that used as a highway certain revenues may be derived in the form of tolls. These observations apply in a greater or less degree to the other tangible property and works which go to constitute the road and which are enumerated in the claimants' summary, viz., cut and fill, ditching, culverts, bridges, roadbed, and toll-gates."

Against the award of the Ontario Railway and Municipal Board an appeal was taken by the claimant. While differing as to the rate of interest which should be employed in the capitalisation of the earnings of the road, the principle of valuation adopted by the Board was affirmed by the Appellate Division of the Supreme Court of Ontario.

Later during the proceedings, counsel for the Grand Trunk tendered evidence as to the valuation of certain buildings. These included elevators, freight and passenger stations, and hotels. The character of the evidence sought to be adduced is shewn by the following extract from the record:—

"Q. You have made, I believe, an appraisal and valuation of the buildings I have just mentioned? A. Yes, a complete survey of the quantities and valuation.

Mr. Lafleur: I am tendering this evidence like the other evidence we have tendered as to valuation.

The Chairman: If it is objected to there will be the same ruling.

Counsel for the Crown: You have built it up on the basis of what it would cost to build to-day? A. As at January 1, 1920. Q. What it would cost to build as at January 1, 1920? A. Yes. Q. Actual cost? A. Actual cost.

Counsel for the Crown: Then I object to the evidence.

The Chairman: It is ruled out.

Hon. Mr. Taft: In order to avoid any trouble just note my dissent.

Mr. Lafleur: I point out in regard to the Fort Garry Hotel, Winnipeg, and the Macdonald Hotel, Edmonton, that these two buildings belong to the Grand Trunk Pacific Development Co., and that the Grand Trunk has a claim of about $11,000,000 against that company for advances of various kinds. I do not know whether that will affect the view of the Board as to our right to shew what is the value of the physical assets of the Grand Trunk Pacific Development Co.

Counsel for the Crown: My submission is you are not

proving the value of the assets of the Grand Trunk Development Co. If the witness will give evidence as to what the two hotels would sell for now in the market, and the suggestion is made that that is their highest value, then I would admit the evidence."

Formal tender was subsequently made by counsel for the Grand Trunk of evidence of the reproduction cost of the physical assets of the subsidiary railway, tunnel, terminal, dock, telegraph, steamship, development and other companies.

The nature of the evidence thus tendered is indicated by the following extract from the testimony of Mr. Berry:—

"Mr Butler: You used the expression in your testimony this morning 'sales value' and sometimes 'selling value.' By that did you mean the cost of production or the cost of reproduction less depreciation? A. I mean cost of reproduction. Q. Without considering depreciation? A. Without considering depreciation. Q. In your answers made to me just now I understood you to say that by 'sales value' as used in your testimony you mean the reproduction cost? A. That is what I would sell it for. Q. And that is the meaning you give to 'sales value' as used by you in your testimony? A. Yes."

All this evidence like that of a similar character tendered earlier was ruled out as inadmissible. Personally, I am unable to see that it could be of any value in enabling the Board to come to a conclusion as to the question in issue, viz., the value of the preference and common stock of the Grand Trunk. It was not suggested by counsel for the Grand Trunk that the System as it stands should be disintegrated and its assets or any of them now actually in use turned into cash, or that its late directors had ever had such a policy in contemplation. Presumably, the use to which the physical assets of the various companies comprised in the System have been put has been that which was deemed best in the interests of the shareholders. Aside from this, the cases cited above are, I think, authority for the statement that reproduction cost of any building, work, or undertaking is not evidence of real value which depends upon the actual and potential earning capacity of the thing valued; in other words, what can be made out of it by way of actual return. Reproduction cost of a building or work may be of value in some cases as shewing the maximum beyond which

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value should not go, but it affords no guidance as to actual value.

In the case of unproductive assets such as the land grants of the Grand Trunk Pacific Railway Co., evidence was admitted of selling value. Testimony as to value of the coal properties of the System was also received.

With regard to the question of the relevancy of evidence as to reproduction cost whether of property which can be used exclusively for railway purposes or which although used in connection with the System may be sold for what it will fetch, I adopt as the best criterion for establishing value the language of Lord Lindley in the case of London County Council v. London Street Tramways Co., [1894] 2 Q.B. at p. 206:—"Cost price is well known to be no real criterion of the value of an outlay on land. What the result of the outlay will fetch is often much more and often much less than the outlay which has produced it."

And from the judgment of A. L. Smith, L.J., at p. 219.—"There can be no doubt that in any ordinary case where an undertaking such as the present is to be sold and paid for, its present, that is, its then value, is in practice arrived at by capitalising its rental value. I should say that this is the true way of arriving at its present value."

Benefit to the preference and common shareholders of the Grand Trunk could come only through the declaration of dividends from net earnings or from the sale of the assets of their company for a sum in excess of its liabilities. Any purchaser buying such assets would, as to price which he would be willing to pay, have regard to what he would be likely to make in the way of annual return from his purchase. From whatever angle the question is viewed, net earnings, actual and potential, seem to be the essential factor to be determined.

As having some bearing upon the matter of the value of the shares to be valued, records of quotations and sales of the preference and common stock on the London Stock Exchange over a considerable period of years were placed in evidence. In this connection it is to be noted that the agreement expressly prohibits the Board from taking into consideration the fluctuation in the market prices or quotations of these stocks caused by the negotiation of the parties, the passing of the Act or the execution of the agreement. Aside from this provision, however, it does not appear to me that stock market quotations or sales of in-

dividual lots of shares are of value in endeavouring to determine the true value of the large body of stock which we are called upon to appraise. Counsel for both parties were agreed that the question is not as to the value to any individual holder of his shares but as to the value of the shares as a collective whole or aggregate. The case of Peek v. Derry, 37 Ch. D. 541, cited by counsel for the Government, clearly lays down the principle that it is real and intrinsic, not stock market quotation or value, which should be taken into account. In view of the foregoing it appears to me that the question at issue is what is the real value of the preference and common shares and that this real value depends upon the present and future earning power of the company.

In seeking to ascertain the earning capacity of the Grand Trunk we should, I think, consider all evidence relating to the earnings of the company as of the period of the acquisition of the shares (May, 1920), as well as the earnings since that date and down to the present time. So far as possible, endeavour should be made to estimate probable future earnings, and for this purpose the earnings of the Grand Trunk System in the past, and especially before the abnormal period of the war, may be specially considered. All evidence as to physical condition of the system and its proper maintenance, the advantages or disadvantages of the location of its lines, volume of business, traffic rates, operating costs, and fixed charges must be given its due weight in its bearing upon the question of earning capacity, and there must also be taken into account the contingent annual liability upon guarantees of the Grand Trunk in respect of securities of other companies.

With respect to the net earnings of the Grand Trunk System (as defined by counsel for the company) for the past 10 years, evidence of a minute and elaborate character was presented to the Board on behalf of both parties. A matter very much in controversy was as to whether, in the accounts disclosed by the books of the system, adequate allowance had been made for annual maintenance and whether, in addition, reserves should not have been created against depreciation of buildings, rolling stock, and other equipment. These are, of course, very vital matters, because if proper allowance be not made for current maintenance requirements and for depreciation in the annual profit and loss accounts of the system the true earning power in any year is not disclosed.

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It was clearly proven in the course of the inquiry that the reports of earnings shewn in the annual statements to the shareholders and to the Railway Department for many years past were inaccurate and misleading. For the year 1913 the published earnings were considerably larger than those shewn by the books themselves. Later, during the years 1915, 1916, and 1917, a substantial portion of the earnings was concealed by the creation of an "inside reserve" account. Subsequently, this account was availed of to shew during subsequent years larger earnings than were actually made. It is not necessary to deal here with the motives which actuated this policy on the part of the Board of Directors. It will be sufficient to say that these motives were fully revealed in the evidence and that they were not directly connected with the purpose of creating adequate reserves against deferred maintenance or depreciation. To the extent that reserves were so created they are, of course, to be taken into account in estimating earnings of the years over which they were built up.

Numerous exhibits shewing in tabulated detail the results of the operation of the Grand Trunk System since 1910 were placed in evidence on behalf of both parties during the hearings. Out of this mass of testimony there finally emerged a clear and concise statement (Ex. 470) prepared from the books of the company by its auditor, Mr. McLaren, shewing the actual operating results of the G.T.R. Co. of Canada by years irrespective of "inside reserve" or other hidden accounts. I am dealing now with the results of operation of the system as defined and limited by counsel for the Grand Trunk and not inclusive of the Grand Trunk Pacific or Central Vermont systems. The final tables of earnings presented by McLaren, in his restatement of accounts should, I think, be taken as records correctly compiled from the books of the company. Their accuracy was not in fact disputed by the other accountants who gave testimony before the Board. The accounts of the Grand Trunk System as restated by McLaren shew the following annual results after payment of all operating expenses and fixed charges:—

Year	Surplus
1910	$ 3,617,876
1911	4,188,783
1912	4,482,448
1913	2,874,592
1914	2,014,176

1915	5,755,730
1916	11,319,341
1917	3,402,540
1918	3,872,344 Deficit
1919	6,488,918 Deficit

To these figures must be added the following sums representing profits of subsidiary companies not taken into the accounts of the parent body:—

Year	
1910	$ 83,360
1911	267,865
1912	249,196
1913	484,648
1914	71,132
1915	245,924
1916	732,834
1917	270,540
1918	492,588
1919	166,932

The deficit for 1920 exceeded $6,500,000. Including "Federal control" accounts it exceeded $10,000,000.

The restated accounts of the G.T. Pacific and Central Vermont Railway systems which are not included in the above statement shew in the aggregate exceedingly heavy deficits for the period in question. I shall refer to them more particularly later on.

From the foregoing it will appear that down to December 31st, 1917, the G.T. System, according to its books of account, was making profits of varying amounts annually available for dividends, while from the end of 1917 down to December, 1920, very heavy annual deficits were incurred. Notwithstanding the increases in traffic rates which were authorised last autumn, the returns for the present year disclose a heavy deficit. The evidence of McLaren, Auditor of the Grand Trunk, shews the net results of the operation of the system (as defined by Grand Trunk counsel) for the period from January 1, 1920, to the end of April, 1921. The net loss for this period was over five million dollars. As against the increased traffic rates to which reference has been made, the higher wage scale which went into effect early last year, and the decrease in traffic owing to trade depression following the war, have proven more than an offset.

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MAINTENANCE.

A question very much in controversy during the proceedings was as to whether the Grand Trunk management had made from year to year proper provision for maintenance of way, structures, equipment, and plant. Counsel for Grand Trunk contended that with the exception of the latter years of the war period, when labour and material were difficult to obtain and during which reserves against deferred maintenance were built up, the System had been maintained to the extent necessary for maximum operating efficiency. Against this view counsel for the Government claimed that for a long period of years the System had been steadily deteriorating by reason of failure to provide out of annual earnings for adequate maintenance and depreciation of equipment and other property, and that in consequence of such failure the actual net earnings of the company in years for which profits were shewn were materially less while the deficits for years of loss in operation were in reality greater than appeared from the books of the company.

The evidence adduced on this point conclusively established, in my judgment, the essential soundness of the contentions in this regard of the Government.

It was admitted by the Grand Trunk counsel that no special fund had been created against depreciation of rolling stock, buildings, plant, and other equipment of the Canadian part of the System. By Canadian railway law no such fund is required to be maintained. With respect to the American lines forming part of the System, adequate provision against depreciation is required to be made and the Grand Trunk has observed this requirement in the accounts of its subsidiary railway companies operating in the United States. Aside from legal requirements, it seems clear that net earnings cannot be accurately determined for any year without setting aside such a sum as in accordance with the practice of well-managed railway systems will serve as a set-off against the year's depreciation. The authorities are quite clear as to this. See Brice on Ultra Vires, 3rd ed., at p. 340, as to the meaning of "profits"; also the statement of Jessel, M.R., in Davison v. Gillies (1879), 16 Ch. D. 347n.

What amount should have been set aside yearly for depreciation the evidence does not help us to determine. It is clear, however, that a considerable annual provision in this respect should have been made in respect of the Canadian

portion of the Grand Trunk System before net earnings were assumed to have been made.

With regard to annual maintenance the evidence shewed a much more serious state of affairs. The System, at the time of its taking over by the Committee of Management in May, 1920, was confronted with an exceedingly heavy programme of expenditure for deferred maintenance and capital construction. During the last 2 years of the war a good deal of work of this character had been suspended, but in my view of the evidence a considerable part represented maintenance and construction which should have been done in the pre-war and early war period; in fact, the System over the past 10 years and longer does not appear to have been adequately maintained, with the result of gradual deterioration in physical condition and increasing accumulation of deferred maintenance requirements. During the year 1920, after the Committee of Management was appointed, very heavy expenditures were made with the purpose of overtaking work of this character, with the result that the greater part of the System was put in a condition suitable for operating efficiency. Exhibit 457 shews that for the years 1911 to 1917 inclusive an average sum of about $6,000,000 per annum was expended for maintenance of ways and structures. For 1918 the expenditure under this heading was $11,600,000, for 1919, $17,000,000, and for 1920, $18,100,000. Making due allowance for increased costs of materials and wages, these figures indicate the extent to which maintenance had become deferred. The finding with respect to the matter of annual maintenance must, I think, be that inadequate provision was made for it during a long period of years past and that consequently the net operating earnings of the company as shewn by its books did not truly reflect the real condition of affairs. The letter of Mr. Kelley, the chief engineer and new president of the company, dated March 5, 1917, shews clearly the very serious condition of the System with respect to the matter of deferred maintenance, which he estimated at over $21,000,000. The so-called "inside reserves" created by the company prior to this date were quite inadequate to meet the deferred maintenance requirements of that period.

After all the heavy expenditure made upon the System from its taking over in May, 1920, until the end of that year, deferred maintenance to the amount of many millions still remained to be done in respect of bridges, trestles, cul-

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verts, crossings, ties, track, rails, ballast, track-laying and surfacing, fences, docks, and wharves. Evidence adduced by the Government shews estimated extraordinary maintenance and capital requirements in respect of the Grand Trunk System for the years 1921-1925 inclusive as follows:—

Extraordinary maintenance	$ 8,924,318
Remunerative capital	4,780,087
Non-remunerative capital	43,908,612
Total capital	48,688,699
Total capital and maintenance	57,613,017

The estimate for 1920-1925 according to testimony on the part of the Government was as follows:—

Extraordinary & deferred maintenance	$18,889,343
Remunerative capital	6,887,184
Non-remunerative capital	43,908,612
Total capital	50,795,796
Total capital and maintenance	69,685,139

A large part of the item for non-remunerative capital consists of estimated expenditures for grade separations in Montreal, Toronto, Detroit, Chicago, and other cities, which must be carried out in the non-distant future. Making the most liberal allowance for all that was adduced against these figures, it is clear that the expenditures with which the Grand Trunk was confronted in May of 1920 for deferred maintenance and capital construction were of most serious amount and of the gravest financial consequences. Mr. Kelley's letter referred to above indicated necessary capital expenditure (over and above deferred maintenance) of an amount exceeding $30,000,000, the principal item being for rolling stock and shop machinery. The above figures as to deferred maintenance and capital expenditures relate only to the Grand Trunk System exclusive of the Central Vermont and Grand Trunk Pacific systems. The condition of the former as to these items was shewn to be quite serious as to deferred maintenance, while that of the Grand Trunk Pacific was of the gravest character.

With respect to the revenues of the Grand Trunk as shewn in its accounts, it was proven in cross-examination that large sums were included representing charges for interest upon advances or loans made to certain of its subsidiaries. Some of these advances are quite large, as for example $10,000,000 to the Grand Trunk Pacific Development Co. and $11,000,000 to the Grand Trunk Pacific Branch Lines Co. It is clear from the evidence that some of these charges

aggregating very large amounts do not represent collectible indebtedness. In so far as such uncollectible indebtedness entered into the accounts of the company as part of its revenues, the annual statements of net earnings were inaccurate and misleading.

In view of the foregoing, it is plain that without taking into account the contingent liability of the G.T.R Co. of Canada in respect to securities of the G.T.P.R. Co. the financial position of the former was most precarious at the time of the appointment of the Committee of Management in May, 1920, which is the date as of which the preference and common shares are to be valued. The years 1918, 1919, and 1920 shew deficits of $3,872,344, $6,488,918, and $6,719,362 respectively. The results for the year 1921 shew to date a like heavy deficit. Deferred maintenance requirements were large and pressing. In addition, there was confronting the company the program of extraordinary maintenance and capital construction to which reference has been made. Exhibit 474 filed by counsel for the Government shews estimated net cash requirements of the Grand Trunk System for the 15 months ended March 31, 1922, to be nearly $90,000,000. Whether, in the financial conditions prevailing in 1920 and since, the company, even if it had been relieved of its obligations in respect of the Grand Trunk Pacific, could have met its own situation unassisted by Government aid in the way of direct loans or guarantee of its securities, can only be made the subject of conjecture. My view upon the evidence is that the credit of the company would have proven unequal to the emergency and that a receivership would have been inevitable if not in 1920 then in the next year or two. I do not believe that with such yearly deficits the company could have long continued to float its securities to the amount necessary to meet them and to provide for its heavy program of deferred maintenance and capital requirements. This much, however, is clear. There would have been no dividends available for shareholders in 1920, 1921, nor, so far as can be seen, for many years to come. When to this situation is added the burden of the Grand Trunk's guaranteed liability in respect of the G.T.P.R. Co. it will be clear how impossible it would have been for the G.T.R. Co. of Canada to continue as a solvent going concern. The extent of this contingent liability is shewn by Ex. 319 as follows:—

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	Principal.	Annual Interest
Guarantee on funded debt	$54,889,000	$2,292,760
Contingent guarantee of interest on 4% debenture stock		1,395,170
Total		$3,687,930

The Grand Trunk is liable upon its guarantee of both principal and interest of the funded debt. Its guarantee of the payment of interest upon the 4% debenture stock is out of net earnings of the Grand Trunk in each year after deducting working expenses and certain interest charges. If, in any year after payment of such working expenses and other charges, any net earnings remain over, the liability of the Grand Trunk upon such guarantee for the year in question would have to be met in priority to any dividend distribution. The statements presented to the Board shew clearly the grave financial condition of the G.T.P. Railway now in liquidation. This company is hopelessly bankrupt with no prospect now or for years to come of earning even its operating expenses, much less its fixed charges. The contingent liability of the Grand Trunk in respect of the securities mentioned must be regarded as a continuing charge against the earnings and credit of the Grand Trunk until full payment is made in accordance with the terms of the guarantees. It is quite clear that nothing by way of relief can come from the earnings of the G.T.P. Railway undertaking. The liability thus imposed upon the Grand Trunk is so serious that it is desirable to carefully describe and analyse the condition and prospects of this company in order to shew the facts upon which these conclusions are founded. It would be difficult to imagine a more misconceived project than that to which the Grand Trunk committed its credit in this unfortunate enterprise. For nearly half the distance of 900 miles westward from Winnipeg the main line was constructed close to and between the lines of the Canadian Pacific and the C.N.R. Cos. For the remaining 1000 miles to Prince Rupert the main lines traverse for the most part a difficult country, largely mountainous, whose development for the purpose of furnishing local traffic must await settlement and business enterprise, and terminates at Prince Rupert, a port as yet without any considerable trans-Pacific or other external trade. For 200 miles or more this section of the main line parallels the line of the C.N.R. Co. so closely that part of the rails of each has been taken

up and both railways, now under Government control, use the same tracks. When it is considered that the G.T. Pacific was built for the whole distance of 1800 miles from Winnipeg to Prince Rupert at a very high standard of construction and at enormous cost, particularly in the mountain section, the magnitude of the mistake in going forward with this enterprise is apparent. The branch lines in the Prairie Provinces are wholly inadequate as feeders to the main line, providing a strikingly unfavourable contrast to the number and mileage of the branch lines of both the C.P. and the C.N.R. Cos. in this great traffic-producing area. Part of the G.T.P. branch line system is badly situated in territory tributory to its rivals. As a result of the location of the main line and its want of efficient feeders, the G.T.P.R. Co. will not share proportionately with its rivals in the traffic which may be expected with the progressive settlement and development of the Prairie Provinces. As to the lease of the Eastern Division of the National Transcontinental Railway which the G.T.P. Co. was to take after the completion of the Division, I eliminate it from consideration. It was never executed, and as the Government has been operating the Eastern Division the agreement providing for the lease may be regarded as having lapsed and as not imposing further liability upon the G.T.P.R. Co. The financial position of this company since its system was declared open for operation at the close of 1915 may be briefly shewn as follows:

Year	Deficits
1916	$ 1,358,435
1917	5,300,512
1918	6,318,594
1919	11,940,032
1920	23,141,016

These are the deficits after taking into account operating expenses and fixed charges. They with the other evidence as to financial condition shew conclusively that the company is bankrupt and that Receivership was unavoidable.

From this it will be seen that the company is quite incapable of meeting its liability upon its issued securities guaranteed by the G.T.R. Co. of Canada. It should be further pointed out that the above figures which are compiled from the books of the company cannot be regarded as accurately reflecting the earnings of the company because of the failure to provide any reserves against maintenance

or depreciation. The maintenance charges with which the G.T.P. will be confronted during the next 10 years will be exceedingly heavy reflecting as they must the wear and tear of the last 5 years of operation, during which, as construction was recent, the amount of expenditure for maintenance was small. The evidence shews that about $20,000,000 is now required to meet deferred and extraordinary maintenance.

It would be difficult to overstate the serious character of the obligations imposed upon the Grand Trunk by the failure of the Grand Trunk Pacific enterprise to realise the hopes built upon it at its inception. It is quite clear that, whether the war had occurred or not, it would have been utterly impossible for the Grand Trunk to carry the burden of its liability in respect of guarantees upon Grand Trunk Pacific securities. A glance at the earnings of the Grand Trunk for the past 10 years makes this evident. That the position was fully understood and appreciated by the management of the Grand Trunk is shewn by the letter of the Chairman of the Board, Sir Alfred Smithers, in December, 1915, to Sir Robert Borden, Prime Minister of Canada. The G.T.P.R. undertaking was then about to be taken out of its construction stage. The Chairman in this letter pointed out the situation with which the Grand Trunk would be immediately confronted, and suggested as the only solution that the Government should take over the G.T.P. System as from January 1, 1916, relieving the Grand Trunk of all its liabilities in all advances made to the G.T.P.R. Co.; the G.T.P. Development Co. and its subsidiary companies. Referring to these liabilities, Sir Alfred says: "Under present circumstances it is quite impossible for the Grand Trunk R. Co. to meet the extra liabilities arising from the Grand R. Co. to meet the extra liabilities arising from the Grand Trunk Pacific R. Co." And again: "We have done our utmost to meet the heavy financing which has been necessary and the difficulty of which has been immensely increased by the disastrous war conditions. We are now 'at the end of our tether' with regard to Grand Trunk Pacific financing." The letter of Mr. Chamberlin, President of the Grand Trunk, addressed to the Commission appointed in 1916 to examine into and report upon the Canadian railway situation, is even stronger in its statement of the

gravity of the Grand Trunk's position. This letter is dated January 30, 1917, and is filed as Ex. 458. To the question as to the effect on the Grand Trunk should the operation of the Grand Trunk Pacific be left as it was and the former not relieved from its guarantees, Mr. Chamberlin said: "There can be only one answer: it would mean a Receivership for the Grand Trunk Company carrying with it the destruction of its credit for some time to come and the impairment of the credit of the Dominion."

No other view can, I think, be reasonably taken upon the evidence presented to the Board than that in May, 1920, had the agreement providing for the acquisition of the preference and common shares of the Grand Trunk and for financial assistance by the Government not been entered into, the G.T.R. Co. of Canada, struggling with its own deficits and requirements for deferred maintenance and capital construction and burdened with its heavy annual liabilities in respect of Grand Trunk Pacific securities, must inevitably have gone into Receivership.

During the course of the proceedings it was suggested to the Board by counsel for the Grand Trunk that the Grand Trunk had serious cause for complaint against the Government of Canada in respect of the Grand Trunk Pacific undertaking. Particularly was it urged that the Grand Trunk in 1903 desired to build its western system from North Bay (in Northern Ontario) and acted only from compulsion in proceeding with the National Transcontinental project. It was also complained that after the inauguration of the Grand Trunk Pacific undertaking the Government permitted rival railway companies to construct lines in territory which it traversed. The evidence before the Board disclosed no ground for such complaints. No doubt both the Government of the day and the Grand Trunk authorities were gravely mistaken in 1903 as to the cost and future possibilities of the Transcontinental Railway enterprise. But the Grand Trunk was not obligated to proceed with it. The Agreement providing for the construction and financing of the project was entered into by the Grand Trunk acting under no compulsion. The G.T.R. Co. of Canada was the sole holder of the stock of the G.T.P.R. Co. Any profits from the enterprise would have come into its treasury for the benefit of its shareholders. That high expectations were entertained as to the advantage to be derived by the Grand Trunk from the

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construction of the National Transcontinental Railway as authorised by Parliament is clear from the optimistic speeches made by the President and General Manager at the meeting of shareholders in 1904, when authorisation was given to pledge the credit of the Grand Trunk to the obligations devolving upon it under the Agreement. The evidence shews that the Government not only carried out its financial part of the bargain but during a long course of years afterwards—in fact until the Receivership in 1918—made loans aggregating more than $50,000,000 to the G.T.P.R. Co. for the purpose of enabling it to complete its construction and pay its annual deficits. The Agreement for the construction of the G.T.P. Railway has been an unfortunate one both for the Government and the Grand Trunk, but it was nevertheless an agreement deliberately entered into by the Grand Trunk in the expectation of gain from a successful project. For the charge that the Government unfairly permitted rival companies to build into territory traversed by the Grand Trunk Pacific there appears not the slightest foundation. On the contrary, the evidence clearly shews that the Grand Trunk Pacific enterprise was launched into territory in the Prairie Provinces already occupied and in process of occupation by the Canadian Pacific and the Canadian Northern Systems, and that, before the Grand Trunk Pacific enterprise was entered upon, express notice in writing had been given to the Grand Trunk by the C.N.R. Co. that it possessed the necessary charter powers and intended to extend its system easterly through Ontario and Quebec and westerly to the Pacific ocean. The Agreement providing for the construction of the G.T.P. Railway contained no covenant on the part of the Government that no new construction would be authorised by Parliament in the territory traversed by the G.T.P. Railway enterprise.

I mention these matters because they appear to have been put forward as raising some equitable claim in favour of the Grand Trunk. It is clear, however, that as no legal claim is involved complaints of this character could not be taken into consideration in these proceedings. The agreement for the construction of the Grand Trunk Pacific undertaking was entered into, the financing therein provided for was carried out, the obligations of the Grand Trunk by way of guarantee upon the securities of the G.T.P. R. Co. were incurred and are in effect, and the sole

question before the Board is as to the value of the preference and common stock of the Grand Trunk, having regard to all relevant factors, including these obligations, as of May, 1920.

During the course of argument it was suggested by counsel for the Grand Trunk that a sale of the undertaking of the Grand Trunk Pacific might result in a surplus available in relief of the Grand Trunk in respect of its guarantees. It is clear upon the evidence that the result of no sale, judicial or otherwise, would suffice to produce a sum equal to the charges which have priority over the securities so guaranteed. The guarantees will have to be met according to their terms without hope of abatement from earnings or sale of the Grand Trunk Pacific enterprise.

Apart from its guarantees upon Grand Trunk Pacific securities, the evidence shews that the Grand Trunk is liable upon a guarantee of interest on 4% bonds of the Central Vermont Railway Co. to an amount of $13,359,000. Considering the unsatisfactory earnings of the Central Vermont system and its past history, it is impossible to say that no loss will be incurred by the Grand Trunk in respect of this guarantee. I do not, however, in this finding, treat this obligation as one upon which loss will be incurred.

Reviewing all the evidence in the case I have reached the following conclusions.—

(1) The actual earning power of the Grand Trunk R. Co. of Canada before, during, and since the war, and, so far as can be estimated, for the future does not justify the assumption that any profits would, from the date of the acquisition by the Government of the preference and common shares, viz., May, 1920, ever have been available for distribution to the holders thereof, after providing for the contingent liability of the company in respect of Grand Trunk Pacific securities guaranteed by the company and dividends upon the "guaranteed stock." (2) Having regard to its own continuing heavy deficits, the necessity for making provision for deferred and extraordinary maintenance and capital construction, and its heavy liabilities in respect of securities of the G.T.P.R. Co. bearing its guarantee, the G.T.R. Co. of Canada, but for the financial support of the Government since May, 1920, must have been forced into a receivership.

Upon these conclusions I find that the preference and common stock of the G.T. R. Co. of Canada has no value.

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Any question as to compassionate consideration of the shareholders must be for the Government and Parliament of Canada to deal with and not for this Board.

Hon. W. H. Taft (dissenting):—This is a proceeding to determine the value of the first preference 5% stock of the G.T.R. Co. of Canada, amounting in par value to £3,420,000, of the second preference 5% stock, amounting to £2,530,000, and of the third preference 4% stock, amounting in par value to £7,168,055, and of the common stock of the railway company, amounting in par value to £23,955,437. The proceeding is conducted in accordance with an agreement dated March 8, 1920, between the Government of Canada and the G.T.R. Co. of Canada, authorised and embodied in enabling and confirming statutes of the Dominion Parliament. The object of the various Acts of Parliament and of the agreement is to transfer to the Government the control of the Grand Trunk Railway of Canada and all the subsidiary corporations over which it exercises control, by reason of ownership of the stock of such companies, or by lease. The names of the companies whose stock thus passes into the control of the Canadian Government are set forth in the agreement and the statute.

As part consideration for the acquisition of the control of the Grand Trunk Company, the Government guarantees the interest upon the present debenture stocks in accordance with their terms, which are as follows:—[See judgment of Sir Thomas White, ante p. 679.]

In addition to this, the Government of Canada agrees to issue new stock of the G.T. Co. of a par value of £12,500,000 with a guaranty by the Government of 4% annual dividend thereon, in exchange for an existing issue of 4% stock of the same par value, guaranteed by the G.T. Co. which is non-cumulative but prior in right to the preferred and common stock already described.

Under the statutes creating the G.T.R. Co. holders of the debenture stocks and the guaranteed stock had certain voting powers, which under the contract are to cease, so that the voting power is to vest solely in the three preference stocks and the common stock to be transferred.

Clauses 6 and 8 of 1920 (Can.), ch. 13, providing for the present arbitration, are as follows:—

"6. Submission to Arbitration.—The value, if any, to the holders thereof, of the preference and common stock shall be determined by a Board of three Arbitrators, one

to be appointed by the Government, one by the Grand Trunk and the third shall be Sir Walter Cassels, Judge of the Exchequer Court of Canada, who shall be Chairman of the Board. Should Sir Walter Cassels die or be unable to act, the said parties shall agree upon another third arbitrator, who shall be either the then Judge of the Exchequer Court of Canada, or one of the Judges of the Supreme Court of Canada, and who shall likewise be Chairman. Should any vacancy occur in the Board of Arbitrators, other than the third arbitrator, the arbitrator to fill the vacancy shall be appointed in the same way as the arbitrator whose seat has become vacant was appointed."

"8. Making of Award and Appeals.—The award shall be made by the arbitrators, or a majority of them, within nine months from the appointment of the arbitrators, or within such further time as the Governor in Council may approve. The unanimous award of the arbitrators shall be final, but should the award not be unanimous, and should notice of appeal be given by either party to the other within thirty days after the making of the award, an appeal therefrom upon any question of law shall lie to the Supreme Court of Canada, and or to the Judicial Committee of the Privy Council, if leave be granted by the said Committee."

The Board has been constituted in accordance with sec. 6. After convening in September and October, 1920, the members of the Board were taken over the main line of the G.T.R. Co. from Montreal to Chicago. They then visited the Pacific Coast and viewed the G.T.P. Railway, all of whose capital stock is the property of the Grand Trunk Railway, and control of which would therefore pass to the Government under the present proceeding by the acquisition of the preferred and common stock of the Grand Trunk.

On February 1, 1921, the evidence began, and for 73 days we had hearings, resulting in the submission of 8,000 typewritten pages of evidence and over 500 exhibits. The question to be settled is of a class of questions the most difficult ever presented to a tribunal, to wit, to determine the fair value of a great railway system, with all its accessories and subsidiary companies for the purpose of purchase and sale. In substance, the Government of Canada is taking over the ownership and control of the whole Grand Trunk Railway System, including all its subsidiary railways and other corporations. The Government in effect agrees to assume.

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First, the funded obligations of the Grand Trunk Railway of Canada.,

Second, to issue 4% absolute Government obligations of a par value of £12,500,000, with which to take up the present so-called guaranteed capital stock of that amount which is prior in right of dividends to all other issues of capital stock, but is dependent on earning and non-cumulative, and

Third, to deliver in the same kind of 4% obligations, to the owners of the subsequent three Preferred issues of stock and the Common Stock, whatever this Board within the maximum limit of $64,166,666.66 shall determine the stock to be worth.

The G.T.R. Co. was organised under a Canadian Charter in 1852 (Can.) ch. 37. It was the pioneer railway of Canada. It was financed wholly by British capital, and its Board of Directors have always met in London, and there taken corporate action. The present shareholders are and always have been residents of the British Isles. The shares of stock have been placed upon the London Stock Exchange, and have been dealt in as a speculative stock. The stock was fully paid up in cash. The vicissitudes of the company have been such, however, that in 1860 the enterprise seemed likely to go to the wall, but with concessions made by the bondholders, new capital was secured, and the company set upon its feet again. It constructed or acquired in the Province of Ontario, a great many branch lines. Indeed it purchased competing lines, so that its mileage in that Province is greater than that of any other railroad. It owns a line from Windsor, opposite Detroit, to Buffalo, and it has two parallel lines from Toronto to Sarnia. Its main line is a double track line from Montreal through Toronto and Hamilton to Sarnia on the St. Clair River, through a tunnel under that River to Port Huron, and thence to Chicago over the lines of the Grand Trunk Western Company to Michigan, of which the Grand Trunk owns all the stock. An important double track connection from Hamilton, on the main line between Sarnia and Toronto, to Suspension Bridge and Buffalo, makes a double track railway trunk line from Chicago east and from Montreal and Toronto south to the Niagara frontier, whence by the Lehigh Valley, with which the Grand Trunk interchanges traffic, it reaches New York. From Montreal east the Grand Trunk has a line to Quebec, and by a line which the Grand Trunk, at the instance of, and with some pecuni-

ary assistance of, the Canadian Government, built, it reaches Portland, Maine. From Montreal south by some of its subsidiaries, including the Vermont Central, it reaches White River Junction, whence through a connection with the Boston and Maine, it reaches Boston. By the same Central Vermont, it passes through Palmer, Massachusetts, and thence to New London, Connecticut, whence a boat line of the company carries freight to New York. The Harbour at Portland is open the year round, while the harbours at Montreal and Quebec are closed during the winter season. The Grand Trunk, therefore, has a main trunk line from Chicago through Michigan and Canada to the sea at Montreal, at Quebec, at Portland, at Boston, and at New York, the latter by two routes. With its many branch lines in Ontario and in Michigan, the Grand Trunk connects its lines with the Great Lakes at many points, and operates partly water, partly rail routes from east to west. The Grand Trunk has complete or partial ownership of steamship companies, elevator companies, electric lines, subordinate railway lines, bridge companies, terminal companies, and other corporations owning hotel properties used in connection with the railway system.

The Grand Trunk System, as that term is understood in this case, includes the Grand Trunk Co. of Canada, the Western lines, i.e., those of the Grand Trunk Western of Michigan, and the New England Lines, i.e.. the lines to Portland. The Grand Trunk System does not include the Vermont Central, which, though largely owned by the Grand Trunk Railway Company of Canada, is run separately. Its accounts are kept separately.

In 1897 Charles M. Hays was called from the Wabash Railway System to become the President of the Grand Trunk R. Co. of Canada and the System. He found a railroad at that time which was not well equipped, and could not be considered more than a third-class transportation System. He found a property operated under a charter which was so drawn as to emphasise the right of the stockholders to have dividends immediately declared out of the net earnings of the company at the end of the year, and was thought to vest no discretion in the directors to hold the earnings for carrying out broad policies and enlargement of the usefulness and ultimate earning capacity of the company. It is quite evident, from the history before us, that Mr. Hays found it difficult to secure from the

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shareholders consent to the acquisition of needed additional capital properly to equip and reconstruct the road and to enlarge its transportation capacity. It is further obvious that in his efforts to do this, he increased the operating expenses by including in them outlays in the matter especially of motive power, freight and passenger cars, which should have been properly charged to capital and regarded as a new investment, rather than as current additions to operating cost. In this way, he was enabled to improve the road materially and make it a first-class railroad, without calling upon the stockholders for great additional capital. He thus withheld from them dividends that possibly might have otherwise been declared. From the evidence of Mr. Williams, a very experienced expert in the management and development of railways, now the President of the Delaware and Hudson Canal Co., it is clear that the motive power and the car equipment of the Grand Trunk has been improved and maintained with a minimum charge to capital, and with a very large charge to revenues, and that in the years 1910, 1911 and 1912, the company had been gaining in its capacity for doing the business and in the efficiency of its equipment, and had taken on the character of a great trunk system.

I have been impressed by the number of skilled, loyal, reliable and most experienced employees, the heads of bureaus and departments, who have filled the general offices, and who have been in the employ of the Grand Trunk for many years—indeed, who entered the employ in their youth, and have continued loyal to the company until their maturity and old age. Through a school of apprentices and other methods, an esprit de corps has been acquired that has been very valuable to the company, and it can be stated with confidence that had the policy of the company, as dictated from London, been as prudent, as wise and as effective as the local management through the officers of the Grand Trunk here, the fate of the property would have been different.

The Grand Trunk System has been burdened with a very great number of branch lines, and with some lines parallel to its main trunk line, which is acquired to avoid competition, and which are not a source of profit. Many of the branch lines of course are feeders, but it is quite apparent that they are in some respects a burden. In a degree the same thing has been true of branch lines acquired in Michi-

gan, but the marvellous growth of business in that State in the centres reached by the Grand Trunk is very likely to make them very profitable. With much care and wisdom the business of the Grand Trunk System has been nursed into a large through traffic between Chicago and the Atlantic Seaboard. While the amount of business done in the United States by the Western Lines and the New England Lines of the Grand Trunk System is not more than one-third of the Grand Trunk Railway of Canada, the business which has come to the Grand Trunk is perhaps 70% due to its business from and to the United States, to and from Canada, and to other business from and to points in the United States through Canada to and from other points in the United States. This main line through business has been encouraged in every way and with much foresight and ability. The road has been maintained so that the immense burden which was thrust on the road during the war times was carried without a break. Of course, the volume of business was temporarily increased by war conditions. Nevertheless, the business of the Grand Trunk has shewn a steady increase not alone in its operating revenues, which are often a misleading guide, due to increases in rates, but in its statistics of tons carried per mile.

Mr. Kelley, who is the very able president of the Grand Trunk System, and whose ability has been recognised by his continuance in the management of the road, after its transfer to the Government, testifies that the road is in good operating condition, and that it could, without substantial expense, meet a 50% increase in its business.

One of the advantages which the Grand Trunk enjoys, and it is a real one, is the foresight with which land has been acquired in Chicago, in Detroit, in Toronto, and in Montreal for enlarging the terminal facilities in those cities to meet the growth of business. Of course it will take capital outlay to equip them properly, but the land is there and conveniently situated for the purpose. On the other hand, the Grand Trunk is rather unfortunately situated in respect to grade separations in cities. It has a very valuable entrance to Detroit, and its right-of-way, though at places somewhat narrow, passes through the centre and business part of the city. It crosses a great many streets and there is likely to be a movement to require the Grand Trunk to elevate its tracks and separate its grades from that of the streets. This is a very expensive matter. It

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is, however, something that it takes a good deal of time to bring a railroad to do, but the railroad must gradually make preparation to meet the expense. There is a similar situation in Montreal. The Bonaventure station is an old structure, and while very conveniently situated in the city, does not offer very ample accommodations. There are many grade crossings in the approach to the station and an agitation has already begun looking to the separation. The company, in anticipation of the necessity, has expended a considerable sum in the purchase of land needed to widen its approaches to the new station. The city itself must contribute part of the amount to be expended and this fact will probably enable the company to postpone the separation for a number of years. In Toronto the case is more urgent and involves a new Union Station which has been built and for which the companies have entered into bond obligations. The station is erected with a view to the elevation of the tracks. The Grand Trunk has already elevated its tracks west of the station, but there is a great deal of work of a similar character to be done to the east, and $4,000,000 has been spent in the new station. A burden of something like $10,000,000 each threatens the Grand Trunk and the Canadian Pacific in the uncertain future. The entrance to Chicago is over the tracks of the Western Indiana in which the Grand Trunk owns a certain amount of stock. These are elevated. The Grand Trunk has a fractional interest, too, in the Chicago Belt Line, whose tracks are also elevated. But for several miles near the limits of the city, the tracks of the Grand Trunk have grade crossings which are in the uncertain future to be removed by separation, and the city authorities of Chicago are gradually pressing toward this consummation.

A subordinate engineer in charge of grade separations of the company, called by the Government, testified that the expenses of these grade separations, including those of London, Ontario, and South Bend, Indiana, would amount to some $46,000,000. There is no likelihood that either at London, or South Bend, there will be any money spent for such a purpose till the company is quite ready, and yet $13,500,000 are assumed to be needed for those in the next five years. This estimate on the part of this official was a personal one, had never been submitted to his superior officers, and is not one, I think, which we should take as serious. He had made no calculation or investigation as

to how the Grand Trunk would be aided by the New York Central, the Canadian Northern and other roads who must in equity contribute and at least one of which has agreed to do so. This witness himself thought this work might be spread over 20 years. It would not be unreasonable to divide this estimate by two and lengthen the time in which the money would have to be spent.

The physical condition of the railroads in the United States was not improved by the war. The shortage of labour and the very high wages which had to be paid to the labour which could be secured, and its low efficiency, as well as the high cost of material, furnished strong motives for reducing the current maintenance to as low a point as possible, consistent with the safety of the road. Doubtless in this respect the Grand Trunk was no exception. In the restoration of normal conditions, it is natural that maintenance and capital expenditures that often accompany maintenance under such circumstances should be made, but railroads that are not rich will if they are wisely managed do this as gradually and economically as they can, delaying expenditures as far as safety and efficiency will permit, to reach a time of lower prices.

The common stock of the Grand Trunk Railway amounting as already stated to £23,955,437, has never in the history of the road paid a dividend. The first two preference stocks have had full dividends for the calendar years 1910, 1911, 1912, 1913, and 1916. A part dividend was paid on the third preference stock for the same years, except that of 1916. In addition to the interest which the Grand Trunk is legally liable to pay upon debentures, bonds and other kinds of indebtedness of itself and its allied corporations, it has been in the habit of paying the obligations of other companies which it is not legally liable to pay, but which it must pay in order to maintain the unit machine of its system, and which if it is to be preserved in its present earning capacity must be regarded as part of its obligations. The part that this plays in the present issue, I shall consider later on.

THE GRAND TRUNK PACIFIC.

The great mistake in the policy of the President and Directors of the Grand Trunk property, which seriously injured the value of the interest of the shareholders of this property, the association of this Grand Trunk System with

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an enterprise for the contruction and operation of the Grand Trunk Pacific R. Co. This construction was part of a plan of Sir Wilfrid Laurier's Government for a line from the Maritime Provinces and Quebec through the northern part of Ontario to Winnipeg, in Manitoba, called the Transcontinental line, and from Winnipeg to Prince Rupert, called the Grand Trunk Pacific. Mr. Hays, as the president of the road, and Sir Rivers Wilson, as the chairman of the Board of Directors, entered into an arrangement with the Government for the consummation of this plan. The desire of Mr. Hays and the Grand Trunk Directors was to secure merely a western connection for the Grand Trunk Railway of Canada with the Pacific coast. The Government was not content with this and insisted that there must be linked with this a line east from Quebec directly to Winnipeg. Under the contract and charter, the Government finally agreed to construct the Transcontinental line from Winnipeg to Quebec, while the Grand Trunk Pacific, a newly organised company, all of whose stock was to be owned by the G.T.R. Co. of Canada, was to complete the line to Prince Rupert, a point 450 miles north of Vancouver, in British Columbia, and 450 miles nearer to Yokohama than Vancouver. This agreement provided that after the Government should construct the Transcontinental line to Winnipeg, the Grand Trunk Pacific would operate it and pay a rental yielding to the Government a proper percentage on the amount expended in its construction. The cost of both roads was so much greater than was anticipated that in 1916, when both roads were completed, the Grand Trunk Pacific officials refused to undertake to operate the Transcontinental, and in this refusal the Government acquiesced, and has operated the Transcontinental at heavy losses ever since. The Grand Trunk System did, however, secure connection with the Transcontinental line north of the lakes and thereby entered Winnipeg from the western terminus of the Grand Trunk Railway in Northern Ontario. This made a through Grand Trunk line from Montreal to Winnipeg and by the Grand Trunk Pacific to the Pacific coast. The contract required that the Grand Trunk Pacific should be constructed with the same standard of excellence as that maintained in the Grand Trunk main track between Montreal and Toronto. The result was that the cost of the Grand Trunk Pacific was excessive, as indeed was that of the Transcontinental. The Grand Trunk Pacific line runs

through the Yellow Head Pass, along the headwaters of the Fraser river. This is the lowest pass to the Pacific coast either in Canada or the United States, the altitude of the track being not more than 4,000 feet. Except for 20 miles of what is called a pusher grade, where the grade is about 1%, the grade of the rest of the line does not exceed a half of one per cent. The bridges are of stone and steel. Material for them had to be transported by river and other expensive methods, so that the cost was greatly increased. The well-established and economical method of building such a road is to build pile and wooden bridges, temporary structures, and use them until they cease to be safe, and then to substitute a more permanent material, which can be transported over the lines of the railway at least cost. To secure the low grades of which I have spoken, the immense trestles over ravines in the Prairie Provinces and elsewhere along the line have been constructed with a view to their being filled up with dirt and thus made permanent. It would have been much more economical to begin with less favourable grades and gradually better them as growth of traffic justified it. While the Grand Trunk Pacific was being constructed in the Prairie Provinces of Manitoba, Saskatchewan and Alberta, a number of lines were being gathered together in what was called the Canadian Northern System, under the promotion of railroad contractors McKenzie and Mann. It would have been vastly more economical if the Grand Trunk Pacific and the Canadian Northern could have united in some way under the same management, and not be compelled to divide a country which could not furnish more than enough business to engage the capacity of one line. The managers of the two companies were not able to agree upon terms, and the result has been that the Canadian Northern extended its line to the coast at Vancouver, and parallels through the Prairie Provinces and the Yellow Head Pass for hundreds of miles the Grand Trunk Pacific. Mr. Hays' evident object in carrying his line to Prince Rupert, where there is a good harbour, was to make the system one for Oriental business by steamship lines organized to run from Prince Rupert to Yokohama, but in view of financial straits no such lines have been organized. Of the three more or less parallel lines in the Prairie Provinces, the C.P., the C.N. and the Grand Trunk Pacific, the gathering of business depends a good deal upon the character and extent of the branch lines. In this respect, the Grand

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Trunk Pacific is at a disadvantage. Its branch lines have heavier grades and are less in number and extent than those of the other lines and not so well placed.

The Grand Trunk Pacific has been operated since it opened for business on the first day of January, 1916, at a very heavy loss. It has not paid its operating expenses. The Government aided its construction by guaranteeing the interest due on its debentures issued for its building to the extent of $68,000,000. This issue was followed by an issue of 5% and 4% debentures which the G.T.R. Co. of Canada guaranteed. The railway's guaranty is absolute to the extent of $2,594,080 annually. Another guaranty is conditional on there being earnings enough to pay dividends on the guaranteed stock, but not on the preferred and common stock. This involves an obligation of $1,395,170 annually. Subsequent Government aid to the Grand Trunk Pacific was given without a guaranty of the Grand Trunk Railway of Canada. The Grand Trunk Railway also advanced large sums to the Grand Trunk Pacific and its subsidiary companies from time to time. The G.T.P. Branch Lines Co., a subsidiary company, is thus indebted to the Grand Trunk in the sum of about $11,000,000. The G.T.P. Development Co., another subsidiary, is indebted to the mother company in about the same sum, and so is the Grand Trunk Pacific itself in about $267,000.

The drain upon the G.T.R. Co. of Canada began before 1910, with the construction of the road, but it became heavier as the expenses of construction grew until it reached the proportions mentioned. During the years 1912, 1913, 1914 and 1915, before the Grand Trunk Pacific opened for business, and while it was still receiving the proceeds of the bonds issued for its construction, it was able to pay interest to the Grand Trunk Railway of Canada upon advances made, and indeed to repay out of the proceeds of those loans, much of the money advanced directly to the Grand Trunk Pacific by the Grand Trunk Railway of Canada. Nevertheless the net result has been the draining of the resources of the mother company to the extent of $22,000,000, half of which is certainly entirely lost, and can never be recovered, and the other half, that due from the G.T. Development Co., may be paid ultimately, but it must be by way of salvage realised from the sales of the receiver who now holds it. The balance sheet presented on behalf of the company of the operations of the Grand Trunk Pacific Railway System shews a

deficit, after operating from the first of January, 1916, to the first of January, 1920, of $30,845,828. Early in the year 1919, the President of the G.T.R. Co. of Canada and of the G.T.P.R. Co. notified the Government that the Grand Trunk Pacific could not longer continue to operate. The result was the taking over of the Grand Trunk Pacific as a war measure by the Government Receiver. The deficit up to the time of the receivership was $21,415,948. After the receivership, and down to the first of January, 1920, it was increased by $9,429,879. The net loss from rail operations, leaving out taxes, and including only railway operating revenues and railway operating expenses, from the inception of operations to December 31, 1919, three full years, was $10,269,172. Between the first of January, 1916, and the first of January, 1920, the business of the company, instead of increasing, decreased. It may be that the line of railway will ultimately become a valuable one. It is quite probable that the Prairie Provinces, which are so rich in the production of wheat and other cereals, and British Columbia near the line of the Grand Trunk Pacific, with its coal resources, and a steamship line to the Orient when established, may ultimately furnish large revenues to this trunk line. It is certain, however, that it will need much additional capital and a good many years' development to create a business that will make it profitable, and that if the railroad is to be maintained, it will need a very heavy maintenance fund to keep it in proper condition.

The Grand Trunk Co. owning all the stock of the Pacific road abandoned it to the Government. The Government alone could take it over. They were the guarantor or owner of $68,000,000 of its first obligations.

We cannot in this proceeding, it seems to me, attribute to the shares which the G.T. Co. holds in the G.T.P. Company any value at all. The absolute guaranty, $2,594,080, is reduced by $301,320, which is the amount of annual interest due on the bonds of what is called the Lake Superior Line. This has been leased to the Government at a rental of $600,000, and the rental makes complete provision for the payment of the guaranteed interest. This leaves the absolute guaranty at $2,292,760, and the conditional guaranty at $1,395,170, not obligatory unless net earnings of the Grand Trunk Railway, the guarantor, permit its payment after the meeting of all running expenses, interest on funded obligations and the dividend on its guaranteed stock.

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Mr. Atwater argued strongly for the shareholders that something might now be realised out of a sale of the Grand Trunk Pacific to reduce the liability of the G.T.R. Co. of Canada on its guaranty. I have considered this matter with care, but I cannot for the life of me see any hope that by a sale of the Grand Trunk Pacific's property, a sum could be realised that would more than satisfy the first lien of the receiver's debts, which have now become $9,000,000, and the prior debentures amounting to $38,000,000 guaranteed by the Government.

In addition to the $30,000,000 deficit in the three years already referred to, Mr. Sullivan, a witness for the Government, and an able practical engineer, one who had served upon the Canadian Pacific and other roads, and is very familiar with the engineering problems and expense of that region, including the Prairie Provinces and the Pacific Coast, gives an estimate of $24,000,000 of money needed in the near future to keep the Grand Trunk Pacific in proper condition. A stage is rapidly approaching when the wooden structures used to maintain the grade in the form of trestles must be by fills which are very expensive, or by steel structures. Then for 200 miles, in descending to the Pacific Coast, there are constant slides which promise to entail a very heavy expense in repairing them. Mr. Berry, who testified for the Grand Trunk in this matter, emphasised the difficulties and expense growing out of these slides and substantially agrees with Mr. Sullivan in his evidence as to needed fills and the short lives of these great trestles and the unwise policy in the road's too perfect construction by which its cost was greatly and unnecessarily increased.

The association of the G.T.R. Co. with the Grand Trunk Pacific and the Transcontinental, is the tragic part of the story of the Grand Trunk Railway of Canada, whose history, in spite of certain indefensible acts of its London management, to which I shall refer later, is one which should arouse the gratitude of the people of Canada for the benefit which has come to them in the development of their country through the agency of this pioneer system of railways. Canada is so situated that the construction of railways with Government aid has been a political and economic necessity. It is a country 4000 miles from sea to sea, and so far as its settled portion is concerned, not more than 400 or 500 miles from north to south. Its far north-west will doubtless acquire inhabitants in the future, for it shows

a surprising possibility in productiveness due to the climatic influence of the Pacific. For the present, however, the territory in which the railways can find or develop business is more or less a narrow strip of settled and civilised country from east to west, with a barren interval from North Bay to Winnipeg, which is not a source of useful products, but must be traversed in order to reach from the east to the Prairie country and to the Pacific.

It was made a part of the condition of the union, embodied in the B.N.A. Act, that Quebec and Ontario should be united by railway with the Maritime Provinces and the Government was obliged therefore, as a political necessity, to build, construct, own and operate at a loss the then called Intercolonial Railway.

A condition of the coming into the Dominion of British Columbia was an agreement that a railroad should be constructed uniting the Pacific Coast with the eastern provinces of Canada. This had to be done and was done by private enterprise, reinforced by very large contributions from the Government. The history of the Canadian Pacific and its present wonderful prosperity finds something of its explanation in the fact that the Government contributed very largely to its construction in actual outlay and the actual building of important parts of the road, and also in its land grants. These have enabled the company to maintain a very low capitalisation in its bonds and stocks, and therefore to earn substantially a constant dividend on its capital stock, perhaps as certain and as ample as that of any railroad on the continent.

The Canadian Northern, too, has had very extensive Government aid, even greater in proportion than that of the Canadian Pacific. The G.T.R. Co. of Canada, which was much earlier in the field, and offered the opportunity to Ontario and the western part of Quebec to develop prosperously, has had comparatively little assistance.

All these circumstances should challenge, on the part of those who are called upon to do justice to non-resident shareholders, the closest attention to the pleas made in their behalf and to the exercise of a spirit of equity in dealing with their interests, which are now to be ended in this enterprise and are to be compensated for by our adjudication and award.

It was for this reason, among others, that it seemed to me a proper course to allow the company and the shareholders

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to offer in evidence proof of the reproduction value of the whole G.T.R. System and of what is called the physical value of the property as distinguished from the reproduction value. This would not be for the purpose of compelling the Government to pay the reproduction or actual value of the physical property, but only to enable us to use the value as a circumstance in judging its future and potential net earning capacity. Such evidence is held in the United States to be competent and relevant in adjudging what a railway company should earn and therefore to fix its rates. With conditions so much the same in both countries and in respect to a railway like the Grand Trunk, 70% of whose rate receipts are directly affected by rates in the United States, it would seem proper to adopt the same rule of evidence.

In a similar proceeding the Government taking over the Canadian Northern, through a Board of Arbitration, at the head of which was the Chief Justice of Ontario, received evidence of the reproduction value and acted on it in their award. The Government filed there a formal objection but did not press it and the evidence went in. Evidence of this kind here produced might have materially affected the opinion which the Board would form of the earning capacity of the road and its future possibilities, especially in view of the fact that the tendency of railway legislation in the United States, as shewn by the last U.S. Transportation Act, is towards making the reproduction value of railroad property used economically for transportation a proper basis for fixing rates. The ruling of the majority of this Board, however, has been against receiving such evidence. Bowing to that decision, it becomes my duty, as a member of the Board, to fix the value of this stock without the aid of such evidence.

One of the great issues made in the case is as to the physical condition of the road and the system for operation. The Government has been at great pains to point out the defects of the road and the failure of the company to expend the needed funds for current maintenance of bridges, rails, ties, ballast, the motive power, including locomotives, freight and passenger cars. On the other hand the counsel for the shareholders insist that the history of the road and its achievements during the war and under the stress of greatly increased traffic, is an indication that it is safe and one hundred per cent. efficient—that one must judge of a road by the work it does and if the freight is carried and

the passengers are carried without accident or loss for years, and the duty of the common carrier is thus discharged, and the equipment of the road is kept up to such a point that the work to be done is done, it cannot be said that the road is suffering from any great deferred maintenance.

The chief witness for the company was John B. Berry, a railway engineer who has had a long experience in the engineering department of the Chicago and Northwestern R. Co., a most important and extended system, and thereafter Chief Engineer under Mr. Harriman in the great reconstruction of the Union Pacific R. Co., and then for six or seven years the Chief Engineer of the Chicago, Rock Island and Pacific Co. Mr. Berry is a man of the highest standing in the railway engineering profession. He may be looked upon perhaps as the "dean" of that particular branch of his profession. He is a man evidently of solid character and of strong opinions which he does not change at the suggestion of counsel, either of those who call him or those who cross-examine him. He has visited the principal lines of the G.T.R. of Canada many times and the properties of all its subordinate companies, as well as those of the G.T.P. He examined the records of the properties of the company before he made his inspection, made up his mind as to the bridges and places on the road at which he would stop, and give close inspection. He noted the condition of the rails, of the ballast and of the ties from an inspection car placed in front of a locomotive which ran some 15 miles an hour, and which stopped wherever he indicated his wish to do so. He made notes of his examination and reported what he saw as either "good," "fair" or "poor." "Good" meant a high standard, "fair" meant something that would last for four or five years but would then need to be replaced, and "poor" something that ought to be replaced in the near future. He did not make an inspection with a view to reporting on the cost of making the repairs that might be needed, but he made a report as an experienced engineer would make it, in giving to one considering the question of purchasing the property, a satisfactory knowledge of the condition and the value of the road. In fact he did prepare a report of its reproduction value, less depreciation, though he was not allowed to put it in evidence. He made this report with full appreciation of the judgment that those who engage in the actual economical operation and maintenance

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of the road with limited resources must exercise, in determining the amount of current repairs and maintenance that should be made to keep in good operating condition. Mr. Berry's evidence is that the railroad does not shew deferred maintenance but on the whole is in excellent condition.

The Department of Railways and Canals of the Canadian Government, on the other hand, sent out a force of men to make minute examination of every part of the road and to report on every deficiency which they could see, with a view of estimating what it would take to repair and equip the road according to a standard not affected by a limitation of means, but with the backing of a government treasury, and with a knowledge that the report was to be used in depreciation of the value of the road to be bought. I have no criticism to make upon the witnesses for the Government except to say that there was on the part of Col. Montserrat, who reported on the bridges, and the others who reported on the maintenance of way, an enthusiasm of condemnation that rather injured the weight of what they had to say, to me. Col. Montserrat's evidence was so rebutted by the evidence of those who were in constant charge of the work that he criticised as to give me the impression that he was calculating the cost of producing a perfect road without regard to economical considerations. His severe criticism of bridges which in the growth of business had grown too light for the traffic, and had been strengthened by the use of wooden or pile bents, seemed to me to be unjustified, and I must agree with Mr. Berry's criticism and with that of counsel for the shareholders that upon lines where the traffic is light, where the profit from the operation is small, if any, but which must be maintained, the use of pile bents to continue the life of bridges is much wiser than the expenditure of a large amount for new steel structures when the bridges thus reinforced will last for several years and be entirely safe, and this however much they may offend the eye of an engineer who insists on new and good-looking bridges everywhere. The tone of Col. Montserrat's statements as to the bridges was likely to give the impression that the conditions in many instances are dangerous, and yet the fact is that the road has been operated under the same conditions for a number of years with complete safety, with these bridges always under observation, and with an accurate knowledge by the men in charge of the status of each bridge and any change therein for years.

It may seem an anomaly to criticise the reports of witnesses in respect to the condition of the railroad as too minute and too meticulous, and yet the criticism is not without justice. It reflects the purpose to dwell upon small deficiencies, to insist on perfect reparation of them when a reasonable economic policy would lead to a less expensive method by which complete safety and effectiveness can be secured without a large outlay for some years, until a time of cheaper construction and easier money. Thus a recommendation that great grain elevators made of wood and reasonably effective for their purpose for years to come should be torn down and new elevators put up of reinforced concrete, made by a witness for the Government, seems to me quite unreasonable, and this even though the insurance of grain when warehoused in wooden elevators is greater than that in a concrete warehouse. The record shews that there are many, many wooden elevators in active and profitable use, and the mere fact that when the new elevators are built now they are built of concrete does not justify a policy of pulling down perfectly good elevators made of wood. The reason for constructing concrete elevators now is not due solely to a desire to reduce danger of fire but also because of the very high cost of timber.

I do not wish to impeach the veracity or professional skill of the Government experts on this issue of the condition of the road and the needed capital and maintenance expenditures. If the Government wishes to adopt the policy of putting the railroad in pluperfect condition and reduce further maintenance to a minimum for a series of years, and to make these expenditures now when the cost of everything is much higher than it is likely to be, that is a matter of policy with which we here have nothing to do. But when evidence of such cost is used to shew how impossible it would be for the Grand Trunk to avoid heavy and overwhelming deficits in the near future and thus destroy all potential value of the stock of the Preferred and Common stock shareholders, I feel that I should doubt its weight for that purpose. In order to put the Grand Trunk System into proper condition, the sum of the estimates of these Government experts is that it would cost the company in five years $74,000,000, of which $44,000,000 would be non-remunerative capital, $8,700,000 would be remunerative capital, and $21,881,010 deferred and extraordinary maintenance. When the budget was prepared by the officers of the company to

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be presented to Parliament for a vote on the budget of the year of money to be paid out by the company under the operation of the company for fifteen months, ending March 31, 1922, the amount of it was $44,000,000. The Department of Railways directed that the budget be returned and that it be increased to $89,000,000 which was accordingly done by order. One of the chief differences was an additional sum of $16,000,000 for capital and other expenditures for maintenance. As recommended by the Government experts, the officers of the company charged with the safe and efficient operation of the railway system did not deem such a sum necessary at this time.

The counsel for the Government press upon the Board, as corroborating their witnesses as to needed capital and maintenance, a report made by Howard G. Kelley early in 1917. Mr. Kelley, now the President of the Grand Trunk, was then the Chief Engineer of the system. At that time the President, Mr. Chamberlin, and London management of the company were seeking to induce the Canadian Government to take off their backs the burden of their G.T.P. investment and restore to them the moneys which the Grand Trunk had put into the G.T.P. enterprise. They were anxious to make a showing of poverty on the part of the G.T.R. of Canada, and of the impossibility of its continuing if loaded down with the G.T.P. They therefore understated their actual revenues in their published reports by some millions. This is the contention of counsel for the Government, which is not disputed. Their President, Mr. Chamberlin, testified to the Railway Commission appointed for the purpose of investigating the Grand Trunk and other railways in Canada, and the then condition of the Grand Trunk in the matter of maintenance, and greatly emphasised it. At that time, as a matter of fact, and by the admission of Mr. Kelley on the stand in the present case, the maintenance had run down because of war conditions, and the difficulty of securing labour and material. Mr. Kelley, as Chief Engineer, and under the instructions of his superior officers, thereupon made a report upon the needed expenditure capital and current for the purpose of putting the Grand Trunk into a proper condition. It is manifest, from the report itself, as well as from the circumstances, that by direction of his chiefs he prepared this report in accordance with the standard of the same kind of perfection as that which Col. Montserrat and his fellow witnesses for the Government have

prepared their report in the present case. He laid down a measure for the renewal of rails and of other equipment which considerably exceeds in its requirements even those of the Government witnesses. He was not then President of the road—he was merely the Chief Engineer acting under the directions of his superior officers and using that discretionary judgment that may have a very wide range in stating a de luxe estimate of needed expenditures and needed maintenance. Since that time in the years 1918, 1919 and 1920 a very large amount of money—$47,000,000—has been spent in putting the G.T.R. into better condition after the war. Mr. Kelley has been on the stand and testified at great length as to the present satisfactory condition of the road for the efficient discharge of the duties of the railway company. He has told of the heavy traffic that it carried on during the war, and he speaks with confidence of its condition with which he is most familiar, and of its capacity to do a much larger business than it now does, without any extensive additions in the matter of capital and maintenance. Counsel for the Government were at liberty to cross-examine Mr. Kelley by reference to his report as Chief Engineer and thus call from him an explanation of the difference between his present statement as to the condition of the road and his report of 1917. Instead of this, they put in his report without any further cross-examination of him. It is suggested that counsel for the company have said that they were going to reproduce him on the stand with reference to deferred maintenance. Counsel for the company say that they did not carry out their purpose because of the ruling of the Board of incompetency of the evidence as to value. It is only sufficient to say that if the Government had desired, Mr. Kelley was available for cross-examination after the introduction of his report, but he was not recalled for that purpose. We are left, therefore, with his statement in chief, his explanation of the present condition of the road when he speaks as the responsible President of it, and with this earlier report of his in 1917, made under instructions and under the circumstances which I have already described. In order to make up for the condition in which the war had left this railroad, as it had all other roads, the management of the company had spent large sums for maintenance amounting in 1918 to nearly 12 millions, in 1919 to 17 millions and in 1920 to 18 millions, and it is insisted by counsel

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for the company, and testified by Mr. Kelley, Mr. Berry, and the company's officials in immediate charge, that this sum put the road in as good condition as any road in the country, and that such capital expenditure as the Government urges as indispensably necessary are not so.

I should observe at this time that while the date, May 21, 1920, is the day when the stock is deemed under the contract to have passed to the Government, although the shareholders through representation in the Committee of Management still retained some control until June, 1921, evidence as to money spent in the improvement of the road after that date, out of the income from the road, is not rendered irrelevant. More than this, there is evidence that ties and rails had been bought by the company before the date of transfer, which were subsequently put in place. One can not strike a balance as of a day like the 21st of May. We must consider a railroad by years. Its accounts require it. It is a going concern and must be so considered and treated in its condition and valuation. It is fair, therefore, for purpose of determining the kind of railroad in which the Government is acquiring stock control by the purchase to bring the condition of the road down to the end of 1920.

It will be observed that the $74,000,000 of the total proposed by the Government for the years 1920 to 1926, includes $43,000,000 for the grade separations, already referred to. This is to be done in five years when even the witness upon whom reliance is had for this estimate expressed the opinion that it would be twenty years before the railway would be obliged to meet the full weight of such a burden. Such an item does not lend force to the exhibit as a whole. It does tend to make it especially persuasive in trying to estimate what the G.T.R., if left in possession, would have to spend wisely and economically to keep its railway system up to do its public work safely and efficiently. These large sums are then introduced into the future estimated accounts of the company and pile up the fixed charges of the company so as to increase them some seven millions by 1925, which would preclude all possibility of dividends on preferred stock. In other words, it is proposed to put a seventy-five million mortgage on the Grand Trunk property now as essential, with the result that the shareholders' interest disappears under the increased annual charges. I must feel that the evidence of the witnesses for the company is more weighty upon the point here in issue, namely, what would

a reasonable, economical owner of the railway have been able to work out for his shareholders in the next few years after having operated the railroad sufficiently and economically and safely, and having paid the fixed charges. My point is that the witnesses for Government have directed their evidence to the cost of a policy in dealing with the railroad, which is not one which a private owner with the limitations upon his expenditures, not mandatory upon a great Government, would pursue.

Mr. Butler and counsel for the Crown have urged, with great force and ability, the view that the road can not be in good condition now because the company did not pursue a proper course in setting aside a sum each year for maintenance to meet the depreciation that time necessarily brings. Mr. Butler referred to a direction of the Interstate Commerce Commission as to a head for depreciation in its classification of accounts to be kept and reported, a rule which the Canadian Railway Commission has not yet adopted, and which indeed is not fully in force and hardly more than recommended by the Interstate Commerce Commission itself. Cases have been referred to in which the Supreme Court of the United States and Sir George Jessel, the Master of Rolls, have emphasised the duty of directors of a company to make provision for repairs and maintenance and necessary renewals and not to declare dividends out of the gross earnings when nothing has been set aside for these purposes. There is no doubt about this principle, but we are not here for the purpose of determining whether the dividends which were declared should not have been declared, any more than we are for the purpose of punishing the directors for juggling with their accounts. We are here for the purpose of determining what the real interest, if any in this railroad property the shareholders have, and what value, if any, it has. We are interested in the actual condition of the property, and while it is true that rules as to what ought to be done with reference to maintenance, in the view of an expert Commission like the Interstate Commerce Commission, and the failure to comply with their judgment in that respect may have a tendency to shew that the road in question is not in a proper condition, direct evidence as to its condition is more weighty, and the old argument that "proof of the pudding is in the eating," has application. However faulty the managers of the road may have been in not establishing a depreciation reserve and in

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not at different times spending it as such, the fact remains that through the critical period of 1916, 1917, 1918, 1919 and 1920, this Grand Trunk System did an enormous work and never failed to meet the very exigent requirements of the Government in its transportation of the things which were so much needed to win the war. Moreover, it is true that however improper the motive for the establishment of an audit office account, the result of it was to furnish in 1919 and 1920, a large reserve fund to expend on the property by way of maintenance and renewals. No evidence has been offered to rebut the statement of Mr. Williams that in the earlier years a large amount of what might properly have been charged to capital investment was taken from the earnings of the road to keep up the motive power, the locomotives and the cars, and, as already pointed out, there is substantially no evidence to show that the cars and locomotives now owned by the Company are not ample for all the business that it is already doing or is likely to do.

The operating efficiency of the railroad can not be denied. The Company is to-day and has been for years last past, operating fast trains, numerous trains and heavy trains, the trains are making schedule time and there are substantially no accidents. Although these operations and records of the Company have been completely under the scrutinising and critical eye of government experts, no evidence has been adduced to rebut this. No attack has been made upon the tractive power of the Company. Several competent witnesses, after close inspection, have testified to its completeness and effectiveness for the purpose and the work it has done proves it. The same thing is true of the freight and passenger and other cars. The shops and round houses, except in a few spots of comparative unimportance, which can be remedied by very moderate expenditure, are in first class condition. As to the ties, the question is a matter of wise judgment. Mr. Berry's long experience and close examination of the records of the operation of the road enabled him to fix a proper standard of annual tie renewal at 2,000,000 a year, or 264 ties to a mile and the railway records show that taking one year with another, the renewals, including 1919 and 1920, have averaged 265 a mile a year. In respect to rails the showing is not so good because it was impossible to secure suitable rails during the war, and still more difficult to get the labour properly to replace them. The standard set by the Grand Trunk for

its main double track from Montreal to Chicago and the New York territory has been one hundred pound rail, and much more than three fourths of it is of that weight. It could only secure under government limitation during the war period, 85 pound rail. During 1919 and 1920, a large amount of new 100 pound rail was purchased and put in the year following, considerably more than average yearly renewal. Mr. Robb says that more rail was put in the road in those years than in any year since 1907 and 1910. From Mr. Phippen's reference to the exhibits it appears that with the exception of grade separations, docks and wharves and elevators, the amount recommended for 1920 for maintenance, including bridges, rails, ties, ballast, etc., by the Government experts was $15,901,000, while the company actually spent in that year $15,226,000 on the same things. It is true that Mr. Butler remarked that his witness advised him that the two did not cover all of the same things and that there was 7 millions in which they did not overlap, but this has not been explained.

I have already spoken of grade separations and elevators.

In reference to docks and wharves, a word is proper. These docks and wharves upon which the Government witnesses insist much should be spent, are most of them at the termini of branch lines of the Grand Trunk where the business is very light indeed and unprofitable and in respect of which a policy of the severest economy consistent with safety is the one on the basis of which we must place our judgment and estimates, and not one of expensive renewals or complete rebuilding.

On the whole evidence, when the fact as to what the great system is doing and has done for a long series of years, is considered, I can not bring myself to credit an unfavourable and condemnatory description of the condition of this old and settled railroad property, that would require for its continued practical operation for useful public purposes, an investment of what is equivalent to form seventy-five millions of new capital. We must, I think, resort to other means of judging the requirements of the situation.

I do not deny that the government plan of advancing large amounts of capital at the present time to improve the road and reduce the expense of maintenance in the future may be the wise course for the Government to pursue in carrying out its purpose in establishing the Grand

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Trunk System under government ownership. It is not, however, the most economical at such a time as this. Such a policy by Mr. Harriman in the reconstruction of the Union Pacific has proven itself to be wise, but a policy like this can only be carried out by those who are willing to wait decades for results in the form of net earnings and who have financial ability to meet the immediate expense and delay returns for a considerable period. That is not a policy which can be used as a guide in a case like this to determine what the value of shares of stock are in earning dividends within a reasonable short time. It sacrifices much of railroad property capable of further profitable use, and if the stockholders had retained their interest, it would ignore their right to the most economical performance of the railway's public duties consistent with public safety and efficiency.

In a case like this, it is perfectly natural that witnesses should have a leaning toward the side which calls them, with a knowledge of the purpose for which they are called, and the Board must weigh the evidence in the light of the circumstances and attempt to reach in its judgment the probable fact. My own judgment is that the actual facts lie between the views of the opposing witnesses and that while there is a necessity for better maintenance in the Grand Trunk System which may delay somewhat a return to a normal net operating percentage, after the strain of the war, the reports of the governmental engineers are quite excessive. They pile Pelion on Ossa.

We come now to the principal and ultimate question of the case upon which what I have been discussing has a bearing. That question is what we may reasonably anticipate as the net earnings of the three Preferred stocks and the Common stock within such a time that an intending purchaser would be practically affected in the price he would pay for them.

In presenting to the court the various elements of value of the Grand Trunk road, Mr. Phippen first dwelt upon certain properties which he denominated as "frozen assets." He considered that they amounted in ultimate realisable value to $25,000,000 or more. The first of these was the property of the Southern New England R. Co., a railroad projected and partly built between Palmer, Massachusetts, and Providence, Rhode Island. This railroad was begun by the Central Vermont and the expenditure was made by it

of $7,000,000 loaned for the purpose in 1911 by the G.T. Co. without interest. The right of way has been purchased and a good deal of the grading has been done, but it would take some $7,000,000 more to finish it. It is a railroad which if built would give access to Providence, Rhode Island, to the Grand Trunk System and would bring that system into a territory in Massachusetts, Connecticut and Rhode Island, which is a hive of industry, and would doubtless be a source of much increased business for west bound traffic over the Grand Trunk lines. Mr. Kelley does not recommend the investment of any further money in the completion of the railway until times change and prices fall, but his judgment is that in the future it will be wise to complete the road, and that the road will become a profitable feeder for the system. It seems to me that the road may be made profitable some years hence.

The Jacques-Cartier Railway running around the mountain of Montreal to connect the main line of the Grand Trunk with the territory east of Montreal to the river is another unfinished investment that brings in now nothing but obligations in the form of taxes. How valuable this may prove to be in the future is a matter of speculation and upon which we have no means of judging except by the cost of it, which was $1,600,000.

The next item in this list of "frozen assets" is the indebtedness of the G.T.P. Development Co. to the G.T. Ry. of Canada. This indebtedness grew out of advances made by the latter company to this Development Company to enable it to carry on the business of assisting the G.T.P. Co. in its building and operation. It owns steamship companies, dock companies, hotel companies, and a good deal of land for sale. It has not paid a dividend because from much of its property it is not expected to secure a regular income but merely to develop it and then sell it and divide the proceeds. It owes $11,000,000 to the G.T.R. of Canada, and $2,000,000 to the G.T.P. Co. It was taken possession of by the receiver whom the Government put in charge of the G.T.P. Co. The Grand Trunk counsel insist that this is a breach of the rights of the Development Company because it was not insolvent and the Grand Trunk was its largest creditor. We have not had specific evidence adduced before us as to the value of the properties which it holds. There is $3,000,000 outstanding in payments due upon lands sold, and there are two large fine hotels, the Fort Garry Hotel

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at Winnipeg, and the McDonald Hotel at Edmonton, which cost millions, and are valuable and likely to be profitable. The assets of the Development Company, as shown by its books, amount to $12,536,324, as follows:—

Hotel property	$5,719,108
Wharves and docks	3,859,624
Steamships	1,278,135
Company holdings	7,719
Gravel lands	37,236
Terminal lands	292,745
Rights of way	3,932
Mortgages on employees' houses.	11,135
Cost of farm lands	1,331,690
	$12,536,324

They indicate a very considerable salvage in the claim for $11,000,000 which the Grand Trunk has against the Development Company when the other debts are only two millions.

The fire insurance fund accumulated by the Grand Trunk of more than a million dollars, in order to do its own insurance, would seem to be worth its face in that it saves the Grand Trunk from the annual payment of a very considerable amount for current insurance and this reduces its operating expenses. Another fund of a similar character is the compensation fund of $350,000 which adds value to the G.T.R. Co. certainly to the amount of its face, by reason of offering indemnity against claims for damages for injuries that are a constant source of expense.

The next item is the investment of some $2,000,000 in the Montreal and Southern Counties Railway. The operation of this railway has resulted at times and for some years in the earning of a small surplus over and above expenses. For the last three or four years, however, there has been a deficit of about the same amount each year. The Grand Trunk has $340,000 of the stock, with $100,000 held by the public, and in addition the Grand Trunk has $500,000 of the stock issued or to be issued to reduce its indebtedness. I was much impressed by the evidence that this company will in a few years become a paying investment. It serves a series of rapidly growing suburban towns south of the St. Lawrence river within easy reach of Montreal, not only for commuters but

also for the carriage of milk and for express and other freight. It has not made any provision for depreciation and may need further capital to confirm its success, but I have a strong feeling that the property is one which will turn out to be profitable.

The Rail and River Coal Co. owns 30,000 acres of coal land in south-eastern Ohio. The coal is of the Pittsburg vein and is excellent steaming coal. The value of the property is estimated by Walter Kelley, the Superintendent of the Mines, as worth $12,000,000. An estimate by an expert connected with the geological department of Ohio was $8,000,000. These views were contradicted by a witness of some experience in coal lands, but who it seems to me did not qualify himself as the other witnesses were qualified. It is quite certain that the mining plant is well managed and is well equipped with the best modern machinery, that a very considerable amount of money has been expended in perfecting it, and that an adequate depreciation fund is provided. It is also clear that a good deal of the unused land has a definite market value per acre. Of course the value of the property will be much affected by the general situation of the coal market, questions of strikes and otherwise, but in this proceeding when the value must be fixed, we must assume a return to normal conditions and a demand for coal which the resumption of business will certainly create.. I am inclined to think that the estimate of Professor Ray as to the value of the mines and property of this company was not in excess of its real value now that the mines can be economically operated with the best machinery and the surplus lands can be disposed of with reasonable care and discretion. To put therefore the unused land in among the frozen assets at a figure of $3,000,000 would be fair, leaving the full amount of land for years to come for mining purposes still in the possession of the Rail and River Coal Co.

A question has arisen over the title to the stock of the Rail and River Coal Co. and a good deal of evidence is submitted. This has given me no difficulty. The argument of Mr. Lafleur upon this head is entirely satisfactory and convincing. The history shortly stated is this. Mr. Hays became convinced that it would be wise to acquire this coal property to be used in connection with the operation of the G.T.R. in furnishing at a low cost good steaming coal for that part of the railroad that could be reached by a reason-

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ably short haul. He was anxious to acquire it, but he could not induce the Board of Directors to take over the property to the Grand Trunk chiefly for the reason that they were advised that the charter of the Grand Trunk would not permit it to operate a coal mine. Moreover, there was fear that the commodity clause of the Interstate Commerce Act would forbid a railroad from owning a mine for such purpose. As a matter of fact, neither of the objections proved sound. However, the property was taken over in the name of the Development Company and contracts were formally made with the G.T.R. for the delivery of coal. The money for the purchase price was paid by the G.T.R. of Canada, and notes were given to the G.T. Co. for this. While the Directors were thus loath to assume the ownership the property was carried in what was really a state of suspense as to the title for several years. In spite of a good many formalities inconsistent with the real fact, it seems to me that the truth was that Mr. Hays and those in charge always considered that the property belonged to the G.T.R. Co., which had paid for it, and were only waiting until the unfounded fears of ultra vires on the part of the directors of the G.T. road were removed before vesting the title to the stock formally in the G.T. Co. Some two years before the initiation of the receivership of the G.T.P.R. Co., which embraced that of the Development Company, the Grand Trunk directors gave authority to the officers of the Company to take over to the Company the stock of the Coal Company. This authority was not formally exercised until just before the receivership. It is said that this formal transfer, effected just before the receivership, was a fraud upon the creditors of the Development Company. As the Grand Trunk is the only creditor of the Development Company, except the G.T.P. Co., the debt to the former being eleven millions and to the latter two millons, the motive for the fraud is not apparent. In fact, the transfer was in my judgment nothing but the commendable formal execution of either a resulting or an express trust. The mines are a valuable adjunct in the operation of the G.T.R. All of the land is not needed and a part might well be sold. In the estimate of frozen assets, it would not be unfair to put this extra coal land in at three millions of dollars. The last of these assets is the amount of land purchased by the Grand Trunk in Montreal for enlargement of the approaches to the Bonaventure station in Montreal, the original cost of which Mr. Phippen doubtingly

estimated at half a million, but the interest charged to the purchasers indicates that it was about three millions. It will be available for use in grade separations and establishing new terminals in Montreal. Mr. Phippen's claim is that these frozen assets at a fair estimate are worth $25,000,000. It is possible that this is too rosy a view of what their value is, but certainly I should think that $20,000,000 could be realized from them in the course of the next ten years, and that they may be regarded as an offset to the amount of money likely to be imposed as an obligation upon the Grand Trunk System for grade separations in Toronto and Montreal, Detroit, and Chicago in that time.

Counsel for the shareholders have urged three different ways of proving that in the near future enough may be earned by the company to pay all that the contract and statute permits the Board to award to these stockholders.

The first agreement is based upon quotations taken from the London Stock Exchange and covering some four or five years, ending with 1913. In the discussion of the competency of evidence as to reproduction and physical value, I said that in my opinion little or no weight should be given to quotations on the Stock Exchange, especially where the stock has speculative value, as this seems to have had. Where the question is between one who has bought and one who has sold, and of damages for a breach of contract of a sale of a block of stock, the stock market quotations showing what might have been realised for the block at a particular time, or what stock might have been bought for at a particular time, would be relevant and important evidence in determining the rights between the vendor and purchaser, but here is where the Board advised as to all the facts in respect to the financial condition and earnings and management of the company—facts that could not be known fully to the public or those engaged in dealing in the shares, and where the purchaser is to buy the whole issue of stock, I do not myself feel that the quotations are useful at all. These quotations were quotations in 1913 made before the company had been greatly affected by its association with the G.T.P., and while it was receiving interest on its advances to that company. This Board is warned in the very statute under which it is acting not to take into consideration, as a means of determining the issue here, stock quotations if they are effected by the negotiations between the Government and the company. On the other hand, to go back to

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the quotations before the war, when so much has happened detrimental to the G.T. Co. since, is to resort to evidence of the most unsubstantial character.

The next basis for the claim of counsel is based on the provisions of the new transportation act of the United States. It is said that because the Esch-Cummins Act ordered the Interstate Commerce Commission to establish such rates as would return to the railway companies in the United States not less than 5½ per cent and not more than 6 per cent. on the value of all the property of those companies devoted to the public service, and the relation of the Grand Trunk System to the American Railway System is so close in that 70 per cent. of its rates are affected by the rates of the United States that we must assume that the action of the Interstate Commerce Commission under the Act will bring a net return to the owners of the Grand Trunk of 6 per cent. on the value of their property. On this basis counsel for the company urged the relevancy and competency of the reproduction value and actual physical value of the Grand Trunk properties. That evidence was rejected. In the absence of such evidence, I do not think there is any basis of comparison under the Transportation Act and cannot follow Mr. Phippen in his argument on this head.

The third argument of Mr. Atwater and Mr. Phippen is based upon the normal net earnings of the Grand Trunk in the past and their amount having regard to the steady increase in the total business of the railway and its operating revenues.

Before taking this up in detail, I think it proper to consider the conclusion which the Chairman of the Board has reached, that on May 21, when the transfer of the title to the stock probably vested, the company was bankrupt, and therefore that the shareholders, the value of whose interests in the company we are considering, had nothing then in the company which we can value. The value we have to determine is, it is true, the value of the shares in May, 1920, but their value in May, 1920, is determined not by the limited earning capacity of the company at that time if there was a reasonable prospect that within a few years its earnings will be greatly increased. I agree the injury done to the property by the war and the absolute losses thereby suffered, those interested in it, bondholders and shareholders as well, must accept as a reduction in the value of their property, but they are not to be held to an earning capacity

as of that date. They are entitled to a value then reflected by the prospect of a return to better conditions and an earning capacity within a reasonable period such that the earnings may meet not only the fixed charges but also furnish a dividend on the capital stock. We have a right to exercise our judgment as to when a normal condition of affairs will come, and on the basis of our judgment to judge the normal earnings in the future by the normal earnings in the past. More than this, if it be true that the volume of the business done by the company, and which the company is able to do, in spite of the untoward conditions, has shown a steady increase in the amount of business done, at a regular ratio we have the right to predicate an increase in the future. Normality in respect to the G.T.R. of Canada is one that can be much more safely reasoned about and acted upon than in the case of a new railroad as the G.T.P. We can be quite sure that if other railroads in the country are returning to a normal basis, the Grand Trunk is likely to do the same thing. To say that the Grand Trunk on the 21st of May, 1920, at the nadir of railroad prosperity in the world, when purely operating expenses were as abnormally as large as they were, was in a state of bankruptcy, and the interests of its shareholders worth nothing, is, it seems to me, to deal most inequitably with the shareholders. Who can say what would have happened to the Grand Trunk if the Government had not taken it over? Had the Government not come to the rescue, it is quite possible that the bondholders who had already come to its rescue in 1860, might have aided it again, with the confidence that by tiding over the then exigent situation, they could count on a return to the normal.

I may add with reference to the views of the Chairman of the Board as to the bankruptcy of the Grand Trunk, that they are based largely on the Drayton-Acworth report and its contents, made now more than four years ago, in 1917. That report was admitted in evidence as reflecting on the value of stock quotations and for other limited purposes, and its use as evidence by way of admission against the company, or its shareholders, was distinctly disavowed by counsel, and as I understood it, that disavowal was approved by members of the Board. This is apparent from the record from which I quote at length.

"Counsel for the Crown: The question was raised before adjourning this morning as to the admission of the Drayton-

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Acworth report. I suppose my friends are ready to take a stand on that.

"Mr. Lafleur: Of course, this report is not strictly evidence except that a certain recommendation was made by a Government Commission. At the same time I do not know that we have any serious reason for objecting to it, provided it is understood that the statements which are there made as to the company's financial standing, or as to the deferred maintenance is not binding and we are not to be considered as admitting those statements at all because we consider that that question must be decided by the evidence which has been adduced before you.

"The Chairman. No question about that.

"Mr. Lafleur: And we wish to be at liberty to criticise those finding if they are urged against us, and to show that those Commissioners erred in their statement of the company's liabilities, and in the statement as to the deferred maintenance, because they made no distinction between deferred maintenance and deferred improvements.

Subject to these observations, we are not strenuously opposing the introduction of this as a sort of historical document. It is a public report.

"The Chairman: There is a portion of that report, Mr. Lafleur, that struck me as not admissible. It is the evidence that is quoted of Mr. Chamberlin and said to be corroborated by Mr. Kelley. I may be wrong about it, but I would have thought that was not admissible.

"Mr. Lafleur: No, because we had no opportunity of cross-examining these gentlemen, it was an ex parte examination.

"The Chairman: It could have been used while Mr. Kelley was in the box by confronting him with the evidence he gave then. The question of Mr. Chamberlin's evidence raises another point.

"Mr Lafleur: We are prepared to show that Mr. Chamberlin, in his answers there, was not familiar with the situation, and that he made no distinction between deferred maintenance and deferred improvements which are chargeable, respectively, to income, revenue and capital.

"Hon. Mr. Taft: I understood that Mr. Kelley's statement had already gone in as evidence.

"Counsel for the Crown: His statement went in yesterday.

"Hon. Mr. Taft: As an admission by the company. That is what I supposed it did.

"The Chairman: I didn't understand that. I don't remember it, and more than that his evidence is not stated in this report.

"Hon. Mr. Taft: Mr. Butler introduced the evidence, and there was no objection to it. At least I didn't hear any.

"Hon. Mr. Atwater: Just at the last moment last night Mr. Butler introduced Ex. 444 which he stated to be the letters written by Mr. Kelley to Sir Henry Drayton in connection with his examination that he was making. We did not have an opportunity to object to the production of them at the time, and Mr. Butler, when he produced them said he was just giving notice that he was going to produce the letters.

"The Chairman: It is a statement made by Mr. Kelley, corroborating Mr. Chamberlin.

"Mr. Lafleur: In which he furnished Sir Henry Drayton with certain statements. Now, it seems to me, if my learned friends intend to rely upon that, they ought to examine Mr. Kelley as to that, because there are explanations which must be given in order to make them conform with the evidence actually before you.

"The Chairman: That is a different question from what we are discussing. That is a letter from Mr. Kelley regarding information asked for by Sir Henry Drayton. The point we are discussing now is whether the evidence stated to be given by Mr. Kelley before the Commission is admissible.

"Mr. Lafleur: It is annexed as an appendix to the report and, of course, I would respectfully submit that you should not consider that at all.

"The Chairman: As I recollect it, there is no evidence which is appended to the report as having been given by Mr. Kelley. There is only the statement made by Sir Henry Drayton that Mr. Kelley was sworn and corroborated.

"Mr. Lafleur: I am saying that you should give no consideration either to the evidence of Mr. Chamberlin in that report or to the alleged corroboration by Mr. Kelley, because you have the evidence in this case upon this question.

"The Chairman: They ought to be confronted with the evidence.

"Mr. Lafleur: If that report simply goes in as a sort of historical record that the recommendation was made to the

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Government to deal with the railways in a certain way, we have no objection, but if it is intended to refer to that evidence, or to that admission, or to the findings, as binding upon us, or as evidence before you to assist you in coming to your award then we object.

"The Chairman: Of course, they were seeking to get $25,000,000 at that time, and it was up to them to give certain evidence that does not exist to-day.

"Sir Thomas White: It seems to me that what Mr. Lafleur says is sound. Evidence taken in the inquiry by the Drayton-Acworth Commission would not be evidence here. If Mr. Kelley was in the box I suppose it would be quite proper for counsel for the Crown to confront him with any statement that he made while the Drayton-Acworth inquiry was in progress, or as to Mr. Chamberlin's evidence I suppose he could be called. That is what I would think.

"Mr. Lafleur: Subject to those observations, If you wish to have this report in as a sort of public document we have no serious objection, but if that deposition, and these statements of the finances are to be relied on as evidence in this case then we say it is illegal and should not be admitted.

"Hon. Mr. Taft: I do not think myself that the report is evidence.

Counsel for the Crown: I am not tendering it in that light, but merely showing the report to be evidence of the facts stated. I am tendering it as one of the documents that has become public since the negotiations commenced about the Grand Trunk's difficulties with respect to the G.T.P. and about the Government taking it over, and I put it forward because, in the report itself, there are certain recommendations made as to the treatment to be accorded to the Grand Trunk which it may be material for me to refer to when it comes to a summation of the case at the end, because my friends may rely on stock exchange quotations, and such like, and all these things would have a bearing, particularly under clause 20 of the agreement.

"The Chairman: Mr. Lafleur and you could agree.

Counsel for the Crown: I think we substantially agree. The evidence of Mr. Kelly, putting it in that way, possibly is not evidence of the fact, but it is evidence to this extent, that a Commission was appointed to investigate matters, that they made certain requests to the Government, heard them and reached certain conclusions as to what they had

to say with regard to their properties, and so on, but it hasn't any great bearing on the question of value.

"The letter Mr. Kelley wrote, however, is in a different category, because there he was answering specific questions and that we feel is in to stay."

But even if Mr. Chamberlin's statements are to be taken as evidence, in the nature of admissions against the shareholders, they should be given no weight to establish bankruptcy of the company then or later. The counsel for the Government have satisfactorily shewn that the statements of Mr. Chamberlin were only a part of the plan to show the Grand Trunk to be in worse condition than it was, of which the understatement of revenues to the extent of eight millions was another part, all with a view of threatening bankruptcy in the hope of inducing the Government to relieve the Grand Trunk of the burden of the G.T.P. It is not just to visit responsibility for such evidence upon innocent stockholders and thereby establish against them a probable bankruptcy which their directors really did not credit and were adopting most questionable methods for an ulterior purpose, to prove. These statements of Mr. Chamberlin were made in the year 1917 immediately after the most profitable year in the history of the Grand Trunk when its surplus, after paying all its fixed charges, was $11,319,341, a sum large enough to pay the full guarantees on the G.T.P. debentures, a dividend on the 4 per cent. guaranteed stock, the dividends on the three preference stocks and leave a surplus of more than two million for extra maintenance. Instead of being in bankruptcy or near it at that time the G.T.R. was more prosperous than ever in its history, but the directors were trying to conceal it. This shews how unfair it is in this proceeding to base our judgment on what Mr. Chamberlin said in 1917.

We come to the past earnings and the probable future net earnings as the only evidence of value of this stock.

This subject requires a reference to the accounts of the G.T.R. Co. of Canada. It appears without dispute that from 1912 until 1920, the London management exercised a discretion to understate operating revenues and to understate operating expenses of the railway different from that which a true transcript of the books would have disclosed. In doing this they made use of a so-called audit office account which they charged and credited with sums to accomplish their purpose. They directed these charges

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and credits by cable messages to Mr. Chamberlin and the officer in charge of accounts. Counsel for the Government ascribe variable motives to the London management for this treatment of the accounts and they are borne out by the circumstances. In 1913 the operating revenues were improperly increased apparently in order to justify the declaration of a dividend on the three series of preferred stocks, a full dividend on the first and second, and half on the third. Then came a period in which the London management was anxious to induce the Canadian Government to take the burden of the G.T.P. off its back, on the ground that obligation to run and finance the Pacific road might lead to the bankruptcy of the Grand Trunk. That led the London management to understate their operating revenues and charge the Audit Office Fund during the years 1915, 1916, and 1917 with an aggregate of nearly $8,000,000 that should have appeared as additional revenue.

In 1919 and 1920, when the sale of the road to the Government was being faced as the best course, manipulation of the accounts was directed to making the financial condition of the road seem better than it was. This dealing with accounts by the London management admits of no defence, but it cannot be permitted to prejudice the interests of the shareholders in this case. The London management in these misleading statements was attempting to induce action on the part of the Government, on the one hand, and to avoid complaint on the part of the shareholders, on the other. The local officers, except the President and those immediately charged with the matter of accounts, were not privy to this action. This is not a proceeding to penalise managers or directors of a company for false statements. We must refer to it, however, in order to understand the necessity of restating the accounts and to reach the truth as to the real earnings of the G.T.R. Co. of Canada during the ten years from 1910 to 1920.

The Chairman of the Board has referred to a statement by Mr. McLaren, the auditor, in respect to the accounts as published in 1919, in which year there was a deficit, according to the corrected accounts, of $6,488,918.75, whereas the result as published was $5,556.53. It should be added that this discrepancy arose from the fact that there was taken from the office audit account the amounts which had been withheld from operating revenues in 1916 and 1917, to the extent of more than $7,000,000, and put,

with the exception of about $150,000, into maintenance of way and maintenance of equipment, and used it in the betterment of the road in 1919, but in the published account for 1919 was not shewn. In other words, the fund created by the understatement of operating revenues in 1915, 1916 and 1917 was used as a reserve account for renewals and repairs of the road in 1919, but the published accounts showed neither the formation of the reserve nor its expenditure.

Another feature of the accounts which is misleading and which became quite material after 1916, was entering to the credit of the company, as if paid, interest which was not paid on advances made to the G.T.P. and to other subsidiary companies, on advances made for the purchase of land for use in the future which was wholly unremunerative. In some cases it represented a reasonable expectation of future payment, but in other cases it was an obligation, notably in the case of the G.T.P. Co. and in the case of the G.T.P. Branch Lines Co., entirely worthless, upon which nothing could ever be realised. The books have been revised by Mr. McLaren to eliminate the two features referred to of the audit office account, and the other overstatements and understatements, and the crediting of unpaid interest. This unpaid interest does not enter into the net operating income, but into the final surplus applicable to fixed charges and dividends.

I have attempted, in what I have had to say in this case to deal only with the accounts as revised by Mr. McLaren, the auditor, and they are, as I understand, undisputed.

From the revised accounts it appears that in the year 1910, the percentage of the operating surplus of the G.T.R. Co. of Canada, after taxes, uncollectable railway revenues, hire of equipment, joint facility rents, etc., were paid, was 26 per cent. of the total operating expenses. I append, in tabular form, the shewing as to 1910 and the following years:

In 1910	26	per cent.
" 1911	25	"
" 1912	23	"
" 1913	19.6	"
" 1914	23.35	"
" 1915	32	"
" 1916	32.88	"
" 1917	18	"

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In 1918	8.4 per cent.
" 1919	3.16 "
" 1920	3.91 "

This table shows an average for the seven years before 1917, when the United States came into the war, of 25.97 per cent. and justifies the claim of counsel that 25 per cent. is a normal percentage of the net operating income of the G.T.R.. It is in accord with the normal percentage for many of the first-class railways of the country. Indeed it is in a percentage which has been recognised by the Railway Commission of Canada and other public bodies engaged in fixing rates, as a reasonable one. The reduction in the net operating income since 1918 is due to the enormous increase in the operating expenses, which have grown far more rapidly than the operating expenses, though they have increased, due both to growth of traffic and higher rates. The labour costs increased 100% or more, and material in some respects quite as much. This feature was more marked after the armistice than during the war, so that under the award of railway boards, huge sums were imposed upon railways as back pay to their employees, and sometimes before any attempted compensating increase of rates had been allowed to go into effect. These were the features of the year 1920 which was so disastrous in railway circles. Railways which had up to that time always earned a normal surplus were put in the category of those not earning even their operating expenses. This is now changing. The tendency of all wages is now downward. The Railway Board of the United States ordered a decrease in the wages of the skilled railway employes of 12% and more, effective July 1 last, and the percentage in reduction of common labour has been far in excess of this, with large numbers of unemployed. So, too, has the price of all material that enters into the operation of railways been much reduced, notably the price of coal. The returns of the American railways for the months of June and July, after the order reducing wages went into effect, indicate that the turn is at hand. How rapid the return to the normal will be is of course a matter of judgment, but the changes in the returns as the official reports for June and July, are so marked as to indicate that it will be only for two or three years before the normal ratio between operating expenses and operating revenues will be restored. This grows chiefly out of the reduction in operating expenses

The operating revenues shew a decline, but the difference between the operating revenues and the operating expenses is broadening towards a wholesome net operating surplus for the railways.

Having thus determined from the past what is the normal operating ratio of revenues to net operating surplus, we come now to consider what we may normally expect to be the sum of the operating revenues of the G.T.R. Co. of Canada. These revenues increased from $36,133,125 in 1910, to $81,442,647 in 1920. The ton miles for freight traffic increased from 3,143,687,000 to 5,028,650,000, or at the rate for the ten years of 60% or 6% a year. The passenger traffic in 1911 was 545,335,000 miles, and in 1920, 529,810,000 passenger miles, showing a decrease during the ten years of 2.6 per cent. In other words, the passenger traffice was about stationary, while the freight traffic increased 6%. The operating revenues for 1919 were nearly $70,000,000. The operating revenues for 1920 were $81,000,000. The operating revenues for the first four months of 1921—not a good year for business, and always the worst third of the year, because the movements for grain are in the latter part of the year—was, in round numbers, $23,500,000, from which we can properly calculate that the total revenues for 1921 are likely to reach at least $72,000,000. It is fairer to take this as the basis of our calculation than $81,000,000 in 1920, because the traffic that year was exceptional and the rates in 1920 were higher than the rates in 1921, which latter rates seem quite likely to continue. Beginning therefore with the basis of $72,000,000 of business, and allowing for an increase of 5 per cent. a year, at the end of 1926, five years hence, we should have a total of $90,000,000. Assuming that the normal operating ratio of 25% will be restored by that time, it would make the net operating surplus applicable to fixed charges, and other liabilities, and to the payment of dividends on capital stock, $22,500,000 for 1926.

We now turn to the fixed charges. The statement put in by the Government shews that the funded obligations of the G.T.R. Co. of Canada, including its own direct indebtedness, the funded obligations of its stock, controlled and leased lines, which it has paid in the past when the principal debtor failed to pay, amounts after excluding the G.T.P. guarantees, to $17,421,455.88. This includes interest on an issue of 25 millions of dollars in 1920, bearing 7%

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interest to take up obligations incurred in meeting the deficit. It also includes the 4% dividend on the guaranteed stock. The G.T.P. guarantee by the G.T.R. of Canada should be stated in two amounts. The first is its absolute guaranty of $2,291,660. Its conditional guaranty is $1,395,000. To this should be added the cost of refunding 4, 5 and 6 per cent. bonds which fall due in 1922, amounting to $297,200. The Grand Trunk and the subsidiary lines after the disastrous years of 1920, 1919, and 1918, as is shown by the unpaid vouchers needed some $18,000,000, $14,000,000 for the Grand Trunk and $4,000,000 for the United States lines for an operating cash or working fund upon which interest due for the year 1921, amounts to $858,031 for the Grand Trunk lines and $254,122 for the other lines. Another item which Mr. Brown, the government accountant, inserted in his statement, and which appears in the budget, was for something over $5,000,000 as bank draft drawing interest. I eliminate that for the reason that as between the G.T.R. and the Government, the Government owes to the Grand Trunk something over $5,000,000, being a sum which it received as the proceeds of the Grand Trunk twenty-five million, 1920, loan, by reason of a profit on exchange which it made in paying off obligations of the Grand Trunk in London. This, therefore, I state in tabular form below, making a total of $22,467,468.88:—

Funded obligations of the G.T.R. Co. of Canada, including its own direct indebtedness, the funded obligations of its stock controlled, and leased lines which it has paid in the past when the primary debtor failed to pay, excepting the G.T.P., and including the 4 per cent. guaranteed stock		$17,421,455.88
G.T.P. absolute guaranty		2,291,660.00
G.T.P. conditional guaranty		1,395,000.00
Refunding 4, 5 and 6 per cent bonds which fall due in 1922		297,200.00
The deficit of the Grand Trunk and the subsidiary lines during the disastrous years of 1920, 1919 and 1918, amounting to $18,000,000, upon which interest will be due in 1921, amounts to $858,031 for the Grand Trunk lines, and $254,122 for the other lines, or a total of		1,112,153.00
Total		$22,467,468.88
From this should be deducted the non-operating income which appears upon Mr. McLaren's Exhibit to be for the year 1920	$3,122,505.00	

From that, however, should be deducted for interest credited to the Grand Trunk, which was not paid	1,179,821.00	
Leaving a balance for non-operating income even in that bad year of	$1,942,648.00	
In the same year Mr. McLaren credits the Grand Trunk for surplus income of subsidiary companies even in that year	449,532.00	
		2,392,216.00
This leaves as the fixed charges to be provided for ..		$20,075,252.00
Deducting this from the net estimated operating income in 1926, amounting to $23,400,000, it leaves		3,324,748.00

which is enough to pay the $2,424,748 or within $150,000 of the limit fixed under the contract beyond which this Award cannot go.

I have been dealing only with the unit of the G.T.R. of Canada, and not with the lines going to make up the Grand Trunk System. They have had deficits which have been taken care of by the Grand Trunk in the past and in the statement of fixed charges given above. This is true also of the Vermont Central which is not in the System, but whose bonded indebtedness is included in the statement of funded obligations of the Grand Trunk stated above. Now these parts of the Grand Trunk System and the Vermont Central are bound to share in the improvement growing out of a return to a more normal relation of operating revenues to operating net income. They have in the past generally paid their fixed charges, some of them have paid dividends, and there is no reason why they may not in a reasonably short time come to do so again. When they do meet their fixed charges, they will relieve the Grand Trunk of an annual payment of $1,312,649, as follows:—

Portland Elevator Co.	$ 11,075
Grand Trunk Western Railway ..	655,024
Milwaukee Ferry Co.	1,890
Central Vermont Railway	507,635
Rail and River Coal Co.	97,025
Montreal Warehousing Co.	40,000
	$1,312,649

This will give leeway for making of capital expenditures in improving the railroad system without excluding these Grand Trunk shareholders from participating in the benefit of better times.

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In addition to this, the subsidiary companies belonging to the Grand Trunk, whose undistributed surpluses are credited above, may well in a period of good times increase both their dividends which would increase the non-operating income as well as their undistributed surpluses.

In stating this conclusion, I am met by the inquiry, "Assuming your estimates to be correct, what are you to do in the meantime, and how are the probable deficits to be prevented from piling up in such a way as to create permanent fixed liabilities absorbing this net operating income which you assume for the year 1926?" It should be noted in the first place that from the total fixed charges stated in tabular form in the foregoing amounting to $22,467,468.00, reduced by the non-operating income and by the surplus income of subsidiary lines to $20,075,252, there is included conditional obligations that do not arise until there are not earnings over fixed charges. They are not cumulative, and the failure to pay them would not constitute a deficit increasing the funded or unfunded indebtedness.

These are the amounts due on the guaranteed stock $2,433,333.33
and the conditional guaranty of the G.T.P. of 1,395,000.00

Deducting this from the fixed charges of $20,075,252 leaves $16,246,918.67, as the fixed charges to be met during the interval before the net earnings are enough to pay anything on the guaranteed stock or the smaller conditional G.T.P. guaranty. Twenty per cent. net operating income on 81 millions would meet all the absolute fixed charges and this result we may anticipate within two or three years. Assuming that after the proper maintenance for the year 1922 there may be a deficit, and that deficits continue so to make an addition to the permanent liabilities of $10,000,000, this would add $700,000 to the fixed charges which could be met as above and still leave the limit for the stockholders in 1926. The recent experiences of some American railways, as already indicated, show that this normal ratio may not be postponed for six years, but may come in considerably less time than that, and that the current deficits will have disappeared long before 1926, so that the surplus will begin to afford a part payment on capital stock.

What might have happened to this road had the Government not taken it over and adopted the policy it has of very large investment for capital betterment and extraordinary maintenance, is of course a matter of judgment for the arbitrators. Five years is not a long time in which to calculate ahead. Such calculations must be made in determining the potential values of property subject to such change as this is.

The stock upon which dividends may not be paid for five years is not as valuable as that upon which they are paid at once and this may properly reduce the amount immediately to be awarded below the value of the stock in 1926, as above stated. As I am in the minority, however, and my conclusion is not to be embodied in an award, I need not discuss how much reduction should be made for this postponement, though it ought certainly not to be more than twenty-five per cent. This would make my appraisement of all the stock, the value of which is here in issue, not less than forty-eight million dollars.

For the reasons given I must dissent from my brethren.

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