Dominion Law Reports

CITED "D.L.R."

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

For Alphabetically Arranged Table of Annotations to be found in Vols. I-XXVII D.L.R., See Pages vii-xvi.

VOL. 27

EDITED BY

C. E. T. FITZGERALD

C. B. LABATT *and*

I. FREEMAN

CONSULTING EDITORS

E. DOUGLAS ARMOUR, K.C.

A. B. MORINE, K.C.

TORONTO:

CANADA LAW BOOK CO., LIMITED

84 BAY STREET

1916

CASES REPORTED

IN THIS VOLUME.

TABLE OF ANNOTATIONS

(Alphabetically Arranged)

APPEARING IN VOLS. I TO 27 INCLUSIVE.

DOMINION LAW REPORTS

COOK v. DEEKS.

IMP.
P. C.

Judicial Committee of the Privy Council, The Lord Chancellor, Viscount Haldane, Lord Parker of Waddington, and Lord Sumner. February 23, 1916.

1. CORPORATIONS AND COMPANIES (§ IV G 4—125)—FIDUCIARY RELATIONSHIP OF DIRECTORS—DIVERTING INTEREST IN RAILWAY CONTRACT BY MAJORITY VOTE—ACCOUNTING FOR PROFITS TO MINORITY.

The majority directors of a corporation formed with an object of undertaking railway contracts, who are entrusted with the conduct of affairs of the company, cannot consistently, before dissolution, deliberately exclude, by using their influence and position, the interest of the corporation in a railway contract they procured, in favour of a company separately formed by them with a similar object, and owe a duty of accounting to the minority in respect of the profits realized from such contract.

[*North-Western Transportation Co.* v. *Beatty*, 12 App. Cas. 589; *Burland* v. *Earle*, [1902] A.C. 83, distinguished; *Cook* v. *Deeks*, 21 D.L.R. 497, 33 O.L.R. 209, reversed.]

2. CORPORATIONS AND COMPANIES (§ V G 2—290)—DEALINGS BY DIRECTORS —VOTING POWER—RIGHTS OF MINORITY.

Apart from the principle of *ultra vires*, directors holding a majority of votes cannot make a gift to themselves of the property belonging to the corporation, and if directors have acquired for themselves property or rights which they must be regarded as holding on behalf of the company, a resolution that the rights of the company should be disregarded in the matter amounts to a forfeiture of the interest and property of the minority of shareholders in favour of the majority, by the votes of those who are interested in securing the property for themselves; such use of the voting power is not sanctioned by the Courts.

[*Menier* v. *Hooper's Telegraph Co.*, 9 Ch. App. 350, followed.]

Statement

APPEAL from the judgment of the Supreme Court of Ontario (Appellate Division), 21 D. L. R. 497, 33 O. L. R. 209. Reversed.

The judgment of the Board was delivered by the

Lord Chancellor

LORD CHANCELLOR:—The appellant in this case is the plaintiff in a suit brought against the respondents, under circumstances to which full reference is necessary; his rights depend entirely upon the fact that he is, and has, throughout the whole history of these proceedings, been a shareholder in the Toronto Construction Co., Limited, one of the defendants in the suit. Between himself and the defendants G. S. Deeks, G. M. Deeks, and T. R. Hinds, there have been at sundry times various business arrangements and relationships outside their association in the Toronto Construction Co.; but, except for the purpose of explaining what may have caused the conduct to which these proceedings are due, it is unnecessary to refer at length to these relationships.

IMP.
P. C.
COOK
v.
DEEKS.
Lord Chancellor

The respondent, the Toronto Construction Co., was formed some time in 1905; the date of its incorporation is nowhere exactly stated, nor is it material. It appears that at the date of its incorporation all the parties were in business in various parts of the Dominion of Canada and the United States of America as contractors. The two defendants—G. S. Deeks and G. M. Deeks—were in partnership, and had just completed for the Canadian Pacific R. Co., a subway under the track of the C. P. R. at Winnipeg. In 1905 the C. P. R. were asking for tenders for the construction of a line from Bolton to Parry Sound, known as the Toronto-Sudbury Line, and the tenders of G. S. Deeks made, as it would appear, on behalf of the firm of Deeks & Deeks, were accepted by the company. Before tendering, arrangements had been made by Messrs. Deeks with a firm of Winters, Parsons, & Boomer that they should take an interest in the contract to the extent of one-half if G. S. Deeks were successful in obtaining it. Mr. Winters, however, had assumed certain obligations which rendered him unwilling to accept his full share of responsibility and the plaintiff and the defendant, Hinds, were accordingly introduced by him to Mr. Deeks, in order to supplement his obligation, with the result that all the parties agreed to share in the contract in the following proportions: G. S. Deeks and G. M. Deeks to take three-eighths; the plaintiff and the defendant Hinds to take three-eighths; and Winters, Parsons and Boomer one-quarter. In order to place these relationships upon a fixed foundation, and the better to define their interests, the Toronto Construction Co. was formed, and its share capital distributed in the proportions mentioned, the company taking over and carrying out the work under the contract.

In 1906 Messrs. Winter and Boomer withdrew from the company, and the stock that they held was divided equally among the remaining parties, so that the plaintiff and each of the three defendants—George S. Deeks, George M. Deeks, and T. R. Hinds—held one-fourth of the entire capital of the company, with the exception of four shares held by Mrs. Deeks (the wife of George S. Deeks), whose introduction as a shareholder was necessary in order to provide the total number of five. These interests have remained unchanged down to the present time.

The board of directors was comprised of Messrs. Deeks, Hinds and the plaintiff, and, in addition, George S. Deeks was appointed

IMP.
P. C.
COOK
v.
DEEKS.
Lord Chancellor

president of the company, the plaintiff was general manager, and Hinds was secretary and treasurer, though their Lordships do not think that the description of these offices affords an accurate description of the duties assumed and discharged by the various parties. The company appears to have carried out the work of laying the Toronto-Sudbury Line to the entire satisfaction of the C. P. R., and they continued to tender, and were fortunate in obtaining a considerable number of other contracts of great value from the Canadian Pacific Railway. Apart, however, from this work, they undertook no other contracts. As has been already stated, during part of the time of the operations of the company, the plaintiff and the three defendants were associated together in various other enterprises of a similar nature in Montana and in the west, but no contracts were taken in the east excepting by the Toronto Construction Co.

In 1907 disagreement appears to have arisen between the parties, and the different firms, which had been constructed between them, and were all partnerships at will, were dissolved, and the parties refused to enter into any further voluntary arrangements between themselves.

Subsequently, in 1909 the C. P. R. Co. invited tenders for an important contract, known as Seaboard Number 2, a contract which involved the continuation of a line which had been already laid by the Toronto Construction Co. This contract was tendered for by the company, in competition with others, in the usual way. Their tender did not appear to be the lowest. In consideration, however, of the company having previously constructed the line known as Seaboard Number 1, the company was given the contract at the lowest price. The date of that contract was May 14, 1910. Seaboard Number 3 was again taken up on behalf of the Toronto Construction Co. and apparently the negotiations for it were entirely conducted by Mr. Hinds, or at any rate by Mr. Hinds and Mr. Deeks; while finally a contract known as the Guelph Junction and Hamilton Branch was also taken on April 29, 1911, Mr. Leonard acting for the Canadian Pacific Railway, and either G. S. or G. M. Deeks acting on behalf of the company. As this contract was nearing completion, the defendant Hinds gave the manager of the Toronto Construction Co.—H. F. McLean—instructions to get the work through as quickly as possible, as other work was coming up. The statement upon this

IMP.

P. C.

COOK
v.
DEEKS.

Lord Chancellor

matter is important, and it had better be given in the actual words, taken from the evidence of Mr. McLean:—

Q. Was the work on the Seaboard line handled in any respect in any exceptional way, was there anything out of the ordinary in the way that work was handled? A. What is that? Q. Was there anything out of the ordinary in the way the work on the Seaboard line No. 2 and 3 was handled? A. I do not know that it was. Q. Was it proceeded with at the ordinary rate of expedition? A. No, I think we made better progress on that line than I had on the other line. Q. What was the reason for that progress? A. We hurried the work through. Q. You hurried the work through? A. Yes. Q. Why did you do that? A. Why did we do it. Q. Why did you personally? A. I always rush our work as fast as we possibly can. Q. Did you get any instructions as regards the Seaboard line, any special instructions? A. Yes, I had special instructions regarding the line. Q. Who did you receive these from? A. I think it was from Mr. Hinds. I am quite sure it was Mr. Hinds and I do not remember any conversation with Mr. Deeks over it. Q. Tell me what Mr. Hinds said about rushing the Seaboard? A. He said there was other work coming up. The company was going to do it, if we rushed this through and got it through that fall, our opportunity would be better to get this other work. Q. Did he say what other work? A. Yes, he referred to a contract the C.P.R. was proposing to run on the South Shore—I do not know what the name of the contract was. It is the line they were proposing to run on the South Shore—— Q. The South Shore of what? A. I think they called it the South Shore line. It was down near Lake Ontario somewhere. Q. We have referred in these proceedings continually to a South Shore line—I think the line is sometimes referred to as the Campbellford, Lake Erie & Western—is that the one? A. That is the one I have referred to. Q. There are a great many south shores, and I wanted to make sure. And it was on these instructions of Mr. Hinds you acted in reference to the work? A. I acted on these instructions. Q. And did you keep the work up later in the fall? A. Yes, we tried our best to finish it, so we worked away until December. Q. For the same reasons? A. Yes, on some of it, and some of it we worked in the winter. Q. Was that unusual? A. Not for the class of work we were doing there—it would be unusual for the class of work—ballasting and track-laying in December.

The South Shore contract is the one which has given rise to the present dispute, and it is of the utmost importance to follow closely the circumstances under which it was obtained. The representative of the C. P. R. Co. was a Mr. Leonard, and it was he who arranged some, though it is impossible to say how many, of the contracts effected with the Toronto Construction Co. on behalf of the railway company. His negotiations were always carried out either with Mr. Deeks or with Mr. Hinds. He never discussed any details with any other person, and he never saw the plaintiff in the office, though he sometimes saw him on the line.

The management of Messrs. Deeks and Hinds of the affairs

of the construction company was eminently satisfactory; but so far as railway construction was concerned, the whole of their reputation for the efficient conduct of their business had been gained by them while acting as directors of the Toronto Construction Co.

In 1911, and probably at an earlier date, the three defendants had settled that they would no longer continue business relationships with the plaintiff. It is unnecessary to seek the cause of the quarrel, or to determine whether they had good reason for the opinion that they had formed. There was nothing to compel them to work with or for the plaintiff, and it is impossible to see that they were bound to continue their relationship with him by any legal or moral consideration. They were, however, involved with him in different reciprocal duties, by reason of their relationship in connection with the Toronto Construction Co. and if they desired freedom to act, without regard to the restrictions that those relationships imposed, it was necessary that they should terminate their position as directors and shareholders in the company, and place it in dissolution. This they could easily have accomplished owing to the fact that they held three-fourths of the share capital. It is suggested that they might also have resolved at a general meeting of the company that the company should no longer continue the work. This would have been all but equivalent to a resolution of voluntary liquidation; but even this step was not taken. While still retaining their position as directors, while still actually acting as managers of the company, and with their duties to the company of which the plaintiff was a shareholder entirely unchanged, they proceeded to negotiate with Mr. Leonard for the new Shore Line contract, in reality on their own behalf, but in exactly the same manner as they had always acted for the company, and doubtless with their claims enforced by the expeditious manner in which they, while acting for the company, had caused the last contract to be carried through.

The negotiations for this contract were opened by a telephone message sent through to Mr. Hinds at the Toronto Construction Co.'s office. Upon receipt of that message certain units of price were prepared in the company's office; and, the prices being ultimately fixed, the defendant Hinds was informed by Mr. Leonard that, although the prices had been agreed to, the contract

IMP.
P. C.
COOK
v.
DEEKS.
Lord Chancellor

would not be then immediately let, as it was necessary that there should be an appropriation of the necessary cash made to authorise the contract by the C. P. R. Co.

During the whole of this discussion, up till the time when these prices were fixed, it does not appear that at any moment the representatives of the C. P. R. Co. were told that this contract was in any way different from the others that had been negotiated in the same manner on behalf of the Toronto Construction Co.; although it was plain that Mr. Leonard had been told by Mr. Deeks, when he was engaged on the Georgian Bay and Seaboard line, that when it was finished Messrs. Deeks and Hinds intended to go on their own account and leave Mr. Cook. But, after all the necessary preliminaries of the contract had been concluded, Mr. Hinds made to Mr. Leonard this statement: "Remember, if we get this contract it is to be Deeks and I, and not the Toronto Construction Co."

On March 12, 1912, the C. P. R. Co. made the necessary appropriation for the contract, and this was communicated to Mr. Deeks by Mr. Ramsay, who said that they might proceed with the contract at once. As from this moment, although the formal contract was not signed until April 1, the defendants became certain of their position, and knew that they had obtained the contract for themselves. They then for the first time informed the plaintiff of what had happened. He protested without result, and the defendant—the Dominion Construction Co.—was formed by the three defendants, G. S. Deeks, G. M. Deeks, and T. R. Hinds, to carry out the work. The contract was accordingly taken over by this company, by whom the work was carried out and the profits made.

On March 20, 1912, there was a meeting of directors of the Toronto Construction Co., at which the three defendants were present; and they resolved that a fresh meeting of the shareholders be held to consider the question of the voluntary liquidation of the company.

Ultimately, after sundry meetings which are really not material, on April 26, 1913, resolutions were passed owing to the voting power of the defendants, G. S. Deeks, G. M. Deeks, and T. R. Hinds, approving the sale of part of the plant of the company to the Dominion Construction Co. and a declaration was made that

the company had no interest in the Shore Line contract, and that the directors were authorised to defend this action, which had in the meantime been instituted.

Two questions of law arise out of this long history of fact.

The first is whether, apart altogether from the subsequent resolutions, the company would have been at liberty to claim from the three defendants the benefit of the contract which they had obtained from the C. P. R. Co. And the second, which only arises if the first be answered in the affirmative, whether in such event the majority of the shareholders of the company constituted by the three defendants could ratify and approve of what was done, and thereby release all claim against the directors.

It is the latter question to which the Appellate Division of the Supreme Court of Ontario have given most consideration, but the former needs to be carefully examined in order to ascertain the circumstances upon which the latter question depends.

It cannot be properly answered by considering the abstract relationship of directors and companies; the real matter for determination is what, in the special circumstances of this case, was the relationship that existed between Messrs. Deeks and Hinds and the company that they controlled.

Now, it appears plain that the entire management of the company, so far as obtaining and executing contracts in the east was concerned, was in their hands, and, indeed, it was in part this fact which was one of the causes of their disagreement with the plaintiff. The way they used this position is perfectly plain. They accelerated the work on the expiring contract of the company in order to stand well with the C. P. R. when the next contract should be offered, and, although Mr. McLean was told that the acceleration was to enable the company to get the new contract, yet they never allowed the company to have any chances whatever of acquiring the benefit, and avoided letting their co-director have any knowledge of the matter. Their Lordships think that the statement of the trial Judge upon this point is well founded when he said that "it is hard to resist the inference that Mr. Hinds was careful to avoid anything which would waken Mr. Cook from his fancied security," and again, that "the sole and only object on the part of the defendants was to get rid of a business associate whom they deemed, and I think rightly

IMP.
P. C.
COOK
v.
DEEKS.
Lord Chancellor

deemed, unsatisfactory from a business standpoint." In other words, they intentionally concealed all circumstances relating to their negotiations until a point had been reached when the whole arrangement had been concluded in their own favour, and there was no longer any real chance that there could be any interference with their plans. This means that while entrusted with the conduct of the affairs of the company they deliberately designed to exclude, and used their influence and position to exclude, the company whose interest it was their first duty to protect.

It is quite impossible to enter into the speculations which form part of the examination of Mr. Leonard and Mr. Ramsey on behalf of the C. P. R. What might have happened if the railway company from the first considered Mr. Cook as a possible competitor, or considered the position of the Toronto Construction Co., apart from Messrs. Deeks and Hinds, is a matter too conjectural to be brought into consideration. Their Lordships think that the Appellate Division of the Supreme Court of Ontario may have been misled in the attempts that they made to see whether this particular duty of the defendants had been the subject of previous judicial decision. Their Lordships see no reason to differ from the opinion which the Appellate Division extracted from careful consideration of the authorities, except so far as they were led by these conclusions to regard the transaction as a question of policy and a matter that lay entirely within the directors' individual discretion. But this reservation is important, for throughout the whole of the judgments, both of the Judge who tried this case and of the Appellate Division, there is under-lying rather the question as to whether the transaction was not one which, by virtue of their preponderating influence in the company, the defendants would be able ultimately to put right, than the real question of whether it was one into which, consistently with their duty, they were at liberty to enter.

It is quite right to point out the importance of avoiding the establishment of rules as to directors' duties which would impose upon them burdens so heavy and responsibilities so great that men of good position would hesitate to accept the office. But, on the other hand, men who assume the complete control of a company's business must remember that they are not at liberty to sacrifice the interests which they are bound to protect, and, while ostensibly acting for the company, divert in their own favour

business which should properly belong to the company they represent.

Their Lordships think that, in the circumstances, the defendants, T. R. Hinds and G. S. and G. M. Deeks, were guilty of a distinct breach of duty in the course they took to secure the contract, and that they cannot retain the benefit of such contract for themselves, but must be regarded as holding it on behalf of the company.

There remains the more difficult consideration of whether this position can be made regular by resolutions of the company controlled by the votes of these three defendants. The Supreme Court have given this matter the most careful consideration, but their Lordships are unable to agree with the conclusion which they reached.

In their Lordships' opinion the Supreme Court has insufficiently recognised the distinction between two classes of case, and has applied the principles applicable to the case of a director selling to his company property which was in equity as well as at law his own, and which he could dispose of as he thought fit, to the case of a director dealing with property which, though his own at law, in equity belonged to his company. The cases of the *North-Western Transporation Co.* v. *Beatty* (1887), 12 App. Cas. 589, and *Burland* v. *Earle*, [1902] A. C. 83, both belonged to the former class. In each, directors had sold to the company property in which the company had no interest at law or in equity. If the company claimed any interest by reason of the transaction, it could only be by affirming the sale, in which case such sale, though initially voidable, would be validated by subsequent ratification. If the company refused to affirm the sale the transaction would be set aside, and the parties restored to their former position, the directors getting the property and the company receiving back the purchase price. There would be no middle course. The company could not insist on retaining the property while paying less than the price agreed. This would be for the Court to make a new contract between the parties. It would be quite another thing if the director had originally acquired the property which he sold to his company under circumstances which made it in equity the property of the company. The distinction to which their Lordships have drawn attention is expressly

IMP.
P. C.
COOK
v.
DEEKS.
Lord Chancellor

recognised by Lord Davey in *Burland* v. *Earle*, *supra*, and is the foundation of the judgment in *North-Western Transportation Co.* v. *Beatty*, *supra*, and is clearly explained in the case of *Jacobus Marler Estates, Ltd.* v. *Marler and another*, a case which has not hitherto appeared in any of the well-known reports. (*See* note at the end of this judgment.)

If, as their Lordships find on the facts, the contract in question was entered into under such circumstances that the directors could not retain the benefit of it for themselves, then it belonged in equity to the company, and ought to have been dealt with as an asset of the company. Even supposing it be not *ultra vires* of a company to make a present to its directors, it appears quite certain that directors holding a majority of votes would not be permitted to make a present to themselves. This would be to allow a majority to oppress the minority. To such circumstances the cases of *North-Western Transportation Co.* v. *Beatty* and *Burland* v. *Earle* have no application. In the same way, if directors have acquired for themselves property or rights which they must be regarded as holding on behalf of the company, a resolution that the rights of the company should be disregarded in the matter would amount to forfeiting the interest and property of the minority of shareholders in favour of the majority, and that by the votes of those who are interested in securing the property for themselves.

Such use of voting power has never been sanctioned by the Courts, and, indeed, was expressly disapproved in the case of *Menier* v. *Hooper's Telegraph Works*, 9 App. Cas. 350.

If their Lordships took the view that, in the circumstances of this case, the directors had exercised a discretion or decided on a matter of policy (the view which appears to have been entertained by the Supreme Court), different results would ensue, but this is not a conclusion which their Lordships are able to accept. It follows that the defendants must account to the Toronto company for the profits which they have made out of the transaction. Their Lordships will therefore humbly advise His Majesty that the judgments of Middleton, J., and of the Appellate Division be set aside, and that the case be referred back to the High Court Division of the Supreme Court of Ontario for the purpose of taking such account. There must not be included in such account any

claim in respect of the plant purchased from the Toronto company; their Lordships are satisfied by the evidence that this was bought at the fair market price. Their Lordships have throughout referred to the claim as one against the defendants, G. S. Deeks, G. M. Deeks, and T. R. Hinds. But it was not, and it could not be, disputed that the Dominion Construction Co. acquired the rights of these defendants with full knowledge of all the facts, and the account must be directed in form as an account in favour of the Toronto company against all the other defendants. The respondents must pay the costs of the appellant here and in the Courts below, and the costs of taking the account will be dealt with in the Supreme Court. Although the account is in favour of the Toronto Company, the plaintiff must have the conduct of the proceedings. *Appeal allowed.*

Note.—MARLER v. MARLER (House of Lords, 1914, unreported). **Note.**

PRINCIPAL AND AGENT (§ III—31)—FIDUCIARY RELATIONSHIP—PROFITS ACQUIRED WITHIN SCOPE OF AGENCY—ACCOUNTING—MEASURE OF DAMAGES.]—The following is the judgment of Lord Parker of Waddington, delivered in the House of Lords on April 14, 1913, in the unreported case of *Jacobus Marler Estates, Limited* v. *Marler and another*:—

My Lords, it is no doubt well settled that in equity an agent cannot, without the consent of his principal, given with full knowledge of the material facts and under circumstances which rebut any presumption of undue influence, retain any profit acquired by him in transactions within the scope of the agency. The principal can always in such a case treat the profit as acquired on his own behalf, and insist on its being accounted for to him. For the same reason an agent, whose duty it is to acquire property on behalf of his principal, cannot, without the like consent, acquire it on his own behalf and subsequently resell it to his principal at an enhanced price. In such a case the principal can treat the property as originally acquired for him and the resale as nugatory, and may, therefore, recover from the agent the money paid on such resale less the original price and the expenses incurred by the agent in acquiring the property. This, however, only applies where the relationship of principal and agent existed at the time when the agent acquired the property. If it did not then exist the property acquired was, at the outset, the agent's own property

IMP.

Note.

for all purposes, and the subsequent constitution of the relationship of principal and agent cannot deprive him of property already his own. *Re Cape Breton Co.*, 26 Ch.D., 221 and 29 Ch.D., 795; *Ladywell Mining Co.* v. *Brookes*, 35 Ch.D. 400; and *Burland* v. *Earle*, [1902] App. Cas. 83. There is another principle of equity which ought to be distinguished from, but is sometimes confused with, that to which I have already referred. Equity treats all transactions between an agent and his principal in matters in which it is the agent's duty to advise his principal, as voidable unless and until the principal, with full knowledge of the material facts and under circumstances which rebut any presumption of undue influence, ratify and confirm the same. In such cases the interest of the agent is in conflict with his duty, and there can be no real bargain at all. It must be remembered, however, that if the transaction be one of sale by the agent to the principal, the latter must, in order to avoid it, be able to restore the agent to his original position. If he has resold the property, or cannot restore it to the agent in its original condition, the right to avoid the transaction will, as a general rule, have been lost. But, even so, it does not follow that the principal is without remedy. He may be able to recover damages from the agent for negligence in the performance of his duties. Thus, if the agent's duty is to advise the principal as to the purchases of stocks or shares having a market value, and he sells to his principal stocks or shares of his own at prices in excess of their market value, he may be liable in damages for the excess of the prices received over the market value. It is a different matter if the property sold by the agent to the principal is a specific property having no market value, for the court will not fix a new price between the parties. In such a case the measure of damages will be the principal's loss in the whole transaction. If he has suffered no such loss there can be no damages.

The equities above referred to as governing the relationship between principal and agent apply also to other fiduciary relationships, and in particular to that which exists between a company promoter and the company which results from the promotion, and its shareholders.

The facts of this particular case are comparatively simple. Sidney Marler and Jack Jacobus acquired the leasehold property

IMP.

Note.

in question on March 14, 1904, as a joint adventure. On June 13, 1905, after many disputes, they came to an agreement as to the terms on which they would endeavour to dispose of it. These terms involved the promotion of a company, and the sale of the property to such company at an improved rental, and subject to an obligation to erect certain buildings and to sub-demise part of the property, with the buildings thereon, to Jack Jacobus, at a rent of £1,500 per annum. Sidney Marler, who was an estate agent, having already done a considerable amount of work on behalf of the joint adventures in trying to dispose of the property, it was further provided that he, or his firm, should receive from Jack Jacobus, as remuneration for such work, a commission of £1,000.

It is reasonably clear, and indeed was in effect admitted by counsel for the appellant company, that neither on March 14, 1904, nor on June 13, 1905, was either Sidney Marler or Jack Jacobus in any fiduciary relationship toward the appellant company, or any one whom the appellant company represents. It follows, therefore, that the appellant company can have no equity to treat the property itself or the £1,000 payable to Sidney Marler, or his firm, as property or profit acquired on its own behalf. It appears, however, that, after June 13, 1905, and pursuant to the terms agreed on that day, Messrs. Jacobus and Marler entered into the agreement of June 16, 1905, for the sale of the property to one Phillips, as trustee for the intended company, and that the appellant company was thereafter promoted and registered; Sidney Marler, Seymour Hicks (who was interested in the property through Sidney Marler), and Alfred Beyfus being the first directors. On June 29, 1905, at a directors' meeting, it was resolved that the agreement with Phillips should be adopted by the company, and that an agreement adopting the same and endorsed thereon should be sealed with the company's seal. Obviously this resolution was not passed by any independent board, and was not binding on the company, and the agreement sealed pursuant thereto was voidable at the option of the appellant company. But the appellant company does not desire to avoid this agreement, even if it be in a position to restore the property to the vendors. Its remedy, if any, must therefore be in damages against Sidney Marler or Seymour Hicks for negligently allowing it to purchase the property on the terms specified.

IMP.
Note.

Such damages cannot be measured by the £1,000 commission payable to Sidney Marler or his firm. They can only be measured by the loss resulting to the appellant company from the whole transaction. It is not even alleged, much less proved, that there has been any such resulting loss. The allegation is that, by reason of the negligence of Sidney Marler, the terms on which the appellant company acquired the property were not so beneficial as Sidney Marler might with reasonable care have obtained for the appellant company. In other words, the appellant company is asking the Court to fix a proper price between vendor and purchaser, and estimate the damage with reference to such price. This the Court cannot do. I concur, therefore, in the opinion that the appeal fails.

IMP.
P. C.

HOLDITCH v. CANADIAN NORTHERN ONTARIO R. CO.

Judicial Committee of the Privy Council, Viscount Haldane, Lord Parker of Waddington and Lord Sumner. February 7, 1916.

1. EMINENT DOMAIN (§ III E 1—165)—RAILWAYS—COMPENSATION FOR CONSEQUENTIAL INJURIES—SEVERANCE AND LOSS OF ACCESS—SUBDIVISION LANDS.

The basis of a claim to compensation for lands injuriously affected by severance must be that the lands taken are so connected with or related to the lands left that the owner of the latter is prejudiced in his ability to use or dispose of them to advantage by reason of the severance; but the owner of a registered subdivision, which has been parceled out and a number of lots transferred before the taking of some of the lots for railway purposes, cannot claim additional compensation for injurious affection to the remaining land by the severance thereof and loss of access thereto.

[*Cowper Essex* v. *Acton*, 14 App. Cas. 153, distinguished.]

2. EMINENT DOMAIN (§ III E 1—165)—RAILWAYS—COMPENSATION FOR CONSEQUENTIAL INJURIES—DEPRECIATION BY PROSPECTIVE OPERATION OF TRAINS.

Sec. 155 of the Railway Act, R.S.C. 1906, ch. 37, requiring a railway company to make full compensation to all persons interested for all damage by them sustained by reason of the exercise of the powers of expropriation, and secs. 191 and 193 distinguishing between compensation for land taken and damage suffered, do not change the well settled rule, that land so taken cannot by its mere use, as distinguished from construction of works upon it, give rise to a claim for compensation, and gives no right to claim additional compensation for depreciation in value by reason of the *prospective or future* annoyance from noise, smoke and vibration of passing trains.

3. RAILWAY BOARD (§ 1—2)—JURISDICTION—RIGHT OF WAY ACROSS SUBDIVISION LANDS—COMPENSATION TO ABUTTING OWNERS.

Under the Railway Act (R.S.C. 1906, ch. 37), it is from an order of the Railway Board that a railway company must get power to take their line along or across the streets laid out in a subdivision; and the awarding of compensation to adjacent or abutting landowners, or the direction of alterations of levels or other works, in order to prevent injury to them, rests with the Board.

[*Canadian North. Ont. R. Co.* v. *Holditch*, 20 D.L.R. 557, 50 Can. S.C.R. 265, affirmed.]

IMP.

P. C.

HOLDITCH v. C.N. ONT. R. CO.

Lord Sumner.

APPEAL from the judgment of the Supreme Court of Canada, 20 D.L.R. 557, 50 Can. S.C.R. 265. Affirmed.

The judgment of the Board was delivered by:—

LORD SUMNER:—The appellant owns a considerable area of building land near Sudbury, Ontario, part of which the respondent railway company desired to take for the purposes of their line. The property had been marked out in numbered lots, and the railway company's notice specified twenty of these lots by their numbers as the land to be taken. The sum offered was $3,300. It was unsatisfactory to Mr. Holditch, and this claim accordingly went to arbitration.

Although the notice served referred only to the twenty lots which were to be taken out and out, and contained no reference to any other lands or to the exercise of any other powers, the arbitration took a wide scope, and in the result the award dealt with three subjects: (*a*) lots taken; (*b*) severance and access; (*c*) vibration, noise, and smoke.

For the lots taken $5,315 were awarded, and upon this no question now arises. The award then found that forty-nine other lots were impaired in value by being severed from the appellant's other lands and being rendered more difficult of access, and found that they were injuriously affected to the extent of $4,800. No award, however, was made under this head, as the arbitrators thought that the law did not warrant any. Lastly, they declared that they could not, and did not, award anything for injurious affection by vibration from trains and by noise and smoke. Their Lordships take it that the arbitrators considered this head of claim inadmissible in law. In fact, there was some evidence that a few lots were actually depreciated in selling value by the likelihood of noise, vibration, and smoke in the future operation of the line, and the award does not seem to have been meant as a finding against the existence of such injury or depreciation.

An appeal was taken to the Appellate Division of the Supreme Court of Ontario, and that Court unanimously allowed the appeal as to $4,800, directing that Mr. Holditch should recover that sum, but referred the matter for the arbitrators to ascertain the damage caused or to be caused to forty lots (specified by their numbers), by the construction of the railway, with a declaration

IMP.

P. C.

HOLDITCH v. C.N. ONT. R. CO.

Lord Sumner.

that the appellant was entitled to recover all damages sustained by him to the said property by reason of the construction of the railway. The forty lots so dealt with were entirely different from the forty-nine lots in respect of which $4,800 were awarded. Reasons for this decision were not given in writing, and their Lordships have not the advantage of knowing the grounds upon which the Appellate Division allowed Mr. Holditch's appeal. Upon further appeal to the Supreme Court of Canada this decision was reversed and the original award was restored, but Anglin, J. and Duff, J., dissented, holding with the Appellate Division that the claimant was entitled to recover all damages sustained by him to the said property by reason of the construction of the said railway.

There may be several questions of procedure in this case, of which no doubt the most important is that of the alleged power to refer the case to the arbitrators after completion of their award. Their Lordships, however, are of opinion that it is not now necessary to determine or to discuss any of them, as the appeal may be decided upon the substantial questions of the claimant's rights in respect (*a*) of severance and access, and (*b*) of vibration, noise, and smoke injuriously affecting his property.

It is necessary to describe the property somewhat particularly. There was originally one large tract of land of very irregular contours, intersected by a winding creek and broken in places by an outcrop of rock. Some time ago the Manitoulin and North Shore Railway was constructed roughly following the direction of this creek, and only a little further off a portion of the C.P.R. approached and eventually joined the Manitoulin and North Shore Line. The respondents' railway was plotted to cut across the bend formed by the latter line and would also run in the neighbourhood of the creek. Independently of the respondents' line the land suffered some of the disadvantages of the proximity of railways.

The whole property had been surveyed and divided into building lots, and a plan showing the lay-out had been duly registered. The roads and streets had thus become public highways by force of the surveys and registry statutes applicable, but had not been made up. The total number of building lots was great, and many, if not all of them, had been staked out on

the ground. The streets were numerous; they all intersected at right angles and the several lots were nearly always of the same dimensions.

With one or two exceptions they were all rectangular parallelograms. All had access to a street, some to two streets. In the area in question there was no land not subdivided into lots of this kind, none consisting of fields or market-gardens or agricultural back-land. From time to time a great many lots had been sold by Mr. Holditch or his father, his predecessor in title, but they were scattered all over the property at haphazard. They had been bought for speculation. They had little individuality. They were chiefly distinguished by the numbers assigned to them and the name of the street on which they fronted. They were sold out and out. No restrictive covenants were taken. There was no building scheme, other than the lay-out shown on the registered plan, and this derived its fixity from the legislation affecting it, and not from any notice to the purchaser or any private obligation entered into by him. It is plain that, so far as in them lay, the proprietors of this building estate had parcelled it out in lots, made an end of its unity (other than bare unity of ownership), and elected once for all to treat this multitude of lots as a commodity to trade in.

The basis of a claim to compensation for lands injuriously affected by severance must be that the lands taken are so connected with or related to the lands left that the owner of the latter is prejudiced in his ability to use or dispose of them to advantage by reason of the severance. The bare fact that before the exercise of the compulsory power to take land he was the common owner of both parcels is insufficient, for in such a case taking some of his land does no more harm to the rest than would have been done if the land taken had belonged to his neighbour. Compensation for severance therefore turns ultimately on the circumstances of the case. The appellant contended that the present case was governed by the decision in *Cowper Essex* v. *Acton*, 14 App. Cas. 153, and it was so held in the minority judgments in the Supreme Court of Canada. Their Lordships are unable to agree in this view. In that case the building owner retained such control over the development and use alike of the parcels sold and of the parcels unsold as made a real and preju-

IMP.
P. C.
HOLDITCH
v.
C.N. ONT. R. CO.
Lord Sumner.

dicial difference between his ability to deal with what remained to him after the compulsory taking of land and his ability to deal as a whole with both it and the land taken before such compulsory taking. In the present case the appellant's relation to the property had been definitely fixed before any notice to take land was served at all. He had parcelled out the entirety of his estate and stereotyped the scheme, parted with numerous plots in all parts of it without retaining any hold over the use to be made of them, and converted what had been one large holding into a large number of small and separate holdings with no common connection except that he owned them all. There was one owner of many holdings, but there was not one holding, nor did his unity of ownership "conduce to the advantage or protection" of them all as one holding.

This being so, there is really but little left in the case. If the claim for severance fails it seems that, apart from the question of jurisdiction to send the award back to the arbitrators, the claim for loss of access must fall with it, for both are included in the one sum of $4,800 adjudged by the Appellate Division, and there are no materials on which separate compensation for loss of access can be assessed. Their Lordships, however, think that, the claim for severance failing, this further claim fails upon a broader ground.

Under the Dominion Railway Acts, which are the legislation applicable, it is from an order made by the Railway Board that the respondents must get power to take their line along or across the streets laid out by the appellant. Whether any order has as yet been obtained for this purpose does not appear, but the awarding of compensation to adjacent or abutting land-owners, or the direction of alterations of levels, or other works in order to prevent injury to them, rests with the Board. The case is a most ordinary one. The contours of the ground crossed are not particularly steep. The streets need be made up to a height of a few feet at most in order to enable the traffic to cross the line. There are but few lots for which any relief works or compensation at all could be required. Their Lordships think that the arbitrators were right in rejecting claims in respect of difficulty of access to the appellant's land by reason of the railway's future user of the streets.

IMP.

P. C.

HOLDITCH v. C.N. ONT. R. CO.

Lord Sumner.

The claim for depreciation by the prospective annoyance from noise, smoke, and vibration was put thus, sec. 155 of the Railway Act of Canada (R.S.C. 1906, ch. 37), requires the company to "make full compensation . . . to all persons interested for all damage by them sustained by reason of the exercise of" the powers granted to them by this or by their special Act, and secs. 191 and 193 use language which draws a distinction between compensation for land taken and for damage suffered from the exercise of any of the powers granted for the railway. It was argued that the interference with convenient access to some of the lots by reason of the line being taken across the streets and the annoyance to be expected from the noise, smoke, and vibration of passing trains alike constituted damage suffered from the exercise of the powers granted for the railway.

Their Lordships are unable to adopt this view. The substantive obligation upon the railway company to make compensation is derived from sec. 155, and the other two sections are only concerned with the procedure by which this obligation is to be enforced. The language of sec. 155 is taken, with modifications to which in this case no importance can be attached, from the proviso to sec. 16 of The Railways Clauses Consolidation Act, 1845, and it is well settled by decisions of the highest authority that land so taken "cannot by its mere use, as distinguished from the construction of works upon it, give rise to a claim for compensation." The decisions on this construction of The Railways Clauses Consolidation Act have been applied to the Canadian legislation many years ago.

As soon as it is decided that the lands taken and the lands, in respect of which the claims in question arise, are in fact separate and disjoined properties, so that these claims have no connection with the lands taken, it follows upon authority which cannot now be questioned that the arbitrators were right in holding that the claims in respect or noise, smoke, and vibration were beyond their jurisdiction. Their Lordships will accordingly humbly advise His Majesty that this appeal should be dismissed with costs. *Appeal dismissed.*

MAN.

C. A.

De VRIES v. C.P.R. CO.

Manitoba Court of Appeal, Richards, Perdue, Cameron, and Haggart, JJ.A. February 21, 1916.

1. RAILWAYS (§ III—45)—LIABILITY FOR ACCIDENTS AT CROSSINGS — CHARACTER OF CROSSING—TRESPASSERS.

The fact that a roadway used as a transmission line for the conveyance of employees, over which public travel has been forbiden, is extensively used by the public, does not necessarily constitute it a public highway so as to charge a railway company with the statutory duty to give warnings at highway crossings, and in the absence of evidence that the locomotive engineer had seen a vehicle approaching the crossing, the railway company cannot be held responsible for the collision of a train with a trespassing vehicle at such crossing.

[*Royle* v. *C.N.R. Co.*, 14 Man. L.R. 275; *G.T.R. Co.* v. *Anderson*, 28 Can. S.C.R. 541; *G.T.R. Co.* v. *Barnett*, [1911] A.C. 361, followed.]

Statement

APPEAL from a judgment of nonsuit in an action for injuries sustained while crossing a railway. Affirmed.

W. S. Morrissey, for appellant, plaintiff.

H. A. V. Green, for respondent, defendant.

Richards, J.A.

RICHARDS, J.A.:—At a place where there are two lines of rail, the defendant's right of way is crossed by the electric transmission line of the City of Winnipeg. There are roadways along that line for the city's workmen to travel on in their work in connection with such transmission line.

The crossing has gates, cattle guards, etc. These roadways are not a highway in any sense and the public have no right to travel on them. There are printed notices on them, placed by the city, warning people against trespassing. In spite of such notices many people did, prior to the accident now in question, use those roadways to cross the defendant's line of rail.

The plaintiff and his son drove in broad daylight on to the roadways for the purpose of crossing the right of way and lines of rail. There was a shorter way of going to their destination by using a public highway that crossed the right of way east of where the transmission line crossed it. But, because a part of it had become bare of snow, the plaintiff left that highway before reaching the right of way and drove to the transmission line.

The plaintiff and his son were in a sleigh on which there was an empty hay rack and which was drawn by the plaintiff's horses. There was open prairie on both sides of the crossing, so that the plaintiff and his son could, for a considerable distance either way see a train approaching. As they came to the crossing the horses were walking only. They noticed a train on their right coming

towards the crossing and watched it, but did not look to their left. A train came from their left and struck and killed the horses. The latter train did not slacken speed when approaching the crossing and did not sound bell or whistle.

The trial Judge nonsuited the plaintiff, holding, as I understand his judgment, that there was no evidence to go to the jury of negligence on the defendant's part. From that decision the plaintiff appeals.

As the crossing was not a highway, there was no statutory duty to sound bell or blow whistle. There was no evidence that the engine-driver saw the plaintiff's sleigh or horses approaching. Even if he had seen them, there was nothing to suggest that they were going to try to cross in front of the train. As the country was open, so that the plaintiff could see both ways, there would be no reason to suppose that he was ignorant of the train's approach, or to suggest to the engine-driver that he should slacken the speed of his engine.

I agree with the trial Judge that there was no evidence of negligence on the defendant's part. The argument that the defendants must be presumed, from the number of people crossing there daily, to have notice of such unlicensed crossings, and to therefore be liable as if it had been a highway crossing, or, at any rate, to take special care when passing, does not seem tenable. It was not a place where the fact of people so crossing was likely soon to come to the notice of the defendant's officials.

There is no suggestion that any official of the railway did in fact know of others than the city's employees passing over there. The railway could not close the crossing because the city's servants had the right to use it at any time. They probably also knew of the notices put up by the city forbidding the use of the transmission line by trespassers. It was in no different position from that of a farm crossing which was being used by someone not authorized to do so.

I would dismiss the appeal with costs.

Cameron, J.A.

CAMERON, J.A.:—This action is brought to recover damages sustained by the plaintiff, who, while driving a team of horses with a sleigh across the defendant's track at a crossing west of the Transcona yards, where the railway track crosses the City

MAN.
C. A.
DE VRIES
v.
C.P.R. Co.
Cameron, J.A.

of Winnipeg power transmission line, was run into by a locomotive. One of the horses was killed, the other so injured that it had to be destroyed and other damage was sustained. Negligence on the part of the engineer of defendant company is alleged in not stopping or slowing up the locomotive, in not ringing the bell or giving any warning signal, in not keeping a proper lookout and in running at an excessive speed. Other acts of negligence on the part of the company are alleged. At the trial, on the conclusion of the plaintiff's case, the County Court Judge entered a nonsuit, referring to *Royle* v. *C.N.R.*, 14 Man. L.R. 275.

The crossing in question was not one over a public highway within the Railway Act. The strip of land, upon and along which the towers of the city's transmission plant has been constructed and wires strung, has apparently been used by the public as a highway. The use of that strip was and is intended for the employees of the power plant in making repairs upon the transmission line and keeping it in order, but the public has no rights whatever in respect thereto. In fact, signs were placed upon it warning the public that it was "public" (*i.e.*, city) property, no thoroughfare, and that trespassers would be prosecuted. Those of the public who go upon that strip do so without permission and in face of these warnings. It is the fact, however, that it has been used by the public to a considerable extent. It is also established, on the evidence, that the crossing has been guarded and that it is designated by signs as a railway crossing. But these matters can be regarded as matters of precaution merely, primarily intended for the employees of the city. That it was used by the public was probably known to the locomotive engineers of the defendant company and to their switchmen in the immediate vicinity. But of this knowledge there is no direct evidence. In any event, these engineers and switchmen would have no authority to bind the company. No evidence whatever was given of any such knowledge on the part of any officials of the company who would have such authority. Such being the case, what is the position of the plaintiff? Can it be said that in any way he was the invitee of the railway company in using this crossing?

In my judgment, this case is governed by the principles laid down by the Supreme Court in *Grand Trunk R. Co.* v. *Anderson*,

28 Can. S.C.R. 541, where a man who had been a passenger on the railway, being stormbound at a place called Lucan Crossing, got off the train and, attempting to walk on the track to his home, a few miles distant, was killed. Travellers had been allowed for some years to make use of the permanent way in order to reach the nearest highways, there being no other passage way provided. A strong argument was presented that this right of user of the permanent way had been recognized by the company. Sedgwick, J., who delivered the opinion of the majority of the Court, held there was no evidence proving license or invitation by the railway company. "When," he says, at 552,

> they surround the railway track with all the safeguards and means of protection which the statute demands, they, in my view have done all that they are required to do.

And further:—

> No doubt, if the public generally are in the habit of crossing a railway track at any well known, particular, specified spot for their own convenience in cases such as appear in *Dublin, Wicklow and Wexford R. Co.* v. *Slattery*, 3 App. Cas. 1155, and that in the very face of the company's officials, that would be evidence of assent and a judgment based on it might be supported. But here, in the present case, there is no evidence that even the usage of the farmers which is proved in the evidence, was ever brought to the knowledge of any officer of the company having authority to give a right of passage or other privilege to any portion of the public.
>
> 33 Cyc. 760. Such a license (to go upon the track), whether express or implied, must proceed from the fact of someone having authority to grant it: and in the absence of proof it cannot be presumed that the servants of a railroad company who operate its trains have such authority.

In *Royle* v. *C.N.R.*, *supra*, it was thus stated by Chief Justice (then Justice) Dubuc, at p. 282:—

> If they (the defendants) had been made aware that the trail leading to the crossing was a public road, or was used as such by the travelling public, it might be questioned whether they would not be bound to give warning of their trains coming to the crossing: but the evidence does not shew that they had any such knowledge.

Killam, C.J., expressed himself as in accord with the judgement of Dubuc, J., p. 278-9.

The evidence here, in my judgment, is not sufficient to establish that the plaintiff was an invitee or a licensee of the railway company in going upon the company's tracks. There was no evidence of knowledge of user by the public of this strip, except such as might be inferred from the possible observations of the company's engineers and switchmen, which is clearly insufficient, even if such knowledge were proved, which it was not.

MAN.

C. A.

DE VRIES v. C.P.R. Co.

Cameron, J.A.

The plaintiff was a trespasser and went where he did at his peril. This was admitted by Henderson, one of the plaintiff's witnesses, so far as he was concerned. There could, therefore, be no violation by the company of any statutory obligation imposed upon it. What then could be the negligence of the engineer or of the company which could be said to be the cause of the accident? What duty was there placed upon the engineer or the company in respect of possible trespassers on this part of the right of way?

As a general rule a railroad company is under no duty or obligation to exercise active vigilance to provide against injury to trespassers on its tracks or right of way until their presence is known . . . and is only bound to abstain from wantonly, recklessly or wilfully injuring a trespasser, and to exercise reasonable care to avoid injuring him after discovering his peril: 33 Cyc. 769 *et seq.*

To my mind, it is not possible to say that there was presented at the trial any evidence whatever of wanton, reckless or wilful conduct on the part of the engineer or any evidence that, after he discovered the presence of the plaintiff, he failed to exercise reasonable care to avoid injuring him or his property. On this essential branch of the plaintiff's case there was, in my judgment, no evidence to be submitted to the jury and the Judge was justified in withdrawing the case from their consideration.

I refer to *Harrison* v. *N.E. R. Co.*, 29 L.T. 844, where the plaintiff was injured in crossing a railway track at a point some distance from the regular crossing. Pollock, B., entered a nonsuit at the trial which was upheld. Baron Bramwell's judgment, at p. 845, is instructive. He says:—

I think it monstrous that where the company allows a trespass they should in so allowing have a special duty cast upon them. If the plaintiff had the right to go where he did, he had the right to go anywhere he pleased on the line, and the company, with such a duty cast upon them, could not carry on their business effectually.

And, in this case before us, there is, as I have pointed out, no evidence of any permission.

A large number of cases were cited on both sides. I do not think it necessary to go further into a discussion of them than I have, or into a discussion of the other branch of the case, raised by the contention of the defendant, that the plaintiff, by his own acts and conduct and lack of reasonable vigilance, had rendered

MAN.
C. A
DE VRIES v. C.P.R. CO.
Haggart, J.A.

himself incapable of succeeding. I am satisfied the trial Judge was right in entering a nonsuit, and I would dismiss the appeal.

HAGGART, J.A.:—I have perused the reasons of my brother Cameron in which he has fully stated all the relevant facts, and I agree with the conclusion at which he has arrived.

In my opinion, the trial Judge was right when he withdrew the case from the jury and caused a nonsuit to be entered. The plaintiff had no legal right to be on the railway track when and where the accident happened. It is proved that many of the people in the neighbourhood used the road along the transmission line, and the plaintiff was in the habit of using it as the others. There is no evidence, however, that such user by the public was known to, or acquiesced in, by officers of the company, who had authority and whose words or conduct could be construed to be an invitation or a license to the people so using it. The people no doubt had their own reasons for so doing. It may have been a shorter way or a smoother road. The plaintiff says the reason he took that road on the day in question was because there was no snow on the Bird's Hill Road crossing, which was a regular highway crossing. It was winter time and his vehicle was a sleigh. I presume he used it as Henderson, one of his own witnesses, did, who said he used the power line road for his own convenience and at his own risk. There was no invitation by the defendants to the plaintiff or to the public and there was no licence to the plaintiff or the public. The plaintiff was a trespasser. There was no obligation or duty imposed on the defendants to give the warnings required at highway crossings. There is no evidence of actionable negligence.

Royle v. *C.N.R. Co.*, 14 Man. L.R. 275; *G.T.R. Co.* v. *Anderson*, 28 Can. S.C.R. 541; 21 Hals. 394; *G.T.R. Co.* v. *Barnett*, [1911] A.C. 361; and *Hardcastle* v. *South Yorkshire R. Co.*, 4 H. & N. 67, are authorities sustaining the ruling of the trial Judge.

I would dismiss the appeal. *Appeal dismissed.*

CAPITAL TRUST CO. v. YELLOWHEAD PASS COAL & COKE CO.

ALTA.
S. C.

Alberta Supreme Court, Appellate Division, Scott, Stuart and McCarthy, JJ. February 19, 1916.

1. PARTIES (§ III—123)—FORECLOSURE ACTION—INTERVENTION OF CREDITORS TO CONTEST SECURITY.

In a foreclosure action to enforce the securities of bondholders against a company in liquidation, an unsecured creditor cannot, either under r. 28 or r. 40, be allowed to be added as a party defendant for the purpose of contesting the validity of the deed of trust.

[*Lloyd* v. *Lloyd*, 6 Ch. D. 339, 343, referred to.]

ALTA.

S. C.

CAPITAL TRUST CO. v. YELLOWHEAD PASS COAL CO.

2. PLEADING (§ II P—283)—MODE OF ATTACKING SECURITY OF CREDITOR.
The more regular course for an unsecured creditor, who desires to attack the security of another creditor, is not to contest it by way of defence or counterclaim in an action for its foreclosure, but to issue a separate statement of claim and then apply for a consolidation order, or for a stay of proceedings in the foreclosure action under r. 233.

3. PLEADING (§ III A—300)—COUNTERCLAIM—NATURE OF PLEA.
A counterclaim when properly drawn is not a defence, but is a new and separate action.

4. CORPORATIONS AND COMPANIES (§ VI F 2—350)—WINDING-UP—CONTESTATION OF CLAIMS—SECURED CLAIMS.
Sec. 85 of the Winding-up Act, R.S.C. 1906, ch. 144, which enables a creditor to contest claims filed in the proceedings, only applies to those claims which are made in the winding-up proceedings, and since a secured creditor is not bound to enter such proceedings for the purpose of enforcing his security, a general creditor has therefore no standing to attack such security, the enforcement of which is sought by an independent foreclosure action.

5. CORPORATIONS AND COMPANIES (§ IV D 2—80)—ULTRA VIRES—RIGHT OF CREDITOR TO SET UP.
The plea of *ultra vires* cannot be set up by a creditor defending on behalf of the company.

6. BILLS OF SALE (§ IV—45)—STATUS OF CREDITOR ATTACKING VALIDITY.
A creditor defending on behalf of a company cannot attack the validity of an instrument under the Bills of Sale ordinance where such course is not open to the company.

Statement

APPEAL from the judgment of Beck, J., granting leave to defend in a foreclosure action. Reversed.

J. E. Wallbridge, for plaintiff, appellant.

H. H. Parlee, K.C., for defendant, respondent.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—The plaintiff sues as trustee for the bondholders of the defendant The Yellowhead Pass Coal & Coke Co. Ltd., under a mortgage to secure the bonds. The action is the usual mortgage action. Prior to the commencement of the action in which originally The Yellowhead Pass Coal & Coke Co. Ltd. was the sole defendant an order had been made under the Winding-up Act ordering that company to be wound up and appointing a provisional liquidator. For this reason it was necessary under the provisions of sec. 22 of the Act to obtain the leave of a Judge before commencing the action. This leave was given by Beck, J., by an order dated November 23, 1915. That order is expressed on its face to have been made "upon the application of the Capital Trust Corporation Ltd. and upon hearing what was alleged by counsel." Although this does not shew that anyone representing Revillon Wholesale Ltd., who are said to be unsecured creditors of the insolvent company, was present upon the application, it was stated to us that the solicitor for that company was

in fact present and made some objection. It was also stated to us that at that time the solicitor for Revillon Wholesale Ltd. asked to be allowed to defend the action. Just exactly what occurred may be perhaps a matter of dispute, but on consulting Beck, J., he informs us that the question of Revillon Wholesale Ltd. being allowed to defend the action was mentioned, and he thinks also the question of their being added as defendants and being allowed to counterclaim; but he intimated that a separate application could be made by that company for that purpose. Some days later an application was made to Beck, J., and a draft order was submitted to him which is in the appeal book and which shews that Revillon Wholesale Ltd. then asked for an order that they

> be at liberty in the name and on behalf of the defendant company to take all necessary and proper proceedings as said Revillon Wholesale Ltd. may be advised by way of defence to this action, and if so advised to proceed thereupon to trial,

with liberty to apply for further directions. Upon this draft order Beck, J., made the following notation;

> The applicants may take this order as it is drawn or if they wish they may substitute or add a provision whereby they themselves be added as defendants with liberty to counterclaim on behalf of themselves and all creditors other than the plaintiff on any ground they may set up. In such a case as this there may quite clearly be grounds open to the creditors at all events by counterclaim which are not open to the company. No order for security is made owing to the admitted worth of the applicant. Under the practice permitting the intervening of parties interested who are not parties and the addition of parties it is not necessary that the statement of claim should shew or be amended so as to shew any claim for relief against them.

The applicants accepted the alternative suggestion thus made and Beck, J., eventually, on December 15, signed an order adding Revillon Wholesale Ltd. as a defendant and permitting it on behalf of itself and all other creditors to take all necessary and proper proceedings by way of defence or counterclaim or both as it might be advised. From this order the plaintiffs have brought this appeal.

It appears that after the order was obtained a defence was filed on behalf of the original defendant and the added defendant jointly. By this document a number of defences were set up, some of which could have been raised by the insolvent company but also another which that defendant could not have raised, viz., that the trust deed or mortgage covered considerable goods and

ALTA.
S. C.
CAPITAL TRUST CO. v. YELLOWHEAD PASS COAL CO.
Stuart, J.

chattels (this being, however, stated rather inferentially than directly), that there had been no immediate delivery or actual change of possession and that the deed had not been registered under the Bills of Sales ordinance. Then the "defence" concludes as follows:—

"The defendants therefore *counterclaim* against the plaintiff a declaration that (1) The trust deed in the statement of claim mentioned was *ultra vires* of The Yellowhead Pass Coal & Coke Co. Ltd. (non-personal liability) and is invalid; or in the alternative (2) That the said trust deed is void against the creditors of the said The Yellowhead Pass Coal & Coke Co. Ltd. (non-personal liability) in respect of the chattels purported to be pledged and charged thereby."

It is perhaps worthy of notice that, although in the style of cause in this defence Revillon Wholesale Ltd. is described as "Defendants as well on its own behalf as on behalf of all other creditors of the Yellowhead Pass Coal and Coke Co. Ltd. except the plaintiff, under order dated November 15, 1915," there is not in the defence itself any allegation that Revillon Wholesale Ltd. is in fact a creditor of the insolvent company nor to what amount. In these days formality in pleading is perhaps out of date, but I should have thought that a more proper form would have been followed if the insolvent company had made its own defences and if a separate counterclaim had been inserted shewing that Revillon Wholesale Ltd. were in fact creditors, stating the amount of its claim, which indeed in such an action has to be proven before the plaintiff can go on to attack the deed and then alleging the facts which it was to be submitted would give it the right to a judgment as on a statement of claim declaring the trust deed invalid as against creditors, that is, for non-compliance with the Bills of Sale ordinance. This latter is clearly not a claim which the insolvent company could make, and yet it is made to put it forward as the defence (not called a counterclaim at all) is drawn.

It would appear from *Lloyd* v. *Lloyd*, 6 Ch. D. 339, and, in appeal, 343, that the only ground upon which the Court will refuse leave to a mortgagee to proceed by action to enforce its security is that the Court is prepared to say to the mortgagee at once that he need not trouble about his action because his claim will be at

once recognised and allowed in the liquidation proceedings. If the Court is not prepared to say that, then it seems that the mortgagee should have no impediment put in his way in proceeding in the ordinary manner to enforce his claim. It would appear, therefore, that Beck, J., adopted the proper course in refraining from imposing any terms under the provisions of sec. 22, although, as he informs us, the question of imposing terms did occur at least to his own mind even if not suggested by counsel. He decided apparently, and in view of the decision in *Lloyd* v. *Lloyd supra*, I think correctly, that the leave to bring the action should be given without reserve, and that the desires of Revillon Wholesale Ltd. could be properly met by an application by that company to be made after the action was begun to be added as a party defendant, just as might be done in any ordinary action, but, I am careful to add, *in a proper case*.

In my opinion, the order in its full extent cannot be supported under either r. 28 or r. 40. The plaintiff's action is the usual foreclosure action. As between the parties to that action there could not be any question raised with regard to the invalidity of the trust deed for lack of registration under the Bills of Sale Act. I am unable to see how its invalidity on that ground could be in any way "involved in the cause or matter." The concluding words of r. 28 (2), viz., "In order to protect the rights or interests of any person or class of persons interested *under* the plaintiff or defendant," do not seem to me to be at all wide enough to allow a new action by a third party by way of counterclaim to declare the deed void as against him. Such a third party cannot possibly be claiming *under* the original defendant because that obviously involves merely the right to claim the advantage of the defendant's rights, the party proposed to be added being dependent upon that defendant and claiming *through* him. But in this case Revillon Wholesale Ltd., so far from claiming or being interested under or through the insolvent company defendant, are claiming a separate and independent right to set aside the deed, which that company could not possibly maintain at all.

The matter is perhaps not so clear in so far as r. 40 is concerned. That rule says:

Where a person who has not been made a party to an action satisfies the Court or a Judge that he is interested in the subject matter or result of the action and that it is just and convenient that he should be allowed to *defend*

ALTA.

S. C.

CAPITAL TRUST CO. v. YELLOWHEAD PASS COAL CO.

Stuart, J

the action in whole or in part the Court or Judge may order that he have leave so to do.

At first blush this would seem to be wide enough. But upon consideration I think it must be clear that this is not so. It is to be observed that the intervening party is only to be given leave to *defend* the action. Surely that means that he may raise matters of defence only. An affirmative claim by a creditor of the grantor to set aside a deed as invalid as against creditors is surely not properly described as a defence to an action against the grantor to enforce the deed. The rule is an extension of the English marginal r. 95, which is confined to an action for the recovery of land. But the extension seems to me to be an extension only so far as the subject matter of the action is concerned. A counterclaim when properly drawn is not a defence, but is a new and separate action. It is in effect a statement of claim, and I cannot see that we have even yet arrived at the stage where a statement of claim is to be considered a defence.

I was first inclined to think that something could be rested in support of the order upon the provisions of sec. 85 of the Act, which says that

> Any liquidator, *creditor* or contributory or shareholder or member may object to any claim filed with the liquidator or to any dividend declared.

But this appears to me to apply only to claims made in the winding-up proceedings. A secured creditor is not bound to enter the winding-up proceedings for the purpose of enforcing his security: Parker and Clark, 498. The provisions of sec. 76 with respect to valuing a security apply only where the right to the security is not disputed: Parker and Clark, 497. Of course, if the secured creditor does attempt to use the winding-up proceedings to enforce his security by making an application in those proceedings, it may be that a right to contest will arise: see *Re Gaudet Frères Steamship Co.*, 12 Ch.D. 882. But ordinarily a secured creditor is to be considered as an outsider: *Lloyd* v. *Lloyd*, and *Re Gaudet Frères Co.*, *ubi supra*; Palmer II., 28. I think, therefore, there is nothing in the suggestion that the existence of a right of contestation by a creditor of another creditor's claim in the winding-up proceedings can give any foundation for a right to contest the usual and separate action for foreclosure which is outside the winding-up proceedings altogether.

There is remaining, however, another aspect of the matter which requires consideration.

Counsel for the appellant plaintiff stated that the appellant did not object to the order as originally submitted to Beck, J., which merely gave liberty to Revillon Wholesale Ltd., *in the name and on behalf of the defendant*, to take all necessary and proper proceedings as they might be advised *by way of defence to the action*. This would permit the defence being urged by Revillon Wholesale Ltd., in the name, of course, of the insolvent company, that the trust deed was *ultra vires* of the company, but would not make Revillons parties defendants nor give them any right to counterclaim. It does not appear at first sight, of course, to be going very much farther to permit them also to counterclaim, but the real obstacle to the respondent's contention again at once appears when it is observed that they desire to counterclaim on a ground not open at all to the defendant in whose name they are being allowed to defend.

In the result the matter comes down to this, therefore: A man gives a mortgage on his property to secure a creditor and that creditor brings an action to enforce his security. Another creditor desires to attack the validity of the security on a ground not open to the mortgagor. He brings an action, we shall suppose, in the ordinary way. Would the mortgagee be allowed in such a case to proceed to enforce his security while the action to set it aside was also proceeding? The mortgagee would be a necessary party to that action, and, where as here it is necessary for the plaintiff first to prove his claim and right to a judgment, the mortgagor is also a necessary party. Although these exact circumstances do not appear to have arisen in any case I can discover, it seems clear that the Court would not allow the mortgagee to proceed to realize upon his security until he had successfully maintained its validity in the action against himself and the mortgagor to set it aside; although, of course, the party attacking it would be put upon terms to proceed promptly with his action. I have no doubt indeed that the case would be a proper one for a consolidation order or for a stay of proceedings in the foreclosure action under r. 233.

In reality, therefore, it becomes simply a question of the technical regularity of the course adopted. For the reasons given I think, with much respect, that it was irregular. There is no doubt that Revillon Wholesale Ltd. could have issued their separ-

ALTA.

S. C.

CAPITAL TRUST CO. v. YELLOWHEAD PASS COAL CO.

Stuart, J.

ate statement of claim and then immediately have obtained a consolidation order. That is the course which in strict practice it seems to me should have been adopted. And it would have had this advantage, that there would probably have been a real statement of claim properly drawn instead of the peculiar document which is called a defence and turns into a counterclaim at the end.

It cannot, therefore, be said to be certain that by the adoption of the more regular and deliberate course exactly the same result would have been arrived at as by the short-cut method allowed by the order appealed from. I think, therefore, the appeal should be allowed with costs, the order below set aside, and the order originally asked for substituted. In view, however, of what has been intimated, and of the appellant's expressed desire to hasten their action, it would be perhaps a matter worthy of their consideration whether they should not be content with a simple amendment of the pleadings and the payment of costs.

Appeal allowed.

N. B.

S. C.

REX v. FOLKINS; Ex parte McADAM.

New Brunswick Supreme Court, Appeal Division, White, Barry and Grimmer, JJ. November 26, 1915.

1. OBSTRUCTING JUSTICE (§ I—10)—"SUMMARY CONVICTION," OR "SUMMARY TRIAL"—JURISDICTION.

The offence of obstructing a peace officer in the execution of his duty (Cr. Code, sec. 169), is one which may be prosecuted under the "summary convictions" procedure of Part XV. of the Code, or under the "summary trials" procedure of Part XVI., if taken before a magistrate having jurisdiction under both procedures; if the procedure of Part XVI is followed his jurisdiction will be subject to the consent provided for in Cr. Code, sec. 778, in a province where consent is not dispensed with; but if the procedure of Part XV (summary convictions), is followed throughout, the magistrate has jurisdiction to try the case and impose the punishment applicable to a "summary conviction," without asking the consent of the accused under Cr. Code, sec. 778.

[*R.* v. *Crossen*, 3 Can. Cr. Cas. 152, *R.* v. *Carmichael*, 7 Can. Cr. Cas. 167, and *R.* v. *Van Koolberger*, 16 Can. Cr. 228, dissented from; *R.* v. *Nelson*, 4 Can. Cr. Cas. 461 and *R.* v. *Jack*, 5 Can. Cr. Cas. 304, considered; and see Annotation at end of this case on "Summary proceedings for obstructing peace officers."]

Statement

MOTION on *certiorari* to quash a conviction made by the police magistrate of the town of Sussex, N.B., for wilfully obstructing a peace officer in the execution of process.

One William J. McAdam was convicted before Hiram W. Folkins, police magistrate for the town of Sussex, on a charge of wilfully obstructing William McLeod, a provincial constable, in the execution of a certain legal process. The proceedings before

Statement

the magistrate and the conviction founded thereon were removed into this Court by *certiorari* granted by His Honour Mr. Justice Crocket on the 27th of July last, and at the same time His Honour granted an order nisi calling upon the magistrate and the prosecutor to shew cause at this sitting why the said conviction should not be quashed on the ground that the magistrate had no jurisdiction to try and convict the accused without first obtaining his consent to be tried summarily, pursuant to the provisions of sec. 778 of the Criminal Code.

Argument

Ralph St. John Freeze shewed cause. The proceedings were commenced and continued to conviction under Part XV. of the Code. The charge is laid under sec. 169, for obstructing a peace officer in the lawful execution of a legal process. It will be contended that the procedure of Part XV. does not apply to this offence, because under sec. 706 of the Code it is subject to a special provision enacted in Pt. XVI., sec. 773 (*e*), and that the accused could not be tried summarily without first being put to his election as to the mode of trial. There is no special provision within the meaning of sec. 706 providing for the trial of this offence. The offence contemplated by sec. 773 (*e*) is a different offence, and one for which a much more severe penalty is imposed. For the offence under sec. 169 the punishment is six months' imprisonment or a fine of $100; for the offence under sec. 773 (*e*) it may be both (see sec. 781). Section 774, sub-sec. (2), expressly provides that the absolute summary jurisdiction given to any justice or justices by any part of the Code is not to be affected by Pt. XVI. The cases of *The Queen* v. *Crossen* (1899), 3 Can. Cr. Cas. 153; *The King* v. *Carmichael* (1902), 7 Can. Cr. Cas. 167; and *The King* v. *Van Koolberger* (1909), 16 Can. Cr. Cas. 228, deciding that the offence could not be tried summarily if not overruled should not be followed, and *The Queen* v. *Crossen* was not followed in *The King* v. *Nelson* (1901), 4 Can. Cr. Cas. 461, and *The King* v. *Jack* (No. 2) (1902), 5 Can. Cr. Cas. 304, and Mr. Daly, in his work on Criminal Procedure, second edition, at page 386, says that the provision that is now sub-sec. (2) of sec. 774 was not brought to the attention of the Court in *The Queen* v. *Crossen*, and the decision as reported is not understandable. If the contention on behalf of the accused that Pt. XVI. controls Pt. XV. is correct, the offences

N. B.

S. C.

REX v. FOLKINS. EX PARTE MCADAM.

Argument

under secs. 370, 374, 375, 376, 377 and 378 cannot be tried summarily without the consent of the party charged, and if consent is refused, they cannot be tried at all; they cannot be tried on indictment and no other procedure is provided.

Daniel Mullin, K.C., in support of the order nisi. It is important to keep in mind that the offence and the only offence that concerns the present application is the offence of obstructing a peace officer in the discharge of his duty. The defendant's contention is that this is an offence provided for by special enactment by sec. 773 (*e*) within the meaning of sec. 706, and, therefore, is not triable summarily without his consent under Pt. XV. The Manitoba, the Nova Scotia, and the Quebec cases referred to by my learned friend, and which I cite in support of this application, have not been overruled, but, on the contrary, are the only decisions on the point in question in any of the provinces in which the summary jurisdiction in respect to such an offence is not absolute. The cases of *The King* v. *Nelson* and *The King* v. *Jack*, No. 2, from British Columbia, cited in support of the conviction, are not authorities on the point, for in that province the jurisdiction of the magistrate in respect to a summary trial of this offence is absolute, and no consent of the party charged is required. Notwithstanding what is said in Daly on Criminal Procedure, it seems improbable that a Court with the standing of the Manitoba Court could have decided the *Crossen* case in ignorance of the provision of 55 & 56 Vict. ch. 29, sec. 784, now contained in sub-sec. (2) of sec. 774. But, assuming that it did, it is contended that knowledge of it would not have affected the decision in the case, because absolute summary jurisdiction is not given over this offence by any other part of the Act. It does not follow, as has been argued, that if Pt. XV. is controlled by Pt. XVI. in respect to the prosecution of this particular offence the summary jurisdiction of magistrates over the matters enumerated in secs. 370, 374, 375, 376, 377 and 378 would be destroyed. They would only be deprived of absolute jurisdiction where special provision had been otherwise enacted.

White, J.

WHITE, J.: This matter is before us on *certiorari*. The conviction was made by the police magistrate of the town of Sussex. The offence with which the defendant was charged, and for which he was convicted, is, "that he did wilfully obstruct William

McLeod, then acting as a peace officer, in the lawful execution of a certain process, namely, an execution issued out of the town of Sussex civil Court."

The defendant now seeks to quash the conviction on the ground that the charge is not one triable under Pt. XV., "Summary Convictions," but could only be summarily tried under Pt. XVI., which provides for the summary trial of certain indictable offences (of which the offence here in question is one), and could be so tried only with the consent of the accused.

Section 773 (Pt. XVI.) enacts, "Whenever any person is charged before a magistrate" with—then follows, in clauses lettered (*a*) to (*g*), an enumeration of a number of offences—"the magistrate may, subject to the provisions of this part, hear and determine the charge in a summary way." Clause (*e*) of this sections reads: "With assaulting or obstructing any public or peace officer engaged in the execution of his duty or any person acting in aid of such officer."

All of the offences specified in sec. 773, with the exception of that of obstructing a peace officer in the execution of his duty, are declared by the Code to be indictable offences; and but for the provisions of Pt. XVI. must have been prosecuted and tried as such.

Section 169 reads: "Everyone who resists or wilfully obstructs

"(*a*) Any peace officer in the execution of his duty or any person acting in aid of such officer.

"(*b*) Any person in the lawful execution of any process against any lands or goods or in making any lawful distress or seizure"

is guilty of an offence punishable on indictment or on summary conviction, and liable, if convicted on indictment, to two years' imprisonment, and, on summary conviction before two justices, to six months' imprisonment with hard labour, or to a fine of one hundred dollars.

It is claimed on behalf of the defendant that, notwithstanding the terms of sec. 169, the effect of the provisions of Pt. XVI. is to require that the offence of obstructing a peace officer must either be prosecuted by indictment, or, with the consent of the accused, be tried under Pt. XVI. before one of the officials therein designated, and in the mode thereby provided, and cannot be

N. B.

S. C.

REX v. FOLKINS. EX PARTE MCADAM.

White, J.

tried under the ordinary summary conviction procedure provided by Pt. XV.

The Supreme Court of Manitoba decided in favour of a like contention in *The Queen* v. *Crossen* (1899), 3 Can. Cr. Cas. 152. No reasons are, however, given for the judgment.

That authority was followed, in Nova Scotia, by Weatherbe, J., in *The King* v. *Carmichael* (1902), 7 Can. Cr. Cas. 167.

Cross, J., in *The King* v. *Van Koolberger* (1906), 16 Can. Cr. Cas. 228, reached a like conclusion.

On the other hand, in two British Columbia cases, one, *The King* v. *Nelson* (1901), 4 Can. Cr. Cas. 461, before Drake, J., and the other, *The King* v. *Jack* (1902), 5 Can. Cr. Cas. 304, before Walkem, J., *Regina* v. *Crossen* was considered and not followed.

It is obvious that if Pt. XVI. has the effect claimed for it, namely, that it affords the only authority under which a person can be proceeded against summarily for obstructing a peace officer, then the words in sec. 169, distinctly making such offence punishable on summary conviction, are, to say the least, superfluous. For if the words "summary conviction," there used, are to be construed as meaning a summary trial, under Pt. XVI., they are unnecessary, since Pt. XVI. would have sufficed to provide such trial without those words. Moreover, sec. 169 says, "On summary conviction before two justices;" while Pt. XVI. vests the power of trial thereunder in such officers only as are specified in sec. 771, and which officers do not include justices, though they do include any officer having the power to do alone such acts as are usually required to be done by two justices.

It has been suggested that all difficulties may be reconciled by holding that the offence in question may, by virtue of sec. 169, be tried summarily before two justices, in which case the penalty would be limited to that imposed by that section; but that whenever the offence comes before a magistrate, as defined by sec. 771, then it can only be disposed of under the provisions of Pt. XVI. As I understand the judgment of Cross, J., in *The King* v. *Van Koolberger*, he held that view, although he decided, notwithstanding, that the accused could only be tried before two justices with his own consent, because it could not be supposed that Parliament intended to dispense with such consent

in the case of a trial before two justices while requiring it in the case of a trial before the higher officials designated in sec. 771.

The difficulty in the way of that solution is that sec. 604 provides that certain officials, including a "police magistrate or stipendiary magistrate appointed," etc., may do alone whatever is authorized by this Act to be done by two or more justices." Reading this section in conjunction with sec. 169 the result is that sec. 169, in authorising summary conviction before two justices, authorizes the like conviction before a police magistrate, the penalty in either case being that fixed by the section.

On the other hand, the maximum penalty provided by sec. 781 in case of trial and conviction under Pt. XVI. is doubly as severe as is that imposable in the case of summary conviction under sec. 169.

Now, it is quite clear that, if it were not for the provisions of Pt. XVI., the offence of obstructing a peace officer could, under sec. 169, be prosecuted and punished on summary conviction before two justices, or before any magistrate having, by sec. 604, the power of two justices. In such case the procedure would undoubtedly be that provided by Part XV. ("summary convictions"). That procedure differs in many material respects from the procedure governing preliminary enquiry in the case of indictable offences. One very important distinction is this, that in the case of summary convictions the prosecutor, who may be, and usually is, the informant, initiates the proceedings and is liable for costs in the event of the information being dismissed; while, on the other hand, the defendant, if convicted, may be adjudged to pay costs to the prosecutor.

Upon summary conviction proceedings, the magistrate tries and finally disposes of the charge, subject, of course, to appeal as provided. But in preliminary enquiry proceedings, the duty of the magistrate is merely to ascertain whether the accused shall be sent up for trial. Manifestly, if it were not for the provisions of Pt. XVI., the only steps which could be taken before a magistrate in respect of any of the offences specified in sec. 773, except that of obstructing a peace officer, would be by way of preliminary hearing. For, as I have already pointed out, all of such offences being made indictable, and indictable only, by the several sections creating them, could have been tried only upon indictment

N. B.

S. C.

REX v. FOLKINS. EX PARTE MCADAM.

White, J.

were it not for Pt. XVI. That part is, I think, clearly intended to provide, in respect of the offences there specified, that the accused may, with his consent, be tried before the magistrate instead of being sent up for trial in the ordinary way. If the accused refuses his consent, the only course open to the magistrate is to proceed with the preliminary enquiry. In other words, the object and effect of that Pt. XVI. is to provide a summary trial for certain offences which would otherwise have been triable only upon indictment.

It is not intended to substitute a trial under its provisions for proceedings on summary conviction, when such proceedings are authorized by the Act as they are in the case of sec. 169. Any doubts suggested as to that must, I think, be laid to rest by sec. 774 (2), which expressly declares "The provisions of this part shall not affect the absolute summary jurisdiction given to any justice or justices in any case by any other part of this Act."

I find it impossible to believe that when the Code, in sec. 169, makes the offence here in question not only indictable, but also punishable on summary conviction, and prescribes a maximum penalty where the accused is convicted on summary conviction, which is less, not only than that imposable where he is convicted on indictment, but less than that imposable under Pt.XVI., it was, nevertheless, intended that the offence can only be prosecuted either by indictment or under Pt. XVI.

In the present case, had proceedings been taken before the magistrate with the view of having the accused committed for trial, then no doubt Pt. XVI. would have applied; and had the accused then given the requisite consent, the magistrate could have tried him, and in that case could, in the event of conviction, have imposed the punishment provided by sec. 781. Or, he might in such case, under the provisions of sec. 784, have refused to try the accused, and sent him up for trial. But, when, as was the case here, the prosecutor laid the information, and prosecuted throughout, as for an offence punishable on summary conviction, and the offence is by statute expressly made so punishable, I do not think Pt. XVI. is applicable.

For these reasons I think the rule should be discharged.

Barry, J.

BARRY, J.: Every person who is charged with the offence of which the defendant here is charged and convicted, that is, wil-

fully obstructing a peace officer in the lawful execution of a process against goods, may, under sec. 169 of the Criminal Code, be proceeded against under Pt. XIV. by preliminary inquiry and indictment, and, if convicted on indictment, is liable to two years' imprisonment; or he may be proceeded against summarily under Pt. XV. before two justices, and, if convicted under this part, is liable to six months' imprisonment with hard labour, or to pay a fine of $100.

It is not disputed that the police magistrate of the town of Sussex, the magistrate before whom the accused was convicted, has the power to do alone whatever is authorized by the Criminal Code to be done by any two or more justices (sec. 604). The proceedings returned here upon the *certiorari* shew that the magistrate, in making the conviction, proceeded under Pt. XV. of summary convictions, and that he imposed the maximum fine of $100. On appearing before the magistrate, the accused was asked to plead, pleaded "not guilty," and was admitted to a full defence; he was not asked to consent, and did not consent, to the charge being summarily tried and determined by the magistrate. And this is the objection, and the sole objection to the conviction—that the magistrate had no jurisdiction to try the accused without his consent.

Pt. XVI. of the Criminal Code provides for the trial in a summary way of a number of indictable offences, amongst which is the offence of obstructing any public or peace officer engaged in the execution of his duty: sec. 773 (*e*). But it is made a condition precedent to the exercise by the magistrate of the increased jurisdiction conferred by this part of the Code that consent of the accused to the charge being thus summarily tried and determined should be obtained: sec. 778 (3). And it is argued on behalf of the accused that, because the application of Pt. XV. is made subject to any special provision otherwise enacted with respect to the same offence (sec. 706), and inasmuch as secs. 773 and 778 (3) of Pt. XVI. do make special provisions for the summary trial with the consent of the accused, of the same offence, it follows that the summary jurisdiction conferred upon the magistrate by Pt. XV. to try the accused without his consent is excluded. But, with every deference for the opinions of those who may hold that view, I cannot assent to that reasoning.

N. B.

S. C.

REX v. FOLKINS. EX PARTE MCADAM.

Barry, J.

I do not think that it can be inferred from the grant of a jurisdiction to the magistrate over an offence which, on account of the gravity of the circumstances surrounding its commission, may be regarded as indictable, that the Parliament intended to deprive the magistrate of the jurisdiction which he already possessed over the same offence in a less aggravated form, and which, on that account, might properly be triable by summary conviction under Pt. XV.

In the interpretation of statutes, it is an old and settled canon of construction that a statute ought to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant: *The Queen* v. *Bishop of Oxford* (1879), 4 Q.B.D. 245, at p. 261. In order to arrive at the real meaning of a statute, it is always necessary to get an exact conception of the aim, scope and object of the whole Act: *Smelting Company of Australia* v. *Commissioners of Inland Revenue* (1896), 2 Q.B.D. 179, at p. 184. In Maxwell on the Interpretation of Statutes, 5th ed., 372, the principle of construction is laid down in these terms: "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purposes of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words and even the structure of a sentence."

There appears to have been a wide divergence of judicial opinion and some confusion in the decisions of some of the Courts of Canada in regard to the question which this Court, for the first time, I believe, is now called upon to determine. In two British Columbia cases, *Rex* v. *Nelson* (1901), 4 Can. Cr. Cas. 461, and *Rex* v. *Jack* (1902), 5 Can. Cr. Cas. 304, it has been decided in circumstances similar to the facts in this case, that the magistrate has jurisdiction under Pt. XV. to try an offence of this kind; but those cases lose much of their value as authorities in this province when it is pointed out, as it has been pointed out in a subsequent case, that, in the province where those cases were decided, the jurisdiction of the magistrate is absolute and does not depend upon the consent of the accused.

In *Reg.* v. *Crossen* (1899), 3 Can. Cr. Cas. 152 (Manitoba),

it was decided by a strong Court, and a Court to whose opinion every respect is due, that, notwithstanding the provisions of sec. 144 of the old Code, which corresponds with the present sec. 169, the parties who were charged with an offence similar to the one of which the defendant here has been convicted, could not be tried summarily under Pt. XV. except with their consent, as provided by sec. 778 (3). *Rex* v. *Carmichael* (1902), 7 Can. Cr. Cas. 167, a Nova Scotia case, was decided, as appears by the report of the case, solely upon the authority of *Reg.* v. *Crossen*, *supra*. Mr. Justice Cross, in *Rex* v. *Van Koolberger* (1909), 16 Can. Cr. Cas. 228, arrives at the same conclusion.

An interesting side light is thrown upon the case of *Reg.* v. *Crossen*, which, if true, and I can see no reason for doubting its correctness, must have the effect of materially weakening, if not totally destroying, the effect of that decision, by Mr. Patterson, K.C., the learned editor of the second edition of Daly's Criminal Procedure. Mr. Patterson, who was counsel for the Crown in the argument of the case, at page 386 of the work referred to, says that, for a reason not necessary to give, the Crown was not specially anxious to sustain the conviction, and that the provisions that are now to be found in sec. 774, sub-sec. 2, were not drawn to the attention of the Court. That sub-section, which seems to me to be of vast importance, reads: "The provisions of that part (XVI.) do not affect any absolute summary jurisdiction given to justices by any other part of this Act."

This sub-section seems to convey a very clear idea that, in passing secs. 773 and 778 of Pt. XVI., the Parliament did not intend to nullify and render of no effect whatever the provisions of sec. 169, which, in express terms, confers upon the magistrate an absolute jurisdiction to punish on summary conviction an offence of this kind without the consent of the offender. And who can say that a consideration of the section, had it been brought to the attention of the Court, might not have produced an entirely different result in the case of the Manitoba decision referred to.

The manifest intention of a statute must not be defeated by too literal an adhesion to its precise language: *Rex* v. *Vasey*, [1905] 2 K.B. 750. Obviously, the intention of Pt. XVI. was to

N. B.

S. C.

REX v. FOLKINS. EX PARTE MCADAM.

Barry, J.

provide, with the consent of the accused, a summary mode of trial of certain indictable offences, and not to interfere with the jurisdiction to try offences punishable by summary conviction. But the offence charged in this case is punishable either by indictment or summary conviction; and the difficulty seems to lie in determining whether it should be made the subject of a "summary trial" under Pt. XVI., or of a "summary conviction" proceeding under Pt. XV., or of a preliminary inquiry under Pt. XIV.,to be followed in that case, should the evidence warrant it, by indictment. The determination of that question rests, I think, with the magistrate and not with the accused, and is to be made to depend upon the gravity or the trifling character of the particular offence. It would, indeed, often produce curious results were a party who, according to my view, might properly be triable in any one of three different ways, and by one of three different courses of procedure, and whose measure of punishment would to a large extent depend upon the choice of procedure, allowed the selection of the tribunal before which he is to be tried. Colour is lent to this view by the language of secs. 773 (*d*) and 778.

By reading together Pts. XIV., XV., and XVI.—for the whole Code for the purpose of interpretation is to be read as one Act—and having regard to the varying measures of punishment which the legislature has prescribed for an offence which, obviously, is one susceptible of widely differing degrees of violence, I think it is clear enough that the magistrate might, with perfect propriety in either case, have pursued any one of the three following courses:—

(1) Without the consent of the accused, he could have entered upon the inquiry authorized by Pt. XIV., and, had the evidence warranted it, committed the party to take his trial upon indictment. For a conviction upon indictment, the maximum punishment is two years' imprisonment.

(2) Without the consent of the accused, he could have proceeded summarily under Pt. XV., and himself awarded the maximum punishment or penalty prescribed by sec. 169 (*b*) on a summary conviction, namely, six months' imprisonment with hard labour, or (in the alternative) a fine of $100.

(3) Or, had he proposed to dispose of the case summarily

under Pt. XVI.—and that, as I have already remarked, is a matter for him and not for the accused to determine—the magistrate, after ascertaining the nature and extent of the charge, and before the formal examination of the witnesses for the prosecution, and before calling upon the accused for any statement which he might wish to make, should have stated to the accused the nature of the charge against him; and then, with the consent of the accused, and following the procedure prescribed by sec. 778, the magistrate might have proceeded to try and dispose of the case summarily. The maximum punishment for a conviction under Pt. XVI. is six months' imprisonment with hard labour, and, in addition, a fine of not exceeding, with costs, $200.

When the measure of the punishments under the different modes of procedure is considered, it is not difficult to discern reasons why, in a procedure involving the more severe penalties, Parliament has required the consent of the accused as a condition precedent to the exercise of jurisdiction by the magistrate under Pt. XVI., whilst in a summary conviction proceeding under Pt. XV., involving, as it does, a much more moderate punishment, it has considered such consent unnecessary.

It is only by a very forced construction that sec. 773 can be said to be a "special provision otherwise enacted" with respect to the specific offence charged in the information here, so as to bring it within the scope of sec. 706 of the Code. I should be disposed to regard it, not as a special provision with respect to this or any other particular offence, but rather as a general enactment making provision for the summary trial of a number of indictable offences which, without it, could only be tried by indictment. So that I conceive the true intention of Parliament to have been, not the curtailment of the summary jurisdiction previously exercisable by magistrates under the authority of Pt. XV., but the enlargement of that jurisdiction by extending it to a class of offences theretofore punishable by indictment only; extending it, however, only with the consent of the accused.

Some effect must be given to sec. 774 (2). It cannot be lightly passed over, as if it had no place in the statute. If there be any conflict between that section and sec. 706, if they cannot stand together, then it is the earlier and not the later section

N. B.

S. C.

REX v. FOLKINS. EX PARTE MCADAM.

Barry, J.

that must fall. An author must be supposed to be consistent with himself; and, therefore, if in one place he has expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed it. In this respect, the work of Parliament is treated in the same manner as that of any other author; and the language of every enactment must be so construed, as far as possible, as to be consistent with every other which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a statute by construction when the words may have their proper operation without it. If the provisions of a later Act are so inconsistent with, or repugnant to, those of an earlier Act that the two cannot stand together, the earlier stands impliedly repealed by the later: Maxwell on Stat., 5th ed., 253. And the later of the two sections 706 and 774 (2), being the expression of the later intention, should prevail over the earlier as it unquestionably would if it were embodied in a separate Act.

I am of the opinion that the magistrate had jurisdiction to try the applicant, without his consent, under Pt. XV., and that, therefore, the rule should be discharged.

Grimmer, J. (dissenting)

GRIMMER, J. (dissenting): This is an application on the part of the defendant to quash a conviction of the police magistrate of Sussex under a writ of *certiorari* issued by order of Crocket, J., on July 27, 1915, on the ground of want of jurisdiction to convict, the accused not having consented to be tried summarily.

The offence is that of wilfully obstructing a peace officer in the lawful execution of a process (an execution) against the goods of one Laura A. McAdam, which is made an offence by sec. 169 of the Criminal Code, clause (*b*), the enactment there being as follows:—

"Everyone who resists or wilfully obstructs . . . (*b*) any person in the lawful execution of any process against any lands or goods, or in making any lawful distress or seizure, is guilty of an offence punishable on indictment or on summary conviction, and liable, if convicted on indictment to two years' imprisonment, and, on summary conviction before two justices to six months' imprisonment with hard labour, or to a fine of $100."

Section 604 of the Code clothes police magistrates with all the powers of two justices, and authorizes them to do also

whatever by the Code is authorized to be done by any two or more justices. Section 773 provides that:—

"Whenever any person is charged before a magistrate, (*e*) with assaulting or obstructing any public or peace officer engaged in the execution of his duties, or any person acting in aid of such officer," the magistrate may, subject to the subsequent provisions of this part, being Pt. XVI. of the Code, hear and determine the charge in a summary way. This section relates to procedure only, and is designed apparently to provide a summary means of disposing of certain offences, as to which, as stated by one of the writers on the Criminal Code, in the interests of justice the utmost expedition is required in bringing them to trial, and which were thought not to be of too serious a nature to entrust to the judgment of the officers named in sec. 771, when surrounded with the limitations of sec. 778 and following sections.

Section 778 provides that, whenever the magistrate before whom any person is charged as aforesaid, proposes to dispose of the case summarily, he shall, after ascertaining the nature and extent of the charge, but before the examination of the witnesses and before asking the accused if he wishes to make any statement, state to him the substance of the charge against him, and if it is not one that can be tried summarily without the consent of the accused, shall say to him: "Do you consent that the charge against you shall be tried by me, or do you desire that it shall be sent for trial by a jury?"

Section 781 provides the penalty for certain offences named in sec. 773, among which is the offence charged in this case, and which differs from the penalty provided by sec. 169 in that, under 781, both the fine provided and imprisonment may be imposed, while under 169 it must be one of the two only.

By sec. 776, the jurisdiction of the magistrate is absolute, without the consent of the accused, over offences similar to this, in British Columbia, Prince Edward Island, Saskatchewan, Alberta, North-West Territories, and the Yukon Territory.

From this summary, I think it sufficiently appears that the accused is given the fundamental right of electing how he will be tried, and I do not think he can be deprived of that right under the provision of sec. 169 or under sub-sec. 2 of sec. 774, and, as authority is, under sec. 169, given to two justices to try

N. B.

S. C.

REX v. FOLKINS. EX PARTE MCADAM.

Grimmer, J. (dissenting)

this charge, and by sec. 604 a police magistrate has all the power of two justices, and the offence is specifically named in sec. 773, the accused is "*charged before a magistrate*" within the terms of this section, and, in my opinion, except in localities where the jurisdiction of summary trial is absolute, without the consent of the accused, a person charged as in this case cannot be tried summarily without his consent being obtained, as provided in sec. 778. This was the decision of the Court of Queen's Bench of Manitoba, in *The Queen* v. *Crossen*, where an offence similar to the present was charged, and it was held that a writ of *certiorari* should be granted on the ground that the offence charged came within the provisions of sec. 783, sub-sec. (*c*), now sec. 771 of the Code, and subsequent sections, and that the accused could not have been tried summarily except after compliance with sec.786, now 778 of the Code, notwithstanding the provisions of sec. 144, now 169. This judgment was followed by Mr. Justice Weatherbe, of the Supreme Court of Nova Scotia, in *The King* v. *Carmichael and McDonald* (1902), 7 Can. Cr. Cas. 167, and more lately by the Court of King's Bench of Quebec, in *The King* v. *Van Koolberger* (1909), 16 Can. Cr. Cas. 228.

For the reasons given herein I think the conviction should be quashed. *Order nisi discharged and conviction affirmed.*

Annotation

Obstructing a peace officer.

Annotation—Criminal law (§ II A—49)—Summary proceedings for obstructing peace officers—Criminal Code, sec. 169.

The decision in *Ex parte McAdam*, *supra*, adds another case to the many conflicting decisions as to summary proceedings applicable to the offence of obstructing a peace officer when the prosecution is not taken by way of indictment or by way of the "formal charge" which takes the place of an indictment in Alberta and Saskatchewan. The offence is declared by sec. 169 of the Criminal Code, and is made punishable either on indictment (which includes the "formal charge" before mentioned) or on summary conviction. In addition to this, sec. 773 declares that whenever any person is charged before a magistrate with obstructing a peace officer engaged in the execution of his duty or any person acting in aid of such officer, the magistrate may, subject to the subsequent provisions of Pt. XVI., hear and determine the charge in a summary way. The language of sec. 773 corresponds in this respect with sub-sec. (*a*) of sec. 169. Section 773 includes *inter alia* the offence of assaulting a peace officer in the execution of his duty, which offence is not included in sec. 169, but in sec. 296. The assault is one of those specially

Annotation (*continued*)—Criminal law (§ II A—49)—Summary proceedings for obstructing peace officers—Criminal Code, sec. 169.

N. B.

Annotation

Obstructing a peace officer.

designated as "aggravated assaults," and is indictable but not punishable on summary conviction, as is the wilful obstruction of the officer. Furthermore, sec. 169 includes as an offence punishable either on indictment or on summary conviction the wilful obstruction of any person in the lawful execution of any process against any lands or goods or in making any lawful distress or seizure. That offence is not included in sub-sec. (*e*) of sec. 773 as one of the subjects of a summary trial under Pt. XVI. apart from the extended jurisdiction of sec. 777.

In order to find the procedure to be followed where a summary conviction is sought, reference has to be made to Pt. XV. of the Code, and by sec. 706 Pt. XV. was to apply to every case in which a person committed an offence for which he was liable to be punished on summary conviction, but the application of Pt. XV. was subject to any special provision otherwise enacted with respect of such offence. The question then arose whether sec. 773 should be treated as regards offences which might be punished on summary conviction as subsidiary to the provisions of Pt. XV. or as an independent method of procedure. The weight of authority seems now to be in favour of the latter theory. It is also supported by sec. 798, which declares that, with certain exceptions not material to this question, Pt. XV. shall not apply to any proceedings under Pt. XVI. The list of offences now specified in sec. 773 is one of indictable offences, and there is, consequently, no inconsistency in viewing the procedure of summary trial under Pt. XVI. as an alternative for the procedure by indictment. This was not always the case, as prior to the amendment of 1909, sec. 773 included under sub-sec. (*f*) certain vagrancy offences which were declared the subject of summary conviction, and which were not to be indictable, such as being an inmate or habitual frequenter of a disorderly house. Sub-sec. (*f*) was amended in 1909, and later, in 1915, with the result that no offence is now included in sec. 773 which is not indictable. The officials authorized to hold a summary trial under Pt. XVI. are generally qualified also to hold a "summary conviction hearing" under Pt. XV., and, except where the accused has been asked whether he elects summary trial or not in the terms of sec. 778, in which case the record would shew a consent, if given, it is not easy to ascertain whether the magistrate intended to try a charge of obstructing a peace officer under the procedure of Pt. XV. or that of Pt. XVI. In some of the provinces the jurisdiction of summary trial for the offence was absolute without the consent of the accused: see Criminal Code sec. 776, as to British Columbia, Prince Edward Island, Saskatchewan, Alberta, North-West Territories and the Yukon.

N. B.

Annotation

Obstructing a peace officer.

Annotation (*continued*)—**Criminal law (§ II A—49)—Summary proceedings for obstructing peace officers—Criminal Code, sec. 169.**

The forms of summary conviction are Code forms 31, 32 and 33, and the forms of conviction on summary trial are Code forms 55 and 56. The distinction between the two classes of forms is that the latter recite that the accused is "charged" before the magistrate; an expression which does not appear in the summary conviction forms. Of course, where the consent is necessary to summary trial, the bracketed words in forms 55 and 56 indicating that the consent had been given will also appear on a conviction under Pt. XVI. as for the indictable offence.

The question of procedure is made important because of the varying limits of punishment applicable to the different methods of trial. If the accused is convicted on indictment, the punishment may be two years' imprisonment. The term "indictment" includes a formal charge, which under sec. 873A initiates a criminal prosecution in the Supreme Courts of Alberta and Saskatchewan respectively, and takes the place of a true bill found by the grand jury in other provinces.

If the trial takes place under Pt. XVI. before a "summary trials" magistrate acting under sec. 773, the accused is liable on conviction to imprisonment for six months or a fine not exceeding, with the costs in the case, $200, or to both fine and imprisonment: sec. 781, as amended, 1913, Canada Statutes, ch. 13, sec. 27.

If the defendant is found guilty on a summary conviction made under the procedure of Pt. XV., the penalty may be six months' imprisonment or a fine which must not exceed $100, but there is no power to impose both imprisonment and fine. The justices making the summary conviction have, under sec. 735, a discretion to order payment of costs by the defendant to the complainant.

Section 707 provides that where there is no direction as to the number of justices necessary to try the case under Pt. XV., in the law under which the complaint is laid, one justice may do so; but every complaint is to be tried by one justice or two or more justices, as directed by the Act or law upon which the information is framed.

Section 169 makes special provision that a summary conviction under it shall be before two justices, and by sec. 708 such justices shall be present and acting together during the holding and determination of the case. The definition of a "justice" in Code sec. 2, sub-sec. 18, gives it the singular or plural meaning in Pt. XV., according as one or more justices may be necessary to the jurisdiction in a particular case. Furthermore, it is declared to include also a police magistrate, a stipendiary magistrate, and any person "having the power or authority of two

Annotation (*continued*)—Criminal law (§ II A—49)—Summary proceedings for obstructing peace officers—Criminal Code, sec. 169.

N. B.

Annotation

Obstructing a peace officer.

or more justices of the peace." Certain police magistrates and other functionaries are empowered by provincial authority to do alone what the law assigns to be done by two justices, and the power so conferred is what is here referred to and which is adopted in sec. 604 for the purposes of the Criminal Code.

As to these magistrates, section sec. 604, contained in Pt. XII. of the Code, provides, *inter alia*, that every police magistrate, every district magistrate and every stipendiary magistrate appointed for any territorial division may do alone whatever is authorized by the Code to be done by any two or more justices. Similar power is conferred upon every magistrate authorized by the law of the province in which he acts to perform acts usually required to be done by two or more justices.

These provisions of sec. 604 bring within the jurisdiction of a police or stipendiary magistrate offences as to which Pt. XV. is applicable, whether directed to be tried by one justice or by two justices. As to certain offences, any two justices sitting together constitute the statutory tribunal for a summary trial under Pt. XVI.: see sec. 771, sub-sec. (*a* 7), and sec. 773, sub-secs. (*a*) and (*f*). Any two justices sitting together have a general power of summary trial in the provinces of British Columbia, Prince Edward Island, Saskatchewan, Alberta, North-West Territories and the Yukon Territory; but in Ontario, Quebec, Manitoba, Nova Scotia and New Brunswick two justices, sitting together, have power of summary trial under Pt. XVI. only in respect of the offences of theft or receiving not exceeding $10 and with disorderly house cases under sub-secs. (*a*) and (*f*) respectively of sec. 773.

As to other offences subject to summary trial in those provinces, the authority is conferred upon police magistrates, district magistrates and other tribunals invested by the proper legislative authority with power to do alone such acts as are usually required to be done by two or more justices. Certain functionaries are specially empowered in addition to this provision, such as a Recorder in the province of Quebec, a Judge of a county Court in Ontario, Manitoba, Nova Scotia and New Brunswick. The entire proceedings would have to be looked at to determine in any particular case whether the police magistrate or similar functionary had proceeded under Pt. XV. or under Pt. XVI. upon a charge brought under sec. 169. The inclusion of the words "charged before me," which belong peculiarly to convictions under Pt. XVI., would probably not be conclusive that Part XVI. had been followed; and if it appeared that the summary convictions clauses of Pt. XV. had been in-

N. B.

Annotation

Obstructing a peace officer.

Annotation (*continued*)—**Criminal law (§ II A—49)—Summary proceedings for obstructing peace officers—Criminal Code, sec. 169.**

voked in the first instance and their procedure followed, the words "charged before me" might be treated as surplusage.

The better opinion seems to be that Pt. XVI. in no way affects the jurisdiction or the procedure upon a charge which is being prosecuted by a complainant as for an offence punishable on summary conviction, although the same offence might be prosecuted under sec. 773 by way of summary trial before the same official.

In *Rex* v. *West*, 24 Can. Cr. Cas. 249, at 250, 9 O.W.N. 9, Mr. Justice Middleton says:—

"Section 169 creates the offence, and gives to the Crown the right either to try summarily, when a less severe punishment may be inflicted, or, if the Crown thinks the offence is serious enough to warrant an indictment, then, at the Crown's election, the accused may be prosecuted as for an indictable offence, with the result that he has the right of election afforded by sec. 778, and with the consequence that, upon conviction, more serious punishment may follow. The right to choose the mode of prosecution is a right given to the Crown, and not the right of the accused. His sole right is to select the tribunal to try him if the Crown elects to prosecute for an indictable offence.

"The only colour that is lent to the argument for the accused is the mention in sec. 773 (*e*) of this particular crime in the catalogue of indictable offences for which persons may be tried summarily. This, I think does not help the argument, for the whole of Pt. XVI. of the Code, secs. 771 to 799, relates solely to the trial of indictable offences, and sec. 773 (*e*) must relate to cases where the charge against an accused is laid as an indictable offence."

That decision was affirmed by the Appellate Division in *R.* v. *West* (No. 2), 35 O.L.R. 95.

In *Rex* v. *Nelson* (1901), 4 Can. Cr. Cas. 361, Mr. Justice Drake held that the accused could be tried for obstructing a peace officer under Pt. XV., although the charge happened to be brought before a police magistrate having authority under Pt. XVI. To the same effect was the decision of Mr. Justice Walkem, in *R.* v. *Jack*, 5 Can. Cr. Cas. 304, 9 B.C.R. 19, in which he said that there was no ground for upholding the contention that what is now sec. 169 should be controlled by what is now sec. 773. Both of these decisions were in British Columbia, in which, under sec. 776, the jurisdiction under Pt. XVI. for this offence is absolute without the consent of the party charged. In *R.* v. *Jack* the sentence was six months' imprisonment, and this would be authorized either on a summary conviction or on a summary trial.

Annotation (*continued*)—Criminal law (§ II A—49)—Summary proceedings for obstructing peace officers—Criminal Code, sec. 169.

N. B.

Annotation

Obstructing a peace officer.

In the opinion of Walkem, J., the punishment on summary conviction is limited to that specified in sec. 169. Section 781, providing a different punishment on a trial before a magistrate with the consent of the accused, would have no application where the procedure under the summary convictions clauses was followed. *Semble*, if the charge were for an assault of the officer in the performance of his duty, secs. 773 and 781 would then apply, and not sec. 169, if the magistrate was one having jurisdiction only under sec. 773 and not authorized to act under sec. 777. Where a police magistrate has authority under sec. 777, the limitation of sec. 781 is expressly excluded by sub-sec. (3) of sec. 777.

The theory that sec. 773 limits the power of summary conviction under sec. 169 is supported by a Manitoba case, *R.* v. *Crossen* (1899), 3 Can. Cr. Cas. 152, and was followed by Judge Weatherbe, of the Nova Scotia Supreme Court, in *R.* v. *Carmichael* (1902), 7 Can. Cr. Cas. 167. Both of these cases are disapproved in *Ex parte McAdam, supra*. The theory of the *Crossen* case appears to have been that, if it happened that the charge under sec. 169 came on for hearing before an official qualified as a "magistrate" under sec. 771, the procedure of Pt. XVI. became obligatory as regards such magistrate, and was limitative in its effect upon the jurisdiction to make a summary conviction for the offence. In Manitoba, as appears from the reference above made to sec. 771, two justices of the peace, sitting together, had no power of summary trial in respect of this offence, their power of summary trial being limited by sec. 771, sub-sec. (*a* 7), to offences under sub-sec. (*a*) and (*f*) of sec. 773, while the offence here dealt with, of obstructing a peace officer, is contained in sub-sec. (*e*) of sec. 773. Two justices in Manitoba, sitting together, would, by the express terms of sec. 169, have power to make a summary conviction, but would not have any general power of summary trial under Pt. XVI. The Court of Queen's Bench of Manitoba said, in effect, that, no matter what two justices might be able to do under sec. 169, a police magistrate or other functionary who was a summary trials magistrate under sec. 771, did not necessarily have the same power, and that upon a person being charged before him with an offence under sec. 169, sec. 773 at once applied to compel him in hearing the charge "in a summary way" to do so subject to the subsequent provisions of Pt. XVI., and consequently to take the consent of the accused under sec. 778.

Still another theory was advanced in *R.* v. *Van Koolberger*, 16 Can. Cr. Cas. 228, 19 Que. K.B. 240, in which it was held that the procedure of Pt. XVI., including the provision of sec.

N. B.

Annotation

Obstructing a peace officer.

Annotation (*continued*)—Criminal law (§ II A—49)—Summary proceedings for obstructing peace officers—Criminal Code, sec. 169.

778 for the defendant's election or consent to be tried summarily, applied to a charge under sec. 169 brought before two justices in the province of Quebec who would have no power of summary trial for an indictable offence except under sub-sec. (*a* 7) of sec. 771 for theft not exceeding $10 and in respect of certain disorderly house cases. Mr. Justice Cross there held that as authority is given to two justices to try such charge by Code sec. 169, and the offence is specifically named in Code sec. 773 (*c*), the accused is "charged before a magistrate" within the terms of sec. 773, although two justices in Quebec province are not constituted a statutory magistrate under Code sec. 771, except as to certain other offences named in sec. 773, paragraphs (*a*) and (*f*). He further held that the decision of the two justices in such a case is a "summary conviction," and subject to appeal as such, although the procedure of Part XVI. (Summary Trials) is applicable under Code sec. 706 as a "special provision otherwise enacted with respect to such offence": *R.* v. *Van Koolberger, Van Koolberger* (appellant) v. *Lapointe* (respondent), 16 Can. Cr. Cas. 228, 19 Que. K.B. 240.

As pointed out in *Ex parte McAdam, supra,* and in Daly's Criminal Procedure, 2nd ed., 386, the decision in *R.* v. *Crossen* may have been influenced by the circumstance that, for some reason not disclosed, the Crown was not seeking to sustain the conviction in that case.

It is submitted with deference that the most consistent theory amongst the various opinions referred to in these conflicting cases is the one to which effect is given in *R.* v. *West*, 24 Can. Cr. Cas. 249, 9 O.W.N. 9 (affirmed on appeal), and in *Ex parte McAdam, supra,* by Mr. Justice White of the New Brunswick Court.

The provision as to summary trial by a police magistrate for the offences stated in sec. 773 with the defendant's consent is one which originated in Ontario, and was extended, with various limitations as to the functionary upon whom this judicial power was conferred, to the other provinces of Canada. The summary trials provisions of sec. 773 are to be viewed as entirely independent of the power of summary conviction. While, prior to the amendment of 1909, some offences were specified which were not indictable, the general scope of Pt. XVI. was always for the trial of minor indictable offences, and in its present form it embodies no offences but those which are indictable. The system of summary trial under Pt. XVI. bears the general heading "Summary trial of indictable offences," and its provisions are to be entirely disregarded in pursuing a prosecution as for an offence punishable on summary conviction. Prosecutions for indictable offences are matters peculiarly under the control of the

N. B.

Annotation

Obstructing a peace officer.

Annotation (*continued*)—**Criminal law (§ II A—49)—Summary proceedings for obstructing peace officers—Criminal Code, sec. 169.**

Crown authorities, but where an indictable offence is also made punishable on summary conviction as an alternative method of procedure, a private prosecutor is enabled not only to initiate a charge, but to carry the same forward to its ultimate hearing and disposition. He is the plaintiff in the proceedings, and has a status to be awarded his costs of the prosecution as against the defendant in case the latter is convicted.

It will be seen from this that the application of Pt. XVI. in limitation of the power of two justices or of a police magistrate to make a summary conviction would have the effect of depriving a private prosecutor of a substantial remedy which he has under Pt. XV. in advancing his own cause of complaint against the defendant for an infraction of the criminal law under sec. 169. It may, of course, be that his prosecution might be superseded by the action of the Crown authorities in intervening in his proceedings under Pt. XV., but that is quite a different matter from being dependent entirely upon the Crown authorities to prosecute his sworn information before a magistrate, as he would be dependent in many jurisdictions in Canada if Pt. XVI. has the limitative effect indicated in the *Crossen* case.

If the only information before the magistrate is one laid by the peace officer or other party aggrieved in which he expressly asks a trial under the Summary Convictions Act (Code Part XV.), being satisfied to have the lesser punishment imposed which is applicable to that procedure, it may be doubted whether the magistrate would have any authority to turn the case into a "summary trial" under Part XVI. without the prosecutor's consent, or to proceed with a preliminary enquiry and committal for trial without a fresh information. See *Ex parte Duffy*, 8 Can. Cr. Cas. 277; *Re McMullen*, 20 Can. Cr. Cas. 334, 8 D.L.R. 550; *R.* v. *Mines* (1894), 1 Can. Cr. Cas. 217, 25 Ont. R. 577, *R.* v. *Lee*, 2 Can. Cr. Cas. 233; *R.* v. *Shaw*, 23 U.C.Q.B. 616; *R.* v. *Dungey*, 5 Can. Cr. Cas. 38, 2 O.L.R. 223. W. J. TREMEEAR.

TWEEDIE v. The KING

CAN.

S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. November 2, 1915.

1. ADVERSE POSSESSION (§ I H—41)—CONTINUOUS USER OF TIDE LANDS—FORESHORE—LOST GRANT.

Continuous user of a foreshore adjoining one's land for booming purposes, for upwards of forty years, affords as strong an instance of adverse possession as can be had of tide lands, from which a prior like user may be inferred or a lost grant presumed.

2. EMINENT DOMAIN (§ III C 2—150)—EXPROPRIATION BY CROWN—COMPENSATION TO OWNER BY ADVERSE POSSESSION.

In order to entitle an owner to claim compensation for the Crown's expropriation of a foreshore adjoining his land, he need not establish

CAN.

S. C.

TWEEDIE v. THE KING.

his ownership by a documentary title, but his title may be founded on adverse possession.

3. EVIDENCE (§ IX—675)—ADMISSIONS BY CROWN—PRIMA FACIE EVIDENCE OF TITLE BY POSSESSION.

An instrument constituting an admission touching the title to lands claimed by adverse possession, made by the only executive authority competent to make it on behalf of the Crown, is admissible in evidence against the Crown, and is *prima facie* evidence of title by possession.

[22 D.L.R. 498, 15 Can. Ex. 177, reversed.]

Statement

APPEAL from a judgment of the Exchequer Court of Canada, 22 D.L.R. 498, 15 Can. Ex. 177, awarding compensation for land expropriated for purposes of the Intercolonial Railway.

Teed, K.C., and *Lawlor*, K.C., for the appellant.

Baxter, K.C., Att'y-Gen'l of New Brunswick, for the respondent.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—The pleadings and evidence are so fully dealt with by my brother Judges that it will not be necessary for me to do more than state briefly the conclusion I have reached.

The grant to the appellant of lot 37 did not include the adjacent foreshore, but I think appellant has established a possessory title to it. The evidence shews sufficient continuous use of the boom extending over the foreshore for the purpose of retaining the floating logs. The only other question that arises is as to the nature of this use of the foreshore and its consequences.

It seems to me that it is strictly analogous to the common practice of mooring vessels to the bank in such a way that rising and falling with the tide, they rest at extreme low tide on the soil of the foreshore. This is the right or privilege known as groundage and in respect of which dues are payable. It is recognized that this right like that of anchorage is one directly affecting the soil and its use raises a presumption of ownership of the soil. See the judgment of Erle, C.J., in *Le Strange* v. *Rowe*, 4 F. & F. 1048.

It seems to me that this floating of logs that ground at every tide upon the soil of the foreshore affords a strong instance of such possession as can be had of lands covered by water at the flow of the tide; it is incompatible with any ordinary use to which the foreshore could be put by another as owner.

The case must be referred back to the Exchequer Court to fix the additional compensation to which the appellant is entitled in view of the fact that he is the owner, not only of lot 37, but of its adjacent foreshore.

The appellant is entitled to his costs of this appeal.

DAVIES and IDINGTON, JJ., dissented.

DUFF, J.:—The lands that are the subject matter of this controversy were taken for the purposes of the Intercolonial Railway under the provisions of ch. 143, R.S.C., on September 21, 1910.

On July 16, of the same year, the following minute had been passed by the Lieutenant-Governor in Council of New Brunswick:

Memoradum and report of the Honorable Attorney-General for the information of the Committee of the Executive Council. The Attorney-General reports, that it is proposed to make a diversion of the line of the Intercolonial Railway from Nelson to Loggieville in the County of Northumberland, in the Province of New Brunswick, and the Minister of Justice of Canada has, through his agent, Warren C. Winslow, Esquire, K.C., of Chatham, N.B., applied for a disclaimer of damages on account of taking for use of the said Intercolonial Railway, certain lands covered with water, situate below high-water mark, on the Miramichi River, at a point called Walsh's Cove, the particular lots being described as follows:—

Lot number 86, beginning at station 290-77 on the centre line of the right of way of the new diversion at its intersection with the eastern side line of the Russell Wharf, so called; thence northwesterly by the said line seventy-five (75) feet, more or less, to a point distant seventy-five (75) feet at right angles north-westerly from the centre line; thence easterly parallel to the centre line and distant therefrom north-westerly seventy-five (75) feet at right angles four hundred and thirty (430) feet, more or less, to the prolongation of the western boundary of the property of Walsh Brothers at a point distant seventy-five (75) feet, north-westerly at right angles from the centre line, thence by the said western boundary and prolongation south-easterly, crossing the centre line four hundred and seventy (470) feet, more or less, to a point on the southerly shore of the river Miramichi, so called, at highwater mark; thence north-westerly by the shore at highwater mark, four hundred and ten (410) feet, more or less, to the eastern side line of the Russell Wharf aforesaid; thence by the said eastern side line fifty (50) feet, more or less, to the place of beginning, containing 154,330 square feet, more or less.

Lot number eighty-four, beginning at the intersection of the centre line of the right of way of the new diversion with the western boundary of the property of the said Dominion Government; thence by the said boundary north-westerly seventy-five (75) feet, more or less, to a point distant seventy-five (75) feet at right angles north-westerly from the centre line; thence easterly parallel to the centre line one hundred and fifty (150) feet, more or less, to the eastern boundary of said property at a point distant seventy-five (75) feet at right angles north-westerly from the centre line; thence south-easterly by the said boundary crossing the centre line, and the shore of the river Miramichi, so called, at the original highwater mark, three hundred and ninety (390) feet, more or less, to the eastern boundary of the property of Walsh Brothers, thence north-westerly by the said eastern boundary four hundred and ten (410) feet, more or less, to the place of beginning, containing 48,350 square feet, more or less, and containing in both lots 202,680 square feet, more or less.

The Attorney-General having carefully inquired into the matter has ascertained that the owners of the lands above mentioned along the shore, claim that they are entitled to the land covered by water in front of their said lands

CAN.
S. C.
TWEEDIE
v.
THE KING.
Duff, J.

to the channel or to a line drawn from the north-easterly corner of the Russell Wharf, to the north-westerly corner of the Loggie Wharf, with the exception of the property claimed by the Walsh Brothers, and that the said land covered by water has been used for over sixty years by the owners of the said lands for booming purposes and otherwise, and that blocks have been built in front along the channel for said booming purposes for over sixty years. He is, therefore, of opinion that whatever rights the province may have formerly had in the said lands covered by water, that said rights have become extinguished, and that it would be inadvisable to set up any claim to the same. He, therefore, recommends that upon His Honour the Lieutenant-Governor approving of this minute, that the Minister of Justice be informed that the said Province of New Brunswick lays no claim to the said lands covered by water and situate below highwater mark, and that the Department of Railways must deal with the parties claiming said lands and lands covered by water.

And the Committee of the Executive Council concurring in the said recommendation.

It is accordingly so ordered.

Certified: Passed July 16th, 1910.

(Sgd.) JOE HOWE DICKSON.
Clerk of the Executive Council of N.B.

This instrument constitutes an admission touching the title to the lands in question, made by the only executive authority competent at the time to make admissions on that subject on behalf of the Crown; and, therefore as an admission on behalf of the Crown, it is admissible in my opinion in evidence against the plaintiff in this proceeding.

This admission, of course, does not operate as a conveyance; but it is *primâ facie* evidence of title by possession. And it is sufficient for the purposes of this appeal to say (applying the well settled principle that enjoyment of "all the beneficial uses of the foreshore" for 60 years, which would naturally have been enjoyed by the direct grantee of the Crown. *Lord Advocate* v. *Young*, 12 App. Cas. 544, at 553, is sufficient to establish a case of title by possession), that the evidence as a whole (while it cogently supports), contains little or nothing to detract seriously from the strength of this *primâ facie* case.

There should be a reference back to ascertain the amount of compensation to which the appellant is entitled in respect of the parts of the foreshore and solum taken. I should not disturb the finding in respect of the value of the upland taken, or in respect of compensation for injurious affection of the upland.

Anglin, J.

ANGLIN, J.:—For the construction of a line of railway, known as the Chatham Diversion of the Intercolonial, the Crown has taken a portion of lot 37, admittedly the property of the defen-

dant. In respect of this piece of upland, including riparian rights, he has been awarded in the Exchequer Court as compensation, the sum tendered by the Crown, $2,150. The Crown has also utilized for its railway a portion of the foreshore in front of lot 37, to which the defendant has hitherto in his litigation unsuccessfully asserted title. On the present appeal he seeks to have his title to the foreshore established, or, in the alternative, his right to an easement over it for the booming of logs, and to receive compensation in respect thereof, and he also claims increased compensation for the upland taken and injuriously affected.

In regard to the latter claim, I have not been satisfied that the amount allowed by the learned trial Judge is inadequate.

I also agree with the learned assistant Judge of the Exchequer Court, that the grant to the defendant's predecessor in title of lot 37, bounded by the waters of a tidal river, did not carry to the grantee title to the foreshore. It should scarcely be necessary to say that the order in council passed by the provincial government disclaiming any interest in the foreshore in question does not vest title to it in the appellant. But if he was in possession when the expropriation proceedings were instituted, his inchoate holding title, though short of the statutory 60 years duration, would avail as a defence against everybody but the true owner, and inasmuch as, if the defendant is not the owner, the title would be in the Crown in right of the Province of New Brunswick and not in right of the Dominion, the disclaimer of the former may be of importance. Moreover, if the defendant had possession when the expropriation proceedings were commenced and the Crown had been out of *de facto* possession for 20 years, the statute 21 Jac. I., ch. 14, may be an obstacle in the plaintiff's path. *Doe d. Watt* v. *Morris*, 2 Bing. N.C. 189; *Emmerson* v. *Maddison*, [1906] A.C. 569. But, in the view I take of the defendant's claim of title by possession, it is not necessary to dwell upon these aspects of the case.

In so far as the defendant's claim to a prescriptive easement rests upon the Prescription Act (C.S., N.B., 1903, ch. 156), he encounters the difficulty that the alleged right of booming logs had not been exercised for several years before this action was brought (sec. 3). His claim to an easement apart from the operation of the statute, need be considered only if his claim of title by possession to the solum cannot be supported. After hearing the evidence in support of this latter claim the trial Judge deemed it

CAN.
S. C.
TWEEDIE
v.
THE KING.
Anglin, J.

insufficient. The question is one of fact, and the judgment in favour of the Crown should be interfered with, only if upon a careful consideration of the evidence, it is clear that the conclusion reached is erroneous.

In order to establish title by possession to a portion of the foreshore, it is not necessary to prove the same exclusive possession of it, which would be requisite in a case of uplands. A grantee of foreshore holds it subject to the *jus publicum* of navigation and fishing, and a similarly restricted title to it by possession may be established by proof of such beneficial enjoyment as a grantee holding subject to this *jus publicum* might have exercised. *Lord Advocate* v. *Young*, 12 App. Cas. 544, at 553; Moore on Foreshore (3rd ed.), pp. 658, 660, 779, note (*u*), and 830, n. (*s*); 28 Hals., pp. 368-9. In *Johnston* v. *O'Neill*, [1911] A.C. 552, at 583, Lord Macnaghten, quoting from the speech of Lord O'Hagen, in *Lord Advocate* v. *Lord Lovat*, 5 App. Cas. 273, at 288, said:—

> As to possession, it has been said in this House that "it must be considered in every case with reference to the peculiar circumstances . . . the character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might be expected to follow with due regard to his own interests—all these things, greatly varying as they must under various conditions, ought to be taken into account in determining the sufficiency of a possession."

This same passage was quoted with approval in *Kirby* v. *Cowderoy*, [1912] A.C. 599, at 603. This restriction upon the nature of the possession requisite must be borne in mind in considering the sufficiency of the case made out. What is that case?

The upland lot No. 37 was granted to Thos. Loban in 1798. We have no evidence of any dealing with the foreshore by him. He died in 1817. By a lease dated August 29, 1818, his executors and his devisee demised to Robert Young for 15 years from July 1, 1817, *inter alia*,

> the privilege of erecting a boom for the purpose of securing timber, etc., in front of the said lot No. 37, from the upper line of the said lot 37 down stream until it comes to the distance of 50 feet from the upper part of the boom now occupied by Francis Peabody, Esq.

There is no evidence of actual occupation under this lease, and it may be contended that the lease itself is as consistent with a claim by the Lobans to an easement of the right to boom logs as it is with an assertion of a title to the solum of the foreshore. But see *Van Diemen's Land Co.* v. *Table Cape Marine Board*, [1906] A.C. 92, 99, and *Le Strange* v. *Rowe*, 4 F. & F. 1048. The next

piece of documentary evidence is not subject to this observation. It is the will of Jane Loban, widow and devisee of Thos. Loban, made in 1852, whereby she devised to her son, John Loban, the foreshore in front of lot 37 "to the outside of the boom in front." Meantime the evidence of the actual presence and use of the boom itself commences.

His Honour Judge Wilkinson, aged 89 years, and a resident of Chatham for 75 years, formerly County Court Judge of the County of Northumberland, deposed to the existence and use of the boom for storing logs from 1850 for a number of years, down to a period some "20, 30 or 40 years ago."

Jas. Curran, aged 78, who resided in Chatham all his life, cannot remember when the boom was not in front of the Loban lot. His memory goes back to 1846. The boom was first used to his knowledge by Joseph Cunard, then by Johnston and MacKay, and later by Ritchie and by Muirhead. He remembers constant user of the boom down to about 27 or 28 years ago and a subsequent user some 8 or 9 years ago.

Jas. Mowatt, aged 81, knew the Loban property for 60 years. He had a shop on part of it for 25 years prior to 1880. The boom was maintained during that period.

Jos. Synott knows of the existence of the boom since 1850. He and Mowatt, however, state that they think the user of it for storage purposes ceased about 1884 or 1885.

Alexander Fraser, aged 81, came to Chatham in 1846. He remembers the block to which the boom was attached from about that time, and that the Rainnies used the boom from about 1847 to 1850.

In 1862 John Loban devised to his widow, Jane Grey Loban, the foreshore "to the outside of the boom in front."

Allan Ritchie deposed that the firm of D. & J. Ritchie made payments of rent for the use of the boom in question, first to John Loban and afterwards to Jane Grey Loban from 1855 to 1873, when it was leased to Muirhead.

Jas. Robinson deposed to the use of the boom from 1861 down to about ten years ago.

The defendant Tweedie, 65 years of age, gives evidence of the constant use of the boom from his earliest recollection, down to 1886 by lessees or licensees of the Lobans and to subsequent inter-

CAN.

S. C.

TWEEDIE v. THE KING.

Anglin, J.

mittent use of it, down to about ten or twelve years ago. He acted as solicitor for Jane Grey Loban and drew a lease of the boom from her to Muirhead in 1873. He also proves payment of rent for the boom by Muirhead to Jane G. Loban, and the user of it by Muirhead down to 1886 and subsequently by Richards.

John Johnson, a witness called by the Crown, says that 60 years ago the boom was an old established boom and that it was used for many years until some time, he cannot say how long, after the burning of the mill in 1873.

There is also evidence from Alexander Fraser that he had heard that the boom existed long previous to 1845, but this I treat as inadmissible.

In 1892, Muirhead's interest as lessee of the boom was sold by the sheriff and bought by the defendant. In 1895, Jane G. Loban demised to the appellant *inter alia* the boom privilege for a term of thirty years. This he assigned to Helen Russell. In 1906 Jane G. Loban conveyed to the defendant her reversion in the property, including the block and boom, and assigned to him her rights under the existing leases. In 1909, Helen Russell surrendered her rights to the defendant. There is no contradiction of the oral evidence of occupation and there is no suggestion that all the documents mentioned were not executed and delivered for substantial consideration and in good faith, no question of title having then arisen. They leave no room to doubt the character of the right to the foreshore which the Lobans asserted and make clear the intention with which the acts of occupation were performed. *Duke of Beaufort* v. *Aird*, 20 Times L.R. 602. While the storage of logs at high tide may not have involved any actual possession of the solum of the foreshore, at and for some time before and after low tide the logs undoubtedly lay upon the solum itself. *Le Strange* v. *Rowe*, 4 F. & F. 1048, at 1052-3. Moreover, the block to which the booms were attached, though perhaps outside the foreshore, was a permanent structure and the booms were themselves secured by pickets. They would not otherwise have held in place. These were, in my opinion, acts indicative of an assertion of ownership, such that those interested in disputing the title asserted by the Lobans would so understand them. Coulson & Forbes, Law of Waters (3rd ed.), 29-39.

Having regard to all these circumstances, I think the user of the foreshore shewn to have been made by the predecessors in

title of the defendant and their lessees or licensees was of the character necessary to support a claim of possessory title. Continuous user of this kind from 1840 to 1885 or 1886, is clearly shewn by the evidence and it indicates that the Loban boom was well known and established for years prior to 1840 or 1845, beyond which the memory of living witnesses does not go. There is no reason to suppose that the booming privilege demised in 1818 to Robt. Young was not exercised or that the assertion of ownership of the foreshore by the Lobans and occupation of it under them, do not date at least from that time. *Rogers* v. *Allen*, 1 Camp. 309; *Att'y-Gen'l* v. *Emerson*, [1891] A.C. 649, at 658. The reference in the lease of 1818 to the fact that an adjacent part of the foreshore was then occupied by a boom held by Francis Peabody is significant in this connection. If the later user of the Loban boom has been intermittent it would appear to have been only because owing to the burning of mills and other causes permanent tenants for it were not available. There is no evidence of anything to suggest abandonment of the foreshore or of the right to use it for booming purposes.

From a continuous user of upwards of 40 years (such as has been actually proved in this case), an earlier like user may readily be inferred. *Chad* v. *Tilsed*, 2 Brod. & B. 403, at 408. This, coupled with the lease of 1818 and subsequent documents indicative of the character of the right asserted (*Re Alston's Estate*, 28 L.T. (O.S.) 337), in my opinion suffice to support the defendant's claim to a possessory title under the New Brunswick statute, 6 Wm. IV., ch. 74 (now C.S.N.B., ch. 139, sec. 1).

If it were necessary for him to invoke the doctrine of lost grant, even a shorter user than has been proved might warrant the presumption of such a grant; 28 Hals., 371 (*g*); Moore's Foreshore (3rd ed.), p. 598; *Duke of Beaufort* v. *Mayor of Swansea*, 3 Ex. 413; *Re Alston's Estate*, 28 L.T. (O.S.) 337. Although the statute of 8 Wm. IV., ch. 1, probably precludes a presumption of a grant made subsequently to 1837, it presents no difficulty in presuming a grant prior to that date. The evidence proves actual possession from 1840 at least to 1886, if not 1902, and warrants an inference of assertion of ownership and possession consistent therewith since 1818, and there appears to be no reason why a lost grant of a date earlier than 1837 should not be presumed. Taylor on Evidence (10th ed.), 138; *Turner* v. *Walsh*, 6 App. Cas. 636.

CAN.

S. C.

TWEEDIE v. THE KING.

Anglin, J.

Although in most instances the Courts have, no doubt, dealt with ambiguous and equivocal grants of upland, and the question presented has been whether the proof of user of the adjacent foreshore was such as warranted its inclusion in the grant of the upland, such cases as *Lord Advocate* v. *Young*, 12 App. Cas. 544, and *Mulholland* v. *Killen*, Ir. R. 9 Eq. 471, at 481, would seem to be authorities for the view that, although the description of the riparian lot cannot be said to include any part of the adjacent foreshore, a grant of the latter may be presumed from long user. That title to foreshore may be acquired against the Crown by occupation for the statutory 60 years in cases where the grant of the upland clearly does not include it, is, I think, not open to doubt. 6 Encyc. Laws of England, 199.

The evidence adduced by the defendant in support of his possession is as satisfactory as could reasonably be expected, having regard to all the circumstances, and it should, in my opinion, be held that he has established title to the foreshore in question.

It is quite clear that the compensation which has been allowed him is confined to the damage sustained by deprivation of and injury to his upland property and riparian rights incident thereto. Nothing has been allowed for his interest in the foreshore, it having been held that he had none. As already indicated that interest is subject to the *jus publicum* of navigation and fishing, and it is quite possible that any user of the foreshore such as the defendant alleges he contemplated was out of the question. Any possibility of obtaining a license to so use it he is entitled to have taken into account. *Cedars Rapids Manufacturing Co.* v. *Lacoste*, 16 D.L.R. 168, [1914] A.C. 569; but its remoteness must also be considered. *Cunard* v. *The King*, 43 Can. S.C.R. 88. The value of the foreshore in question in former years for booming purposes may perhaps be estimated from the rental paid for the privilege, but the revenue which would have been derivable from this or any other available source, now or in the future, had the Chatham Diversion not been undertaken, may be greater or smaller than formerly. It must also be borne in mind that in the $2,150 already allowed as compensation there is included a substantial sum for riparian rights, and it may be that the situs of the pier or block to which the boom was attached and of part of the boom itself is not included in the property to which the defendant's title has

been established. *Fitzhardinge* v. *Purcell*, [1908] 2 Ch. 139, at 166.

On the whole, while the appellant is entitled to some additional compensation in respect to his interest in the foreshore, I think we are not in a position to fix the amount which should be allowed him, and that the case must be referred back for that purpose to the Exchequer Court.

The appellant is entitled to his costs of this appeal.

Appeal allowed.

CAN.
S. C.
TWEEDIE
v.
THE KING.
Anglin, J.

BANKERS TRUST v. OKELL.

B. C.
C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Galliher, and McPhillips, JJ.A. March 7, 1916.

1. CORPORATIONS AND COMPANIES (§ V F 3—263)—LIABILITY AS CONTRIBUTORY — ALLOTMENT OF COMMON STOCK IN PLACE OF PREFERRED — NULLITY.

There is no binding subscription contract effected as to charge a subscriber with liability as a contributory by allotting to him common shares in place of preferred stock he applied for, the subscriber at the time of the allotment not being a director and having no knowledge of the company's inability to issue such stock, and even had he ascertained from the articles and memorandum of incorporation the corporate powers to issue such stock he would have found the company empowered to issue them.

[*Re Bankers' Trust and Barnsley*, 21 D.L.R. 623, 21 B.C.R. 130, followed; *Oakes* v. *Turquand*, 36 L. J. Ch. 949, at 964, referred to.]

Statement

APPEAL by applicant from order of Hunter, C.J.B.C. Reversed.

F. A. McDiarmid, for applicant.

Maclean, K.C. and *H. W. R. Moore*, for Bankers Trust.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I agree that the appeal should be allowed for the reasons to be handed down by my brother Galliher.

Irving, J.A.

IRVING, J.A.:—I think, with deference to the Chief Justice appealed from, that our decision in the *Barnsley* case, 21 D.L.R. 623, 21 B.C.R. 130, must govern this case. I would allow the appeal.

Galliher, J.A.

GALLIHER, J.A.:—This Court has already decided in *Re Bankers' Trust and Barnsley*, 21 D.L.R. 623, 21 B.C.R. 130, following the decision of the Court of Appeal of Ontario in *Re Pakenham Pork Packing Co.*, 12 O.L.R. 100, that the shares issued by the company were common and not preferred shares, and that Barnsley was not liable as a contributory.

Unless a distinction can be drawn on the ground that Okell was a director and acted as such between the allotment of shares and the going into liquidation of the company then this case is governed by our decision in the *Barnsley* case.

B. C.

C. A.

BANKERS TRUST v. OKELL.

Gallihier, J.A.

Okell made three applications for shares. The first application was for one hundred shares of the capital stock of the company without specifying common or preferred, and it would be open to the company to allot him either.

As a matter of fact these hundred shares allotted are described in the interim certificate which contains the notice of allotment as 100 ten per cent. preference shares. These were accepted by Okell and he says in his evidence that any conversations he had with the brokers for the sale of the shares was for preferred shares, so that their minds were *ad idem* as to the class of shares, but under our decision in the *Barnsley* case the company had no preferred shares, and there was no basis for the contract. The notice of allotment of these shares is dated January 15, 1913.

A second application was made by Okell for 50 shares of ten per cent. preferred stock and notice of the allotment of thesebears date of January 28, 1913.

The third application of Okell is similar to the second only for 250 shares, and the notice of allotment bears date January 31, 1913.

John Edward Allen, the liquidator, says in his evidence that Okell was appointed a director on January 30, 1913, but that he (Okell), was not present at the meeting, and that no notice of his appointment was sent him, and Okell swears he knew nothing of the appointment until just before the meeting of February 24, 1913, which he attended. Allen also says in answer to a question by the trial Judge that Okell was appointed after his shares had been allotted to him.

At the meeting of February 24, 1913, the first one attended by Okell, the minutes of the previous meeting, including a list of shares allotted among which was an allotment to Okell, were read and confirmed and Okell took part in this meeting and moved two or three resolutions.

He attended again on March 13, 1913, and then became aware for the first time that the company was in bad shape. This meeting was continued from day to day until the 18th, the directors trying to devise ways and means to save the company but without avail, and the company then went into liquidation. Under these circumstances is Okell in a different position to Barnsley who was a shareholder simply? All his shares had been allotted to him before he was appointed a director.

In this connection I quote from the judgment of the Lord Chancellor in *Oakes* v. *Turquand*, 36 L.J. Ch. 949, at 964.

In a still later case, that of *Ex parte Peel, Re Barned's Banking Co.*, L. R. 2 Ch. 674, Lord Cairns expressed an opinion on the subject to which I entirely subscribe. He said:—"It is the bounden duty of a person to ascertain at the earliest practicable moment what is the charter or title deed under which the company in which he has agreed to become a shareholder is carrying on business. I think he ought to be held bound to look to the memorandum and articles of association before he applies for shares. But even when the memorandum and articles of association are not in existence at the time, I think at the very latest when he receives his allotment of shares, he ought to satisfy himself that there is nothing in the memorandum or articles of association to which he desires to make any objection." This appears to me to lay down a clear and precise rule, which will render unnecessary the consideration in each case, whether a reasonable time has or has not elapsed from which acquiescence may be assumed.

Had Okell, when these shares were allotted to him, searched the memorandum and articles of association, he would have found that the company had power to issue preferred shares. Was he bound to go further and search the books of the company to ascertain if those shares were regularly and properly issued and if he did not do so, is he now estopped from setting up that they are not preference shares? Had he been a director at the time these so-called preference shares were issued, it may very well be that he would be taken to have had actual notice and would be estopped, but we have been referred to no case, nor have I been able to find one, where a shareholder who afterwards becomes a director is, in respect of his shares (unless he goes beyond the memorandum and articles of association and ascertains that the necessary steps were taken for the proper issuance of the shares), estopped from saying that there was no contract between the company and himself. It is not a case of a voidable contract but no contract at all.

The appeal should be allowed and the plaintiff struck from the list of contributories.

McPHILLIPS, J.A., dissented. *Appeal allowed.*

McPhillips, J.A. (dissenting)

DUBE v. ALGOMA STEEL CO.

ONT.
S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee and Hodgins, JJ.A. January 24, 1916.

1. MASTER AND SERVANT (§ II A 6—122)—LIABILITY TO SERVANTS OF THIRD PERSON—HIRED CREW—DUTY AS TO SAFETY.

The hirer of a crane owes a duty to the crew furnished with it to so direct and supervise the operation as to provide for the safety of those engaged in it and to employ a system which will insure the workmen

ONT.
S. C.
DUBE
v.
ALGOMA
STEEL
CO.

against injury, no matter whose servants they are, and in the absence of the owner's knowledge of the character of the work to be performed with it and his undertaking to supply a machine capable of doing it, there being no contributory negligence or *volens*, the hirer and not the master of the crew is responsible for the death of a craneman occasioned by the overturning of the machine in course of operations.

[Compare *Balfour* v. *Bell Telephone Co.*, 24 D.L.R. 395, 34 O.L.R. 149.]

2. MASTER AND SERVANT (§ II E 1—210)—FELLOW SERVANTS—HIRED CREW.

The crew furnished with the hiring of a crane do not necessarily become the servants of the hirer or the fellow-servants with those in his employ.

[Sec. 3 (*c*) of the Workmen's Compensation Act, R.S.O. 1914, ch. 146, considered; *McCartin* v. *Belfast Harbour Commissioners*, [1911] 2 I.R. 143, referred to.]

Statement

APPEAL from the judgment of Britton, J., in favour of plaintiff and dismissing the action against one of the defendants brought by widow and administratrix on behalf of herself and children, to recover damages resulting from death. Affirmed.

The judgment appealed from is as follows:—

A travelling derrick owned by the paper company, and usually operated for their own business upon their own premises, was, with its crew—consisting of the deceased Martin P. Dube as engineer and a fireman—hired by the steel corporation to do some work upon the premises of the steel corporation. The work was to be of comparatively short duration, and the steel corporation was to pay $40 per day for the use of the derrick and these two men. The derrick was handed over and by its engineer and fireman moved from the tracks upon the premises of the paper company to the tracks of the steel corporation.

There is no evidence that the paper company knew the precise work the derrick was to do, beyond this, that it was intended to lift and remove something of the weight of five, six, or seven tons. Neither the engineer nor the fireman knew until actually at work.

While Dube was lifting by the derrick an iron tank of the steel company from one side of the track to replace it upon a flat car on the other side of the track, the derrick was overturned and fell, in its fall instantly killing Dube.

The plaintiff alleges negligence on the part of both defendants and sues both, treating them as jointly liable. The negligence assigned is:—

(1) That the track was unsafe and insecure by reason of absence of proper ballasting and bracing.

(2) In not furnishing Dube with proper and adequate equipment for carrying on his work.

(3) For having a defective system in doing the work as it was being done at the time when Dube was killed.

(4) In failing to employ competent persons to assist Dube in his work.

(5) In failing to have the derrick properly stayed with outriggings.

(6) In failing to have the derrick properly fastened to the rails by clamps or braces.

(7) In using defective plant and in not having proper superintendence.

Particulars were ordered and furnished as to the negligence of each defendant relied upon by the plaintiff.

At the close of the evidence, each defendant moved for the dismissal of the action, and objected to the case going to the jury. I reserved my decision, and submitted questions to the jury. The following are the questions and answers:—

(1) Was the defendant the Lake Superior Paper Company guilty of any negligence which caused the death of Martin P. Dube? A. Yes.

(2) If so, what was that negligence? Answer fully. A. In not furnishing proper equipment, clamps and ballast, in deck of crane.

(3) Was the crane a safe or dangerous machine at the time when used and as used by the defendant the Algoma Steel Corporation? A. Yes.

(4) If dangerous, in what respect was it dangerous? A. In not being properly clamped to track or blocked under decking. Deck of crane not being properly ballasted.

(5) Was the defendant the Algoma Steel Corporation guilty of negligence which caused the death of Martin P. Dube? A. Yes.

(6) If so, what is the negligence you find? Answer fully. A. In not having a proper rigger to superintend the work that had to be done.

(7) Could the deceased Martin P. Dube, by the exercise of reasonable care, have avoided the accident? A. No.

(8) If so, what could the deceased have done? A. Nothing more than he did.

(9) Damages? A. Each company to pay $1,500 to widow and children, and to be divided as the Judge sees fit. Damages,

ONT.

S. C.

DUBE v. ALGOMA STEEL CO.

Statement

$3,000. If both companies are liable, each to pay $1,500; if only one, that company to pay the $3,000.

No question was submitted to the jury as to whose servant Dube was at the time of the accident. The facts were not in dispute. Upon the undisputed evidence it is a question of law.

In the answers of the jury, the answer to the 3rd question is "Yes." That, of course, is ambiguous; on being asked if they meant "dangerous," they answered in the affirmative, but apparently the clerk omitted to take down the answer in that way. No harm, however, can result from that, because the answer to the 4th question shews that the jury clearly found that the machine was dangerous.

I have read with great interest the exhaustive and carefully prepared argument which counsel kindly sent to me in accordance with leave given at the trial; but, as this case was tried by a jury, the only thing for me is to determine whether there is any evidence which should properly have been submitted to the jury, upon which they could reasonably be asked to find negligence, and how, upon the answers to the questions, the judgment should be entered.

The jury said, and that was the only negligence found by them, that the paper company was negligent "in not furnishing proper equipment, clamps and ballast, in deck of crane." The crane was of standard make. So far as appeared, no accident had happened from using it. It was represented by the paper company that it would lift six or seven tons, and that was shewn to be true, as it did lift that weight. The clamps might or might not be with it. There was a place for clamps, and the use of clamps would depend upon its location on the ground and for what weight the crane was to be used. The other equipment mentioned was ballast. The ballast would simply be stone, or some heavy material, upon the deck, ready to be placed on the side opposite to where the crane and its load would swing.

Blocking was not mentioned by the jury, but there was evidence that blocks might be placed under the overhanging edge of the deck of the derrick and upon the ground upon the side over which the crane hung. Such blocks could easily have been found, and are not, in my opinion, any part of what properly could be

called "equipment." It is manifest that the danger was in the using of the crane as it was used and under the circumstances disclosed—not by reason of anything wrong or dangerous in the crane as it stood.

I am of opinion that there was no evidence of negligence on the part of the Lake Superior Paper Company which should have been submitted to the jury.

As to the Algoma Steel Corporation, Mr. Irving's first objection is, that the deceased Martin P. Dube was not a "workman" within the meaning of the Workmen's Compensation for Injuries Act. It was argued that the deceased was not the servant of the steel corporation; that the relation of master and servant did not exist between them. The plaintiff's reply is, that, by reason of sec. 14 of the Act, the defendants not having raised it in their pleadings as a matter of defence, it is not now open to them. The question was not, as I remember, argued at the trial.

No useful purpose would be served by my discussing at length the objections raised. I am of opinion, as I was at the close of the trial, that there was evidence against the steel company that could not properly be withdrawn from the jury. These questions with my charge were submitted to the jury, and upon these findings judgment must be entered against the defendant the Algoma Steel Corporation for $3,000, with costs, the costs to be only as if that company were sole defendant.

The $3,000 will be apportioned $1,250 to the widow and $1,750 divided equally among the children. If it be necessary to deduct anything for costs between solicitor and client, the minutes may be spoken to and the apportionment varied. The money of the infant children will be paid into Court. The names and ages of all the children to be verified by affidavit filed upon payment in.

The action against the Lake Superior Paper Company will be dismissed, but without costs.

A. W. Anglin, K.C., for appellant, the Algoma Steel Co.

T. P. Galt, K.C., and *E. V. McMillan*, for plaintiff.

W. M. Douglas, K.C., for respondent the Lake Superior Paper Company, Limited.

Hodgins, J.A.

HODGINS, J.A.:—The facts of this case are fairly clear. The crane and its attendants were hired by the steel company. The jury have found against the paper company, on the ground that

ONT.

S. C.

DUBE v. ALGOMA STEEL CO.

Hodgins, J.A.

it had supplied a machine lacking the proper equipment. But that equipment was only necessary in cases where the crane was used in lifting with a long arm or where the weight was very heavy.

If the paper company had been accurately informed as to the work, and had undertaken to supply a machine capable of doing it, there would be a basis for the finding of the jury.

But the inquiry made and the answer given are not actually connected with the bargain when made, and I have come to the conclusion, with some hesitation, that the paper company cannot be made liable.

The appeal of the plaintiff against the paper company should therefore be dismissed with costs.

In dealing with the steel company's appeal, it must be borne in mind that, while the crane and its crew were hired by it, it was only their work and services that were transferred. It is clear upon the evidence that a craneman, such as Dube was, must have his hands full in working the levers and attending to the brakes, and could not be expected to supervise the outside work. He could have surveyed the situation; and, if he did so, and considered it dangerous to perform the operation, he could have declined to proceed. In that case the steel company could not have dismissed him, nor could they have compelled him to risk his life or limbs, or his master's property, in doing what they wished to be done. All that the steel company's servants did was to notify him what they proposed to move and where to go, to signal him when to raise the boom and swing it and when to lower.

None of these things, as it appears to me, indicate that he had become their servant in the sense that the paper company had parted with all control or that the steel company had for the time become his complete master. Their right to require him to act was always subordinate to his right to refuse to do what he considered dangerous, either to himself, as the paper company's servant, or to the crane as the property of that company. An examination of the cases, and particularly that, in the House of Lords, of *McCartan* v. *Belfast Harbour Commissioners*, [1911] 2 I.R. 143, leads to the conclusion that he was not a fellow-servant with those of the steel company who were assisting him. The steel company had, it is true, a superintendent on the ground when the accident happened and a foreman, but I cannot find that they were in

ONT.

S.C.

DUBE v. ALGOMA STEEL CO.

such relation to him that he was bound to conform to their orders, as that expression is used in the Workmen's Compensation for Injuries Act, R.S.O. 1914 ch. 146, sec. 3 (*c*).

But I do not think that is decisive of this case. Being supplied by the paper company with a machine which might, under certain conditions induced by orders given for its operation, become dangerous in use, because not properly equipped, the steel company, through its workmen, undertook an operation in a hazardous way, and gave directions to Dube during its progress without any one in charge who was in fact competent to direct it and carry it out safely. It was the steel company's duty to have so directed or superintended the operation as to provide for the safety of those engaged in it, and to have employed a system which would ensure the workmen, no matter whose servants they were, against injury. The jury have absolved Dube from negligence, and there is no finding that he had voluntarily assumed the risk of the work. The steel company should be held liable.

Hodgins, J.A.

The steel company's appeal should be dismissed with costs, and the judgment directed to be entered against it for $3,000 should stand, with costs of action and appeal, including any costs payable by the respondent to the paper company.

MEREDITH, C.J.O.:—I agree with my brother Hodgins that the appeal of the defendant the Algoma Steel Corporation fails and must be dismissed, and that the plaintiff's appeal must also be dismissed.

Meredith, C.J.O.

I express no opinion on the question whether the deceased was, for the purpose of the work in which he was engaged when he met with his death, the servant of the steel company.

MAGEE, J.A.:—I agree.

Magee, J.A.

GARROW and MACLAREN, JJ.A., dissented.

Garrow, J.A., and Maclaren, J.A. (dissenting)

Appeal dismissed.

McPHAIL v. ABBOTT.

SASK.

S.C.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Lamont, Elwood and McKay, JJ. March 18, 1916.

1. DAMAGES (§ III A 4—80)—MEASURE—BREACH OF WARRANTY AS TO FITNESS FOR BREEDING.

The measure of damages for breach of warranty as to fitness for breeding, sought as a set-off against the purchase price, is not only the loss of service fees the purchaser would have received, but in addition, if claimed, under sec. 51 of the Sale of Goods Act (R.S.S. 1909, ch. 147), the difference between what the animal would have been worth had the warranty been fulfilled and the actual value of the animal at the time it was purchased. [*Braithwaite* v. *Bayham*, 4 D.L.R. 498, distinguished.]

SASK.

S. C.

McPHAIL v. ABBOTT.

Lamont, J.

APPEAL from a judgment in favour of plaintiff in an action for the price of a horse and set-off for breach of warranty. Varied.

E. B. Jonah, for appellant.

L. A. Seller, for respondent.

The judgment of the court was delivered by

LAMONT, J.:—The plaintiff brought this action upon a lien note given to him by the defendants as the purchase price of a stallion bought by them for breeding purposes. The defendants admit the making of the note, but allege that, at the time of sale, the plaintiff gave a warranty with the horse that he would leave with foal 50% of mares bred to him. They also allege that the stallion proved to be sterile, and as a consequence thereof was valueless to them, and they claimed to be entitled to set up this breach of warranty in extinction of the price. In addition they counter-claimed for the service fees they would have received if the horse had satisfied the warranty.

At the trial the defendants admitted that the horse was worth $175. The trial Judge found the warranty to be established, but held that, under the decision of this Court in *Braithwaite* v. *Bayham*, 4 D.L.R. 498, the only damages he could award were the service fees which the defendants would have received had the horse fulfilled the warranty. These damages he fixed at $125. From that judgment the defendants now appeal to this Court.

With great deference, I am of opinion that the case above cited does not touch the question as to whether or not the plaintiff is entitled to have the price of the horse reduced by the difference between what the horse was actually worth and what he would have been worth had he fulfilled the warranty.

In that case the Court said: (at p. 501)

> The evidence establishes that the plaintiff did so warrant the stallion; and I find that there was a breach of that warranty. I find that the stallion was put to 65 mares, only 23 of which proved to be in foal. There were, therefore, 16 short. Allowing the defendant $12 for each foal short, the amount is $192. I am of opinion that this is a proper amount to award as damages. This is special damage, but it is claimed specifically in the counterclaim, and it naturally arises from the breach of warranty complained of. It is not prospective damage. It is the only species of damages claimed for such breach; and it is not, therefore, necessary to discuss the matter of any other damage.

In that case the only damage claimed was the loss of the service fees; in the present case, in addition to the loss of the service fees claimed in the counterclaim, the defendants expressly

ask that the loss they have suffered by reason of the horse not being up to the warranty be set off *pro tanto* against the price. In my opinion they are entitled to this.

The loss suffered by the defendants by the breach of warranty was, 1st: The difference between the value of the horse as he actually was and the value he would have had if he had fulfilled the warranty, and 2nd: the loss of the service fees.

Sec. 51 of The Sale of Goods Act (ch. 147 R.S.S. 1909), reads as follows:

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty.

(3) In the case of breach of warranty of quality such loss is *primâ facie* the difference betwen the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

(4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price, does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

The actual value of the horse at the time the defendants purchased him is admitted to have been $175. Had he fulfilled the warranty, he would have been worth $550, which was the purchase price; the difference, or $375, represents the loss suffered by the defendants on the value of the horse himself.

I am therefore of opinion they are entitled to have this loss set off against the purchase price, and judgment for the plaintiff on the claim should be reduced to $175 and interest.

The judgment on the counterclaim for the defendants will stand as it was not appealed against, although I am of opinion that it is doubtful if the defendants are entitled to service fees for the second season; at the end of the first season they knew the horse was sterile, that being so, it would seem to me to follow that they should not have bred mares to him the second season. As, however, no objection was raised to the judgment on the counterclaim the point need not be considered.

The appeal should, therefore, be allowed, and the judgment varied by reducing the judgment for the plaintiff on the claim to $175 and costs. *Appeal allowed.*

N. S.

S. C.

TOWN OF GLACE BAY v. SMITH.

Nova Scotia Supreme Court, Graham, C.J., and Russell, Drysdale, and Harris, JJ. February 26, 1916.

1. TAXES (§ III B 1—113)—NAME IN WHOM PERSONAL PROPERTY ASSESSABLE —CONDITIONAL VENDORS—SALE OF PIANOS ON INSTALMENT PLAN.

The sale of pianos under a hiring agreement, whereby title to the property is retained until all instalments of the purchase price are paid, constitutes the seller the actual legal owner of the property though possession thereof is in the purchaser, and he is therefore subject to assessment under r. 4 of sec. 15 of the Assessment Act, R.S.N.S. 1900, ch. 73.

Statement

APPEAL from the judgment of Finlayson, Co. Ct. J., in favour of defendants in an action to recover taxes for the year. Reversed.

N. R. McArthur, for plaintiff, appellant.

A. D. Gunn, K.C., for defendant, respondent.

Drysdale, J.

DRYSDALE, J.:—This action is to recover taxes assessed as against defendants in the town of Glace Bay for the year 1913.

It appears that defendants had sold pianos and organs in the town on the instalment plan under hiring agreements, duly recorded, intended to and which did on their face prevent the said instruments or the property therein from passing to the purchasers until full payment of the price was made to defendants.

It is common ground that defendants formerly had a store in Glace Bay and were for years prior to 1913 assessed upon property in respect to said store. They had ceased in 1913 to have goods in said store but were assessed in respect to property owned by them in Glace Bay for that year, 1913, to the extent of $45. The rate roll is not in dispute, under the provisions of the Assessment Act, and the plaintiff town justifies the assessment under r. 4 sec. 15 of the Assessment Act, R.S.N.S. 1900, ch. 73. The fact is not in dispute that at the time of the making of the roll for 1913 defendants were interested in pianos in the town that had been sold under hiring agreements and that if they can be considered the owners of the goods so sold they held personal property in said town and would thus be liable to taxation. The Judge of the County Court for District No. 7 has held that defendants cannot be considered owners in respect of pianos so sold in said town and has dismissed an action to recover as against them the taxes imposed by the assessment roll of 1913 on the ground, as I read his decision, that defendants are not the owners of such instruments in the ordinary popular sense and do not come within the provisions of the Assessment Act as to the assessment of personal property.

N. S.

S. C.

TOWN OF GLACE BAY v. SMITH.

Drysdale, J.

I think the case turns upon a proper interpretation of r. 4 of sec. 15 of the Assessment Act, ch. 73, and must be so decided.

This is not an appeal from assessors, and if property such as pianos sold by defendants under the ordinary hiring agreement that appears in the case, and obviously intended to prevent the passing of the property in the instruments sold until full payment of the price, can be said to be defendants' property situated in the town, then the assessment of defendants was in due course and the taxation imposed within the Act. The important section under consideration reads as follows:

> Personal property shall be assessed in the name of the owner thereof, if known to the assessors; otherwise in the name of the person in possession thereof, provided that the assessment thereof may be transferred to the owner after hearing by the Court on appeal.

This provides for assessment upon the actual owners, or upon the apparent owners, *viz.*, the person in possession of the goods. Now can it be said that defendants are not the actual or real owners of the goods? It is argued that the word "owners" must be construed as owners in a popular sense; that because defendants had made a contract of sale and parted with possession they cannot be said to be the real owners. This view would place the ownership in the person in possession. But as the section of the Act contemplates assessment upon the actual owner as contradistinguished from the person in possession I cannot think it is a sound construction. The defendants are the actual legal owners under the instrument of sale and took care to let the world know that they are and remain owners until full payment of the price by solemnly executing and filing under the Bills of Sale Act an agreement to that effect, and being and remaining the real owners until payment of the price I am of opinion they take the responsibility attached to owners under the Assessment Act in question.

I would allow the appeal and direct recovery by the plaintiff town for the assessment sued for, all with costs.

GRAHAM, C.J., and RUSSELL, J. concurred.

Graham, C.J. Russell, J. Harris, J.

HARRIS, J.:—I agree with the decision of my brother Drysdale. I confess, however, that I have a strong suspicion that the plaintiff has already collected taxes from the possessors of the pianos, and having assessed the defendant for goods in his shop which it afterwards appeared he did not have the town is now trying

N. S.

S. C.

TOWN OF GLACE BAY v. SMITH.

Harris, J.

to support the assessment by a subsequent discovery of these piano contracts. I hope my suspicion is unfounded because it is unnecessary to say that such a course of procedure would be most reprehensible. However, as the case comes to this Court we have no alternative but to allow the appeal and direct judgment in the Court below for the amount sued for with costs of the action and appeal. *Appeal allowed.*

ONT.

S.C.

CAMPAIGNE v. CARVER.

Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., and Riddell, Latchford and Kelly, JJ. December 31, 1915.

1. MECHANICS' LIENS (§ V—32)—SEMI-DETACHED ERECTION FOR DIFFERENT OWNERS ON ADJOINING LOTS—JOINT OR SEVERAL CONTRACT—OFFER AND ACCEPTANCE—"OWNER'S REQUEST AND BENEFIT."

A contractor's offer to build a pair of semi-detached houses on two adjoining lots, owned by different persons, naming separate terms for each house but addressed to both owners together, implies a distinct acceptance by each of them, and the acceptance by one does not create a joint contract binding on both as subjecting both lots to a mechanic's lien for plumbing materials furnished for both houses; nor can the interest of the accepting owner be charged for materials furnished on the adjoining lot not at "his request or for his direct benefit," within the meaning of sec. 2 (*c*) of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140.

[*Deegan* v. *Kilpatrick*, 54 App. Div. N.Y. 371, distinguished.]

2. MECHANICS' LIENS (§ VIII—66)—STATUTORY PERIOD OF REGISTRATION—MATERIALS FURNISHED.

No lien attaches to the land under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, in the absence of evidence that any materials furnished for the building were supplied within the statutory period of the registration of the lien.

Statement

APPEAL by defendants from a judgment of the Local Master in a mechanic's lien action. Varied.

Gideon Grant, for appellants.

P. R. Morris, for plaintiff, respondent.

Latchford, J.

LATCHFORD, J.:—The two adjoining parcels of land, on the owners' interest in which the lien for $168.23 appealed against has been held to attach, were owned, when Carver agreed to erect houses upon them, one by Amelia Castell, and the other by Chester Spence and his wife; and they are still, so far as appears, respectively owned by the same persons.

In a proposition dated the 24th March, 1913, intituled "Tender for pair of houses on Wilson street for Messrs. Spence & Cassels," Carver said: "I will build those houses . . . furnish all material to complete the house (*sic*) for the sum of $2,467 each. . . ."

On the 11th April, in a document intituled in the same words,

Carver modified his original proposition, stating: "The alterations you gave me note of will make a difference of $37 for each house, which is $74 for both, which will make $2,430 for each house."

This tender was given by Carver to Mr. Spence (p. 30), who states (p. 37) that there was no written acceptance of it. Castell says he signed no contract, nor did his wife, so far as he knows. But that it was accepted is uncontested. The question upon which the case turns is, how was it accepted? By Spence and Castell jointly, or by each acting solely for himself? In other words, was it accepted in such a way as to constitute a single contract between Spence and Castell on the one part and Carver on the other for the erection of both houses? Or were two contracts made—one between Spence and Carver for the erection of the house on the Spence lot, and the other between Castell and Carver for the erection of the house on the Castell lot?

If there was a joint contract, the lien, in my opinion, was properly registered, and attached to the interest of both the owners (I treat the ownership of Castell and his wife as one).

In *Deegan* v. *Kilpatrick* (1900), 54 App. Div. N.Y. 371, the First Department of the Supreme Court of New York held, under a Lien Act similar to our own, that where two persons, each owning in severalty (as here) one of two adjoining lots, enter into a joint contract for work to be done on both lots, under an agreement treating both lots as one, a mechanic's lien for the work may be filed on both parcels.

With that decision, upon the facts of the case, I entirely agree. Other useful cases may be found collected in Rockel on Mechanics' Liens (1909), p. 225.

But the facts here are different. In considering the evidence, it is to be observed that Carver did not require a joint acceptance of his tender. That he might have done so is nothing to the point. It is also well to remember that, while the tender is frequently referred to—especially by the learned Master—as *the contract*, it was in reality but a proposal, the acceptance of which, whether joint or several, was necessary before a contract, or more than one contract, could be constituted.

ONT
S.C.
CAMPAIGNE
v.
CARVER.
Latchford, J.

In one aspect, the tender itself was not severable. The houses were to be semi-detached; divided, but built as one. It is, I think, highly improbable that Carver would, at the tendered price, have built one if he was not at the same time to have the building of the other. But this term, plainly enough implied, would be completely satisfied if, with the concurrence of Carver, each of the parties addressed accepted for himself.

It is, in my opinion, manifest, from the testimony given and from the conduct of all the parties concerned, that Spence accepted the tender as to the one house, and Castell as to the other, so as to constitute, when ratified, as it was, by Carver, one contract between Spence and Carver for the Spence house, and another contract between Castell and Carver for the Castell house. There were thus formed between the parties two separate and distinct contracts—not one, as found by the learned Master. So long as Carver had the building of both houses, he was content that each owner should be responsible for the price of the erection of his particular house. That the houses were semi-detached and not entirely separated, and therefore more cheaply constructed, is quite immaterial. The evidence is uncontradicted that there were two contracts—one for each house.

Carver says (p. 23): "I was to go ahead and complete the houses for $2,430 a piece.

"Q. And that is for which one? A. For both.

"Q. That is altogether or separately? A. Separately."

Carver knew the houses were on separate properties, one belonging to Spence, and the other to Castell (p. 24).

A bill for the Castell house was sent to Mr. Castell, and he paid it. Each (Castell and Spence) paid separately; each took care of his own contract (p. 25).

Castell, who looked after the paying of the bills for his wife, was asked (p. 31):—

"Q. And what was the contract, so far as you remember? A. The contract was for $2,430." He received from Carver, and produced, an account made out to himself before the lien proceedings were begun, shewing the amount of the contract made with him to be $2,430.

Spence says in effect (p. 32): "Castell had nothing to do with my property, nor had I with his."

"Q. Now, what was your contract? A. $2,430" (p. 39).

"Q. In the completion of the houses, did you have anything to do with the adjoining house? A. None whatever.

"Q. And did Mr. Castell have anything to do with yours? A. None."

Castell had made out, and he produced at the hearing, a bill rendered to Carver, shewing the account between Carver and himself on the basis of a liability on his part for the cost of his own house—$2,430.

Spence says (p. 36) that he handled no part whatever of the contract moneys in connection with the other—the Castell—property.

There is more evidence to the same effect, and none to any other. Clearly, then, there were two distinct acceptances of a tender which was severable, and which, with Carver's concurrence, was actually severed, so as to give rise to two distinct contracts.

Upon the Master's erroneous conclusion that there was but one contract, and that a joint contract between Spence and Castell on the one part and Carver on the other, for the erection of the two houses on the two parcels treated as one, is based his decision that Campaigne is entitled to a lien on the interest of the owners of both parcels for $168.23, being the price of plumbing materials used in both the houses by the defendant Snodny, who had a sub-contract (and only one sub-contract) for the installation of the plumbing in both houses. The last of such materials—a bath and sink-basin—were furnished on the 6th August, and were placed in the Castell house by Snodny and his man, Marshall, on the 10th August. On the day when they were installed, Marshall did, he says, 15 minutes' work in the Spence house; but there is no evidence that any materials furnished for the Spence house were supplied within 30 days of the registration of the lien, which was effected on the 3rd September.

Holding, as I do, that there were two contracts, the lien, so

ONT.

S.C.

CAMPAIGNE v. CARVER.

Latchford, J.

far as it affects the interest of the Spences in their land, utterly fails.

The lien for $168.23 also fails as to the Castell property. The Castell interest cannot be held liable for goods not supplied—as the materials installed in the Spence house—upon the request of the Castells, and not for their "direct benefit" (Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, sec. 2 (c) (iv.)); and, as stated, the claim covers materials supplied for both houses. However, as the cost of the plumbing—work and materials—was the same for each house, and two sets of like fixtures are shewn by the accounts in evidence to have been supplied, it is, I think, a reasonable inference that half the materials was used in each. Half their cost is $84.11, and the lien should be reduced to that sum and restricted to the Castell property. Materials to that amount were supplied at Mrs. Castell's request, carried on to Campaigne through Castell, Carver, and Snodny, and for the direct benefit of Mrs. Castell.

If Campaigne is not satisfied with the amount mentioned, he may have a reference at his own risk.

Success being only partial, and both appellants represented by the one solicitor and the one counsel, there should be no costs of the appeal. The plaintiff should, however, have his costs of the proceedings below as against Mrs. Castell, limited, however, apart from disbursements, to an amount not exceeding 25 per cent. of the amount recovered.

Falconbridge, C.J.K.B.

FALCONBRIDGE, C.J.K.B.:—I agree.

Kelly, J.

KELLY, J.:—The important element for consideration is, whether there was one undivided contract by Carver, the contractor, to build two houses for Spence and Castell, or in effect two separate contracts—one to build a house on the Spence lot for its owner, and the other to build another house for Castell on his lot. The two parcels adjoined. Carver signed a written tender, dated the 24th March, 1914, "for pair of houses on Wilson street for Messrs. Spence & Cassels" and to "do all labour and furnish all material to complete the house for the sum of $2,467 each." This was supplemented by a written memorandum of the 11th April, 1914, that "the alterations you gave

me note of will make a difference of $37 for each house, which is $74 for both, which will make $2,430 for each house."

Carver employed Snodny to do the plumbing at $165 for each house. The plaintiff supplied material to Snodny, for which he did not pay; and on the 3rd September, 1914, he caused to be registered against both properties a claim for lien for $168.23. In proceedings before His Honour Judge Monck to establish the lien, he held that the lien attached to the two properties. Carver and the property-owners have appealed.

The form of tender was such that acceptance could have been made by each of the owners separately for his own or her own house. The price for each was stated quite separate from and independently of the price for the other. There was no written acceptance of the tender by the owners jointly or by either of them separately; so that in that respect we are not assisted in determining whether the tender was treated by the parties as joint or separate. Something more than mere assumption is necessary on which to base a finding that there was joint acceptance—that there was but one contract for the two houses. But, if we look at the evidence of the manner the parties immediately concerned treated the transaction, a conclusion against one joint contract becomes apparent; for not only is there nothing to indicate the making of such a contract, but rather it becomes evident that the parties had in mind that the contractor was to proceed as on two separate contracts; and their subsequent dealings bear this out.

Carver says that each of the owners took care of his own contract, and that they paid separately for the houses. This is not contradicted. Carver's account rendered, the only one in evidence, is against Castell personally and in respect only of his house, and in it he makes a charge for "amount of contract $2,430," clearly indicating that what he had in mind was a separate and distinct contract with Castell for his house, independently of the other, and for the price named in the tender for one house.

Spence says his contract was for $2,430; that there was a tender for $2,430 for his house and $2,430 for Castell's. This

ONT.

S.C.

CAMPAIGNE v. CARVER.

Kelly, J.

also is not contradicted. He also says that in the completion of the houses he had nothing whatever to do with the other house, nor Castell with his; that he was not handling any part of the contract moneys in connection with the other property. I am compelled to the conclusion that there were two separate contracts.

On the authorities, and in view of sec. 19 of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, I am of opinion that the registration of the lien in the form it took was not improper. If there was anything objectionable in such registration, it only amounted to an informality, such as is provided against by that section. But, though the claim for lien may be free from objection in that respect, a difficulty may still be encountered in determining what part of the amount claimed is chargeable upon each separate parcel of land. Here the material-man's account is claimed against the properties as one, no distinction being made either in the claim or in the evidence between what was supplied for one house and what for the other.

So far as concerns the Spence property, the lien must fail. The evidence shews that that house was completed not later than the 1st August, more than 30 days prior to the registration of the claim for lien or the institution of proceedings to establish the lien. The only suggestion of anything to the contrary is in the evidence of Marshall, a workman of Snodny's, that on the 10th August he worked on these houses, and in a vague way says something of having worked on this house for 15 minutes; but, in the face of the direct evidence of its completion on the 1st August, Marshall's testimony is not sufficient on which to found a claim against the Spence property, and the lien, in so far as it is against that property, should be vacated.

The Castell property stands in a different position. As to it the evidence of the registration of the claim within the time prescribed by the statute is sufficient. But the claim for its full amount against that property is not established. The contract for plumbing was the same for each house; the plumbing was the same; and, on the evidence submitted, it is not unreasonable to assume that one-half of the material claimed for went into

ONT.

S.C.

CAMPAIGNE v. CARVER.

Kelly, J.

each house, and that the price of what went into the Castell house is one-half of the amount so claimed.

As the case presents itself to me, it seems equitable that the lien should be held good against the Castell property for one-half of the $168.23 claimed—or $84.11. It is possible that, had the evidence been pursued further, it might have been shewn that this is not the correct price of the material used in that house. If either of the parties is dissatisfied, he may have a reference, at his own risk as to costs, to determine the amount. The plaintiff is entitled to his costs, but only as against the Castell property and its owner, of the proceedings below, limited, however, as declared by sec. 42 of the Act.

Under the circumstances, there should be no costs of the appeal.

RIDDELL, J. dissented. *Appeal allowed in part.*

Riddell, J. (dissenting)

LUTZ v. DOMINION TRUST CO.

SASK.

S.C.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Newlands, Brown and Elwood, JJ. March 18, 1916.

1. LAND TITLES ACT (§ V—50)—CERTIFICATE OF TITLE TO ASSIGNEE FOR CREDITORS—EXECUTIONS AND MORTGAGES—PRIORITIES.

The object of sec. 9 of the Assignment Act (R.S.S. 1909, ch. 142) declaring an assignment for the benefit of creditors to take precedence over all executions not completely executed by payment, and the general purpose of the Act, is to provide for the distribution of the assets of the insolvent without priority, except in so far as any creditor may have obtained a priority prior to the assignment, but the assignee is not entitled to receive a certificate of title free from such executions where, in so doing, it would in effect give to mortgagees subsequent to the executions a greater claim than they would have had at the time of the registration of the mortgages.

[*Re Brooks*, 2 S.L.R. 504, distinguished; *Edmonton Mortgage Co.* v. *Gross*, 3 A.L.R. 500, followed.]

Statement

APPEAL from Master of Titles sustaining under the Land Titles Act (R.S.S. 1909, ch. 41) the issuance of a certificate of a title free from executions to an assignee for creditors. Reversed.

A. G. MacKinnon, for respondent, Dominion Trust Co.

A. F. Sample, for appellant, Lutz.

The judgment of the Court was delivered by

Elwood, J.

ELWOOD, J.:—By the abstract filed in this matter it appears that one James Arthur Pryor was the registered owner of the land in question and there is registered against the title to the land the following encumbrances and in the following order:—

SASK.

S. C.

LUTZ
v.
DOMINION
TRUST CO.

Elwood, J.

Registration abstract and certificate of the title of S.W. 1-4 32-20-9-W 2nd, 160 acres more or less. James Arthur Pryor (mtgee.,) 35-102 17th July, 1908. Lemberg, Sask.

A. K. 3655 mortgage 30th May, 1910, 1st June 1910 (reg.), James Arthur Pryor—The Canada Life Assurance Co., $15,000.

A. G. 5955 mortgage 22nd April, 1910, 10th June, 1910 (reg'd), James Arthur Pryor—The Beaver Lbr. Co., Ltd., $1,724.

A. N. 3770 mortgage, 6th Feby. 1911—24 Feby., 1911 (reg'd). James Arthur Pryor—George H. Hurlburt, $1,830.

A. W. 2908 mortgage 23rd April, 1912, 22nd May, 1912 (reg'd), James Arthur Pryor—The Canada Life Ass. Co., $18,000.

A783 execution filed 16th Nov., 1912, Peter Lutz v. James A. Pryor, $395.55, renewed by D23 to 9.

A1003 mortgage 26th Nov., 1912, 29th Nov., 1912 (reg'd), James A. Pryor—the Union Bank of Canada, $2,163.90.

A4197 transfer of mtge. 27th March, 1913, 21 May, 1913 (reg.) The Union Bank of Canada—William Shinbane—mtge. No. A1003.

A4198 transfer of mtge. 16th April, 1913, 21st May, 1913 (reg.), William Shinbane—John O'Connell & George Edward Johnson——.

A1063 execution filed 3rd Dec., 1912, Fletcher & Lutz v. James A. Pryor, $849.40, renewed by No. D2474.

A6335 mortgage, 6th Aug., 1913, 9th Aug., 1913 (reg'd), James A. Pryor—Int. Harvester Co. of Canada, Ltd., $3,220.25.

C1250 caveat, 12th Jany., 1914, 15th Jany., 1914, made by Dominion Trust Co.

D644 assignment of mortgage 20th Jany., 1914, 2nd Feby., 1914 (reg.), George H. Hurlburt—Dominion Trust Co.—Mtge. No. AN3770.

D732 assignment of mortgage 21st Jany., 1914, 11th Feb., 1914, John O'Connell & George Edward Johnson—Dom. Trust Co., mtge. No. A1003.

On November 4, 1915, an assignment under the Assignments Act of the Province of Saskatchewan (R.S.S. 1909, ch. 142), for the general benefit of his creditors was made by the said James A. Pryor to the Dominion Trust Co. On or about December 11, 1915, the Dominion Trust Co. applied to the registrar for a transmission to it of the said lands.

The question asked by the registrar was:

Whether the executions above mentioned of Peter Lutz and Fletcher and Lutz should appear on the title in the order in which they respectively appeared on the title to James A. Pryor upon issue of Certificate of Title to the Dominion Trust Co.

The Master of Titles decided that the registrar was justified upon the application of the assignee under the assignment in granting transmission of the land and issuing the certificate of title clear of those executions on proof that the lien for costs has been satisfied or issuing the title clear of the executions but preserving the lien for costs.

For the respondent it is argued that by sec. 9 of the Assign-

ments Act the assignee is entitled to have the certificate of title issued freed of the executions.

The section is as follows:—

An assignment for the general benefit of creditors under this Act shall take precedence of all attachments of debts by way of garnishment, where the money has not been actually paid over to the garnishing creditor, as well as of all other attachments and of all judgments and of all executions not completely executed by payment, subject to the lien, if any, of execution or attaching creditors for their costs.

The object of the above section of the Assignments Act and of the various sections of the Act referring to assignments for the benefit of creditors is, in my opinion, to provide for the distribution of the assets of the insolvent without priority, except in so far as any creditor may have obtained priority prior to the assignment.

It was contended on behalf of the respondent that the case of *Re Brooks*, 2 S.L.R. 504, is authority for the proposition that these executions should be removed from the certificate of title. In that case, however, it will be observed that no question arose as to the respective rights of execution creditors and subsequent mortgagees, there was apparently no encumbrance subsequent to the execution, and the Court held that the assignee was entitled to receive the land without the executions appearing on the certificate of title.

In the case at bar, however, to issue the certificate of title without the executions appearing would be to give the subsequent mortgagees a greater claim on the land than they had at the time of the execution and registration of the mortgages. I agree with what was said by Beck, J. in *Edmonton Mortgage Co.*, v. *Gross*, 3 A.L.R. 500, at p. 501, where he says:—

The second mortgage, therefore, was a specific charge of the interest of the execution debtor, subject to, and, for the purpose of the question under consideration, it seems to me, with the same effect as if expressed to be subject to the rights of the then execution creditors. A new and different interest from that to which the 3 prior executions attached was thus carved out of the debtor's interest, and specifically charged with the second mortgage, leaving again a new and different interest, subject to be charged or bound, voluntarily or involuntarily, by the act or default of the debtor; and it is, in my opinion, only this latter interest that became affected by the subsequent executions.

To give effect to the contention of the respondent would, in my opinion, be to defeat the apparent intention of the above quoted sec. 9 of the Assignments Act, because it would, as I have

SASK.

S. C.

LUTZ v. DOMINION TRUST CO.

Elwood, J.

pointed out above, effect the result of giving to the subsequent mortgagees an interest greater than was given to them at the time of the execution and registration of their mortgages. It may be that the executions will eventually enure to the benefit of the estate of the debtor and that the sheriff, should he realize on the executions, may be compelled to pay over to the assignee the proceeds of these executions to be distributed for the benefit of all of the creditors. However, it is not necessary that I should express any opinion on this point; suffice that, in my opinion, the executions under the particular circumstances of this case should remain on the certificate of title.

The result is that, in my opinion, the appeal should be allowed and the certificate of title issue with the executions appearing in the order set out in the above abstract.

The appellant should have his costs of this appeal.

Appeal allowed.

CAN.

S.C.

CANADIAN PACIFIC R. CO. v. JACKSON

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. November 29, 1915.

1. DAMAGES (§ III I 4—192)—INJURIES CAUSING PERMANENT INCAPACITY—INSTANCES OF AMOUNT—REVIEW ON APPEAL.

A verdict in the sum of $27,000 awarded to a railway engineer aged 32, whose yearly earnings were about $2,100, for injuries permanently incapacitating him and based upon the pain and suffering of the person and the pecuniary loss for the duration of life, will not be set aside on appeal or a new trial directed merely because the amount of damages awarded appears to be excessive.

2. EVIDENCE (§ VII F—620)—QUANTUM VALEAT—MORTUARY TABLES—ADMISSIBILITY.

The testimony of a witness in regard to estimates based on mortuary tables shewing the expectancy of life and the cost of an annuity at given ages is admissible, *quantum valeat*, though the witness is not capable of explaining the basis upon which the tables had been prepared.

[*Rowley* v. *London & N. W. R. Co.*, L.R. 8 Ex. 221; *Vicksburg & M. R. Co.* v. *Putnam*, 118 U.S.R. 545, applied; 24 D.L.R. 380, affirmed.]

Statement

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (24 D.L.R. 380), affirming (on an equal division of opinion) the judgment entered at the trial, by McCarthy, J., upon the verdict of the jury in favour of the plaintiff.

O. M. Biggar, K.C., and *Geo. A. Walker*, for the appellants.

Frank Ford, K.C., and *G. M. Blackstock*, for the respondent.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—The respondent, an engine-driver in the employ of the appellant company, was severely

injured whilst in the performance of his duty. The jury found the appellant

> guilty of negligence from the fact that the mail crane was in faulty condition and that the plaintiff was injured by it in the performance of his duty.

They awarded the plaintiff $27,000 damages.

I have no hesitation in saying that in my opinion the amount of the damages is too large. There is, however, a general consensus of authority that it is for the jury alone to fix the amount of damages to be awarded in an action and that under ordinary circumstances the verdict should not be set aside merely on the ground that the damages appear excessive. Where the damages are manifestly so unreasonable that no body of twelve men could have honestly given such a sum, or where it is shewn that in arriving at the amount the jury took into consideration something which they ought not to have taken, or failed to take into consideration something which they ought to have taken, there may be ground for the court to set aside the verdict. It is not, however, a ground for interference that the damages seem to the court too large and more than would to most people have seemed ample.

One might assume that the jury have not sufficiently taken into account the accidents of life, and that they probably misapprehended the effect of the figures in the actuarial tables produced, but, with all respect, I do not think that is sufficient to justify us in granting a new trial on the ground that the jury have gone beyond a figure which any jury of reasonable men properly informed as to the question which they were to decide could have reached.

In *Thoms* v. *Caledonian R. Co.* ([1912-13] Ct. of Sess. 804), Lord Kinnear said:—

> Now, it is impossible to read the account of this man's history and his present position without seeing that no amount of damages could ever be considered as real compensation for the personal injury he has suffered. It is obvious that that is not a consideration which can be pressed to any logical conclusion, because the result of it would be that the defender, in a case of personal injury, might be ruined, and yet the pursuer not compensated. And, therefore, that cannot be treated as a ground for any exact or logical estimate of damage, but I think it is a consideration which may fairly lead us to think that, upon a question of this kind, a larger latitude, within the bounds of reason, is to be allowed to a jury than upon matters which are capable of anything like exact calculation.

The same might well be said of the respondent in the case as it comes before us.

CAN
S. C.
C.P.R.
v.
JACKSON.
Sir Charles Fitzpatrick, C.J.

This Court held in *Fraser* v. *Drew* (30 Can. S.C.R. 241), that where a case has been properly submitted to a jury and their findings upon the facts are such as might be the conclusions of reasonable men, a new trial will not be granted on the ground that the jury misapprehended or misunderstood the evidence, notwithstanding that the trial Judge was dissatisfied with the verdict.

The case of *The Canadian Pacific R. Co.* v. *Roy*, decided in this Court in November, 1913, might be consulted with advantage. On that appeal the only question pressed was as to the amount of the damages.

That the damages were excessive was the only ground for setting aside the judgment that was urged by the appellant at the argument before us. I do not think the damages, though undoubtedly high, are so excessive as to warrant the interference of this Court on that ground. I do think, however, that the trial Judge did not direct the jury as fully as was desirable as to the measure of damages which the plaintiff was entitled to recover. True, he told them that they were not to award punitive damages, but the instruction would, I think, have been more intelligible to lawyers than to a jury of laymen. I cannot help thinking that the amount of the damages awarded indicates that the jury did not properly appreciate the considerations on which they had to assess these damages.

There is yet another serious objection to this judgment being allowed to stand. Although, as I have said, the amount of the damages was the only question discussed, on the hearing before this Court, the notice of appeal by the defendants to the Appellate Division of the Supreme Court of Alberta claims that there was no evidence of negligence on the part of the defendants.

Now there was, I think, misdirection by the Judge at the trial. After referring to the order of the Board of Railway Commissioners, dated November 20, 1908, which provides that

> such crane must be erected at a distance of not less than 7′ $1\frac{3}{4}$″ . . . in position,

(*i.e.*, from the centre of the track), he continues—

> that briefly is the allegation of negligence on the part of the plaintiff that this crane was erected or allowed to be closer to the track than the order of the Board of Railway Commissioners provided. That question I must leave to you, whether or not that crane was permitted to be closer to the centre of the track than the order provides for. That is the question which you must determine.

And further on he says:—

The defendants in this case would be liable for the acts of their servants or workmen if they did construct this crane closer to the track than the order of the Board of Railway Commissioners provided.

It may perhaps be assumed that the order was passed for the protection of railway employees in the position of the plaintiff, though, of course, unless this were so, he could advance no claim founded upon it. The Judge, however, did not instruct the jury that they must not only find a breach of the statutory duty, but also that this was the cause of the accident.

The failure to give such a necessary instruction was the main reason why the Privy Council directed a new trial in the case of *Grand Trunk R. Co.* v. *McAlpine* (13 D.L.R. 618, 16 Can. Ry. Cas. 186, [1913] A.C. 838). At p. 623 the judgment reads:—

Where a statutory duty is imposed upon a railway company in the nature of a duty to take precautions for the safety of persons lawfully travelling in its carriages, crossing its line, or frequenting its premises, they will be responsible in damages to a member of any one of these classes who is injured by their negligent omission to discharge, or secure the discharge of, that duty properly, but the injury must be caused by the negligence of the company or its servants. . . .

In the last passage quoted from the charge of the learned Judge in the present case, he did not point out to the jury that it was necessary, in order that the plaintiff should recover, that the omission to whistle or to give the warning, or both combined, and not the folly and recklessness of the plaintiff himself, caused the accident. For all that appears, the omission to whistle might not have contributed in any way to the happening of the accident. The jury, instructed as they were, may well have been under the impression that the two alleged breaches by the company of its statutory duties—the two faults of which the jury found them guilty—rendered them liable whether or not those faults caused to any extent the injury to the plaintiff or the contrary.

These are, in the main, the reasons which led their Lordships to the conclusion that a new trial should be directed.

In precisely the same way in the present case the jury, instructed as they were, may have concluded that the breach by the defendants of the order of the Board of Railway Commissioners, of November 20, 1908, rendered them liable whether this fault caused the injury to the plaintiff or the contrary.

Though, for these reasons, I am of opinion that there was misdirection of the jury, yet as the appellant has not raised the point I do not think this Court should send the action for a new trial on this ground. The respondent ought to have had an opportunity to argue that the verdict shews, as perhaps it does, that the jury were not misled by the misdirection and that no substantial injustice has been caused thereby.

CAN.

S. C.

C.P.R. v. JACKSON.

Sir Charles Fitzpatrick, C.J.

Idington, J.

Though I find much that is unsatisfactory about the conduct of this trial and its results, I cannot say that there is sufficient ground for setting aside the judgment. I have not come to this conclusion without much hesitation, and I think it would be unfortunate if the case were to be regarded as any precedent for awarding such enormous damages in similar actions in the future.

IDINGTON, J.:—This is an appeal on the ground of excessive damages. There is nothing else put forward to support it except the untenable objection to evidence admitted to shew how much an annuity might be purchased for. This practice of using such evidence to help a jury in arriving at a reasonable estimate has been in daily use for many years in our Courts.

The objection that because a man called to testify what his company held to be the market price could not vouch for the accuracy of the tables upon which it and such life companies proceed, therefore the evidence was inadmissible, seems to me as unsound as it would be to object to the evidence of actuaries resting their estimate upon the basis of the "Carlisle Tables," for example, because none of them can vouch personally for the accuracy of the figures upon which such tables rest. The truth is the evidence which was adduced was of little value and made nothing of by the learned trial Judge or the jury so far as we can see, but that is quite another thing and furnishes no ground for setting aside the trial, which seems to have been eminently fair.

It is impossible to say there was a miscarriage of justice by reason of anything connected therewith.

To come to the real ground of appeal resting upon excessive damages it may be admitted the damages are large and possibly larger than we as a jury would have assessed.

But can we say they are such as to demonstrate that the jury must necessarily have proceeded upon an erroneous basis or been moved by some indirect motives in arriving thereat?

The almost uniform course of this Court has been to refuse to interfere with the mere assessment of damages when maintained by the local Court having usually an immense advantage over us in the way of fairly appreciating the damages which must be measured in light of many local conditions.

But I must respectfully decline to accept the suggestion of counsel for appellant, and apparently some of the Judges below,

that the possibilities of a permanent investment producing eight per cent. per annum forms a proper basis of estimating the value of this verdict simply because that may be a fair rate of interest at the present moment.

We all know, if we can recall the economic history of other provinces, that this will not continue. And some other arguments put forward by counsel and in a measure countenanced in the Court of Appeal seem to me untenable.

It seems, for example, assumed, as matter of course, that the earnings of the respondent at the time of the accident must be taken as basis for life. They are properly taken in ordinary cases as basis of estimating pecuniary loss of a temporary character. But in the case of a young man only 32 years of age, when probably earnings would increase, being disabled for life, there is no rule of law preventing the jury from contemplating the possibilities of the future in that regard.

Again, it was even suggested that the pain and suffering of him injured could not enter into the basis of the estimate of compensation. I dissent entirely from any such proposition. Physical and mental pain and suffering have always, by law, entered into the basis of such estimates, and when these must endure for a lifetime, or the victim be reduced to the deplorable condition of the respondent, it is hard to place the limit of an adequate compensation therefor. And the possible need of attendance to help and comfort him in decay may also be considered.

It is quite true that in cases resting upon the Fatal Accidents Act, pain and suffering are excluded from the basis of the estimate for damages. In such cases the estimate must be confined to the mere monetary considerations bearing upon the case of survivors who have suffered in a monetary sense as well as otherwise by the death of him upon whom they were dependent for the deprivation of what they might reasonably have hoped to enjoy.

No such rule obtains in the case of him suffering and suing for such damages as caused thereby.

We may yet hear it urged that a man reduced to the impotent condition in which respondent, a young man with the prospects before him of increasing his earnings and savings and thereby adding to the comfort of his life and enjoyment thereof, when so

CAN.
S. C.
C.P.R.
v.
JACKSON.
Idington, J.

reduced ought to be treated as a helpless creature who can enjoy life no longer and hence might as well be kept, or keep himself in some asylum or house of refuge for a few cents a day, and thereby ameliorate the sad condition of the unfortunate offender in the like position the appellant is now in.

I prefer resting as usual upon the broad common sense of an intelligent jury as being more likely to fix justly the amount which the wrongdoer should pay than to look for justice in anything which might be determined in a very logical way either thus or otherwise.

The appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—Having regard to all the circumstances of this case—the plaintiff's earning capacity prior to his injury, his comparative youth, the pain and suffering to which he was subjected, his probable total incapacity for work in the future, and the inconvenience, discomfort and unhappiness which his condition is likely to entail during the rest of his life—it is, in my opinion, not possible to say that the verdict in this case is so excessive that it is apparent that the jury must have been influenced by views and considerations to which they should not have given effect; *Johnston* v. *G. W. R. Co.* ([1904] 2 K.B. 250); *Cox* v. *English, Scottish and Australian Bank* ([1905] A.C. 168). If the only element of damage were the plaintiff's actual pecuniary loss, it might be argued with great force that an attempt had been made to award him full and complete compensation; and when the loss to be compensated for has a money value capable of precise ascertainment there is no good reason why that should not be done. But with such other elements of damage, as I have indicated, present, which must be taken into account, while the jury should not attempt to give full compensation, it is almost impossible to say that an amount awarded short of what would distinctly shock the conscience, is so great that a new trial should be ordered purely on the ground of its excess.

The admission of evidence as to the expectation of life of a person of the plaintiff's age and as to the cost of an annuity equal to his income is made a ground of appeal. The objection is based on the alleged lack of qualification of a witness who gave this evidence and the misleading character of the evidence itself.

Standard mortuary tables shewing the expectancy of life and

the cost of an annuity at given ages are admissible in evidence; *Rowley* v. *London and N.W.R. Co.* (L.R. 8 Ex. 221); *Vicksburg and Meridian R. Co.* v. *Putnam* (118 U.S.R. 545). The appreciation of the value to be put upon such tables in any particular case may always be affected by appropriate cross-examination and by directing the attention of the jury, by other relevant evidence and by argument, to considerations calculated to lead to the conclusion that the plaintiff's expectation of life should be regarded as less than the average and that his continued receipt during the full period of his expectation of life of the income which he enjoyed when injured was subject to many contingencies.

If a witness called can verify a mortuary table produced in evidence as one in actual use by a company dealing in that class of business I do not understand it to be the law that he must possess knowledge sufficient to enable him to explain the basis on which the table was prepared or to give an opinion worth something as to its reliability or correctness in order to render his evidence, *quantum valeat*, admissible. No doubt such tables are not conclusive and the jury should be warned to take into accouut the contingencies to which the continued receipt of his income by the plaintiff would have been subject had he not met with the injury for which he sues. In the present case those contingencies were called to the attention of the jury by the trial Judge by reading a passage from a judgment in which they were referred to. He was not asked further to emphasise them or specially to warn the jury against attaching too much weight to the evidence now objected to. No doubt its value had been fully discussed by counsel for the defendant in his address. No objection was taken either at the trial, in the notice of appeal to the Appellate Division, or in the appellant's factum in this Court to the accuracy or sufficiency of the charge itself. At bar, counsel suggested non-direction only; *Creveling* v. *Canadian Bridge Co.* (21 D.L.R. 662, 51 Can. S.C.R. 216). Misdirection upon any aspect of the case was not even hinted at.

The verdict is, no doubt, large, but a case has not been made for interfering with it or for ordering a new assessment of damages, which, if an experience not uncommon should be repeated, might not result favourably to the defendants.

The appeal fails and should be dismissed with costs.

CAN.

S. C.

C.P.R. v. JACKSON.

Brodeur, J.

BRODEUR, J.:—The only question in this case is whether a new trial should be granted because the amount granted by the jury for damages is excessive.

It is a railway accident. The plaintiff (respondent) was a locomotive engineer, an employee of the appellant company. He seems to have been incapacitated for life. He was earning a sum of about $2,100 a year. There was not much evidence given as to the damages which should be granted and the verdict was for the sum of $27,000.

I am inclined to think that the amount is excessive, and if I had been on the jury I would certainly not have given so large a sum. But the charge to the jury seems to have been fair and it was for them to decide as to the amount. I am sorry that we have to accept their verdict. It is to be expected that some day legislation will be passed in the provinces, where it does not exist now, by which those verdicts could be reduced by the Courts of appeal. In the circumstances, I cannot do otherwise than to dismiss the appeal.

Duff, J. (dissenting)

DUFF, J., dissented. *Appeal dismissed.*

QUE.

C. R.

CRADOCK SIMPSON v. CITY OF WESTMOUNT.

Quebec Court of Review, Archibald, A.C.J., Mercier and Greenshields, JJ. January 22, 1916.

1. MUNICIPAL CORPORATIONS (§ II H 1—266)—SPECIAL ASSESSMENTS OF LOCAL IMPROVEMENT—MODE OF LEVYING.

A municipality, empowered by a by-law to levy by special assessments for the costs of certain local improvements, has the authority to make separate and distinct special assessments, one to cover the expenses of grading and paving the streets, and another for the cost of the land required.

2. MUNICIPAL CORPORATIONS (§ II H 1—266)—SPECIAL ASSESSMENTS FOR LOCAL IMPROVEMENTS—UNIFORMITY.

The power of a municipality to levy a special assessment for local improvements, to be borne by the property owners directly benefited thereby, enables the municipal council, under sec. 51 of 8 Edw. VII. (1908), ch. 89, as amended by sec. 1 of 4 Geo. V. (1914), ch. 77 (Stat. Que.), to effect such assessment by resolution and at a varying rate, according to the benefit acquired by each lot, though a by-law provided for a uniform rate.

3. PARTIES (§ I A 4—46)—INTEREST OF RATEPAYER ATTACKING LOCAL IMPROVEMENT BY-LAW.

A ratepayer, who is not substantially prejudiced by the assessment for local improvements enacted by a special by-law, has no interest in attacking its validity.

Statement

APPEAL from the judgment of the Superior Court rendered by Lafontaine, J. dismissing an action by ratepayer attacking a municipal assessment by-law. Affirmed.

Brown, Montgomery and McMichael, for petitioner.

Weldon and Stephens, for respondent.

The judgment of the Court was delivered by

GREENSHIELDS J.:—Before this Court the petitioner confined himself to two grounds, and two grounds only, *viz.*: (1). The special assessment attacked was premature; (2). The by-law provided that the whole cost should be borne by the proprietors within the area designated, and that at a uniform rate, whereas the resolution and the assessment roll enact and provide for a varying rate, which is beyond the power of the council by resolution, and is an amendment to the by-law; that the by-law could be amended only by another by-law approved of by a vote of the ratepayers affected by it.

The facts, so far as reference is necessary, may be briefly stated. On October 13, 1914, the date when the first resolution was passed and the special assessment roll first adopted, the lands required for the new street and the extensions, had been acquired and paid for, no sewers or sidewalks, no macadamizing or paving had been done, or if any had been done, the works had certainly not been completed.

This, in my opinion, is a special statement of facts upon which to determine the rights of the parties as to the first point raised by the petitioner, *viz.*, the premature levy of the special assessment roll.

Now, clearly, the by-law contemplates the making of two separate and distinct special assessments, one to cover the cost of grading, macadamizing and paving a new street and extensions, and which special assessment shall be levied in proportional amount spread over a term of 14 years, as shall be determined by resolution; and another special assessment for the cost of lands required for the new street and extensions, spread over a period of forty years, and in such proportional instalments as may be determined by resolution of the council.

There is another special assessment contemplated, *viz.*: for the construction of a sewer, and this assessment shall be levied on a less extended area of property, although contained within the limits of the parget area, covered by the special assessments for the cost of the lands and for grading, macadamizing and paving, etc.

QUE.

C. R.

CRADOCK SIMPSON v. CITY OF WESTMOUNT.

Greenshields, J.

The only assessment roll in question in the present case is that finally adopted and homologated on November 24, 1914, and that is a special assessment roll to provide for the payment of the lands which had then been acquired and paid for from the proceeds of the bonds then issued and sold in whole or in part.

Now the question, in a nutshell, is whether a special assessment roll could then be made and provided for the cost of the land only, and that before the entire works or improvements contemplated by the by-law had been fully completed and paid for and certified by the city engineer and approved of by the council.

With respect to the acquisition of the lands, that had been done. The cost was ascertained and was certified by the engineer and was approved by the council.

If the council has erred, that error consists merely in putting in force an assessment roll at one time rather than at another. At some time, in order to give effect to the by-law, there would have to be made a special assessment roll for the very purpose and only for the purpose for which the special assessment roll attacked was made: there being a necessity for at least two special assessment rolls, I do not believe it was a wrong or illegal exercise of the discretion of the council after all the cost had been incurred, after all the money had been expended for the purpose and to meet which one special assessment roll should be made to make that special assessment then and there and so soon as that special branch of the work had been completed and paid for.

I am of opinion that the petitioner has not shewn any substantial prejudice which would justify the interference of the petitioner with the administrative power and administrative discretion of the council, and since the respondent is under interest charges for the amount paid for these lands, I see no just reason to upset and annul the assessment roll passed and made for the purpose of meeting these existing charges. I should rule against the petitioner upon this ground.

As to the second, *viz.*: that the by-law contemplates a uniform rate, whereas by resolution the council of respondent adopted a varying rate.

The power of the City of Westmount to enact such a by-law as by-law No. 282, is found in 4 Geo. V. (1914), ch. 77, which by sec. 1 replaces sec. 51 of 8 Edw. VII. (1908), ch. 89. The section provides in part as follows:—

In and by any by-law passed in virtue of the foregoing section, it may be declared and ordered, that the cost of any such improvements and works shall be borne and paid by the owners of real estate situate on each side of such street, road, avenue, boulevard, lane, alley, public way or place, or any section or sections thereof, or by the owners of real estate situate within a fixed area or limits specified in such by-law and directly benefited by such works and improvements, by means of a special assessment made, laid or levied upon the said owners of said real estate, according to the frontage of such properties, when such improvements are made, saving nevertheless the right of the council to declare, by resolution passed by two-thirds of the members of the whole council, that the said fronting properties shall be assessed only for a certain proportion or percentage of the cost of any such improvements, in the manner hereinafter set forth.

Now up to this point, the statute contemplates that a by-law made and passed, enacting and ordering that the whole cost shall be borne by the proprietors within a certain area, whose property, in the opinion of the council, shall be directly benefited.

This by-law, with that provision, we will assume, has been passed and has been submitted to the ratepayers, and by them has been approved. Now, by the section, that by-law can be changed by a resolution passed by two-thirds of the members of the whole council, and it may be substantially changed and materially changed, *viz.*: by burdening those proprietors within the limits defined in the by-law with only a proportion of the cost, without limitation as to the proportion, and the balance of the cost, presumably, shall be borne by the ratepayers generally.

Here is a substantial change that may be made in a by-law by resolution.

Then continues the section—and this part has for marginal indication "Rate may not be uniform."

Such frontage rate may be greater or less upon one side of the street, avenue boulevard, . . . than upon the other side, and may be imposed either at a uniform or varying rate, and either upon the properties fronting upon the improved portion or upon the whole or part of the length of the existing street, . . . or upon the real estate situate within the fixed area, or limits specified in by-laws and directly benefited by said works.

Therefore, the section empowers the city to tax:

(1.) Only the owners of real estate situate on each side of the street, avenue, etc., and that for the whole cost, or,

(2.) Upon the owners of real estate situate within a fixed area or limits specified in the said by-law directly benefited by such works and improvements, and that for the whole cost; or (3.) That the council see fit, it may by resolution change the by-law and

QUE.
C. R.
CRADOCK SIMPSON v. CITY OF WESTMOUNT.
Greenshields, J.

impose only part of the burden on the owners previously mentioned, and may enact a rate not uniform, but varying.

There is no doubt that by by-law a varying rate could be imposed—the variation levied in the wise discretion of the council.

But the question here is, the by-law not enacting a varying rate, could a varying rate be enacted by resolution? In my opinion, a much more serious modification of the by-law is clearly provided for in the section as being capable of being made by resolution, *viz.*: to make an owner whose property will not be directly benefited by the improvement—an owner whose property is far removed from the scene of the improvement—bear possibly two-thirds of the whole cost of the improvement.

I have read and re-read the section, and I am satisfied from its reading, that the intention of the legislators was to give the council respondent the power to modify a by-law and to create a varying rate where no varying rate was provided for by the by-law itself.

I therefore come to the conclusion that the municipality respondent was well within its powers in passing the resolutions attacked, and in making and homologating the assessment roll, and I should affirm the judgment. *Judgment affirmed.*

N. S.
S. C.

MURRAY v. MUNRO.

Nova Scotia Supreme Court, Graham, C.J., and Drysdale, J., Ritchie, E.J., and Harris, J. February 26, 1916.

1. EXECUTORS AND ADMINISTRATORS (§ VII—140)—VALIDITY OF SALE BY EXECUTOR DE SON TORT—BENEFIT OF ESTATE—RELATING BACK.

The validity of a sale by an executor *de son tort*, which is done for the benefit of the estate, relates back, upon his appointment as administrator, to the death of the intestate by operation of law, and he cannot thereafter claim the property or the value thereof in his capacity as administrator.

[*Maher* v. *Hubley*, 17 N.S.R. 295, distinguished; *Whitehall* v. *Squire*, 1 Salk. 295; *Christie* v. *Clarke*, 16 U.C.C.P. 544, 27 U.C.Q.B. 21; *Robertson* v. *Burrill*, 22 A.R. (Ont.) 356, followed.]

Statement

APPEAL from the judgment of Patterson, Co.C.J., in favour of plaintiff in an action by an administrator claiming damages for the conversion of a horse. Reversed.

L. A. Lovett, K. C., for appellant.

The judgment of the Court was delivered by

Harris, J.

HARRIS, J.:—William Murray for some time previous to his death resided with his son, the plaintiff. After he died the plaintiff intermeddled with the goods of the deceased and thereby became an executor *de son tort*. William Murray at the time of his

death owned a horse, and plaintiff afterwards sold it to the defendant for $100. Defendant was to pay off a bill of sale on the horse for $25 and the balance of the purchase money was to be credited on an account which defendant's firm had against the deceased amounting to $88.93 and an account of $14.32 due by plaintiff personally to defendant's firm. The defendant tried to pay off the bill of sale but the holder refused to accept the money and a few days later the plaintiff paid the $25 to the holder of the bill of sale and defendant then took charge of the horse and credited the estate of the deceased and the plaintiff personally on the two accounts with the $100 and sent the plaintiff a receipt for the amount. The next day after selling the horse to the defendant, the plaintiff took out letters of administration of the estate of William Murray and brought this action to recover the horse. The County Court Judge who tried the case and who heard the witnesses believed the evidence of Duncan Munro as to the terms of the bargain and disbelieved the plaintiff where they were in conflict.

There is no reason for thinking the trial Judge did not reach a right conclusion on this point. The matter was one to be decided by him and this Court is I think bound by what he says as to the credibility of Duncan Munro.

Accepting his statement, I think the agreement made for the sale of the horse was for the benefit of the estate. The sale of the horse relieved the estate of the expense of its keep. The price received was apparently a good one and all that plaintiff asked for it. There is nothing to show that the estate was not solvent and plaintiff and one other son of the deceased were his next of kin. The plaintiff was entitled to one-half of the estate after the debts were paid. In these circumstances the arrangement made with the defendant was obviously a good one and for the benefit of the estate.

The County Court Judge decided that an executor *de son tort* could not make an agreement with another person unless that person had fair reason for supposing that the executor *de son tort* had authority to act as executor, and that the agreement must be a legal one, and such as the true administrator would be bound to make in due course of administration, and he gave the plaintiff judgment.

N. S.

S. C.

MURRAY v. MUNRO.

Harris, J.

What the trial Judge decided is the law where the executor *de son tort* is not the same person afterwards appointed administrator, but it has no application to a case where the executor *de son tort* is afterwards appointed the true administrator. Where the executor *de son tort* and the true administrator are different persons and the true administrator seeks to recover property belonging to the estate, the third person who seeks to justify his possession of the estate property and to hold it against the rightful administrator of the estate must show that when he bought the property he had fair reason for supposing that he was dealing with the true representative of the estate, and also that he made a lawful bargain and such as the true representative was bound to make. If he cannot show all this, then he cannot defeat the claim of the legal representative and force him to go against the executor *de son tort* to recover.

In the case where the true representative and the executor *de son tort* are one and the same person, the true administrator has received the money and can be made to account for it as representative.

The Courts very properly in that case applied different principles. They naturally reasoned in this way: You the plaintiff have the money; it is true you got it before letters of administration were granted to you, but you have it, and you can be made to account for it as administrator, and therefore the transaction ought to stand. And to get over the technical difficulty that the plaintiff did not receive the money as administrator, the Court said the letters of administration when granted relate back to the date of the death of the deceased, so as to legalize and make binding all acts done for the estate by the person who afterwards became the true administrator; and thus was invented the doctrine of relation back as it is called.

In *Maher* v. *Hubley*, 17 N.S.R. 295, the party sued by the true administrator endeavoured to make title to property by reason of a transfer or purchase from a person who had acted as executor *de son tort* and who did not afterwards become the true administrator. The County Court Judge seems to have adopted the decision of Rigby, J., and the cases cited by him, overlooking the fact that in that case the executor *de son tort* did not afterwards become the true administrator.

That case has no application to the facts in evidence here. In *Kendrick* v. *Burges*, Moo. K.B. 126, the Court held that if one enters as executor of his own wrong and sells goods and then obtains administration the sale is good by relation; the wrong is purged; so that where a person sells a lease and afterwards obtains administration the title goes back by relation. The only test is whether or not the wrong has been purged.

In *Whitehall* v. *Squire*, 1 Salk 295, the plaintiff as administrator of J.M. brought an action of trover to recover a gelding. J.M. had died intestate. Before his death he had put the gelding with the defendant to pasture. Before the plaintiff took out administration he asked the defendant to bury J.M. decently, which he did at a cost of £23. Plaintiff agreed that defendant should have the horse in part satisfaction and gave his note for the balance of the £23. Plaintiff afterward took out administration and sought to recover the horse. The majority of the Court held that plaintiff was bound by the agreement.

The law as laid down in these early cases has been ever since recognized. See 1 Williams on Executors, pp. 316, 317; 14 Hals. p. 146; Ingpen on Executors, pp. 194, 195.

Some of the authors of books on executors say that the doctrine of relation back would seem to apply only where the transaction sought to be upheld is for the benefit of the estate. Halsbury states it in this way:

> The doctrine is also applied to render valid dispositions of deceased's property made before the grant when it is shewn that such dispositions are for the benefit of the estate, or have been made in due course of administration. 14 Hals., p. 146.

The authority cited for the above proposition, that it must be shown that such dispositions are for the benefit of the estate, is the case of *Morgan* v. *Thomas*, 8 Exch. 302.

In that case after the death of the deceased his widow remained in possession and while she so remained in possession a writ in *fi. fa.* was issued against the widow, and the property of the deceased was seized and sold. The son of the intestate, who afterwards administered, was living near by at the time when the goods were sold for his mother's debt. The son, as administrator, afterwards sued for the recovery of the goods from the sheriff. It was held that there was no evidence that the son had ever assented to the widow's taking the property, and if such assent could be

N. S.

S. C.

MURRAY v. MUNRO.

Harris, J.

implied, the estate was not bound by it as the act to which the assent was given did not benefit the estate. Parke, B. at p. 307 said:

> An act done by a party who afterwards becomes administrator to the prejudice of the estate is not made good by the subsequent administration. It is only in those cases where the act is for the benefit of the estate that the relation back exists by virtue of which relation the administrator is enabled to recover against such persons as have interfered with the estate, and thereby to prevent it from being prejudiced and despoiled.

Ever since that decision text writers and Courts in quoting the rule have attached to it the qualification that the act must be for the benefit of the estate.

The rule has been followed in Massachusetts and other American States as well as in Ontario.

In *Alford* v. *Marsh*, 12 Allen (Mass.) 603, it was held that one who assumes to act in behalf of the estate of a deceased person in compromising debts due to it before the appointment of an administrator will, if subsequently appointed administrator, be bound by his acts to the same extent as if he had received his appointment at the time of doing the acts. Hoar, J. said:

> The taking out letters of administration relates to the death of the intestate and by operation of law makes valid all acts of the administrator in settlement of the estate from the time of the death. It, therefore, legalizes receipts of property by the administrator for which he would otherwise have been responsible as executor *de son tort*, and requires him to account for them in regular course of administration.

After citing a number of American authorities for this proposition he proceeds:

> It has, indeed, been doubted whether an executor *de son tort* can give any title to the goods of the intestate as against the rightful administrator, especially where the conveyance is the single wrongful act which makes him executor *de son tort* . . . But no such question can arise where, as in the present case, the alleged executrix *de son tort* becomes herself afterwards the lawful administratrix. Her acts of receiving debts due to the estate or property belonging to it become by relation lawful acts of administration for which she is liable to account to the same extent as if they had occurred after the letters of administration were granted. The liability thus imposed upon her necessarily involves a validity in her acts which is a protection to those who have dealt with her concerning the estate.

In *Christie* v. *Clarke*, 16 U.C.C. P. 544, the plaintiff, before the grant of letters of administration to her, contracted with defendant for the sale to him of the good-will of the intestate's business on certain terms. It was held that the contract being for the benefit of the estate the title of administratrix related back to the time of the death of the intestate and the plaintiff could

therefore as administratrix enforce the same though made before she had acquired that character.

This was affirmed on appeal, 27 U.C.Q.B. 21.

As an illustration of the doctrine of relation back in the case of administration *Robertson* v. *Burrill*, 22 A.R. (Ont.) 356 may be referred to. There it was held that an acknowledgment of indebtedness by letter written after the creditor's death by the defendant to the person who was entitled to take out letters of administration to the creditor's estate and who does after the receipt of the letter take out such letters is a sufficient acknowledgment within the Statute of Limitations. The principle upon which this decision is based is that the letters of administration have relation back to the date of the death of the deceased.

The sale of the horse in this case was obviously for the benefit of the estate and is in my opinion binding on the plaintiff.

The appeal should be allowed with costs, and judgment entered in the Court below for the defendant with costs.

Appeal allowed.

ASSINIBOIA LAND CO. v. ACRES.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Newlands, Brown and McKay, JJ. March 18, 1916.

1. MORTGAGE (§ III—48)—STATUTORY LIABILITY OF TRANSFEREE—MODE OF PLEADING IMPLIED COVENANT.

A statement of claim in an action to enforce the statutory implied covenant of a transferee to pay the mortgage debt, alleging that the defendant is the present registered owner and that he became such since the execution of the mortgage, and praying for judgment in accordance with the implied covenant under the Land Titles Act (R.S.S. 1909, ch. 41), sufficiently sets out the defendant as "transferee" under sec. 63 of the Act and fully warns him of the nature of the relief claimed against him.

[*Colonial Invest. & Loan Co.* v. *Foisie*, 4 S.L.R. 392, distinguished; *Assiniboia Land* v. *Acres*, 25 D.L.R. 439, affirmed.]

2. PLEADING (§ I N—123)—AMENDMENT — TERMS — REASONABLENESS—RE-TRIAL.

Terms imposed by the Court when allowing an amendment, that the whole action be retried and that the costs thereof be paid forthwith, are not unreasonable, and having been rejected by declining to accept the amendment and proceeding with the action, there can be no further relief.

Statement

APPEAL from the judgment of Elwood, J., 25 D.L.R. 439, in an action for foreclosure of mortgage and personal judgment. Affirmed.

T. J. Blain, for defendant, appellant.

H. V. Bigelow, K.C., for plaintiff, respondent.

SASK.

S. C.

ASSINIBOIA LAND CO. v. ACRES.

BROWN, J.

The judgment of the Court was delivered by

BROWN, J.:—This is an action brought under a mortgage held by the plaintiffs. The mortgage was executed by the defendants Stewart and W. H. Acres, who were then the registered owners of the mortgaged property. The defendant Etheland Acres, the appellant herein, became the registered owner of the property covered by the mortgage under a transfer from Stewart and W. H. Acres dated October 11, 1913, and a certificate of title duly issued in her favor on that date subject to th mortgage in question. Etheland Acres leased the property and her tenants being in arrears for rent she seized or caused to be seized certain articles to satisfy such arrears. The plaintiffs contend that the articles which were so seized were fixtures and that Etheland Acres had no right to seize them to satisfy the rent.

The plaintiffs bring this action claiming judgment against the defendants Stewart and W. H. Acres on their covenant to pay in the mortgage, also judgment against Etheland Acres on her implied covenant to pay under the Land Titles Act; in default of payment they claim foreclosure of the mortagge, and they further claim an injunction restraining the defendants from removing the articles which had been seized to satisfy the rent aforesaid.

Etheland Acres filed a defence denying practically all the allegations in the claim and asserting her right to the articles seized. The action came on for trial before Elwood, J., and, as appears by the remarks of counsel at the opening of the case, the whole contest was really as to whether or not certain of the articles seized were fixtures or otherwise. At the conclusion of the plaintiff's case Mr. Blain, counsel for Etheland Acres, contended that on the pleadings and the evidence the plaintiffs could not recover against his client on the implied covenant to pay. The trial Judge refused at that stage to decide the point and requested Mr. Blain to put in such evidence as he had, and Mr. Blain then asked leave to amend his statement of defence.

[After argument as to terms, Mr. Blain agreed to continue without the amendment.]

The action was then proceeded with and eventually judgment given in favor of the plaintiffs both on the covenant and as to the chattels. Etheland Acres now appeals from that decision on two

grounds only. In the first place, that she should not have been found liable on the personal covenant and, secondly, that she should have been allowed to amend her defence.

As to the first point the statement of claim alleges that the defendants Stewart and W. H. Acres executed the mortgage in question on June 10, 1913, and that they were at that time the registered owners of the property so mortgaged. Par. 8 of the statement of claim is as follows:

> The defendant Etheland Acres is the present registered owner of the said land under certificate of title dated October 11, 1913.

(b) of the prayer for relief in the statement of claim is as follows:

> Against the defendant Etheland Acres judgment in accordance with the implied covenant referred to in the Land Titles Act for the recovery of the sum of $5,819.74 and interest at 8 per cent. per annum from March 25, 1915.

Sec. 63 of the Land Titles Act, being the one on which the plaintiffs base their claim under the implied covenant reads:

> In every instrument transferring land for which a certificate of title has been granted, subject to mortgage or incumbrance, the e shall be implied a covenant by the transferee with the transferor and so long as such transferee shall remain the registered owner with the mortgagee or incumbrancee that the transferee will pay the principal money, interest, annuity or rent charge secured by the mortgage or incumbrance at the rate and at the time specified in the instrument creating the same . . . and will indemnify and keep harmless the transferor from and against the principal sum or other moneys secured by such instrument and from and against the liability in respect of any of the covenants therein contained, or under this Act implied on the part of the transferor.

"A transferee" under the Act means "the person to whom any interest or estate in land is transferred whether for value or otherwise." The allegation, therefore, that Etheland Acres is the present registered owner coupled with the further statement that she became such since the execution of the mortgage makes her a transferee under sec. 63 of the Act and *primâ facie* liable under the implied contract therein referred to. The statement of claim as a whole, in my opinion, fully warns the defendant of the nature of the relief claimed against her and sufficiently sets out the facts on which such relief is founded.

The case of *Colonial Investment & Loan Co.* v. *Foisie*, 4 S.L.R. 392, which was relied on by counsel for the appellant is quite different. That was an application for judgment in Chambers in default of appearance; the registered owner was not represented and there was no allegation anywhere in the statement of claim that the plaintiff was claiming against the registered owner on

SASK.

S. C.

ASSINIBOIA LAND CO. v. ACRES.

BROWN, J.

an implied covenant to pay under the Land Titles Act. In that case ex-Chief Justice Wetmore very properly held as follows:—

> I am of opinion that, where a proceeding is taken against a transferee of land subject to a mortgage, and it is sought to hold him liable personally under sec. 63 of the Land Titles Act, there should be an express claim setting forth that such transferee is so liable. I think this is especially true, as the liability is statutory and new; but, under any circumstances, the defendant sought to be charged ought to be distinctly informed as to how or by what authority he is claimed to be held personally liable.

As to the second branch of defendant's appeal, the appeal book shews that the proposed amendment was not refused; there was evidently considerable argument and some misunderstanding on the point, but finally it was, I think, made clear that the amendment would be allowed on condition that the whole action be re-tried and that the defendant pay forthwith the costs of the day. Counsel for the defendant declined to accept the amendment on those terms and elected instead to proceed with his defence. The question to be considered is, were the terms imposed so unreasonable as to justify the defendant in refusing them? The trial Judge was evidently of the opinion that in view of the length of the adjournment of the trial which was necessarily involved in the amendment he himself might find it impossible to try the new issue and that it would be advisable to have the whole of the case disposed of by the same Judge, and he therefore imposed the term of re-trial. This term after all simply involved payment of additional costs and such additional costs would not have been very onerous as the time occupied in the whole trial, including the taking of the evidence for the defence, was only part of a day. All of the witnesses who gave evidence, with two exceptions, live in Regina, the place of trial and the two exceptions live at Qu'Appelle in reasonably close proximity to the place of trial.

It may be that a better course would have been to dispose of the issues on which the parties were prepared for trial and postpone for trial only the issue raised by the proposed amendment. The other course, however, which appealed to the trial Judge as the proper one, was, under the circumstances, not unreasonable and having been rejected by counsel for the appellant there cannot now be any relief. The appeal should, therefore, be dismissed with costs. *Appeal dismissed.*

CHURGIN v. GUTTMAN.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and McCarthy, JJ. March 24, 1916.

1. COURTS (§ I B 1—10)—TERRITORIAL JURISDICTION—NON-RESIDENTS—APPEARANCE AND FAILURE TO DISPUTE JURISDICTION AS WAIVER.
If a defendant, resident out of the territorial jurisdiction of the Court and over whom the Court would not otherwise have jurisdiction, appears and defends the action without raising any objection to the jurisdiction in his statement of defense as required by sec. 29 of the District Courts Act (Alberta Stat. 1907, ch. 4), such appearance is a waiver of any objection to the jurisdiction and cannot be raised later at the trial, and if the Court has jurisdiction over the subject matter of the action, a judgment thus recovered against him is binding upon him.
[*Reid* v. *Taber Trading Co.*, 7 D.L.R. 229, referred to.]

2. NOVATION (§ I—5)—LOAN—NEW DEBTOR—ACCEPTANCE.
In order to establish novation as affecting the liability on a loan, the evidence must shew acceptance of the liability by the third party, and that the latter had been accepted by the creditor as his debtor in lieu of the actual borrower.

Statement

APPEAL from the judgment of Taylor, D.C.J., in favour of plaintiff in an action on a loan against a non-resident defendant. Affirmed.

H. A. Friedman, for plaintiff, respondent.

H. R. Milner, for defendant, appellant.

The judgment of the Court was delivered by

McCarthy, J.

McCARTHY, J.:—In this appeal two grounds are urged by the appellants why the judgment of the trial Judge should be set aside. (1) That the District Court of Edmonton had no jurisdiction to entertain or try this action. (2) That the respondent accepted the defendant Guttman as his debtor in lieu of the appellant, *i.e.*, that there was a novation.

The objection to the jurisdiction was that the cause of action arose and the defendants resided in the Calgary district, and that, therefore, the action ought to have been commenced and tried there.

The result of the authorities seems to be that, if a defendant, resident out of the jurisdiction and over whom the Court would not otherwise have jurisdiction, appears and defends the action, such appearance is a waiver of any objection to the jurisdiction, and a judgment recovered in any such action is binding upon him, that is, of course, if some District Court in the province had jurisdiction over the subject matter of the action.

Apparently the question has already been before the Courts in this province and there are two conflicting decisions.

In *Reid* v. *Taber Trading Co.*, 7 D.L.R. 229, Walsh, J., in effect,

ALTA.

S. C.

CHURGIN v. GUTTMAN.

McCarthy, J.

decides:—That a cause of action of any one of the kinds named in sec. 23 of the District Courts Act and involving no greater amount than that which is fixed as the limit of the District Court's jurisdiction, any District Court in the province can entertain it, subject to certain exceptions which do not arise in this case.

A contrary view is expressed by Winter, D.C.J., in *De Barothy & Co.* v. *Markham & Co.*, in 5 W.W.R. 806.

From an examination of the authorities I am satisfied that if any District Court in the province had jurisdiction over the subject matter of the action, the defendant might attorn to the jurisdiction of a particular Court, and waive his rights to object to the territorial jurisdiction of that Court to entertain or try the action.

What happened in the case before us on appeal from Taylor, D.C.J., was, as far as can be ascertained from the proceedings, that the defendant, although living outside the territorial jurisdiction of the trial Court, filed his statement of defence, raising no objection to the jurisdiction. The first objection to the jurisdiction appears to have been taken at the trial and the objection was overruled by the trial Judge, but the defendant was represented by counsel and present at the trial and took his chances in that Court; the result of the trial to him was adverse and he now urges that the District Court at Edmonton had no territorial jurisdiction. Before the case came on for trial, the usual order for directions was applied for; the order provides that the place of trial shall be at Edmonton. No objection to this provision was raised by solicitors for defendants and on the other hand the order is approved by them.

It appears to me that the defendant, by his failure to dispute the jurisdiction in his defence—sec. 29 of the District Courts Act (Alberta Stat. 1907, ch. 4), requires it to be raised in the defence—by his acquiescence in the terms of the order for directions, by his participation in the trial, is not in a position to dispute the jurisdiction and has attorned to the jurisdiction. If want of jurisdiction over the subject matter was apparent in the proceedings, then, of course, it would be open to him to question the right upon any steps taken upon a proceeding in that matter, but in this case, I do not think he can, after having failed to raise the question in his defence, concurred in the fixing of the venue in the order for directions and participated in the trial, question the jurisdiction and successfully contend that the trial Court had not jurisdiction.

ALTA.

S. C.

CHURGIN v. GUTTMAN.

On the question of novation, the trial Judge has found that the loan was actually made to Waterman, the appellant. From a careful perusal of the evidence, I cannot find that Guttman accepted liability to the respondent, or that he was accepted by the respondent as his debtor in lieu of the appellant.

I think the appeal should be dismissed with costs.

Appeal dismissed.

McCarthy, J.

TECLA v. BURNS.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, Galliher and McPhillips, JJ.A. March 7, 1916.

1. MASTER AND SERVANT (§ II E 4—256)—EMPLOYERS' LIABILITY ACT—WORKMEN DROWNED WHILE CROSSING RIVER—NEGLIGENCE OF FOREMAN—FAILURE TO WARN.

Where evidence in general does not point to the real cause of the accident, the fact that a foreman, in charge of railway construction work, permits workmen to cross a river without directing them the manner of navigating the river or cautioning them of the danger of a cable which sagged in the water, does not, in the absence of evidence of fault as to the seaworthiness of the boat or the competency of the oarsmen in charge thereof, support a specific finding of negligence of the foreman within the meaning of sec. 3 (2), of the Employers' Liability Act, R.S.B.C. (1911), ch. 74, to render the employer liable for the drowning of the men in consequence of the boat capsizing when colliding with the cable.

[*Andreas* v. *C.P.R.*, 37 Can. S.C.R. 1, referred to.]

Statement

APPEAL by defendant from the judgment of Murphy, J., in an action under the Employers' Liability Act, which is reversed.

S. S. Taylor, K.C., for appellant.

R. L. Reid, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The judgment appealed from rests entirely upon the finding of the jury that the foreman was negligent in the exercise of superintendence within the meaning of sub-sec. (2) of sec. 3, of the Employers' Liability Act. The deceased men were working on the east side of the river. At lunch time the foreman, who was on the west side, is said to have called to them to come across. There is no evidence that he gave directions as to how they were to cross, *i.e.*, what course their boat was to take in crossing. The means of crossing supplied by the appellants was a rowboat in charge of two rowers, whose skill is not in question, nor is any question raised as to the seaworthiness of the boat and the sufficiency of its equipment. What evidence there is goes to shew that the rowers were skilful in that kind of navigation. The foreman in question was in charge of railway construction work, and it was not suggested that he had as good a knowledge of the dangers of navigating the river as had the

B. C.
C. A.
TECLA
v.
BURNS.
Macdonald, C.J.A.

two rowers who had been engaged to do that very work. It was just as apparent to the boatmen, in fact, it ought to be more apparent to them than to the foreman, that the presence of the cable spanning the stream would make the crossing more dangerous than it had been theretofore. I do not think it was negligence on the foreman's part to refrain from directing the boatmen how they should navigate the river, or to refrain from calling their attention to the danger which was apparent to the boatmen and to the deceased men. Whether the crossing could be made with reasonable safety at a point on the river above the cable was a matter of judgment to be exercised by the boatmen—not by a foreman of railway construction.

But there is another difficulty in the plaintiff's way: the evidence does not disclose what caused the accident: all that is disclosed is that the boat was seen drifting with the current towards the cable, which it ultimately came in contact with. The boatmen had stopped rowing, but for what cause does not appear. It may have been because of an accident to the oars, or of misconduct of the boatmen themselves or of the deceased men. What caused the boatmen to cease rowing and lose control of the boat is a matter of mere conjecture. The jury must have felt this difficulty because they refrained from specifying in what the foreman's negligence consisted, they merely say that it consisted in not taking proper precautions in view of the cable being in the stream. The most that plaintiff's counsel could contend for was that the foreman ought to have told the boatmen to cross below the cable. The fact that it was safer to cross below does not prove that it was not reasonably safe to cross above. It is quite clear to me that the crossing could have been safely made above, it had often been made there prior to the accident and though the cable was not then across the stream, yet it is not suggested that the boat had previously been carried down stream to the place where the cable was on that morning. But be that as it may, the boatmen and not the foreman were, in my opinion, the persons to decide how the crossing should be made. Moreover, there is no evidence that the foreman did not instruct the boatmen to cross below the cable, though I think the fair inference is that he left the manner of crossing entirely to the discretion and skill of the boatmen.

Irving, J.A.

IRVING, J.A.:—Three men, who were working for the defendants, contractors engaged in the construction of the Great Nor-

thern Railway, were drowned in broad daylight in the Fraser River when returning in a rowboat from their work on the left or easterly bank of the river to the defendants' camp, which was on the right or westerly bank of the river.

In order to transport their stores from the easterly to the opposite shore, the defendants had strung, or were engaged in stringing, a cable across the river, some 700 or 800 ft. wide. It was in consequence of the rowboat having got foul of this cable, where it sagged into the water, that the plaintiffs were drowned.

The plaintiffs who represent the deceased men, brought their action for negligence at common law and alternatively under the Employers' Liability Act.

At the trial, the following questions were submitted and answers given:—

1. Were the defendants guilty of negligence which was the proximate cause of the accident? A. No. 2. If so, what was such negligence? (Not answered). 3. Was the accident caused by reason of the negligence of any person in the service of the defendant who had any superintendence intrusted to him whilst in the exercise of such superintendence? A. Yes. 4. If so, who were such persons? A. Foreman. 5. If so, what was such negligence? A. In not seeing that proper precaution was taken in re-crossing river on account of danger from the sagging cable and also apparent loss of control of boat. 6. The damages of Francesco Forte and Sofia Galassi, a thousand dollars; to Ranalli and his wife, $1,500, to Bellabene Tecla, $2,000.

Evidence was given shewing that the river, which ran at about 6 miles per hour, could be crossed either above the cable or below. The crossing above the cable was the more convenient to the work then in hand. In either event, the boat on starting to cross would work up close to the bank so as to take advantage of the eddies or slack water, and then when it had reached—in the opinion of the boatmen, an opinion based on experience—a point sufficiently high up, would turn into the centre of the stream where the current is strongest, and by its force be carried down obliquely to the other side, the men rowing all the time. The resultant force should bring it to the opposite bank above the cable.

The defence of *volens* was pleaded but no question was put to the jury on that point. In the grounds of appeal, it is alleged that the learned Judge should have taken the case away from the jury on this ground.

The ground mainly argued before us was that there was no evidence to go to the jury in support of the point upon which the verdict is founded.

B. C.
C. A.
TECLA
v.
BURNS.
Irving, J.A.

The persons concerned were the three men whom the plaintiffs represent, a fourth Italian who was saved, and two men Blaine by name, who were the men in charge of the boat. It was a large dory such as is used by fishermen on the lower Fraser. No fault is found with its capacity, or its equipment. The evidence as to the fitness of the men was given by Welch, one of the defendants, on discovery: "I employed these men—the best possible men I could get, on account of—we had some very bad places." The ability and experience of the Blaines was questioned in argument, but the only evidence to support that view is that they were new to the job, in fact, this was the first day on which they had been employed on this particular job, but the trip which terminated in this unfortunate accident was not their first trip. They had that morning ferried these same three men across to the left bank and the accident occurred as they were returning to the right bank for dinner.

The accident took place some four years before the case was brought to a hearing. By discovery evidence, it was established that these three men were acting under one Murphy, who was foreman in charge of the cable; that he had told them to cease work and return to the right bank for their dinner; that the usual distance to be made up-stream before launching out into the current was 500 to 600 ft.; that the boat on this occasion, instead of reaching the shore, struck the sagging cable at about 75 ft. from the shore; with one exception all were drowned. The rescued man was not a witness.

The plaintiff called three eye-witnesses to the accident. Forte, who was on the right bank, standing alongside the foreman, saw them start out; he said the Blaines pulled up the river 300 or 400 ft. only, when they started to cross (the Swedes, he says, used to row upstream 700 or 800 yds. before they turned). The strong current took them down to the cable where the boat capsized after it struck the cable. Novello, who was also on the right bank, said he first saw the boat when it was about 150 ft. from the cable—drifting. The men were not then rowing. It struck the cable, first one man and then another seized the cable, the boat tipped, one man fell overboard, and the boat capsized. Asked if they were not rowing because they had lost their oars, witness said: "they were not rowing because they had become so frightened, they had let the oars drop from their hands."

B. C.

C. A.

TECLA v. BURNS.

Irving, J.A.

Scamorra, who was also on the right bank, said that when he first saw the boat it was right at the cable. That the occupants fell into the water; that one man saved himself by holding on to the cable till he was rescued by another boat.

That is the whole of the evidence as to the accident. It gives us little or no information as to how the accident occurred. I am unable to see any evidence of negligence on the part of the foreman so as to bring in the 2nd sub-sec. of the 3rd sec. of the Employers' Liability Act.

To support the judgment—plaintiffs must rely on the first part of the 5th answer—the latter part, also apparent loss of control of boat, seems insensible. Now, under the rule laid down in *Andreas* v. *C.P.R.* (1905), 37 Can. S.C.R., 1, all negligence is negatived, except the alleged specific default of the foreman in not having made proper precaution for the re-crossing of the boat; but if the boat was sound and well found and the oarsmen qualified, I do not see how the foreman could anticipate that for some unknown reason the men were to be struck with a sort of paralysis, and that such an accident could occur.

I would dismiss the action.

Martin, J.A.

MARTIN, J.A.:—After much deliberation I am unable to see upon what ground the verdict can be supported. I regard the case as not going beyond one of deplorable accident, but for which, upon the evidence, the defendants cannot be held responsible. There is, in short, in my opinion, no evidence upon which the jury could reasonably find the main ground of negligence relied upon as regards the foreman, and as to "the apparent loss of control of the boat," that is mere idle speculation. Therefore the appeal should be allowed.

Galliher, J.A. and McPhillips, J.A. (dissenting)

GALLIHER and MCPHILLIPS, JJ.A., dissented.

Appeal allowed.

MARTIN v. CAPE.

QUE.

C. R.

Quebec Court of Review, Fortin, Guerin and Archer, JJ. February 7, 1916.

1. MASTER AND SERVANT (§ V—340)—AMENDMENT OF WORKMEN'S COMPENSATION ACT—RETROACTIVE EFFECT—CAPITAL RENT—CHOICE OF PAYMENT.

The Act of Geo. V. (1914), ch. 57, amending the Workmen's Compensation Act (R.S. Que. 1909, art. 7329), which gives the person injured, or his representatives, the option to demand the payment direct to themselves of the amount of compensation or of the capital of the rent, has no retroactive effect and does not apply to an accident arising before the passing of the law, and the employer can only be required, as formerly, to pay the

QUE.

C. R.

MARTIN v. CAPE.

Statement

capital of the rent to an insurance company designated for that purpose by an Order-in-Council.

[See also *Jennings* v. *Brisette*, 25 Que. K.B. 21; *Blanchette* v. *Black Lake Co.*, 20 Rev. de Jur. 605; *Foucher* v. *Morache*, 46 Que. S.C. 498; *Canadian Pacific R. Co.* v. *McDonald*, 23 D.L.R. 1, [1915] A.C. 1124, 24 Que. K.B. 495.]

APPEAL from the judgment of the Superior Court, rendered by Greenshields, J. Affirmed.

On November 2, 1914, judgment was given for the plaintiff condemning the defendant to pay a yearly rent of $87.50, under the Workmen's Compensation Act, for an accident which took place on January 28, 1914. The plaintiff presented a petition praying the defendant be ordered to pay him $1,514.18, to wit, the capital of the said rent; and subsidiarily that, if aforesaid capital is not paid to him, that it should be paid to the Travellers Insurance Co. of Hartford.

The defendant contested that the said plaintiff was not entitled to demand the capital of said rent, as it could only be demanded when permanent incapacity to work has been ascertained, such not being the case in this instance. Moreover, the judgment condemning the defendant is subject to revision during four years, and the said capital cannot be demanded during that delay; and also that the demand that the capital be paid to the plaintiff, and also that it should be paid to the designated insurance company is contradictory and inconsistent.

The Superior Court refused the option prayed for by petitioner, but granted the capitalization of the rent giving to the defendant the choice of the insurance company, by the following judgment:

"Considering that at the date of the happening of the accident to the plaintiff-petitioner which gave rise to the present action, there was no law in force in this province authorizing the payment of the capital direct to the injured party;

"Considering that the amendment made by 4 Geo. V. ch. 57 was not in force at the time of the happening of the accident therein, and said amendment had no retroactive effect;

"Considering that a judgment debtor of a rent has the right to select any one of the insurance companies designated for that purpose by Order-in-Council to which the payment of the capital shall be made, when the judgment creditor of the rent makes option that the capital be paid to an insurance company;

"Considering that the plaintiff-petitioner is not entitled to be paid the capital of the said rent to himself in person, nor is he entitled to an order upon the defendant-respondent to pay the capital to the Travellers Insurance Co. of Hartford;

"Considering, however, that the plaintiff-petitioner is entitled to act of his option that the rent be capitalized;

Statement

"Doth grant act of the plaintiff-petitioner's option that the rent accorded to him under the judgment of November 2, 1914, be capitalized:

"Doth order and condemn the defendant-respondent within eight days from the rendering of the present judgment to pay to an insurance company designated for that purpose by Order-in-Council, the capital of the said rent of $87.50, said rent payable quarterly, provided the capital necessary to buy the said rent does not exceed the sum of $2,000, but if the capital necessary to buy the said rent of $87.50, payable quarterly, in favor of the plaintiff-petitioner exceeds the sum of $2,000,

"Doth condemn the defendant-respondent to buy for the plaintiff such annual rental payable quarterly from an insurance company designated for that purpose by Order-in-Council as the sum of $2,000 and not more will purchase, the whole without costs."

This judgment was affirmed by the Court of Review.

J. M. Ferguson, K.C., for plaintiff.

McLennan, Howard & Aylmer, for defendant.

DOBLE v. CANADIAN NORTHERN R. CO.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. April 11, 1916.

1. RAILWAYS (§ II D 6—70)—INJURIES TO ANIMALS AT LARGE—MUNICIPAL BY-LAW—ENACTMENT BY IMPLICATION—NEGLIGENCE OF OWNER.

A municipal by-law which restrains animals from running at large for a certain number of hours of the day does not give rise to an enactment by implication permitting them to run at large during the remaining hours of the day in derogation of the common law duty of the owner to keep the animals from his neighbour's land, and there can be no recovery when they are killed on the right of way of a railway company, if the animals are at large through the negligence of the owner within the meaning of sub-sec. 4, of sec. 294, of the Railway Act, R.S.C. 1906, ch. 37, as amended by sec. 8, ch. 50, 9-10 Edw. VII. (Can.)

[*Greenlaw* v. *C.N.R. Co.*, 12 D.L.R. 402, 23 Man. L.R. 410, distinguished; *Watt* v. *Drysdale*, 17 Man. L.R. 15, followed; *Garrioch* v. *McKay*, 13 Man. L.R. 404; *Crowe* v. *Steeper*, 46 U.C.Q.B. 87, referred to.]

Statement

APPEAL from a judgment in favour of plaintiff in an action under the Railway Act (R.S.C. 1906, ch. 37, sec. 294 (4) as

MAN.

C. A.

DOBLE
v.
C.N.R.

Richards, J.A.

amended by sec. 8, ch. 50, 9–10 Edw. VII. (Can.)), for the killing of animals running at large. Reversed.

C. W. Jackson, for appellant, defendant.

A. E. Hoskin, for respondent, plaintiff.

The judgment of the Court was delivered by

RICHARDS, J.A.:—The facts are set out in the reasons for judgment given by the trial Judge. As stated by him the question is whether or not the animals got at large through the negligence or wilful act or omission of their owner. If they did so get at large, then under sub-sec. 4 of sec. 294 of the Railway Act (R.S.C. 1906, ch. 37, as amended by sec. 8, ch. 50, 9–10 Edw. VII. (Can.)) the plaintiff cannot recover.

Sub-sec. 4 does not limit the distance from the right of way within which the letting animals go at large shall be considered negligence. But if that question of distance is capable of being a factor in deciding whether there was negligence, I do not think it affects the present case. Animals can easily stray 2 miles at any time on an open road.

The real question is whether by-law No. 20 of the municipality in which the animals got at large and were killed permitted their running at large during the hours from 6 o'clock in the morning till 7 in the evening. The enacting clauses of the by-law are sufficiently stated in the judgment appealed against. The animals in question come within clause 4, which restrained them from running at large between 7 o'clock in the evening and 6 o'clock of the following morning, but made no express provision as to whether or not they might so run between 6 in the morning and 7 in the evening.

The trial Judge held, as I understand it, that, by implication, the by-law did so enact, one of his reasons for so holding being, I presume, that, otherwise, there would be no object in the restraining enactment, because, if they were not to be permitted to be at large at all, there was no need for any enactment, as by the common law they would be so restrained.

If the by-law is to be given the meaning put upon it by the Judge, then the position at law is like that in *Greenlaw* v. *Canadian Northern R. Co.*, 12 D.L.R. 402, 23 Man. L.R. 410, where the by-law expressly permitted the running at large during the hours within which the animals there in question were killed.

MAN.

C. A.

DOBLE v. C.N.R.

Richards, J.A.

In that case, which the trial Judge followed, this Court held that the intention of parliament was to leave the expression "negligence or wilful act or omission" to be interpreted by the provincial law in force where the killing occurred, and that it followed that, where they were so lawfully at large under the provincial law, the mere fact of the owner having let them at large would not, in itself, be a defence to his action for damages.

Then assuming, as I think we must till it is overruled, that the decision in the *Greenlaw* case is good law, the issue in the present case reduces itself to this. Does by-law No. 20 of the municipality enact by implication that the cattle expressly restrained by sec. 4 from running at large between 7 at night and 6 in the morning, are permitted to run at large in the other thirteen hours of the day?

The argument in favour of the enactment by implication is a strong one. But it must be borne in mind that it is in derogation of the common law. The matter has been dealt with by a case exactly in point, which apparently was not brought to the notice of the trial Judge. I refer to *Watt* v. *Drysdale*, 17 Man. L.R. 15, a decision of the Chief Justice of this Court sitting in appeal. There, as here, there was a clause in the by-law restraining the running at large of animals during a certain part of the day, but saying nothing as to the rest of the day. The Chief Justice at p. 17, says:

> The by-law carefully provides that certain animals shall not be allowed to run at large, but there is no provision, as above remarked, declaring that any animals may run at large. At common law the owner of cattle was bound to keep them from his neighbour's land . . . *Garrioch* v. *McKay*, 13 Man. L.R. 404; *Crowe* v. *Steeper*, 46 U.C.Q.B. 87.

Again, on p. 18:

> At the trial, the defendant relied on this by-law as an authority permitting his cattle to run at large . . . I cannot agree with this construction of the by-law. I think, at most, it must be looked at as a by-law restraining animals from running at large.

And at p. 20:

> There is ample authority also for the proposition that the power of a municipality to pass by-laws restricting common law rights can only be found in language clear and distinct.

In support he cites; *Taylor* v. *Winnipeg*, 11 Man. L.R. 420; *The King* v. *Nunn*, 15 Man. L.R. 288 and *Merritt* v. *Toronto*, 22 A.R. (Ont.) 205.

It is probable, as suggested in *Watt* v. *Drysdale*, *supra*, that the draftsmen of such by-laws supposed that, at common law,

MAN.

C. A.

DOBLE v. C.N.R.

Richards, J.A.

cattle were permitted to be at large, and that the only enactment required in a by-law of this kind was one restraining them.

On careful consideration, I think that the reasoning in *Watt* v. *Drysdale*, and the other cases above named, applies in this case. The result, in my opinion, is that the by-law before us is only a restraining one, purporting to enact a restraint which already existed at common law.

The by-law, however, does provide one thing not in the common law, and which serves some purpose—that is, a provision that a breach of the restraining enactment may be punished by fine, on conviction before the reeve, or a justice of the peace.

With deference, I feel obliged to hold, as I think the Judge would have held if his attention had been drawn to *Watt* v. *Drysdale*, *supra*, and the cases there cited, that the by-law did not permit the animals in question to run at large. If I am right in that, *Greenlaw* v. *C. N. R. Co.* does not apply, and the animals were at large through the negligence of the owner, within the meaning of sub-sec. 4 of sec. 294 of the Railway Act.

I would, therefore, allow the appeal, set aside the judgment in the County Court and enter there a judgment for the defendant.

Appeal allowed.

ALTA.

S. C.

ALBERTA DRILLING CO. v. DOME OIL CO.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Scott, Stuart, and Beck, JJ., March 26, 1915.

1. CONTRACTS (§ II D4—190)—RIGHT TO SEIZE EQUIPMENT UPON NON-PERFORMANCE OF DRILLING CONTRACT—BREACH OF COVENANT AGAINST ENCUMBRANCES.

An agreement whereby an oil drilling contractor covenants the drilling equipment to be free of debt, lien or incumbrance and to so maintain it until completion of the contract, and that in the event of an abandonment or failure to substantially perform the contract the oil company is given the right to seize the equipment and complete the well, does not entitle the company to exercise the right of seizure for an outstanding indebtedness on the machinery not amounting to a charge or lien, and that it is only upon the failure of substantial performance of the contract that the right to seizure may lawfully be exercised.

2. CORPORATIONS AND COMPANIES (§ IV DI—65)—ERROR IN CERTIFICATE OF CORPORATION AS AFFECTING CORPORATE POWERS—CONTRACT ULTRA VIRES.

An incorrect statement in the certificate of incorporation that the liability of the company is specially limited under sec. 63 of the Companies Act (Alta.) does not thereby affect the usual powers of the corporation incidental to the corporate objects, and a contract executed by the corporation within the scope of those powers is not on that account *ultra vires*.

[Affirmed in *Dome Oil Co.* v. *Alberta Drilling Co.*, 52 Can. S.C.R. 561.]

APPEAL from the judgment of Hyndman, J., in favour of the plaintiff in an action for damages for the wrongful seizure of an oil drilling equipment. Affirmed.

A. H. Clarke, K.C., for plaintiff, respondent.

George H. Ross, K.C., and *L. F. Maghood*, for defendant, appellant.

The judgment of the Court was delivered by

HARVEY, C.J.:—The plaintiff and defendant entered into an agreement on July 6, 1914, whereby the plaintiff was to bore for oil for the defendant at a defined rate. The time for commencing work is not specified. The defendant agreed to pay $5,000 on the execution of the agreement and $5,000 when the equipment was on the ground, which sums were to be in payment of the work thereafter to be done. The first $5,000 was paid. The machinery, with the exception of certain parts, was on the ground about July 22. The derrick, which, by the terms of the agreement, was to be constructed by the defendant, was not then completed and by arrangement the plaintiff completed it, for which it claims $142.50, which claim is admitted. Although the plaintiff had a staff of men on the ground from July 22, it was not until August 15 that the machinery was completed, so that the drilling could proceed. Four days later the plaintiff's bookkeeper applied to the defendant's manager for the payment of the $5,000 payable when the equipment was on the ground. Objections were made and the bookkeeper made several visits to defendant's manager on that day and the next in the endeavour to satisfy him.

One of the provisions of the agreement was as follows:—

> And the contractor hereby covenants and agrees with the company to place their equipment, material, tools and appliances on the ground free of debt and of all and every lien and encumbrance and to so keep and maintain the said equipment, material, tools and appliances until the completion of this contract and not to sell the same until this contract has been performed in every respect by the contractor.

There was a balance of $4,045 of the purchase price of the machinery still unpaid and Mr. Phillips, the defendant's manager, objected to pay the $5,000 on that account. He demanded an affidavit shewing that it was paid for in full, and an order was given to the vendors by arrangement with them for the unpaid balance upon the defendant, and an affidavit thereupon made by plaintiff's manager to satisfy Mr. Phillips. These documents were taken to

ALTA.

S. C.

ALBERTA DRILLING CO. v. DOME OIL CO.

Harvey, C.J.

Mr. Phillips on August 20, with an order to pay the balance of the $5,000 to the bank, but he declined to make any payment until his solicitors approved. He told the plaintiff's bookkeeper that he was going out of town the next day and that they could arrange matters the day following. Mr. Phillips did go out of town the next day. He went out to the place where the drilling was in progress and seized all of the plaintiff's equipment, giving notice that the defendant would continue the drilling with it.

The clause of the agreement under which it is sought to justify the seizure is as follows:—

> It is further agreed and understood that if the contractor abandons the work before the completion of either well to the depth of twenty-five hundred feet as provided for in this contract, or fails in any respect in the substantial performance of any of the agreements herein contained, the company shall have the right forthwith and without notice by any officer or agent of the company to seize the drilling equipment, material, tools and appliances owned by the contractor on the well site and to complete the well.

It is a little difficult to ascertain from Mr. Phillips' evidence the true reason for the seizure. In answer to defendant's counsel, he said it was:—

> First, for the protection of the stockholders of the Dome Oil Company; further that the machinery according to the contract, as I construed it, had not been paid for. Also that the men that were working there were complaining about their wages; that the people who were supplying the camp were complaining about not getting their money; that the work was not going ahead.

If the first can be considered an independent ground, this gives five grounds on which to rest the validity of the seizure. Later in cross-examination, he limits these to two, *viz.*, the complaints of the men about their wages and the fact that the work was not progressing satisfactorily. Again, he says, referring to the seizure: "If the work was going all right, we had no intention of doing it." On re-examination, however, he restores as one of the grounds the fact that the material was not paid for.

The plaintiff claims $5,000, the amount agreed to be paid, $142.50 for building the derrick, which is admitted, and damages of $34,000. Mr. Justice Hyndman, before whom the action was tried, gave judgment for $5,000 and $250 for damages for illegal seizure and $142.50.

On this appeal, counsel for the defendant contends that the contract is invalid as being beyond the power of the plaintiff to make. It is apparent that as far as the seizure is concerned, it can

only be justified by the terms of the contract and if that is invalid the seizure must necessarily be illegal. The ground on which it is contended that the contract is one the plaintiff has no power to make is that it is a company formed with a liability limited by sec. 63 of the company's ordinance, the powers of which are set out in sec. 63(*a*), which powers, it is contended, do not include the power to make a contract such as the one in question. Both companies in this action purport to come within the section. Sec. 63 provides that when the objects of a company are restricted to those specified relating to mining, the memorandum may provide that the liability of shareholders is limited to the amount actually paid on their shares. It also provides that the certificate of incorporation shall state that the company is specially limited under this section. It is not contended that oil is not a mineral, but it is contended that the terms used in the section indicate that it is not such a mineral as to come within the section and that in any event the section does not contemplate a company incorporated as this company as indicated by its object, its name and the contract in question, to do common labour involving nothing of a speculative nature. I am of opinion that it is not necessary to determine whether this company is one which comes within the terms of sec. 63 or not for it is not by virtue of sec. 63 that it is incorporated. It is incorporated as any other company under the general provisions of the ordinance. There is no doubt that its objects come within the legislative authority of the province and that, therefore, it may be duly incorporated under the ordinance. If the certificate of incorporation which, as sec. 63 says, is issued under sec. 16 and not under sec. 63, states that the liability of the company is specially limited under that section when the company is in fact one which does not come within the terms of that section and whose liability, therefore, is not limited under that section, the certificate is in error to that extent, but not necessarily any farther. The company is incorporated because it has complied with the provisions of the ordinance and obtained a certificate of incorporation and has the powers necessarily incident to a company with its objects. One of the objects of the plaintiff is to bore for oil as a contractor. Clearly, therefore, this contract is within its power. Sec. 3 is for the express purpose of limiting the liability of the members. The question of liability does not arise here and it is, therefore, unnecessary to decide whether the company is within sec. 63 or not.

ALTA.

S. C.

ALBERTA DRILLING CO. v. DOME OIL CO.

Harvey, C.J.

The defendant company, therefore, has the right given by the contract and it is necessary to determine whether in making the seizure it was within its right. I have already quoted the provision of the contract indicating the conditions under which a lawful seizure might be made. There is no suggestion that the plaintiff had abandoned the work. The seizure, therefore, can only be justified upon the failure of the plaintiff in the substantial performance of one of its agreements. The ground given by Mr. Phillips as to the protection of the shareholders need not be considered, therefore, other than as comprising some other ground. As far as concerns the complaints of non-payment both on the ground as found by the trial Judge, that there were no such complaints and on the ground that nowhere in the contract does the plaintiff agree with the defendant to pay its employees or for supplies, no justification can be found. It is quite clear that the work was not proceeding satisfactorily and I apprehend that the progress was as unsatisfactory to the plaintiff as the defendant. The only agreement of the plaintiff in the performance of which this might be deemed to be a failure appears to be contained in par. 2, which provides "(c) That the contractor will use the best materials and labour available and will commence drilling within ..... days from the date of the signing of this agreement and proceed with the work of drilling the said wells in a workmanlike manner and will drill continuously and will complete the same at the earliest possible date from the commencement of operations. (d) That it will at all times during the continuance of the above operations have in charge of the work competent drillers."

There was dissatisfaction with the delay before the work got started and the foreman for plaintiff states that Mr. Phillips told them that if they did not get something done by the 15th they could get out. They did, however, get started by the 15th, and if the defendant had any ground for complaint up to that time, it apparently waived or abandoned it because it allowed the plaintiff to proceed, but in a day or two, owing to gravel being found, there was a caving in and some casing was required from the defendant and Mr. Phillips told them where to get it instead of supplying it on the ground as the contract required the defendant to do. The plaintiff's men went and got it and put it in place and were just starting ahead when the seizure was made. There appears to be no evidence whatever that it was the plaintiff's default in any of

his engagements that resulted in the unsatisfactory progress. Indeed, there seems to have been insufficient time given to permit any fair test. Moreover, the agreement provides that

> in the event of the company making default in paying the contractor any payment due hereunder promptly on the date when same becomes due . . . the contractor may, upon its option, immediately cease operations and it agrees that it will pay to the contractor the liquidated damages the sum of $50 for each and every day during which the company shall cease to carry on operations as aforesaid and for all other delays caused by the company.

Notwithstanding the confusion in words in this clause, it appears clear that by reason of the defendant's failure to pay the amount due when the equipment was on the ground, the plaintiff could have refrained from doing any work and demanded in addition $50 a day. It did not do that, but it made what progress it could, making no claim, though part of the delay was due to the defendant's failure to furnish casing as agreed. The defendant company appears to have thought that it was only the plaintiff that was bound by the terms of the agreement. The defendant contends that its promise to pay the second $5,000 is dependent on the plaintiff placing the equipment on the ground free from debt, and that as the latter was not done, it was not liable to pay. In support of this it is argued that the intention was that the second $5,000 should be available for drilling operations and that was why the machinery was to be free from debt. While this argument is plausible, I can see nothing else to support it. The intention appears rather that the machinery should be free from lien so that there could be no interference with its use for drilling and that is why it is not merely to be free from encumbrance when placed on the ground, but also to be kept free during the operations. The provision for payment and for providing unencumbered equipment are in separate paragraphs in different parts of the agreement and appear to be entirely independent of each other. For breach of either, the consequences provided by the agreement, or the natural consequences would follow, but neither party could excuse a breach of its covenant on the ground of the other's breach of its covenant. As to the claim that there was a right to seize because the machinery had not been paid for, the learned Judge's finding that the seizure was not made on that ground seems to have ample support in the evidence. I am of opinion, however, that the seizure could not be supported on that ground.

It is argued and there appears to be much force in the argument that there has been no breach of agreement by the plaintiff in this

ALTA.

S. C.

ALBERTA DRILLING CO. v. DOME OIL CO.

Harvey, C.J.

respect and that appeared to have been the view of the trial Judge. It is said that though the plaintiff was indebted for the machinery there was no debt against the machinery for that can only mean what the rest of the provision indicates, something that is a charge on the machinery itself, which a personal liability of the owner would not be, but even if this be not so, it is only a failure in the *substantial* performance of any agreement that would justify the defendant's act, and in this case the machinery was in substance, at least, paid for by the acceptance of the order on the defendant, and if it was not in reality paid for, it was because the defendant itself refused to do what it was by the terms of the agreement bound to do. I think this contention is sound, and that the seizure cannot be justified on this ground and consequently that it cannot be justified at all.

The learned trial Judge only allowed $250 as damages for the seizure. The defendant may consider itself fortunate that it is not called upon to pay more than a sum so trifling in comparison with the value of the machinery and the operations involved, especially having regard to the fact that there is ample evidence for thinking that the seizure was not honestly made. The trial Judge appears to have allowed the $5,000, not as the overdue payment, but rather under a provision of the agreement which authorizes the defendant to stop the drilling at any time, but with the condition that if it does so it "will pay the contractor a minimum of $10,000 for the drilling of each well so stopped." It appears to me that it is unimportant which view is taken. It is clear that it is contemplated that the contractor should not be called on to acquire the expensive machinery and go to the other expenses without being certain of being paid a reasonable amount and that amount is fixed, first, by providing that it shall receive $10,000 on account of future services before it commences work, and secondly, that that exact amount it shall be entitled to retain, even if it has not earned it, if it is prevented from earning it by the act of the defendant. The defendant did stop the work effectually by seizing the machinery with which the work was required to be done and it could not, therefore, demand back any part of the $10,000 if it had paid it, nor I think, should it be allowed to maintain that it is not liable to pay the remaining $5,000 which had not been paid.

The appeal should be dismissed with costs. *Appeal dismissed.*

[Appeal dismissed by Canada Supreme Court, 52 Can. S.C.R. 561.]

MORGAN v. McDONALD.

CAN.

S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Anglin and Brodeur, JJ., December 29, 1915.

1. APPEAL (§ VII L 2—475)—REVIEW OF JURY'S FINDINGS ON FRAUD AND MISREPRESENTATION.

The issue of misrepresentation or fraud in procuring an agreement and promissory notes, raised in the defense to an action thereon, is one for the consideration of a jury, whose findings for the defendant, where the evidence is conflicting, are final and cannot, in the absence of misdirection, be disturbed on appeal by granting a new trial merely because the result of their findings may seem unsatisfactory to the appellate Court.

[*Toronto R. Co.* v. *King*, [1908] A.C. 260, followed; *Canada Carriage Co.* v. *Lea*, 37 Can. S.C.R. 672, distinguished; *McDonald* v. *Morgan*, 22 D.L.R. 705, 49 N.S.R. 1, reversed.]

Statement

APPEAL from the judgment of Supreme Court of Nova Scotia *en banc*, reported *sub. nom. McDonald* v. *Morgan*, 22 D.L.R. 705, 49 N.S.R. 1, ordering a new trial. Reversed.

J. J. Power, K.C., for appellant.

H. Mellish, K.C., for respondent.

Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—I am of opinion that this appeal should be allowed with costs.

Davies, J.

DAVIES, J.:—At the conclusion of the argument I was strongly inclined to think that the appeal should be dismissed and the judgment of the Supreme Court of Nova Scotia directing a new trial confirmed.

After, however, reading the evidence carefully, and the findings of the jury upon the questions submitted to them as also the charge of the trial Judge, I have reached the conclusion that the judgment entered by him does substantial justice, is based upon the findings of fact of the jury, which themselves have ample evidence to support them, does not shew that he misdirected them or himself upon the counterclaim which both on the law and the facts were left to him by consent and should not be interfered with.

As the Judge said, the facts are somewhat complicated but involve questions of fact only. Some of the answers of the jury are not as plain as they might have been, but read altogether there can be no doubt as to their meaning. They found that the notes were signed by defendant under untrue material representations of fact made to her by the respondent's selling agent, and make practically the same answer with respect to her signature to the agreement she signed.

The evidence was very conflicting on the material points in

CAN.

S.C.

MORGAN v. MCDONALD.

Davies, J.

dispute. It was for the jury to say which witnesses they believed. Evidently they accepted the evidence of the defendant respondent and her witnesses. That evidence supports their findings.

The substantial results are that the defendant escapes payment of her note, the plaintiff retains possession of, and the property in, both the pianola and the Mason-Risch piano, while the plaintiff pays on the counterclaim (all questions respecting which are left to the trial Judge), $65 for the organ which they received and hold, together with costs of the action the result of which was adverse to him.

It does not appear to me possible and it was not suggested at bar that any new evidence could be given on a new trial. I see no reason for disturbing the findings of the jury and the judgment of the trial Judge at the trial already had upon those findings.

The appeal should be allowed and the judgment of the trial Judge restored.

Idington, J.

IDINGTON, J.:—I am, with great respect, unable to see why there should have been a new trial ordered in this case. Ever since the case of *Toronto R. Co.* v. *King*, [1908] A. C. 260, and I suspect a long time before, the law did not permit a verdict and judgment to be set aside and a new trial directed merely because the result seemed to the appellate Court unsatisfactory.

In that case the Court of Appeal for Ontario, in the exercise of a discretion it felt it had, directed a new trial.

In the absence of misdirection or well-founded complaint of that kind relative to fairness of trial being available, the Judicial Committee of the Privy Council in that case held the Court should not have directed a new trial.

I am at a loss to find the misdirection herein. The substantial question between the parties was fairly tried and on most conflicting evidence the jury, which was the proper tribunal to decide, discredited plaintiff's witnesses and accepted the version of the defendant and her witnesses.

I can find nothing in the trial Judge's charge which should be held to have misled the jury. Indeed there is nothing now in that regard seriously put forward except that the trial Judge presented for the jury's consideration questions bearing upon the time when the notes in question were payable and why they were given and he added he would amend the pleading to meet the facts as found.

If these questions had been submitted without any reference to amending the pleadings but on the pleading as it stood at the opening of the trial, I do not see what objection in law could be maintained to the submission of such questions. They all bear more or less upon the main allegation of fraud.

The facts relative to the giving of notes and reasons for giving them are also pertinent to the other main issues raised in the pleadings. There were other issues than the charge of fraud which seem to have been overlooked by those strenuously objecting to these questions.

Certainly if the appellant's evidence is to be believed the notes never should have been given payable in the way they were. The obtaining of them in that way helps to illustrate the nature of the alleged fraud. The mere submission of such questions as bear upon that phase of the case needed no pleading beyond that already on the record.

But assuming for a moment that the matter can only be looked at as the trial Judge evidently did and that an amendment was necessary, what of it?

The evidence bearing upon such an issue was admitted without objection. The evidence of the plaintiff's witnesses in denial thereof was given in answer thereto, as if the issue at law really was before the Court.

The case apparently was fought out upon such issue; and I have no doubt elaborated to the jury in same way as if accurately pleaded.

A trial Judge hearing all that was quite right in treating the issue of fact so fought out as a thing he should submit to the jury.

We know how little attention is paid in these times to the issues developed in the pleadings and the course of dealing therewith. If counsel wishes to insist on a rigid adherence to the actual pleadings, let him insist upon the evidence being kept relevant thereto.

To allow a case to be in reality tried on the facts and then in appeal tried on the pleadings alone apart from the facts, would hardly be in accord with modern methods of administering justice.

But one answer to the whole of this ground of complaint seemed to me on the argument to be that if all these questions and all relevant thereto were struck out, how can the respondent hope

CAN.

S.C.

MORGAN v. MCDONALD.

Idington, J.

to succeed on the other facts as found in the other answers? I have heard no satisfactory answer to that suggestion. I am not called upon to pass any opinion upon what should have been the verdict.

But upon that verdict, read in light of what was the matter in contest between the parties, and leaving the answers to the questions bearing upon the notes if possible out of the question, certainly the respondent is seeking to enforce a contract he has no right to maintain.

The case of *Canada Carriage Co.* v. *Lea*, 37 Can. S.C.R. 672, relied upon by respondent's counsel, was decided before *Toronto R. Co.* v. *King*, above referred to, and was in line with some earlier cases which could not be lightly set aside.

It was as a mere question of jurisdiction that it came up here. So did *Toronto R. Co.* v. *King*, *supra*, also come here and meet the same reception. Since then, as a result of the ruling in the Court above therein, we have, I think, uniformly held or intended to hold parties to the lines laid down therein, that unless there is some legal ground of a substantial character impeaching the conduct of the trial, no new trial should be granted.

If the notes and contract in question were obtained by the method defendant testifies to, no man should seek to recover thereon.

I think, therefore, this appeal should be allowed and the trial Judge's judgment be restored.

Anglin, J.

ANGLIN, J.:—This was eminently a case for a jury. The issues raised by the defence were misrepresentation and fraud on the part of the plaintiff's agent in obtaining the notes and agreement sued upon. The defendant alleged and testified that upon a representation that she was purchasing a pianola outright on a defined credit with an option later to exchange it for a piano, she was induced to sign a document in the form of a lease or hire agreement under which no property would vest in her until payment had been made in full. She further testified that it was represented to her that the notes which were taken for the purchase price would not be payable until May 1. In fact they were made payable at a much earlier date. She was at the time unable to read to the knowledge of the plaintiff's agent who took the notes and agreement and she relied upon his statement of their contents.

Her testimony is fully corroborated by that of Mrs. Doddsworth and is also corroborated as to what were stated to her to be the terms of the agreement by the plaintiff's witness, Langley.

The jury found for the defendant and it cannot be said that there was not evidence to support their findings.

The plaintiffs assert that they offered a piano to the defendant on the day following their taking away of her pianola and that she refused to accept it. This the defendant denied and said that it was not until a fortnight later, and after, as she understood, the plaintiffs had refused to give her a piano, that she notified them that she considered the contract broken by them and demanded a settlement. Although the defendant's evidence on this branch of the case is not as clear or satisfactory as it is upon the issue of fraud, the plaintiffs have not obtained a finding upon it in their favour and it is not essential to the defendant's success that her version of what occurred after the pianola was taken away—wrongly, I think, against the defendant's protest—should have been found to be true.

It may be that if the plaintiffs had tendered a piano to the defendant on May 8, when they removed her pianola, she might have been obliged to pay her notes. Perhaps if they had tendered the piano when removing the pianola and then demanded payment of the notes as a condition of leaving it with the defendant, subject to the question of her right to claim rescission on the ground of fraud, their position might have been defensible. But that was not done. If, as they now contend, the pianola had in fact been sold to the defendant, and not merely leased or rented to her although they claim the $400 alternatively as rent under the agreement), the property in it had passed to her and they had no right to take it from her except on the terms upon which she was willing to allow it to go, *viz.*, that she should at the same time receive in exchange the piano which, with their concurrence, she had already selected.

I have found no misdirection—at all events none which occasioned any substantial wrong or miscarriage.

The only objection made to the Judge's charge was that he submitted to the jury the charge of fraud by the plaintiffs' agent in taking notes payable at a date earlier than that stated to the defendant as the time when she would be expected to pay. The

CAN.

S.C.

MORGAN v. MCDONALD.

Anglin, J.

Judge refused to withdraw this question from the jury. Evidence had been given upon it without objection and an amendment to the statement of defense raising the issue was allowed. In taking that course I think the Judge acted within his powers and that his discretion should not be interfered with. But if this question were entirely out of the case, the finding of fraudulent misrepresentation in regard to the nature of the agreement, for the fulfilment of which according to its terms the promissory notes sued upon were given as security, would suffice to sustain the judgment for the defendant.

With respect for the Judges of the appellate Court I am of the opinion that there was no sufficient ground for setting aside the verdict of the jury and the judgment of the trial Judge based upon it. There is no suggestion that any further evidence can be offered by either party and I cannot see any advantage to be gained from submitting the case to another jury. I would allow the appeal with costs in this Court and in the Court *en banc* and would restore the judgment of the trial Judge.

Brodeur, J.

BRODEUR, J.:—After the argument I was inclined to dismiss this appeal; but, in reading over the pleadings, the evidence and the judgments, I have reached a different conclusion.

There is no doubt in my mind that the lease on which the respondent bases his alternative claim was never duly consented to. The only contract discussed between the appellant and the respondent's agent was a sale and not a lease. The verdict of the jury declaring that nothing was said to Mrs. Morgan about a lease should stand and could not be disturbed.

As to the notes sued upon, it may be, as has been found by the Court of Appeal, that the verdict is not as clear as it should be.

The notes might have been obtained by fraud and misrepresentation; but it may be inferred also from the verdict that the payment of the notes would not be made before May 1. In the latter case, the signer could not complain; because the action had been instituted long after May 1.

But another aspect of the case would prevent, according to my opinion, the plaintiff-respondent from claiming the payment of these notes.

The original plea of the defendant-appellant was that those

notes were given for a piano and that the plaintiff failed and refused to deliver it.

CAN.
S.C.
MORGAN v. McDONALD.

The jury found that the plaintiff had refused to fulfil his obligation and to deliver the piano.

How could he expect to recover from the defendant without delivering the goods which he had sold and for which those notes had been given or at least without showing his willingness to fulfil his obligation?

Brodeur, J.

The evidence and the verdict are against the plaintiff on that issue and the defendant could not be condemned to pay notes for which no consideration had been received or offered.

The judgment *a quo* that ordered a new trial should be reversed and the judgment of the trial Judge dismissing the action should be restored with costs of this Court and of the Courts below.

Appeal allowed.

HOWARD v. CITY OF ST. JOHN.

N. B.
S. C.

New Brunswick Supreme Court, Appellate Division, McLeod, C.J., and White and Grimmer, JJ. November 26, 1915.

1. INSURANCE (§ IA—9)—ADDITIONAL LICENSE FEE—"NAME OF ANY OTHER INSURANCE COMPANY"—FICTITIOUS NAME.

The name of a fictitious association under which a policy is issued by an insurance company is not "the name of any other insurance company or association," so as to make it liable to an additional fee within the meaning of sec. 2 (*g*), of the St. John City Assessment Act (N.B.), 3 Geo. V. (1913), ch. 55, as amended by 5 Geo. V. (1915), ch. 94, requiring every insurance agent who issues a policy of any company and causes or permits it to be represented upon the name of any other insurance company or association, whether the same be connected with responsibility under the policy or not, to pay a fee of $100 for each company or association he represents.

Statement

SPECIAL case agreed upon, *viz:* Is the plaintiff liable to pay, under ch. 94, 5 Geo. V., an Act in further amendment of the St. John City Assessment Act, 1909, the additional fee of $100 paid by him under protest, by reason of issuing policies of the National Fire Insurance Co. of Hartford, Connecticut, with the name "Atlantic Fire Underwriters' Agency" printed thereon, the National having paid its license fee?

Fred R. Taylor, K.C., for plaintiff.

Hon. J. B. M. Baxter, Attorney-General, for defendant.

Grimmer, J.

GRIMMER, J.:—This is a special case submitted to the Court involving the interpretation of a section of an Act passed by the Legislative Assembly of this Province in 1915, being ch. 94 of said Acts.

The statement of facts as gathered from the special case

N. B.

S.C.

HOWARD v. CITY OF ST. JOHN.

Grimmer, J.

are as follows: This action was commenced by writ of summons issued on September 11, A.D. 1915, whereby the plaintiff claims the return of $100 paid by him to the said defendant under protest.

The plaintiff is an insurance agent carrying on business in the city of St. John and is an agent of the National Insurance Company of Hartford. By ch. 94 of the Acts of Assembly, 1915, N.B., it is enacted:

(G) Every insurance agent who issues a policy of a company or companies, insurance association, underwriters' agency, or other association of underwriters, and upon such policy causes or permits to be represented when issued, the name of any other insurance company, insurance association, underwriters' agency, or other mode of association of underwriters, whether the same be connected with responsibility under the policy or not, shall pay a fee of $100 for each such company, insurance association, underwriters' agency, or other association of underwriters which he represents; but this fee shall not be payable if the company, insurance association, underwriters' agency, or other association of underwriters so represented by him shall pay for itself, and on its own separate account, the tax of $100 provided by sub-section (*a*) of the said section.

The plaintiff issues policies with the heading "Atlantic Fire Underwriters' Agency," but the policy provides that by this policy of insurance the National Fire Insurance Co. of Hartford, Connecticut, in consideration of the stipulations herein named and of ..... dollars premium, does insure," etc. The policy is signed by the president of the National Insurance Co. and its secretary, and the only mention of the Atlantic Fire Underwriters' Agency is in the name printed as part of the heading on the first page of the policy, and the indorsement on the back thereof beneath which is written the words "The National Fire Insurance Company of Hartford."

The National Fire Insurance Co. of Hartford has paid the license fee of $100 required by sub-sec. (*a*) of sec. 2 of 3 Geo. V., ch. 5, and there is no association of underwriters known as the Atlantic Fire Underwriters' Agency this being merely a name adopted by the National Fire Insurance Co. of Hartford in issuing policies.

The question here is the true interpretation of section (G) of the statute, and whether under it the plaintiff is liable to pay an additional fee of $100 for issuing a policy of the National Fire Insurance Co. of Hartford, with the title or name "Atlantic Fire Underwriters' Agency" printed thereon. As stated the section reads that

N. B.

S.C.

HOWARD v. CITY OF ST. JOHN.

Grimmer, J.

every insurance agent who issues a policy. . . . . and upon such policy causes or permits to be represented when issued, the name of any other company, insurance association, underwriters' agency or other mode of association of underwriters whether the same be connected with responsibility under the policy or not, shall pay a fee of $100 for each such company . . . . . which he represents,

which fee, however, shall not be payable if the company represented pays for itself on its own separate account the tax of $100. It is admitted the plaintiff is the agent of the National Fire Insurance Co., and that he issues policies for it with the heading "Atlantic Fire Underwriters' Agency," but which policies are the policies of the National Fire Insurance Co. without any pretense that it is the policy of the Underwriters' Agency. Also that the National Fire Co. has paid the license fee of $100 required by law, and that no association such as the Atlantic Fire Underwriters' Agency exists, but that the same is merely a name adopted by the National Company. Upon these facts and admissions I am of the opinion that judgment should be entered for the plaintiff. Under the section as I am able to interpret it the plaintiff simply represents the National Fire Insurance Co., which it is admitted issues a policy with the name Atlantic Fire Underwriters' Agency thereon (being merely a name adopted for the policy), but none the less the National Fire Insurance Co.'s policy.

The Atlantic Fire Underwriters' Agency is not the name of any existing company or association, or agency, and does not so purport either in the policy or in the indorsement on the back thereof, both of which clearly shew it to be the policy of the National Company and nothing else, and therefore it could not be represented by the plaintiff. The company has paid the license fee established, and is entitled to do business through its duly appointed agent, the plaintiff, and in this respect both the company and its agent have complied with what the law requires and cannot be required or compelled to do more. If the section had ended at the word "underwriters" in the tenth line thereof, the result might have been very different, but we now are only called upon to dispose of this matter under the section as it now stands. The question submitted to the Court must be answered "No," and judgment entered for the plaintiff with costs.

WHITE, J.:—The answer to the question submitted in the stated case must be that the plaintiff is not liable to pay the

White, J.

N. B.

S.C.

HOWARD v. CITY OF ST. JOHN.

White, J.

McLeod, C.J.

additional fee of one hundred dollars mentioned. That answer must be given for the reason that the Atlantic Fire Underwriters' Agency is not the name of any "company, insurance association, underwriters' agency, or other mode of association of underwriters," but is a mere name representing no existing company or person.

McLEOD, C.J., agreed that the judgment should be for the plaintiff. *Judgment for plaintiff.*

YUKON.

T. C.

CANADIAN-KLONDYKE POWER CO. v. NORTHERN LIGHT, POWER AND COAL CO.

Territorial Court of the Yukon Territory, Black, J. (pro tempore). March 27, 1916.

1. TRUSTS (§ II 4—47)—POWERS OF TRUSTEE—DISCRETION AS TO "NECESSARY OPERATING EXPENSES"—MISCONCEPTION OF DUTY—REVOCABILITY OF APPOINTMENT.

A power of attorney to collect the earnings of certain power companies and to pay all "necessary operating expenses" in connection with the operating of the business, does not confer upon the trustee named therein the wide discretionary power to determine, in case of dispute, as to what are necessary operating expenses, and though the instrument creating his appointment is expressed to be irrevocable, it becomes revocable, if through misconception of duty, without seeking professional advice, he acts in deciding upon matters of such importance and so vitally affecting the interests of the companies.

[*Perrins* v. *Bellamy*, [1898] 2 Ch. 521, referred to.]

2. INJUNCTION (§ II—130)—GRANTING OR REFUSING INTERLOCUTORY INJUNCTION—ADEQUATE REMEDY AT LAW—DEALINGS BETWEEN PUBLIC UTILITIES CORPORATIONS.

Before the Court will interfere by interlocutory injunction with the conduct of business of companies operating and supplying public utilities, there must be a very strong urgent reason shewn, and in the absence of any irreparable injury or any injury so material that it cannot be adequately remedied in damages, such relief will not be granted.

Statement

INTERLOCUTORY application by the plaintiff company for an order restraining, until the trial, the defendants from purchasing, taking or receiving electrical power for the operation of their business from any person or company other than the plaintiff company, as provided in a certain agreement between the parties.

C. W. C. Tabor, for plaintiff.

J. Austen Fraser and *J. A. W. O'Neill*, for defendants.

Black, J.

BLACK, J. (*pro tem.*):—The action in which this application is made was begun on February 1, 1916, and involves (*a*): A general claim for damages; (*b*): An injunction order restraining and compelling the defendant companies as above set forth: (*c*): A declaration of the Court that the said agreement, the subject matter of the action and contained in the statement of claim, is

a valid and subsisting agreement, and that the said defendant companies are bound to take all electric power from the plaintiff company under the said agreement which may, from time to time, be required by them for the operation of their respective businesses in Dawson, and so compelling them; (*d*): A declaration that the powers of attorney given by the companies to said Marion Arthur Hammel are good and subsisting powers of attorney and that said Hammel is a trustee under the same for both the plaintiff and the defendants, and entitled to exercise the powers given him thereby, and further declaring that the purported revocations of the said powers of attorney are illegal and of no effect; (*e*): Specific performance of the said agreement; (*f*): Such further and other order as to the Court may seem meet.

Notice of this application was given for February 9, 1916, and the hearing was adjourned from time to time on the application of both parties to allow time for the filing of further affidavits, and was finally had on March 3 and 4, 1916, further time being allowed on the hearing to both parties, until March 11, to file certain additional affidavits.

The agreement upon which this application is based, and which is set forth in the statement of claim, was entered into on January 14, 1915, between all the defendant companies, represented by F. W. Corbett, parties of the first part, and the plaintiff company, represented by J. W. Boyle, party of the second part.

The preamble to the agreement sets forth, *inter alia*, that the plaintiff company had entered suits in this Court against the Dawson Electric Light & Power Co., Ltd., and the Northern Light, Power & Coal Co., Ltd., respectively, the first of said suits being No. 85 of 1914, to recover the sum of $75,209.51 for electrical power alleged to have been delivered by the plaintiff company to the Dawson Electric Light & Power Co., Ltd., between February 13, 1913, and October 31, 1914. The second of said actions being to recover the sum of $6,307.30 for electrical power alleged to have been delivered by the plaintiff company to the Northern Light, Power & Coal Co., Ltd., between the same dates: That a certain other action was pending between the plaintiff company and the Dawson Electric Light & Power Co., Ltd., to recover possession of a certain Turbo generator, the ownership of which is disputed; and that a writ of replevin had

YUKON.

T. C.

CANADIAN-KLONDYKE POWER CO. v. NORTHERN LIGHT, ETC. CO.

Black, J.

issued therefor, and that garnishee summons had issued in said action; and briefly, in effect, that pending a proposed settlement of these actions between the parties the plaintiff company should refrain from further garnishee proceedings and from seizure of said Curtiss generator "until the trial of the actions which shall not take place before May 1, 1915, or until a settlement of the said actions, whichever date shall be prior."

It may be stated here, as was alleged by counsel, that this agreement was not prepared by any solicitor. The drawing of the agreement, though, shows considerable skill on the part of a layman, though it is, in some respects, from a legal point of view, indefinite and uncertain, and is found difficult of construction by the Court in dealing with this application.

By para. 1 of the agreement the defendant companies each and severally agree to, concurrently therewith, execute a power of attorney to Marion Arthur Hammel, giving to him, as their attorney, exclusive power

to collect any and all moneys now or which shall become due them in connection with the operation of their business in Dawson aforesaid or vicinity, and to conduct in their name all necessary bank accounts, with full power to the said Marion Arthur Hammel to sign cheques, drafts and bills of exchange, with the understanding that out of the moneys so received by him the said Marion Arthur Hammel shall pay all wages and necessary operating expenses in connection with the operation of the said business of the parties of the first part (said parties of the first part being all of the defendant companies in this action), from the date of January 1, 1915, until the expiration of this agreement;

and by clause (*a*) of said para. 1, that after payment of wages and operating expenses as above set forth the said attorney should pay to the Canadian Klondyke Power Co., Ltd. (the plaintiff herein), any and all sums of money collected by him for the defendant companies, as follows:—First, the sum of $26,000 to be applied to the amounts due and owing to the plaintiff company for power delivered "as hereinabove set forth")—(having reference presumably to the preamble to the agreement, though what constitutes the $26,000 is nowhere defined), and for power delivered between November 11, 1914, and December 31, 1914, in accordance with certain bills rendered the Northern Light, Power & Coal Co., Ltd., the Dawson Electric Light & Power Co., Ltd., and the Dawson City Water & Power Co., Ltd., set out in detail in the agreement, amounting to $9,994.56, which amount forms part of the $26,000.

Clause (*b*) of para. 1 provides that after payment of said $26,000 the said attorney should pay to the plaintiff company "amounts aggregating to the amount" which shall become due to the plaintiff company for power delivered under the terms of pars. 2 & 3 of the agreement.

By para. 2 the Dawson Electric Light & Power Co., Ltd., agrees to purchase from the plaintiff company, and the latter company agrees to deliver to it, all the electric energy "required by it for the conduct of its business in Dawson and vicinity," until the trial or settlement of the above-mentioned actions, at a certain rate during the months from November to April, both inclusive, and at a certain other rate named during the months from May to October, both inclusive, and provides for monthly payments and the manner by which the amounts shall be determined.

By par. 3 the like agreement is made with the Dawson City Water & Power Co., Ltd., for all the electrical energy required by it for the operation of its electrically driven pump and for the heating of its well at the South Dawson plant, and the Dawson City Water & Power Co., Ltd., agrees to operate said pump continuously in connection with its water service for commercial purposes in Dawson, and to heat the water in its well exclusively with electrical heaters, using its steam driven pump only in case of necessity on account of fire or interruption in the electric service of the plaintiff company; and to pay for such power either at certain fixed rates during certain months as provided in sub-sec. (*a*) of said par. 3 of the agreement, or, under sub-sec. (*b*), at a flat rate per month of an amount equal to the average cost of operating the water company's plant by steam, such amount to be determined by the arbitration of persons named in said clause (*b*). The question as to the basis of payment, that is, as to whether power should be paid for under the terms of sub-sec. (*a*) or sub-sec. (*b*), to be determined by Mr. C. M. Knatchbull-Hugessen (now Lord Braeburn), of London, England; the question to be submitted to him by written statements to be prepared by Mr. Corbett and Mr. Boyle representing their respective companies, the Dawson City Water & Power Co., Ltd., and the Canadian Klondyke Power Co., Ltd.

Powers of attorney were given to said Hammel by three of

YUKON.

T. C.

CANADIAN-KLONDYKE POWER CO. v. NORTHERN LIGHT, ETC. CO.

Black, J.

the defendant companies, viz.: The Dawson Electric Light & Power Co., Ltd., The Dawson City Water & Power Co.,Ltd., and the Yukon Telephone Syndicate, Ltd., the powers granted in each being identically the same, and limited in their terms in the same language as is found in the provisions of the agreement in regard thereto, above set forth, namely: Exclusive power to collect moneys, to open, carry on and conduct, in the names of the companies respectively, all necessary bank accounts, and to transact the banking business, with power to sign cheques, etc., and out of the moneys received to pay all wages and necessary operating expenses of all the companies named in the agreement as parties of the second part, from January 1, 1915, until the expiration of the power, and after payment of said wages and operating expenses then to pay to the plaintiff company the moneys referred to, and as provided in the said agreement; the said powers of attorney to be irrevocable until the trial or settlement of the several actions to which I have referred.

Mr. Hammel in due course entered upon his duties under said powers of attorney, and pursuant to appointment by the companies, and continued to act thereunder until on or about January 16, 1916, when he was notified that the said powers of attorney were cancelled and revoked, and that his services were no longer required. Having questioned the right of the said companies in this respect he was, on January 17, 1916, dismissed from the service of the companies, and was not allowed by them to act further under the said powers of attorney. The reasons alleged for such cancellation of power will be referred to later on.

The argument on the hearing occupied two full days and the material used comprised a score of affidavits, several of them of great length and directly at variance, and having reference for the most part to matters which cannot be determined on this application.

The action, as has been said, is based upon the agreement of January 14, 1915, which was intended as a tentative arrangement between the parties pending the disposition of the several actions to which I have referred, and having in view of settlement thereof.

In construing a contract or agreement the whole of the instrument is to be taken together, and in order to arrive as nearly as

possible at what was the intention of the parties I find it necessary in this case to refer to the recital or preamble.

It is stated in the preamble to the agreement that the trial of the actions shall not take place before May 1, A.D. 1915, or until a settlement, whichever date shall be prior. So it was clearly in contemplation by the parties that the agreement should not continue much beyond the date mentioned, namely: May 1, 1915. The actions were not, however, brought to trial by either party and no settlement has been made. The defendant companies, through Mr. Hammel, continued making the payments to the plaintiff company under the agreement, and matters ran along until, as will be hereinafter referred to, conflict arose between the parties because of the failure or refusal by two of the defendant companies to take electrical power from the plaintiff company under the agreement, and because of the manner in which Mr. Hammel was conducting matters under his powers of attorney.

It is shewn by the material before the Court, and I think the evidence is, that Mr. Hammel had an erroneous idea of his powers, rights and duties under the said agreement and the powers of attorney given him, and that he improperly assumed the management of the business of the defendant companies, or some of them, in several respects of a material character, and in disregard of the expressed and definite directions and requests of those properly in control of and responsible for the management of such business.

Mr. Hammel's position was that of a collector of the earnings of all the defendant companies, and trustee thereof for all parties, and under the terms of the agreement and powers of attorney it was his duty out of the moneys received by him first to pay

all wages and necessary operating expenses in connection with the operating of the business of the parties of the first part (being all the defendant companies), from January 1, 1915, until the expiration of the agreement.

It cannot be held that, under the terms of the agreement or of the powers of attorney, it was intended that Mr. Hammel should, because of some dispute arising between the plaintiff company and the defendant companies, or any of them, in regard to certain alleged violations of covenants contained in the agreement, or in any case, have the right to determine what were or were not the necessary operating expenses of the defendant companies. If it was intended to give him such wide discretionary

YUKON.

T. C.

CANADIAN-KLONDYKE POWER CO. v. NORTHERN LIGHT, ETC. CO.

Black, J.

powers it should have been clearly stated in the agreement, and in the absence of any such provision such powers must remain with, and be exercised by, the duly constituted and acting officers of the several companies.

As shewn by the affidavit of said Marion Arthur Hammel, sworn on February 24, and the exhibits thereto, J. W. Boyle, general manager of the plaintiff company, on December 27, 1915, instructed or requested said Hammel, by letter of that date, in part as follows:—

The refusal on the part of the Dawson Electric Light & Power Co., Ltd., and the Dawson City Water & Power Co., Ltd., to take power, is an absolute violation of their contract, and any debts, either for wages or materials, contracted by them on account of their not taking power from us, are entirely unnecessary expenses, and do not come under the head of "wages and necessary operating expenses" in connection with the operation of their business as provided in clause 1 of the said agreement, and as further provided in the power of attorney to you. We, therefore, request that you not pay any wages or amounts for fuel or other materials which the above-mentioned companies may see fit to contract for, and we further request that you forthwith send written notice to any and all employees and any and all other persons and corporations who have been, or are, doing any work or delivering any materials to the said companies, which said work and materials are required on account of the fact that the companies are not taking power from us. This notice to be to the effect that you will not be responsible for, and will not, on behalf of the said companies, make payment for any such work or materials after this date.

Pursuant to these instructions by Mr. Boyle, representing the plaintiff company, on the following day said Hammel sent a notice or circular letter to officials and employees of the companies, and to a number of wood dealers and others with whom the companies were dealing in the course of their business, notifying them that he had been named as attorney for the companies with power to collect and disburse moneys under the said agreement, and containing the following:—

I would and do hereby respectfully notify you that I will not be responsible for the payment for any wood, material or supplies of any kind whatsoever, or for any labour furnished to: Dawson Electric Light & Power Co., Ltd.; Dawson City Water & Power Co., Ltd., or Yukon Telephone Syndicate, Ltd., after this date, unless a written order is given by me for the same.

It will be observed that, to this extent, the management of the telephone company's business was to be taken charge of by Hammel although that company was under no contract to take power.

The trustee acted unreasonably and improperly in deciding upon matters of such importance and so vitally affecting the

interests of the companies without seeking professional advice. *Perrins* v. *Bellamy*, [1898] 2 Ch. 521.

The failure or refusal by the Electric Light Co. and the Water Co. to take power from the plaintiff company under clauses 2 and 3 of the agreement is the chief question to be determined in this action, and is based upon alleged breaches or failure to perform its part of the contract by the plaintiff company, a matter which cannot be determined upon this application, and certainly should not be arbitrarily determined by the plaintiff company, or its manager, but must go to the trial of the action.

It is shewn that said Hammel as attorney or trustee refused to pay wages, expenses and other liabilities apparently properly incurred and payable in the course of the operations of the companies or some of them, and that he assumed that the agreement does not authorize the payment, out of moneys collected by him, of the operating expenses of the Northern Light, Power & Coal Co., Ltd., when in expressed terms the agreement does authorize and provide for such payment. It may not have been the intention of the parties that the operating expenses of the Northern Light, Power & Coal Co., Ltd., should be paid out of such moneys, and here again I say, that if so it should have been clearly stated and provided in the agreement.

The general conduct of matters by said Hammel under the powers of attorney shews, as I have said, a misconception of his powers and duty thereunder, and affords evidence of undue influence.

Though the instruments appointing said Hammel attorney and trustee are expressed to be irrevocable, they become revocable in consequence of the manner in which he has acted thereunder, and by this it is not intended to imply the slightest dishonesty on the part of Mr. Hammel, but a misconception of his powers, and the consequent improper dealing with matters thereunder.

There remains to be dealt with that part of the application which asks that under clauses 2 and 3 of the agreement the Electric Light Co. and the Water Co. be restrained from taking, purchasing or receiving electrical power for the operation of their business from any person or corporation other than the plaintiff company, and that an order be made compelling said companies and each of them to take and accept from the plaintiff company all electrical power required as provided in the agreement.

YUKON.

T. C.

CANADIAN-KLONDYKE POWER CO. v. NORTHERN LIGHT, ETC. CO.

Black, J.

The affidavits shew that electrical energy was supplied by the plaintiff company under clauses 2 and 3, with frequent interruption, until November 29, 1915.

It is admitted in the affidavit of J. W. Boyle, sworn on February 24, 1916, and the ex. A thereto, which is a statement of power delivered by the plaintiff company to defendant companies and payments made under the agreement of January 14, 1915, that said Hammel had paid to the plaintiff company out of the moneys collected by him under said agreement the sum of $53,635.46 in cash, and that the plaintiff company had received further sums from the defendant companies amounting to $4,745.16; in all, $58,380.62, and in said statement, ex. A, there is charged against this, for power delivered by plaintiff company from January 1 to November 30, 1915, under the agreement, the following sums:—

To the Electric Light Co.	$20,725.20
To the Water Co.	20,116.00
To the Northern Light, Power & Coal Co., Ltd.	1,681.76
Amounting in all to	$42,522.96

Par. 5 of Boyle's said affidavit admits the further payment of $471.54 on January 28, 1916, and states that "the total amount paid under sub-sec. (*a*) of sec. 1 of the said agreement of January 14, A. D. 1915" is $58,852.16—

which, after deducting the said amount of $42,522.96 due plaintiff company for power delivered between January 1, 1915, and November 30, 1915, as shewn in said ex. A, would leave an amount of $16,329.20 to be credited to the defendant companies under the said agreement.

Such an application of the moneys received by Hammel as attorney and trustee under the agreement is a direct violation and absolute perversion of the terms of said sub-sec. (*a*) of sec. 1, which provides that

from the first of such moneys so collected, there shall be paid to the Canadian Klondyke Power Co. the amount of $26,000, which said amount shall be applied to the amounts due and owing to the said Canadian Klondyke Power Co. for power delivered as hereinabove set forth, and for power delivered by them between November, 1, 1914, and December 31, 1914,

items of which latter service are given.

Sub-sec. (*b*) immediately following, provides that "after" payment of the said $26,000 as set forth in sub-sec. (*a*) hereof" the said attorney should pay to the plaintiff company amounts which should "become due" to the said company for power

delivered by them under the terms of clauses 2 and 3 of the agreement.

By a proper application of the $58,852.16 so admitted by plaintiff company to have been paid to it by the trustee, the said $26,000 would be satisfied and the sum of $32,852.16 in the hands of the trustee for payment on account of power furnished under said clauses 2 and 3, when ascertained. Defendants claim that a greater amount than that so admitted by the plaintiff has been paid over by the trustee; and here it may be observed that the amounts to be paid plaintiff company for power delivered under said clauses 2 and 3 have not been ascertained or determined under the terms of the agreement, and have therefore not "become due," and it does not appear that the delay in ascertaining the amounts is the fault of the defendants.

Interruptions in the service and the failure to supply the Electric Light Co. and the Water Co. with sufficient electrical energy for the proper conduct of their business or with any power are shown to have occurred, and in some cases to have continued for considerable periods of time.

On November 29, 1915, the defendants disconnected the lines over which the electrical energy was being supplied by the plaintiff company because, as alleged, and as the weight of evidence, I think, shews, of the irregularity and insufficiency of the supply of electrical energy by the plaintiff company.

It is claimed on the part of the plaintiff that such insufficiency or irregularity was because of the failure by the defendants to properly care for and operate the automatic regulators at the plant of the defendants in Dawson, regulating the voltage, which the defendants on the other hand allege was the duty of the plaintiff company.

Authorities were cited on the part of the defendants to shew that in the absence of a negative contract by the defendants that they were not to take power from any other source, or use power other than that to be supplied by the plaintiff company, the agreement to take all the power "required" by them did not prevent the defendant companies taking power from their own plant.

It was argued from authorities cited on behalf of the plaintiff that a negative contract should be implied.

YUKON.

T. C.

CANADIAN-KLONDYKE POWER CO. v. NORTHERN LIGHT, ETC. CO.

Black, J.

The conflict between the parties and the question of the position and rights of the parties in regard to matters coming within the provisions of clauses 2 and 3 of the agreement must stand until the evidence of witnesses is fully heard at the trial, and the matter should, therefore, not be enlarged upon at this time.

Kerr on Injunctions, the standard English authority, lays it down that,

> a man who seeks the aid of the Court by way of interlocutory injunction must, as a rule, be able to satisfy the Court that its interference is necessary to protect him from that species of injury which the Court calls irreparable before the legal right can be established at the trial.

The plaintiff has, in my view, failed to show that "irreparable injury," or any injury so material that it cannot be adequately remedied in damages, will follow if the interlocutory injunction order is not granted.

Before the Court will interfere by interlocutory injunction with the conduct of business of companies operating and supplying public utilities there must be very strong and urgent reason shewn, which does not appear in this case.

I must, for the reasons stated, decline to make any order restraining the defendant companies from collecting moneys otherwise than through said Hammel under said powers of attorney, and compelling said companies to permit said Hammel to collect said moneys and carry on said business under said powers of attorneys, and the injunction order will be refused with costs.

The agreement which is the subject matter of the action being no doubt in part intended by the parties to be in the nature of a security until the trial or settlement of the actions then pending, and to which I have referred, there will be an order for payment into Court in this action by the defendants, after the payment of

> all wages and necessary operating expenses in connection with the operating of the said business of the said defendant companies,

of all moneys arising from the carrying on of the said business of said companies and each of them in Dawson and vicinity, now in the hands, or under the control of said companies, or any of them, or of any officer or employee of any of said companies, or which may come into the hands of said companies or any of them, or any such officer or employee, until further order of the Court.

Such payment is to be made on or before the 5th day of each

YUKON.

T. C.

CANADIAN-KLONDYKE POWER CO. v. NORTHERN LIGHT, ETC. CO.

Black, J.

month beginning with April 5, 1916, and to cover the moneys so received up to and including the last day of the preceding month. A statement showing, in reasonable detail, the receipts and disbursements for the month, to be filed in Court with each payment. There will be no costs to either party of the order for payment in. There will be no further garnishee proceedings in any of the said pending actions, and no proceedings had to replevy the said Turbo generator until further order of the Court.

Application refused.

PAULSON v. THE KING.

CAN.

S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. December 29, 1915.

1. MINES AND MINERALS (§ I B—10)—LEASE OF DOMINION LANDS FOR COAL MINING—FORFEITURE—NOTICE OF CANCELLATION—CONTENTS AND HOW SERVED—SERVICE ON SOLICITORS OF LESSEE.

In order for the Crown to effectively terminate a coal mining lease granted under the regulations in pursuance of sec. 47 of the Dominion Lands Act, the conditions of the lease empowering the Minister of the Interior to cancel the lease by written notice upon default by the lessee to perform the conditions therein, it is essential that the cancellation should be effected by a notice which actually reaches and is served on the lessee, and in the absence of special authority, solicitors employed by the lessee in respect of his business with the department are not deemed agents to whom such notice of cancellation could be given; such notice should first convey a proposal or intention to cancel and thus give the lessee an opportunity to remedy the breach or at least to be heard before forfeiture.

[*Davenport* v. *The Queen*, 3 App. Cas. 115, applied; *The King* v. *Paulson*, 20 D.L.R. 787, 15 Can. Ex. 252, reversed.]

Statement

APPEAL from the judgment of the Exchequer Court of Canada, 20 D.L.R. 787, 15 Can. Ex. 252, whereby it was declared that a certain lease by the Crown to the defendant of mining lands in the Province of Alberta was properly forfeited and cancelled. Reversed.

J. F. Smellie, for appellant.

R. G. Code, K.C., for respondent, His Majesty The King.

Lafleur, K.C., and *Falconer*, K.C., for respondents, The International Coal and Coke Co.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—The appellant obtained from the Crown a mining lease dated August 8, 1904, of coal under Dominion Lands in the then provisional district of Alberta. He did not fulfil the conditions of the lease. It is unnecessary to enter into the correspondence between the parties which ensued until we come to the letter addressed on September 13, 1909, by the assistant-secretary of the Department of the Interior to the lessee, the present appellant. That letter is as follows:—

CAN.
S. C.
PAULSON
v.
THE KING.
Sir Charles Fitzpatrick, C.J.

Department of the Interior.
Ottawa, 13th September, 1909.

Sir,—I am directed to inform you that, as you have failed to comply with the provisions of clause 12 of your lease for coal mining purposes of the east half of sec. 29, township 7, range 4, west of the 5th meridian, by commencing active mining operations on the land within the time required by the said section of the lease, the Department has been obliged to cancel your lease, and it will, therefore, now make such other disposition of the land as may seem advisable.

I am to add that a refund cheque for $96 paid by your solicitors, Messrs. Lewis & Smellie, as rental for the year ending the 15th July next, will be forwarded to them on your behalf in the course of a day or two.

Your obedient servant,
(Sgd.) L. PEREIRA,
Assistant-Secretary.

Paul A. Paulson, Esq.,
Coleman, Alberta.

The envelope containing this letter was addressed in the same way as the letter itself. It appears to have remained in the post-office of the Town of Coleman some two months and was then returned from the dead letter office marked "no address—not called for."

This communication was no doubt intended to be a notice pursuant to the 16th and 17th conditions in the lease, which are as follows:—

16. That any notice, demand, or other communication which His Majesty or the Minister may require or desire to give or serve upon the lessee, may be validly given or served by the secretary or the assistant-secretary of the Department of the Interior.

17. That, in case of default in payment of the said rent or royalty for six months after the same should have been paid, or in case of the breach or non-observance or non-performance on the part of the lessee of any proviso, condition, term, restriction or stipulation herein contained and which ought to be observed or performed by the said lessee and which has not been waived by the said Minister, the Minister may cancel these presents by written notice to the said lessee and, thereupon, the same and everything therein contained shall become and be absolutely null and void to all intents and purposes whatsoever, and it shall be lawful for His Majesty or His successors or assigns into and upon the said demised premises (or any part thereof in the name of the whole), to re-enter and the same to have again, re-possess and enjoy as of His or their former estate therein anything contained herein to the contrary notwithstanding.

Provided, nevertheless, that in case of such cancellation and re-entry the lessee shall be liable to pay and His Majesty, his successors or assigns shall have the same remedies for the recovery of any rent or royalty then due or accruing due as if these presents had not been cancelled but remained in full force and effect.

The notice was incompetent to cancel the lease for two reasons:—

1. It was not such a notice as is called for by condition 17.

2. It was not given to nor served on the lessee.

As to the first reason, it would be necessary, in order to hold the notice of any validity, that the condition should be construed to mean that the Minister may cancel the lease, but must then give notice to the lessee that he has done so. This is in terms what the letter of September 13, 1909, does. There can be no doubt that this is not such a notice as is called for. The notice must be to the effect that it is the intention of the Minister to cancel the lease for breach of the conditions of the lease, thus giving the lessee an opportunity of remedying the breach or at any rate of being heard before his lease is forfeited. There can be no object in a notice that the lease has been already irrevocably cancelled without notice. In the most extreme view, the notice should state that the Minister cancels the lease for breach of condition and not that he had already done so without notice which he had no power to do.

It has been represented to us that the provision for re-entry was a cumulative requirement for putting an end to the lease; there can be no doubt that frequently in leases the proviso for re-entry stipulates that notice shall be given before a forfeiture is enforced.

The Courts lean against a forfeiture and a condition like this should be strictly construed. It is most reasonable to suppose that notice should be given before the forfeiture is enforced because the power to cancel the lease by notice only arises on breach of any of the conditions. If there had been no breach of condition a notice could not have rendered the lease void and there would, therefore, be uncertainty whether the lease was still subsisting or not.

The Imperial statute, 44 & 45 Vict. ch. 41 (The Conveyancing Act, 1881), provides by sec. 14, sub-sec. 1, as follows:—

> A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

A similar provision is to be found in the Ontario statute

CAN.

S. C.

PAULSON
v.
THE KING.

Sir Charles Fitzpatrick, C.J.

(R.S.O., ch. 155, sec. 20(2)) and perhaps in the statutes of others of the provinces.

Secondly, the notice such as it was, was neither given nor served on the lessee. It was simply mailed to him at the town of Coleman and, as he did not happen to inquire at the post-office if there was such a notice there for him, which he was certainly not bound to do, it never came to his hands at all. Whatever the effect of a proper notice would have been, this notice was clearly insufficient for any purpose.

The next document calling for attention is the letter of January 28, 1910, addressed by the secretary of the Department of the Interior to the lessee's solicitors. It is as follows:—

Ottawa, 28th January, 1910.

Gentlemen,—With further reference to the Departmental letter of the 11th instant, I am directed to say that, in view of your representations, it has been decided to reinstate the lease in favour of Mr. Paul Paulson for the coal-mining rights of the east-half of section 29, township 7, range 4, west of the 5th meridian.

The re-instatement is, however, granted on the express condition that Mr. Paulson will fyle evidence in the Department, shewing the nature and progress of the work it is understood he has now commenced on the land, giving full particulars as to the extent and depths of the shaft, as well as the necessary works connected therewith.

Your obedient servant,

Messrs. Lewis & Smellie,
Barristers, Ottawa, Ont.

(Sgd.) P. G. KEYES,
Secretary.

This letter was written on the erroneous assumption that the lease had been cancelled, but that it was in the power of the lessor to allow it to hold good, as the letter says, to reinstate the lease.

It is clear that, if the lessor was willing to continue the lease notwithstanding the breaches of condition, he must be taken, on the true fact that the lease was still existing, to have consented to waive the forfeiture of the lease for breach of condition.

This waiver disposes of any necessity for inquiring into the question whether the subsequent lease of June 28, 1910, to the International Coal and Coke Co., Ltd., constituted a sufficient re-entry by the lessor. Having waived the breaches of condition the lessor had no right to re-enter for a forfeiture.

I desire to add that I concur in what I understand was the view of the Judge of the Exchequer Court that the remedy pursued by the Crown in this case was entirely unsuitable.

The appeal should be allowed and the information of the Attorney-General dismissed. The defendant Paulson is entitled to be paid by the Crown his costs of the action and of this appeal.

IDINGTON, J., dissented.

DUFF, J.:—In my view of this appeal two questions only require discussion. One of these was raised, I think, for the first time during the course of the argument and touches the construction of the order-in-council under the authority of which the appellant's lease purports to be granted. The suggested construction which, if adopted, would be conclusive against the appeal is not consistent with the interpretation followed by the department charged with the administration of the lands affected by the order-in-council and the working of the order-in-council itself; but nevertheless it must be considered.

The exact point is this:—Has sec. 6 of the order-in-council the effect of causing the lessee's interest to come automatically to a termination, without the exercise of any election on behalf of the Crown, on failure to perform any of the conditions thereby prescribed, namely: (1) the commencing of active mining operations on the demised property within one year after the commencement of the term, or (2) the working of a mine or mines within 2 years after that date, or (3) the payment of the reserved ground rent or royalty?

The words of the section are as follows:—

> Failure to commence active operations within one year and to work the mine within two years after the commencement of the term of the lease, or to pay the ground rent or royalty as before provided, shall subject the lessee to the forfeiture of the lease and to resumption of the land by the Crown.

Does this section merely vest in the Crown the right, at its election, to free its title from the lessee's interest on default of performance of the nominated conditions; or, does it operate on such default to terminate that interest *ipso jure* irrespective and independently of any election on behalf of the Crown?

The question is a question of construction simply. There can be no doubt that under sec. 47 of the Dominion Lands Act the Governor-in-Council has power to pass a regulation having the force and operation of statute and having the meaning it is now suggested we should ascribe to sec. 6. The question is:—What is the meaning of sec. 6? In examining that question it will be convenient to apply some of the usual aids to construction—the traditional interpretation of similar provisions by the Courts, the language and the tenor of the order-in-council as a whole, the administrative interpretation of this order-in-council and of

CAN.

S. C.

PAULSON v. THE KING.

Duff, J.

similar regulations passed by the Governor-in-Council under the authority of the Dominion Lands Act, and providing schemes for the administration of various classes of public land by the same Department, the Department of the Interior.

The manner in which the Courts have dealt with such provisions, whether found in contracts or in statutes, is described by a very eminent Judge in the following passages taken from a judgment of final authority. (Sir Montague Smith speaking for the Privy Council in *Davenport* v. *The Queen*, 3 App. Cas. 115, at 128, 129 and 130.)

> In a long series of decisions, the Courts have construed clauses of forfeiture in leases declaring in terms, however, clear and strong, that they shall be void on breach of conditions by the lessees, to mean that they are voidable only at the option of the lessors. The same rule of construction has been applied to other contracts where a party bound by a condition has sought to take advantage of his own breach of it to annul the contract: see *Doe* v. *Bancks*, 4 B. & Ald. 401; *Roberts* v. *Davey*, 4 B. & Ad. 664, and other cases in the notes to *Dumpor's Case*, 1 Sm. L.C. (12 ed.), 56.
>
> In *Roberts* v. *Davey*, 4 B. & Ad. 664, the words were that the license "should cease, determine, and be utterly void and of no effect to all intents and purposes." As far, therefore, as language is concerned, it was stronger in that case than in the present.
>
> It is, however, contended that this rule of construction is inapplicable when the legislature has imposed a condition. But in many cases the language of statutes, even when public interests are affected, has been similarly modified. Thus, where the statute provided that if the purchaser, at an auction, refused to pay the auction duty, his bidding "should be null and void to all intents and purposes," it was decided that the bidding was void only at the option of the seller, though the object of the Act was to protect the revenue. In that case Mr. Justice Coltman said: "It is so contrary to justice that a party should avoid his own contract by his own wrong that, unless constrained, we should not adopt a construction favourable to such a view." *Malins* v. *Freeman*, 4 Bing. N.C. 395.
>
> There is no doubt, that the scope and purpose of an enactment or contract may be so opposed to this rule of construction, that it ought not to prevail, but the intention to exclude it should be clearly established.
>
> The question arises in this, as in all similar cases, whether it could have been intended that the lessee should be allowed to take advantage of his own breach of condition, or, as it is termed, of his own wrong, as an answer to a claim of the Crown for rent accruing subsequently to the first year of his tenancy. The effect of holding that the lessee himself might insist that his lease was void, would, of course, be to allow him to escape by his own default from a bad bargain, if he had made one. It would deprive the Crown of the right to the future rents, although circumstances might exist in which it would be more to the interest of the Crown, representing the colony, to obtain the money than to re-possess the land, as, indeed, in the present case, it was thought to be.

See also *Bonanza Creek Hydraulic Concession* v. *The King*, 40 Can. S.C.R. 281.

Such being the way in which the Courts have looked at similar provisions, is it capable of being "clearly established" that the intention of sec. 6 was to exclude this "rule of construction," as Sir Montague Smith calls it? The order-in-council provides for the "issue" of "leases" and it is indisputable that the word "lease," as designating an instrument creating a term of years in the public lands, "issued" by the Department of the Interior, means, in common understanding and usage, a contractual instrument recording in the form of contractual stipulations—covenants, provisos for re-entry and the like—the terms of the agreement between the Crown and the lessee by which their reciprocal rights and obligations are to be governed touching the subject-matter of the lease. The phraseology of sec. 6 contains nothing to suggest that the section was framed with a view to excluding the ordinary rule of construction. "Shall subject the lessee to the forfeiture of the lease," while certainly not unambiguous points rather to a penalty exigible from the lessee at the will of the lessor rather than to a consequence decreed by the law itself independently of the will or choice of either. The words "resumption of the land by the Crown" even less disputably seem to point in the same direction.

Ambiguity in such instruments as this order-in-council entitles us by the settled practice of the British and American Courts to seek the assistance of any settled administrative interpretation which is clear and unmistakable in its effect for arriving at the more probable intention of the authors of the law. The only actual evidence now formally before us as to administrative interpretation is the lease itself upon which the proceedings are taken coupled with the conduct of the Minister and the Department of the Interior and the attitude of the Crown in the course of this litigation; but there can be no shadow of question that, down to the moment of the hearing of the appeal, the construction of sec. 6, upon which the Government has deliberately acted, as regards the matter now under discussion, is the construction for which the appellant contends.

It is common knowledge that the "rule of construction" of *Davenport* v. *The Queen*, 3 App. Cas. 115, has usually governed the departmental construction of similar regulations.

I think the proper conclusion is that the lease contemplated by the order-in-council is a contractual instrument and that the

form of covenant made use of for the purpose of binding the lessee in the lease before us to perform the conditions of sec. 6 and the clause of forfeiture employed for the purpose of giving effect to the provisions of sec. 6 are proper clauses to which it was within the power of the Minister to assent and that the reciprocal rights and duties of the Crown and the lessee in respect of the matters to which these clauses relate are in this litigation to be determined by giving effect to the clauses according to their proper construction as stipulations in an instrument *inter partes*.

I do not find it necessary to decide the question raised by the Judge of the Exchequer Court whether or not the phrase "excused from so doing by the Minister," in the 12th clause of the lease, applies to the covenants to commence active operations within a year and to work a mine within two years. There is no doubt much could be said in favour of the view of the learned Judge, if I may say so respectfully. But the acceptance of that view must, I think, lead to the dismissal of the information for this reason. The judgment of Lord Cozens-Hardy, M.R. in *Stephens* v. *Junior Army and Navy Stores*, [1914], 2 Ch. 516, cited at length in the factum of Mr. Smellie, is a sufficient authority for holding that the covenant to commence operations within a year and to work a mine or mines within two years (which I take to mean to open a mine or mines within two years) is not a continuing covenant but a covenant that can only be broken once, and consequently that a waiver of the right of forfeiture (which undeniably took place) arising from the breach of this covenant was an election by the Crown not to avail itself of that right, which election once made, of course, is final.

As to the covenant to continue to work any opened mine—that obviously only comes into effect upon a mine being opened; and the waiver of the forfeiture, or rather the election not to exercise the right of forfeiture accruing for non-performance of the first two mentioned covenants, necessarily imports, or rather necessarily is, an election against exercising that right in respect of any breach of any of the covenants expressed in the clause. The only suggestion that could be made against this view, the suggestion, namely, that a covenant to work continuously any mine or mines that might be operated implies a general covenant to open mines. That suggestion is negatived in the decision referred to as putting forward an interpretation of the clause

which is far fetched and unreasonable. I am not satisfied that this conclusion as to the consequences of the waiver of forfeiture arising from the breach of the first two covenants in clause 12 —a conclusion difficult to escape if we accept the learned Judge's construction—would rest upon quite so satisfactory a foundation under the construction put upon that clause by the appellant; but I shall not consider this point further, it being unnecessary to do so in consequence of the opinion I have formed that the right of cancellation vested in the Minister by the provisions of the lease has not in fact been effectively exercised.

The clause (17) is in the following terms:—

That in case of default in payment of the said rent or royalty for six months after the same should have been paid, or in case of the breach or the non-observance or non-performance on the part of the lessee of any proviso, condition, term, restriction or stipulation therein contained and which ought to be observed or performed by the said lessee and which has not been waived by the said Minister, the Minister may cancel these presents by written notice to the said lessee and, thereupon, the same and everything herein contained shall become and be absolutely null and void to all intents and purposes whatsoever, and it shall be lawful for His Majesty or his successors or assigns into and upon the said demised premises (or any part thereof in the name of the whole), to re-enter and the same to have again, re-possess and enjoy as of His or their former estate therein anything herein contained to the contrary notwithstanding.

Provided, nevertheless, that in case of such cancellation and re-entry the lessee shall continue to be liable to pay and His Majesty, his successors or assigns shall have the same remedies for the recovery of any rent or royalty then due or accruing due as if these presents had not been cancelled, but remained in full force and effect.

The acts upon which the Attorney-General relies as constituting the exercise of the power of cancellation given by this clause are set out in paragraph 4 of the information, which is as follows:—

That the Minister, by memorandum, under date of September 1st, 1909, directed the cancellation of the said lease and pursuant to such direction, the assistant-secretary of the said Interior Department, on September 13th, 1909, by letter addressed to said defendant, Paulson, advised said defendant, Paulson, that he (Paulson), having failed to comply with the provisos of clause twelve (12) of said lease, the Department had been obliged to cancel his said lease, to which memorandum and letter the plaintiff will on trial hereof, crave leave to refer.

The letter there referred to admittedly in fact never reached Paulson, and that it should reach him, was, I think, essential to its taking effect as a cancellation. The words

the Minister may cancel these presents by written notice to the said lessee and, thereupon, the same and everything therein contained shall become and be absolutely null and void,

CAN.

S. C.

PAULSON v. THE KING.

Duff. J.

import a written notice to the lessee as a condition of the valid exercise of the forfeiture as, indeed, the mode appointed exclusively for exercising it. It required no argument to shew that the paper deposited in the post-office, addressed to the lessee but not received by him, cannot be treated as a written notice within either the letter or the spirit of this stipulation. The learned trial Judge appears to have thought that a letter addressed to the lessee's solicitors and admittedly received by them informing them that the Minister had by notice to Paulson cancelled the lease was either by itself sufficient to satisfy the condition or that, as supplementing the letter addressed to Paulson, it completed and perfected the notice thereby initiated.

With great respect, to my mind, this reasoning is not convincing. In the first place there is no allegation in the pleadings that the gentlemen who, in their capacity as solicitors, were conducting a correspondence with the Department of the Interior on behalf of the appellant in relation to this lease, had any authority to receive notice under clause 17 as agents for the appellant. It hardly requires authority to shew that the fact that they were employed in this non-litigious business did not necessarily in itself invest them with such capacity.

In the next place the letter does not profess to be sent on behalf of Minister and in exercise of the power reserved to him by clause 17 and, indeed, evidently was not so sent. It was, therefore, neither actually nor constructively a notice of cancellation by the Minister, and it cannot be regarded as constituting any essential element of such a notice. Then, if it had been intended to rely upon the correspondence which subsequently passed as constituting notice within the clause, the information should have been framed in such a way as to apprise the appellant that such was the case he would have to meet at the trial. In the absence of anything of the kind in the pleadings, the Crown could only take such a position if it were clear that all the facts were before us so that the appellant could not be prejudiced by the frame of the allegations in the pleading. After analyzing the correspondence I have no difficulty in reaching the conclusion that there is no evidence entitling us to say judicially that the conditions of the forfeiture claues were complied with in respect of written notice. This conclusion makes it unnecessary to consider the other points raised in the argument presenting, what appeared

CAN.
S. C.
PAULSON
v.
THE KING.
Duff, J.
Anglin, J.

to me upon superficial examination of them only, rather formidable difficulties in the way of the Attorney-General's success. I pass no opinion upon them.

The appeal should be allowed and the information dismissed with costs.

ANGLIN, J.:—The regulations (June 11, 1902), empower the Minister of the Interior to make leases of school lands for coal-mining purposes, and provide that failure of the lessee to commence active operations within one year and to work the mine within two years shall subject him to forfeiture of his lease. The lessee clearly made default. Under the regulations his lease, thereupon, became not *ipso facto* void, but voidable. The lease itself provided that upon default under the regulations "the Minister may cancel these presents by written notice to the lessee." There is nothing in this provision inconsistent with the regulations. It was within the power of the Minister, to whom the statute (R.S.C. 1886, ch. 54, sec. 24), entrusted the administration of the school lands, to stipulate as to the manner in which the power of cancellation vested in him by the regulations should be exercised.

Professedly in the exercise of the power conferred by the provision of the lease, a letter from the Department of the Interior, dated September 13, 1909, signed by "L. Pereira, assistant-secretary," and addressed to the appellant at Coleman, Alberta, informing him that "the Department has been obliged to cancel your lease," was placed in the post-office. It never reached Paulson and was subsequently returned to the Department from the dead letter office. Concurrently with the mailing of this letter Paulson's solicitors were notified that their client

> is being advised that his lease . . . has been cancelled.

Assuming the sufficiency of a notice that the *Department has cancelled* the lease, if duly given (I think it was clearly insufficient because it does not purport to be the act of, or even to have been authorized by the Minister himself, and because it signifies past and not present action), the notice so mailed was not given to the lessee. That the notice to which he was entitled should actually reach him is what the lease contemplated. There is nothing in it which constituted the post-office his agent to receive the notice for him—nothing which dispensed with its actual delivery to him.

CAN.

S. C.

PAULSON v. THE KING.

Anglin, J.

But it is contended that the stipulation for a written notice was waived by the subsequent steps taken on Paulson's behalf to secure a re-instatement of the lease. I do not find in what was done anything amounting to such a waiver. There is no evidence of intention on the part of the lessee, with full knowledge of the facts on which his rights depended, to forego or abandon those rights.

Moreover, the Minister subsequently decided to re-instate the lease in favour of Mr. Paul Paulson. His solicitors were so notified by letter of January 28, 1910. This step clearly involved a waiver by the Minister (who was competent to waive them) of any grounds of forfeiture existing up to that date. It is true that the re-instatement is said to be made on condition that Paulson should file certain evidence with the Department. No time was specified within which that should be done. Whether this condition had been already complied with was perhaps doubtful when, on April 14, 1910, not at all for failure to comply with it, but because the Minister had been advised by the law officers of the Crown that it was not within his authority to revive the lease in Mr. Paulson's favour, the appellant's solicitors were informed by letter that the Department would treat the lease as having been cancelled from September 13, 1909.

With respect, I am of opinion that the lease was not terminated in the manner in which the Minister was empowered to effect cancellation. The conditions of a clause of forfeiture in its favour must be observed by the Crown with the same care and precision which is exacted from a subject.

Brodeur, J. (dissenting)

BRODEUR, J., dissented. *Appeal allowed.*

ALTA.

S. C.

McLEAN v. MERCHANTS BANK OF CANADA.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and McCarthy, JJ. March 24, 1916.

1. EXECUTION (§ I—3)—SEIZURE OF EQUITABLE INTEREST IN PERSONALTY. Under r. 614 (Alta.), the sheriff may seize and sell any equitable interest in any goods and chattels.

2. EXECUTION (§ I—3)—PROPERTY PURCHASED WITH FUNDS OF EXECUTION DEBTOR—MONEY IN BANK IN ANOTHER'S NAME—TRUST—BURDEN OF PROOF.

Money standing in a person's name in a bank, without any indication that it is a trust account, *primâ facie* belongs to that person, and the burden of shewing that it is in reality a trust account rests upon the party making the assertion; unless that burden is met to the satisfaction of the trial Court, an execution creditor cannot successfully seize under the writ an automobile claimed to have been purchased with the funds of the execution debtor standing in the name of another person.

3. NEW TRIAL (§ II—5)—ERROR OF COURT—REFUSING CROSS-EXAMINATION OF MEMORANDUM USED BY WITNESS TO REFRESH MEMORY—"SUBSTANTIAL INJUSTICE."

There exists a well established right to cross-examine the memorandum used by a witness to refresh his memory, the denial of which constitutes a substantial injustice, particularly in view of the inconsistencies and mistakes of the testimony of the witness the evidence of whom is the very essence of the case, and is ground for a new trial.

[*Sinclair* v. *Stevenson*, 1 Car. & P. 582, applied.]

Statement

APPEAL from the judgment of Ives, J., in favour of a claimant in an interpleader issue to determine the ownership of an automobile. New trial ordered.

Laidlaw, Blanchard & Rand, for defendant, appellant.

G. W. Blackstock, for plaintiff, respondent.

Stuart, J.

STUART, J.:—On October 16, 1914, the plaintiff had on deposit in her own name, with the Union Bank of Canada in Medicine Hat, the sum of $9,000. On or about April 17, 1915, the plaintiff's son, one Leonard J. McLean, either on his own account or for his mother, purchased from one Drake an automobile for the sum of $1,150. The price was paid by a cheque on the bank account of the plaintiff, signed by the plaintiff, and the vendor gave Leonard J. McLean a receipt, saying "Received from Mrs. Clara McLean the sum of $1,150 in full of account for one Hupmobile Car." The defendant bank were execution creditors of Leonard J. McLean. Under its execution the sheriff seized the automobile in question while it was in possession of the execution debtor. The mother claimed the automobile as her own, the sheriff interpleaded and the issue was tried by Ives, J., who gave judgment for the claimant the plaintiff in the present issue.

From this judgment the defendant bank, the execution creditor appeals. . . . . .

The question of the legal property in the car is of little interest because under r. 614 the sheriff may seize and sell any equitable interest in any goods and chattels. . . . . .

The matter, therefore, chiefly turned upon the real beneficial ownership of the money in the bank. There was no suggestion that the mother had bought the car and given it to the son. If the money in the bank was really Mrs. McLean's, there is no doubt that it must follow that the car was hers. If, however, it was really the son's money, merely deposited for protection in the mother's name, then also there can be no doubt that the car was the son's.

ALTA.

S.C.

McLEAN v. MERCHANTS BANK.

Stuart, J.

At the trial, therefore, the chief enquiry was upon the questions where the plaintiff got the money and how it happened to be standing in her name. . . . . .

It is clear that the evidence of the plaintiff demanded the closest scrutiny. The trial Judge, however, accepted her testimony as true. He said:

I cannot find that she has any intention of mis-stating the facts, but rather that she is endeavoring to explain something of her own business affairs beyond her own knowledge, but which she left to her son to manage.

In view of this opinion of the trial Judge I do not think the Court would be justified in reversing his finding and giving judgment for the defendant.

But the appellant asks for a new trial upon a particular ground to which I have not yet referred.

During the cross-examination of the plaintiff,

Q. Didn't you get a mortgage in Redcliffe or didn't Leonard get some mortgage for exchange of certain lands in Redcliffe? You told me you had a deal up there in which you lent some money? A. I did not think this would concern that. Q. What is that you are looking at? A. Redcliffe property, house and lot, I marked it down and thought you would ask about it. Q. When did you write it down? A. This morning. Q. Have you spoken about this matter this morning to Leonard? A. Yes. Q. He told you and you wrote it down? A. Yes, my memory is poor and I don't remember.

Counsel at this point evidently took the paper which she had in her hand but he went on to ask about other matters. Later on he returned to the question of the Redcliffe deal and the loan of some money to her son and repeated his questions when the witness said, "If you give me that little piece of paper I might explain it." What counsel did with the piece of paper does not clearly appear but a little later while he was still asking about the Redcliffe matter, the following occurred:

Q. And then there was a mortgage or something for $2,000? Wasn't there?

The Court: She has not been reading from that, she looked at it. You haven't any writing.

Mr. Rand (Defendant's counsel): I am perfectly willing for your Lordship to see it. *The Court:* I don't want to.

The witness: There are things that I could not remember that I wrote down. I marked down some of those things that I could not remember.

Mr. Rand: I must ask your Lordship to note my objection over-ruling that application.

The Court: If a witness comes in the box and produces something for the purpose of refreshing her memory and we find out that it is something she is using to refresh her memory, counsel has no right to use it.

Mr. Rand: Assuming that it was written off for her for the purpose of preserving her evidence cannot I ask her for that. *The Court:* No, I do not think so.

With great respect I think the trial Judge took a too narrow view of the rights of a cross-examining counsel. The financial dealings between the plaintiff and her son were of the very essence of the case. She had at her son's dictation written down something about them to refresh her memory. It may be doubtful whether she had a right to look at the paper at all. But I think it is clear that she had done so before counsel took it from her. The right to cross-examine upon a document used to refresh memory, so far as the items or matters used by the witness for that purpose is concerned, is clear. The right to examine on the whole document is clear also, although if it goes beyond the matters looked at by the witness then these further items become evidence against the cross-examiner's client. But that is his affair. His right to cross-examine is I think clear. (Phipson, 4th ed. p. 468).

There was every reason in a case like this for allowing the most complete cross-examination. The defendant could not hope to succeed except by the strength of his cross-examination of the plaintiff. More than that the witness who could have told all about the matter, the son Leonard, had been at hand that morning and was evidently available. Yet he was not put in the box. Instead of that the plaintiff got him to coach her, repeated things merely because he had told her of them, looked at a memorandum made at his direction to refresh her memory and yet cross-examining counsel, who could not cross-examine the son, was prevented from cross-examining upon the memorandum. I think that this constituted a substantial injustice to the defendant particularly in view of the inconsistencies and mistakes shown by the plaintiff in her evidence.

In my opinion, therefore, the judgment appealed against should be set aside and a new trial ordered.

At first I was inclined to the view that there should be no costs of the appeal for the reason that plaintiff's counsel had made no objection to cross-examination upon the memorandum. But he made no offer to allow it. He took the benefit of the Judge's error. For this reason and because it was principally because of the plaintiff's omission to call the son Leonard, who knew all the facts, so that he could be cross-examined, that the trial was unsatisfactory I think the respondent should pay the costs of the appeal.

ALTA.

S. C.

McLEAN v. MERCHANTS BANK.

McCarthy, J.

The costs of the first trial should follow the event of the second trial.

SCOTT and BECK, JJ., concurred.

McCARTHY, J.:—Leonard J. McLean against whom the appellants issued execution and seized the automobile in question is a son of the respondent and the latter at the trial of the issue testified that the automobile belonged to her and was taken in execution to satisfy her son's debt to the appellant bank.

It was contended by the appellants that the account standing in the name of the respondent in the Union Bank of Canada at Medicine Hat, Alta., was in fact the account of the son. To establish this fact, counsel for the appellants at the trial, cross-examined the respondent as to previous transactions she had with her son (the execution debtor), concerning the acquisition and disposition of certain real estate in which it was alleged they were jointly interested.

In the course of the cross-examination witness produced a memorandum to refresh her memory as to certain details of the transactions which counsel for the appellants desired to cross-examine upon. This right of cross-examination was denied by the trial Judge.

From the evidence of what transpired on the cross-examination I am of the opinion that the cross-examination should have been allowed. The law governing the matter, as it is to be gathered from decided cases, is I think clear.

Odgers on Evidence (1911) ed. at p. 169 states it to be

> But the counsel on the other side is entitled to look at any document by which the witness has refreshed his memory and to cross-examine him on it,

and at p. 171:

> The opposite party is entitled to see any memorandum by which a witness refreshes his memory, and to cross-examine upon it.

In the case of *Sinclair* v. *Stevenson*, 1 Car. & P. 582, Best, C.J., said

> If you put a paper into the hand of a witness in order to refresh his memory, the other side have a right to see it: if you merely give it to prove a handwriting they have no such right.

See also Phipson on Evidence, 5th ed. 468.

From the evidence it is apparent that the memorandum was placed in the witness's hand to refresh her memory and inspection and the right to cross-examine thereon was refused. I think, therefore, there should be a new trial. *Appeal allowed.*

ONTARIO POWER CO. OF NIAGARA FALLS v. TOWNSHIP OF STAMFORD.

IMP.
P. C.

Judicial Committee of the Privy Council, The Lord Chancellor, Viscount Haldane, and Lord Sumner. February 2, 1916.

1. TAXES (§ I F 2—81)—MANUFACTURING COMPANIES—ILLEGAL BY-LAW CREATING EXEMPTION VALIDATED BY STATUTE — INTERPRETATION — SCHOOL RATES.

A statute passed for the purpose of validating an illegal municipal by-law enacted contrary to the provisions of sec. 366 of the Municipal Act (Ont.) 1887, exempting a manufacturing company from any kind of assessments beyond a fixed rate, merely confirms the by-law subject to the interpretation provided by sec. 4 of the Public Schools Act (Ont.) 1892, existent at the time of the passage of the by-law, that "no municipal by-law exempting ratable property from taxation shall be construed to exempt such property from school rates of any kind whatsoever."

[*Pringle* v. *City of Stratford*, 20 O.L.R. 246, followed; *Tp. of Stamford* v. *Ontario Power Co.*, 8 O.W.N. 241, 7 O.W.N. 646, affirmed.]

Statement

APPEAL from the judgment of the Supreme Court of Ontario (Appellate Division), 8 O.W.N. 241, 7 O.W.N. 646. Affirmed.

The judgment of the Board was delivered by the

Lord Chancellor

LORD CHANCELLOR:—In this case the Ontario Power Co. of Niagara Falls claims that its property within the municipal corporation of the township of Stamford should be assessed for the purpose of all rates at the sum, fixed and unalterable until 1924, of $100,000.

This claim depends entirely upon the meaning of a statute of the legislative assembly of the Province of Ontario, passed on May 25, 1905. But though the construction of this statute is the sole subject for their Lordships' consideration it is desirable to go back a short distance in history before stating and examining the words of the Act.

It was stated to their Lordships in argument that since the year 1879 the municipal council of the township of Stamford has been the sole body to possess the right to levy and collect taxes within the district. The school authority, although it fixes the sum required to be raised for school purposes, has no power either to levy or collect. It also appears that the municipal authorities of the township, from the year 1879 onwards, in order to develop and realise the resources and possibilities of the district, granted to industrial undertakings a preferential treatment with regard to their taxes. This practice was regulated by the Municipal Act of 1887, and was even further controlled in 1892 by two statutes passed in that year. The first of these later Acts was called the Consolidated Municipal Act, and it contains in sec. 366 the following provisions:—

IMP.
P. C.
ONTARIO POWER CO.
v.
TOWNSHIP OF STAMFORD.
Lord Chancellor

> Every municipal council shall by a two-thirds vote of the members thereof have the power of exempting any manufacturing establishment or any waterworks or water company, in whole or in part, from taxation, except as to school taxes, for any period not longer than ten years, and to renew this exemption for a further period not exceeding ten years.

The other was the Public Schools Act of 1892, sec. 4 of which was in the following terms:—

> No municipal by-law hereafter passed for exempting any portion of the ratable property of a municipality from taxation in whole or in part shall be held or construed to exempt such property from school rates of any kind whatsoever.

The former of these Acts was extended and re-enacted by the Consolidated Municipal Act of 1904; and this again provided that, in order to render a by-law of the municipality for granting a bonus in aid of any manufacturing industry a valid by-law, the assent of two-thirds of all the ratepayers who were entitled to vote should be obtained; this provision being subject to certain qualifications, which are not necessary for the purpose of this case. In the same Act, the word "bonus" is defined as a total or partial exemption from municipal taxation, or the fixing of the assessment of any property for a term of years; and the general provisions of the statute contained this further condition—that nothing in the Act should authorise any exemption for a longer period than ten years, nor any exemption, either partial or total, from taxation for school purposes. The provisions of the Public Schools Act, 1892, were also re-enacted from time to time, the last of such statutes being passed in 1914.

In 1900 the appellant company obtained a license from the Park Commissioners of the Queen Victoria Niagara Falls Park to construct and operate within the area under their control certain works necessary to enable the falls of the Niagara River to be utilised for the conversion of its energy into electrical or hydraulic power. It is not plain at what time the work under this license was begun, but it was at least as early as 1902. In 1904 the company was contemplating the expenditure of considerable sums in the municipality of Stamford for the construction and equipment of the plant necessary for its undertaking. The establishment of such work within the municipality was, no doubt, a matter that would prove of considerable advantage to the locality; and the appellant company appears to have urged this before the municipality as a reason why it should receive consideration with regard to the assessable value of its property.

Whether before the passing of the by-law any definite binding agreement was ever come to between the parties is not established by the evidence before their Lordships, nor is it necessary for the determination of the present dispute. So far as the documents shew what transpired, it would appear that the company formulated a request for considerate treatment, and that this request was granted by the municipal authority, who promised that all the real estate, property, franchise, and effects of the appellants, within their municipality, should be permanently fixed, for the purposes of assessing the taxation, at the sum of $100,000; accordingly, the municipality passed a by-law, which is known as by-law No. 11, and is stated to be a by-law relating to the assessment and taxation of the property of the appellant company. The by-law recited that it was expedient to grant the request of the company and enacted that the assessment should be fixed at $100,000 apportioned as therein provided, that the assessment should last at this figure for every year between 1904-24,

and that the said company and its property in the municipality shall not be liable for any assessment or taxation of any nature or kind whatsoever beyond the amount to be ascertained in each such year by the application of the yearly rate levied by the municipal council in each such year to the said fixed assessment of $100,000, apportioned as aforesaid.

And it also enacted

that this by-law shall come into full force and effect immediately after the municipality shall be authorised by sufficient legislative or other authority to pass the same.

This by-law appears to have been treated as a formal enacting provision of the municipality, was read a first, second and third time, and was finally passed on October 10, 1904.

It is plain from consideration of the terms of the Consolidated Municipal Act of 1902, to which reference has been made, that this by-law was outside the power of the municipality. They could not have passed any by-law granting a relief—partial or total—in respect of taxation, or fixed an arbitrary basis of assessment without a majority of two-thirds of the voters; and even with that majority they could not extend the period during which assessment should be fixed beyond the period of ten years; while finally, not only were they unable to grant exemption from the school rate, but the Public Schools Act, 1892, which was then in force, provided that any by-law that dealt with the question of exemption should be construed and held not to have excluded the school rate.

IMP.

P. C.

ONTARIO POWER CO. v. TOWNSHIP OF STAMFORD.

Lord Chancellor

If, therefore, this by-law had been within the competence of the municipal authority, notwithstanding the general words which it contained, it would have been held and construed as meaning that from those general words exemption from liability to the school rate should be excluded.

In the following year, on May 25, 1905, the statute was passed which has given rise to these proceedings. It is entitled An Act to Confirm By-law Number 11 of the Corporation of the Township of Stamford. This Act after reciting the petition of the appellant company representing that by-law No. 11 of the municipal council should be confirmed and made legal and binding, in accordance with the intention and meaning thereof, contains in sec. 1 the following passage:—

> By-law No. 11 of the municipal corporation of the Township of Stamford, set forth as schedule "A" to this Act, is legalised, confirmed, and declared to be legal, valid, and binding, notwithstanding anything in any Act contained to the contrary.

By-law No. 11 is then scheduled to the Act.

Now, it is important to observe that the Act does not purport to confirm any agreement whatever between the parties; it purports only to legalise and make binding the by-law which was not legal and could not be made binding without statute, for the reasons that have been already set out.

The question on which this case depends is whether this statute confirms this by-law as a by-law subject to the interpretation to which such a by-law would be subject by virtue of the statute relating to public schools, or whether it confirmed it so as to enable its words to be read according to their general meaning and not in accordance with their statutory significance.

In their Lordships' opinion, the former is the true view of the case. The by-law did not attempt in express language to include the school rate among the rates for which exemption was granted It did, indeed, use wide and sweeping terms to describe the exemption; but had any question arisen upon the construction of that by-law between its passage and the passage of the Act of Parliament by which it was confirmed, it would have been necessary to construe it so as to limit the general words to rates, other than the rate received for school purposes, and the school authority would have been entitled to rely on this as the true construction.

Their Lordships cannot think that the statute has altered

IMP.
P. C.
ONTARIO POWER CO. v. TOWNSHIP OF STAMFORD.
Lord Chancellor

this construction. It has enabled the by-law to be passed, it has confirmed the by-law and made it legal, but it still remains what it always purported to be—a by-law of the municipal authority carrying within it the meaning which the statute of 1892 had assigned.

It was strongly urged on behalf of the appellants that the words used in the Act meant the same as though a school rate had been expressly mentioned, and that, had the school rate been expressly mentioned, confirmation by the legislature would necessarily have confirmed, as the legislature had full power to do, a deviation from the ordinary statutory obligation. Their Lordships are not satisfied that this would have been the inevitable result, but assuming that it were, it does not follow that the same result ensues when other and general language has been used. It should be remembered that the Act in question was promoted by the appellant company. It lay in their hands to make plain that which they desired. It does not at all follow that if the by-law had contained express words relating to the school rate that it would have been accepted by the legislature. Their Act must be assumed to confirm the by-law as it was drawn and with the meaning with which it was endowed; and speculation as to what might have happened had other words been used is unprofitable in an attempt to construe the actual language in which the Act was framed.

Their Lordships find that this view is in accordance with that expressed in the case of *Pringle* v. *City of Stratford*, 20 O.L.R. 246, and, indeed, that case is far stronger than the present, for an actual agreement to grant exemption for a consideration subsequently executed was in that case confirmed by the special statute, and this fact appears to have greatly influenced Meredith, J.A., who delivered a dissenting judgment.

For these reasons their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

Appeal dismissed.

MELLIS v. BLAIR.

B. C.
C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, Galliher and McPhillips, JJ.A., March 7, 1916.

1. BILLS AND NOTES (§ I C—24)—CONSIDERATION—SUBSTITUTING CURRENT LIEN NOTE.

There is no consideration supporting the making of a lien note in place of another note which is still current for the same indebtedness.

B. C.

C. A.

MELLIS v. BLAIR.

2. BILLS AND NOTES (§ I D 1—30)—LIEN NOTE—DAYS OF GRACE.

A lien note is not a negotiable instrument and does not carry days of grace.

3. SALE (§ III B—66)—LIEN NOTE—POWER TO RETAKE OR SELL—MORTGAGE—CONVERSION.

A lien note which entitles the holder, in case of default in payment of the debt, to take and hold possession of the chattel until the note is paid, or to sell it by private or public sale and apply the proceeds in payment of the note, does not give the holder a right to convert the chattel to his own use, or to mortgage it to another, without being answerable for the conversion.

4. DAMAGES (§ III J—203)—MEASURE OF—CONVERSION—SET-OFF FOR UNPAID PURCHASE PRICE.

The measure of damages in an action for conversion is the value of the thing converted and any special damages which the plaintiff can prove; in such assessment the unpaid purchase money due the defendant on the article converted cannot be considered, but the same may be claimed by way of counterclaim or set-off.

[*Page* v. *Eduljee*, L.R. 1 P.C. 127; *Gillard* v. *Brittan*, 8 M.&W. 575; *Victoria Saanich Co.* v. *Wood Motor Co.*, 23 D.L.R. 79, referred to.]

Statement

APPEAL by the defendant from the judgment of Gregory, J.[1] which is varied.

S. S. Taylor, K.C., for appellant.

G. Roy Long, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The first question is that of consideration for the making of the lien note of July 10, 1914. The indebtedness of the plaintiff to the defendant at that time was evidenced by the promissory note dated June 23, 1914, payable in 30 days at 8% interest. This note, adding the days of grace, would be due on July 26, but at the top of the note are the words "due July 27."

The plaintiff's evidence is to the effect that the defendant came to him on the said July 10, and asked him to make a new note to replace the said note of June 23, which was then current. He says defendant's plea was that he wanted to use it at his bankers. Plaintiff says he was willing to oblige him, and in consequence a new note in the common form and a lien note, both payable on the apparent due date of the old note—July 27—were signed by him on the understanding aforesaid. Defendant on the contrary says that he asked the plaintiff for the lien note in order to get security for the debt, and that is the reason why the current note of June 23 was replaced by the new promissory note and lien note, which were for the amount of the old one with interest up to July 27. Accepting either the plaintiff's or the defendant's story, there was in my opinion no consideration for the making of the lien note. A feeble attempt was made by ap-

pellant's counsel to found the consideration on the apparent mistake in the due date of the old note and the 3 days' grace which would be allowed plaintiff in respect of the new note. I attach no weight to this argument: neither party dreamed of founding the new notes on such a consideration. Moreover, a lien note is not a negotiable instrument and would not carry days of grace. Defendant's object was to get security, but he gave no consideration at all for the instrument which he took for that purpose.

Moreover, even if the lien note be held to be made upon a valuable consideration, and assuming that as between the parties it could operate as an agreement authorising the taking of the truck, although in fact not within the statute at all, the defendant did not pursue its terms. The defendant's right was, in case of default in payment of the debt, to

> take and hold possession of such chattel until such note, or any renewal or renewals thereof are paid, or to sell the said chattel by private or public sale, and apply the net proceeds in payment of any such note or notes and interest.

Immediately after taking possession of the truck, the defendant converted it to his own use. He not only converted it by user for several months, but he mortgaged it to another, which mortgage had not been discharged at the date of the trial. He took the truck, but neither held it as a pledge, as he was entitled to, assuming for the moment the validity of the instrument, nor did he sell it and apply the proceeds as provided in the instrument. It was, to my mind, a clear case of conversion.

There was also an attempt made to shew that the plaintiff had consented to the taking of the truck by the defendant. I think the evidence fails to establish such consent.

The only remaining question is that of the damages. The action as framed is one for trover and conversion and for nothing else. The judgment appealed from decrees the return by the defendant to the plaintiff of the sums paid on the purchase price of the truck as if there had been a rescission of the contract. When counsel sought to cross-examine the plaintiff on his claim for damages the Judge stopped him and said:—

> You are dealing now with the damages that the plaintiff suffered by reason of the car being taken?
>
> *Mr. Arnold* (defendant's counsel): Yes.
>
> *The Court:* Perhaps that had better be reserved for a reference?
>
> *Mr. Long* (plaintiff's counsel): Yes, I am agreed.

The consequence is that the proofs of damage were not gone into

B. C.

C. A.

MELLIS v. BLAIR.

Macdonald, C.J.A.

and hence in my opinion there must be a new trial for the purpose of assessing them.

The measure of damages in an action of this kind is the value of the thing converted and any special damage which the plaintiff can prove. In such assessment the unpaid purchase money could not be considered, but the defendant could, under the Supreme Court Act and Rules, claim the same by way of counterclaim or set-off: *Page* v. *Eduljee* (1866), L.R. 1 P.C. 127; *Gillard* v. *Brittan*, 8 M. & W. 575; and as to set-off or counterclaim, *Victoria Saanich Co.* v. *Wood Motor Co.*, 23 D.L.R. 79. The defendant has done neither, but I would give him leave to amend in this respect as he may be advised.

McPhillips, J.A. MCPHILLIPS, J.A., concurred.

Irving, J.A. IRVING, J.A.:—I would allow this appeal, without interfering with the determination of the Judge that there had been a conversion; the new trial to be confined to the question of damages.

Martin, J.A. MARTIN, J.A.:—While I agree with the Judge's findings of fact, yet there should be, in my opinion, a new trial on the ground that the damages were assessed on a wrong basis, *e.g.*, the actual value of the car at the time of its wrongful taking cannot be ascertained by awarding the plaintiff the amount he had paid on account of it, irrespective of depreciation. The costs of the first trial to abide the result of the second.

Galliher, J.A. GALLIHER, J.A.:—I concur in the reasons for judgment of the Chief Justice. *Appeal allowed.*

ALTA.

S. C.

JAMIESON v. CITY OF EDMONTON.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Scott, Stuart and Beck, JJ. February 19, 1916.

1. HIGHWAYS (§ IV A 6—155)—INJURIES CAUSED BY DEFECT IN SIDEWALK—FAILURE TO ENFORCE MUNICIPAL BY-LAW—LIABILITY OF MUNICIPALITY.

A municipal corporation cannot be held liable for negligence in not repairing a defect in a sidewalk with sufficient promptness, which has been caused by the passing of a heavy coal wagon a few hours prior to the occurrence of an accident and which has not come to the knowledge of the corporation; and since the latter can only be liable for breach of a corporate duty, the making and enforcing ordinances regulating the use of streets brings into exercise governmental and not corporate powers, and in the absence of a statute providing otherwise, a mere failure to enforce a municipal by-law, requiring abutting owners to keep a sidewalk used as a crossing in a proper state of repair, will not render the municipality liable for injuries to a pedestrian in consequence of a defect occasioned by its unsuitable condition for the purposes for which it was used.

[*Clark* v. *City of Calgary*, 6 Terr. L.R. 309; *Vancouver* v. *McPhalen*, 45 Can. S.C.R. 194; *Chaplin* v. *Westminster*, [1901] 2 Ch. 329, referred to; Text in 28 Cyc. 1356, adopted.]

APPEAL from the judgment of McCarthy, J., in favour of the plaintiff in an action against a municipality for damages sustained on a public highway. Reversed.

A. G. MacKay, K.C., for plaintiff.

J. C. F. Bown, for defendant.

HARVEY, C.J.:—I am of opinion that no liability is shewn against the defendants. It seems clear that they cannot be liable for negligence in failing to repair the sidewalk because the break only occurred a comparatively few hours before the accident to the plaintiff and as yet had not come to the knowledge of the defendants. Harvey, C.J.

The neglect therefore of the city, if any, was in permitting the walk to be used in an improper way by being driven over or in not strengthening it to make it suitable for such use, but both of these are cases of mere non-feasance which in the absence of statute would not make the corporation liable for damages, at least on the facts of this case. See *Clark* v. *City of Calgary*, 6 Terr. L.R. 309, and *City of Vancouver* v. *McPhalen*, 45 Can. S.C.R. 194, and cases there cited.

No statutory provision either expressly or impliedly imposing such liability appears to exist since it is in no sense, in my opinion, a question of repair.

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

SCOTT, J., concurred with Beck, J. Scott, J.

BECK, J.:—This is an appeal from the judgment of McCarthy, J., at the trial without a jury holding that the plaintiff was entitled to recover and assessing the damages at $700. Beck, J.

The plaintiff's claim is one for negligence of the city in leaving a portion of a sidewalk in such a state of construction that it became broken, and then in leaving it in that state of non-repair with the result that the plaintiff walking upon it stepped into the hole caused by the break and in consequence of which he broke his leg.

The plaintiff lived in a house on the south side of 87th Ave., Edmonton (running east and west) between 4th and 5th Sts., (running north and south). The sidewalk was on the south side of the avenue. The block is sub-divided so as to make lots fronting on 87th Ave., and these lots ran a distance of probably 150 ft.

ALTA.

S. C.

JAMIESON v. CITY OF EDMONTON.

Beck, J.

—the exact distance is not material—to a lane in the rear which runs across the block from 4th to 5th St. What appears to be two lots on the north-west corner of the block, *i.e.*, the corner formed by 4th St., and 87th Ave., were built upon so that the frontage was upon 4th St. and a space was left at the rear of these buildings which permitted of access to the yards behind the buildings by entering the surveyed lane across the block at 4th St., and then turning northerly on the space behind the yards to these houses. This space for convenience I call the accommodation lane. As a matter of fact, people so entering instead of turning around and going out by the way they came sometimes continued north getting out on 87th Ave., by crossing the sidewalk on the south side of 87th Ave. People also, sometimes, took the reverse route and in order to get to the rear of the buildings facing on 4th St. drove over the sidewalk from 87th St. The portion of the sidewalk driven over by these people was not constructed for a crossing but as an ordinary sidewalk with the planks running crosswise and with no sloping approach at either side. It was by reason of stepping into a break made as was shewn by a 3½ ton load of coal passing over this portion of the sidewalk that the plaintiff was injured. The accident occurred on November 4, 1914, at about 7.30 p.m. while the plaintiff was walking along the sidewalk going west from his home towards 4th St. He had noticed the break in the sidewalk the same evening about six o'clock when coming home but had forgotten about it. At the time of the accident it was dark, the plaintiff had stopped to light his pipe and almost instantly on starting to walk forward stepped into the hole in the sidewalk. The sidewalk had been built over 6 years before the accident and before the houses facing on 4th St. had been built. The plaintiff had been residing in the house on 87th Ave. for about a year before the accident. In the grading of 87th Ave. apparently some considerable time before the accident some dirt had been left in an unlevelled condition and one Armitage, who then lived in a house between the plaintiff's house and the portion of the sidewalk in question and the west side of whose house lay parallel to the accomodation lane, had some months before the accident levelled this dirt and in doing so had graded it up to the outside of the sidewalk and the sidewalk shewed the marks of the wagons passing over it. This had apparently gone on for about a year prior to the accident to the knowledge of the

plaintiff. The breaks in the sidewalk into which the plaintiff stepped were in fact made, as I have said, by a teamster drawing a very heavy load of coal over the sidewalk for delivery to Armitage's house. Two planks were broken by the wheels on one side of the wagon and one by those on the other. This occurred—and Armitage saw them—about 4 p.m. of the day before the accident and these breaks were as I have said noticed by the plaintiff about 6 p.m. of the same day. Evidence was given by Armitage to the effect that an inspector, had he inspected the sidewalk during some months preceding the accident, would have seen that teams occasionally crossed the sidewalk to and from the accommodation lane, by observing during or after rain that mud had been carried on to the sidewalk and by wheel marks on the sidewalk and on either side, and, by a closer observation, the chipping of the edges of the sidewalk.

Wynne, a policeman, was called as a witness. The *locus in quo* was on his beat. He lived just across the road from it. He said it was part of the duty of policemen to report broken and defective sidewalks to the city engineer. He was on duty on the day of the accident till 6 p.m. He said in effect that it was evident all summer that teams had crossed the sidewalk going to and from the accommodation lane and that the earth on the street side gave the appearance of its having been graded so as to make an approach to the sidewalk for the purpose of crossing.

One McDonald was a foreman under Mr. Alton, who had charge of streets and sidewalks on the south side of the river. McDonald was foreman for a certain district on each side of Main St. A man named O'Brien was foreman under him for a district east of Main St. in which the *locus in quo* lay. McDonald had been over the sidewalk many times during the summer. He said he had noticed the chipping of the ends of the planks in the sidewalk at the place in question and that the chipping would indicate that wagons were being driven over the sidewalk. O'Brien had been over the sidewalk two or three days before the accident. It appeared to be in good repair. McDonald and O'Brien made it clear that men had repaired this sidewalk at or about the place in question some days before the accident.

It appears then that the breaking of the sidewalk occurred about 4 p.m. and the accident about 7.30 p.m. of the next day.

ALTA.

S. C.

JAMIESON v. CITY OF EDMONTON.

Beck, J.

There is no evidence that the city had notice of the breaking of the sidewalk before the accident. It can hardly therefore be contended that the city is liable for the negligence by reason of it not repairing the injury to the sidewalk with sufficient promptness.

It is contended however that the city is liable because the city officials had notice that the sidewalk at the place in question was being constantly used as a crossing and that they must be taken to have known that the sidewalk as constructed was not strong enough for that purpose and was therefore likely to break, and having broken the city is liable for the consequences. It is on this ground that the trial Judge rested his decision. He says:—

> It is my opinion there was a duty upon the city—to have put and kept the crossing in a proper state of repair or to have required the private owners of the property adjoining who used the crossing to put the same in a proper state of repair. The by-laws of the city provide for the city requiring such private owners to do this and the city's not doing so seems to me to be evidence of negligence.

The only provisions of the by-law of the city bearing upon the question which has been put in evidence are in the following:—

By-law No. 418, sec. 8, which says:—

> Every owner or occupier of any house, building or lot within the city who shall require to drive any horse or other animal or any wagon, carriage, cart, sled, or other vehicle across any paved or planked sidewalk or boulevard for the purpose of entering his house, building or lot, shall, before so doing, construct across the drain, gutter or water course opposite the place where he shall desire to enter his premises, a good and sufficient bridge of planks so constructed as not to obstruct such drain, gutter or water course and shall also place planks or timber over the sidewalk or pavement or boulevard to be crossed sufficient to prevent the sidewalk or pavement or boulevard from being injured in crossing it or entering such house, building or lot.

Sec. 9:—

> No person shall ride, drive, lead or back any horse, carriage, cart, wagon, sleigh, sled or other vehicle over or along any sidewalk or boulevard in any public street or other public place within the city, provided always that it shall be lawful for any person to cross the pavement or sidewalk or boulevard to go into any yard or lot adjoining the same where a proper bridge has been constructed and the pavement or sidewalk or boulevard timbered as prescribed in the last preceding section.

This does not seem to support the trial Judge's statement that the city can, by virtue of its by-laws, require an owner to put or keep a sidewalk abutting on his property in repair. It merely prohibits him or anyone else from crossing the sidewalk without taking any steps to avoid injuring it.

No doubt an owner has the right of ingress or egress from his property (See per Buckley, J., in *Chaplin* v. *Westminster*, [1901]

2 Ch. 329, at 334) and at the time a sidewalk is being constructed can insist within reasonable limits that provision be made at his expense for such ingress or egress at certain places and that the sidewalk be suitably constructed to provide therefor, if the sidewalk has already been made, he may exercise his right of ingress or egress at any reasonable place, but it seems to me that in doing so he must act reasonably, having regard to the condition in which at the time he finds the sidewalk, boulevard, curb, and so forth, and that the burden of making a proper passage between the boundary of his property and the portion of the street allotted vehicular travel is upon him. I know of no general law nor of any provision of the Edmonton Charter or of a by-law of the city by virtue of which he can cast this burden on the city even though the cost may ultimately be thrown upon him by way of a special assessment against his property.

It seems to me, therefore, that the most that might be expected of the city with regard to such a case as the present is that they should have prosecuted under the provision of the by-law which I have quoted, any person driving over the sidewalk without taking the required precautions against injuring it—which was done after the accident in the case of the teamster who actually broke the sidewalk—or to have to put up a barrier to prevent, or a notice to warn, people against crossing at that point.

In 28 Cyc., p. 1356, it is said:—

> The manner in which a highway of a city is used is a different thing from its quality and condition as a street. The construction and maintenance of the street in a safe condition for travel is a corporate duty and for a breach of such duty an action will lie, but making and enforcing ordinances, regulating use of streets brings into exercise governmental and not corporate powers and the authorities are well agreed that for a failure to exercise legislative, judicial or executive powers of government, there is no liability . . .
>
> Notwithstanding the municipality may not be liable for a mere failure to enact an ordinance or to enforce one which is enacted, it has been held that its duty to preserve its streets and highways in a reasonably safe condition is independent of such questions, and if it permits such acts either by failure to enact ordinances or by failure to enforce those in existence *as are a public nuisance*, it will be liable for any injury arising therefrom.

And see Dillon on Municipal Corporations, 5th ed., vol. 4, sec. 1627.

Emphasizing the important distinction made by the second paragraph of this quotation, I adopt it as a correct statement of the law in this jurisdiction. It appears to afford an

ALTA.

S. C.

JAMIESON v. CITY OF EDMONTON.

Beck, J.

Stuart, J. (dissenting)

answer to the plaintiff's contention that negligence has been established against the city, for only on the ground of negligence is the plaintiff entitled to succeed.

For the reasons indicated I would allow the appeal with costs and direct that judgment be entered dismissing the action with costs.

STUART, J., dissented. *Appeal allowed.*

MAN.

C. A.

FITZSIMONS v. STOLLER.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. April 11, 1916.

1. PARTNERSHIP (§ VI—25)—DISSOLUTION—DISMISSAL OF PARTNERS—"JUST AND REASONABLE CAUSE."

Intoxication forms a "just and reasonable cause" for the dismissal of a partner and the dissolution of the partnership within the meaning of such phrase in the articles of co-partnership, and may be set up in justification to an action for wrongful dismissal.

2. APPEAL (§ VII E—323)—REVIEWING CREDIBILITY OF DEPOSITION EVIDENCE.

Though an appellate Court will not ordinarily interfere with the credence given by the trial Judge to the testimony of witnesses whose demeanor he could observe, that does not apply to evidence taken on commission which the appellate Court has the same opportunity of judging as the trial Judge.

[See also *Chalmers* v. *Machray*, 26 D.L.R. 529.]

Statement

APPEAL from the judgment of Curran, J., in favour of plaintiff in an action for wrongful termination of partnership. Reversed.

J. H. Leech, K.C., and *F. J. Sutton*, for appellant, defendant.

H. W. Whitla, K.C., and *D. A. McCormick*, for respondent, plaintiff.

Howell, C.J.M.

HOWELL, C.J.M., concurred with RICHARDS, J.A.

Richards, J.A.

RICHARDS, J.A.:—I agree with the trial Judge that the defendant, before leaving Winnipeg on October 24, 1914, intended, on his arrival at Strassburg, to dismiss the plaintiff from the management of the hotel and dissolve the partnership. The fact that he had the notice of dissolution prepared in Winnipeg before then proves no more than that he thought he might wish to so act. But his engaging a new manager for the hotel, several days before he went up, is, I think, definite proof of such intention.

Further, I cannot say that the defendant was justified in his action in such dismissal and dissolution by anything that had come to his knowledge when he caused the notice of dissolution to be given to the plaintiff on the 24th. If nothing further had occurred than what he then knew, I should not like to disturb the findings of the trial Judge.

But, though the defendant may have been actuated by improper motives and have acted without, so far as he then knew, sufficient justification, it seems to me self evident that if the facts, though then unknown to him, would have justified his action, he can now avail himself of them and resist the plaintiff's claim.

Several witnesses at the trial swore to habits of intoxication on the plaintiff's part which, if true, rendered him quite unfit to manage the hotel. The trial Judge heard their evidence and saw their demeanour, and apparently did not sufficiently credit their testimony to find in it good reason for the dismissal. If that had been all that was before the Court it might be improper to interfere with the findings, as we have not had the same opportunity that the Judge had to estimate the weight to be given to their evidence.

But there was a large amount of evidence taken on commission, as to which this Court has the same opportunity of judging that the trial Judge had, he not having been present when it was taken.

In examining that evidence I find that twelve, or thirteen, men, of different occupations, swore that the plaintiff was intoxicated in the hotel at different times during his management. The plaintiff swore that their evidence was false. But nothing further was shown to discredit them.

No matter with what appearance of truthfulness the plaintiff so testified, I cannot accept his denial as disproving such a weight of testimony to the contrary. I am sorry to take such a view, but I think we should hold that the plaintiff is proved to have been guilty, during his management, of such habits as unfitted him for his duties.

Par. 23 of the agreement of partnership says:

> Upon the happening of any of the causes or things mentioned in par. 15, *or for any other just cause*, the said partnership may be determined at any time within the said period of one year by the party of the first part, upon his serving the party of the second part with three days' previous notice in writing of his intention to determine the said partnership.

In that agreement the plaintiff is called "the party of the second part" and the defendant "the party of the first part."

Without going into the provisions of par. 15, it seems to me that there was, within the meaning of par. 23, "just cause" for

MAN.

C.A.

FITZSIMONS v. STOLLER.

Richards, J.A.

the defendant's action, though he may not at the time have been aware of it.

With deference, I think the plaintiff's action fails and that the defendant, on his counterclaim, should recover from the plaintiff $259—the sum by which the amounts drawn by him from the business exceed his share of the profits.

I would allow the appeal with costs, set aside the judgment entered in the Court of King's Bench and enter judgment there dismissing the plaintiff's action with costs.

Perdue, J.A.

PERDUE, J.A.:—Under par. 15 of the articles of partnership the defendant has the right to determine the partnership, if for any "reasonable cause the party of the first part (the defendant), should think such business was not being conducted to the best interest and advantage of the partnership." The conditions which, under this provision, would furnish a justification for the defendant's action in terminating the partnership are, a belief on the part of the defendant that the business was not being conducted to the best interests of the partnership and that there was something which to the defendant's mind justified that belief. Without interfering with the trial Judge's conclusion in regard to the actual facts as they were presented in the evidence, I think that par. 15 conferred on the defendant the right to terminate the partnership if, from what he heard and believed, he thought that the business was not being conducted in its best interests, even though another person might upon an investigation of all the facts come to a different conclusion. I think that the defendant did believe from what he saw and heard that the business was suffering and being endangered under the plaintiff's management and that for this reason he dissolved the partnership.

I would allow the appeal.

Haggart, J.A.

HAGGART, J.A.:—The trial Judge in his reasons for judgment sets forth all the facts necessary for the consideration of the questions in this appeal, and he seems to have carefully weighed the conflicting testimony as to the plaintiff's management of the hotel.

It was urged by the defendant's counsel with great force that the trial Judge should not have found that the defendant was not justified in serving the notice determining the partnership but should have found that the business was not being conducted in

the best interests of, and to the advantage of, the partnership. It was also urged that the evidence directed against the plaintiff's management of this business was taken under commission and that we in this Court were in as good a position to estimate its value as the trial Judge.

In addition to the reasons given by Curran, J., I would observe that the witnesses of the defendant were present if not participants in the discreditable details upon which the defendant relies for justification in determining the partnership and evicting the plaintiff from the premises. I would further observe that these witnesses voluntarily gave their testimony. I do not think their story is the highest class of evidence. The parties to the suit and some other witnesses gave their evidence in Court. The trial Judge believes the plaintiff and his witnesses, and I would hesitate before substituting my finding for his on a pure question of fact when so much might depend on the appearance and deportment of those giving the testimony.

Neither do I think there was any acquiescence or consent on the part of the plaintiff to the vacation of the premises as was contended by the defendant. It appears to me that there was an ouster or eviction. It is true there was no physical resistance. There is no question as to the intention of the defendant to get rid of the plaintiff. He brings all the way from Winnipeg his lawyer, Mr. Hamilton, with the notice already drawn, and Mr. Hamilton, up to this date, had been acting for both parties. The plaintiff had no opportunity to consult with any other lawyer in regard to his legal rights. At the interview after the service of the notice, in answer to a question, the plaintiff says: "Well, I tried to argue with them (that is the defendant and his lawyer), and told them that it was very unfair and that I certainly would not let it end there, that I would take an action against him (Stoller)." Stock was taken and statements were made out, but the defendant was at all times, as a partner, entitled to be so treated, and I cannot find that there was anything to show that there was a termination of the partnership and a vacation of the premises by consent, and further on the plaintiff says: "Well, I say, they had given me notice to get out of house and home and my family were there with me and I had to go to Winnipeg."

MAN.

C.A.

FITZSIMONS v. STOLLER.

Haggart, J.A.

But from the interpretation I give to the agreement, dated September 1, 1914, which creates the partnership and tenancy, it is not necessary for me to affirm or dissent from the findings of the trial Judge as to the contradictory evidence given at the trial. This agreement under the signature and seal of both parties, after reciting that the defendant is the owner of the premises and contents, and that the parties as a partnership have agreed to take over the business as a going concern, then it witnesses that the partnership shall commence on the date of the agreement and continue for one year "or until determined as hereinafter provided."

The clauses providing for the termination of the partnership are Nos. 15 and 23. Clause 15 reads as follows:

Notwithstanding anything herein contained, in case at any time the said business is for a period of one month not making any profit or is not making such profit as under skilful and competent management the said business should make, *or if for any other reasonable cause the party of the first part should think such business was not being conducted to the best interest and advantage of the partnership*, or if the said premises or any of the furniture, fixtures, bedding, dishes, cutlery, towels, linen, musical instruments, furnishings, stock in trade or the bar, food and supplies and other goods and chattels in said hotel, are not being cared for in a careful and proper manner, the party of the first part shall have the right to intervene in the management of the said hotel, and to require the party of the second part to modify his policy or management of the said hotel in such manner as the party of the first part shall direct, and to comply with such conditions, regulations, policy or restrictions as may be demanded or required by the party of the first part, *or the said partnership may be determined by the party of the first part upon the notice provided for in par. 23 hereof.*

And par. 23 reads as follows:—

Upon the happening of any of the causes or things mentioned in par. 15 hereof, or for any other just cause, the said partnership may be determined at any time within the said period of one year by the party of the first part upon his serving the party of the second part with three days' previous notice in writing of his intention to determine the partnership.

On October 24, 1914, the defendant caused to be served on the plaintiff a notice addressed to the plaintiff, and signed by the defendant, in these terms:

Take notice that pursuant to the powers for this purpose contained in the articles of partnership between myself as party of the first part and you as party of the second part, dated September 1, A.D. 1914, it is my wish and intention that the partnership now subsisting between us under the said articles shall cease and determine at the expiration of three days after the service of this notice upon you.

Dated at Strassburg, October 24, A.D. 1914.

The powers reserved by the defendant in the agreement for

the partnership and tenancy to determine that partnership and tenancy are extensive, and the text of the agreement is very wide. The partnership is to continue for a year "or until determined as hereinafter provided," and in clause 15 it is expressly stated that "or if for any other reasonable cause the party of the first part should think such business was not being conducted to the best interests, etc." then "the partnership may be determined by the party of the first part upon the notice provided for in par. 23."

If the defendant *bona fide* thought that the business was not being properly conducted, even though he were in error, he was acting within his rights and powers which he reserved to himself in the original agreement creating the partnership and the tenancy.

However harsh or unreasonable the defendant's actions may appear to have been, I can only hold that the defendant was acting strictly within his rights.

I would allow the appeal and set aside the judgment which was entered in the Court below against the defendant.

CAMERON, J.A., concurred. *Appeal allowed.* Cameron, J.A.

WADE v. CRANE.

Ontario Supreme Court, Appellate Division, Garrow, Magee and Hodgins, JJ.A. and Kelly, J. January 24, 1916.

1. SALE (§ I C—19)—EXTENT OF RIGHT TO REPOSSESSION—RIGHTS OF BONDHOLDERS.

A vendor reserving the right to repossess property upon default in payments by the purchaser is entitled to recover upon notes given for the purchase-price and at the same time retain the property until payment: he may also seize new machines substituted for the old ones and forming part of the plant sold, but he cannot justify the taking or retaining of other chattels under the terms of a charge created by debentures of the purchaser in derogation of the rights of other bondholders.

[*Canadian Westinghouse Co.* v. *Murray Shoe Co.*, 20 D.L.R. 672, 31 O.L.R. 11; *Utterson Lumber Co.* v. *Petrie, Ltd.*, 17 O.L.R. 570, followed.]

2. SET-OFF AND COUNTERCLAIM (§ I C—15)—MUTUAL DEBTS—TORT AND CONTRACT—ACTION BY LIQUIDATOR.

A claim in detinue and a claim on a promissory note or on an account are not "mutual debts" within the meaning of sec. 126 of the Judicature Act, R.S.O. 1914, ch. 56; therefore a claim on a note or an account cannot be set off under sec. 71 of the Winding-Up Act, R.S.C. 1906, ch. 144, against an action by a liquidator for the recovery of certain chattels and damages for their wrongful seizure, and the defendant is merely entitled to rank as a general creditor upon the assets in liquidation.

[*Eberle's Hotels and Restaurant Co.* v. *Jonas*, 18 Q.B.D. 459, followed; *Moody* v. *Can. Bank of Commerce*, 14 P.R. (Ont.) 258, distinguished.]

Statement

APPEAL by the defendant from the judgment of Middleton, J., in favour of the plaintiff in an action by a liquidator to re-

ONT.

S.C.

WADE v. CRANE.

Garrow, J.A.

cover certain goods and chattels,and damages for the wrongful seizure. Varied.

W. M. McClemont, for appellant.

A. C. McMaster and *J. H. Fraser*, for plaintiff, respondent.

The judgment of the Court was delivered by

GARROW, J.A.:—The action was brought by the plaintiff, suing as liquidator of the Excelsior Brick Co., to recover certain machines used in the process of brick-making, bricks manufactured and in the course of manufacture, and other goods and chattels which had belonged to the Excelsior Brick Company, of which, it was alleged, the defendant had wrongfully taken possession, and for an account of other goods and chattels also wrongfully taken possession of by the defendant, which he had sold, and damages for the wrongful seizure.

The facts are simple, and practically, except as to the quantity and price of the brick, not in dispute.

The defendant, prior to March, 1913, owned a brick-yard in the township of Clinton, in the county of Lincoln, which he had operated for many years. On the 6th of that month, he gave to one Vane, acting for the Excelsior Brick Company, a written option to purchase the brick-yard and plant, at the sum of $110,000, of which $1,000 was paid in cash, $9,000 was payable when title was shewn to be satisfactory, $20,000 by transferring to the defendant $24,000 in treasury debentures, and $12,000 of paid-up stock in the Excelsior Brick Company, and the balance of $80,000 in eight instalments of $10,000 each on the 1st March in the years 1914, 1915, 1916, 1917, 1918, 1919, 1920, and 1921, without interest.

The option was transferred, with the defendant's consent, to the Excelsior Brick Company, and that company exercised the option and became the purchaser and made the cash payment of $9,000 and delivered to the defendant the debentures and paid-up stock, as agreed upon, and was let into possession.

One of the terms of the agreement was that the purchaser, while in possession, agreed to operate the plant so as not to impair its value or that of the lands connected therewith. Another term provided that, upon default in paying the instalments of purchase-money or any of them, the purchaser's right under the contract should cease, and the defendant as vendor might re-enter.

The Excelsior Brick Company carried on the business for

about a year, but made default in paying the instalment which fell due in March, 1914, whereupon the defendant proceeded to take possession, not only of the lands, but also of the chattel property now claimed by the plaintiff as liquidator.

Middleton, J., after hearing much evidence, and after apparently making a considerable allowance to the defendant, reached the conclusion that a fair sum with which to charge him for the bricks, finished and unfinished, was the sum of $6,300, of which sum he directed $3,000 to be paid into Court to abide further order, to meet any claim to be made by one Zimmerman.

No sufficient case is, I think, made upon this appeal to justify interfering with the learned Judge's conclusions in that respect. If in the result injustice is done to the defendant, he has himself largely to blame for not keeping a reliable record of what came to his hands when he entered into possession.

The machines to which the plaintiff made claim were a boiler, a four-mould machine and a wire-cutting machine, all purchased by the Excelsior Brick Company and affixed to the land as part of the permanent plant, in substitution (of which the defendant complained) for old machinery in use when the Excelsior Brick Company purchased. As to these, the learned Judge dismissed both complaints: a conclusion with which I also agree.

The defendant attempted to justify taking and retaining the goods and chattels under the terms of the charge created by the debentures or bonds of which he is the holder. But out of a total issue of over $100,000 (the exact amount is not, I think, mentioned in the evidence) he only holds to the amount of $24,000. Middleton, J., was of the opinion that the defendant could not so justify, but by his judgment permitted him to prove before the liquidator *pari passu* with the other bondholders for the amount of his holdings.

I agree that the attempted justification fails; but, in the absence of the other bondholders, who are not represented before us, it seems to me that the judgment should go no further, especially as the defendant does not require the aid of the Court to enable him to prove under his bonds. I would therefore strike out paragraphs 3 and 4 of the formal judgment.

The defendant also set up by way of defence and counterclaim certain claims against the brick company, some of debt and others

ONT.
S.C.
WADE
v.
CRANE.
Garrow, J.A.

of unliquidated damages. Of these the claims persevered in at the trial were, in addition to the claim under the bonds or debentures before referred to, a sum claimed to be due upon an account, damages for the conversion of brick which the defendant had left upon the premises, damages for injuries to the freehold, fixtures, and machinery, and a sum of $1,925 and interest owing upon two promissory notes made by the brick company; these being the lien-notes in question in the other action of *Crane* v. *Hoffman* now pending.

Middleton, J., allowed the defendant's claim under his account at the sum of $546.05; he held however, that the amount could not be set off, but that it might rank upon the assets in the liquidation. I agree with both conclusions.

Nothing was allowed by Middleton, J., upon the promissory notes. They are not even mentioned either in the notes of judgment or in the formal judgment. They cannot, I think, have been intended to be included in the general clause in the notes of judgment which says: "Any claims that I have not now specifically mentioned must be taken to be determined adversely to the respective claimants." But, if it was so intended, I would, with deference, be unable to agree. The notes were given for the price of a machine bought by the brick company from the defendant, to replace an older machine of the same sort, and the new machine was, upon the evidence, annexed to the freehold by the brick company as a permanent fixture, with the result that, when the defendant took possession of the land upon the forfeiture by the brick company, he also took possession of the machine so annexed. In the other action the surety claims that he has been discharged because the defendant did not, under the Conditional Sales Act, proceed to sell the machine, but used it as part of the brick-making plant. But, whatever may be the result in so far as the surety is concerned, the circumstances mentioned cannot, I think, afford a legal defence to the claim against the maker, the brick company.

In *Canadian Westinghouse Co.* v. *Murray Shoe Co.*, 20 D.L.R. 672, it was held by a Divisional Court that the holder of a lien might, in the assertion of his common law rights, sue for the instalments as they became due, and also retain the property until payment. A similar conclusion is expressed in *Utterson Lumber Co.* v. *H. W. Petrie Limited*, 17 O.L.R. 570.

There is the further circumstance in this case, that the annexation to the freehold was made by the brick company itself, to take the place of a machine which had belonged to the defendant. That being so, it seems absurd to suggest that, in order to entitle him now to sue the brick company upon the notes, the defendant should first disintegrate his plant and sell the machine, and only recover for the balance, if any, remaining after the sale.

I therefore am of the opinion that the defendant is entitled to recover against the brick company the full amount due and owing upon the notes; and that he is, under the circumstances, under no compulsion to sell the machine for which they were given. But I am unable to agree with the defendant's further contention that he is entitled to set off the amount of the notes against the plaintiff's claim. The position is similar to that of the claim upon the account which has been before dealt with. As in that case, so in this, the defendant should be declared entitled to rank upon the assets in liquidation, but not to the set-off claimed.

The claims in both cases are pleaded by way of counterclaim. That in itself would not be fatal if the correct conclusion should be that the claims, although called counterclaims, are really set-offs. See *Gates* v. *Seagram* (1909), 19 O.L.R. 216. Section 126 of the Judicature Act, R.S.O. 1914, ch. 56, provides that "where there are *mutual* debts between the plaintiff and defendant . . . . one debt may be set against the other." And this right of set-off is preserved by sec. 71 of the Winding-up Act, R.S.C. 1906, ch. 144. The defendant's difficulty, however, is, that the plaintiff's claim is not a debt, but a claim really, in form at least, of detinue, or in the alternative for damages. It is not therefore a case of mutual debts, and hence not the proper subject of set-off. In *Eberle's Hotels and Restaurant Co.* v. *Jonas*, 18 Q.B.D. 459, the facts were very similar. The language of the statute there in question was, "where there have been mutual credits, mutual debts, or other mutual dealings, between a debtor against whom a receiving order shall be made under this Act, and any other person proving or claiming to prove a debt under such receiving order." And the Court of Appeal held that, under these words, there was no right in the defendant in an action of detinue to set off a claim for goods sold and delivered. See also

ONT.
S.C.
WADE
v.
CRANE.
Garrow, J.A.

Moody v. *Canadian Bank of Commerce*, 14 P.R. 258, where the set-off claimed was allowed, but solely on the ground that the claim, originally one for damages caused by a malicious prosecution, had been converted by the judgment into a debt.

To the extent indicated, I would, for these reasons, allow the appeal, but, under the circumstances, without costs. The liquidator will, of course, have his costs of this appeal out of the estate.

Appeal allowed in part.

N. S.
S.C.

McISAAC v. McKAY.

Nova Scotia Supreme Court, Graham, C.J., and Russell, Longley and Harris, JJ. February 26, 1916.

1. BOUNDARIES (§ II A—8)—CONFLICTING SURVEYS—FENCE LINE.
In ascertaining the correct division line from conflicting surveys, the line running in the course of an old fence line is likely to be more accurate. [*Diehl* v. *Zanger*, 39 Mich. 60, applied.]

2. EJECTMENT (§ II A 1—6)—SUFFICIENCY OF PLAINTIFF'S TITLE—DEED OF FORMER PERSON IN POSSESSION—ASCERTAINING BOUNDARIES.
It is not necessary in order to recover in ejectment to trace a title back to the Crown, and either party asserting title is only bound to trace it to someone who has been in possession of the land; it is quite sufficient for the plaintiff, in an action for trespass to determine the division line between lands of adjoining owners, to prove his title by putting in his title deed given by a person who had for a long time been in possession of the land.
[*Cunard* v. *Irvine*, 1 James N.S.R. 31, applied.]

Statement

APPEAL from the judgment of Drysdale, J., in favour of defendants in an action for trespass to land and an injunction. Reversed.

D. McNeil, K.C., for appellants.

D. MacLennan, for respondent.

Graham, C.J.

GRAHAM, C.J.:—This is an action of trespass to determine the division line between the lands of two neighbours. The question in effect is which is the proper line, that run by a surveyor, Archibald McLellan, a deputy crown land surveyor, in July, 1902, for the plaintiff, or a line run for the defendant, McKay, by Walter Davis, also a crown land surveyor, run in 1910. Each surveyor adopted the same mode of ascertaining the line. In the plaintiff's and the defendant's deeds the land of each by description bounds on the land of the other. Then the land of the plaintiff, the westernmost of the two lots, bounds on the southwest (or west), by lands possessed by the late George Cameron, deceased. The present occupant of those lands, Hugh J. Cameron, gave evidence at the trial. That line between Cameron and the plaintiff and his predecessors in title is a line fenced for a long

time. Each surveyor chose for himself a starting point in that fence and measured 10 chains across the lot of the plaintiff. Apparently they ran on different courses for there is a difference of a quarter of a degree between them. The defendant's surveyor, toward the rear, approached nearer to the common line, so that measuring across the lot the plaintiff would not have 10 chains, but only 653 ft., that is, between the Cameron fence and the new fence placed on the line of the defendant's surveyor. The consequence is that there is a strip of land in dispute between them about 500 ft. long and 18 ft. across at one end and 21 ft. at the other. The defendant has taken that strip in with a new fence and that is the alleged trespass.

After reading the evidence, I think the McLellan line is more accurate than the other. It is in accordance with the course of the division fence running from the front at the shore towards the rear where it was likely to be correct and has the course of all the lines of adjacent lands in the vicinity.

In respect to the importance of an old fence line I quote the following from a judgment of Cooley, J., in *Diehl* v. *Zanger*, 39 Mich. 60:

> As between old boundary fences and any survey made after the monuments have disappeared, the fences are by far the best evidence of what the lines of a lot actually are, and it would have been surprising if the jury in this case, if left to their own judgment, had not regarded them.

Of course, towards the rear of a farm, as in the pasture lands, and in the wood lands, fences, if any, are not necessarily on the line, but are constructed for the use of the occupants, taking in areas for crops and fencing out cattle, and one cannot there expect to find straight fences, but in the front lands, where the land is more valuable and in use, it is different.

The defendant makes nothing by contending that because a brush fence at the rear is crooked, therefore it is not a line fence and the line must be some place else. The safe rule is to follow the course of the fence in the well-used and cultivated portion of the farm and regard the parallel fences of adjoining proprietors.

The conversation at the hearing of the appeal took a wide range. Namely, it was suggested, as the trial Judge found, that the plaintiff had not proved a title. But it was quite sufficient for the plaintiff to put in his title deed given, as it was, by a person who had for a long time been in possession of that farm.

N. S.

S. C.

McISAAC v. McKAY.

Graham, C.J.

Under *Cunard* v. *Irvine*, 1 James' N.S. R. 31, this Court long ago held that it is not necessary in order to recover in ejectment to trace a title back to the Crown. He is only bound to trace it to someone who has been in possession of the land. The defendant's title to his farm is proved in the same way and in no better way. Neither can dispute the title of the other to his farm. The lands adjoin, as the deed shews, and the question is where the division line between them is. Each attempted to establish that the other agreed to the line run by his surveyor when it was being run but each failed in that attempt. I think that the plaintiff's line is better established than that of the defendant.

Some discussion took place in respect to an occupation of Lewis McIsaac, brother of Alexander, both sons of the common ancestor Roderick McIsaac. But it is not shewn that his interest was ever laid off to him or to his successors in severalty or had a separate possession as against Alexander. This would only affect the amount of the plaintiff's damages and that is not important here. The plaintiff can only have his share of the damages and there will be no prejudice to the other heirs of Roderick.

The rights of these heirs between themselves cannot well be determined in this action.

The appeal should be allowed and the plaintiff have damages in the sum of $1 with costs.

Russell, J.
Longley, J.
Harris, J.

RUSSELL and LONGLEY, JJ. concurred.

HARRIS, J.:—The question in this case is as to the true boundary line between the plaintiff's and defendant's farms. Two surveys have been made—one about 12 years ago, made by a surveyor named McLellan, at the instance of the plaintiff, and the other about 2 years ago, by a surveyor named Davis, employed by the defendant.

One Cameron owns the land on the west of plaintiff and the boundary line between Cameron and plaintiff is apparently well defined.

It is common ground that the plaintiff's farm is ten chains wide. Both surveyors went to Cameron's eastern line near to the front or shore end of the lot and measured across plaintiff's lot at right angles ten chains and apparently they reached the same point on plaintiff's eastern line as their starting point. McLellan in making his survey ran from this point parallel to

the Cameron line. After going a certain distance he went to the back end of the lot and there again found the Cameron line, the corner of which was plainly marked on the ground, and measured across the plaintiff's land the ten chains and he then ran the line up until he met the line he had started on the shore end of the property.

Davis having started at the same point as McLellan, near the shore, seems to have made an allowance for variation, and as a result his line did not run parallel with the Cameron line but gradually veered to the westward as it went toward the back end of the lot. At or near to the point where the alleged trespass was committed plaintiff's lot, according to the Davis survey, had been reduced in width from 660 ft. to 639 ft. The Davis line projected to the rear of the lot, would leave plaintiff's property much narrower than the 639 ft. on the rear end.

If the Davis line had been run parallel to the Cameron line, the plaintiff's lot would have been 660 ft. wide and not 639 at the point where the measurement referred to was made.

There was on this point on the McLellan line, or very nearly so, an old fence, which had existed there for more than 32 years, and the land at that place had been cultivated up to this old fence by the plaintiff's father some years ago when he occupied the plaintiff's farm. Now I understand it is wild land and trees have grown up. The defendant at the point referred to has recently built a fence on the line run out by Davis and this fence is over 20 ft. to the westward of the old fence and the McLellan line. It therefore follows that if the McLellan line is the true line the defendant is a trespasser upon the plaintiff's lot.

As between the 2 surveys, I have no hesitation in accepting the line of McLellan as the true line.

Neither party is able to trace back to the Crown but the plaintiff's deed bounds his land on the east by defendant's lot, and the defendant's deed is on the west bounded by the plaintiff's lot.

When the McLellan line was run 12 years ago, John D. McIsaac owned the lot of the defendant and he gave evidence on the trial.

Other evidence shows that Alexander McIsaac, plaintiff's father, had possession of the locus in his lifetime and the plaintiff has since had possession of it.

N. S.

S. C.

MCISAAC v. MCKAY.

Harris, J.

I think the plaintiff has the better title and sufficient possession to maintain the action.

The fact that Lewis McIssac at one time had possession of a part of the plaintiff's farm along with Alexander McIsaac (the plaintiff's father), or even if he alone occupied at that time the part of the property now in question, does not in my opinion have any bearing on the question. He died many years ago and his widow and children all left the property more than 18 years ago, and the plaintiff has since had exclusive possession of the whole property.

I think the appeal should be allowed with costs and judgment entered for the plaintiff for one dollar damages and the costs of the action. Plaintiff should also have an injunction if desired.

Appeal allowed.

QUE.

S. C.

BEAUCHENE v. PROVINCIAL BANK OF CANADA.

Quebec Superior Court, District of Arthabaska, Pouliot, J. March 15, 1916.

1. INSURANCE (§ VI D 2—380)—WIDOW AS BENEFICIARY UNDER REGISTERED MARRIAGE CONTRACT—HUSBAND'S POWER TO PLEDGE POLICIES—COLLATERAL SECURITY TO BANK.

An assignment of life insurance policies by husband to wife, in virtue of a marriage contract which has been registered, is irrevocable and the policies become the exclusive property of the wife and cannot thereafter be pledged by the husband as collateral security for advances by a bank, nor retained by the latter in derogation of the wife's rights, particularly where the bank can sufficiently satisfy its demands from other incomes and resources of the husband.

Statement

ACTION by widow to recover on certain life insurance policies of which she was beneficiary under a marriage contract. Judgment for plaintiff.

Pouliot, J.

POULIOT, J.:—The Court having heard the parties, examined the evidence, the record and the proceedings and on the whole seriously deliberated:—

Whereas the defendant alleges: That by her marriage contract with the late Honoré Roux, at Victoriaville, dated October 5, 1913, before Poirier, notary, stipulating separation of property between the consorts she became beneficiary;

1. Of a life insurance policy taken out by the said Honoré Roux, July 7, 1908, in the Federal Life Assurance Co., of Hamilton, Ont., for the sum of $1,500, payable to the said Honoré Roux, in 20 years from July 7, 1908, and payable, in the event of his death before said date, to his executors, administrators and representatives in 60 days from date of notice and proof of the death.

2. Of a life insurance policy taken out by the said late Honoré Roux, on September 25, 1904, in the Canada Life Assurance Co., of Toronto, Ont., for the sum of $1,000, payable after receipt and approbation of the evidence as to the death of the assured, to the testamentary executors, administrators, assignees or mandatories designated by the said assured.

That, following the said contract, the marriage of the plaintiff with the said Honoré Roux was celebrated and the contract duly registered on October 30, 1913;

That the plaintiff's husband died at Victoriaville on February 11, 1915;

That immediately after the said Honoré Roux's death the plaintiff claimed from the said Federal Life Assurance Co., and the Canada Life Assurance Co., the payment of the said Honoré Roux's insurance policies amounting to $2,500 which said policies the defendant had in its possession and which it pretended belonged to it by virtue of two transfers made to it by the said late Honoré Roux, subsequent to the said marriage contract, to wit, there or about May 1, 1914, for the policy of the Federal Life Assurance Co., and about April 21, 1914, for the policy of the Canada Life Assurance Co.;

That the amount of the said two insurance policies was then paid by the said companies "*mises en cause*" to the defendant who, there and then, irregularly and illegally appropriated the said sum of $2,500 and refused to remit it to the plaintiff although duly put in default to do it:

That the transfers of the said policies by the said Honoré Roux to the defendant were and are null and illegal and that the property of the sum represented by the said policies belongs exclusively to the plaintiff who has the right to recover same from the said defendant;

Whereas the defendant has admitted having drawn the amount of the said insurance policies and pleaded to the plaintiff's action:

(a) That, by the marriage contract of October, 5 1915, the said insurance policies were not transferred to the plaintiff, and that at the time of the said marriage they were no longer in the possession of the said Honoré Roux, but had been transferred several years before to the Molsons Bank;

(b) That the said policies were never transferred to the plain-

QUE.

S. C.

BEAUCHENE v. PROVINCIAL BANK OF CANADA.

Pouliot, J.

tiff, and no entry of said transfer was ever made in the books of the insurance companies "*mises en cause*;"

(c) That the plaintiff never obtained delivery of the said insurance policies, was never the owner of same nor in possession thereof;

(d) That the said insurance policies were effectively transferred and delivered to the defendant (who ignored the pretended transfer contained in the marriage contract) about the date mentioned in the declaration, *viz*: April 21, and May 1, 1914, by the regular transfers of the same, which transfers were then regularly entered in the books of the said insurance companies;

(e) That at the time of the transfer of the said policies, previous to, then and since, advances were made by the defendant to the said Honoré Roux, which advances served to free or discharge the said Roux from his debts to the Molsons Bank and thereby permit of the transferring of the said policies to the defendant;

(f) That the said transfers were so made by Roux for value and so as to guarantee to the defendant the reimbursement of any amount which might in any time be due by Roux, either directly or indirectly;

(g) That at the date of his death, the said Roux was indebted to the defendant in a sum exceeding the amount of the policies and guarantees retained by the bank; and that the estate of the said Roux is insolvent;

(h) That the said insurance policies, since the date of the said transfers, have always remained in the possession of the defendant until the payment of the said policies after the death of Roux;

(i) That the amount of the insurance policies drawn by the defendant were applied to the account which Roux owed to it, at the time of his death, and notwithstanding the said payment the defendant remained said Roux's creditor for a large amount;

(j) That therefore the plaintiff's action is not well founded:

Whereas the plaintiff has answered to the said plea, alleging:

1. That the marriage contract containing the said transfer having been duly registered, the defendant could therefore not ignore it;

2. That no real and valid transfer was made in favour of defendant;

Whereas the issue was so joined between the parties:

Considering that a life insurance policy may be validly alienated or pledged by the assured;

Considering that the power granted, under certain conditions and in virtue of a special statute, to the assured to revoke the choice by him, previously made of the beneficiary of such a policy so as to substitute another for him, does not place any obstacle to the right of attributing the benefit of such policy in a marriage contract, nor to stipulate that the premiums on such would be payable by one of the spouses;

Considering that such a disposition contained in a marriage contract and accepted by the other spouse participates of the nature of unnamed contracts and constitutes a commutative and aleatory contract, under suspensive condition authorised by law, and is not susceptible of revocation by a subsequent act of the assured;

Considering that the appropriation by Honoré Roux, on his marriage contract, of the two life insurance policies in the Federal Life and the Canada Life in favour of his said wife, accepting beneficiary, has become, by the fact of the liberation and remittance of the policies by the Molsons Bank to the insured, a definite alienation in virtue of which the plaintiff found herself retroactively invested of a personal and direct right to recover the benefit thereof;

Considering that if the plaintiff cannot, on account of the non-observance of certain formalities required, recover the payment from the insurance companies, who in good faith would have paid the amounts to the bearers of the policies, the plaintiff would not for that be deprived of her recourse against the persons to whom the assured had illegally ceded or unduly withheld the amount thereof;

Considering that the pledging of another's property made without the consent of the proprietor is null, and that Honoré Roux could not validly, April 21, and May 1, 1914, cede to the defendant policies which were, in virtue of his marriage contract, the exclusive property of the plaintiff;

Considering, moreover, that supposing the transfer of the diverse insurance policies had been illegally made to the plaintiff, it is proved that the said transfer was made by the said Honoré

QUE.

S. C.

BEAUCHENE v. PROVINCIAL BANK OF CANADA.

Pouliot, J.

Roux to the defendant to warrant as a collateral security for advances already made and to be made in future to the said Honoré Roux in virtue of a line of discount which has been opened at the said bank in his favour;

Considering that it has not been established in the said case that any of the advances made by the defendant to the said Honoré Roux, previous to the transfer of the said insurance policies and guaranteed by them, is actually still due to the defendant;

Considering, that it appears, on the contrary, from the defendant's statement, that at the time of the death of the said Honoré Roux, February 11, 1915, the sum due the defendant, a total amount of $18,543.85, a result of discounts, maturity of which only expired on February 11, and at subsequent dates;

Considering that the balance really due by Roux to the defendant, on February 11, for discounts which were advanced to him, deduction being made of a sum of $4,500.42 represented by clients' notes, and which were wholly paid and moreover appear credited in the said account, the total of which, in capital, interest, and cost of protests, amounts to $14,288.42;

Considering that it appears in said account that the defendant has received from several insurance companies, from other sources and by deposits to the credit of Honoré Roux, a total sum of $18,018.98 in which amount are not comprised the insurances of $1,000 in the Federal Life and the $1,500 in the Canada Life claimed by plaintiff;

Considering that this sum of $18,018.98 at the credit of H. Roux is amply sufficient to pay wholly the said sum of $14,288.42, for advances so made to said Roux, by the defendant, as also all contingent charges, without it being necessary to appropriate any portion whatever of the $2,500 from insurance assigned to the plaintiff by the contract of marriage;

Considering that the defendant cannot retain the said sum for the repayment of cheques and drafts amounting to $21,950 signed the 6th and 8th of February, 1915, by Roux in favour of certain persons and made payable at the office of the defendant, at Victoriaville, these cheques having neither been honoured nor charged to Roux in the books of the bank which never gave any value for them;

Considering that the second alienation of the insurance policies in question by the said H. Roux in favour of the bank, if it is

valid, must be held as annulled and revocated by the full payment of the principal debt which it guaranteed, and that the plaintiff should be held as the sole beneficiary, first and irrevocable of the said insurance policies;

Considering that the plaintiff has, therefore, the right to obtain from the defendant an account of the use by the bank of the thing given as pledge, and to obtain and exact from the defendant (the principal debt which was the object of the constitution of the pledge being paid wholly in capital and accessories) the restitution of the pledge, in this case the reimbursement of the amount of the two policies belonging to plaintiff and unduly retained by defendant;

Considering that the defendant did not prove his plea and that the plaintiff has justified her right of action and the obligation of the defendant to pay her back the amount of the said insurance policies;

Doth maintain the said action: and condemn defendant to pay plaintiff the sum of $2,500, with interest and costs.

Judgment for plaintiff.

MELDRUM v. BLACK.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, Galliher and McPhillips, JJ.A., April 3, 1916.

1. MUNICIPAL CORPORATIONS (§ II C 1—50)—MODE OF ACQUIRING LAND—INCOMPATABILITY OF STATUTES—REPEAL BY IMPLICATION.

So far as the purchase and acquisition of real property are concerned, the provisions of sec. 5 of the Act, 1915, ch. 46, amending the Municipal Act, B.C. 1914, ch. 52, as to the necessity of the assent of the electors, are incompatible with the powers under the by-laws conferred by sub-sec. 155 of sec. 54 of the Act 1914, and therefore, to this extent, the latter must be deemed to have been repealed by implication.

2. MUNICIPAL CORPORATIONS (§ II C 3—61)—VALIDITY OF BY-LAW FOR ACQUIRING LAND—ASSENT OF ELECTORS—QUASHING IN TOTO WHEN INVALID IN PART.

A municipal by-law passed for the purpose of purchasing certain properties for street widening and the erection of a fire hall, which has not received the assent of the electors as required by the Municipal Act (Statutes B.C. 1914, ch. 52, sec. 54, as amended by Act 1915, ch. 46, sec. 5), even if operative under the Act as to one of the purposes but incapable of segregation from the general scheme, it fails as a whole, and should be quashed.

3. STATUTES (§ III—31)—SPECIAL AND GENERAL—RESTRICTIVE PROVISIONS—PREVAILING EFFECT.

A special section of a statute (sub-sec. 160 of sec. 54 of the Municipal Act, B.C. 1914, ch. 52), prevails over a general one (sub-secs. 27 and 155 of sec. 54), and a section which imposes a restriction must prevail over one which is silent as to the restriction.

[*Garnett* v. *Bradley*, 3 App. Cas. 944, referred to.]

B. C.

C. A.

MELDRUM v. BLACK.

APPEAL from the judgment of Murphy, J., quashing a municipal by-law. Affirmed.

Cassidy, K.C., for appellant, intermediary.

O'Brien, for respondent, applicant.

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

Irving, J.A.

IRVING, J.A., agreed.

Martin, J.A.

MARTIN, J.A.:—After a careful study of the various groups of sections in the Acts in question I have come to the conclusion that we should not be justified in disturbing the judgment given below. The question is not an easy one to solve, and generally speaking, repeal by implication is not favoured, but so far as the purchase and acquisition of real property are concerned I am of opinion that the provisions of the new sec. 5 of ch. 46, Stat. of B.C. 1915, as to the necessity of the assent of the electors are wholly incompatible with the unfettered powers under by-laws conferred by the old sub-sec. 155, and therefore the latter must be deemed to have been repealed, to this extent at least, by implication. And I am inclined to think that it would also be impliedly repealed on another ground, viz: that the two standing together would lead to wholly absurd consequences.—See the authorities collected in Craies on Statute Law (1911) 328-9, 334-5, 27 Hals. 197.

Galliher, J.A.

GALLIHER, J.A.:—This is an appeal from an order of Murphy, J., quashing a by-law of the municipality of South Vancouver, passed for the purpose of purchasing certain properties therein set out for street widening and the erection of a fire hall. The by-law was quashed on the ground that it had not before passing received the assent of the electors. The application to quash was made by C. W. Meldrum, a ratepayer of the corporation, and interested in the by-law. A. Black and Wilcox, on behalf of themselves and all other vendors to the corporation, came in as intervenants.

The validity of the by-law depends upon the effect to be given to certain sections of the Municipal Act, ch. 52 of the Stat. of B. C. 1914.

The sections to which we have been referred are sub-secs. 27, 155 and 160 of sec. 54.

It was contended that the Act of 1915, ch. 46 (see sec. 4 and sec. 5, under heading "Assent of Electors"), repeals by implication

sub-sec. 155 of ch. 52 of 1914, but even if it does not, in my view that does not affect the case.

Sub-sec. 27 in so far as it is necessary to consider same, and sub-sec. 155 and 160 and sec. 4 of ch. 46 of 1915 are hereunder set out:—

(27) For negotiating, purchasing, acquiring, taking on lease, or accepting the abandonment of and the control of lands, rights, easements, and privileges from the Government of the Dominion, or the provincial government, or any corporation or person for and to the use of the municipality:

(155) For accepting, purchasing, or taking or entering upon, holding, and using any real property in any way necessary or convenient for corporate purposes, and so that the council may direct the taking or entering upon immediately after the passing of any such by-law, subject to the restrictions in this Act contained:

(160) For purchasing, acquiring, holding, managing, and maintaining real property for the purpose of a fire hall or halls within the municipal limits.

Sec. 160, which it will be noted is a section dealing with one specific subject, viz.: fire halls, is invoked in respect of appellants' second objection, viz.: that the by-law is good as to the fire hall clause, which I will deal with last.

Now as to sub-secs. 27 and 155, the wording in both is general, and though somewhat different both deal with the acquisition of real property for municipal purposes generally, but 27 is restricted in that the assent of the electors is necessary before passing the by-law: see par. (*f*) sub-sec. 30 ch. 52, 1914. Sub-sec. 155 is silent as to restrictions.

We have then in the Act two sections dealing generally with the purchase of lands for the purposes of the corporation, one under which it is necessary to obtain the assent of the electors, and the other in which it is not.

In such a case in my opinion the section which imposes a restriction must prevail over that which is silent as to restriction to the extent of requiring the assent of the electors.

It is not set out and one does not set out in a by-law the section under which they are proceeding: the proceeding is under the powers given by the Act so that even if sub-sec. 155 is unrepealed by the amendment of 1915, upon which I express no opinion, the municipality are not relieved from complying with the provisions of sub-sec. 27.

On the second branch of the appeal, sub-sec. 160 is a special and not a general section—in that sense a special Act—and in

B. C.
C. A.
MELDRUM v. BLACK.
Galliher, J.A.

my opinion would prevail over a general enactment such as sub-sec. 27: see per Lord Hatherly in *Garnett* v. *Bradley*, 3 App. Cas. 944, at 950; but this being a by-law for one general scheme, though combining two purposes, unless one of these purposes, viz: the fire hall scheme, can be segregated from and given effect to, independently of the street widening scheme, the by-law must fail as a whole.

On examining the by-law it is found that it provides for an expenditure of not more than $8,000. It also provides for the purchase of lots 21, 22 and 23. Upon the rear of these lots the fire hall is to be erected, the front of the lots forming a part of the str et widening scheme.

The street widening scheme being defeated, the result would be if the fire hall scheme was sustained, that we have a fire hall on the rear of these lots, access to which could only be obtained by crossing private property—something never contemplated by the by-law. Moreover, it cannot be said that under such conditions the balance of the property could be secured within the limit fixed in the by-law.

The by-law must stand or fall as a whole, and in my opinion the appeal should be dismissed.

McPhillips J.A.

MCPHILLIPS, J.A.:—I agree in this appeal being dismissed.

Appeal dismissed.

IMP.
P. C.

FOLEY v. McILWEE.

Judicial Committee of the Privy Council, Earl Loreburn, Lord Atkinson, Lord Parker of Waddington, and Lord Sumner, January 19, 1916.

1. DAMAGES (§ III A 1—42 *a*)—MEASURE—BREACH OF CONTRACT FOR CONSTRUCTION OF TUNNEL.

In the event of a contractor treating a contract for the construction of a tunnel as broken and suing at once for the breach of it, he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, taking into consideration what the plaintiff has done, or had the means of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been, or would have been, diminished.

[*Frost* v. *Knight*, L.R. 7 Ex. 111, applied.]

Statement

APPEAL from a judgment of the Court of Appeal of British Columbia. Affirmed.

The judgment of the Board was delivered by

Earl Loreburn.

EARL LOREBURN:—This is a dispute arising out of a contract between Messrs. Foley Brothers and Messrs. McIlwee and Sons.

Messrs. McIlwee, who are the plaintiffs, agreed to construct

a tunnel some 5 miles long. It would be necessary to make the tunnel from both ends.

In September, 1914, a quarrel arose between Mr. Dennis, who was acting on behalf of Messrs. Foley Bros., and Mr. McIlwee, acting on behalf of his firm. Mr. Dennis in his haste sent a notice cancelling, at all events, part of the contract, and he also thereupon stopped the supply of air which was necessary to enable the work to continue. After some fruitless interviews, Mr. McIlwee broke up his staff, and treated the contract as ended, inasmuch as the action and the notice of Mr. Dennis went to the very root of the contract. Their Lordships feel no doubt that the letter of September 24, containing the notice and the action of Messrs. Foley Bros., through Mr. Dennis, justified Messrs. McIlwee in treating the contract as having been repudiated in respect of matters going to the root of it. The work was in fact discontinued by Messrs. McIlwee and Co. because of the action of and the notice that had been given by Mr. Dennis.

An argument was addressed to the Board to the effect that the discontinuance of the work and the cancellation or annulment of the contract was due to a common agreement by both sides. This view seems to be quite untenable. It did not commend itself either to the trial Judge or the Court of Appeal, and it is not necessary to elaborate the facts bearing upon that issue.

Messrs. McIlwee thereupon brought an action, and certainly are entitled to damages; but an important question has been raised upon what principle those damages ought to be assessed. With regard to that matter, the trial Judge, Clement, J., and the Court of Appeal differed, and it is desirable to explain how that difference arose. The unwise letter of September 24 had hardly been written, and action hardly taken, before the author of it appeared to have had some misgivings, and he wished and his principals wished that the contract should be continued. Messrs. McIlwee for obvious reasons were anxious to continue the contract, but seem to have been annoyed at the treatment they thought they had unjustly received. Thereupon two offers were made by Mr. Dennis on behalf of Messrs. Foley Bros. He offered upon October 9, that the work should be continued, and that Messrs. Foley Bros. should pay damages up to date. At this time the workmen originally engaged had been discharged by Messrs.

IMP.
P. C.
FOLEY
v.
MCILWEE.
Earl Loreburn.

McIlwee and Co., and part of the staff—nearly all of the staff, apparently—had been disbanded. Of course, the damage arising from the breach of contract might continue beyond the date of October 9. Messrs. McIlwee professed to be ready to renew the contract, but were uncertain as to whether the terms of the offer included damage which might occur after October 9. They could not obtain any assurance that this was intended, or that this was offered, and they would not renew the contract without being satisfied upon that point. The Court of Appeal thought this was reasonable; their Lordships agree with that view, and must regard the letter of October as being, to say the least, doubtful in construction.

The second offer was made upon November 10, by which time 5 more weeks had elapsed, and Messrs. McIlwee had now been kept from work for 6 weeks. The offer by Messrs. Foley Bros. amounted to this—that they would pay all damage of every kind arisen or to arise from the breach, and would restore the terms of the old contract. By this time it had become necessary that considerable modifications should be made in the old contract to meet the new situation, as regards the time, for example, and other matters. Messrs. McIlwee expressed their demands in a letter of November 11. If any legal adviser, by which is meant any person competent to give an impartial opinion upon this contract, had been asked in regard to this letter of November 11, their Lordships think he would have said there must be considerable modification in the contract before any renewal could be advised, and that he could not advise a renewal unless the points raised in that letter were cleared up and satisfactorily settled. In point of fact when the letter was received it was not treated as being a basis of settlement, and the offer of November 10 came to nothing. The Court of Appeal thought that this was not unreasonable conduct on the part of Messrs. McIlwee, and their Lordships are not prepared, in any way, to differ from that opinion.

Perhaps it would be advisable to say one or two words in view of some of the expressions that have been made use of in the judgments. Their Lordships think that the quotation by Galliher, J., from the judgment of Lord Chief Justice Cockburn in the case of *Frost* v. *Knight*, L.R. 7 Ex. 111, truly expresses the law. The Lord Chief Justice, in speaking of the event of one

person treating a contract as broken and suing at once for breach of it, says:—

he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time . . . and in assessing the damages for breach of performance a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been, or would have been, diminished."

In many cases the nature of the contract, or its circumstances, may make it extremely difficult, if not impossible, to apply any such rule, but that rule of law seems applicable to all contracts where it can practically take effect.

Under these circumstances, their Lordships will humbly advise His Majesty that this appeal ought to be dismissed with costs.

Appeal dismissed.

TILBURY TOWN GAS CO. v. MAPLE CITY OIL AND GAS CO.

Ontario Supreme Court, Meredith, C.J.O., Garrow, Maclaren, Magee, and Hodgins, JJ.A., December 21, 1915.

1. CONTRACTS (§ II D 1—157)—AGREEMENT TO FURNISH NATURAL GAS—EXTENT OF SUPPLY.

A clause in a contract for the supply of natural gas, which concedes the right to supply others with gas after the company shall be supplied "to the full extent of its requirements at all times and which may be required for supply, marketing, or sale," does not create a duty of storing up of all assets, or the preservation of a reserve of untapped gas, in order to be able at some indefinite future time to meet any possible demand which may be made, but merely obligates to deliver only what is actually required and demanded from time to time.

[*Dolan* v. *Baker*, 10 O.L.R. 259, applied.]

2. CONTRACTS (§ II D 1—157)—AGREEMENT TO SUPPLY GAS—STIPULATION AS TO PRESSURE AND REGULARITY—APPROPRIATION.

A contract for the supply of natural gas providing delivery of the gas at sufficient pressure and with regularity indicates a duty of so handling the gas when won and controlled as to enable its delivery in a usable condition, and until so done it is not appropriated under the contract.

3. CONTRACTS (§ II D 1—157)—NATURAL GAS—INTEREST IN LAND—CHATTEL.

An agreement to bore for gas and deliver it into pipe lines does not differ from a contract to deliver timber when cut, and is not an agreement for the sale of or concerning an interest in land.

[*Smith* v. *Surman*, 9 B. & C. 561; *Marshall* v. *Green*, 1 C.P.D. 35; *Erie County Natural Gas Co.* v. *Carroll*, [1911] A.C. 105, 116, referred to.]

4. INJUNCTION (§ I B—20)—WRONGFUL DETENTION OF GAS CONTRARY TO CONTRACT—SUFFICIENT REMEDY FOR DAMAGES.

The right to an injunction for wrongfully withholding a supply of natural gas detrimental to the rights under a contract depends upon the situation and abilities of the parties, as to their plants and connections, and a company may be enjoined from allowing such gas to be taken from a sufficient area of the lands if it still owned them; but after it had parted with the lands to others not bound by the covenant or not having notice thereof, a remedy for damages may be sufficient.

Statement

APPEAL from the judgment of Lennox, J., dismissing an action and sustaining a cross-action on a contract for the supply of natural gas. Reversed.

ONT.

S. C.

TILBURY TOWN GAS CO. v. MAPLE CITY OIL AND GAS CO.

Hodgins, J.A.

G. Lynch-Staunton, K.C., *O. L. Lewis*, K.C., and *E. Sweet*, for the appellant the Maple City Oil and Gas Company Limited.

J. W. Bain, K.C., and *Christopher C. Robinson*, for the appellant the Glenwood Natural Gas Company Limited.

I. F. Hellmuth, K.C., *W. M. Douglas*, K.C., and *J. G. Kerr*, for the plaintiff company, respondent.

The judgment of the Court was delivered by

HODGINS, J.A.:—In his view of the actions of all parties I agree generally with the learned trial Judge. But, apart from that, the case raises an important question as to the interpretation of the contract of the 22nd July, 1912, between the Tilbury company and the Maple City company.

The key-note to the judgment appealed from is to be found in this sentence taken from the learned trial Judge's reasons: "I am of opinion that the agreement requires the Maple City company so to act as to secure, as far as possible, a permanent or quasi-permanent source of supply of gas for the Tilbury company."

From that standpoint the following consequences flow, under the terms of the formal judgment, which is as follows:—

"1. This Court doth declare that the plaintiff is, under the agreement set forth in the statement of claim and dated the 22nd day of July, 1912, entitled to sell and market or consume all of the natural gas to be obtained from the lands described in the said agreement, except such as is required by the defendant the Maple City Oil and Gas Company Limited, for the supply of the contracts or undertakings entered into by it with consumers at Merlin and along its pipe-line and in force on the said 22nd day of July, 1912, and doth adjudge the same accordingly.

"2. And this Court doth further declare that the defendant the Maple City Oil and Gas Company Limited has no right to bore or operate upon the said lands for natural gas, or to supply and deliver the same, except when and as required by the plaintiff, and that the defendant the Maple City Oil and Gas Company Limited has no right to sell or bore for gas for delivery in merchantable quantities to any corporation, person, or persons other than the plaintiff, except such as is required for its con-

sumers at Merlin and along its pipe-line as aforesaid, and doth adjudge the same accordingly.

"3. And this Court doth order and adjudge that the defendants the Maple City Oil and Gas Company Limited and the Glenwood Natural Gas Company Limited, and each of them, and their and each of their servants, workmen and agents, be and they are hereby perpetually enjoined from operating the wells mentioned in the statement of claim, or any of them, or drilling or operating any new wells upon the lands in the statement of claim described, except for the supply of gas to the plaintiff, and for such other supply as comes within the exceptions above set forth, and from otherwise boring or drilling or operating for gas, contrary to the rights of the plaintiff as above declared.

"4. And this Court doth further order and adjudge that the defendant the Maple City Oil and Gas Company Limited do continue to produce, supply, and deliver natural gas to the amount of the requirements of the plaintiff under the said agreement.

"5. And this Court doth further order and adjudge that, in default of compliance with the order contained in paragraph 4 hereof, the plaintiff is entitled to enter upon the said lands, or any of them, and drill for and produce such gas as it requires.

"6. And this Court doth further order and adjudge that the notices for forfeiture and the surrenders of the leases in the pleadings mentioned are fraudulent and void, and that the same be and they are hereby set aside, in so far as they may be deemed to have any effect upon the rights of the plaintiff in the premises."

I am unable, with great respect, to arrive at the same conclusion as did the learned trial Judge.

The recitals in the agreement, where wider than the contractual stipulations, cannot extend them. Dealing with the latter, clauses 1 and 3 are as follows:—

"1. The Tilbury company agrees with the Maple City company to receive, accept, and take from the Maple City company, and the Maple City company agrees to bore or operate for, supply and deliver as and when required, to the Tilbury com-

ONT.

S. C.

TILBURY TOWN GAS CO. v. MAPLE CITY OIL AND GAS CO.

Hodgins, J.A.

pany, all the natural gas to the full extent of its requirements at all times which can be obtained in merchantable quantities from the said lands now held or which may hereafter be held as aforesaid by the Maple City company, and which gas may be required for supply or marketing or sale by the Tilbury company, or used by the Tilbury company within the limits of the town of Tilbury, or within the township of Tilbury East, in the county of Kent, or elsewhere, under any franchises or agreements under which the Tilbury company may from time to time have the right or power to deliver, distribute, or market or use natural gas, and may desire so to do."

"3. And the Tilbury company agrees with the Maple City company that it will not, while the present franchise or agreement with the town of Tilbury for the supply therein of natural gas by the Tilbury company shall remain in existence and in force, take or procure natural gas from any other company or person than the Maple City company for the supply of natural gas in the town of Tilbury, so long as and provided that the Maple City company shall continuously supply from the land hereinbefore described to the Tilbury company sufficient natural gas with at all times sufficient pressure and regularity of delivery required for the purposes from time to time of the Tilbury company and the persons or corporations taking or buying such gas from the Tilbury company, and the Maple City company agrees with the Tilbury company that it will produce, supply, and deliver to the Tilbury company hereunder sufficient natural gas with sufficient pressure and regularity of delivery from time to time required for the purposes as aforesaid continuously (provided that same can be obtained in merchantable quantities in or upon said land), and will not supply or deliver gas or allow gas to be taken from the lands aforesaid now or hereafter held or leased by the Maple City company, or agree so to do, except subject to the rights of the Tilbury company hereunder, and after the Tilbury company shall be supplied as aforesaid, with all the gas required by it, or to which it may be entitled for supply or marketing or sale or use by the Tilbury company as aforesaid."

Under these provisions the amount of gas to be delivered to the respondent is to be (clause 1) "to the full extent of its requirements at all times . . . and which gas may be required

for supply or marketing or sale by the Tilbury company;" and (clause 3) "sufficient natural gas with at all times sufficient pressure and regularity of delivery required for the purposes from time to time of the Tilbury company."

While the requirements of the Tilbury company may arise under the contracts for present supply, they may include demands "under any franchises or agreements under which the Tilbury company may from time to time have the right or power to deliver, distribute, or market or use natural gas, and may desire so to do."

These give a wide range to what can be asked of the Maple City company, but they do not, consistently with the concluding part of clause 3, as it seems to me, compel that company to store up all its assets in order to be able at some indefinite future time to meet any possible demand which may be made upon it by the respondent.

Clause 3 in effect concedes to the Maple City company the right to supply others with gas after the respondent "shall be supplied as aforesaid with all the gas (1) required by it, (2) or to which it may be entitled for supply or marketing or sale or use by the Tilbury company as aforesaid."

It is not seriously disputed that the Maple City company has provided all the gas required by the respondent, as in (1) above; and, after a perusal of the evidence, I agree with the opinion expressed by the trial Judge on this point. And I think the respondent is entitled under (2) only to what it actually requires and demands from time to time, and not to the creation and preservation of a reserve fund of untapped or unexhausted gas which, in the meantime, costs it nothing, although it might cost the Maple City company a very considerable expenditure, and the enforced retention of which would deprive it of the right given by the contract of selling "subject to the right of the Tilbury company." That expression would be meaningless if its import was that what it could sell would be nothing at all because of possible demands in the future.

I find nothing in the contract which militates against this construction.

The recital that it is desired that the Tilbury company

ONT.

S. C.

TILBURY TOWN GAS CO. v. MAPLE CITY OIL AND GAS CO.

Hodgins, J.A.

"shall sell, market, or consume all the natural gas to be obtained from the said lands," is explained by the further words, that the gas shall be obtained and delivered for sale or consumption in Tilbury or elsewhere "under the franchises or agreements of the Tilbury company." This means under actual or existing franchises or agreements, whether now or subsequently acquired; for no delivery could be required under rights and contracts unless they were operative and in force. This is definitely expressed in clause 1 by the words "under which the Tilbury company have the right or power to deliver . . . and may desire so to do."

The clause as to payment (2) of course provides for settlement on delivery, and is to be for natural gas marketed and sold or used by the Tilbury company, and nothing by way of recompense is suggested for the forbearance of the Maple City company in acting so as to secure a permanent source of supply for the Tilbury company.

A circumstance of some weight is that, under clause 3, the provision that the Maple City company will not supply or deliver gas, etc., except subject to the rights of the Tilbury company, affects not only the land included in the recited leases, but that "hereafter held or leased by the Maple City company."

If the rights of the respondent are as extensive as it claims, then all the lands afterwards acquired would be tied up and rendered unproductive, no matter how great the disparity between their productiveness and the requirements of the respondent.

I think the words of Mr. Justice Anglin in *Dolan* v. *Baker* (1905), 10 O.L.R. 259, at p. 270, may well be applied in this case: "The unfairness to the vendor of any construction of the instrument, which would give to the purchaser an option to cut and remove, to be exercised at some indefinite future date, however remote, in effect tying up the timber forever for no consideration, unless the purchaser should see fit to exercise his rights over it, affords the strongest possible reason for believing that the parties never contemplated such an arrangement."

It is in point to refer to the learned trial Judge's opinion on the effect of the additional wells, which is as follows: "Neither am I able to accept unreservedly the theory that all

the wells within the entire area of the Tilbury gas-field draw from the same gas-pockets. It is not pretended that it has ever been demonstrated that it is so. All that can be affirmed is that it may be so—or at the very most that it is probable. But, as there are external barriers to the north, south, east, and west of the field, taken as a whole, so it may well be that there are ridges of impervious strata intersecting the field at some or many intermediate points. On both sides it is theory and speculation only."

This, if it applies, as it may, to portions of the field, would involve the practical failure of the respondent's contention that the appellants are actually depleting the gas in the original field rather than opening new ones. I think the evidence amply supports the statement that, while the proximity of other wells makes it likely that both will draw from the same field, it is only theory and speculation to assert it as inevitable.

If the Maple City company was withholding gas to the detriment of the respondent, it might be that an injunction would be granted to compel its supply. This would, however, depend upon the evidence offered as to the situation and abilities of the parties and as to their plant and connections, and it is not a question to be decided now. If the respondent's rights are as far-reaching as it contends, then, under the concluding words of clause 3, the Maple City company could well be enjoined from allowing gas to be taken from a sufficient area of the lands in question, if it still owned them. But, if it had parted with them to others not bound by the covenant or not having notice thereof, or if damages were a sufficient remedy, or if the contract is one for the sale of chattels only, it would be open to it to argue that an award of damages was a sufficient remedy. That relief was deemed adequate in *Silkstone and Dodsworth Coal and Iron Co.* v. *Joint Stock Co.* (1876), 35 L.T.R. 668, and was given in *Erie County Natural Gas and Fuel Co.* v. *Carroll*, [1911] A.C. 105, in *Kohler* v. *Thorold Natural Gas Co.* (1914), 16 D.L.R. 862, 6 O.W.N. 67, 26 O.W.R. 31, and in *Dominion Coal Co.* v. *Dominion Iron and Steel Co.*, [1909] A.C. 293.

The original contracting parties have now passed under the control of large rival concerns, one desirous of sterilising the

[*Kohler* v. *Thorold Natural Gas Co.* reversed, 27 D.L.R. *infra*, 52 Can. S.C.R. 514.]

ONT.

S. C.

TILBURY TOWN GAS CO. v. MAPLE CITY OIL AND GAS CO.

Hodgins, J.A.

Maple City company's resources, and the other of exploiting them. Present conditions are radically different from the original situation in reference to which the contract was framed, and it is a waste of time to try and square the language of the agreement with a set of circumstances never contemplated by the parties when they made it. Both concerns went into the fight fully aware of the exact terms of the contract. The present deadlock is the work of both parties, and their actions make it nothing but reasonable to regard that agreement as expressing by its words exactly what was intended and what they must be held to.

This would dispose of the action upon the ground that the respondent has suffered no wrong at the hands of the appellants, were it not for the other defences raised by the appellants. Instead of merely submitting their construction and offering to perform their obligation, the appellants plead that the whole contract is void as transgressing the rule against perpetuities, and set up the vesting of the properties in the Glenwood company and the subsequent cancellations of the gas-leases. While these defences are not now necessary, if the judgment in appeal is reversed, they must be disposed of, because they affect the basis on which the contract rights, even as now defined, must depend.

By paragraph 6 of the formal judgment, the surrenders and forfeitures are set aside "in so far as they may be deemed to have any effect upon the rights of the plaintiff in the premises." I agree that the findings of the learned trial Judge upon the facts would fully entitle them to this relief under the contract as construed by him, and in his views on those facts I entirely concur. But I do not think the respondent is entitled, in point of law, to the relief given.

The Glenwood company had the right to buy the fee. Having done so, it could forfeit or accept a surrender of the leases, unless its doing so interfered with the rights of the respondent under the contract in question. If that contract does not relate to land so as to give the respondent an interest in it, the respondent cannot complain of the dealings of the appellants *inter se*. It is not necessary to decide whether natural gas is a chattel

ONT.

S. C.

TILBURY TOWN GAS CO. v. MAPLE CITY OIL AND GAS CO.

Hodgins, J.A.

or an interest in land, for in this case it is dealt with only as the former, just as severed trees may be.

The Maple City company is to bore for and win the gas, and is then to deliver it "into the pipe-lines or piping of the Tilbury company on or opposite to the east half of lot 14, Middle Road South, in the township of Tilbury, where the pipe-lines of the Tilbury company now are upon the highway, there or elsewhere, at places acceptable to the Tilbury company."

This does not differ in any way from a contract to deliver logs or timber when cut by the vendor, which is not an agreement for the sale of or concerning an interest in land: *Smith* v. *Surman* (1829), 9 B. & C. 561; *Marshall* v. *Green* (1875), 1 C.P.D. 35, at p. 40.

So that the respondent has no right, except that arising out of the contract, to receive the gas when collected and ready for delivery in the pipes of the Maple City company. The words "which can be obtained in merchantable quantities from the said lands" are merely descriptive of the source of supply, and might well be used in such an agreement as I have mentioned for logs and timber from a particular timber limit or area, as was the case in *McCall* v. *Canada Pine Timber Co.* (1914), 7 O.W.N. 296, and in the Supreme Court of Canada (not yet reported). The provisions as to delivery at sufficient pressure and with regularity indicate that the Maple City company is wholly charged with the duty of so handling the gas when won and controlled by it as to enable it to deliver it in a usable condition to the respondent. Till it does so, it is not appropriated, under the contract, to the latter. I think the remarks of Lord Atkinson in *Erie County Natural Gas and Fuel Co.* v. *Carroll*, [1911] A.C. at p. 116, indicate that natural gas, under circumstances similar to those in this case, is merely a chattel.

There remains to be considered the defence based upon the rule against perpetuities. In my view of the contract, this can only have reference to clause 5, giving a right of entry at the respondent's option upon the lands to bore for gas.

It must be remembered that, apart from that clause, this is a personal contract, and clause 5 gives a remedy only upon breach of it, to be exercised at the option of the respondent.

ONT.

S. C.

TILBURY TOWN GAS CO. v. MAPLE CITY OIL AND GAS CO.

Hodgins, J.A.

Whether clause 5 is void or not, the rest of the contract is effective and binding.

The Maple City company, when the right arises, may be willing to perform the covenant or allow the exercise of the respondent's rights under it; and it is, therefore, unnecessary now to decide the point raised.

The result is, that the appeal should be allowed with costs, and the judgment should be reversed. There should be substituted for it a judgment declaring (if desired) that the contract in question, as now construed, is in full force and effect as between the Maple City company and the respondent, and directing that the respondent pay the costs of the action and counterclaim to the appellants. *Appeal allowed.*

ALTA.

S. C.

UNION INVESTMENT CO. v. GRIMSON.

Alberta Supreme Court, Scott, Stuart, Beck and Hyndman, JJ. February 19, 1916.

1. BILLS AND NOTES (§ VB 2—135)—HOLDER IN DUE COURSE—BANKING TRANSACTION—KNOWLEDGE OF FRAUD—FACTS PUTTING ON INQUIRY.

A promissory note acquired in an ordinary banking transaction as collateral security for advances does not necessitate the making of inquiries about it, unless there is something which might reasonably lead to suspect something wrong with the particular note; the fact that a banker, before acquiring the note, knew that similar notes were tainted with fraud or that in some of the actions brought upon them the defence of fraud was raised, does not reasonably lead to suspect that all such notes were tainted with fraud as affecting the right to recover as a holder in due course.

[*Oldstadt* v. *Lineham*, 1 A.L.R. 416; *Jones* v. *Gordon*, 2 App. Cas. 616, distinguished. See also *Hayden, Clinton Nat. Bk.* v. *Dixon*, 26 D.L.R. 694.]

Statement

APPEAL and cross appeal from the judgment of Ives, J., in favour of the plaintiff in an action on a promissory note by holder in due course. Varied.

O. M. Biggar, K.C., for plaintiff, respondent.

Frank Ford, K.C., for defendants, appellants.

The judgment of the Court was delivered by

Scott, J.

SCOTT, J.:—The action is for the balance unpaid upon a promissory note for $875 made by the defendants dated March 2, 1909, payable December 1, 1910, to McLaughlin Bros. or order at the Canadian Bank of Commerce, Red Deer, with interest at 6% per annum. The plaintiff claims to be the holder thereof in due course.

The note is one of a series given by the defendants in payment

for a stallion sold or agreed to be sold by McLaughlin Bros. to them. Another note of the same series was the subject matter of an action brought by the Hayden, Clinton National Bank against these defendants an appeal in which was heard at this sittings of the Appellate Division (26 D.L.R. 694). The same defences are raised in both actions. In my reasons for judgment in the other action I have dealt with several of the questions arising in this action and it is therefore unnecessary for me to again refer to them.

The only evidence as to the circumstances under which the plaintiff acquired the note in question is that of Mr. Nye who states that for the 6 years preceding the trial he was the plaintiff's assistant treasurer, that it has a paid up capital of $500,000 and has its place of business at St. Paul, Minnesota, that it has been doing business with McLaughlin Bros. ever since 1904 during which it has acquired from them about 200 notes of their customers averaging about $1,000 each; that it advanced moneys to the firm from time to time taking these notes as collateral security for the advances, the total amount of the advances varying from time to time, but never exceeding $50,000; that by the terms of the arrangement with the firm the plaintiff was entitled to hold the collateral notes as security for all the outstanding advances; that in August, 1910, the plaintiff advanced the firm $9,000, taking their own notes therefor and, as collateral security thereto, the note in question with other notes amounting in all to over $9,000 and that the firm is now indebted to the plaintiff in upwards of $10,000 in respect of such advances.

The defendants contend that the plaintiff has not satisfied the onus cast upon it of proving that it was the *bona fide* holder of the note in question for value before its maturity.

Mr. Nye admits that the plaintiff, before it acquired the note in question, had brought 6 or 8 actions upon similar notes payable to the firm which had been pledged as security for these advances and that in some of these actions, if not in all of them, the defence of fraud was raised. Three of these cases are reported, *viz.*, those of the plaintiff against *Wells*, 5 W.L.R. 409, against *Polushie*, 4 W.L.R. 552, and 8 W.L.R. 530, and against *Perras*, 12 W.L.R. 76, and it is apparent from them that the plaintiff had, before that time, acquired knowledge that some of the notes taken by the firm upon sales of stallions were tainted with fraud

ALTA.

S.C.

UNION INVESTMENT CO. v. GRIMSON.

Scott, J.

and the defendants contend that the plaintiff, having this knowledge, was in duty bound before taking the note in question to inquire into the circumstances under which it was made, and, as it is shown that it failed to make any such inquiry, it cannot be held to be a holder in due course.

McLaughlin Bros. appear to have been very extensive dealers in stallions in many places in the United States and Canada and to have taken a large number of notes in payment for those sold by them and the plaintiff alone is shewn to have acquired about 200 of them. In answer to the question why he did not make any inquiry about the notes Mr. Nye states that the plaintiff had done a large amount of business with the firm, that the collections had been satisfactory, that the plaintiff had quite a margin and that he did not go into the merits of any particular set of notes. He further states that when the firm was doing business at Merriam Park, one of their places of business, the plaintiff had less than 1% of loss on the collections, that all the collections were made upon the collateral notes and that the firm never paid plaintiff anything, and that it was not until the firm were in financial difficulties in 1912 and then went out of business that plaintiff called upon the members of the firm to pay.

In my view the transaction under which the plaintiff acquired the note in question was an ordinary banking transaction, one of everyday occurrence, and I doubt whether it is the practice of bankers when taking notes as collateral security for advances to make inquiries about any such note unless there is something which might reasonably lead them to suspect that there might be something wrong with that particular note. I doubt also whether the fact that a banker knew that a small percentage of many notes made to a certain customer in respect of other transactions and pledged by him as collateral security were tainted with fraud would reasonably lead the banker to suspect that all notes made to that customer were so tainted.

In *Oldstadt* v. *Lineham*, 1 A.L.R. 416, which is relied upon by the defendants the plaintiffs who had given their separate notes by way of bonus for the construction of a grain elevator joined in action against the payee and the holder for the delivery up of the notes on the ground of fraud and misrepresentation on the

part of the payee. The holder admitted that before purchasing the notes he had heard rumors that the maker of certain notes purchased by him from the same payee in respect of other similar transactions had stated that they were obtained by false representations. The jury returned the verdict: "The plaintiffs are not liable for these notes and they should be returned to them." Upon this verdict judgment was entered for the plaintiffs. Upon appeal by the holder the Chief Justice who delivered the judgment of the Court says at p. 424:—

> While the evidence here may not be by any means conclusive to establish bad faith on the part of the defendant, yet inasmuch as . . . . there appears to me clearly to be some evidence, such as the facts stated about the other notes of the same character passing through the same hands, the consideration paid for the notes, etc., that might raise a doubt in the jury's minds as to the good faith of the defendant and therefore justify the finding that he had not satisfied the burthen cast upon him of establishing good faith. I think the appeal should be dismissed, with costs.

In addition to the fact that the Court held in that case that the evidence of bad faith on the part of the holder was not by any means conclusive there is the further important fact that the holder's knowledge of these rumors was only one of a number of circumstances pointing to bad faith on his part and it is apparent that it was only the combination of those circumstances which justified the Court in upholding the verdict of the jury. That case cannot therefore be looked upon as an authority in favor of defendants' contention.

The other cases cited by defendants' counsel are cases in which the notes sued upon were purchased outright by the plaintiff and in each of them there were circumstances known to the purchaser in connection with the making of the particular note which should have put him upon inquiry and, in addition thereto, the acts and conduct of the purchaser were such as to lead the Court to infer that he had not acted in good faith. In one of these cases, *Jones* v. *Gordon*, 2 App. Cas. 616, the plaintiff had purchased for £200 an acceptance for £1,720 with the knowledge that it had been drawn upon and accepted in contemplation of the acceptor's bankruptcy.

In the last mentioned case Lord Blackburn says at 628:

> If a man, knowing that a bill was in the hands of a person who had no right to it, should happen to think that perhaps the man had stolen it, when if he had known the real truth he would have found, not that the man had stolen it, but that he had obtained it by false pretences, I think that would not make

ALTA.

S.C.

UNION INVESTMENT CO. v. GRIMSON.

Scott, J.

any difference if he knew that there was something wrong about it and took it. If he takes it in that way he takes it at his peril.

But then I think that such evidence of carelessness or blindness as I have referred to may *with other evidence be* good evidence upon the question which, I take it, is the real one, whether he did know that there was something wrong in it. If he was (if I may use the phrase), honestly blundering and careless, and so took a bill of exchange or a bank note when he ought not to have taken it, still he would be entitled to recover. But if the facts and circumstances are such that the jury, or whoever has to try the question, came to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind—I suspect there is something wrong, and, if I ask questions and make further inquiry, it will not longer be my suspecting it, but my knowing it, and then I shall not be able to recover—I think that is dishonesty. I think my Lords that that is established, not only by good sense and reason, but by the authority of the cases themselves.

In the other case against these defendants I have dealt with the other circumstances relied upon by the defendants as casting suspicion upon the *bona fides* of the plaintiff in this case.

The trial Judge gave judgment for the plaintiff for the balance unpaid upon the note with interest to maturity only, but as he held that there was no evidence that the note was presented at the place of payment at its maturity, he directed that the plaintiff should pay the defendants' costs.

The effect of this judgment is that the trial Judge must have found that the plaintiff was the holder of the note in due course. For the reasons I have stated I am of opinion that this finding should be sustained.

The plaintiff has given notice of cross appeal on the grounds (1) that the trial Judge should have given judgment for the plaintiff for interest from the maturity of the note until judgment, and (2) that the plaintiff should not have been deprived of his costs of the action, nor should he have been directed to pay the defendants' costs.

For the reasons stated by me in the other case, I would hold that the plaintiff is entitled to interest after maturity.

There is evidence, at least, that the note in question was presented at the place of payment before the action was commenced but, apart from this, I have, in the other case referred to, expressed the view that in an action against the maker the plaintiff should not be deprived of his costs unless it is shewn that the maker has been, in some way, prejudiced by the omission to present it.

I would dismiss the defendants' appeal with costs and direct that the judgment in the Court below be amended by awarding the plaintiff in addition to the amount already awarded to him, interest at the statutory rate from the maturity of the note until judgment and, in lieu of the direction that the plaintiff should pay the defendants' costs, directing that the plaintiff should have the costs of the action.

I would allow the cross appeal with costs.

Appeal dismissed; cross appeal allowed.

ALTA.
S.C.
UNION INVESTMENT CO. v. GRIMSON.
Scott, J.

HANNA v. CITY OF VICTORIA.

B. C.
C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A., April 3, 1916.

1. EMINENT DOMAIN (§ II B 2—115)—"TAKING" WHAT IS—PLANS AND NOTICE TO TREAT—MUNICIPAL EXPROPRIATION FOR OPENING LANE. Filing plans and specifications and service of notice to treat, in an expropriation by a municipality for the purpose of opening a lane, constitutes a "taking" of land in the statutory sense as entitling the owner to claim compensation under sec. 399 of the Municipal Act, R.S.B.C. 1911, ch. 170.

2. LIMITATION OF ACTIONS (§ III C—115)—ACTIONS AGAINST MUNICIPALITY WHAT ARE—PROCEEDINGS FOR COMPENSATION UPON EXPROPRIATION. An application to a Judge to appoint an arbitrator is merely a step in the statutory proceedings to determine compensation and not an "action" within the meaning of sec. 513 of the Municipal Act (R.S.B.C. 1911, ch. 170), barring actions against the municipality if not commenced within a year from their accrual.

[*Hanna* v. *City of Victoria*, 24 D.L.R. 889, affirmed.]

Statement

APPEAL from the judgment of Clement, J., 24 D.L.R. 889, granting an application in proceedings for compensation under the Municipal Act, R.S.B.C. 1911, ch. 170. Affirmed.

Hannington, for appellant, defendant.

McDiarmid, for respondent, plaintiff.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The point of law involved is a very narrow one. The city passed a by-law for the opening of a lane which would involve the taking of a strip of Hanna's property. The city in due course filed plans and specifications and served notice to treat and Hanna made his claim within 60 days thereafter. From that time on nothing was done by either party until recently when Hanna appointed an arbitrator, and in default of the city doing likewise moved a Judge of the Supreme Court to appoint the city's arbitrator. The order was made, and from that order the city is appealing.

Two points were taken before us by appellant's counsel. He said that as the land had not yet been actually entered upon,

B. C.

C. A.

HANNA v. CITY OF VICTORIA.

Macdonald, C.J.A.

but was still in the respondent's possession, he has suffered no injury and is not entitled to compensation. I think the city took the land in the statutory sense when it filed plans and specifications and served the notice to treat in pursuance of sec. 399 of the Municipal Act. When the respondent filed his claim the city could then accede to his demand or arbitrate. It did not accede to his demand, and it was therefore open to either party to appoint an arbitrator and force along the proceedings, and unless the respondent is barred by delay we are not in this appeal concerned with the question of damages or compensation: that is a matter to be decided in the arbitration proceedings.

This brings me to the second contention in the appeal, namely, that respondent's claim is barred by one or other of the limitation sections in the Municipal Act. Now, it cannot be barred either by sec. 398 or by sec. 402 because the claim admittedly was made within the shortest of the periods therein specified. The only other section relied on is 513, which declares that all "actions" against the municipality shall be barred unless commenced within a year from the accrual of the right of action. In my opinion the respondent's application to a Judge to appoint an arbitrator was not an action within the meaning of that section: it was merely a step in the statutory proceedings to determine the compensation.

I cannot see how respondent's delay can affect the matter. The appellant was more to blame for this delay than respondent was. Unless therefore it can be said that the scheme of opening the lane was abandoned with the acquiescence of the respondent, which on the material before us it cannot, then respondent's position is as strong to-day as it was 3 years ago. The appeal should be dismissed.

Martin, J.A.

MARTIN, J.A.:—I think the Judge below came to the right conclusion on the effect of sec. 513. That was the only point on which I entertained any doubt during the argument. In view of the decisions of this Court, then cited, the submissions that the land was not "taken" by the city, and that it can withdraw from its position are hardly open to argument: the difference on the latter point between the English and American authorities is noted in Dillon on Municipal Corporations (1911), vol. 3, p. 1651.

GALLIHER, J.A.:—The applicant Hanna has applied, under sec. 8 of the Arbitration Act, to have the Judge appoint an arbitrator on behalf of the city, the city having refused to do so. The Judge made the order and from that order this appeal is taken.

Galliher, J.A.

On April 4, 1912, the city passed a by-law to open up a lane through certain property of the applicant and others, and served notice upon Hanna that they would require certain portions of his property for the undertaking. Hanna replied to this notice on August 5, 1912, sending in his claim for damages. The city did not proceed with the work nor did they take actual possession of the lands and nothing was done by either party until September, 1915.

Hanna, through his solicitor, F. A. McDiarmid, on September 16, 1915, notified the city that he had appointed A. M. Bannerman as his arbitrator, and called upon the city to appoint an arbitrator representing them. This the city failed to do—hence the application.

Mr. Hannington, on behalf of the city, objects that the land was never taken, and secondly, that Hanna is too late in making this application. I think the land is taken under the Act when the notice to treat is served. The city cannot serve and file notices affecting lands and assume dominion over them, and prevent the owners from dealing with them, and withdraw at pleasure without more. The serving of the notice under our Act is, I think, equivalent to an agreement to purchase the lands. On that ground the appellants fail.

On the second ground—this is not an action within the meaning of sec. 513 of the Act, nor does sec. 398 apply. It was contended that, as the land was not actually taken and no work proceeded with, no damage has accrued to the applicant. That does not necessarily follow. In any event the applicant is entitled to a reference to arbitration. The appeal should be dismissed.

IRVING, J.A., agreed.

Irving, J.A.

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

McPhillips, J.A.

Appeal dismissed.

SASK.

S.C.

CITY OF PRINCE ALBERT v. VACHON.

Saskatchewan Supreme Court, Newlands, Lamont, Brown and Elwood, JJ., March 18, 1916.

1. LIMITATION OF ACTIONS (§ I D—27)—CLAIMS AGAINST MUNICIPALITIES—RETROACTIVENESS OF STATUTE.

Section 358 of Stat. Sask. 1915, ch. 16, barring claims for damages against municipalities resulting from land being injuriously affected unless made in writing with particulars of the claim within one year after the injury, affects more than mere matters of procedure and takes away a right existent under the law as it stood before the passage of the statute, and is therefore not retrospective.

[*Rex* v. *Dharma*, [1905] 2 K.B. 335, *The Ydun*, [1899] P. 236, distinguished; *Hickson* v. *Darlow*, 52 L.J. Ch. 453; *Wright* v. *Hale*, 30 L.J. Ex. 40, applied.]

2. MUNICIPAL CORPORATIONS (§ II G 1—203)—LIABILITY FOR LAND INJURIOUSLY AFFECTED FROM GRADING STREETS.

The work of grading streets is specifically conferred by secs. 378 and 390 of the City Act, R.S.S. 1909, ch. 84, and is therefore a work in the "exercise of powers under the Act" within the meaning of sec. 245 as entitling an owner to compensation for land injuriously affected though no part of the land itself is actually taken.

3. MUNICIPAL CORPORATIONS (§ II GG—264)—DAMAGES RESULTING FROM GRADING STREETS—FORM OF REMEDY—ACTION AT LAW—ARBITRATION.

The fact that the affidavit on a motion to appoint an arbitrator claims damages in consequence of excessive and unnecessary grading does not thereby restrict the applicant to the remedy by an action at common law, but it is for the arbitrator, acting under sec. 370 of the City Act, 1915, ch. 16, to determine the amount of damages resulting from the exercise of powers under the Act.

Statement

APPEAL from an order of McKay, J., appointing an arbitrator under sec. 370 of the City Act 1915, ch. 16, to determine the damage to an abutting property owner on a claim arising under sec. 245 of the City Act, R.S.S. 1909, ch. 84. Affirmed.

D. W. Adam, for appellant.

R. Mulcaster, for respondent.

The judgment of the Court was delivered by

Elwood, J.

ELWOOD, J.:—In or about the spring of the year, 1912, the city of Prince Albert graded on Sixth Ave. west, and on Eighteenth St. west, past the property of the claimant, J. A. Vachon. On October 22, 1914, the said Vachon wrote a letter to the Board of Works Committee of the city stating that on account of the change of grade of the said Sixth Ave. his property had been injured in the manner set forth in his letter and stating that the city should reimburse him for the loss sustained and suggesting that the same be referred to a board of arbitration.

On November 4, 1915, the said Vachon, by his solicitor, served a notice returnable before a Judge in Chambers to appoint an arbitrator under the City Act to arbitrate on the claim of the said Vachon.

My brother McKay appointed an arbitrator and from this the city has appealed. The grounds of appeal are as follows:

2. That the claim of the applicant is barred by sec. 358 of the City Act, being ch. 16 of the Statutes of Saskatchewan of 1915, in respect the said Vachon did not make a claim for damages in writing with particulars of the claim within one year after the injury was sustained. 3. In the alternative, that the said Vachon did not deliver, or furnish to the said city any particulars, or alternatively, sufficient particulars of his claim against the city. 4. In the further alternative, that the matters complained of by the said Vachon as set forth in his affidavit of October, 1915, having been done by the city not in the exercise of any powers conferred upon it under the City Act or otherwise, but wrongfully, the remedy of the said Vachon is not by arbitration under the City Act. 5. In the further alternative that the terms of the said order appointing the said Thomas H. McGuire, arbitrator, if said order be not discharged, be amended so as to restrict his appointment to determine only the compensation payable to or damage sustained by the respondent in so far as same arise from work properly done by the appellant under the statutory powers conferred upon it by the City Act only.

At the time of the injury complained of, the City Act in force was ch. 84 of the R.S.S. 1909.

With the exception of sec. 247 of that Act, there was no section requiring the applicant to give notice to the city of his claim, and it was admitted before us that no notice had been given by the city in a local newspaper of the completion of the work. I think, therefore, that section did not apply.

It was contended, however, by virtue of ch. 16 of the Statutes of 1915, sec. 358, the applicant, not having made a claim in writing, with particulars of his claim, within one year after the injury was sustained, has no right to make a claim for damages. Said sec. 358 is as follows:—

> Except where the person entitled is an infant, a lunatic, or of unsound mind, a claim for damages resulting from his land being injuriously affected, shall be made in writing, with particulars of the claim, within one year after the injury was sustained, or after it became known to such person, and, if not so made, the right to such damages shall be forever barred.

I am of the opinion that the said section is not applicable to the case at bar. To give effect to the contention of the city would mean that the effect of the statute of 1915 would be to absolutely

SASK.

S. C.

CITY OF PRINCE ALBERT v. VACHON.

Elwood, J.

take away the claim of the applicant, because that statute was passed more than a year after the injury complained of and, therefore, there never was since the passing of the Act any occasion upon which a notice provided for by the Act could be given.

The case is quite different from cases cited by the city; for instance, in *Rex* v. *Dharma*, [1905] 2. K.B. 335, the statute under review did not take away the right but merely extended the time within which the proceedings might be taken. The same was the case in *The Ydun*, [1899] P. 236. The case at bar seems to me to be similar to *Hickson* v. *Darlow*, 52 L.J. Ch. 453. The question in that case was the effect of the Bills of Sale Act, 1882, sec. 8, of which provided that every bill of sale

> shall be registered under the principal Act within seven clear days after the execution thereof—otherwise such bill of sale shall be void in respect of the personal chattels comprised therein.

It appeared that the bill of sale in question was given on October 5, 1882, before the Bills of Sale Act, 1882, came into operation.

Fry, J., is quoted as follows:—

> In the next place, the difficulty in which the holder would be placed would be great, because he would be required to register in seven days. Consequently, his right would be avoided by a statute which does not give him an opportunity to put the matter right.

And it was held that the statute was not retrospective.

It seems to me that the law is correctly stated by Channel, B., in *Wright* v. *Hale*, 30 L.J. Ex. 40 at 42, where he says as follows:

> When an Act of Parliament is made which from the time of its operation, whenever that time shall be, will have the effect of taking away a right of action that had actually vested before the Act passed, then I agree in the argument of Mr. Chambers that the Court ought to see clearly that the legislature intended the Act to have a retrospective operation.

And Wilde, B., at p. 43, is reported as follows:—

> And the principle that seems to me to be applicable to the case is this, that where you are dealing with a right of action, and an Act of Parliament passes, unless something express is contained in that Act, the right of action is not taken away; but where you are dealing with mere procedure, unless something is said to the contrary, and the language in its terms applies to all actions, whether before or after the Act, there I think the principle is, that the Act does apply without reference to the former law or procedure.

In my opinion, the effect of requiring the applicant to give notice of his claim so far as it affects the present case is something more than mere procedure. At the time that the statute of 1915 was passed, the applicant had a claim for damages. The law, as it then stood, did not require any notice of his claim to be given.

The statute of 1915, if it applies, takes away the right without giving the applicant—to quote the language of Fry, J., *ante*—"an opportunity to put the matter right." I am of opinion, therefore, that the section of the statute of 1915 is not retrospective.

This, therefore, disposes of the first two of the above objections, because, as stated above, the applicant was not bound to furnish any particulars of his claim and, therefore, it was immaterial whether or not the particulars furnished were sufficient.

So far as the third of the above grounds of appeal is concerned—the section under which the claim is made is sec. 245 of the above ch. 84; that section is as follows:—

> The said council or commissioners shall make to the owners or occupiers of or other persons interested in any land taken by the city in the exercise of any of the powers conferred by this Act due compensation therefor and pay damages for any land or interest therein injuriously affected by the exercise of such powers the amount of such damages being such as necessarily result from the exercise of such powers beyond any advantage which the claimant may derive from the contemplated work; and any claim for such compensation or damages if not mutually agreed upon shall be determined by arbitration under this Act.

It was argued before us that the compensation payable for land injuriously affected was only payable when some land had been taken and other land injuriously affected. I am of opinion, however, that the clear meaning of the above section is that the council shall pay damages for any land injuriously affected by the exercise of the powers conferred by the City Act upon the city.

Sec. 390 of the said ch. 84 provides that

> All public roads, streets, bridges, highways, lanes, alleys, squares or other public places in a city shall be subject to the direction, management and control of the council for the public use of the city,

and sec. 378 specifically provides for

> The opening, widening, straightening, extending, grading, levelling, macadamising, paving or planking of any street or public lane, alley, way or place.

I do not think there can be any doubt and, in fact, it was not seriously argued that the work of grading the street was a work in the exercise of powers granted by the said Act.

It was objected, however, that because the affidavit filed by the applicant as part of the material on the motion to appoint the arbitrator claimed damages in consequence of excessive and unnecessary grading that therefore something was being claimed beyond what could be assessed upon an arbitration under the

SASK.

S. C.

CITY OF PRINCE ALBERT v. VACHON.

Elwood, J.

Act, and that therefore the proper remedy of the applicant was by action at common law and not by arbitration. It is quite true that the affidavit does so claim, but there was put in as part of the material the notice which merely claimed compensation on account of the change of the grade and I am of opinion that nothing in the affidavit takes away the right of the applicant to have determined by arbitration and as provided by the Act the amount of the damages, if any, sustained in consequence of the work performed by the city. It will be for the arbitrator to assess the damages at such an amount as is necessarily the result of the exercise of the powers; but I do not think that we should in any way formally restrict the arbitrator.

The order appealed from was made under sec. 370 of the Act of 1915, which is as follows:—

> Where the compensation or damages have not been agreed upon, the amount thereof shall be determined by the award of an arbitrator appointed by a Judge of the Supreme Court upon motion made to him by either party.

And in my opinion the sole duty of the Judge was to appoint an arbitrator and as I said above, it is the duty of the arbitrator to assess the damages in accordance with the provisions of the Act.

In my opinion, therefore, the appeal should be dismissed with costs. *Appeal dismissed.*

CAN.

S. C.

SINGER v. SINGER.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur, JJ. February 1, 1916.

1. WILLS (§ III G 7—150)—INCOME OF ESTATE DURING WIDOWHOOD—DISCRETION AS TO MAINTENANCE OF CHILDREN.

A will providing the payment to a widow, during the term of her natural life and as long as she shall remain a widow, the net annual income from the estate for the maintenance of herself and children, the annuity to cease upon her re-marriage, entitles the widow to such income during her widowhood for her own use absolutely, and vests in her the discretion, non-reviewable if exercised in good faith, as to the extent and manner of providing for each child, and does not obligate her to take into consideration the need of children who married or otherwise forisfamiliated.

2. WILLS (§ I F—60)—CODICIL—EFFECT ON TERMS OF WILL—LIMITATION AS TO TIME OF DISTRIBUTION.

A clause in a will, directing the payment to each of the testator's sons who shall reach the age of thirty years, a sum equal to half that portion of the estate to which he may become entitled under the will upon the death or re-marriage of his mother, modified by a codicil that the real property of the testator shall not be divided among the beneficiaries until after the lapse of ten years from the testator's death, does not thereby postpone the division to be made upon the death or marriage of the widow, but merely has the effect of suspending the payment to which any son may become entitled in so far as it may necessitate the sale or conversion of any real estate for that purpose.

[*Re Singer*, 22 D.L.R. 717, 33 O.L.R. 602, affirmed.]

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 22 D.L.R. 717, 33 O.L.R. 602, varying the judgment of Middleton, J., at the hearing. Affirmed.

Dewart, K.C., for the appellant, Mr. J. Singer.

Cowan, K.C., and *Rose*, K.C., for other appellants.

Watson, K.C., for respondent, Annie Singer.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—I am of opinion that this appeal should be dismissed with costs.

Davies, J.

DAVIES, J.:—The difference of opinion between the trial Judge, Middleton, J., and the Appellate Division, as to the rights of the widow, Annie Singer, to the net annual income arising from the estate during her widowhood is not very great. After consideration of the arguments advanced at bar on the construction of the provisions of the will and codicil relating to this net annual income, I accept that of the Appellate Division as probably the more correct one.

With respect to the construction of the clause providing for advancement to those sons of the testator who reached the age of 30, I entertained at the close of the argument a good deal of doubt. The reasons given in the dissenting judgment of Magee, J., are strong and cogent in favour of the construction he adopted, that the codicil did not interfere with the provision in the will for payment by way of loan to the sons on attaining the age of 30 years.

While I agree that the solution of the question is surrounded with difficulties, I have reached the conclusion that the arguments in favour of the construction adopted by the Appellate Division preponderate, and that the effect of par. 10 of the codicil is to postpone the right under the will of the sons who attain the age of thirty to be paid the one-half of their shares except as stated by the Chief Justice.

in so far as it may be practicable to make payments to them out of the personalty and the proceeds of such of the real property as the trustees may have sold.

On the whole, I adopt the reasoning and conclusions of Sir William Meredith, C.J., and would dismiss the appeal.

Under the circumstances and the reasonable doubts existing as to the true construction of these clauses of the will, taken together with Magee, J.'s dissenting opinion, I would not allow costs against appellants but would let each party pay his own.

CAN.
S. C.
SINGER
v.
SINGER.
Idington, J.

IDINGTON, J.:—The conditions existent in this family are unsatisfactory. I should, however, be sorry to increase and intensify their troubles and then perpetuate them by substituting the discretion of the Court for that of the mother whom the testator had wisely chosen to be head of the family when he was gone. She may make mistakes, but her maternal instincts will probably rectify or ameliorate them. The Court substituting itself for her, inevitably must make mistakes it never can rectify.

The carefully prepared judgment of the learned Chief Justice of Ontario, with which I agree, leaves nothing more for me to say on the question of interference with the mode of the mother's exercising her judgment.

The formal judgment of the Appellate Division lays down correctly the lines to be observed and yet as I read it puts no bar in the way of the mother aiding when they deserve it, even those over 21 and *forisfamiliated*.

On the question arising upon the construction of clause 10 of the codicil I agree with the result reached by the judgment appealed from.

The testator by a will, made in 1904, directed as follows:—

I direct my said trustees to pay to each of my sons who shall reach the age of thirty years a sum equal to half that portion of my estate to which such son is entitled under this my will upon the death of his mother, such portion to be valued at the time of each son attaining his thirtieth year, the valuation to be made by my executors and trustees and shall be final. Such payment to be considered as a loan from the estate.

and on October 31, 1911, two weeks before his death, made a long codicil thereto of which clause No. 10 is as follows:—

10. I hereby further direct that my real property shall not be divided among the beneficiaries as directed by my will until after the lapse of ten years from my death, and I further direct that the business of managing my real estate shall be carried on by my sons as it has been carried on heretofore, and I direct that my sons shall receive such salaries as shall seem just in the discretion of my executors in remuneration for their services.

And clause No. 14, the last, is as follows:—

14. And I further direct that anything mentioned in the aforesaid will which is at variance with the provisions mentioned in this codicil, shall be subservient and subject to this codicil.

The estate, at his death, consisted chiefly of over three hundred parcels of real estate in Toronto. Four of his sons had then reached the thirty-year limit.

The estate was under mortgages to three-eighths of its value. Much of it was unproductive or in a state of dilapidation, needing

repair. These and many other known circumstances must be borne in mind in attempting the interpretation and construction of this codicil. We can say nothing of the unknown which the prudent testator refrains from disclosing and which we cannot appreciate in order to help construction.

I should have supposed, but for judicial differences of opinion, the mere reading of this clause No. 10, in light of the surrounding facts and circumstances, restricted as it is to real estate, was so plain as to need no aid. But in effect it is urged that it must have read into it the word "finally" as qualifying the word "divided" therein. For the argument presented by appellant means, if anything, that the distribution provided for by the clause I have quoted from the will, was not in substance a division *pro tanto*, though conditionally subject, however, in case of a shrinkage of the estate to a return or reduction in share, but merely a loan, and that, according to some theories put forward, on good security and bearing a good rate of interest; the prospective share in the estate, of course, forming part of the security.

If it was in essential characteristics merely a loan, why all this litigation? The parties concerned, over thirty years of age, could possibly borrow in Toronto on their respective shares almost as advantageously as the executors without all this expensive litigation to be paid for, in addition to the usual commissions on such transactions.

Plus the contingency of death without issue, possibly insurable against, there is not much difference in the character of the borrowing by the trustees sought herein to be immediately enforced by this proceeding and that obtainable by each of the appellants in respect of his share.

For admittedly the trustees of the estate cannot just now, in the present state of the market, sell its real estate and can only meet the obligations which the construction contended for would involve, by borrowing at a great disadvantage.

All this is, it may be said, aside from the question of construction. I agree. I only desire to illustrate the real nature of what is contended for by those relying upon the language used in the clause relative to the advances to be made being merely loans to those attaining 30 years of age.

What has happened may, or may not, have been within the

CAN
S. C.
SINGER
v.
SINGER.
Idington, J.

contemplation of the testator when making his will, but assuredly it was when making his codicil thereto, and anything in the will at variance therewith is expressly made subservient to the codicil. Such submission extends to the giving, if need be, of an entirely different shade of meaning to that it might have borne standing alone and amid entirely different surrounding circumstances.

I think, however, such advances were merely intended to be *pro tanto* a distribution of the estate, but in order to provide for the contingencies necessary to be kept in view, having regard to the equal division ultimately to be made and contemplated by the testator, should be in such view, but in that only, treated as loans.

Assuming any such advance made upon terms only within the language of the clause and without any further stipulation for its return than implied therein, is it at all conceivable that any Court would maintain an action for the recovery back of any part thereof, save so far as needed to produce the equal distribution contemplated?

If not, then the advance is to the extent not so recoverable neither more nor less than the division in the language of the codicil "among the beneficiaries as directed by my will." Again, the language of the clause itself presupposes the money in hand; for nowhere is there any direction to sell or mortgage for any such purpose. To imply such an imperative direction in the clause or whole will (to be read now in light of the codicil now dominating its expressions) dealing with such an estate as left at the death of the testator, would be, I think, attributing to him a want of that business sense and foresight which, I think, he was possessed of.

If no other question had been raised than one asking the Court to compel the trustees to mortgage and pay for such a purpose, would the Court have listened to it and acceded to that which might spell ruin for the estate?

The testator realizing, as every sane man of experience and foresight must have done in the end of October, 1911, that by the end of a year thence, when his will would have become operative for purposes of partial distributions, and the fruits of real estate speculation would have begun to ripen; and of these a long period of depression in real estate was sure to ensue, provided against such contingencies. He realized the possibly disastrous results of

an enforced distribution under such conditions of a large part of his estate. He wisely anticipated all that and what was or might be involved therein and provided against it by clause No. 10 of this codicil.

We are invited to frustrate his purpose by putting on his will, and on this codicil, a construction that I venture to think would have surprised him. So far common knowledge, if we use it, can guide us.

But in view of the lapse of time between the making of will and codicil, it is not at all improbable, in light of the story unfolded herein by some of those concerned, that in the development of his sons he had found something to warrant him in providing (in a way his earlier hopes in that regard induced him to refrain from), against their possible or probable improvidence or that of some of them.

I do not think we are entitled to frustrate the results he aimed at, whatever they were, by placing upon his language used in clause No. 10, and clearly emphasized in clause No. 14, a construction it does not necessarily bear.

Moreover, it is quite clear he left to the future developments, that time and chance might bring, the earlier conversion, in the ordinary prudent way, of his real estate into personalty, whereupon the clause for partial distribution would become operative.

The power of sale remained intact, save that impliedly it was not to be used in obedience to an enforced demand for distribution within the period of ten years.

I need not dwell upon the bearing of other minor considerations such as, the income of the estate belonging to the widow and the consequent results upon it by the construction contended for; and the salaries provided in the codicil for the management of the estate by his sons, and the possibility of the codicil having been drawn by a non-professional hand as the providing for a seal in the execution thereof indicates.

The true construction must ever be in the case of a will, the ascertainment of the purposes of the testator to be gathered from the will read in light of the circumstances known to surround him, making it and not least of these the condition of the estate.

Then its entire scope and purposes must be kept in view and no single feature, unless so expressed as in this codicil, allowed to

CAN.

S. C.

SINGER v. SINGER.

Idington, J.

dominate the rest. So treating will and codicil I do not feel any doubt in the results I have reached.

I agree that no compensation is allowable to the executors. The actual labour in that connection is provided for by salaries to be paid the sons in regard thereto. The responsibility evidently was not to be compensated for. I think the appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—The important question turns upon the effect of clause ten of the codicil. It is by no means free from doubt, but I think effect may be given to the intention of the testator, as I infer from the admitted facts, without doing violence to the language. The intention unquestionably was, I think, to prohibit a sale of any part of the real estate for a period of 10 years. The appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—The first question presented on this appeal is as to the effect of the following provision of the will of the late Jacob Singer:—

> I direct my said trustees to pay to my wife, Annie Singer, during the term of her natural life and as long as she will remain my widow, the net annual income arising from my estate for the maintenance of herself and our children; should, however, my wife re-marry, then such annuity shall cease.

Middleton, J., who heard the case in the first instance on an originating notice, held that:—

> The said Annie Singer is not entitled to the net annual income arising from the said estate to her own use absolutely, but subject to the obligation to use the same not only for her maintenance, but also for the maintenance of the children of the testator, and that the right of any child to maintenance does not cease on attaining majority or marriage;

and he directed a reference to determine what allowance, if any, should be made to each of the children of Jacob Singer out of the income of the estate.

The Appellate Division varied this judgment by declaring that:—

> The said Annie Singer is entitled to the net annual income arising from the said estate during her widowhood for her own use absolutely, but subject to an obligation to provide thereout for the maintenance of the children of the testator or such of them as in her discretion to be exercised in good faith she shall deem to require the same, but such obligation does not extend to any child who has or shall be married or otherwise be forisfamiliated.

The appellants contend for the restoration of the judgment of Middleton, J. The respondent Annie Singer upholds the judgment of the Appellate Division. The other respondents, represented by Mr. Holman, maintain that the interest of Annie Singer

is absolute; that any obligation imposed upon her is not in the nature of a trust, but is purely moral; and that the children have no interest legally enforceable. The difference between the respective orders made by Middleton, J., and by the Appellate Division (apart from the exclusion of children married, or otherwise forisfamiliated), would seem to be that, under the latter, the discretion of the mother is wider and enables her, for reasons that seem to her sufficient, to exclude any child from maintenance. Interference of the Court is limited to a case of *mala fides* in the exercise of her discretion.

With Sir George Mellish, L.J.:—

I do not understand how a Court of Equity can execute a trust where the testator says that he has such confidence in his widow that he wishes her, and not the Court of Chancery, to say what share she shall have, and what share the children shall have. *Lambe* v. *Eames*, 6 Ch. App. 597, at p. 601.

According to many authorities language such as that used by the testator does not create a complete trust in the strict sense; *Bond* v. *Dickinson*, 33 L.T. 221; *Lambe* v. *Eames*, 6 Ch. App. 597, at p. 601; *Mackett* v. *Mackett*, L.R. 14 Eq. 49; *Allen* v. *Furness*, 20 A.R. Ont. 34; *Re Shortreed*, 2 O.W.R. 318; *Atkinson* v. *Atkinson*, 80 L.J. Ch. 370-372. But there are, no doubt, other authorities in which the contrary has been held, *e.g.*, *Scott* v. *Key*, 35 Beav. 291; *Woods* v. *Woods*, 1 My. & Cr. 401; *Longmore* v. *Elcum*, 2 Y. & C. Ch. 363. The line is difficult to draw. But the cases rather seem to indicate that a bequest of income will more readily be held to impose a trust, especially if given to the mother, than a similarly phrased gift of the *corpus*. Eversley on Domestic Relations (3rd ed.), p. 688. Yet whether she should, or should not, be held to be a trustee, the authorities seem to establish that there is an obligation toward the children imposed upon a widow to whom money is bequeathed for the support of herself and her children, which the Court will, under certain circumstances, enforce. *Allen* v. *Furness*, 20 Ont. App. R. 34; and *Booth* v. *Booth*, [1894] 2 Ch. 282; are instances in which the Court interfered to protect the fund in the interest of the children against creditors of a legatee subject to an obligation of maintenance. *Re G. Infants*, [1899] 1 Ch. 719, is a case in which the Court interfered on an admission of obligation made by an immoral mother. *Thorp* v. *Owen*, 2 Hare 607, was a case of admitted trust. But there are other cases in which, without holding

CAN.
S. C.
SINGER
v.
SINGER.
Anglin, J.

that a trust had been created, the Courts have, as against the parent, asserted the existence of an obligation in favour of the children which they would enforce. *Re Robertson's Trust*, 6 W.R. 405; *Raikes* v. *Ward*, 1 Hare 445; *Castle* v. *Castle*, 1 De G. & J. 352; *Browne* v. *Paull*, 1 Sim. (N.S.) 92, at 103; *In re Pollock*, [1906] 1 Ch. 146. *A fortiori*, if there be a trust, however wide the discretion, the Court will interfere in the event of failure or refusal to exercise it honestly.

As Theobald says (7th ed.), p. 491:—

> The decisions upon gifts to a parent for the benefit of himself and his children run into fine distinctions.

See cases collected in Lewin on Trusts (10th ed.), at p. 157, and Jarman on Wills (10th ed.), pp. 890 *et seq.*

After fully considering all the provisions of Jacob Singer's will, I agree with the view expressed by Middleton, J., when, speaking of the testator's intention, he said:—

> Mr. Singer undoubtedly had unbounded confidence in his wife. Many expressions in the will point in that direction; and I think that his dominant intention was that during the lifetime of the wife, so long as she remained his widow, she should occupy substantially the same position towards the children as he occupied himself.

In that view there would be no trust properly so called. The obligation of the mother would be almost purely moral. The only right enforceable against her in the Courts would be the right to support which the law gives to minor children against their father, commensurate with his means and station in life, subject to the further limitation, that the Court will not interfere to enforce that right against the mother if she should, in the *bonâ fide* exercise of her discretion, determine that the circumstances warrant her withholding maintenance in part or in whole in the case of any child. That, I take it, is the measure of the children's right which the judgment of the Appellate Division accords.

This wide discretion the mother appears to have under such a provision as that with which we are dealing, which involves determining from time to time and under varying circumstances how much of the income should be used for each and any of the purposes indicated, and it is subject to curial interference or control only when it is shewn that she has not exercised it fairly and honestly; *Costabadie* v. *Costabadie*, 6 Hare 410; *Tabor* v. *Brooks*, 10 Ch. D. 273, at 277; *Re Roper's Trusts*, 11 Ch. D. 272.

CAN.

S. C.

SINGER v. SINGER.

Anglin, J.

I am, with respect, of the opinion that this is the correct interpretation of the disposition made by the testator of the income of his estate. I desire, however, not to be understood as dissenting from the view expressed in the Appellate Division that, under the doctrine *stare decisis*, whatever may be the view now prevailing in England (Theobald (7th ed.), 495; Lewin on Trusts (10th ed.), p. 159), in Ontario the view expressed in *Cook* v. *Noble*, 12 O.R. 81, that married and otherwise forisfamiliated children are not entitled to share in a gift for maintenance such as this should be adhered to. But there is nothing to prevent the mother applying a part of the income for the benefit of adult and married children who may need assistance, if she can do so consistently with her duty to herself and her unmarried minor children.

I question the jurisdiction on an originating notice to determine the issue of good or bad faith on the part of the widow. At all events, if such a jurisdiction exists, I think the better course is that which has been taken in the Appellate Division, viz., in the first instance to dispose of the questions of construction and to determine finally the rights of the parties under the will leaving it to the children, after that has been done, to proceed, if they should deem it necessary and proper to seek the aid of the Court to enforce the rights so declared.

I would, for these reasons, maintain the judgment of the Appellate Division on the first branch of the appeal.

The next question is whether the provision of the will, which directs the trustees

> to pay to each of my sons who shall reach the age of 30 years a sum equal to half that portion of my estate to which that son is entitled under this, my will, upon the death of his mother, such portion to be valued at the time of each son attaining his thirtieth year, the valuation to be made by my executors and trustees and shall be final. Such payment to be considered as a loan from the estate,

is affected by clause 10 of the codicil.

> 10. I hereby further direct that my real property shall not be divided among the beneficiaries as directed by my will until after the lapse of ten years from my death, and I further direct that the business of managing my real estate shall be carried on by my sons as it has been carried on heretofore, and I direct that my sons shall receive such salaries as shall seem just in the discretion of my executors in remuneration for their services.

The will provided for the distribution of the estate on the death or re-marriage of the widow, any advances previously made

CAN.
S. C.
SINGER
v.
SINGER.
Anglin, J.

being brought into hotchpot. The appellant contends that it is only to his final distribution that the provision of the codicil applies and that it does not control or affect the right of the sons to advancements under the clause above quoted.

The will was made in 1904; the codicil in 1911, a month before the testator died. At his death his estate consisted almost entirely of real property. Up to five years before his death he had carried on the business of a watchmaker, jeweller, and money-lender. The capital invested in that business appears upon its discontinuance to have been used in acquiring lands and houses. The condition of the testator's estate, as it existed in 1904, when his will was made, had, therefore, been materially changed when he made the codicil in 1911. Assets of other kinds, no doubt considerable in amount, and out of which the advancements to the sons might have been made, had in the interval been converted into real estate. This circumstance must be borne in mind in considering the effect of the codicil, which not only postpones a division of the real estate for a period of 10 years, but directs that the business of managing it shall be carried on as theretofore. I am of opinion that the dominant purpose disclosed by this codicil was that, saving the power to make sales demanded by good management, the real estate should be kept intact for a period of 10 years, and that any provision of the will in favour of beneficiaries, other than specific or pecuniary legatees, inconsistent with that purpose should yield to it. For the purpose of this provision of the codicil advancements to the sons which would entail a disposition of the real estate would, in my opinion, be in the nature of a division which the testator meant to prohibit. It has been suggested that the portions to be advanced might be raised under the trustees' power to mortgage. But, apart from the fact that the existence of mortgage incumbrances on the estate to the extent of $360,000 might well render that method of procuring money impracticable, it might entail the defeat of the very purpose which the testator had in view in making the codicil and would be an indirect method of accomplishing that which I cannot but think he intended to provide against. For these reasons and for those stated by Middleton, J., and the Chief Justice of Ontario, I would affirm the judgment in appeal on this question.

CAN.

S. C.

SINGER v. SINGER.

Anglin, J.

I have no doubt that by the 11th clause of the codicil directing that no salary shall be paid to the executors for their services as executors, the testator meant to deprive them of all right to remuneration in any form for their services in the administration of his estate.

I would dismiss the appeal with costs. Having had the opinion of two Courts against them on the main question—their right to immediate advancements—the appellants should, I think, have been satisfied. The slight difference in opinion between Middleton, J., and the Appellate Division as to the extent of the widow's discretion and the propriety of curial interference would not, in my opinion, justify our encouraging the carrying of appeals in cases such as this beyond the provincial Courts, as we would do were we to award the appellants costs' out of the estate, or relieve them from payment of the costs of the respondents.

Brodeur, J.

BRODEUR, J.:—After a great deal of hesitation I have come to the conclusion that this appeal should be dismissed.

In directing his trustees to pay to his wife the annual income arising from his estate, the testator intended to give her discretion as to the way she would dispose of that money for the maintenance of their children. She is expected to exercise that discretion with impartiality and wisdom. It may be that in the past the mandate imposed upon her has not been discharged in a satisfactory way, but it is expected that she will in the future treat all her children in a most just, equitable and impartial way.

On the other point in issue, I agree with the construction put on the will by the Appellate Division.

Appeal dismissed with costs.

OLDRIEVE v. ANDERSON CO., LTD.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee and Hodgins, JJ.A. January 10, 1916.

1. SALE (§ I D—20)—LUMBER IN ESSE—EFFECT OF INSPECTION AND ACCEPTANCE—CAVEAT EMPTOR.

The inspection of a quantity of lumber *in esse* at the time of the sale, followed by an acceptance of the shipment, brings into operation the rule of *caveat emptor* to exclude any implied warranties and settles all questions as to quality and quantity.

[*Towers* v. *Dominion Iron Co.*, 11 A.R. (Ont.) 315; *Jones* v. *Just*, L.R. 3 Q.B. 197, applied.]

Statement

APPEAL by the defendant from the judgment of the Junior Judge of the County Court of the County of Elgin, in favour of

ONT.

S. C.

OLDRIEVE v. ANDERSON CO. LTD.

GARROW, J.A.

the plaintiff, in an action to recover a balance of the price of lumber sold to the defendant company. Affirmed.

S. H. Bradford, K.C., for appellant company.

A. A. Ingram, for plaintiff, respondent.

GARROW, J.A.:—The plaintiff had a quantity of white ash lumber manufactured and piled at Dutton station for sale, and the defendant entered into negotiations with the plaintiff for its purchase.

One Schriner, a buyer for the defendant, came to Dutton and saw the pile, and made some, but not a complete, examination of it.

The plaintiff's price was $45 per thousand ft. Schriner informed the plaintiff that the defendant would only purchase subject to what is called "national inspection," a term well understood in the lumbering trade. To this the plaintiff at the time objected, and they parted without making a bargain.

Negotiations were subsequently renewed, and in the end the plaintiff agreed to accept national inspection. Then the defendant's manager, Mr. Charles G. Anderson, and a Mr. Inglis, acting for the Fisher Car Body Company of Detroit, to whom the lumber in question had been resold by the defendant, came to Dutton, met the plaintiff there, and the lumber was inspected, loaded on cars, and shipped, apparently to Detroit.

The defendant now contends that some 9,920 ft. more of No. 1 lumber was in the quantity inspected and shipped than, under the terms of the agreement, the defendant was obliged to take, for which the defendant claims a reduction at the rate of $20 per thousand. The defendant also contends that a cash allowance of 2 per cent. is customary and should have been allowed. The learned Judge held in favour of the plaintiff on both contentions, and I agree with his conclusions.

The first contention is, I think, concluded by the inspection and delivery at Dutton. The goods were *in esse* from the beginning of the negotiations—not goods to be manufactured. The rule *caveat emptor* therefore applied to exclude implied warranties. See *Jones* v. *Just* (1868), L.R. 3 Q.B. 197, at p. 202. And the inspection, followed by the acceptance and shipment away, settled all other questions, both of quantity and quality, in my opinion. See *Towers* v. *Dominion Iron and Metal Co.* (1885), 11 A.R. 315.

I am unable to see any evidence in the case sufficient to justify

ONT.

S. C.

OLDRIEVE v. ANDERSON CO. LTD.

a holding that the defendant is entitled to the 2 per cent. trade discount which is claimed.

The appeal should be dismissed with costs.

MACLAREN and MAGEE, JJ.A., concurred.

MEREDITH, C.J.O.:—I agree with the conclusion of my brother Garrow that the appeal fails and must be dismissed. Meredith, C.J.O.

I should have agreed with my brother Hodgins if I were able to take the same view of the facts as he has adopted.

In my opinion, the proper conclusion upon the evidence is that, when the appellant took delivery of the lumber at Dutton, it accepted it as answering its contract with the respondent.

It would, I think, be most unjust, after what took place at Dutton, to permit the appellant to take the position in which my brother Hodgins puts it, of having taken delivery, reserving or retaining the right to claim to recover for breach of the respondent's warranty as to the quantity of No. 2 common.

HODGINS, J.A., dissented. *Appeal dismissed.* Hodgins, J.A. (dissenting)

LINDSAY-WALKER v. HILSON.

MAN.

C. A.

Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron and Haggart, JJ.A. March 27, 1916.

1. EVIDENCE (§ VI F—542)—PAROL EVIDENCE TO SHEW LIABILITY ON PROMISSORY NOTE—DIRECTOR AND CORPORATION.

The general rule that parol evidence is inadmissible to vary the terms of a written contract applies also to a promissory note, and it is not open to the managing director of a corporation to shew by extrinsic evidence that the liability on a promissory note signed in his individual capacity was intended to be that of the corporation, which shortly afterwards went into liquidation.

[Sec. 52 (2) of the Bills of Exchange Act, R.S.C. 1906, ch. 119, considered; *Wilton* v. *Man. Independent Oil Co.*, 25 D.L.R. 243, 25 Man. L.R. 628; *Crane* v. *Lavoie*, 4 D.L.R. 175, 22 Man. L.R. 330, followed; *Madden* v. *Cox*, 5 A.R. (Ont.) 473; *Fairchild* v. *Ferguson*, 21 Can. S.C.R. 484, referred to.]

2. BILLS AND NOTES (§ I D 1—32)—LIABILITY OF DIRECTOR SIGNING NOTE OF CORPORATION—MEANING OF "I" OR "WE."

The word "we" instead of "I" used in a promissory note signed by an officer of a corporation in his individual capacity does not necessarily imply that the note was that of the corporation.

APPEAL from a judgment dismissing an action on promissory notes. Reversed. Statement

W. P. Fillmore, for appellant, plaintiff.

H. F. Tench, for respondent, defendant.

The judgment of the Court was delivered by

HAGGART, J.A.:—This action is upon three promissory notes for $50 each all bearing the same date and maturing respectively Haggart, J.A.

MAN.

C. A.

LINDSAY-WALKER v. HILSON.

Haggart, J.A.

in 45, 60 and 70 days. The form of the note in each case is the same. The wording of one is sufficient for our purposes. The first note is as follows:

Winnipeg, February 10, 1914.

$50.

Forty-five days after date we promise to pay to the order of Lindsay-Walker Company, at our office, fifty 00/100 dollars with interest at the rate of.....per cent. per annum. For value received.

Fred Hilson.

The trial Judge nonsuited the plaintiff, who appeals on the ground that parol evidence was admitted, contradicting the terms of the instruments.

Hilsons, Ltd., a corporation, were indebted to the plaintiffs. The defendant Hilson was their managing director. The plaintiffs' collector called on the defendant with the unsigned notes. The defendant signed them and gave them to the collector without any discussion. Shortly after the making of the notes Hilsons, Ltd., went into liquidation. The defendant says he intended to use a rubber stamp printing the name of the company above his own. Nothing further was said or done until after the company went into liquidation.

In *Chapman* v. *Smethurst*, [1909] 1 K.B. 73, Channell, J., on p. 76, in considering the question as to whether the company or managing director was liable on a promissory note in an action against the managing directors, says:

> That depends upon the intention of the parties, which intention I think must be gathered from the terms of the document alone.

On the appeal from this judgment Kennedy, L.J., cites with approval the above quotation upon p. 930 of the same volume.

The defendant also contends that the use of the word "we" in the promissory note implies that there was an intention to have the notes signed by the company. It was permissible to the maker to use either the word "we" or "I."

Sub-sec. (2) of sec. 52, of the Bills of Exchange Act (R.S.C. 1906, ch. 119), enacts that

> In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument is to be adopted.

As in the case of other contracts the note must be in writing, and it is subject to the ordinary rule that oral evidence is inadmissible in any way to contradict or vary its effect.

The law is discussed and the authorities are given in Falconbridge on Banking, 2nd ed. at p. 532.

It is not open to the defendant to show by extrinsic evidence that the liability is that of the insolvent company and not that of the defendant.

The question has been considered in our own Courts in *Wilton* v. *Man. Independent Oil Co.*, 25 D.L.R. 243, 25 Man. L.R., 628, and *Crane* v. *Lavoie*, 4 D.L.R. 175, 22 Man. L.R. 330. See also *Madden* v. *Cox*, 5 A.R. (Ont.) 473, and *Fairchild* v. *Ferguson*, 21 Can. S.C.R. 484.

The appeal should be allowed, and judgment entered for the plaintiff for $150 with interest at the legal rate of five per cent. from February 10, 1914, the date of the notes, with costs of the Court below and of this appeal and the judgment entered for the defendant in the County Court will be set aside.

Appeal allowed.

BRANDEIS v. WELDON.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, Galliher and McPhillips, JJ.A., January 6, 1916.

1. HOSPITALS (§ I—4)—PATIENT DROWNED DURING ABSENCE OF NURSE—PROBABILITY AS TO NEGLIGENCE IN CARE AND VIGILANCE.

A patient in an apparently normal condition, and in no apparent need of any special attention who, during a short absence of the nurse in charge, leaves the room and is on the following day found drowned in a creek in the proximity of the hospital, presents no case from which a jury could reasonably find the physician or his nurse guilty of want of reasonable care in discharging their duties and should therefore be withdrawn from their consideration; the fact that the defendant failed to timely notify the authorities of the patient's disappearance is immaterial in the absence of evidence that such failure was the cause of the patient's death.

[*Hillyer* v. *St. Bartholomew's Hospital*, [1909] 2 K.B. 820; *Foote* v. *Greenock Hospital*, [1912] S.C. 69, referred to. Compare *Lavere* v. *Smith's Falls Public Hospital*, 26 D.L.R. 346, 35 O.L.R. 98.]

Statement

APPEAL from the judgment of Hunter, C.J., in favour of the plaintiff in an action for negligence in caring for patient at hospital. Reversed.

Alexander Macneil, and *H. A. Maclean*, K.C., for defendant, appellant.

A. B. Macdonald, for plaintiff, respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I think the appeal must be allowed. There are only two items of negligence charged against the defendant in this case, and one is that there was negligence on the part of his servants or nurses in not preventing this unfortunate plain-

B. C.

C. A.

BRANDEIS v. WELDON.

Macdonald, C.J.A.

tiff's wife leaving the hospital some time between 10 and 11 o'clock on the night in question.

The only thing that could be discovered in the nature of evidence on that point is that the nurse had seen her at 10.15. She was then in a normal condition, she was improving, her temperature had been improving, she was cheerful, there were no indications of irresponsibility or that she needed special looking after or watching. The nurse came back approximately an hour afterwards and found her gone. She had got up and taken her clothes, with the exception of two small articles. The nurse assumed that she had gone home. The doctor was away and nothing was done until the next morning, when the husband came to inquire for his wife, and was told she had gone home, and then the police were communicated with, a search was made for her, and her body was found in the creek.

On the evidence it seems to me that reasonable men could not find that the defendant or his servants were guilty of want of reasonable care in the discharge of their obligations towards her.

The other branch of the case turns on the fact that the plaintiff was not notified of the disappearance of his wife until next morning. It is evident if there was any want of reasonable care in visiting her after 11 o'clock that the earliest time for notifying the plaintiff should be fixed only at a time shortly after 11 o'clock when the nurse went to her room and found that she had gone away, assuming that there was an obligation to notify in the case of an apparently sane person leaving the hospital of her own accord. There was no evidence to shew that failure to notify was the cause of death, in other words, that she was not already dead when the nurse discovered her absence.

The onus was on the plaintiff to shew that the death was caused by the failure of the defendant to notify, and there is not a tittle of evidence on this point.

Irving, J.A.

IRVING, J.A.:—I think the Judge should have withdrawn the case from the jury on the ground that there was no evidence of want of care on the part of the hospital staff. There was nothing in the history of the case to shew that it required watching. There was no reason to anticipate that the woman would leave the hospital, and no reason to suppose, if she had left, that she would do anything else than return to her own people.

B. C.
C. A.
BRANDEIS v. WELDON.
Irving, J.A.

It is for the Judge to determine whether there is any case to go to the jury before he allows the jury to deal with it at all. I think he should have taken it away on the above grounds.

There is a report of a case in England not unlike this. There the plaintiff's husband, some months previous to the accident out of which the action arose, had suffered from delirium tremens and had been received into the Infirmary of St. George in the East. The patient was shortly afterwards discharged as cured and some months later was brought in again with a certificate from the local doctor that he was suffering from fits, and he was put into the fits ward, a reference being made on his cards to his previous admission. He shewed no symptoms of violence, but after a few days, when the nurse who was in charge was away, he broke through the window and threw himself down and was killed.

The widow brought an action on the ground that more vigilance should have been exercised. That is the point in this action. The case was tried before Baron Huddlestone who gave judgment in her favour. This was afterwards reversed in the Court of Appeal, which held that no evidence of negligence was disclosed. The case has never been fully reported, but it is mentioned in Bevan on Negligence.

In the case before us there was no evidence to cause anyone to anticipate that the woman would behave as she did behave and therefore there was no case to go to the jury.

Galliher, J.A.

GALLIHER, J.A.:—I agree.

Martin, J.A.

MARTIN, J.A.:—I agree. Even assuming that the husband should have been notified when the patient's absence was discovered, the only possible inference was that she was already dead when her absence was discovered, and therefore the notification would have been futile.

McPhillips, J.A.

MCPHILLIPS, J.A.:—I am in agreement with what my brothers say, but I wish to add that it is a matter of regret that the verdict of the jury has to be overborne. However, the hospital authorities in this case did all that the law requires, which was the best care that physicians and nurses could give under the circumstances. There is no evidence that the physicians and nurses were not competent and that reasonable care was not exercised.

That being so, the decision in *Hillyer* v. *Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820, 78 L.J.K.B. 958, is really

B. C.
C. A.
BRANDEIS v. WELDON.
McPhillips, J.A.

the governing decision supplemented also by *Foote* v. *Greenock Hospital*, [1912] S.C. 69. Apart from a special contract the managers of a public hospital are not responsible for the patients they receive, provided they exercise due care in selecting a competent staff. I consider that in this particular case the attendance upon this patient was in its nature professional attendance and the professional attendants would be called upon to do all that was reasonable and proper consistent with their professional knowledge, and I cannot see that there was any absence of that.

I feel very much impressed by the language of Lord Loreburn in *Kleinwort Sons* v. *Dunlop Rubber Co.*, 23 T.L.R. 696, at 697, dealing with the verdict of the jury:—

> To my mind nothing could 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 of some plain miscarriage before it can be disturbed.

In the present case in my opinion there was error of law as there was no sufficient evidence to be submitted to the jury in the establishment of negligence, and it is plain that there was no sufficient evidence to suggest the finding of the jury.

I would refer to the case of *Cooke* v. *T. Wilson, Sons & Co.*, (1915), 32 Times Law Rep. 160, Lord Justice Phillimore at page 161.

In my opinion the jury could only come to one conclusion in this case and that conclusion should have been that there was absence of negligence and, being of that opinion, I consider that it is a proper case for the Court of Appeal to overthrow the verdict of the jury. *Appeal allowed.*

ALTA.
S. C.

JOHNSON v. MADSON.

Alberta Supreme Court, Appellate Division, Scott, Beck and Simmons, JJ. March 3, 1916.

1. VENDOR AND PURCHASER (§ II—30)—FORECLOSURE—PRACTICE—FAILURE TO APPEAL AGAINST ORDER NISI.

Where in an action for specific performance of an agreement for the sale of land an order *nisi* is not appealed against within the manner and period prescribed by the rules, and having been refused leave to appeal after the time has expired, the order of sale founded upon it must likewise stand.

Statement

APPEAL from the judgment of Stuart, J., refusing to set aside an order of sale in an action for specific performance. Affirmed.

A. H. Clarke, K.C., for plaintiff, respondent.

S. C. Woods, for defendants, appellants.

The judgment of the Court was delivered by

Scott, J.

SCOTT, J.:—The action is for specific performance of an agree-

ment for the sale of land, the plaintiff and the defendant Taylor being the vendors.

On December 18, 1914, the Master at Calgary made an order *nisi*, declaring that the agreement mentioned in the statement of claim should be specifically performed, declaring that certain sums were due thereunder to the plaintiff and defendant Taylor respectively and directing that, upon payment thereof with interest by the defendants or either of them, the plaintiff and defendant Taylor should convey the lands to the defendants and that, upon default in payment, the plaintiff might apply in chambers for an order cancelling the agreement or for an order for the sale of the lands.

Default having been made in payment the Master on September 21, 1915, ordered that, upon the plaintiff depositing with the clerk a sufficient transfer of the lands with the certificate of title thereto, the lands should be sold under the direction and with the approval of a Judge of the Court.

On November 3, 1915, the defendant gave notice of motion of an application by way of appeal from the order of sale and by way of a substantive motion for an order *re* setting aside both the order for sale and the order *nisi* upon certain grounds stated in the notice.

This application was heard by my brother Stuart, who, on November 15, 1915, dismissed the appeal from the order for sale and also the substantive application to set aside that order and the order *nisi*. No reasons for the dismissal were given by him in writing but he informs me that, upon the hearing of the application, he expressed the view that, as the order *nisi* had not been appealed against, the order for sale being founded upon it must stand.

Apparently by reason of the view then expressed by him the defendants on November 26, 1915, gave notice of an application for leave to appeal from the order *nisi*. This application was dismissed by my brother Stuart, December 6, 1915.

This appeal is from the order of November 15, 1915, refusing to set aside the "judgment given and order for sale made herein" the grounds of appeal stated relating solely to objections to the making of the order *nisi*.

In my opinion my brother Stuart was right in the view he

ALTA.

S. C.

JOHNSON v. MADSON.

Scott, J.

expressed that, if the defendants were dissatisfied with the order *nisi*, they should have appealed against it in the manner prescribed by the rules. Not having done so within the prescribed time and having been refused leave to appeal after that time had expired, both that order and the order for sale founded upon it must therefore stand. I would dismiss the appeal with costs.

Appeal dismissed.

N. S.

S. C.

URSULAN v. FOLEY BROS.

Nova Scotia Supreme Court, Graham, C.J., and Russell, Longley, Drysdale and Harris, JJ. February 26, 1916.

1. TRIAL (§ V C 1—285)—ACTION FOR DEATH OF WORKMAN—GENERAL FINDING BY JURY NEGATIVING NEGLIGENCE—SUFFICIENCY.

A general finding by a jury in an action for negligence causing the death of a workman by the fall of lumber which he was engaged in removing, that the death was not caused by the negligence of the defendant, thereby sufficiently covers any allegation of negligence in the action, rendering it unnecessary for them to make more specific findings as to whether the accident was caused by the negligence of defendant's employees or the defective condition of the plant.

Statement

APPEAL from the order for judgment in favour of defendants in an action brought by the administrator of the estate of a workman in the employ of defendant, who died from injuries received from the fall of a number of pieces of lumber which he, with others, was engaged in removing from the place where the lumber was piled. Affirmed.

R. H. Murray, for appellant.

H. Mellish, K.C., for respondent.

Drysdale, J.

DRYSDALE, J.:—The motion herein against the order for judgment granted on the findings of the jury in favour of defendants and for a new trial was based upon the allegation that in the absence of any answer to question No. 4 the order for judgment was improper. No. 4 was an inquiry as to whether there had been any negligence on the part of defendants' employees that caused the death of Vasile Ursulan. The jury found in answer to question No. 1 that such death was not caused by the negligence of the defendants, and plaintiff's counsel contended that this may well be and yet that there might be a finding of negligence against employees. Whether the answer to question No. 1 covers the negligence referred to in question No. 4 obviously depends on the charge of the trial Judge and after an examination of that charge I think it quite clear that the answer to question No. 1 must be treated as covering any allegation of negligence alleged in the action.

The trial Judge's report as to what occurred on the jury's return when the findings were handed in is conclusive, however, on this point and puts an end to any contention thereon made before us. The appeal must be dismissed with costs.

GRAHAM, C.J., concurred.

RUSSELL, J.:—The plaintiff is administrator of Vasile Ursulan deceased, who was employed by the defendants at the terminal construction work in the city of Halifax. He was performing duties which required him to assist in removing some pieces of lumber from a pile 8 or 9 ft. high for the purpose of sawing them into smaller pieces to be placed under a derrick. In the process of removing the lumber the conditions were in some way disturbed so that three or four heavy planks fell upon him and killed him. His case is that the lumber was carelessly and improperly piled and that the defendants are therefore responsible for his death. There was not much evidence of negligence, if indeed there was any. It is even quite possible that if a verdict had been found in favour of the plaintiff, based upon the assumed negligence of the defendant, it would have been set aside as against the weight of evidence.

The question was left to the jury whether the death of Ursulan was caused by the negligence of the defendants and the jury answered it in the negative.

There was a further question, "Did the death of Vasile Ursulan occur by reason of the negligence of any of defendants' employees?"

This was not answered by the jury in terms but the trial Judge asked the jury if by their answer to the first question they meant to convey the idea that there was no negligence on the part of the company or any of its servants, to which they replied that this was their view, or that it was what they meant by their finding. This incident does not occur in the stenographer's report but is communicated by the Judge who tried the cause.

The only point remaining to be considered is the contention of the counsel for the plaintiff based on the refusal of the trial Judge to put to the jury the following questions:

1. Was the death of the deceased caused by a defect in the condition or in the arrangement of the plant intended for or used in the business of the defendant? 2. If so, in what did such defect consist? 3. Was the death of the deceased caused by reason of the negligence of any

N. S.

S. C.

URSULAN v. FOLEY BROS.

Russell, J.

person in the service of the defendant who had any superintendence entrusted to him while in the exercise of such superintendence? 4. If so, of what did such negligence consist? 5. Was the death of the deceased caused by reason of the negligence of any person in the service of the employer to whose orders or directions the deceased at the time of the injury was bound to conform and did conform?

The trial Judge considered these questions unnecessary in view of those he had already put to the jury and I am of opinion that his judgment to this effect was right. If the pile of lumber can be considered a part of the defendants' plant the jury has negatived any defect in its condition. They have also negatived any negligence on the part of any person answering the description in the third question tendered or in the fifth question. There is, therefore, no reason that I can discover for setting their verdict aside and I should dismiss the appeal with costs.

Harris, J.

HARRIS, J.:—I agree that the motion for a new trial should be dismissed. There was no misdirection in the charge so far as I am able to find, and there is very little, if any, evidence of negligence and the jury has found against the plaintiff. The only difficulty I had on the argument was occasioned by the fact that the jury did not answer the third question and this has been removed by the statement of the learned trial Judge to the effect that when the verdict was rendered he asked the jury what they meant by their answer to the first question, and they explained that it meant that there was no negligence on the part of the defendants or any of their employees. Unfortunately the stenographer had for some unexplained reason left before the verdict was rendered and this important part of the trial was not reported. I understand the same thing has happened on other occasions, and in future I think the stenographers should understand that their work is not completed until the jury is discharged.

Appeal dismissed.

ALTA.

S. C.

ALLEN v. EVANS.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and McCarthy, JJ., February 19, 1916.

1. PARTNERSHIP (§ VI—29)—DISSOLUTION OF PARTNERSHIP AT WILL—RIGHT TO FORFEIT PARTNER'S SHARE FOR NON-PAYMENT OF DEBT TO FIRM—ACCOUNTING.

Where no time is fixed for the duration of a partnership, it is presumed to be one at will, terminable by any partner at any time; and though a partner's non-compliance with a demand by the other partners to pay a debt due by him to the firm is ground for a dissolution, they cannot, except by process of law or an agreement to that effect, forfeit and

acquire his interest in the firm in satisfaction of the debt, and must account to him for his share in the assets and the profits, up to a reasonable time after notice of such demand, subject to the deduction of the amount of his indebtedness to the firm.

APPEAL by the plaintiff from the judgment of Simmons, J., in favor of the defendants in an action for accounting by partner. Reversed.

J. A. Ross, for plaintiff, appellant.

W. Rea, for defendants, respondents.

The judgment of the Court was delivered by

SCOTT, J.:—About the end of 1911 the plaintiff, the defendant Evans and one Smith entered into partnership for the purpose of carrying on a commission business at Edmonton. The business, which appears to have been confined to the sale of horses, commenced on January 1, 1912, and was carried on under the name of "Evans and Smith." It was purchased as a going concern from one Stimmell for $800. By the terms of the partnership agreement the plaintiff was to furnish the money for the establishment of the business and was to be entitled to a one-third interest therein and to one-third of the profits. The amount required to establish it was the $800 paid to Stimmell. Of this amount the plaintiff paid $500 at the time of purchase and a note was given for the remaining $300 which was afterwards paid by the firm. The plaintiff appears to have been a sleeping partner in the firm, Smith was its auctioneer, and Evans, the book-keeper and manager. Scott, J.

The plaintiff admits that he has received his share of the profits up to the end of 1912, but he alleges that Evans, although repeatedly requested so to do, has not, since that date, made any return of the profits, or paid him anything on account thereof.

About December, 1912, the plaintiff became indebted to the firm for stock purchased by him therefrom to the amount of $379.10. This having remained unpaid and the firm requiring the money to defray pressing liabilities, Evans advanced the amount to the firm. Sometime in January, 1913, the three partners being present, Evans demanded the amount from the plaintiff, and told him that he would either have to pay or get out. The evidence clearly establishes that all the parties understood that the effect of the demand then made by Evans was that, unless the plaintiff paid up, his partners would take over the plaintiff's interest in the business in satisfaction of his debt. The plaintiff states that he refused the demand and then stated that the business

ALTA.

S. C.

ALLEN v. EVANS.

Scott, J.

was good enough for him to stay in it. Smith states that the plaintiff's only reply was that the business was good enough, while Evans states that the plaintiff made no reply. It must, therefore, be assumed that the plaintiff did not accept of the ultimatum presented by Evans.

The plaintiff, not having paid his indebtedness at that time, Evans appears to have taken it for granted that he was no longer interested in the partnership business or in its assets.

Defendant Dyson bought Smith's interest in the business for $300 about the end of February, 1913. He desired to acquire a half interest and would not buy if the plaintiff retained his interest. He was informed by Evans that the plaintiff no longer had any interest and, relying upon Evans' statement and without consulting the plaintiff, he bought Smith's interest and also one-sixth interest from Evans, paying the latter $150 therefor. Evans and Dyson went into partnership on March 1, 1913, under the name of "Evans and Dyson" and its business was carried on at the premises occupied by the former firm.

The plaintiff claims that he is still a partner in the business. Smith states that until he sold out to Evans the plaintiff continued to be a partner while Evans claims that the plaintiff ceased to be a partner or to have any interest in the property of the partnership when he omitted to comply with the demand to pay the amount due by him. The trial Judge has found that the subsequent conduct of the plaintiff in taking his business to other auctioneers, or getting business for them and in other respects, was such as to lead to the conclusion that the plaintiff considered that he was no longer a partner, and, as there was evidence to support this conclusion, his finding to that effect should not be disturbed.

The finding of the trial Judge on this question is not clear as to the date upon which the dissolution took place. His finding being that it took place by reason of the non-compliance of the plaintiff with the demand to pay the debt due by him. Had he then accepted the terms then proposed to him and agreed to give up his interest in the partnership in satisfaction of his debt the dissolution would have taken place at that time, but not having accepted these terms, he was at least entitled to a reasonable time to consider the proposal. What would be a reasonable

time it is difficult to determine, but, in view of the statement by Smith that, until he sold out to Dyson at the end of February, the plaintiff remained a partner, and the fact that the term of the new partnership of Evans and Dyson began on March 1 following, the dissolution should be deemed to have taken place at the end of February, 1913.

The trial Judge has found that the plaintiff was bound to accept Evans' ultimatum to pay the amount due by him or get out, and that not having paid it, the remaining partners were entitled to treat him as no longer a partner, giving him credit for the $379.10 for his interest.

As no time appears to have been fixed for the duration of the partnership it was a partnership at will which could be determined by any partner at any time. At the time he delivered his ultimatum to the plaintiff Evans was entitled to dissolve the partnership unless the plaintiff paid up, but, in my view, he was not entitled to say to him, as he in effect did say, "Unless you pay up I will not only dissolve the partnership but Smith and I will take over your interest in the partnership in satisfaction of your debt." The firm could have sued the plaintiff for the debt, but, in the absence of any agreement on the part of the defendants, I know of no way by which his partners could acquire his interest in the partnership except by process of law.

The note for $300 given to Stimmell for the balance of the purchase money was paid by the firm. The books of the firm do not contain any entries showing how this payment was charged. The plaintiff states that Evans told him that it was charged to him, and deducted from his share of the profits. Smith states that Evans told him it was so charged. Evans' evidence upon this question is contradictory. He at first stated, "I think the $300 was paid out of all the profits, I don't think it was charged to Allen's share. The only thing I am sure of is that the note was paid." Later on in his evidence he states positively that it was paid out of the general profits. In view of the plaintiff's admission that he was to pay the whole $800 and of the admissions made by Evans to the plaintiff and Smith I think the reasonable conclusion is that it was paid out of the plaintiff's share of the profits.

The business of the firm appears to have been a profitable

ALTA.

S. C.

ALLEN v. EVANS.

Scott, J.

one as its books show that the net profits for the year 1912 exceeded $5,400. Evans and Smith appear to have concluded that, as they were doing all the work, they were not getting the share of the profits to which they were entitled and they therefore proposed to the plaintiff in December, 1912, that they should each receive a salary of $100 a month. The plaintiff assented to this on condition that he should have the use of the firm's stable. Smith agreed to this but Evans made no reply. The plaintiff assumed that the matter had been so arranged, but, upon going to take possession of the stable, Evans refused to let him have it. The latter states that he objected to carrying out the arrangement because he would not let the plaintiff have the stable. It is therefore apparent that Evans and Smith are not entitled to claim the $100 per month.

In view of what I have stated, I am of opinion that the plaintiff is entitled to a one-third interest in the property of the partnership and in the profits for the months of January and February, 1913, subject to a deduction of $379.10 the amount of his indebtedness to the firm. A reference to take the partnership account is unnecessary as the amount which the plaintiff is entitled to receive in respect of his share can be ascertained from the evidence given at the trial.

As to the value of the plaintiff's interest in the partnership estate, the evidence of Smith is to the effect that shortly before Evans delivered his ultimatum, he (Smith) offered to sell his interest to the plaintiff for $400 or to buy his interest for the same sum. This appears to me to be a reasonable indication of its value at that time. It is true that Smith shortly afterwards sold his interest to Dyson for $300 but it is shown that he was then ill and that, being unable by reason of this illness to fulfil his duties as auctioneer, he had been obliged to employ Dyson to fulfil his duties. He may, therefore, have sold at an under value. I would place the value of the plaintiff's interest at $400.

The books show that the net profits of the business for January and February, 1913, amounted to $440.20, but against the January receipts was charged the auctioneer's license fee of $25 for the whole of that year, while only one-sixth ($4.17), is properly chargeable against the receipts for those months. This would increase the net profits for those two months to $451. I would fix the

amount which the plaintiff is entitled to recover at $175, made up as follows:—His share of the partnership assets, $400; one-third of the profits for January and February, 1913, $154.10 = $554.10; less the amount due by him to the firm, $379.10 = $175.00.

The plaintiff has not made out any case against the defendant Dyson. The only charge against him in the statement of claim is that the defendants were striving to sell and dispose of the partnership business and of this there does not appear to be any proof. He would, therefore, have been entitled to his costs against the plaintiff were it not for the fact that in his statement of defence he alleges that the plaintiff had absolutely no interest in the partnership business after first January, 1913, and was not entitled to any returns from it after that date, thus taking upon himself the responsibility of disputing a portion of the plaintiff's claim upon which I hold he is entitled to succeed. I therefore think he should be deprived of his costs, but the plaintiff should not be given costs against him.

I would allow the plaintiff's appeal with costs against defendant Evans alone, according to column 1 of schedule C and would direct that the judgment in the Court below be reversed and judgment entered thereon for the plaintiff against defendant Evans alone for $175 with costs on the above mentioned scale.

Appeal allowed.

THE KING v. COURTNEY.

Exchequer Court of Canada, Cassels, J., March 15, 1916.

1. EMINENT DOMAIN (§ III E 1—166)—COMPENSATION—GROCERY AND LIQUOR BUSINESS—LICENSE—ELEMENT OF VALUE.

The defendant J. C. had been carrying on for a long period a grocery and liquor business in the premises expropriated. The liquor side of the business was being operated at a profit, while the grocery did not yield large returns. The liquor license was only good for one year, and its renewal was dependent upon a petition being endorsed by a certain number of the ratepayers. Moreover, it was granted to the individual only so long as he continued in business in the same premises; and the defendant was an old man. At the time of the expropriation it was also shown that prohibition legislation was impending which would have put an end to the defendant's sale of liquor.

Held, that under all the circumstances the Court, in determining the amount of compensation, was not called upon to decide whether the license was an interest in land and value the same separately, but that the proper principle to follow was to compensate the defendant for the value of the premises to him and the loss of his business as a whole.

Statement

INFORMATION exhibited by the Attorney-General of Canada, seeking to have compensation assessed by the Court for certain

CAN.
EX. C.
THE KING
v.
COURTNEY.
Cassels, J.

premises in the City of Halifax used at the time of expropriation for the purposes of a grocery and liquor business.

T. S. Rogers, K.C., and *T. F. Tobin*, K.C., for plaintiff.

H. McInnes, K. C., and *H. Mellish*, K.C., for defendants.

CASSELS, J.:—This is an information exhibited on behalf of His Majesty the King to have it declared that certain lands are vested in His Majesty and to have the compensation assessed. The case was tried before me at Halifax on June 3 last.

It was agreed at the close of the case in Halifax that a memorandum should be put in setting out the various statutes relating to the licensing of public houses, shops, etc., in Halifax, and a written argument by counsel on the question whether in assessing compensation any regard should be had to the fact that Courtney held a license permitting him to sell liquors. This statement and arguments of counsel were received towards the middle of January last.

The expropriation plan was registered on February 13, 1913, and the compensation has to be assessed as of that date. The property in question is situate on Pleasant St., in the City of Halifax, having a frontage of 64 ft. 7 ins. on the east side of Pleasant St. On the south side of the property is a lane, called Gas Lane, with a width of about 20 ft., extending from Pleasant St. This lane forms the southern boundary of the property. The lot has a depth of 177 ft. and a width at the rear of 87 ft.

The defendant Courtney purchased this lot in 1883 or 1884 and erected thereon at that time the buildings now on the lot. The front part of the lot on Pleasant St. is used as a grocery store. The rear part is utilized as a store for the sale of liquors, and is entered from Gas Lane. Prior to moving into the present premises the defendant Courtney carried on a similar business on premises situate on the opposite corner, commencing in 1874 and continuing until 1884, when he removed to the present site.

During all the years from 1874 to the present time, Courtney had a shop license to sell spirituous liquors. The Crown offers $12,800. The defendant claims $30,300. The offer of the Crown is made up as follows: Land $3,300; house $8,400 and 10% is added for compulsory taking. Nothing has been allowed for good will, loss of business, value of the license, etc. The defendant acquiesces in the allowance for the house of $8,400

but claims, according to Mr. Roper's evidence, $4,000 as the value of the land, a difference of $700.

If the sole question for determination were the value of the premises, the land as it stands with the buildings, and no question of good will, loss of business, or value of the license came in question, I would consider the offer of the Crown of $11,700 a very liberal one. The way in which the valuator approached the subject is certainly a favourable one from the landowners' point of view. To value the land as if it were vacant and the house for what it would cost to replace it is hardly arriving at the market value of the premises as they stand. The government valuator was in a difficult position as he had nothing to guide him in the way of sales of similar property.

I do not think the valuation has been made on a proper basis. The defendant, as far as I could judge, is a respectable man. He has continuously carried on business at the premises in question and the opposite corner since the year 1874—about 39 years. During all this time he has had a shop license (which has been continued during 1914 and 1915 after the expropriation). In addition, a point not referred to, he has had his home since 1884 above the shop. His returns from the grocery business for an average of 15 years prior to expropriation have netted him an average between $400 to $500 per annum and from the liquor business an average of from $2,000 to $2,500 per annum. Altogether, in addition to his residence, he has had from $2,500 to $3,000 net receipts from the premises per annum.

It seems that a shop license is only good for one year and then can only be renewed on a petition endorsed by a certain number of the ratepayers and is granted to the individual and only so long as he continues in business in the same premises. I do not think I am called upon to deal with this case as if the sole question were: Is a license of the character of the one in question an interest in real estate for which compensation can be allowed?

The defendant is entitled to be compensated for the value of the premises to him and the loss of his business. Here are premises occupied since 1884 in which the defendant has carried on a prosperous business. He had the grocery business and the liquor business continuously carried on since 1873 and his license continuously renewed.

CAN.
EX. C.
THE KING v. COURTNEY.
Cassels, J.

What compensation is he entitled to for the loss of this business? The question of compensation is a difficult one. It must be more or less conjectural. The defendant is a man well advanced in years and lately has not been in very good health, necessitating the employment of an extra clerk. On his death the license would no longer be an asset. Moreover, the temperance agitation and probable prohibition is something not to be lost sight of. A considerable number of beer drinkers would leave the vicinity when the works now under construction are finished.

On the whole I think if the defendant is allowed $17,000 to include everything, including compensation for compulsory taking, he will be fairly compensated. I understand the Crown makes no claim for rent or for occupation of the premises since February, 1913. I therefore allow no interest as the occupation is of more value to defendants than interest. The defendant is entitled to the costs of the action.

If the defendants fail to agree as to the settlement for dower, a reference will be necessary, the costs to be borne by defendants, and the money can be paid into Court.

Judgment accordingly.

Annotation

Annotation—Eminent domain—Expropriation for Dominion public works—Compensation—Allowance for compulsory taking—Liquor business—License.

COMPENSATION GENERALLY—Under the provisions of the Dominion Expropriation Act (R.S.C. 1906, ch. 143, sec. 8), when the Minister of any department charged with the construction and maintenance of a public work deems it advisable to expropriate any land for the purposes of such public work, he shall deposit of record in the office of the registrar of deeds for the county or registration division in which the land is situate, a duly authenticated plan and description of such land, and upon such deposit being made the land shall become and remain vested in His Majesty. Following upon this, in order to have the compensation payable to the owner ascertained, the Attorney-General of Canada may cause to be exhibited in the Exchequer Court of Canada an information, setting forth, among other things, the names of the persons having any estate or interest in or encumbrance upon the land taken, and the sums of money which the Crown is ready to pay in respect of such estate or encumbrance. In this way the owners and encumbrancers are made defendants in the expropriation proceedings.

It is now settled law in Canada, following the decisions of the English Courts, that the right to compensation always exists where lands are taken, and where, but for the statute authorizing such taking, an action would have lain. *Paradis* v. *The Queen*, 1 Can. Ex. 191 at 193; *The Queen* v. *Barry*, 2 Can. Ex. 338. The principles upon which such compensation is assessed in the English Courts have been in the main adopted in the Canadian Courts. See *The Queen* v. *Barry*, 2 Can. Ex. 333; *Re National Trust Co. & C. P. R. Co.*

CAN.

Annotation

Annotation *(continued)*—**Eminent domain—Expropriation for Dominion public works—Compensation—Allowance for compulsory taking—Liquor business—License.**

15 D.L.R. 320, 29 O.L.R. 462. In *Dodge* v. *The King*, 38 Can. S.C.R. 149 at 155, Idington, J., in delivering the judgment of the Court, said:—"The market price of lands taken ought to be the *primâ facie* basis of valuation in awarding compensation for land expropriated. The compensation for land used for a special purpose by the owner, must usually have added to the usual market price of such land a reasonable allowance measured by possibly the value of such use, and at all events the value thereof to the using owner, and the damage done to his business carried on therein, or thereon, by reason of his being turned out of possession." In referring to this opinion in *The King* v. *Macpherson*, 20 D.L.R. 988, 15 Can. Ex. 215 at p. 217, Cassels, J., says: "I think a careful analysis of the authorities as a whole will show that the above is an accurate and concise statement of the law that should govern." *In Cedars Rapids Mfg. Co.* v. *Lacoste*, 16 D.L.R. 168, at 171, [1914] A.C 569 at 576, Lord Dunedin says: "The law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England." And he adds: "It has been explained in numerous cases, nowhere with greater precision than in the case of *In Re Lucas and Chesterfield Gas and Water Board*, [1909] 1 K.B. 16, where Vaughan Williams and Fletcher Moulton, L.JJ., deal with the whole subject exhaustively and accurately." Later on he states the following propositions:—"(1) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to 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."

COMPULSORY TAKING—SPECIAL ALLOWANCE—In addition to the market value of the land the Court may, in its discretion, add 10 per centum of such value to the compensation, because of the compulsory taking and the fact of the owner being turned out of possession. See per Burbidge, J., in *Symonds* v. *The King*, 8 Can. Ex. p. 322; per Idington, J., in *Dodge* v. *The King*, 38 Can. S.C.R. at pp. 155, 156; per Cassels, J., in *The King* v. *Macpherson*, 15 Can. Ex., at p. 233; per Audette, J., in *Raymond* v. *The King*, 16 Can. Ex. 1; and per Anglin and Idington, JJ., in *Hunting* v. *The King* (a case recently decided in the Supreme Court of Canada on appeal from the Exchequer Court, but not yet reported). In that case, Cassels, J., the trial Judge, had allowed the 10 per centum, and as the Chief Justice and Duff, J., affirmed the judgment below, it is a fair predication that four of the Judges of the Supreme Court in the *Hunting* case sanction the principle of such allowance. On the other hand, Brodeur, J., in the *Hunting* case, was of opinion that the 10 per centum in such cases ought not to be allowed, and the propriety of it has been challenged by other Judges as well as by text-writers. See per Hodgins, J., in *Re National Trust Co.*, 15 D.L.R. 320 29 O.L.R., 474. Cripps on Compensation, 5th ed., p. 111; Arnold on Damages, p. 225. The preponderance of authority is that the Court has a discretion to make the additional allowance in question.

LIQUOR LICENSE—In the case above reported there was a liquor license held by the owner at the time of the expropriation. The point was raised at the argument that the license by itself was an interest in land for which compensation might be allowed. It will be observed that the Court said that it

CAN.

Annotation

Annotation *(continued)*—**Eminent domain—Expropriation for Dominion public works—Compensation—Allowance for compulsory taking—Liquor business—License.**

was not called upon "to deal with the case as if the sole question were: Is a license of the character in question an interest in real estate for which compensation can be allowed?" But that the license was treated as an element in the business of the defendant for the loss of which he was entitled to compensation is clear from the learned trial Judge's remarks. It is important to note that Cassels, J., in *The King* v. *Rogers*, 11 Can. Ex. 132, dealt with the case of a liquor license which was similar to the one in question here, with the exception that the law then allowed the license to be removed in the name of the widow of a deceased licensee. He says (p. 135):—"With respect to the annual license held for these premises it appears that it could, as the license laws then stood, be renewed in favour of the owner, or in case of his death, of his widow; but no license could be granted to any other person for these premises. If the owner sold the property the use to which he put it could not be continued. That particular use therefore added nothing to the market or selling value of the property. It enhanced its value to the owner, but not its actual value. It seems to me, however, that the defendants are entitled to its value to the owner at the time of the expropriation, having regard to any use he could make of it, including, of course, the use he was then putting it to."

Re Cavanagh (1907), 14 O.L.R. 523, is authority for the proposition that a hotel license is a proper subject for compensation, the license not being a personal right only but one attaching to the property. That case was decided under the Dominion Railway Act, 1903.

"In assessing compensation for the loss of licensed premises, evidence is admissible that a license exists, and the compensation will be increased by the fact that the premises were licensed." Mayer on Compensation, p. 151, citing *Belton* v. *London County Council*, 68 L.T. 411, 62 L.J.Q.B. 30; *Wadham* v. *North Eastern R. Co.*, 16 Q.B.D. 747.

The case of *Lynch* v. *City of Glasgow* (1903), 5 Ct. Sess. Cas. 5th ser. 1174, is often relied on to support the doctrine that the loss of business which depends upon a mere hope of existing conditions being continued, but which may not be, ought not to be considered in assessing compensation in expropriation cases. There the pursuer was tenant of certain licensed premises under a lease for years, and it was held that the expropriating authority was not liable to pay the pursuer any sum for the chance of obtaining a renewal of the lease. The Lord President, in giving judgment, says at p. 1180:—

"I think that the Lord Ordinary is correct in saying that there is no reported case since the Act of 1845 was passed, in which the chance of a tenant, or his successor, obtaining a renewal of his lease after its natural expiry, has been taken into account in assessing compensation, although the case must have occurred very frequently, and if this be so, the present case involves a new departure of great importance and of far reaching consequences. It appears to me that such a claim could only prevail if it was established that the chance or hope of obtaining a renewal of a lease after its expiry, is an 'interest in the lands,' in the sense of the statutes, and I am unable to find any warrant either in the statutes or in the decisions for adopting this view. A lease during its currency has some of the attributes of a real right or interest in lands, but the chance of its being renewed by the personal volition of the lessor, does not seem to me to be in any reasonable sense an interest in land.

Annotation *(continued)*—**Eminent domain—Expropriation for Dominion public works—Compensation—Allowance for compulsory taking—Liquor business—License.** CAN. Annotation

for the purposes of such a question as the present.' Cassels, J., in *The King* v. *Wilson*, 22 D.L.R. 585 (1914), 15 Can. Ex. 283, at 289, observes: "*Lynch* v. *City of Glasgow* is a decision based upon the Land Clauses (Scotland) Act, 1845, which, as far as I can see, is practically the same as the English Lands Clauses Acts and our Expropriation Act as construed by the various decisions in this Court." On the other hand, Riddell, J., expressed the view in *Re Cavanagh and The Canada Atlantic Railway Co.*, 14 O.L.R. 523, that the statute there in question (the Dominion Railway Act, 1903, now R.S.C. 1906, ch. 37), is so much broader in its provisions than the Lands Clauses (Scotland) Act of 1845 as to entitle the owner of licensed premises in Canada to compensation for the loss of his chance of renewal.

ESSENTIAL CHARACTER OF LIQUOR LICENSE—In the case of *Hernandez* v. *The State*, 135 S.W. 170, the Court of Civil Appeals of Texas considered the nature of a liquor license as an element of property. The judgment there lays down the doctrine squarely that a license to sell intoxicants is not property within the constitutional prohibition against deprivation of property without due process. Neill, J., says:(p. 171) "A license to sell intoxicating liquors is neither a contract nor a property right in the licensee, but a mere permit to do what would otherwise be unlawful. It has none of the elements of property and confers none within the constitutional provision that no person shall be deprived of life, liberty or property without due process of law."

CHARLES MORSE.

Re SOVEREIGN BANK OF CANADA; CLARK'S CASE.

ONT S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee and Hodgins, JJ.A. January 24, 1916.

1. INFANTS (§ I D 2—26)—LIABILITY AS CONTRIBUTORY UPON INSOLVENCY OF BANK—FAILURE TO DISAFFIRM—RATIFICATION.

An infant who, within a reasonable time after attaining majority, fails to repudiate a contract respecting bank shares purchased during infancy and standing in the infant's name, thereby assumes the statutory liabilities in respect thereto on the ground of laches and acquiescence: receiving dividends on the shares after attaining majority amounts to a ratification of their ownership, and upon insolvency of the bank the statutory double liability of shareholders under sec. 125 of the Bank Act, R.S.C. 1906, ch. 29, will therefore attach.

2. APPEAL (§ XI—720)—WHEN LEAVE GRANTED—RELIEF TO CONTRIBUTORIES.

Leave to appeal should be granted at the instance of a person who is sought to be made liable as a contributory, where there is reasonable ground to suppose that the would-be appellant may obtain further relief, and a prolongation of the litigation cannot be regarded as vexatious (*Per* Middleton, J.)

[See sec. 101 of the Winding-Up Act, R.S.C. 1906, ch. 144).

Statement

APPEAL from the judgment of RIDDELL, J., affirming an order of an Official Referee, under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, confirming the placing of the name of the appellant upon the list of contributories in respect of her "double liability" upon shares standing in her name, under the Bank Act. Affirmed.

ONT.

S. C.

RE SOVEREIGN BANK OF CANADA.

CLARK'S CASE.

Riddell, J.

George Kerr, for Muriel I. Clark, appellant.

Joseph Montgomery, for A. D. Clark.

J. W. Bain, K.C., and *M. L. Gordon*, for the liquidator.

RIDDELL, J.:—In the office of the Official Referee in the winding-up proceedings, Miss Muriel I. Clark was placed on the list of contributories in the Sovereign Bank of Canada for 5¼ shares; she appeared and gave evidence, and her name was struck out of the list; thereafter certain facts came to light shewing that her evidence, while no doubt truthful, was by no means all the truth, the case was reconsidered (no formal judgment having been taken out), and her name reinstated. This proceeding, which her counsel before me animadverted upon as most extraordinary, seems to me to be most just and wholly proper—precisely such as was the plain duty of the Referee. She now appeals.

The appellant, born on the 6th December, 1890, was living with her father in Toronto; Mr. Stewart, the general manager of the Sovereign Bank, was a brother-in-law of Clark's; and Clark, believing that an investment in the bank's stock would be remunerative, bought for his daughter some shares, paying for them with his own money, but having the shares put in her name.

The following were the transactions:—

1903, Dec. 31.	Transfer from Stewart "in trust"....	1 share
1904, Dec. 14.	" " " "	2 "
1905, June 3.	New stock allotted, May 8, 1905....	1 "
" " 13.	Transferred by H. D. Eby.....	1 "
1906, July 15.	New stock allotted Mar. 31, 1906...	2 "
	In all.....	7 shares
1907, Aug. 12.	The capital was reduced by 25% ...	1¾ "
	Leaving in Miss Clark's name.....	5¼ "

It will be seen that during all this time Miss Clark was an infant: she did not know all the particulars—perhaps no particulars at all—but she knew she had some shares in the Sovereign Bank, as I should judge from her own evidence: "I think I knew—I knew I had some shares . . . I didn't know how many, but I knew I had some shares."

Dividends were declared from time to time; dividend cheques were issued and deposited to the credit of Miss Clark in the bank,

apparently without communication with her. There is one exception in the cheques produced—the dividend cheque for the 16th August, 1907, for $7, was paid on her endorsement, but in December, 1907, the previous custom was reverted to.

Other moneys were paid into this account, and on the 20th January, 1908, there was a balance to her credit of $149.28—the bank had then got into difficulties, and the amount was taken out of the Sovereign Bank and deposited to the credit of Miss Clark in the Merchants Bank of Canada on the last named day—of this at least $102.80 came from the dividends.

This account is still current; it consists of the original sum, $149.28, with a few trifling deposits and interest declared and added from time to time: Miss Clark by cheque withdrew $110 on the 4th October, 1913, leaving then in the account the sum of $93.03, thereby receiving $56.25 (at least) from the original $149.28, and consequently (at least) $9.77 from the bank's dividends.

She was then of full age, and it is contended that this act was a ratification.

Miss Clark says that, shortly after she came of age, she was told that shares were bought by her father in her name; she knew that the money in the Merchants Bank "came from the Sovereign Bank;" her father told her that she "had some money in the Merchants Bank from the Sovereign Bank." She knew the meaning of "dividends," but didn't think she "bothered about dividends;" and, "no matter whether it came as a dividend from shares or not," she was "going to use the money when it was there for herself;" she "understood that this was some money that came from the Sovereign Bank in connection with these shares . . . some money connected with these shares that" her "father had bought in her name."

It seems to me that the only conclusion is that she knew or believed that the money came from her ownership of shares in the Sovereign Bank.

Before the Referee, her counsel took the position that the liquidator had no right to recover back the dividends, the argument being as follows:—

"7. The liquidator contends that, if Miss Clark is entitled to repudiate double liability, she should pay back the dividends she has received in respect of these shares; on the ground that,

ONT.

S. C.

RE SOVEREIGN BANK OF CANADA.

CLARK'S CASE.

Riddell, J.

the contract being thus rendered void *ab initio*, she cannot retain any benefit under it.

"8. This principle might be applied if payment of dividends could have been considered as part of the original contract, as would be the case if she had made some deal with these shares and had received part payment. In such a case, if she repudiated the contract, she might be asked to pay back the money so received. Here the contract was complete when she paid for the shares in full, and the dividends she subsequently received were undoubtedly dividends subsequently earned by the bank by the use of her money; and, as she is making no claim to get her money back, the liquidator can have no claim to get back from her the profits earned with this money while she was an infant, and which have been paid over to her; the money, having been *bonâ fide* paid, cannot be recovered back: *Langley* v. *Van Allen* (1900), 32 O.R. 216; Smith's Leading Cases, 10th ed., vol. 2, p. 430."

The act of the appellant was an express ratification of the ownership of the stock, as it seems to me. Upon the argument before me, I asked Mr. Kerr if his client was willing now to pay back the dividends—after consulting the father, he gave a most reluctant consent that the money should be paid back, but insisted on his client's costs being paid (not, however, as a condition, as I understood it).

It is, to my mind, too clear for argument that receiving any part of the money made available by any proceeding, however irregular, is a ratification of that proceeding: *Clark* v. *Phinney* (1896), 25 S.C.R. 633; *Steen* v. *Steen* (1907), 9 O.W.R. 65, affirmed in the Court of Appeal, 10 O.W.R. 720.

The act of Miss Clark in knowingly receiving money, to which she was entitled only if she was the rightful owner of the shares, is, in my view, a ratification by a person after attaining majority of the acts done in her name when she was an infant—this is strengthened by the position taken before the Referee when she did not repudiate the ownership of the stock.

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

In this view, the appeal for an order making the father liable on these shares also fails—I do not think this a case for costs.

Muriel I. Clark moved for leave to appeal from the order of RIDDELL, J.

Middleton, J.

The motion was heard by MIDDLETON, J., in Chambers.

ONT.

S. C.

RE SOVEREIGN BANK OF CANADA.

CLARK'S CASE.

Middleton, J.

MIDDLETON, J.:—Motion for leave to appeal to the Appellate Division from the judgment of Mr. Justice Riddell dismissing the contributory's appeal from the order of the Master placing her upon the list.

The question appears to me to be one which justifies further consideration. Miss Clark, while an infant, had stock in the Sovereign Bank, purchased for her by her father. This was, no doubt, intended by him as a gift to her. Seven shares were purchased between the years 1903 and 1906. The capital was reduced in 1907, so that her holdings became five and a quarter shares. While Miss Clark was yet an infant, the bank went into liquidation, a receiver being placed in charge. An arrangement was made by which certain other banks took over the customers' accounts where there was a credit balance. A small credit of about $150 stood in Miss Clark's name, it is said, derived in part, at any rate, from dividends upon these shares. This amount was transferred to her credit in the Merchants Bank, and she drew it from that bank. It has been held that this amounted to such a ratification of the ownership of the shares that Miss Clark is now precluded from setting up her infancy as a defence to the double liability upon the stock in her name.

No doubt, in ordinary cases, an infant is called upon to repudiate within a reasonable time after attaining majority: *Edwards* v. *Carter*, [1893] A.C. 360; but, where the liability is statutory and does not arise from an express contract on the part of the infant, the reasoning is scarcely applicable, and it may be that the liquidator cannot succeed unless he can shew an act of ratification.

I cannot look upon the taking of the credit balance in the account as being undoubtedly an act of ratification. It seems to me that this is an act quite irrelevant to the issue. The money in the Merchants Bank was in no way ear-marked as the issue or produce of this stock.

Ordinarily the act relied upon as amounting to the adoption of a contract during non-age must be one done with some intelligent appreciation of its significance. Here, this young lady is supposed to have intended to render herself liable for calls upon this stock to the amount of $525 by the withdrawing of this small deposit from the Merchants Bank. The line of cases

ONT.

S. C.

RE SOVEREIGN BANK OF CANADA.

CLARK'S CASE.

Middleton, J.

referred to in Simpson on Infants, 3rd ed., pp. 41 and 42, does not appear to have been adequately considered, for there is a marked distinction between the position of an infant shareholder with a company at the time of his attaining majority, as a going concern, and where the company is being wound up.

This bank was in truth being wound up at the time the infant attained her majority, although the winding-up order was not made till subsequently. Proceedings had been taken at the time of the bank's failure looking to the nursing of its assets in the hands of a receiver appointed by the Banking Association. A winding-up petition was then presented, and enlarged from time to time; but, when the winding-up order was made, this petition was dropped, and a new petition was substituted. This, I think, cannot interfere with the substance of the matter. At any rate, in determining what is a reasonable time for repudiation, the fact that the bank was in liquidation ought to be borne in mind.

As I understand my duty upon an application of this nature, I should permit an appeal* where there is reasonable ground to suppose that the would-be appellant may obtain relief by further appeal, and a prolongation of the litigation cannot be regarded as vexatious. This case is apparently one of great hardship, and the appeal appears to me to be one clearly arguable. Leave will therefore be granted.

Muriel I. Clark appealed accordingly, and the liquidator also appealed (by leave) from the order of RIDDELL, J., in regard to A. D. Clark.

Garrow, J.A.

GARROW, J.A.:—Appeal by Muriel Inman Clark from the order of Riddell, J., affirming the order of an Official Referee placing her upon the list of contributories, and by the liquidator from the order of the same learned Judge affirming the order of the Official Referee refusing to place A. D. Clark, the father of Muriel Inman Clark, upon the list—the appeals, which were closely related, having been argued together.

Muriel Inman Clark was born on the 6th December, 1890, and while she was still an infant, namely, in the years 1903, 1904, 1905, and 1906, her father, Mr. A. D. Clark, purchased certain shares in the capital stock of the Sovereign Bank, in all seven, in the name of his daughter. Of these, three shares were pur-

*See sec. 101 of the Winding-up Act.

ONT.

S. C.

RE SOVEREIGN BANK OF CANADA.

CLARK'S CASE.

Garrow, J.A.

chased from Mr. D. M. Stewart, the general manager of the bank, who apparently held them in trust; one from a Mr. Eby; and three, which had not been previously issued, from the bank.

The capital stock of the bank was afterwards by by-law reduced, and upon that reduction the shares now in question were reduced to five and a quarter shares. The shares were all fully paid-up.

On the 22nd day of December, 1913, the bank having become insolvent, winding-up proceedings were commenced and the liquidator was appointed. The claim now being made by him is in respect of the double liability under sec. 125 of the Bank Act, R.S.C. 1906, ch. 29.

The bank had really been in financial difficulties for some years previous to 1913. Down to the year 1907, dividends had been paid upon the shares in question, but none after that year. Payments were made by cheques (some fourteen in all) in favour of Miss Clark, all of which except one—dated the 16th August, 1907—were placed to her credit in the books of the bank. The history of the exception is not very clear. Miss Clark does not deny that the blank endorsement upon it (there is no other) was made by her. It bears upon its face the usual stamp by the bank's teller, as of a cheque paid across the counter. Miss Clark says she does not remember the circumstances, which is somewhat singular, for she was then a young lady of seventeen, and, so far as appears, was not in the habit of handling many cheques. Altogether it is, I think, a very reasonable presumption that she personally received the money for the cheque from the bank.

When the bank was struggling to overcome its financial difficulties, a number of its accounts were transferred to the Merchants Bank, which, with other banks, was endeavouring to assist the Sovereign Bank; and among the accounts so transferred was the account of Miss Clark. The transfer took place on the 18th January, 1908, and the amount, largely, although not quite entirely, made up of dividends upon the shares in question, was $149.28. Upon this account Miss Clark on the 4th October, 1913, drew her cheque for $110, which was paid to her. The balance still apparently remains in the Merchants Bank.

Riddell, J., held that, under the circumstances, Miss Clark was a shareholder in respect of the five and one quarter shares, and

ONT.

S. C.

RE SOVEREIGN BANK OF CANADA.

CLARK'S CASE.

Garrow, J.A.

therefore subject to the claim for double liability upon them, and dismissed both appeals; and with his conclusions I agree.

An infant may by contract become the holder of shares in a bank. The legal effect of such a contract is the same as that of other voidable contracts of an infant, namely, that it is valid until repudiated. See *Edwards* v. *Carter*, [1893] A.C. 360; *Viditz* v. *O'Hagan*, [1900] 2 Ch. 87, at pp. 97, 98. And the repudiation must, to be effective, take place within a reasonable time after full age is reached: *Holmes* v. *Blogg* (1817), 8 Taunt. 35.

In *In re Constantinople and Alexandria Hotel Co., Ebbetts' Case* (1870), L.R. 5 Ch. 302, an infant had applied for and been allotted shares. The head-note states that he attained his majority on the 8th April, 1864, and the company went on till June, 1865, when an order for winding-up was made. During this period, though he did not appear to have acted as a shareholder, he never took any steps to repudiate the shares, and it was held that he was bound by his acquiescence and must be placed on the list of contributories. When the case came first before the Master of the Rolls, it appeared that the infant had, after attaining his majority, executed a transfer of the shares, which appeared to form an important element in his judgment, as indicating a clear admission of ownership by the infant. But on appeal Sir G. M. Giffard, L.J., expressly put his judgment on the single ground of acquiescence, saying: "I do not rely on the transfer which he executed, but on the ground that he acquiesced for a lengthened period in being on the register." See also to the same effect, where a much shorter interval, namely, five months, was held to be fatal, *In re Blakely Ordnance Co., Lumsden's Case* (1868), L.R. 4 Ch. 31.

Miss Clark knew that her father had purchased some shares in her name. So much she admits in her rather reticent evidence. And the cheque of the 10th August, 1907, which she endorsed and presumably read, told her practically the situation as it is to-day. The cheque reads as follows: "Quarterly dividend No. 17. The Sovereign Bank of Canada, Toronto, 10th August, 1907. No. 208. $7.87. Pay to the order of Miss Muriel I Clark, seven 87/100 dollars, being quarterly dividend at the rate of six per cent. per annum upon five and one quarter shares in the capital stock of this bank standing in her name."

ONT.

S. C.

RE SOVEREIGN BANK OF CANADA.

CLARK'S CASE.

Garrow, J.A.

Having such knowledge, there is not only no evidence of repudiation or disaffirmance by her at any time prior to this application, but there is, on the contrary, a distinct affirmation by her of her apparent position of shareholder, by the withdrawal of the money in the Merchants Bank nearly two years after she had attained her majority—money which she must have known represented the accumulated dividends upon the shares in question.

The appeal of Miss Clark, in my opinion, utterly fails, and should be dismissed with costs. The appeal of the liquidator should also be dismissed, but without costs.

Meredith,C.J.O. Magee, J.A.

MEREDITH, C.J.O., and MAGEE, J.A., concurred.

Maclaren, J.A.

MACLAREN, J.A.:—I am of opinion that the judgment appealed from is wrong in so far as it is based upon ratification by the withdrawal by Miss Clark after attaining her majority of a portion of the money to her credit in the Merchants Bank, which was made up partly by deposits by her father and partly by moneys transferred from the Sovereign Bank, the latter having been originally made up of dividends passed to her credit.

The relation of a bank and its customer is purely that of debtor and creditor, and moneys deposited are not ear-marked in any way: *Foley* v. *Hill* (1848), 2 H.L. C. 28. The case is the same as if she had the money in her pocket derived from different sources and she had used some of it for a particular purpose. It appears altogether too remote to construe the drawing of money from one bank as a ratification of what had taken place with another bank, years before, while she was an infant.

The case is not so clear when the liability is put upon the ground of laches and acquiescence. She would be liable if she did not repudiate within a reasonable time after coming of age. What would be a reasonable time would depend on all the circumstances of the particular case. Here there were several special circumstances that would tend to lengthen the time. It appears that Miss Clark considered that her money had been lost. The bank was in fact being wound up outside of the Act, and a petition had been filed in Court, but not proceeded with. Finally this petition was withdrawn, and a new one presented and acted upon.

However, I am of opinion that, considering the lapse of time between her coming of age and the time of the presentation of the petition for winding-up which was acted upon, and the fact that

ONT.

S. C.

RE SOVEREIGN BANK OF CANADA.

CLARK'S CASE.

she had not repudiated the shares before the commencement of the actual winding-up, the appeal must be dismissed on the ground of laches and acquiescence. It is a hard case, and she is, in my opinion, legally liable only through the juggling of the petition for the winding-up, and her thereby becoming legally liable to the prosecution for the double liability.

Hodgins, J.A.

HODGINS, J.A., agreed with MACLAREN, J.A.

Appeals dismissed.

CAN.

S. C.

GIBB v. THE KING.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. December 29, 1915.

1. EMINENT DOMAIN (§ III C—135)—EXPROPRIATION BY CROWN—NATIONAL RAILWAYS—COMPENSATION—TOTAL OR PARTIAL ABANDONMENT—JURISDICTION OF EXCHEQUER COURT.

Under sec. 23 (4) of the Expropriation Act (R.S.C. 1906, ch. 143), the Exchequer Court has jurisdiction to adjudicate upon claims arising not only out of a partial abandonment of property not required but extends to claims for total abandonment as well, and upon the re-vesting of land taken the owner is entitled to claim compensation for damages sustained in consequence thereof in either such event, the provisions being applicable to expropriations for purposes of the National Transcontinental Railway under Act 3 Edw. VII., ch. 71.

[*The King* v. *Jones*, 44 Can. S.C.R. 495, referred to.]

2. DAMAGES (§ III L 2—240)—EXPROPRIATION BY CROWN—DEPRECIATION BY DESTRUCTION OF MARKET PLACE—LOSS OF ENHANCED VALUE BY ABANDONMENT OF WORK.

An expropriation by the Crown of property which is subsequently returned to the owner, does not entitle the latter to damages for depreciation in the value of the property arising from the destruction of a market place suffered in common by all property owners in the neighbourhood, nor for the loss of enhanced value by reason of the subsequent abandonment of the projected public work by the Government.

[*Gibb* v. *The King*, 15 Can. Ex. 157, affirmed by divided Court.]

Statement

APPEAL from the judgment of the Exchequer Court of Canada, 15 Can. Ex. 157, limiting suppliants on their petition of right. Affirmed by divided Court.

G. G. Stuart, K.C., for appellants, cross-respondents.

E. Belleau, K.C., for respondent, cross-appellant.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—Assuming as both parties to this appeal appear to have assumed throughout that the Expropriation Act is applicable to the proceedings, I am of opinion that the assistant Judge of the Exchequer Court has misapprehended the provision of the Expropriation Act governing this matter. The wording of the statute is simple and its meaning, I think, plain. Failure to regard the words of the statute has led to the confusion and difficulties which the Judge

discusses in his judgment occupying many pages of the printed case.

The lands in this case were taken under the powers vested in the Commissioners of the Transcontinental Railway by the National Transcontinental Railway Act, 3 Edw. VII., ch. 71. These powers which are contained in sec. 13 are, so far as material, very similar to those in sec. 8 of the Expropriation Act. This sec. 13 provides by sub-sec. 1:—

The Commissioners may enter upon and take possession of any lands required for the purposes of the Eastern Division and they shall lay off such lands by metes and bounds, and deposit of record a description and plan thereof in the office for the registry of deeds, or the land titles office for the county or registration district in which such lands are respectively situate; and such deposit shall act as a dedication to the public of such lands, which shall thereupon be vested in the Crown, saving always the lawful claim to compensation of any person interested therein.

The provisions of sec. 23 of the Expropriation Act are, I think, applicable to expropriations under the National Transcontinental Railway Act. See the case in this Court of *The King* v. *Jones*, 44 Can. S.C.R. 495.

This sec. 23, so far as material, provides by sub-sec. 1 that

whenever, from time to time, or at any time before the compensation money has been actually paid, any parcel of land taken for a public work, is found to be unnecessary for the purposes of such public work, the Minister may, by writing under his hand, declare that the land is not required and is abandoned by the Crown.

And sub-sec. 2:—

Upon such writing being registered in the office of the registrar of deeds for the county or registration division in which the land is situate such land declared to be abandoned shall revest in the person from whom it was taken.

And sub-sec. 4:—

The fact of such abandonment or re-vesting shall be taken into account in connection with all the other circumstances of the case, in estimating or assessing the amount to be paid to any person claiming compensation for the land taken.

It will be observed that this section makes no new provision as to any compensation or damages to be paid as between the Crown and the person claiming compensation for the land taken, but only declares that the fact of the abandonment shall be taken into account in estimating the amount to be paid to any person claiming compensation for the land taken.

The law casts the inheritance of land upon the heir and he is the only person in whom it vests lands without his consent.

The power conferred upon the Minister by this section is a

CAN.

S. C.

GIBB
v.
THE KING.

Sir Charles Fitzpatrick, C.J.

very exceptional one since it enables him to vest the land in a person even against his will. We might expect that the rights of persons affected by this arbitrary power would be carefully safeguarded by the legislature and that is what in fact we do find, for I do not know that protection in a wider form could be afforded to their interests than it is by sub-sec. 4 of sec. 23. This gives the Court the most ample and general authority by simply providing that in estimating the compensation to be paid for the land taken the fact of the abandonment is to be taken into account.

By sec. 30 it is provided that if the injury to land injuriously affected by the construction of any public work may be removed wholly or in part, by (amongst other things), the abandonment of any portion of the land taken from the claimant, and the Crown undertakes to abandon such portion "the damages shall be assessed in view of such undertaking." The intention of the legislature is, I think, the same in the rule, laid down in both secs. 23 and 30, that the fact of the abandonment of the land is to be taken into account in assessing in one case the compensation for the land taken and in the other for the injury to land injuriously affected.

The values of the land at the date of the expropriation and at the date of the abandonment have to be ascertained in the ordinary way but otherwise, in my view, it is immaterial to inquire what were the causes of the value of the land at these dates.

The value of the land at the time of the expropriation is ordinarily the compensation which the owner is entitled to claim. I refer to sec. 47 of the Exchequer Court Act and also to the decision of the Judicial Committee of the Privy Council in the *Cedars Rapids Mfg. and Power Co.* v. *Lacoste*, 16 D.L.R. 168, [1914] A.C. 569, to the effect that the compensation to be paid for land expropriated is the value to the owner as it existed at the date of the taking. If, by the inverse process to expropriation, the Minister forcibly vests the property in him again, the value of the land to the owner at the time of such revesting is an element to be considered in estimating the amount to be paid to him.

Suppose a business that has had to be removed when the property was expropriated; the property is abandoned by the Crown; the business cannot be moved back again; it may be years before the value can be realized, and meantime the owner is compelled to hold it for its speculative prospective value. In

taking into account the fact of the abandonment it might in such case be that only the immediate value would be allowed by the Court as a deduction from the compensation.

In a somewhat involved statement which, however, is baldly printed, the Judge suggests that if the Crown is to bear decrease in the value of the land, it should benefit by any appreciation. He forgets, however, that this is an entirely one-sided power and that while the Crown is not obliged to exercise it and would presumably only do so when such exercise would be beneficial to its interests, it would obviously be impossible to force upon the former owner the property for which he may have no use and which he may not want and at the same time call on him to pay for getting it a sum in excess of the compensation to which he was entitled on the expropriation.

The form in which the proceedings were brought before the Court, may have induced the error into which I think the assistant Judge of the Exchequer Court has fallen. It is not, as he says, an action for damages resulting from the abandonment. Briefly, he has treated the matter as if it were an option which the Crown took on the property until the payment of the compensation with a liability if it did not exercise the option to pay any damages caused the owner. That, however, is not what the statute does. It provides that, on the expropriation, the lands "shall be vested in the Crown saving always the lawful claim to compensation of any person interested therein." The present case is remarkable from the fact that the Government had the property valued and filed an information in the Exchequer Court setting forth that His Majesty was willing to pay compensation to the amount of $61,747.75. This sum, the defendants, by their statement of defence, accepted. The parties were thus completely *ad idem*, the land was transferred to and vested in the Crown and the compensation agreed on. Then by the Expropriation Act, as amended by 3 Edw. VII., ch. 22, there is added the power which may never be exercised, of abandoning and re-vesting the property in the original owner. It is more like the case between subjects of an agreement for sale at a valuation with an agreement superadded that the vendor will, at the option of the purchaser, within a given time re-purchase at the then valuation of the property. The cases are not, of course, identical, because the powers of the

CAN.

S. C.

GIBB
v.
THE KING.

Sir Charles Fitzpatrick, C.J.

Crown both of taking and abandoning the land are compulsory, and as I have before said, I do not think the value at the time of revesting is necessarily the amount for which the owner of the land should be called on to give credit.

Although the appellants may not be free from blame for the form in which their claim was presented to the Court, yet the basis of the judgment, being an erroneous construction of the statute, justice requires that the case should be sent back to the Exchequer Court to determine and award the amount to be paid to the appellants in respect of their claim for compensation for the lands taken, taking into account in assessing such amount, the fact of the abandonment in connection with all the other circumstances of the case.

I may add that I entertain no doubt as to the jurisdiction of the Exchequer Court, but if it were necessary to invoke it, I think the claim would be within par. (*d*) of sec. 20 of the Exchequer Court Act.

Davies, J.

DAVIES, J.:—This appeal is from a judgment of the Exchequer Court of Canada awarding the suppliant $3,000 for damages sustained by him by reason of the abandonment and re-vestment in the owners of a property in the city of Quebec, which had been expropriated by the Government of Canada for the National Transcontinental Railway.

The suppliant claimed that the lands and buildings had been expropriated in January, 1911, and had not been revested in them until July, 1912, and that while they were admittedly worth $61,747.75 in 1911 (that being the sum the Government tendered and the suppliant agreed to accept as their value), they had shrunk in value when re-vested to the sum of $30,000, the difference being the damages the suppliant sought to recover, viz., $31,747.75.

The evidence established the fact that there was a "boom" in lands in that part of the city of Quebec, where the property in question was situate, and at about the time these lands were expropriated, brought about in large measure by the belief current amongst the citizens that the principal or terminal station of the National Transcontinental Railway was to be built on the site then occupied by the Champlain Market on or towards which the buildings on the lands in question fronted. That the value of these lands consisted largely in the fact that they so fronted on

this market place on one side or end and on the river front on the other where the farmers came with their boats and produce to the market and that this fortunate conjunction enabled the owners to rent their buildings for shops, stalls and stores at very high rentals. That the general anticipation was that the removal of the market house would be followed by the building on its site and the adjoining lands of the principal station of the National Transcontinental Railway and that the subsequent change of plans, the demolition and removal of the market house to another site, and the construction of the principal station elsewhere caused a collapse of the boom and a great depreciation in nominal land values, and by reason of these facts, as stated in the suppliant's petition of right, his lot of land and buildings when returned by the Crown had depreciated in value to the extent of $31,747.75.

That these were reasons and causes of the high values placed upon the site and lands when expropriated and those placed upon them when returned were clearly proved by the suppliant's own witnesses Collier, Hearn and Colston and were indeed claimed as existing facts and their reasons in the suppliant's petition.

This claim was not allowed by the trial Judge for obvious and clear reasons. The Crown had the right to expropriate the market site and buildings, to demolish the latter and build their principal terminal station on that site and the adjoining properties they expropriated or to change the terminal station site elsewhere without being responsible for the rise or diminution in value of any properties expropriated or otherwise which such changes might cause.

The statutory right to abandon and revest these expropriated properties in their owners could, no doubt, only be exercised subject to the payment of such damages or losses as might have been caused to the owner in consequence of the Crown's proceedings; but the sudden rise or fall in the value of the properties arising from such causes as I have mentioned could not possibly be held to be such a "circumstance in the case" as should be taken into account "in estimating or assessing the amount to be paid to any person claiming compensation for the land taken." (See sub-sec. 4 of sec. 23 of the Expropriation Act, R.S.C., 1906, ch. 143.)

They were not special damages suffered by this land alone, but

CAN.
S. C.
GIBB
v.
THE KING.
Davies, J.

such as were shared in common by the land owners generally in the neighbourhood. They were not caused by the expropriation and the subsequent re-vestment of appellant's land, but by the change of market-site and Transcontinental principal station-site and, in fact, had nothing to do directly with either of these acts of expropriation and re-vestment. This sudden rise and fall in the temporary speculative value of lands in that section of the city were, no doubt, as shewn by the evidence, caused by public belief that the market-house site would become the terminal site of the Transcontinental, and to the subsequent change in that respect made in the Government's plans.

Under the circumstances, therefore, and with the evidence before him the learned trial Judge was right in my judgment in rejecting these fluctuating or speculative prices as the standard by which to estimate suppliant's damages. He allowed $3,000 as a fair and liberal allowance, I think, for the loss of rents the owners sustained during the period between expropriation and re-vestment of the property. The owner's possession had never been disturbed and he continued to draw the rents which were shewn to have been substantially reduced. The owner also escaped the payment of the taxes during the same period, which I should think must have been considerable.

If, however, the owner had lost or been deprived of his right to have sold his property at the high speculative values which may have been reached and had given any evidence to that effect I should certainly think such loss a legitimate damage which could be recovered because it would be special damage caused by direct interference with his right to sell his property. If his *jus disponendi* had been, not technically but actually, prevented by the expropriation and he had given any evidence to shew that he had actually lost a sale at the highest figures spoken of I see no reason why he should not be compensated for that loss. The rule laid down in the *Cedars Rapids* case, 16 D.L.R. 168, [1914] A.C. 569, at 171, is that the compensation to be paid for land expropriated is "the value to the owner as it existed at the day of the taking." It would seem to follow that in the case of lands expropriated by the Crown, with this statutory right of re-vestment subsequently exercised, the loss which the owner actually sustained by reason of his being deprived of the right to dispose of the property during the time the title was in the Crown would be the measure

of his damages. In the absence of any evidence of an offer to purchase the suppliant's right in the land, the question would be: What would they have brought in the market if put up at auction subject to the exercise of the re-vestment power by the Crown? *Cedars Rapids Mfg. and Power Co.* v. *Lacoste*, 16 D.L.R. 168, [1914] A.C. 569. See also *Pastoral Finance Association* v. *The Minister*, [1914] A.C. 1083.

The trial Judge reviews the evidence given on this question and concludes most fairly, I think, that

> it is impossible to find from it that an offer for either $60,000 or $70,000 was ever made the suppliant for the property before the expropriation.

He might have added or for any other sum either before expropriation or afterwards before re-vestment, for no specific offer ever was shewn to have been made by any one. The best that could be said for the evidence on this point was Ramsay's statement that inquiries were made by speculators, after expropriation, who were willing to consider these large sums. But nothing ever came of their consideration.

A syndicate of speculators was considering the matter, so Mr. Hearn said:—

> We had that in mind ($60,000). I don't know that I would have given that for it. We had in mind that it was worth $60,000.

But no offer ever was made to buy before or after expropriation nor, in my judgment, does the evidence shew that any chance of a sale at these figures was lost. Can it be doubted that if the existence of any such offer could have been proved it would have been, or if the reasonable chance of selling at the price of $60,000 could have been shewn that it would have been shewn?

It has been suggested that the case might be referred back and the suppliant given another "day in Court" to try and prove this loss, but I can see no reason or ground for such an unusual course and because of the absence of any such evidence as I have referred to and because I think the damages awarded ample I would dismiss the appeal with costs.

IDINGTON, J.:—The respondent on behalf of the National Transcontinental Railway, pursuant to the authority of 3 Edw. VII., ch. 71, on January 24, 1911, deposited in the registry office in Quebec, a plan and description of certain lands to be expropriated to serve said enterprise, and amongst said lands was a parcel belonging to appellants.

Idington, J.

CAN.
S. C.
GIBB
v.
THE KING.
Idington, J.

The parties hereto being unable to agree as to the compensation to be given for appellants' lands, the respondent, on October 22, 1911, filed an information in the Exchequer Court of Canada for the purpose of determining same and offered thereby the sum of $61,747.75 in payment thereof. The appellants pleaded thereto accepting said price.

On March 19, 1912, respondent filed a discontinuance, and on July 15, 1912, the Honourable the Minister of Railways and Canals for Canada, gave notice to the appellants that the lands so taken were not required for the purposes of the National Transcontinental Railway and that the proceedings were abandoned by the Crown.

Thereupon the appellants, on March 22, 1913, filed a petition of right in said Exchequer Court setting forth the foregoing facts and further alleging that respondent became thereby proprietor of said land and

that the land was abandoned in the month of July, 1912, subject to paying compensation to the suppliants (now appellants), for the value of the land so taken and the damages accruing by reason thereof.

The petition proceeded as follows:—

9. The said land was, on the 24th day of January, 1911, of the value of $61,747.75, and at the time that the said land was returned to your suppliants, in the month of July, 1912, it had a value of $30,000 only.

10. On January 24, 1911, the said lot was situate on a street bounding the Champlain Market, a large and much frequented market place in the City of Quebec, and it was anticipated at that time that the said market if removed would be replaced by the principal station of the National Transcontinental Railway, and in fact His Majesty the King was under contract with the City of Quebec, to which the said market place belonged, to replace the said market by the principal station of the said National Transcontinental Railway in the City of Quebec.

11. In the month of July, 1912, when the said property was abandoned to your suppliants, the Champlain market had been removed and destroyed, by and on behalf of His Majesty the King, and the proposal to erect the principal or any, railway station for the National Transcontinental Railway had been abandoned, and by reason of the foregoing facts, the said lot of land when returned by His Majesty the King had depreciated in value to the extent of $31,747.75.

12. The suppliants were put to great expense by reason of the taking of their said land by the Crown, and of the information filed for the purpose of determining the value thereof, to wit: in the sum of $500.

I set forth in full the only claims set up in said petition so that there need be no misapprehansion of what the claim herein is. There might, I suspect, have been other claims arising from the interference for a year and a half with the appellants' exer-

cise of dominion over said lands or dealing with same. These, if any existed, are not presented by the pleading.

The appellants never were dispossessed. The proceeding, it is said now, though not so alleged in the pleading, had injurious effect upon the appellants' profits derivable from the letting of parts thereof to tenants. Some of the leases had expired pending the proceedings before the abandonment.

On account of the anticipated expropriation being likely to be completed it was quite natural such tenants should look elsewhere for places of business, or perhaps take advantage of the uncertainty of tenure to get better terms. Although no case was made in regard thereto in the pleadings evidence was given relative to the subject of losses caused by reason of such disturbance of the tenants and prospective lettings. Upon that evidence the trial Judge allowed the sum of $3,000 in way of compensation for past and future probable losses occasioned thereby and costs to be taxed.

In his opinion judgment, the trial Judge held the appellants not entitled to recover in respect of the claims set out in above recited pleading.

The claim for costs in and about the information seems to have been dropped owing, it is alleged, to counsel for the appellants properly declining to be a witness. I presume the party and party costs were taxed against the Crown on the discontinuance. And if the solicitor and client costs could not be agreed upon as chargeable to the Crown, it is to be regretted.

I think it is also to be regretted that no evidence was presented as to the amount of the usual assessment of the property, and taxes usually paid thereon. I understood it to be admitted that for two years pending the Crown's registration of title, no taxes were or could be imposed and, hence, appellants benefited to that extent as result of that registration.

The disturbing effect upon leaseholds of a proceeding such as taken and kept open so long may not be fully compensated for by what has been allowed, but that on the meagre evidence presented and no claim thereto having been made in pleading, seems to me all that can be claimed.

The claim made for the difference between alleged values on the date of registration of the plan and the date of abandonment

CAN.

S. C.

GIBB
v.
THE KING.

Idington, J.

is, in my view of the law, quite untenable even if these relative values had been established, which I think they were not.

It is quite true that the legal effect of the registration of the plans was to vest the title in the Crown, but that, as Mr. Belleau well put it, was subject as it were to a resolutory condition which, becoming operative, divested the title and re-vested it in the appellants.

In the case of land held for an investment the injurious effect of such a proceeding as this in question, beyond creating an uncertainty of tenure on the part of the tenants and the disturbing effect so far as detrimental to the landlord, can be very little. In the case of land held for purposes of speculation, or owned for any purpose, being put on the market for sale, the possible loss of a sale in a fluctuating market, by such proceedings as registration of an expropriation plan, might prove serious. But if one has such a case he must plead it and prove it. Here it is neither pleaded nor proven.

Again, it is to be observed that in such a case the conduct of the party who keeps silent and makes no move to expedite the disposition of the claim to expropriate has to be considered. He certainly has not the right to let things drift as the appellants did here, and neither do nor say anything to expedite matters, and then claim his damages must be based on the result of the common neglect of himself and his opponent. The non-registration of the notice of abandonment illustrates this.

It was quite competent for appellants to have gotten it registered and if the expenses attendant on that chargeable to the Crown, it would have come in as part of the compensation they would, in such case, have been entitled to.

I think the appeal should be dismissed with costs.

There is a cross-appeal which questions the jurisdiction of the Exchequer Court to determine the damages suffered herein.

It is, I think, doubtful if, and arguable that, the Exchequer Court has not by virtue of sec. 23, sub-sec. 4, of the Expropriation Act, jurisdiction to determine the compensation to be awarded in case of an entire abandonment of all claims to expropriation. That points to a case of damages being settled on the hearing of the information. But, independently of that, I think that Court has jurisdiction to give relief in any case of the Crown taking.

either permanently or temporarily, the lands of a subject. It has taken for 18 months or more the lands of the appellants and they should, I imagine, in a proper case be entitled to have indemnity therefor from the Crown at the suit of a suppliant in the Exchequer Court.

I think the cross-appeal should also be dismissed with costs.

DUFF, J.:—On January 24, 1911, the lands in respect of the taking of which compensation is claimed by the appellants were taken for the purposes of the National Transcontinental Railway, under the authority of ch. 71, 3 Edw. VII., sec. 13, by the Commissioners appointed under that Act, who on that day deposited a description and a plan of the lands in the office of the registry of deeds for the city of Quebec. On October 21 of the same year, proceedings were taken by the Attorney-General of Canada, professedly under the authority of sec. 26 of the Expropriation Act, ch. 143, R.S.C., 1906, by way of information in the Exchequer Court of Canada on behalf of His Majesty, by which information it was alleged that by the deposit of the plan and the description just mentioned the lands had become and were then vested in His Majesty and by which it was declared that His Majesty was willing to pay the sum of $61,747.75 in full compensation for the claims of all the persons interested, and a declaration was prayed that the lands were so vested and that the sum mentioned was sufficient and just compensation.

The appellants by their defence alleged that they were the sole owners of the property, accepted the sum offered and prayed for judgment declaring that they were entitled to be paid the same. The statement of defence was filed in October, 1911, but the Attorney-General did not proceed to trial; and on March 19, 1912, a notice of discontinuance was filed, and on July 15, 1912, the following notice signed by the Minister of Railways and Canals and by Mr. Leonard for the Commissioners of the National Transcontinental Railway was served upon the appellants:—

Notice of Abandonment of lands taken for the National Transcontinental Railway.

In the Exchequer Court of Canada.

Between: JAMES GIBB and FRANK ROSS, Suppliants;

and

THE KING, Respondent.

Registered in registry office, July 27, 1912. Served personally on suppliants, July 27th, 1912, by Jean N. Fournier, bailiff.

CAN.

S. C.

GIBB
v.
THE KING.

Duff, J.

To James Gibb and Frank Ross, of the City of Quebec, of the Province of Quebec, on plan Estate James Gibb, and to all to whom these presents shall come or to whom the same may in any wise concern.

Whereas the lands shewn upon and described in the annexed plan and description have under the provisions of the National Transcontinental Railway Act, 3 Edward VII., ch. 71, sec. 13, been taken by His Majesty the King, acting through The Commissioners of the Transcontinental Railway for the purposes of a public work known as the National Transcontinental Railway, the construction of which public work is under the charge and control of "The Commissioners of the Transcontinental Railway" by the depositing of record in the office of the registrar of deeds for the City of Quebec, in the Province of Quebec, on the 24th day of January, 1911, of a duplicate of the said plan and description of the said lands.

And whereas no compensation money has yet been paid by or on behalf of His Majesty for the said lands.

And whereas the said lands have been found to be unnecessary for the purposes of the said public work and the undersigned have decided not to take the said lands for the purposes of the said railway.

Now, therefore, pursuant to and by virtue of the provisions of sec. 23 of the Expropriation Act, R.S.C., 1906, ch. 143, and of sec. 207 of the Railway Act, R.S.C., 1906, ch. 37, and section 15 of the National Transcontinental Railway Act, 3 Edward VII., ch. 71, and in pursuance of any other authority in this behalf vested in the undersigned, the undersigned do hereby declare and notify you that the said lands are not required for the purposes of the said railway and that the said lands and the proceedings aforesaid are hereby abandoned by the Crown and by the said "The Commissioners of the Transcontinental Railway."

In witness whereof the Minister of Railways and Canals has hereunto set his hand and The Commissioners of the Transcontinental Railway have caused these presents to be executed and the corporate seal of the Commissioners to be affixed under the hand of the Commissioner and Secretary this fifteenth day of July, 1912.

F. COCHRANE,
Minister of Railways and Canals.

The Commissioners of the
Transcontinental Railway.
R. W. LEONARD,
Commissioner.
Per Secretary.

On April 19, 1913, a petition of right was filed by the appellants claiming compensation and it is from the judgment given on the trial of that petition that the present appeal is brought.

The case presented by the petitioners was that upon the deposit of the plan and description in January, 1911, the title to the lands was transferred to the Crown and that in substitution for it a right to compensation became immediately vested in them and that the amount of compensation to which they then became entitled was that admitted to be due to them (the sum of $61,747.75), by the discontinued information. They admitted

that on the return of the property the Crown became entitled to credit for a sum equal to the value of the property as of the date of its return and accepted it as payment *pro tanto;* but their contention was that they were entitled to the residue of the sum so admitted to be due to them after making deduction of that sum. The advisers of the petitioners apparently assumed that sec. 23 of the Expropriation Act applied and determined their rights.

The Crown, relying upon this same section, took the position that the Exchequer Court had no jurisdiction to entertain the petition. The learned assistant Judge of the Exchequer Court did not accede to this view but rejected the claim of the petitioners for compensation for the value of the property taken—awarding the sum of $3,000 as reparation for loss which the learned Judge held to be reasonably attributable to the action of the Crown in dispossessing the appellants.

I have come to the conclusion that both the advisers of the Crown and the advisers of the appellants have misapprehended the effect of the statutory provisions which must be looked to for the purpose of ascertaining the rights of the appellants. These enactments, I think, rightly construed confer no power upon the Minister of Railways or upon the Commissioners to revest compulsorily in the owners lands which have been taken under sec. 13 of the National Transcontinental Railway Act, or to require the owners to accept, in discharge of the statutory obligation of the Crown to make compensation, anything but compensation in money; and the notice of July 15, 1912, was, consequently, without legal effect. That is the position the appellants were, I think, entitled to assume; but their advisers having proceeded on the assumption that the decision of this Court in *Jones* v. *The King*, 44 Can. S.C.R. 495, was conclusive against this view of their rights, the petitioners by their petition presented their claim upon the footing that there was a re-transfer of the lands to them which must be treated as satisfaction in part of their right to compensation—to the extent, as I have already said, of the value of the lands at the time of re-transfer. While I think the petitioners were entitled to claim compensation without deduction; since, nevertheless, they have accepted the re-transfer and offered to submit to the deduction mentioned, that, I think, is the footing upon which their claim should be now dealt with.

CAN.

S. C.

GIBB
v.
THE KING.

Duff, J.

It will be necessary to refer to several statutes and it will be more convenient, I think, to set out these enactments verbatim before discussing the effect of them.

The statutory provisions to be considered are:—

National Transcontinental Railway Act, ch. 71, 3 Edw. VII.—

Sec. 8.—The Eastern Division of the said Transcontinental Railway extending from the City of Moncton to the City of Winnipeg shall be constructed by or for the Government in the manner hereinafter provided, and subject to the terms of the agreement.

Sec. 9.—The construction of the Eastern Division and the operation thereof until completed and leased to the company pursuant to the provisions of the agreement shall be under the charge and control of three commissioners to be appointed by the Governor-in-Council, who shall hold office during pleasure, and who, and whose successors in office, shall be a body corporate under the name of "The Commissioners of the Transcontinental Railway" and are hereinafter called "the Commissioners."

2. The Governor-in-Council may, from time to time, designate one of the Commissioners to be the chairman of the Commissioners.

Sec. 13.—The Commissioners may enter upon and take possession of any lands for the purposes of the Eastern Division, and they shall lay off such lands by metes and bounds, and deposit of record a description and plan thereof in the office for the registry of deeds, or the land titles office for the county or registration district in which such lands respectively are situate; and such deposit shall act as a dedication to the public of such lands, which shall thereupon be vested in the Crown, saving always the lawful claim to compensation of any person interested therein.

(2) If the lands so required are public lands under the control of the Government of the province in which they are situate, a description and plan thereof shall also be deposited in the department of the Provincial Government charged with the administration of such lands.

Sec. 14.—The Governor-in-Council may set apart for the purposes of the Eastern Division so much of any public lands of Canada as is shewn by the report of the chief engineer to be required for the road bed thereof, or for convenient or necessary sidings, yards, stations and other purposes for use in connection therewith; and the registration in the office for the registry of deeds, or the land titles office for the county or registration district in which such lands respectively are situate, of a certified copy of the order-in-council setting the same apart shall operate as a dedication of the said lands for the purposes of the Eastern Division.

Sec. 15.—The Commissioners shall have in respect of the Eastern Division, in addition to all the rights and powers conferred by this Act, all the rights, powers, remedies and immunities conferred upon a railway company under the Railway Act and amendments thereto, or under any general railway Act for the time being in force, and said Act and amendments thereto, or such general railway Act, in so far as they are applicable to the said railway, and in so far as they are not inconsistent with or contrary to the provisions of this Act, shall be taken and held to be incorporated in this Act.

R.S.C., 1906, ch. 37, Railway Act.:—

Sec. 207.—Where the notice given improperly describes the lands or materials intended to be taken, or where the company decides not to take the lands or materials mentioned in the notice it may abandon the notice and all proceedings thereunder but shall be liable to the person notified for all damages or costs incurred by him in consequence of such notice and abandonment, which costs shall be taxed in the same manner as costs after an award.

(2) The company may, notwithstanding the abandonment of any former notice, give to the same or any other person notice for other lands or materials, or for lands or materials otherwise described. 3 Edw. VII., ch. 58, sec. 166.

Exchequer Court Act, R.S.C., 1906, ch. 140:—

Sec. 20.—The Exchequer Court shall have exclusive original jurisdiction to hear and determine the following matters:—

(*a*) Every claim against the Crown for property taken for any public purpose;

(*b*) Every claim against the Crown for damages to property injuriously affected by the construction of any public works;

(*c*) Every claim against the Crown arising out of any death or injury to the person or to property or on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment;

(*d*) Every claim against the Crown arising under any law of Canada or any regulation made by the Governor-in-Council;

(*e*) Every set-off, counterclaim, claim for damages whether liquidated or unliquidated, or other demand whatsoever, on the part of the Crown against any person making claim against the Crown. 50 & 51 Vict. ch. 16, sec. 16.

Expropriation Act, R.S.C., 1906, ch. 143:—

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

(*a*) "Minister" means the head of the department charged with the construction and maintenance of the public work;

(*b*) "Department" means the department of the Government of Canada charged with the construction and maintenance of the public work;

Sec. 23.—Whenever from time to time, or at any time before the compensation money has been actually paid any parcel of land taken for a public work or any portion of any such parcel, is found to be unnecessary for the purposes of such public work, or if it is found that a more limited estate or interest therein only is required, the Minister may, by writing under his hand, declare that the land or such portion thereof is not required and is abandoned by the Crown, or that it intended to retain only such limited estate or interest as is mentioned in such writing.

(2) Upon such writing being registered in the office of the registrar of deeds for the county or registration division in which the land is situate, such land declared to be abandoned shall re-vest in the person from whom it was taken or in those entitled to claim under him.

(3) In the event of a limited estate or interest therein being retained by the Crown, the land shall so re-vest subject to the estate or interest so retained.

(4) The fact of such abandonment or re-vesting shall be taken into account in connection with all other circumstances of the case, in estimating

CAN.
S. C.
GIBB
v.
THE KING.
Duff, J.

or assessing the amount to be paid to any person claiming compensation for the land taken. 52 Vict., ch. 13, sec. 23.

Sec. 26.—In any case in which land or property is acquired or taken for or injuriously affected by the construction of any public work, the Attorney-General of Canada may cause to be exhibited in the Exchequer Court an information in which shall be set forth—

(*a*) The date at which and the manner in which such land or property was so acquired, taken or injuriously affected;

(*b*) The persons who at such date, had any estate or interest in such land or property and the particulars of such estate or interest and of any charge, lien or encumbrance to which the same was subject, so far as the same can be ascertained;

(*c*) The sums of money which the Crown is ready to pay to such persons respectively, in respect of any such estate, interest, charge, lien or encumbrance; and,

(*d*) Any other facts material to the consideration and determination of the questions involved in such proceedings. 52 Vict., ch. 13, sec. 25.

Railways and Canals Act, R.S.C., 1906, ch. 35:—

Sec. 7.—The Minister shall have the management, charge and direction of all Government railways and canals, and of all works and property appertaining or incident to such railways and canals, also of the collection of tolls on the public canals and of matters incident thereto, and of the officers and persons employed in that service. R.S.C., ch. 37, sec. 6; 52 Vict., ch. 19, sec. 3.

Before giving my reasons for thinking that the notice of July 15, 1912, was inoperative I make one or two observations touching the positions respectively taken on behalf of the appellants and the Crown in the argument before us.

On the hypothesis that section 23 applies, the contention advanced on behalf of the Crown that the Exchequer Court is without jurisdiction to entertain the petition seems to be disposed of simply by reference to sec. 20 of the Exchequer Court Act, and sec. 13 of the National Transcontinental Railway Act. There is nothing in sec. 23 indicating an intention to take away the right to compensation recognized by sec. 13 and even assuming that sub-section 4 of sec. 23 ought to be construed, as the Crown contends it should be construed, as limited, namely, to cases in which the abandonment relates to part of the land taken only, it would still require very explicit language to take away all right of compensation for loss occasioned by the compulsory assumption of the legal title of the property. The general rule which enables the subject to proceed by petition of right for compensation for property which has found its way into the hands of the Crown (*Feather* v. *The Queen*, 6 B. & S. 257, at p. 293, and *Windsor and Annapolis Railway Co.* v. *The Queen*, 11 App. Cas. 607, at page

614), would remain operative. I agree, however, with the appellants that this is not the necessary reading of sub-sec. 4, the construction of which I proceed to consider with special reference to the effect attributed to the statute by the learned trial Judge.

The learned Judge appears to have taken a view, the practical result of which is that, where sec. 23 applies and lands taken are returned under that section so that no part remains in the possession of the Crown, the right of compensation is limited to compensation for disturbance of possession. That, with great respect, I think, is not the point of view from which the subject of compensation is envisaged by secs. 22 and 23 of this statute. To prevent misapprehension, I note specially that I refer only to secs. 22 and 23 and not to sec. 30, which deals only with the subject of injurious affection. It may be that sec. 30 approaches the subject from the same point of view, but that question does not arise and I express no opinion upon it at all. Sections 22 and 23 must be read together. It is perfectly true that, where sec. 23 applies, the declaration in sec. 22 that the lands become vested in the Crown and that in substitution for the title, the translation of which is thereby effected, there is vested in the owner a right of compensation—it is quite true that this declaration must be read with the provisions of sec. 23 empowering "the Minister" compulsorily to re-vest in the owner the lands taken; but on the other hand sub-sec. 4 of sec. 23 must be read with sec. 22 and, reading sec. 22 and sub-sec. 4 together, I apprehend it to be sufficiently clear that the governing consideration in determining the effect of the two provisions is the fact that the language of sec. 22 clearly imports that the compensation to which the owner becomes thereby entitled is normally to be determined as of the date when the lands vest in the Crown by the operation of section 22. In *Re Lucas and Chesterfield Gas and Water Board*, [1909] 1 K.B. 16, Lord Justice Moulton said that the general principle of compensation where land is taken under compulsory powers is that the property *is not diminished in amount but changed in form;* and sec. 22 seems to be only an explicit statement of this well-settled principle. That, as I have said, appears to be the governing consideration for determining the joint effect of these provisions. The result then is that, for the purpose of ascertaining the amount of compensation provided for in sec. 22, you must take into account the fact that the land taken has been compulsorily re-transferred

CAN.
S. C.
GIBB
v.
THE KING.
Duff, J.

together with the other circumstances of the case; but you are to take that fact together with the other circumstances into account for the purpose of determining how much money ought to be paid to the owner in order that he may receive in property and money the equivalent in value to him of the property taken as of the date when sec. 22 became operative; that is to say, the date of the filing of the plan.

One can easily conceive cases in which the question thus formulated might present considerable difficulty. In the case before us, which is a comparatively simple one, we have the formal offer of the Crown and it is not disputed that the amount offered fairly represented that to which the appellants were entitled, namely, the value of their property to them; and it is not suggested, indeed it could not be suggested, that in the circumstances this could be anything other than the market value of their property in the sense in which that phrase is used in the literature of compulsory purchase. The only question of fact, therefore, upon which the learned trial judge was called upon to pass was the question of the value of the property at the date upon which it was returned.

If I had taken the view that the case ought to be dealt with on this footing (that is to say, that sec. 23 is applicable), I should not have felt embarrassed by the course on which the case proceeded in the Court below. As applied to the circumstances before us, Mr. Stuart's method of working out the statute proposed at the trial and on the argument in appeal was, I think, substantially the right method; and the principle upon which the appellants' claim must rest (assuming always sec. 23 of the Expropriation Act to be applicable), was, I think, set forth with perfect clearness in the petition of right. The evidence given on behalf of the petitioners was explicitly directed to the precise point of fact just indicated; and, I think, the result of the evidence is that a deduction to the extent of $30,000 ought to be made from the amount of compensation originally offered.

I come then to the point upon which I think, as I stated above, the appeal should be decided, viz., that the notice of July 15, 1912, was inoperative in law.

The first point for consideration is: Does sec. 23 of the Expropriation Act confer upon the Minister of Railways and Canals authority to re-vest compulsorily in the owner lands

acquired by the National Transcontinental Railway Commissioners under the authority of sec. 13 of the National Transcontinental Railway Act? "Minister" in sec. 23 is to be read (in accordance with the direction of sec. 2 (*a*) and (*b*) as meaning the

head of the department charged with the construction and maintenance of the public work.

It does not appear to require argument (when the terms of sec. 7 of the Department of Railways and Canals Act are compared with those of the sections extracted above from the National Transcontinental Railway Act) to shew that the Eastern Division of the National Transcontinental Railway, although clearly enough a "public work" within the words of sec. 2, sub-sec. (*b*) of the Expropriation Act is not a "public work" with whose "construction and maintenance" the Department of Railways and Canals is "charged." The condition of the authority, therefore, of the Minister, under sec. 23, namely, that he shall be

the head of the department charged with the construction and maintenance of the public work,

for which lands have been taken is in this case unfulfilled. The case is not a case to which the authority of the Minister of Railways and Canals extends under that section; the language of the section itself excludes it.

Moreover, comparing the provisions of the Expropriation Act with the provisions of the National Transcontinental Railway Act, lands taken for the Eastern Division by the Commissioners seem to be clearly outside the contemplation of sec. 23. By sec. 13 of the former Act such lands not only become vested in the Crown, but become affected by a "*dedication to the public*" by the express words of the statute; that is to say, I presume, affected by a "dedication" to the public purposes for which they are taken—for the construction, maintenance and working of the Eastern Division of the National Transcontinental Railway. The "work" was under the charge and control of Commissioners brought into existence by this special statute, passed in pursuance of a contract with the Grand Trunk Railway Co. who were ultimately to be the lessees and operators of it, who, as the agreement between themselves and the Government shews, were narrowly concerned with the economical construction of the railway. Lands acquired for the undertaking by these Com-

CAN.
S. C.
GIBB
v.
THE KING.
Duff, J.

missioners cannot, I think, be fairly held to be subject to the power of the "Minister" under the provisions of sec. 23.

Again, sec. 13, the necessary conditions being satisfied, takes away the title from the owner substituting for it a right of compensation, which means, of course, compensation in money. In *The King* v. *Jones*, 44 Can. S.C.R. 495, this Court took the view that the claim for compensation means a claim against the Crown, not a claim against the Commissioners as a corporate body; and a claim, therefore, which was not intended to be made through the machinery provided by the Railway Act, but must be prosecuted and determined in the ordinary way, by proceedings instituted by petition of right or an information filed on behalf of the Crown; this right to compensation, if one is to ascertain and define it by reference to the language of the National Transcontinental Railway Act alone (I suspend for a moment a necessary reference to sec. 15), is simply a right to be paid in money the value to the owner of what has been taken. And it is, of course, not disputed that the introduction of sec. 23, on any construction of it that has been suggested, must effect a sensible modification of the right so ascertained and defined. There is not a word in the National Transcontinental Railway Act referring to the Expropriation Act; which circumstance does not shew, of course, that the provisions of the Expropriation Act relating to procedure simply are not properly available for the purpose of enforcing rights conferred by the National Transcontinental Railway Act in respect of which no remedy is given specifically by the last mentioned statute. But it is one thing to say, as I have no difficulty in holding, that the provisions of the Expropriation Act relating to procedure simply may be made available for such purposes so long as they are applied consistently with the full recognition of the substantive rights given by the special Act dealing with the particular railway, the National Transcontinental Railway; and it is an entirely different thing to say that such substantive rights can properly be held to be modified by the provisions of another statute, general in its nature, to which not a single word of reference is to be found in the special Act.

It is to be observed, however, that the notice of July 15, 1912, is a notice given by the Commissioners of the National Trans-

continental Railway as well as by the Minister of Railways and Canals; and it is a conceivable suggestion that the National Transcontinental Railway Act establishes a "department of the Government of Canada, charged with the construction and maintenance" of the Eastern Division of the National Transcontinental Railway; and that the Commissioners are the "head of the department" and, consequently, satisfy the description "minister" as defined by sec. 2, sub-secs. (*a*) and (*b*) of the Expropriation Act. There are two distinct objections severally fatal to this suggestion. "Department of the Government of Canada" is a phrase having a well understood significance and it clearly means one of the departments recognized by statute presided over by a Minister of the Crown, a member of the King's Privy Council for Canada. See R.S.C., 1906, ch. 4, sec. 4; ch. 48, sec. 3; ch. 23, sec. 2, etc. The second objection is that, assuming the language used to be capable of a construction reconcilable with this suggestion, it is only by attributing to the words a forced and unusual meaning; and the considerations to which I have just referred are equally weighty to justify the rejection of this interpretation which would have the effect if adopted, of seriously prejudicing the right of compensation given by sec. 13 of the National Transcontinental Railway Act.

The notice in question, moreover, professes to be given pursuant to section 207 of the Railway Act: (see p. 277, *ante*), as well as to sec. 23 of the Expropriation Act. The legislative provision now embodied in sec. 207 of the Railway Act, which had its origin many years ago, frequently has been considered and it has uniformly, I think, been held that the power conferred by that provision is a power which ceases to be operative the moment the title to the land taken becomes vested in the railway company. *Mitchell* v. *Great Western Railway Co.*, 35 U.C.Q.B. 148; *Canadian Pacific Railway Co.* v. *Little Seminary of Ste. Thérèse*, 16 Can. S.C.R. 606; *Re Haskill and Grand Trunk Railway Co.*, 7 Ont. L.R. 429; 3 Can. Ry. Cas. 389. Application, therefore, according to its true intent, it could not have to lands taken under sec. 13 of the National Transcontinental Railway Act the title to which, by the very act of taking, becomes vested in the Commissioners; and sec. 207, consequently, is not incorporated by force of sec. 15 of the last mentioned Act. These are the principal reasons which have satisfied me that the Crown

CAN.
S. C.
GIBB
v.
THE KING.
Duff, J.

is not entitled to invoke the provisions of sec. 23 of the Expropriation Act, or the provision of the Railway Act just referred to.

I have now to consider *The King* v. *Jones*, 44 Can. S.C.R. 495. In *The King* v. *Jones*, 44 Can. S.C.R. 495, the learned Judge of the Exchequer Court had dismissed an information filed by the Attorney-General of Canada praying for a declaration that certain lands taken by the Commissioners had become vested in the Crown and for a determination of the amount of compensation payable in respect of such taking on the ground that the effect of sec. 15 of the National Transcontinental Railway Act was to incorporate the sections of the Railway Act relating to compensation and that compensation must be determined in the way provided for by that Act. On appeal to this Court it was held that the Exchequer Court had jurisdiction to entertain the information and to pass upon the question of compensation on two grounds, first, that the claim for compensation under sec. 13, is a claim against the Crown and that jurisdiction is given by sec. 20 of the Exchequer Court Act, R.S.C., 1906, ch. 140, sub-secs. (*a*) and (*b*), which invest that Court with exclusive jurisdiction over every claim against the Crown for property taken for or injuriously affected by any public work; and secondly, on the ground that the Eastern Division of the National Transcontinental Railway is a "public work" within the meaning of secs. 26 *et seq.* of the Expropriation Act. That is the substance of the decision. The ratio is put very clearly in the judgment of Davies, J., at page 499, in these words:—

> It is a public work vested in the Crown, constructed at the expense of Canada, or for the construction of which public moneys have been voted and appropriated by Parliament within the meaning of sec. 2, para. (*d*) of the Expropriation Act, and the procedure taken by the Crown in fyling this information to determine the claim against the Crown for the lands taken falls within the language of the 26th section of that Act, and the claim itself is one coming, in my judgment within sub-section (*a*) of section 20, of the Act constituting the Exchequer Court and defining its jurisdiction over "every claim against the Crown for property taken for any public purpose."
>
> Altogether I entertain no doubt that the jurisdiction of the Exchequer Court covers the claim made and think the appeal should be allowed and the jurisdiction of the Court affirmed.

With great respect, I am unable to understand why *The King* v. *Jones*, 44 Can. S.C.R. 495, can be supposed in any way to decide the question which I have been discussing, touching the applicability of sec. 23. The effect of sec. 23 was not a subject of con-

sideration in that case and I do not think anybody supposed that the Court was deciding that each and every section of the Expropriation Act is applicable for the purpose of determining the substantive rights of the persons whose lands are taken under sec. 13 of the National Transcontinental Railway Act. There is not the least difficulty, as I have already said, in holding that the Eastern Division of the National Transcontinental Railway is a "public work" under sec. 26 for the purpose of applying that section and the subsequent provisions in so far as they relate to procedure merely; and in holding at the same time that other provisions of that statute affecting the substantive rights of the parties are not capable of application because of the very fact that they deal with substantive rights and not with procedure and because they are not consonant with provisions of the special Act governing substantive rights. Section 13 provides for the right of compensation specifically but it says nothing about procedure. There seems no reason for holding that the provisions of a general statute enabling the Crown to take proceedings in the Exchequer Court for the purpose of determining the amount of compensation where compensation is payable in respect of the taking of lands for public works does not apply to the case of compensation payable under sec. 13 where the language of the statute is broad enough to comprehend, and does literally comprehend, that case; provided always, that the provisions of the general statute are not imported for the purpose or with the effect of modifying the substantive rights which are the legal result of a proper interpretation of the National Transcontinental Railway Act itself. That at all events is, I think, the proper interpretation of *The King* v. *Jones*, 44 Can. S.C.R. 495.

The consequence would have been that the appellants, had they stood upon their rights, would have been entitled to claim the sum of $61,747.75, which the Crown had solemnly admitted to be the compensation to which they became entitled by the taking of the land. The appellants, however, in the petition of right had chosen to accept the property in part satisfaction and to that position they have consistently adhered throughout. I think this position results from a misapprehension of the Expropriation Act, but they have asked for relief upon that footing, and upon that footing I think their claim must be dealt with. There is satisfactory evidence that the property when returned

CAN.
S. C.
GIBB
v.
THE KING.
Anglin, J.

was not worth more than $30,000. It follows they are entitled to be paid the residue of compensation offered after deducting that sum.

ANGLIN, J.:—In *The King* v. *Jones*, 44 Can. S.C.R. 495, a majority of the Judges of this Court held that the National Transcontinental Railway is a public work to which the Expropriation Act (R.S.C., 1906, ch. 143), applies.

Although sub-sec. 4 of sec. 23 of that Act is not as clearly expressed as might be desired, I agree with Mr. Stuart that it applies to cases of total, as well as to cases of partial, abandonment by the Crown, and that in it the words "land taken" mean not land taken and kept, but land taken under the provision for its acquisition, whether wholly or partially retained, or subsequently wholly abandoned. Otherwise there would be no provision in the Expropriation Act for compensation in cases of total abandonment, although in such cases the actual loss to the owner may have been very substantial. It cannot be assumed that it was intended to leave such a grievance without remedy, and if the statute is susceptible of an interpretation under which it will be provided for, that interpretation should prevail.

In the Exchequer Court this case has been dealt with on the footing that, upon the Crown exercising its right of abandonment under sec. 23, the owner became entitled to be indemnified for actual loss sustained as the direct result of his property having been taken out of his hands and held by the Crown from the date of deposit of the plan under sec. 13 of the National Transcontinental Railway Act (3 Edw. VII., ch. 71), until it was re-vested in him under sec. 23 of the Expropriation Act. On that basis the learned assistant Judge allowed him $3,000 for loss of revenue already suffered and likely to be sustained in the future. This allowance was intended to cover all loss attributable to interference with the suppliant's user of his property, including loss of opportunities to lease it to advantage. But the suppliant was also deprived during all that period of the right to sell or otherwise dispose of his property. Until notice of withdrawal had been given the property to all intents and purposes belonged to the Crown, and the suppliant had no reason or right to expect that he would again have any interest in it. That the deprivation of the right of disposition is in most cases a matter proper for compensation can scarcely admit of doubt. When the property

has diminished in value during the time that right has been withheld some compensation should certainly be made. This element of damage was not taken into consideration in the Exchequer Court. No doubt the loss sustained as the result of deprivation of the *jus disponendi* involves elements of contingency. The possibility of profitable sale, as such, must be taken into account. *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste*, 16 D.L.R. 168. Neither the difficulty of determining the loss proper to be allowed for, nor the fact that elements of contingency or uncertainty are involved in it is sufficient reason for refusing compensation. *Wood* v. *Grand Valley Railway Co.*, 22 D.L.R. 614; *Chaplin* v. *Hicks*, [1911] 2 K.B. 786. If the statute should receive the construction put upon it by the learned assistant Judge of the Exchequer Court, it would, therefore, be necessary that this case should be referred back to him to consider what additional sum should be allowed as compensation to the appellant for deprivation of his *jus disponendi* while his property was vested in the Crown, the evidence in the record being scarcely sufficient to enable us to deal satisfactorily with that question.

I was, for a time, inclined to think that this appeal should be disposed of in the manner which I have just indicated, but further consideration has led me, though not without some hesitation, to accept the construction placed upon sec. 23 of the Expropriation Act by my Lord the Chief Justice.

Where land or property taken under sub-sec. 1 of sec. 13 of the National Transcontinental Railway Act is subsequently abandoned and re-vested in the former owner under sec. 23 of the Expropriation Act, no provision of either statute expressly deprives him of "the lawful claim to compensation" reserved to him by sec. 13 of the National Transcontinental Railway Act. If it has been intended that the right to compensation which accrued upon the taking of the land should cease upon the re-vesting of it, having regard to the extraordinary and exceptional exercise of eminent domain involved in such re-vesting, we should certainly expect to find the extinction of the owner's right to compensation declared in explicit terms. But, on the contrary, sub-sec. 4 of sec. 23, though not as clear as could be desired, appears to be framed on the assumption that, notwithstanding the abandonment and the re-vesting, "the person claiming compensation for the land taken" is still entitled to have "the amount to be

CAN.
S. C.
GIBB
v.
THE KING.
Anglin, J.

paid to" him estimated or assessed by the Court, which is directed, in estimating or assessing it, to take into account the fact of such abandonment or re-vesting, *i.e.*, to make allowance, at its then present value to him, for any advantage or benefit which the owner will derive from such abandonment or re-vesting.

The suppliant would, therefore, be entitled to the amount of the compensation which he would have recovered had the Crown retained the property less what is found to be a proper deduction to be made on account of the re-vesting. The property being thus treated as having belonged to the Crown while held under expropriation the Crown is entitled to the *mesne* profits from it during that time, but would be liable to the suppliant for interest for the same period on the full amount of the compensation which he would have recovered had the property not been abandoned.

The case has been dealt with in the Exchequer Court on an entirely different view of the effect of sub-sec. 4 of sec. 23 of the Expropriation Act. We are not in a position to determine satisfactorily what compensation should be allowed the appellant.

The appeal should be allowed with costs and the action should be remitted to the Exchequer Court in order that the amount to be paid to the appellant may be estimated or assessed on the basis indicated.

Brodeur, J.

BRODEUR, J.:—This is a case of petition of right claiming damages.

On January 24, 1911, the Government gave a notice of expropriation of a property belonging to the appellants which it needed for the construction of the Transcontinental. In the month of October, 1911, proceedings were instituted by the Attorney-General before the Exchequer Court to fix the indemnity to be paid for the expropriation of that property and he offered a sum of $61,747.75. There has been contestation as to the amount of the indemnity: but at last the parties have agreed and the appellants expressed their willingness to accept the amount proffered and the proceedings in the Exchequer Court were then dropped.

On July 27, 1912, the Crown declared that the said immoveable property was not required and notice thereof was registered on December 30, 1912.

In their petition of right the appellants claim that the immoveable in question was worth at the time of the expropriation over

$60,000, as it had been admitted by the Government itself, and that at the time of the retrocession it was worth only $30,000 and they claimed the difference.

The Exchequer Court maintained the action for a sum of $3,000 for the damages they had suffered through loss of income.

We have to consider the range of sub-sec. 4 of sec. 23 of the Expropriation Act (ch. 143 R.S.C. 1906). By virtue of that law concerning expropriations, when the Crown deposits in the registry office a plan and description of the lands which it wants to expropriate, such property, by the very fact of such deposit, becomes the property of His Majesty (sec. 8).

In the present case, however, the appellants have remained in possession of the property and have collected all the rents.

There never was any dispossession. The enjoyment was necessarily restricted and it was impossible for the appellants to draw from the property the same revenues as before. I therefore consider that the damages awarded by the Judge of the Court below for that loss of rent should be maintained.

The sum of $3,000 which has been granted represents a higher sum than the rents which have been lost; but at the same time it must be remembered that the appellants have now tenants who will not give them revenues as considerable as those which they would have received, had they been at liberty to let without any restriction. Therefore the amount is not too high, far from it.

But the main point raised by the appellants is as to whether the property has decreased in value between the taking of possession and the retrocession and if the Crown should be condemned to pay that difference.

I understand that if the Crown had taken possession of the property, if there had been a fire, for example, or if deteriorations had occurred, the Crown would be bound to pay those damages.

But in the present case the property of the land in question belonged to the Crown by virtue of its notice of expropriation; but it never availed itself of its right of ownership and left the appellants in possession.

By virtue of the law the appellants were entitled to the damages which they had suffered as a result of that notice of expropriation and of the retrocession. Did the plaintiff really suffer damages besides those above mentioned by me?

CAN.

S. C.

GIBB v. THE KING.

Brodeur, J.

Before the construction of the railroad was decided upon, appellants' property was scarcely worth $30,000. It yielded an income of about $2,000 a year, *i.e.*, a little more than 6%. It is a recognized fact that a city property must yield a gross income of 10%. Then, when valuing at $30,000 that property which was yielding only a revenue of $2,000, I am making a very liberal valuation.

It is recognized by the appellants that it is worth to-day about $30,000. It has then the same value as before. As soon as the Government decided to build the railway that property at once seemed to acquire a plus value. The notices of expropriation were not given at once and when they were the property had doubled its value. And as the Government was bound to pay the value that it had at the date of the notice of expropriation, an offer of a little over $60,000 was made.

The Government considered, I suppose, at a given moment, that that project of building a station at that place was too expensive, probably because of the fictitious value that the expropriated owners were claiming for their lands and then it simply decided not to carry out its intention and to place its station at another place. It gave a notice to the appellants to the effect that it was retroceding to them their property.

The latter, I consider, cannot, as they do, claim damages for that fictitious value that the project of the railroad gave to their property. The Judge was right in examining all the circumstances of the case, as the statute prescribes, and specially to consider the value of that property not only at the time of the expropriation but even before the project of the construction of the road. It is very evident to me that the damages suffered by the appellants are those which have been granted to them by the Court below. That judgment should be confirmed with costs.

Appeal dismissed, Court divided.

N. B.

S. C.

PRIEST v. McGUIRE.

New Brunswick Supreme Court, Appeal Division, McLeod, C.J., and White and Grimmer, JJ. September 24, 1915.

1. MALICIOUS PROSECUTION (§II—5)—PROBABLE CAUSE—MALICE—CHARGE OF THEFT.

Neither malice nor want of reasonable and probable cause are necessary inferences against the informant in a criminal charge for theft of timber, because of such informant having first instituted civil proceedings against the trespasser with the sole purpose of recovering the price and before being advised by his solicitor that the facts justified a prosecution for

theft, if the informant later instituted criminal proceedings in pursuance of his solicitor's advice and the charge was dismissed.

[*Collins* v. *Gould*, 9 D.L.R. 665; *Morrison* v. *Wilson*, 14 D.L.R. 815; *Dugay* v. *Myles*, 15 D.L.R. 388, cited; *Burgoyne* v. *Moffatt*, 10 N.B.R. 13, distinguished.]

N. B.

S. C.

PRIEST v. MCGUIRE.

APPEAL from the judgment of Landry, C.J., in an action for false imprisonment.

Statement

The judgment appealed from was as follows:

LANDRY C.J.: This was a non-jury case, for assault, false imprisonment and malicious prosecution. Evidence and counsel were heard on both sides. Plaintiff proved the institution by defendant of criminal proceedings against him, and of a termination of such proceedings favorable to the plaintiff. He failed to prove malice, and to convince me of the absence of reasonable and probable cause.

Landry, C.J.

The essential facts are as follows: The defendant had a valuable piece of timber on the premises of a third party. On the same premises was lumber, of inferior quality, under the control of one McDermott. The plaintiff desired to become possessed of the valuable piece of timber. On enquiry as to whom it belonged, an enquiry which I believe was not full as to this timber, he was informed, he swore, that it was under the control of McDermott. He met McDermott and asked to buy this timber from him, but did it in such a way as to deceive McDermott. McDermott, I am convinced by the evidence, believed plaintiff was speaking of the almost valueless lumber he had under his control, and told plaintiff he might take whatever was there. The plaintiff, I am as fully convinced, knew McDermott did not profess to sell him the timber he wanted, but took advantage of the conditions to take the timber. The defendant discovered that his timber had been taken by the plaintiff. He billed him for the price of it. The plaintiff refused to account to the defendant for it. The defendant consulted a solicitor, and followed his advice, which resulted in the criminal proceedings above referred to.

While I do not say that what the plaintiff did amounted to theft, yet I find that in what the plaintiff did do he afforded reasonable and probable cause for instituting criminal proceedings against him.

Now was the defendant actuated by malice? There was no express malice proven, and outside of the circumstance that the defendant tried to collect the value of the timber from the plain-

N. B.

S. C.

PRIEST v. McGUIRE.

Landry, C.J.

tiff I can see no evidence from which to infer malice. Authorities establish, I believe, that any motive "for a prosecution other than that of wishing to bring a guilty party to justice is a malicious motive": *Burgoyne* v. *Moffatt*, (1861) 10 N. B. R. 13. Taking all the evidence as I heard it I am convinced that, while the defendant wished and hoped, by some of the proceedings he took, to collect the value of the timber he lost, and to which compensation he was entitled, he honestly believed the property was his, that the plaintiff had committed a theft, and that his motive in the criminal proceedings was to bring him to justice.

I therefore find that the defendant was not actuated by malice, that there was reasonable and probable cause, and I order a verdict for the defendant, with costs.

E. P. Raymond for plaintiff, appellant.

W. A. Ewing, K.C., for defendant, respondent.

The judgment of the Court was delivered by

White, J.

WHITE, J. (oral):—This was an action for false imprisonment and malicious prosecution, tried in March last, at St. John, before the Chief Justice of the King's Bench Division. As it appeared at the trial that the charge laid in the information before the committing magistrate, and on which he committed the plaintiff for trial, was one over which the magistrate had jurisdiction, and as the warrant under which the plaintiff was arrested was regular and showed jurisdiction on its face, this action at the trial resolved itself into one for malicious prosecution only.

The case was tried without a jury, and the learned Chief Justice held that there was reasonable and probable cause, and found that there was no malice. For this holding and finding I think there was ample justification in the evidence.

It was urged before us that, inasmuch as the defendant admitted, on cross-examination, that when he presented the bill for the stick of timber which it was alleged the plaintiff stole, his object was to get pay for the same, it therefore follows that his motive in instituting this prosecution for theft was malicious because it was not simply a desire to bring the guilty party to justice; and the case of *Burgoyne* v. *Moffatt*, (1861) 10 N. B. R. 13, was relied upon.

The facts of the case are stated by the learned Chief Justice, so I need not re-state them here.

It is quite true that the defendant, when he found that this

stick of timber had been taken, presented a bill to the plaintiff and demanded the price of the timber. All the evidence upon that point is as follows:

"Q. You presented a bill to him for the price of it, didn't you? A. Yes.

"Q. When you presented that bill to him you simply wanted to get paid for it? A. I did.

"Q. You had no other idea in view, had you? A. No. That is all I wanted.

"Q. To get paid for the stick? A. Yes.

"Q. If it was to get paid for the stick, why did you change your mind and arrest him for stealing?

"A. I went to the magistrate and said I wanted to sue him for $20, that is the price I asked him to sue for. The case came up, and one evidence—Walter Moore—wasn't there, and Captain Priest didn't appear, and lawyer Ritchie suggested that we have him arrested for theft. That is all I can tell about it. It was by his suggestion I did it."

Mr. Ritchie, a barrister, was employed by the defendant to collect the price, or rather the value of the stick of timber, and after the case had come down to trial and a verdict had not been obtained, for the reasons stated, Mr. Ritchie informed the defendant that it was a proper case in which to lay an information for theft. The defendant says he stated all the facts to his solicitor. He acted upon the advice of his counsel, and although, in the first instance, he undoubtedly took proceedings with a view of collecting his debt, it does not follow that afterwards, when he found that a theft had been committed, he instituted this prosecution simply to collect this money, and apart from the idea of bringing the plaintiff to justice.

I think, therefore, there was ample evidence to warrant the finding of the trial Judge that there was no malice. But in order to succeed the plaintiff must not only show that there was malice, but that there was want of reasonable and probable cause; and, as I have said, I think the facts of the case as disclosed by the evidence, are ample to warrant the trial Judge in finding that there was reasonable and probable cause for this prosecution.

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

Appeal dismissed.

CAN.

S. C.

CANADIAN GENERAL ELECTRIC CO. v. CANADIAN RUBBER CO.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. December 29, 1915.

1. DAMAGES (§ III A 7—97)—DELAY OF CONTRACT—PENALTY OR LIQUIDATED DAMAGES—INTENTION OF PARTIES.

The words "liquidated damages" and "forfeit or penalty" have a like understood meaning in English and French law, and the effect of a proviso in a contract, that in case of failure to deliver various parts of the machinery as therein provided the sum of $25 should be deducted from the contract price as liquidated damages and not as forfeit for every day's delay, is that the parties intended to so pre-estimate a reasonable indemnity as liquidated damages for the delay in the performance of the contract, which need not be specially pleaded as a cross-demand to the action for the contract price, nor actual damages sustained in consequence of the delay alleged or proved.

[Arts. 1013, 1076, 1131, Que. C.C., Art. 217, C.P.Q.; *Dunlop Pneumatic Tire Co.* v. *New Garage and Motor Co.*, [1915] A.C. 79; *Clydebank Engineering Co.* v. *Yzquierda*, [1905] A.C. 6; *Webster* v. *Bosanquet*, [1912] A.C. 394; *Hamlyn* v. *Talisker Distillery Co.*, [1894] A.C. 202; *Sainter* v. *Ferguson*, 7 C.B. 716 at 730; *The "Industrie,"* [1894] P. 58; *Ottawa North. & West. R. Co.* v. *Dominion Bridge Co.*, 36 Can. S.C.R. 347 applied; *Canadian General Electric Co.* v. *Canadian Rubber Co.*, 47 Que. S.C. 24, affirmed.]

2. CONTRACTS (§ II A—128—INTENTION OF PARTIES AS TO INTERPRETATION.

The intention of parties to a contract which has been executed in a form usual in the Province of Ontario is that it should be interpreted according to the law of that province.

Statement

APPEAL from the judgment of the Superior Court, sitting in review, 47 Que. S.C. 24, affirming the judgment of Charbonneau, J., in the Superior Court, District of Montreal, by which the action of the plaintiffs was dismissed with costs. Affirmed.

F. W. Hibbard, K.C., and *G. H. Montgomery*, K.C., for appellants.

A. Chase-Casgrain, K.C., and *Errol M. McDougall*, for respondents.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—I am of opinion that the judgment in this case is right. It is unnecessary for me to go into the facts of the case; the only point that was pressed upon us at the hearing of the appeal was the legal effect of the provision in the contract that

> the sum of $25 per day for each motor, each generator and a complete switchboard shall be deducted from the contract price as liquidated damages and not as a forfeit for every day's delay in the delivery of the apparatus as specified in the delivery clause.

The contract is in English, relates to a purely business transaction and uses terms well recognized in English law. The words "liquidated damages" and "forfeit or penalty" are commonly to be found in similar contracts and, as judicially interpreted by the Courts, have a perfectly well understood meaning in English and

French law. A penalty is the payment of a stipulated sum on breach of the contract, irrespective of the damage sustained. The essence of liquidated damages is a genuine covenanted pre-estimate of damage.

I think any difficulty the case may present has arisen from the fact that similar terms have not perhaps quite the same meaning in English and in French law. In the latter the word "peine" does not correspond to the word "penalty" as construed by the English Courts. Whilst the exact amount of the former may be recovered irrespective of damage, it is only so much of the latter as represents the actual damage sustained that the party in default can be made liable for. To some extent, therefore, the word "peine" corresponds more nearly to "liquidated damages" than to a penalty. See Planiol (6th ed.), vol. II., pp. 90 and 91. I think it must be some confusion of these terms which caused Tellier, J., to dissent from the judgment of all the other Judges before whom the case has come. He seems to think that as the contract provides that the agreed sum payable in lieu of damages is declared not to be a forfeit, the respondent can only recover the damages which he is able to prove he has sustained.

Mais il n'y a pas lieu de rechercher si le créancier souffre ou non un dommage par suite de l'inexécution de l'obligation. La convention faite à forfait a justement pour but de supprimer tout examen de ce genre. La clause pénale est due (et c'est là un de ses grands avantages) dès que le débitur est responsable de l'inexécution. Planiol, *loc. cit.*

The first paragraph of art. 1229, C.N., is not reproduced in the Quebec C.C.

There are innumerable cases in which it has been necessary, in particular cases, to decide whether the parties intended that the payment provided for by the contract should be in the nature of a penalty or liquidated damages. The principles on which such cases are determined are well established. It is only necessary for me to refer to the recent case in the House of Lords of *Dunlop Pneumatic Tire Co.* v. *New Garage and Motor Co.*, [1915] A.C. 79, in which they are very clearly laid down. The English rule seems to be in accord with that laid down by Pothier, Obligations No. 345:—

Where the payment of a smaller sum is secured by a larger, the stipulation will be relieved against as penal, but where the agreement is for an act other than the payment of money and the injury that may result from a breach is not ascertainable with exactness, depending upon extrinsic circumstances, a stipulation for damages, not on the face of the contract out of proportion to

CAN.

S. C.

CANADIAN GENERAL ELECTRIC CO. v. CANADIAN RUBBER CO.

Sir Charles Fitzpatrick, C.J.

the probable loss, may be upheld, the difficult cases turning mainly upon the interpretation of the language of the particular contract. Harvard Law Review, vol. 29, p. 129, and cases there cited.

In the contract in the present case there is a clear agreement for the deduction from the contract price for delay in delivery; there is no objection to such an agreement being entered into and no reason why effect should not be given to the agreement by the Courts. As Sir George Jessel puts it:—

> Courts should not overrule any clearly expressed intention on the ground that judges know the business of the people better than the people know it themselves.

Wallis v. *Smith* (1882), 21 Ch. D. 243, at 266.

Art. 1076, C.C.:—

> When it is stipulated that a certain sum shall be paid for damages for the inexecution of an obligation, such sum and no other, either greater or less, is allowed to the creditor for such damages.

As far back as 1849 it was said by Cresswell, J., in the case of *Sainter v. Ferguson*, 7 C.B., 716 at 730:—

> If there be only one event upon which the money was to become payable and there is no adequate means of ascertaining the precise damage that may result to the plaintiff from a breach of the contract, it is perfectly competent to the parties to fix a given amount of compensation, in order to avoid the difficulty.

This ruling has been approved in many cases ever since. Hals., vol. 10, Damages Nos. 604 *et seq.* It appears to me that it entirely covers the stipulation in the present contract. It could not have been possible to ascertain the damage in advance; the amount fixed is not alleged to have been an extravagant one; and the provision was in every respect a reasonable and proper one which both parties may perfectly well be supposed to have intended.

I may add that the contract is for delivery of an apparatus consisting of the things therein specified, for which apparatus the purchaser agrees to pay $33,000. The delivery clause provides for the delivery of the apparatus not later than May 1, 1911, and the contract provided that

> the sum of $25 per day for each motor, each generator, and a complete switchboard shall be deducted from the contract price (1) for every day's delay in the delivery of the apparatus.

It might perhaps be contended that until the whole apparatus was delivered, $25 per day should be deducted for each motor, etc., whether delivered or not. The contract does not say for each motor undelivered. It is not necessary, however, to decide this as the respondents advanced no claim on such a construction of the contract. I mention it because the appellant has certainly

suffered no hardship in the deduction made from the contract price and perhaps is fortunate in not having to submit to a larger deduction. But one cannot entirely overlook that possible construction of the contract because of the second paragraph of art. 1076 C.C. However, the parties are presumed to be the best judges of the object they had in view when this provision was inserted in the agreement and neither has chosen to raise the question as to whether the obligation to deliver was performed in part.

It may possibly be useful to observe that article 1076 C.C. is new law. See Report of Codifiers for the reasons why they reject the rule as laid down in Pothier, "Obligations," No. 345.

The appeal is dismissed with costs.

Davies, J.

DAVIES, J.:—This is an appeal from the Court of Review of the Province of Quebec affirming a judgment of the Superior Court as to the proper construction of a contract made between the parties for the manufacture and delivery by the electric company to the rubber company of certain apparatus comprising direct and alternating current motors and a large switchboard in the wiring.

The controversy turned upon the proper construction of a clause in the contract providing for the damages to be paid by the electric company to the rubber company in case default was made in the delivery of the apparatus within the time contracted for.

The clause reads as follows:—

> The sum of twenty-five dollars ($25) per day for each motor, each generator and a complete switchboard shall be deducted from the contract price as liquidated damages and not as a forfeit for every day's delay in the delivery of the apparatus as specified in the delivery clause herein, and this sum shall be over and above the cost of any extra inspection.

The rubber company, on being sued for the price of the apparatus manufactured and supplied, claimed the right under this clause to deduct from the contract price as genuine pre-estimated liquidated damages $25 per day for 582 days the plaintiff electric company was in default in delivering the motors and generators less 122 days, which it conceded should not be charged because they were or might be attributable to the defendant company's own fault, thus reducing the number of days for which damages were chargeable to 460, and fixing the damages at $11,500.

Both Courts below maintained the defendants' contentions alike as to its legal rights under the above clause of the contract and as to the actual number of days for which it was entitled to

CAN.

S. C.

CANADIAN GENERAL ELECTRIC CO. v. CANADIAN RUBBER CO.

Davies, J.

deduct the $25 per diem as genuine pre-estimated liquidated damages.

On the question of fact as to the actual number of days chargeable owing to fault in the delivery of the apparatus, after listening to the lengthy argument of counsel for the respective parties, I felt myself quite unable to say that the findings of the trial Judge concurred in by the Court of Review should be disturbed.

As to the legal question, the principal objection raised was that it was not competent for the defendants, respondents, to plead in answer to an action for the recovery of the stipulated price of these motors and generators the liquidated damages agreed upon in the contract for delays in the delivery of the articles, unless and until damages of some kind and amount had at least been first alleged and proved.

I have not been able to understand on what principle such a contention can be maintained.

Once it is established that the damages are genuine pre-estimated liquidated damages, and are not unconscionable, I cannot see why they should not be pleaded in answer to a plaintiff's demand for the price of the article sold.

But in the case at bar, the parties expressly provided that these damages should "be deducted from the contract price" and so the Courts below properly held that the defendant was entitled to deduct them for the number of days he established the vendors' default.

It has been suggested as a possible construction of the contract that a failure to deliver even a fractional part of the "apparatus" might make the vendor liable for the $25 per diem even on the motors and generators he had delivered until the entire apparatus was delivered.

I think, however, this is not the true construction of the clause which only makes the vendor liable for the per diem damages pre-estimated for each motor and each generator undelivered on time and for the days only there was default in the delivery of each such motor and generator.

If the suggested possible construction was the true one there would certainly be strong ground for holding the $25 per diem for each motor and generator not a genuine pre-estimated damage, but an unconscionable amount which was really a penalty.

On the whole, I would dismiss the appeal with costs.

IDINGTON, J.:—The appellant seeks to recover from the respondent the balance due for certain machines to be made at the factory of appellant in Peterborough, in Ontario, and delivered to respondent in Montreal for the contract price of $33,000 and for some other supplies and work incidental to the contract.

The differences between the parties are confined to a claim made by the respondent, and so far sustained by the Courts below, to deduct $25 a day from the contract price in the event of a failure to comply with certain alleged terms of the contract.

The frame of the contract is in some regards ambiguous, and as the claim to these reductions must rest upon the correct interpretation and construction of the contract which is somewhat complicated, I purpose analyzing it.

It consists of three parts. The first is briefly the operative part and therein contains the respective obligations of each party as follows:—

The contractor will manufacture, deliver and erect and operate the apparatus contracted for herein, consisting of four direct current motors—two motor generator sets—four alternating current motors, and a large switchboard with wiring, etc., all as herein specified.

The purchaser agrees to accept and pay for the apparatus the sum of thirty-three thousand dollars ($33,000) under the terms and conditions set forth herein, provided that the apparatus complies in every respect with the general conditions and the specifications herein contained.

The next part consists of the conditions referred to in the foregoing. In one of these conditions is the following somewhat ambiguous expression:—

The contractor will begin work immediately upon signing the contract and complete the same as per the delivery clause, free of all liens and charges within the time specified herein, etc.

Another condition provides as follows:—

The sum of twenty-five dollars ($25) per day for each motor, each generator and a complete switchboard shall be deducted from the contract price as liquidated damages and not as a forfeit for every day's delay in the delivery of the apparatus as specified in the delivery clause herein, and this sum shall be over and above the cost of any extra inspection.

It is upon this clause, coupled with the delivery clause thus referred to and what that delivery clause contains that the claim of respondent to reductions must rest. This condition is immediately followed by another which says:—

In the event of the purchaser ordering the work in connection with this contract to be discontinued, or in any manner whatsoever delays the work, it is hereby agreed that such delay caused by purchaser shall be added to the

CAN.

S. C.

CANADIAN GENERAL ELECTRIC CO. v. CANADIAN RUBBER CO.

Idington, J.

delivery date, mentioned herein, and such delivery date extended by the number of days that will be equal to the delay caused by the purchaser.

Upon this condition the appellant rests a number of claims to reduction from what respondent might otherwise be entitled to. With these, I shall deal presently in detail.

The respondent, however, alleges it has made due allowance for all such counterclaims as well founded.

These delays, it estimated at 122 days in all and tendered a sum to cover same which the trial Judge has found sufficient and in that has been sustained by the Court of appeal.

The "delivery clause" above referred to I find under the heading "Delivery and Erection" and under that appear the following provisions:—

The apparatus shall be delivered on purchaser's foundations, free of cost to the purchaser in his power house in the City of Montreal, Province of Quebec, not later than May 1st, 1911.

In case the contractor should fail to deliver the apparatus by May 1st, 1911, the sum of twenty-five dollars ($25) per day for damages as provided for herein shall apply.

. . . . . .

The purchaser agrees to have the power house foundations, etc., ready for the apparatus. If the purchaser causes any delay to the contractor thereby preventing the installation of the apparatus, or the delivery of the same, the damages of $25 per day provided for herein shall not apply for the number of days' delay caused by the purchaser.

It is herein I find the ambiguity I first mentioned. Clearly there is in this latter clause a confusion between delivery and installation.

True, there are between these just quoted, two provisions I omit, of which one provides appellant shall provide men to erect without delay and have same complete and ready for service not later than May 20, 1911. But as there is no reduction of price or provision for liquidated damages or anything specifically bearing thereon, I find none can by any possibility be claimed in that regard. Indeed, respondent in argument renounced any such claim save in respect of failure to deliver within the time agreed upon.

Notwithstanding that, can appellant, by virtue of the clause lastly quoted, exonerating the appellant for delays caused by respondent, take any benefit therefrom in way of reduction of respondent's claim, by reason of the peculiar expression therein which reads:—

Thereby preventing the installation of the apparatus, or the delivery of the same,

followed by the words:—

The damages of $25 per day provided for herein shall not apply for the number of days' delay caused by the purchaser?

I am of opinion it cannot. It is restricted to the damages provided therein, and they are only provided for in respect of default in delivery. And that default must be computed from the date, after the 1st of May, when the delays caused by the purchaser have been duly credited, and thus appellant given a later day for delivery.

Now let us consider the bearing of these clauses, thus interpreted and construed, upon the respective claims of respondent to make the reductions allowed, and the appellant to be relieved therefrom by virtue of what the purchaser has thus agreed to excuse.

Beginning with the latter which is chiefly in question herein, I shall take them in the order presented.

The first claim so set up is a delay alleged by the respondent's failure, for nearly a month, to execute the contract, after the appellant had duly signed same and sent it to respondent to be executed. I cannot understand how it can be claimed that such a delay can be held as one of those which was caused by the purchaser within the meaning of the contract. It is clearly a hindering the progress of the work which is aimed at and nothing else.

The appellant had the remedy in its own hands by refusing, if it could justify such a course under the attendant circumstances, to go on, unless and until a modification of the terms had been made, but the contract cannot permit of such a mode of construction. Indeed, the appellant in fact did go on meanwhile with the work. It was, as I read the contract in the expression I quote above, clearly contemplated by the parties that it should do so as soon as it had signed it; and everything must be treated as if the contract, which has no date, became operative from the date when the appellant signed it.

I have no doubt that, not only was that the purpose of the peculiar expression used, but also that it was the understanding of the parties.

The next item of claim is a change in three of the 175 h.-p. motors.

CAN.

S. C.

CANADIAN GENERAL ELECTRIC CO. v. CANADIAN RUBBER CO.

Idington, J.

Inasmuch as the specifications forming part of the contract provided for terminals as follows:—

> The motors shall be provided with terminals located suitably for connecting to the switchboard leads; the terminals will be provided with approved insulating couplings. The switchboard location and wiring may call for the terminals to be on top of the motor.

it does not appear to me as self-evident that the respondent was to blame for asking that they should be placed as at first asked.

It was competent for the engineer to have insisted, as some stubborn, self-sufficient men might have done, that what he had written must stand. If he had, I cannot see anything appellant could have done but submit.

Because the engineer was gracious enough to try and meet the appellant's urgent petition to save it expense, I do not think his company can be bound to bear the burden thereof. Moreover, I suspect there was ample work for appellant's men, working on these machines, to keep going steadily on.

The next is in respect of the test on those 175 h.-p. motors. The evidence bearing upon this item illustrates, by the slip-shod methods of those in the appellant's employment, in charge of its business, how very provoking they could be.

The appellant had been warned by a letter of the 5th May, in the nature of a personal appeal to its vice-president, and by a formal letter of 9th May to the company, that full deductions for delays for non-delivery would be insisted upon. Yet in face of these appeals, neither business energy nor ordinary despatch, much less the urgency that a possible loss of a hundred dollars a day should have evoked, was used. And there is no proof which can excuse them at the expense of the respondent.

The next item is in regard to three 175 h.-p. motors and one 20 h.-p. motor. The fault in part admittedly was on the part of appellant, and the requirements of the engineer in way of change were within the contract and no proof is adduced that the entire work was held up by any such cause as assigned.

The next cause of delay by respondent, if any, rests upon what transpired relative to some sub-bases which formed no part of the contract in question, yet were to be so used in connection with the work done under the contract that it might reasonably have been considered by the appellant as due to the respondent that the work done or to be done in Peterborough, pursuant to the

contract, should be so fitted there as to be ready when erected to operate upon the sub-bases.

With every desire to give effect to this reasonable suggestion, I am unable to discover wherein the parties concerned provided in the contract for the due execution thereof.

Whatever relief appellant is entitled to herein must rest within the terms of the contract as expressed in that condition above quoted providing for the extension of the date of delivery by reason of the purchaser causing delay to the contractor.

The reasonableness of the suggestion made in the letter of 1st April, upon which and what followed appellant's claim rests, cannot be gainsaid. But how far does that carry us in relation to the business in hand?

It, when coupled with what preceded and followed it, seems to disclose only this, that some one had blundered.

The contract itself does not seem to have provided for the contingencies involved in anything relating to the sub-bases. If the appellant's men had paid careful attention to the matter they should have seen to it earlier than this letter of 1st April to Sheldon's Ltd., indicates.

The fact is the fitting of the machines to be made by the appellant to serve sub-bases must have been patent to all concerned if heed paid to the business in hand and the means of doing so or anticipating same, ought to have been provided for in the contract. So far as I can discover this was not done.

In such a situation, what, within the contract, should have been done?

Clearly the only alternative in law was to have gone on with the completion of the work according to contract so far as it reached, and shipment of the machines so that the terms regarding delivery might have been fulfilled. If shipped in that condition a new difficulty would have been presented no doubt. The installation would have been delayed but for that no damages per diem for delays could have been claimed. Another difficulty would have arisen relative to the extra expense of having the work of fitting done in Montreal instead of in Peterborough for which due compensation no doubt would have had to be made by respondent.

Indeed, the parts which needed fitting to the sub-bases might have had to be shipped to Peterborough. But for any such event

CAN.

S. C.

CANADIAN GENERAL ELECTRIC CO. v. CANADIAN RUBBER CO.

Idington, J.

the respondent would only have itself to blame. It need not have concerned appellant.

It is impossible now for us to re-mould the contract and provide for all this. It is, I repeat, within the lines of the contract as framed that we must determine the rights of the parties and not by something we can presume to have been inserted and assume to have been contemplated as within same when it is clearly not so provided.

A letter of 13th February from respondent to the appellant made clear what was wanted. And therein appellant is asked for a tender for these sub-bases and it ought to have dawned upon some one in appellant's employment that unless this unprovided forfeiture of the contract was duly provided for, there was trouble ahead.

It may be excusable to overlook the need of this provision in a contract which covers twenty-eight printed pages of the case before us, but doing so furnishes no basis for us to allot the share to be borne of the burden of a joint blunder.

It was possibly a case for an application within the terms of the contract for an extension of time or for a direct appeal to respondent.

Instead of adopting either such course there was correspondence between appellant and the sub-contractors—Ross & Greig and Sheldons—and needless waste of time at that, without a direct communication (and probable understanding), with respondent. The only direct thing appellant has from respondent to shew, and rely upon, is the ambiguous letter of the 4th May. It passes my understanding why that should be relied upon for nothing preceding that letter had been done in any way approaching business methods so far as these sub-bases were concerned. Standing alone as it does, the letter is worthless for appellant's present purpose.

There certainly is fair ground for an appeal in regard to this item to the sense of justice respondent should have. It may or may not have taken that into consideration in arriving at the total of the hundred and twenty-two days it allows for.

But I can see no ground in law upon which to rest the claim made by the appellant in this regard.

I think it might have been possible for the appellant in a contract of this magnitude to have made the templets as requested

in the letter of respondent of 13th February at, say a couple of hundred dollars expense, even without an appropriation.

The next claim is one arising out of the admitted error made by the engineer in connection with the starters for the synchronous and induction motors. It seems well founded, but its consequences, in my opinion, are grossly exaggerated, and amply covered by allowances made.

The last claim relative to the motor generator sets may be disposed of by the like considerations.

I confess, notwithstanding the argument presented, I was disposed at its close to think the claims made by respondent were somewhat harsh and possibly unfounded in law, but the examination I have made leads to the conclusion that appellant has only itself to blame for the result.

There remains only the question of law striking at respondent's entire claim as presented for consideration.

In the first place, it is to be observed that the terms of the contract raise a most formidable obstacle in the way of the appellant. It sues upon a contract for a price agreed upon which it is stipulated, in certain contingencies which have taken place, shall be reduced to another price. What can it matter in such a case that the reduction of price is called "liquidated damages?"

It is not for the law, unless such stipulation is against law, to act upon the name given or name assigned the amount of reduction, but to give effect to the contract.

Of course, if the law clearly expressed such a stipulation to be null, or subject to modification, then the contract could be of no avail.

I do not think the article 1076 of the Civil Code governing the parties' rights in the premises does so interfere with the efficacy of what the parties have contracted for.

The case of *Ottawa Northern and Western Railway Co.* v. *Dominion Bridge Co.*, 36 Can. S.C.R. 347, does not help the appellant. It would be very difficult to extract from the decision in that case anything to help any one. For there was such a difference of opinion in the Court as to render its decision unlikely to be ever applicable to another case unless that other should happen to be, as this is not, exactly the same.

I had the misfortune, in common with my then brother, Mr.

CAN.
S. C.
CANADIAN GENERAL ELECTRIC CO. v. CANADIAN RUBBER CO.
Idington, J.

Justice Nesbitt, to differ from the result reached by the majority. But each member of that majority took different grounds for the conclusion reached.

There were two contracts involved therein; and in no way could one, by construction of the contract fixing the price, as may be held herein, be able to say that as the result of an application of the damages then and there in question, the price was thereby determined. The case chiefly turned, so far as the majority of those expressing opinions held, upon the point of whether there could be held to be an application of art. 217 of the Code of Civil Procedure. The question of whether or not the party seeking there compensation or set-off based in liquidated damages or, as here, such a reduction of price as claimed herein must shew actual damages could only arise in a very incidental manner therein. And as I viewed it then my opinion would be against the appellant. If this Court had by the majority clearly expressed a view in conflict therewith upon the exact point involved, I should cheerfully bow thereto, but unfortunately it did not.

The neat point raised herein, that, of necessity, in law the party claiming the reduction of price must allege and prove damages before he can apply the estimate fixed by the contract, does not seem to me tenable in this case.

In the first place, the contract does not permit of such a holding. And in the next place, the fact is that such proof as was adduced seems to answer the contention.

I can conceive of such a case arising as might give place to such a contention as raised herein, but not in this case, or in the way it is presented.

I find in respondent's factum, art. 1076 C.C. quoted as follows:

> 1076. When it is stipulated that a certain sum shall be paid for damages for the inexecution of an obligation, such sum and no other, either greater or less, is allowed to the creditor for such damages.

This is not the whole of that article. The part quoted is followed by this:—

> But if the obligation have been performed in part, to the benefit of the creditor and the time for its complete performance be not material, the stipulated sum may be reduced unless there be a special agreement to the contrary.

This gives an entirely different aspect to the article as a whole and provides for such cases as I have just indicated may possibly arise. In such a case this second part of the article should be

availed of by pleading the fact applicable thereunder, which was not done or pretended to be claimed herein.

In concluding I may say that the parties are both agreed that the Quebec law must govern their rights. But there are many features in the case arising from the execution of the contract by appellant in Ontario, and the form of contract, which not only contemplated the work of constructing the machines in Ontario but also the right given respondent incidentally thereto to interfere with the expedition of the work there and the shipment thence and only a delivery at Montreal being provided for, before the clauses in question should become operative, which might suggest the law of Ontario was intended to govern. For the later work of installation, in respect of which nothing arises herein, different considerations might apply.

I express no opinion. I merely suggest there is room for argument and should not feel bound in that regard by this decision in any case presenting the like features and any different submission as to the law of the place by which the contract should be interpreted.

I think the appeal should be dismissed with costs.

ANGLIN, J.:—The appellant submits three distinct grounds of appeal:—

(1) That the contract in question must be interpreted and effect given to it according to the civil law of Quebec and not according to English law; and that, under the former, the provision fixing the amount of damages to be paid by the vendors for delay in delivery, installation, etc., is not "a penal clause" within arts. 1131 *et seq.*, of the Civil Code, but a pre-determination of the amount of damages under art. 1076, and that the purchasers, therefore, cannot recover under it without alleging and proving that the delay complained of had actually caused them some damage, the appellants conceding, however, that upon proof of any damage, more than merely nominal, regardless of its extent, the purchasers would be entitled to recover the full sum stipulated for in the contract.

(2) That damages under the clause in question are not a proper subject of compensation or set-off, but recovery of them can be had only in a cross-action.

(3) That the number of days' delay charged to the vendor is excessive.

CAN.

S. C.

CANADIAN GENERAL ELECTRIC CO. v. CANADIAN RUBBER CO.

Idington, J.

Anglin, J.

CAN.
S. C.
CANADIAN GENERAL ELECTRIC CO. v. CANADIAN RUBBER CO.
Anglin, J.

Before considering the character and legal effect of the clause in the contract upon which this litigation has arisen, a word should be said as to its scope. It has been suggested that it might render the vendors liable for the sum of $25 per day in respect of each of the eleven distinct articles which they undertook to supply so long as any one of them should remain undelivered, because until all had been delivered there was delay in the delivery of the "apparatus" contracted for. But both the parties, by their conduct before action and by their attitude in the litigation itself, have made it clear that they understood that the right to recover the stipulated sum for delay in respect of each of the eleven specified articles should be limited to delay in its delivery. That this is the real purview of the agreement seems to be at least equally probable. As the parties have acted upon this view of its scope and have suggested no other, it would appear to be contrary to sound construction to give to the clause in question an effect different from what they seem to have contemplated (art. 1013, C.C.) more onerous, and possibly calculated to render its enforceability doubtful.

The first point made by the appellants is based upon the words "as liquidated damages and not as a forfeit." Only a very cursory examination of the clause in question is required to make it practically certain that it was prepared from the point of view of the English jurist. It is in a form familiar to every English lawyer who knows anything of commercial contracts. It was no doubt taken from some similar contract, framed for use in one of the provinces where English law prevails. The obvious purpose of the parties was to prevent the application of the equity rule, under which Courts administering English law relieve from penalties and forfeitures, by inserting a provision that it would be difficult to regard as anything else than "a genuine covenanted pre-estimate of damages" (*Dunlop Pneumatic Tire Co.* v. *New Garage and Motor Co.*, [1915] A.C. 79, at p. 86), in a case in which "it was impossible to foresee the extent of the injury which might be sustained" by the purchasers should the vendors make default. *Webster* v. *Bosanquet*, [1912] A.C. 394, at p. 398. The circumstances are such that it cannot be said that the sum agreed upon is extravagant or unconscionable; it is made to depend upon the number of articles undelivered and the duration of the delay in the delivery of each; and a precise estimate of actual damage either

before or after the default would have been so difficult to arrive at as to be impracticable. *Clydebank Engineering and Shipbuilding Co.* v. *Yzquierdo y Castaneda*, [1905] A.C. 6, at pp. 16, 19.

The apparent intention of the parties, therefore, was to provide for the payment by the vendors, on default, of a sum agreed upon as pre-estimated damages in such a manner that the Courts would not relieve from or modify the stipulation and to dispense with what would possibly be very expensive proof of the actual loss to which the delay had subjected the purchasers. Such an intention is conformable to the policy of the civil law of Quebec quite as much as it is to that of English law. Under both systems alike, their contract is the law of the parties. It is the duty of the Courts to ascertain as best they can from what the parties have expressed, read in the light of the surrounding circumstances proper to be considered, the nature and extent of the engagements to which they intended to commit themselves, and to give effect to them. In English law, the term "penalty" may bear a meaning and may import incidents which differ somewhat from those attached to it by the Civil Code of Quebec. Yet where it is clear, as it seems to be in the present case, that it was the intention of the parties to contract according to English law, although their agreement was partly made and was partly to be carried out in the Province of Quebec, the Courts of that province, giving effect to such intention, will put upon its language the interpretation which it would receive in an English Court rather than defeat the real purpose of the parties by giving to the terms they have used, the significance which they ordinarily bear in contracts governed by the civil law of Quebec, when there is no sufficient indication that they should receive any other interpretation. The present contract was partly made in Ontario, where one of the contracting parties had its chief place of business. That fact may account for its having taken the English form. But, however that may be, effect must be given to the manifest intention of the parties that their contract should be construed according to the rules of English law. *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A.C. 202; *The "Industrie,"* [1894] P. 58, at pp. 72, 73. In doing so we are but carrying out the provisions of art. 8 of the Civil Code.

In this view, it is unnecessary that I should consider the points suggested by the appellants as to the differences between the cases provided for by art. 1076 C.C., and those dealt with under arts.

CAN.

S. C.

CANADIAN GENERAL ELECTRIC CO. v. CANADIAN RUBBER CO.

Anglin, J.

1131, etc., or whether, if the present case falls under the first mentioned article, it would be necessary for the respondents to allege and to prove that they had sustained some actual damages. I may, however, observe that I would have difficulty in placing a construction on the clause in question which would require the purchasers to prove some actual damage, more than merely nominal, but would upon any such actual damage being shewn, regardless of its extent, entitle them to recover the entire amount stipulated for. I think the first ground of appeal fails.

The term of the contract that the purchasers shall deduct from the contract price any sum payable by the vendors for damages for delay in delivery is an express provision for set-off or compensation which must prevail, the contract being the law of the parties. The effect of this clause must have escaped the notice of Mr. Justice Tellier. But for it, I should be prepared to accept his conclusion that, in view of the provisions of art. 1188 C.C., and art. 217 C.P.Q., there could not be compensation in such a case as this. *Ottawa Northern and Western Railway Co.* v. *Dominion Bridge Co.*, 36 Can. S.C.R. 347.

A study of the record has satisfied me that there has been no overcharge against the vendors for the several periods of delay in delivery and that they have had the full advantage of any reduction in damages to which defaults of the purchasers entitled them. In every case where there was any room for doubt, they have not been charged with delay. Only in a very clear case could we interfere on this branch of appeal with the concurrent judgments of the Quebec Courts.

Brodeur, J.

BRODEUR, J.:—The appellants are manufacturers of electric motor power, and they had undertaken to deliver to the respondent certain machines on May 1, 1911, with obligation on their part to pay $25 damages for each day of delay. The convention stipulated that those damages would be deducted from the price of the contract "as liquidated damages and not as a forfeit for every day's delay in the delivery." The question is to know if the respondent company was obliged to claim and to prove that it had suffered damages.

As a general principle, the debtor is bound to pay damages when he does not fulfil his obligation (art. 1065 C.C.), and the creditor is then bound to prove the loss which he has suffered and the profit

of which he has been deprived and he has also to establish the "quantum" of the damages (art. 1073 C.C.) It is sometimes extremely difficult to give such proof and that proof entails considerable costs of inquiry and therefore the parties agree upon a certain sum to take the place of damages (art. 1076 C.C.). It is the law that they impose upon themselves and that they must, consequently, observe.

There has evidently been in the present case, lack of execution of its obligation on the part of the appellant. It has not delivered the machines within the delay stipulated in the contract. Then, as the convention had as one of its conditions that the sale price would be reduced in the proportion of $25 for each day of delay in the delivery of each of the machines, the respondent could in its defence invoke such reduction (art. 196 (3) C.P.Q.)

But the appellant says that the respondent should just the same, in spite of that stipulation, prove that it had suffered damages.

I am of opinion that the contract relieves the creditor from the necessity of proving the prejudice which he has suffered. Marcadé et Pont, art. 1153, p. 421; Larombière, Obligations, vol. 4, p. 32, art. 1231; 26 Demolombre, No. 663; 17 Laurent, No. 451, p. 448; *McDonald* v. *Hutchins*, 12 Que. K.B. 499.

The parties had evidently in view that it was essential for the respondent to have his machinery at a fixed date and by reason, I suppose, of some contracts that it would have had itself to fulfil, it was absolutely necessary for it that they be delivered at that date, so as to be able in turn to fulfil the obligations that it had contracted towards other persons. As those damages would have been extremely difficult to establish, it was thought advisable for the parties to determine immediately by a contract the *quantum* of those damages and under what conditions they would become due. The *quantum* has been fixed at $25 per day, and the condition is that if the merchandise is not delivered on the 1st of May, that sum of $25 a day may be deducted from the sale price.

Even if we literally interpret the contract, we may say that a certain sum had been stipulated for the price of the goods, if they were delivered on May 1, but that that merchandise would command a lower price if delivered later. I do not see how the respondent could be bound, under the circumstances, to prove that it has suffered damages.

CAN.

S. C.

CANADIAN GENERAL ELECTRIC CO. v. CANADIAN RUBBER CO.

Brodeur, J.

The appellant, however, might have established that if the time for complete execution had been of little importance, the stipulated sum might have been reduced (arts. 1076, 1135): but the burden of proof is upon it: and, as it has not discharged that onus, we cannot do otherwise than apply the agreement of the parties and say that the appellant is bound to suffer a reduction in the price.

Considerable evidence, however, has been given on the question as to whether the inexecution of the contract was not due to the negligence of the respondent. A clause in the contract was to the effect that if the buyer caused the seller delay which might result in preventing the installation of the machinery or its delivery, the reduction in price could not be claimed for the number of days of delay which would have been caused by the buyer.

The respondent itself admits in its pleadings that a certain number of days of delay should be imputed to itself and gives credit to the appellant, under this head, for a sum of about $3,000.

The question was to know if the other delays were not equally due to the fault or to the negligence of the respondent.

One of the first imputations against the Canadian Rubber Co. was that the contract had been signed by it only about a month after the appellant itself had signed.

The plaintiff should in that case have proved that it had at least protested the respondent: but it has not thought advisable to have recourse to that procedure. It had received the contract duly signed by the respondent and besides it is proved that the parties had agreed long before on the nature of the works to be performed and even that the plaintiff had started to execute its contract. The formal contract which has been signed has been done only for the purpose of laying down in a formal document their conditions which were well settled and well known.

The evidence is to the effect that the plaintiff has signed that convention in a very thoughtless way. In fact, we have on record a letter from the superintendent of its factory saying, a few days before the signing of the contract, that it was absolutely impossible to manufacture the machines within the stipulated time. It seems to me then, that before formally obliging itself, as it did, the plaintiff should have inquired from the superintendent of the factory if he was in a position to manufacture those machines within the stipulated time. It seems to me, that it did nothing

of the kind and then it has no right to accuse the respondent of that delay, when it is very evident that it is itself that is at fault.

It complains also about other delays, concerning, for example, the bases upon which the machinery was to rest.

Those bases were to be made by the Canadian Rubber Co. It had them made by a Montreal manufacturer; but as the machines had to be fixed on those bases, it was very important that they be tried in advance so that those machines which require to be installed with much care could perform the works expected from them. The appellant had those bases transported to its factory in Peterboro for those tests.

There is a difference of opinion in the evidence on this subject. Some witnesses say that those tests were necessary; others say that they were useless.

The Superior Court and the Court of Review, on this point as well as on others which it is idle to discuss, have come to the conclusion that on those facts the respondent must succeed.

It is very difficult for us to put aside those concurring decisions of both Courts below. The question, as is seen, is about facts: and according to the well settled jurisprudence of this Court, we must interfere only when there is a very flagrant and evident injustice.

In those circumstances, I am of opinion that the judgment of the Court of Review should be confirmed with costs.

It has been said that the contract in this case, being a commercial contract, should be interpreted according to English law.

I cannot accept that principle. Our laws in Quebec on the penal clause are different from the English law. Glasson, in his work on the "Histoire du Droit et des Institutions de l'Angleterre," expressly declares, vol. 6, p. 375, that the French laws and the English laws give different rules as to obligations with a penal clause.

Appeal dismissed.

ONT.
S. C.

FOSTER v. TRUSTS AND GUARANTEE CO.

Ontario Supreme Court, Appellate Division, Garrow, Maclaren, Magee and Hodgins, JJ.A. January 24, 1916.

1. ASSIGNMENT FOR CREDITORS (§I-1)—WHAT CONSTITUTES—DEED OF TRUST TO BUILD AND PAY DEBTS—VALIDITY OF MORTGAGE BY TRUSTEE.

A conveyance of several parcels of land in trust for the purpose of completing houses in the course of erection and then selling them, with incidental powers of borrowing money thereon and to collect all debts and thereout to pay all creditors of the grantor, is not an assignment for the general benefit of creditors within the meaning of sec. 9 of the Assignments

ONT.

S. C.

FOSTER v. TRUSTS AND GUARANTEE CO.

Statement

and Preferences Act, R.S.O. 1914, ch. 134, as will render ineffectual a mortgage by the trustee because executed without the consent of the creditors or inspectors appointed by them.

APPEAL by the defendant from a judgment of MIDDLETON, J., in favour of the plaintiff in a mortgage action for foreclosure. Affirmed.

The judgment appealed from is as follows:—A man named Moses Ellenson was carrying on business in Toronto under the name of the Ellenson Lumber Company. The title to this business and the land connected with it was in Esther Ellenson, his daughter. Ellenson had received conveyances of various parcels of vacant land in payment for lumber. In the result, he found himself in an embarrassed position financially, but claimed that there was a considerable surplus in his assets.

On the 26th August, 1913, Miss Ellenson made a conveyance of certain real estate to Mr. Lobb, a barrister and solicitor practising in Toronto, upon trust to complete certain houses in the course of erection upon three of nine parcels conveyed, and for the purpose of borrowing upon the security of the land and selling the land and personal property and collecting the debts due to the company and thereout to pay his own remuneration, all preferential claims, and then pay the ordinary creditors, with an ultimate trust in favour of the grantor. It will be noted that the clauses in the deed are inconsistent, as the only conveyance in the deed is of the land, yet the clause defining the trust speaks of the realisation of the personal property and the debts due the assignor. There is a recital in the deed which speaks of the financial embarrassment of the assignor and an assignment of all her property to enable her debts to be paid in full.

The underlying idea was that Ellenson's connection with the lumbering and building business would enable the buildings to be erected on such advantageous terms that there would be in the end a substantial surplus. The transactions undertaken by Lobb seem to have become very large and involved. According to the statement verified by Lobb's bookkeeper, Lobb has disbursed $110,410, and has received $67,943, leaving a balance in his favour of $42,766. This statement, however, antedated the trust deed, and it appears that Lobb had disbursed for Ellenson about $12,000 prior to that date.

Mr. Lobb left the Province, and was examined under com-

mission in New York. Upon his examination he states that the trust owes him at least $25,000. Upon the trial various statements were made reflecting upon the accuracy of these figures, but they were not seriously impeached.

Foster was also a client of Lobb's and on the 5th June Lobb received for him the sum of $5,848.88, and being then in an embarrassed position, not only by reason of the condition of the Ellenson account, but by reason of other transactions, Lobb used this money for his own purposes, and possibly to some extent for the purposes of the trust. There might be some difficulty if the plaintiff's claim depended upon following this specific money into this trust. Foster, however, shortly demanded his money, but it was not forthcoming, and Lobb claimed that he had used it in the erection of these houses; and finally Foster accepted a mortgage upon some portion of the trust property where the houses were situated, as security for his claim. The mortgage is dated the 10th September, 1914. This action is brought to enforce the mortgage by foreclosure.

In the meantime, after Lobb had left Ontario, an order was made on the 1st December, 1914, appointing the Trusts and Guarantee Company trustee under the trust deed in question, in place of Lobb; the application for this order was made under the Trustee Act, R.S.O. 1914, ch. 121.

The plaintiff's claim is put by Mr. Raney in two ways. First, he says that, upon the evidence, Lobb had put far more money into the trust property than he had received, and he was therefore entitled under the terms of the trust to borrow to recoup himself, and that what he did was to borrow from Foster for that purpose. The fact that the money was taken from Foster in the first instance without his consent is something that concerns Foster and Lobb alone, so long as there was more due to Lobb than the amount of the mortgage.

In the second place, Mr. Raney makes the alternative contention that, Lobb having advanced more money upon the trust than received by him, he had a lien upon the trust property for the balance due to him, and that his mortgage to Foster would at least operate as an assignment *pro tanto* of this lien. The difference in the result would be that in this case Foster's sole remedy would be to have his lien enforced by sale rather than by foreclosure.

ONT.

S. C.

FOSTER v. TRUSTS AND GUARANTEE CO.

Statement

Mr. Jennings takes the position that the assignment must be regarded as an assignment under the Assignments and Preferences Act, R.S.O. 1914, ch. 134, and that therefore the assignee had no right to do anything without first calling a meeting of creditors, having inspectors appointed, and then acting in all respects in conformity with that Act.

I do not so understand the law. The assignment is clearly not one under the statute, as the powers which it confers upon the assignee are totally different. An assignment under the statute is an assignment to realise and sell; the intention under this assignment was that the assignee should be a trustee for the purpose of building houses and then selling, with the incidental power of borrowing money. It may be that the creditors could have attacked this assignment or that it would have been superseded by an assignment in conformity with the Act; but it is to be borne in mind that the creditors have not attacked it, and that the Trusts and Guarantee Company is now the trustee under the assignment, and it cannot seek to defeat its own title.

Nor do I find anything in the statute which gives colour to Mr. Jennings' alternative contention that the assignment is to be so read as embodying in itself all the terms of the Assignments and Preferences Act.

It is conceded that there was very little margin in the property covered by the mortgage in question over and above the amount of prior incumbrances, including mechanics' liens; and, this being so, I feel inclined to give effect to Mr. Raney's first contention and to uphold the validity of his mortgage, as a mortgage, and to grant foreclosure. If the defendant is ready to consent to an immediate foreclosure, then, the plaintiff taking the property for the debt, I need not consider the question of costs; but, if this is not consented to, I think there should be foreclosure according to the ordinary practice, and in that event the defendant company, having contested the plaintiff's rights, must be ordered to pay the costs to the hearing.

J. Jennings, for appellant company.

W. E. Raney, K.C., for plaintiff, respondent.

The judgment of the Court was delivered by

Garrow, J.A.

GARROW, J.A.:—The action was brought to enforce by foreclosure a mortgage dated September 10, 1914, made by Mr. Arthur

Freeman Lobb in favour of the plaintiff, upon certain lands in the city of Toronto, to secure $5,980 and interest.

The facts are quite fully set out in the judgment of Middleton, J., and, except in minor matters, are not in serious dispute. The execution of the mortgage is admitted, so is the execution of the conveyance in trust from the debtor to the trustee, Arthur Freeman Lobb. It is not disputed that the trustee received for the plaintiff the sum of money to secure which the mortgage in question was, about three months afterwards, given; nor is it disputed, or, if so, but faintly, that at that time the advances which the trustee had personally made, without security, to the trust estate, considerably exceeded the sum for which the mortgage was afterwards given.

The main contention by the learned counsel for the defendant before us, as previously, apparently, before Middleton, J., was, that the conveyance in trust to the mortgagor was in effect an assignment for the general benefit of creditors within the meaning of sec. 9 of the Assignments and Preferences Act, R.S.O. 1914, ch. 134, and that the mortgage was therefore ineffectual without the consent of the creditors or of inspectors appointed by them.

He also contended that it is not established that the trust estate benefited by the plaintiff's money; and if by that is intended merely a statement that it is not proved that the money received from the plaintiff by Mr. Lobb was actually expended in and upon the trust property, I would be disposed to agree. Mr. Lobb, carelessly perhaps, or at least I may be allowed to be critical to the extent of saying, unwisely, kept but the one bank account. He was evidently a busy man, engaged in many affairs. His cash-book shews that he constantly handled large sums of money. Yet he kept but the one bank account, into which indiscriminately went his own and his clients' money, and upon which he drew by means of cheques as money was required.

The result renders it not easy to trace, at this late date, exactly what became of the plaintiff's money received by Mr. Lobb in June, 1914; nor is it, I think, necessary, or even useful, to do so, since the defendant quite fails, by any reference to the evidence, to displace the important finding by Middleton, J., upon the state of the account in this matter, in these words: "Mr. Lobb left the Province, and was examined under commission in New York.

ONT.
S. C.
FOSTER v. TRUSTS AND GUARANTEE CO.
Garrow, J.A.

Upon his examination he states that the trust owes him at least $25,000. Upon the trial various statements were made reflecting upon the accuracy of these figures, but they were not seriously impeached."

With that finding standing, and fraud and bad faith entirely out of the question, it seems idle to talk about whether or not the plaintiff's money was actually expended upon the trust property. One must look at the substance, and not merely at the form. Mr. Lobb's power and his duty, as defined in the trust deed, was to complete the houses in course of erection, and for that purpose to borrow money upon the security of the lands of the grantor *or otherwise*. And, under these circumstances, he might himself temporarily advance; and for any such advance he was certainly entitled to recoupment out of any loan which was obtained. And, looked at fairly, the giving of the mortgage now in question was therefore merely in effect recoupment *pro tanto*.

As to the other point, which I have before called the defendant's main contention, I also agree with the conclusions of Middleton, J.

Section 9 was first introduced in the statute of 1895, 58 Vict. ch. 23 (O.), and is as follows: "Every assignment for the general benefit of creditors, whether it is or is not expressed to be made in pursuance of this Act, and whether the assignment does or does not include all the real and personal estate of the assignor, shall vest the estate, whether real or personal or partly real and partly personal, thereby assigned, in the assignee therein named for the general benefit of creditors, and such assignment and the property thereby assigned shall be subject to all the provisions of this Act, and the same shall apply to the assignee named in such assignment."

The need for the amendment is said to have been because it had been held that an assignment of part only of a debtor's estate was not within the statute. See Cassels' Ontario Assignments Act, 4th ed., p. 71. I am not aware of any case in which its provisions have been considered.

It applies, as it says, to "every assignment for the general benefit of creditors." The trust set forth in the conveyance to Mr. Lobb is thus expressed: "Upon trust that the said grantee, his heirs, executors, administrators, and assigns, shall complete

ONT.

S. C.

FOSTER v. TRUSTS AND GUARANTEE CO.

Garrow, J.A.

the houses in course of erection upon said parcels 1, 2, and 3, and for that purpose to borrow money upon the security of the lands of the grantor or otherwise, and sell and convey the real and personal property and convert the same into money, and collect and call in all debts, dues, and demands of the said Ellenson Lumber Company, and with the money so received: first, to pay the legal costs of and incidental to the preparation and execution of these presents; second, to retain for himself such remuneration as may be agreed upon; third, to pay preferential claims and liens; fourth, to pay the debts and liabilities of the grantor ratably and without preference or priority."

The controlling idea of the arrangement evidenced by the trust deed clearly was to place in the hands of Mr. Lobb the uncontrolled management of the work of completing and selling the partly finished houses, in which it was apparently believed would be found considerable profit, enough, it was hoped, to pay every one in full. That idea could not have been carried out by means of the usual assignment under the provisions of the statute, where the assignee is always completely under the control of the creditors. The creditors are not bound to accept the benefits, if any, intended for them under the trust deed in question. They might even conceivably attack it, I will not say successfully, as part of a fraudulent scheme for delay; but what they cannot, in my opinion, be allowed to do, is both to approbate and reprobate, which is what, by the mouth of this defendant—whose only right to be here at all is derived under the trust deed and the order of substitution —they are trying to do.

For these reasons, I would dismiss the appeal with costs.

Appeal dismissed.

KOHLER v. THOROLD NATURAL GAS CO.

CAN.

S. C.

Supreme Court of Canada, Davies, Idington, Duff, Anglin, and Brodeur, JJ. February 14, 1916.

1. DAMAGES (§ III A 1—47—) SUPPLY OF GAS PREVENTED BY WRONGFUL ACT OF PURCHASER.

The supply of gas at an agreed pressure, which is prevented by the wrongful placing and use of a regulator by the purchaser, entitles the vendor to be compensated for the amount he would have received but for such interference.

[*Mackay* v. *Dick*, 6 App. Cas. 251; *Burchell* v. *Gowrie Collieries*, [1910] A.C. 614; *Wilson* v. *Northampton R. Co.*, 9 Ch. App. 279, applied; *Kohler* v. *Thorold Nat. Gas Co.*, 16 D.L.R. 862, reversed.]

Statement

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 16 D.L.R. 862, reversing the judgment

CAN.

S. C.

KOHLER v. THOROLD NATURAL GAS CO.

Idington, J.

at the trial in favour of the plaintiffs and dismissing their action. Reversed.

W. T. Henderson, K.C., for appellants.

Collier, K.C., for respondents.

DAVIES, J.:—I concur in the judgment of Duff, J.

IDINGTON, J.:—The appellants by an agreement dated October 14, 1911 (wherein they were called the contractors), agreed with the respondent as follows:—

1. The contractors agree to sell and deliver to the company at its meter house in the Town of Dunnville, in the County of Haldimand, against the line pressure, from time to time in the company's line at that point, having regard to the contracts aforesaid, all the natural gas of a quality and purity suitable for domestic consumption which is now being, or which may be hereafter obtained from the lands now leased or controlled by the contractors in the Township of Canboro, particulars of which are set forth in the schedule hereto attached marked "A," or hereafter acquired or controlled by them in the said township, in such amounts as they shall have available for delivery at the rate of twenty cents per thousand cubic feet up to April 1, 1912, and after that date at the rate of sixteen cents per thousand cubic feet to May 1, 1913, and thereafter at the rate of twenty cents per thousand cubic feet.

The respondent therein agreed as follows:—

2. The company agrees to purchase from the contractors the said gas in the last paragraph mentioned at the prices aforesaid.

The next clause partly exonerated appellants from the comprehensive terms of said agreement by permitting them to use some of said gas obtained from said field for specified purposes incidental to their business operations.

By clause 10 the agreement was to remain in force and effect so long and so long only as gas could be found in paying quantities in the territory then leased or otherwise acquired by the contractors in the said township and they are able to deliver it at a pressure sufficient to enable the company to transmit it as specified.

I should have supposed that the contract was tolerably plain but for the difference of judicial opinion which must make one pause.

The respondent had directly or indirectly prior contracts whereby it was bound to take, in the same transmission line from each of two other contractors respectively, a supply of a specified annual quantity of gas to be delivered.

The transmission line at Dunnville, to be used by the contractors respectively operating, under said prior contracts, apparently was contemplated to be the same line as that to be used for delivery by the appellants in fulfilling their contract.

There is not in appellants' contract any restriction upon the quantity to be supplied per annum or otherwise as there was in each of the other prior contracts.

There is the following provision in clause 9 of appellants' contract:—

> 9. The contractors shall not at any time or times turn in any gas into the company's main without giving reasonable notice to the company, nor turn off any gas which shall have been turned into the company's main without the consent of the company first having been obtained.

There is not in appellants' contract any obligation to maintain any specified degree of pressure or any express limit upon the pressure permissible for appellants' gas.

The gas therefrom was to be conducted for 8 miles by a 4½ inch pipe. To enable the construction of that pipe by appellants the respondent contributed a loan of $5,000 without interest until April 1, 1912, when that was to be repaid. There is nothing in the contract making the supply dependent upon the consuming capacity of the respondent or its customers.

The transmission line was of 8 inches in diameter and capacity; and from Winger to St. Catharines was some 22 miles in length.

The appellants had in April, 1912, 15 wells and drilled 2 more afterwards. Exactly how many existed at the date of the contract does not accurately appear.

In the first of the prior contracts in question (which I shall hereinafter call the Waines' contract) there was imposed upon the contractors an obligation to deliver their gas through respondent's line as then laid to Dunnville at a pressure of 50 pounds to the square inch, provided that the respondent should not maintain a pressure of greater than 50 pounds in its own line at the said point. There was nothing in it preventing a delivery at a greater pressure if the company chose to assent thereto. The appellants took, by the plain terms of the contract, the risk of being able to deliver against the line pressure from time to time in the company's line at Dunnville.

That if supplied at 50 pounds pressure by a pipe in the Waines' system of equal dimensions to the 8 inch line of respondent's would obviously supply all the respondent needed if kept up continuously. But I infer the Waines' delivery pipe being only 5⅝ inches diameter could not thereby shut out by its resistance another supply pipe's product. Nor could the product delivered through

CAN.

S. C.

KOHLER v. THOROLD NATURAL GAS CO.

Idington, J.

that and the delivery through another pipe of same dimensions combined shut out the appellants' product entirely. How much it would have permitted I cannot say.

The problem so presented has not been scientifically dealt with in any such way as it should have been; and I do not venture to speculate. I merely desire to point out by this illustration what I think were the possibilities the appellants faced in their contract.

Instead of letting, as I think the contract intended, the resistent forces in the line of the respondent created by the pressure resulting from the deliveries from both the Waines' and Aikens' supply pipes combined, however great that might be, to determine the matter, the respondent applied to the appellants' delivery pipe a regulator it had never contracted for being so applied.

I do not think it had any such right, nor do I think such a thing was ever in the contemplation of the parties. Having departed from the plain terms of the contract and adopted a test not provided for in the contract, the onus rested upon it of demonstrating, much more clearly than has been shewn herein, that the result obtained by the use of the regulator must of necessity have been the same as, or at least no more detrimental to the appellants than, the application of the test which the contract plainly expresses.

For example, I am unable to explain why, the average pressure in the respondent's line, nearly always during the eight months at least, in question herein, was below, and most markedly below, the fifty pound pressure, which the respondent would have us believe the regulator continuously provided against, although for the most part the average pressure in appellants' pipe during the same period exceeded 50 pounds pressure.

The only answer counsel for respondent could suggest as to this was that the hourly pressure forming the basis for the tables produced and sworn to, might not produce an accurate result. He suggested the average is derived from the hours by day as well as by night, when the pressure might have materially varied by reason of the use of gas being much greater in the day than during the night.

I agree there is a possibility of discrepancies arising out of that, but I cannot think that it entirely accounts for the remark-

able result that the evidence shews. And it is to be remarked that this is the basis upon which, as it seems to me, the payments under the contract for the supply of gas seem to have rested.

Again, this is only by way of illustration, for it devolved upon the respondent to have demonstrated and made clear, when it departed from the terms of the contract, how such results were possible.

It is said that the words "having regard to the contracts aforesaid" cover the whole thing, and mean that a regulator was to be applied.

If so, assuredly it was a very simple thing to have had it so expressed. It is neither so expressed in this contract nor in the Aikens' contract which was made two years later than the Waines' contract, and three to four months before the appellants' contract and subject to the obligations in the Waines' contract.

I am driven to the conclusion that the device of a regulator was entirely an afterthought and never present to the mind of any one at the time of making the contract.

It is said appellants must have known of its existence, and yet never remonstrated, but that is not proven. And on the other side we have the distinct claim put forward on January 23, 1913, reiterating complaints that appellants' gas was not being taken according to contract, and stating in letter of that date to the respondent's manager amongst other things, as follows:—

> Contrary to the terms of our contract you have maintained a regulator for the purpose of creating an artificial pressure against which we cannot feed and against which we beg to protest.

To this we have no reply in the evidence. Throughout the evidence there is a most remarkable absence of reference to proof relative to the regulator except the fact of its existence. And the results seem to destroy the alleged fact as to its proper setting.

There is quite apparent, in this case, the fact that Mr. Aikens was a contractor in one of the prior contracts as well as in that in question, and thus perhaps not personally so damaged as to induce him to cry out as much as otherwise he might have done on the score of this device.

But the respondent took the very unjustifiable course of contracting for and obtaining another contract for further supply and packing the pipes with the product thereof.

It looks as if respondent desired to lay hands upon as much

CAN.

S. C.

KOHLER v. THOROLD NATURAL GAS CO.

Idington, J.

territory as possible against the day when gas might be running short, and was content, therefore, to run the risk of paying for mo than it could consume.

So much as can be gathered by way of the conduct of the parties interpreting the contract, as was suggested by respondent as of some weight, I think it operates entirely against the respondent when all the circumstances are considered.

I think the construction of the contract is that put upon it by the referee and maintained in appeal by the Chancellor. And as to the damage I see no reason for interfering with same so ascertained and so maintained. If, however, the assessment of damages had, of necessity, to turn alone upon the assumption of fact that the appellants' field had been depleted by the rivals referred to in the case, I should hesitate much to accept that alone as sufficient basis for such substantial damages.

The evidence put forward by each party on this head falls singularly short of what I should have liked to hear in a case turning upon the solution of problems respecting which none of the witnesses seem to me to have had either the knowledge or experience which if possessed might have rendered their evidence very helpful.

For example, how can the daily experience of a man boring in the wrong place help us? They, however, tell us enough to suggest the possibility that the man who postpones the reaping of his crop on such a field, runs imminent risk of losing a great part of it.

But it is not alone, from the supposed rivals in the immediate vicinity reaping that crop, as it were, that the risk is run. What the appellants call their field is perhaps but a very narrow part of a much wider field which may be so developed beyond it to their detriment pending delay in operations.

Fortunately we are not driven to rely upon such speculations alone. There may be in the evidence enough to found an assessment of a substantial sum based upon reasonable possibilities alone, but it does not strike me it would, necessarily, reach so far as the sum assessed.

There is in the case coupled with that a much more substantial element in the loss from a large fraction of unproductive capital invested, lying waste, as it were, by reason of the breach of the contract. But again we have nothing to shew how much.

And again, what is much more palpable is the fact that the respondent instead of taking from the appellant what they tendered, chose to discard their legitimate claims and take from the Waines' contractors what they were not entitled to insist upon, and from yet others who should never have been brought into competition with appellants, that from which appellants should have obtained most substantial returns. The extent to which this was done to appellants' detriment is entered into and well demonstrated in Mr. Tilley's factum.

The result reached is one I cannot feel at liberty to interfere with and be assured I can do any better that the referee.

The appeal should be allowed and the judgment of the referee and the Chancellor be restored with costs.

DUFF, J.:—The first question concerns the construction of the agreement of October, 1911. The material passages are in the following words:—

Whereas in a contract made between the United Gas Companies, Limited, and one Frederick M. Waines, on February 13, 1909, and amended on July 19, 1909, the said United Gas Companies, Limited agreed to purchase from Waines gas as therein stated, to be delivered through the company's line as now laid to Dunnville, at a pressure of 50 pounds to the square inch, provided that a greater pressure is not maintained in the company's line between Dunnville and Winger;

And whereas the company agreed with the United Gas Companies, Limited, to transmit the gas so purchased from Waines through its said line for delivery into the lines of the United Gas Companies, Limited, in the Township of Wainfleet;

And whereas by a contract made between William J. Aikens, Frank R. Lalor and S. A. Beck, of the one part, and the company of the other part, bearing date June 28, 1911, the company agreed to purchase gas from the said Aikens, Lalor and Beck as therein stated;

And whereas the company desires to recognize the obligations of the United Gas Companies, Limited, binding upon it under said Waines' contract in so far as the transmission of the Waines' gas through its lines is concerned; and also to recognize its obligations to the said Aikens, Lalor and Beck to purchase and transmit gas pursuant to the said contract with them;

And whereas the contractors are the owners of a gas field in the Township of Canboro, in the County of Haldimand, and have agreed to sell the gas developed in the said field, and hereafter to be developed therein, to the company, upon the terms and conditions hereinafter set forth;

Now, therefore, this agreement witnesseth as follows:—

1. The contractors agree to sell and deliver to the company at its meter house in the Town of Dunnville, in the County of Haldimand, against the line pressure from time to time in the company's line at that point, having regard to the contracts aforesaid, all the natural gas of a quality and purity suitable for domestic consumption which is now being, or which may be here-

CAN.

S. C.

KOHLER v. THOROLD NATURAL GAS CO.

Duff, J.

after obtained from the lands now leased or controlled by the contractors in the Township of Canboro, particulars of which are set forth in the schedule hereto attached and marked "A," or hereafter acquired or controlled by them in the said township, in such amounts as they shall have available for delivery at the rate of twenty cents per thousand cubic feet up to April 1, 1912, and after that at the rate of sixteen cents per thousand cubic feet to May 1, 1913, and thereafter at the rate of twenty cents per thousand cubic feet;

2. The company agrees to purchase from the contractors the said gas as in the last paragraph mentioned at the prices aforesaid.

* * * * *

12. The contractors agree to and with the company to lay a 4½-inch line from their wells, in the Township of Canboro aforesaid, to the company's meter house in Dunnville with the utmost possible expedition, so that the connection with the company's line can be made at the earliest possible moment and gas delivered by the contractors to the company under the terms of this agreement, the company advancing to the contractors the sum of five thousand dollars, towards the cost of construction of the said line, to be repaid by the contractors to the company without interest on or before the first day of April, 1912.

The rival constructions are: (1) By the appellants, that the respondent company agrees to take and pay for gas delivered by the appellants at the company's meter at Dunnville "against the line pressure" from time to time in the company's line at that point, such pressure not to exceed that occasioned by the execution of the contracts mentioned in the recitals.

(2) On behalf of the respondent company that the respondent company is to take such gas so delivered when the pressure does not exceed 50 pounds per square inch in the respondent company's line.

The second of these constructions is that which was adopted in the Court of Appeal. As I read the judgment of Hodgins, J., the principal reason upon which this conclusion is based is derived from the fourth paragraph of the recitals. The view seems to be that by the two agreements mentioned in the recitals the respondent company or the United Gas Co., assumed an obligation not to maintain a pressure in the respondent company's line greater than 50 pounds per square inch. With respect, I think, that is a misreading of the clause in the Waines' contract (cl. 7), which is said to create this obligation:—

Clause 7.—This said natural gas shall be delivered through a meter or meters into the company's pipe or line it may procure to be built by any other company for the purpose of receiving and transmitting the gas herein agreed to be purchased, hereinafter called the "transmitting company" at or near the west end of Canal Street in the Town of Dunnville, and is to be supplied and maintained at that point at a pressure of at least 50 pounds to

the square inch, provided that the company shall not maintain a pressure of greater than fifty pounds in its own line at the said point.

There is a similar provision in the Lalor contract. I read the words beginning "provided that the company" as declaring simply the condition upon the fulfilment of which the contractor's obligation to deliver on the terms prescribed depends. That, I think, is the meaning of the language itself. But, furthermore, I am unable to avoid reading the first paragraph of the recitals in the Lalor contract or the first paragraph of the recitals in the contract we have to construe as giving expression to the interpretation which the parties themselves had put upon the pre-existing contracts and that interpretation seems to me to accord with the view I have formed independently from an examination of the words themselves of these contracts.

I agree that it must be taken that these recitals are intended as a declaration that the appellants and the respondent company were themselves contracting with reference to the fact that there were these contracts. It does not, however, seem to me that the declaration carries us beyond this point, that the respondent company's line might be expected to be charged with gas to the degree that in the ordinary course would result from the fulfilment by the contractors under the earlier contracts of their obligations to deliver gas at 50 pounds pressure.

What then is the effect of this declaration upon the interpretation of the words "having regard to the contracts aforesaid" in the first paragraph of the operative part of the agreement before us? It cannot, I think, be held to qualify the words "against the line pressure from time to time in the company's line at that point" to the extent of the qualification imported by reading the words "of fifty pounds to the square inch" after "pressure" as the respondent company's argument requires. Nor do I think can they strictly be given the sense contended for by the appellants. It is more reasonable, I think, to explain their presence as arising from the desire to preclude any inference that the company was undertaking obligations incompatible with receiving and transmitting gas delivered to it under the provisions of the two recited contracts. That view is confirmed by the provisions of the preliminary agreement, the first paragraph of which provides that the vendors will deliver the gas at the company's meter house in

CAN.

S. C.

KOHLER v. THOROLD NATURAL GAS CO.

Duff, J.

Dunnville "to be received by it against the pressure in its line at that point."

The result is that the placing of the regulator, the effect of which was automatically to interrupt any access of gas from the appellants' pipe when the pressure in the respondent company's line exceeded fifty pounds to the square inch, was a wrongful act that prevented the appellants performing the condition entitling them to be paid in accordance with the terms of their contract.

It was argued by Mr. Tilley that there was delivery. I do not think it can strictly be said that there was delivery in fact because the gas alleged to have been "delivered" did not pass out of the power and possession of the appellants. I think that strictly it is a case of wrongful prevention of delivery rather than a refusal to pay for gas in fact delivered.

The case is within the principle stated by Lord Blackburn in *Mackay* v. *Dick*, 6 App. Cas. 251, in these words:—

> I think I may safely say, as a general rule, that where in a written contract, it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.

What then is the basis on which damages are to be computed? In order to answer that question it is important, I think, to note precisely the nature of the contract into which the appellants had entered.

Their undertaking was in part to construct a pipe line 4¼ inches in diameter connecting their wells with the respondent's line at Dunnville. They were, in the words of the contract, to "deliver" gas at Dunnville "against the line pressure" in the respondent's line. But that obviously means that, subject to their right to supply customers along the line of their pipe, they were to have their conduit so connected with their wells and their appliances arranged in such a way that the gas at Dunnville should be actuated by the full pressure available. The intent of the contract was that the contractors should do that. On the respondent company's part, it was to pay for such gas as should enter its line in these conditions, and as I have just said the company came under the implied obligation to do what might be necessary to enable the pressure in the appellant's line to have its

natural and normal effect so that the compensation to which the appellants were entitled could be measured in the manner provided by the contract. Now it is perfectly clear that the appellants did everything which they were called upon to do under their contract, and, I think, this question of damages ought to be determined by the application of two well recognised principles.

The first principle is stated in a judgment of Mr. Justice Willes in a passage cited in and made the foundation of the decision of the Privy Council in *Burchell* v. *Gowrie and Blockhouse Collieries*, [1910] A.C. 614, at 626, which is in the following words:—

> In *Inchbald* v. *Western Neilgherry Coffee, etc., Co.*, 17 C.B.N.S. 733, Willes, J., thus lays down the rule of law applicable to such cases: "I apprehend that wherever money is to be paid by one man to another upon a given event, the party upon whom is cast the obligation to pay, is liable to the party who is to receive the money if he does any act which prevents or makes it less probable that he should receive it.

Their Lordships in that case held that, as the appellant had in substance done everything he was called upon to do to earn his commission (although his right of action was strictly a right of action for damages for wrongful prevention of performance rather than an action for recovery of commission, as such) he was entitled in the circumstances to recover in the form of damages the sum which would have been payable to him as commission had it not been for the wrongful conduct of the respondents. It may be observed in passing that in the case to which reference has already been made—*Mackay* v. *Dick*, 6 App. Cas. 251—Lord Watson at p. 270 points out that by the law of Scotland where a debtor bound under a certain condition impedes or prevents the event, the condition is held to be accomplished if the creditor has done everything incumbent upon him. This principle, Lord Watson says, has always been recognised by the law of Scotland, which derived it from the civil law. I do not desire to express any opinion on the question whether that principle is strictly applicable here; although there would appear to be nothing inconsistent with legal principle or with justice in holding that the respondent company (being bound by an obligation not to bar the ingress of the appellants' gas into their pipe) is precluded from taking advantage of its own wrong by denying that in fact the appellants' gas did enter its pipe, as it would have done if the course of events contemplated by the contract had been allowed to proceed without interruption by its officers. I do not find it necessary to put my judgment

CAN.

S. C.

KOHLER v. THOROLD NATURAL GAS CO.

Duff, J.

upon that ground because I think the decision in *Burchell* v. *Gowrie and Blockhouse Collieries*, [1910] A.C. 614, is a sufficient authority for holding that the appellants, having done everything incumbent upon them under the contract and their efforts having failed to produce the contemplated effect only because of the wrongful conduct of the respondent company, they are entitled *primâ facie* to the compensation that would have been payable to them had the respondent company not interposed and had the provisions of the contract with respect to compensation become fully operative. Reference may also be had to the judgment of Lord Alverstone, C.J., in *Odgens* v. *Nelson*, [1903] 2 K.B. 287, at 296 and 297.

The second principle is this: as against a wrongdoer, and especially where the wrong is of such a character that in itself it is calculated to make and does make the exact ascertainment of damages impossible or extremely difficult and embarrassing, all reasonable presumptions are to be made. The principle in the form in which it is applicable to this case is stated in these words taken from the judgment of Lord Selborne in delivering judgment for himself and the Lords Justices in *Wilson* v. *Northampton and Banbury Junction R. Co.*, 9 Ch. App. 279, at p. 286:—

> We know it to be an established maxim that in assessing damages every reasonable presumption may be made as to the benefit which the other parties might have obtained by the *bonâ fide* performance of the agreement. On the same principle, no doubt, in the celebrated case of the diamond which had disappeared from its setting and was not forthcoming, a great Judge directed the jury to presume that the cavity had contained the most valuable stone which could possibly have been put there. I do not say that that analogy is to be followed here to the letter; the principle is to be reasonably applied according to the circumstances of each case.

A number of authorities to the same general effect are referred to in *Lamb* v. *Kincaid*, 38 Can. S.C.R. 516. This principle is, I think, properly applied in holding as I do hold, first that the average daily readings are sufficient *primâ facie* evidence for determining the pressure ratios, and secondly, that the onus was upon the respondent company to produce satisfactory evidence of any circumstances upon which it desired to rely as reducing the amount of damages which the appellants are *primâ facie* entitled to recover. It was for them to shew if they desired to rely upon it as effecting the measure of damages that the gas, which otherwise would have passed into their pipe line, is still in the possession and power of the appellants and still available for

sale. That appears to me to be an entirely reasonable application of the principle *omnia præsumuntur contra spoliatorem*.

I add a word with reference to the point of view from which this contract seems to have been regarded. It appears to have been treated as a contract for sale and delivery of property simply. In one aspect, it is that, unquestionably; that is to say, the contract unquestionably does contemplate the transfer of property for a money price. But the authorities touching the estimation of damages arising from breach of contract for the sale of goods are almost universally decisions given in contemplation of circumstances so widely different from the circumstances contemplated by this contract that I cannot think they are of much assistance, except in so far as they lay down the broad principle that as a general rule where a contract is broken the injured party is entitled to receive such a sum of money, by way of damages as will, so far as possible, put him in the same position as if the contract had been performed, provided that damages are not recoverable in respect of loss following the breach of contract unless the loss was (1) the natural and direct consequence of the breach, or (2) within the contemplation of both parties at the time of making the contract as the probable result of the breach. That is the broad principle which is strictly applicable, and I think the conclusions above indicated are strictly within the principle.

It is quite evident, moreover, that on the reference it was not seriously disputed that but for the regulator the appellants would have delivered, and would have been entitled to be paid for, the amount of gas in respect of which they claim. That is clear enough from the last paragraph of the referee's report which is in the following words:—

It is admitted that plaintiffs, in addition to what was taken by defendant, had for delivery the quantity of gas they allege during the months from April to December, and were it not for the regulator would have delivered, viz., 44,853,170 ft. at 16c. per thousand c. ft., or $7,176.50.

The plaintiffs, however, with the defendant's consent sold—

1,050,000 c. ft. at 16c.	$147.00
250,000 c. ft. at 20c.	50.00
	$197.00
The amount to which I find the plaintiffs are entitled is	$7,176.50
Less	197.00
	$6,979.50

And there should be judgment for the plaintiffs for $6,979.50.

CAN.

S. C.

KOHLER v. THOROLD NATURAL GAS CO.

Anglin, J.

The evidence of Mr. Price, the respondent's manager, cited in Mr. Tilley's factum at p. 10, is quite sufficient to justify this paragraph.

The appeal should be allowed and the judgment of the Chancellor restored with costs in both Courts.

ANGLIN, J.:—After careful consideration of the several contracts in evidence in this case, I have reached the conclusion that the "proviso" in the Waines' contract did not merely state a condition to which the obligation of delivery under that contract was subject, but also imposed on the purchasers an obligation (within the meaning of the clauses in the Kohler contract which make it subject to the purchasers' obligations under the Waines' contract) to prevent the pressure in their transmission line exceeding 50 pounds, whenever and so long as Waines was prepared to deliver gas at a pressure of 50 pounds. The defendant company admits that, in order to ensure the fulfilment of that obligation towards Waines, it resorted to the use of a regulator designed automatically to exclude the plaintiffs' gas whenever the pressure in the defendants' transmission line should exceed 50 pounds, and to admit such gas freely when that pressure should be less than 50 pounds. While the use of a devise operating in this way may not have been beyond the defendants' rights so long as Waines was delivering at a 50 pound pressure, they used it at their peril if in fact—whether by accident or by design, whether through a defect discoverable or remediable, or latent and impossible to overcome—it should exclude the plaintiffs' gas when the pressure in the transmission pipe was less than 50 pounds or when the Waines' pressure fell below 50 pounds. The plaintiffs were entitled at all times to deliver against the pressure in the defendants' transmission line subject to the defendants' obligation to Waines to prevent that pressure excluding his gas delivered at 50 pounds. The plaintiffs had not the right to deliver gas in quantities which would increase that pressure beyond fifty pounds at a time when delivery under the Waines' contract at 50 pounds pressure would be thereby interfered with. That, I think, is the effect of the contract between the parties.

There would appear to have been some uncertainty at the trial as to the function which the regulator was intended to perform and as to its actual operation. I take the following extracts

from the opinion delivered by the learned referee as printed in the appeal case:—

It was contended by the defendant that while the contract did not in words provide for the placing of this regulator, still in order to keep faith with Waines and Lalor, Beck and Aikens under their contracts, the company was bound to prevent gas coming from the plaintiffs into their line at a greater pressure than 50 pounds to the square inch, and so placed the regulator fixed so that the gas could not come from plaintiffs' line at a pressure less (*sic*) than 50 pounds.

Later on he says:—

An examination of the records during the period from April 1, 1912, until December 31, 1912, shews that the average pressure in the plaintiff's line was in some months in excess of the average pressure in the defendant's line, and in some months greatly in excess; and this was so notwithstanding the fact that the plaintiffs were compelled to shut off a number of their gas wells in the field.

This would indicate that it was the regulator (and if these records are correct the regulator must have been fixed at more than 50 pounds) placed by the defendant in their line, and not the pressure from the gas supplied under the two other contracts that prevented the plaintiffs from delivering all their available gas into the defendant's pipe line, and was, I think, a breach of their contract, for which the defendant is responsible in damages, if any can be shewn.

The impression of the referee would seem to have been that the operation of the regulator was meant to depend, and did in fact depend, not upon the pressure in the defendants' transmission line, but upon that in the plaintiffs' supply pipe. The case may have been so presented to him in argument and it may be, although the oral testimony is to the contrary, that the pressure returns warrant the conclusion that, as a matter of fact, the opening and closing of the regulator valve depended upon the pressure in the plaintiffs' supply pipe. If so, the use of the regulator was a clear breach of contract and the conclusion that it was "fixed at more than 50 pounds" would seem to be incontrovertible.

In view of the course of the argument in this Court, there would seem to have been some misapprehension in this regard at the trial, and the conclusion there reached as to the extent of the defendants' liability is thus rendered less dependable than it otherwise would be. Counsel for both parties were in accord in this Court upon the fact that the operation of the regulator was governed by the pressure in the defendants' transmission line, and the argument in the appellants' factum proceeds on that assumption.

Although by no means as satisfactory as it might have been

CAN.

S. C.

KOHLER v. THOROLD NATURAL GAS CO.

Anglin, J.

made, the evidence afforded by the returns of average daily pressures put in seems to me to establish that, from some cause not made clear, the effect of the operation of the regulator placed by the defendants on the supply pipe carrying the plaintiffs' gas was to exclude that gas from entering the defendants' transmission line when the pressure in it was less than fifty pounds during at least a very considerable part of the period between April 1, 1912, and December 31, 1912. Moreover, it would seem that during a great part of that period the Waines' pressure was below 50 pounds. But this evidence does not enable us to say for how many hours on any day the wrongful exclusion of the plaintiffs' gas continued, or to determine how much of that gas available for delivery and not taken might have been delivered during that period without raising the pressure in the transmission line above 50 pounds, when the right to have it enter would cease, if, and so long as, Waines should be delivering at a pressure of 50 pounds. But the defendants having seen fit to place a regulating device upon the plaintiffs' supply line, and having had that device under their exclusive control, I think the burden was upon them to shew that it did not operate prejudicially to the plaintiffs' rights under their contract, or, if that could not be established, to shew the times and periods during which, and the extent to which it did not so operate. That they have failed to do, and they are, therefore, chargeable, in my opinion, with the consequences, whatever they may be, of having excluded the plaintiffs' gas during the whole period in question. Moreover, from December 19, to December 31, it seems to be very clearly proved that the defendants took from contractors who had not priority over the plaintiffs 6,762,127 c. ft. of gas, much of which the plaintiffs might otherwise have delivered. They also appear to have taken under a contract with one Kindy (made subsequently to the contract with the plaintiffs) between August and December, 5,975,888 c. ft. of gas, the greater part of which the plaintiffs were entitled to supply.

But it is claimed on behalf of the defendants that the gas not taken by them has not been lost to the plaintiffs—that they still have it and have merely been delayed in marketing it. For the plaintiffs it is urged, on the other hand, that there were gas wells in operation in the same field as theirs belonging to other

persons, and that the gas which the defendants excluded by the regulating device placed on their supply pipe has passed away through such other wells and has been wholly lost to them. This was the conclusion reached by the referee; whereas the Appellate Division deemed the evidence insufficient to support it. With respect I am of the opinion that, subject to what I am about to say, there was evidence in the record sufficient to support this conclusion of the referee.

But it is at the same time my view that it is not established that the loss of this gas is wholly attributable to wrongful conduct on the part of the defendants. Their manager, no doubt, said, in the course of his testimony, that if the regulator had not been placed upon their pipe the plaintiffs would have delivered during the period in question the quantity of gas for which they claim. But he did not admit that such gas was excluded from the transmission line in breach of contract. It may be that as against the plaintiffs the defendants were bound to prove that the exclusion was rightful and that in the absence of evidence it should be assumed that conditions never existed which would have entitled them to exclude the plaintiffs' gas under the clause in the Waines' contract. Yet we cannot shut our eyes to the fact that during the summer months the consumption of gas for heating and domestic purposes is much smaller than in the winter, and that, had there been no regulator set against them, it is more than probable that all the gas which the plaintiffs had available for delivery during the summer season could not have entered the defendants' pipe unless the latter had allowed gas to go to waste. As Hodgins, J., points out, the defendants did not undertake to find customers for all the gas the plaintiffs should have available for delivery. The plaintiffs' right of delivery was limited to delivery against the pressure in the defendants' transmission line. It was, therefore, from its very nature subject to whatever restriction the limitations of the defendants' business should entail. Under these circumstances had there been no regulator used it seems tolerably clear that during the summer months a considerable quantity of the plaintiffs' gas available for delivery could not have been taken, and for gas held back on that account the defendants cannot be held responsible.

We have no records of the quantity of gas from all sources

CAN.

S. C.

KOHLER v. THOROLD NATURAL GAS CO.

Anglin, J.

used by the defendants during these summer months. But we find that during April the plaintiffs delivered 8,509,495 c. ft.; from May to September the average monthly delivery was 4,672,076 c. ft.; in October it rose again to 7,522,787 c. ft. These figures indicate a lessening in the deliveries during the summer months, for which it is not unreasonable to assume that diminished consumption by the defendants' customers at least partly accounts. Moreover, as the other wells operating in the field were probably subject to similar conditions, it may be that gas held back at this season was not lost to the plaintiffs.

It is also noteworthy that from August 2 to August 12, omitting the 3rd, for which the return is blank, the plaintiffs' average pressure was only 17.8 lbs. It was one pound on the 11th and 1.5 lbs. on the 10th.

The plaintiffs' claim is for 44,853,170 c. ft. Of this 31,863,414 c. ft. represents gas not taken during May, June, July, August and September. It is probably quite impossible to determine with even approximate accuracy how much of that gas the plaintiffs would have been able to deliver against line pressure in the defendants' pipe. But dealing with the matter as a jury probably would, I should say that at least one-half of it could not have been taken. I would, therefore, deduct from the amount of the damages assessed at the trial $2,560.57 (the value of 15,931,707 c. ft., at 16 cents per M.), leaving a balance of $4,418.93, for which the plaintiffs should have judgment.

In the Appellate Division attention is drawn to the fact that the defendants paid the same price for the Waines' gas as for the plaintiffs' gas, viz., 16 cents per M. But another fact is apparently overlooked, namely, that under the Aikens-Lalor-Beck contract, the price was only 13 cents per M., and the holding back of the plaintiffs' gas may have enabled the defendants to obtain under that contract at a cheaper rate gas which the plaintiffs would otherwise have delivered.

The monthly settlements of accounts between the plaintiffs and defendants made as provided for by the contract were set up in answer to the plaintiffs' claim. But there is nothing to shew that when these settlements were made the plaintiffs knew that their gas was being wrongfully excluded from the defendants' transmission line.

No doubt loss of profit is ordinarily the measure of damages on breach of a contract of sale and purchase of a commodity. But in the present case there is nothing to suggest that delivery of the gas wrongly excluded by the defendants would have entailed any additional expense or outlay to the plaintiffs. They lost in its entirety the price to which they would have been entitled had that gas been taken by the defendants.

Anglin, J.

I am unable, on the other hand, to construe the contract as entitling the plaintiffs to be paid, not as damages for breach of contract, but as purchase money, for all gas available for delivery whether taken or not.

The appellants are entitled to their costs of the appeal to this Court, and of the proceedings in the High Court Division.

BRODEUR, J.:—I concur with Mr. Justice Idington.

Brodeur, J.

Appeal allowed.

HUNT v. LONG.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. February 4, 1916.

1. CHATTEL MORTGAGE (§ II A—7)—NON-COMPLIANCE WITH STATUTE AS TO EXISTING AND FUTURE DEBTS—INVALID IN PART—SEPARABILITY.
A chattel mortgage, given as security for the payment of an existing debt and also to secure future indebtedness, though invalid as against creditors in so far as it purports to be a security for future indebtedness in non-compliance with sec. 6 (1) of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135, is nevertheless valid as a security for the existing indebtedness if the requirements of sec. 5 have been observed.
[*Campbell* v. *Patterson*, 21 Can. S.C.R. 645, *Hughes* v. *Little*, 17 Q.B.D. 204, 18 Q.B.D. 32, distinguished.]

Statement

APPEAL by the plaintiff from the judgment of the First Division Court in the County of Wentworth upon an interpleader issue as to the validity of a chattel mortgage under which the defendant claimed property seized under the plaintiff's execution against the goods of the mortgagor. It was found in the Division Court that the mortgage was a valid security in so far as it secured the payment of an existing debt, though admittedly invalid (as against creditors) as a security for a future indebtedness.

The provisions of the Bills of Sale and Chattel Mortgage Act, R. S. O. 1914, ch. 135, applicable, are secs. 5 and 6:—

"5. Every mortgage of goods and chattels in Ontario, which is not accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged, . . . shall be registered . . . together with

ONT.

S. C.

HUNT v. LONG.

Statement

"(*a*) the affidavit of an attesting witness. . . .

"(*b*) the affidavit of the mortgagee that the mortgagor therein named is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage, that the mortgage was executed in good faith and for the express purpose of securing the payment of money justly due or accruing due and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagor, or of preventing the creditors of such mortgagor from obtaining payment of any claim against him.

"6.—(1) A mortgage of goods and chattels made

"(*a*) to secure the mortgagee for advances made in pursuance of an agreement in writing to make future advances . . . or

"(*b*) to secure the mortgagee against the endorsement of any bill of exchange or promissory note . . .

"may be registered . . . if accompanied by

"(*c*) the affidavit of an attesting witness . . . and

"(*d*) the affidavit of the mortgagee stating that the mortgage truly sets forth the agreement and truly states the extent and amount of the advances intended to be made or liability intended to be created by the agreement and covered by the mortgage, and that the mortgage is entered into in good faith and for the express purpose of securing the mortgagee repayment of his advances or against the liability intended to be created, as the case may be, and not for the purpose of securing the goods and chattels mentioned therein against the creditors of the mortgagor nor to prevent such creditors from recovering any claims which they may have against the mortgagor."

G. H. Sedgewick, for appellant.

H. S. White, for defendant, respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The one question involved in this appeal is, whether a chattel mortgage given for two quite separate and independent purposes, and so really two mortgages in the one instrument, is altogether invalidated by the Bills of Sale and Chattel Mortgage Act, because, although it complies in all respects with the provisions of that enactment as to the one purpose, it does not comply with it as to the other, and is on all hands admitted to be bad as to that.

The two purposes of the mortgage were: (1) to secure the payment of an existing debt; and (2) to secure future indebtedness.

The enactment makes quite separate and different provisions as to the affidavit of *bona fides* which shall be registered with the mortgage in the case of an existing debt, and in the case of such future indebtedness; so that one may think that what was in the mind of the draftsman of the Act was separate mortgages, and that in separate mortgages would be the more convenient way of taking the security and complying with the requirements of the Act; but there can be no legal objection to the taking of the two securities in the one instrument. If two mortgages had been taken and registered in this case, it need hardly be said that the invalidity of one, for want of compliance with the provisions of the Act, could not invalidate the other, or have any effect upon its validity or invalidity in respect of registration. Why, then, should that entirely separable, indeed in no way connected, part of the mortgage in question, securing payment of the existing indebtedness, be invalidated because the other part of it, securing future indebtedness, is? I speak of course of "invalidated" only in the sense of invalid against creditors and subsequent purchasers or mortgagees in good faith for valuable consideration; the mortgage being valid between the parties to it without registration. No reason has been given, nor can I imagine any, why all should be so invalid because one part is; nor has any case been referred to—and I know of none such—that gives support to the appellant's contention. *Reid* v. *Creighton* (1895), 24 S. C. R. 69, is not in point, and, if it were, would be rather against than in favour of that contention.

The case of *Hughes* v. *Little*, 17 Q. B. D. 204 and 18 Q. B. D. 32, in so far as it deals with the question of separability, favours, rather than is opposed to, the respondent's contention here. The Divisional Court, in the case of a security given for two purposes, held, under the legislation governing that case, that the security was good for the one purpose and bad as to the other. The Court of Appeal decided that it was also bad as to the other, without dealing with the question of separability; each was invalid by itself. But, if the final decision had been that the good could not be saved from the bad, or, more correctly speaking, that the security was altogether invalid because not made in compliance with the provisions of the enactment there in question, that ruling would not govern this case; because the enactment there in question is so widely different from that here

ONT.
S.C.
HUNT
v.
LONG.
Meredith, C.J.C.P.

in question. There the mortgage must be in the form prescribed in the enactment; here no form of mortgage, or of its affidavits, is given: see *Ex p. Stanford* (1886), 17 Q. B. D. 259.

Kitching v. *Hicks*, 6 O. R. 739, though not in point, because in it one part only of the two in question needed registration, favours the respondent's contention. The statement of the general rule upon the subject of severing the good from the bad, made by Willes, J., in *Pickering* v. *Ilfracombe R. W. Co.* (1868), L. R. 3 C. P. 235, at p. 250, and referred to in *Kitching* v. *Hicks*, 6 O. R. at p. 752, is in these words: "The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality is created by statute or by the common law, you may reject the bad part and retain the good." I see no reason why that principle may not be well-applied to such a case as this: the purposes of the enactment in question are the protection of creditors and subsequent purchasers and mortgagees against undisclosed sales and mortgages; not to deprive purchasers and mortgagees, in no way invading that purpose, of their moneys or securities. Nothing but words making it necessary that the respondent should be deprived of his security in this case should justify any Court in depriving him of it. There are no such words in the enactment in question. I am therefore quite in agreement with the learned Division Court Judge in his opinion that, though the mortgage in question is invalid as to future indebtedness, it is good as a security for the existing indebtedness; and, accordingly, would dismiss this appeal.

Masten, J.

MASTEN, J.:—I agree.

Lennox, J.

LENNOX, J.:—The appeal is from the judgment of the Junior Judge of the County Court of the County of Wentworth, holding that the claimant's chattel mortgage, so far as it relates to an indebtedness to him at the date of the mortgage, the 15th August, 1914, for $12,291.10, is a valid security against John J. Hunt, an execution creditor of Montrose. I am of opinion that the judgment of the learned Judge is right.

The mortgage recites that Montrose is indebted to Long in the sum of $12,291.10, and Long has agreed to advance Montrose further sums, by delivery of goods, to enable him to carry on business, to make up, with the present indebtedness, a total sum not exceeding $13,000, within a period of one year from the date

of the agreement, that is to say, the date of the mortgage. It is not disputed that every requirement of R. S. O. 1914, ch. 135, to constitute a valid mortgage securing the repayment of a present indebtedness, has been observed, and the *bona fides* of the transaction is not questioned; nor is it denied that the recitals are true in substance and in fact. The affidavit of *bona fides* in every way complies with the statutory conditions applying to a present indebtedness. It seemed to be assumed upon the argument that the recitals in the body of the mortgage are in every way the recitals necessary, for future advances, within the statute—the combined effect of the requirements of clauses (*a*) and (*b*) of sec. 6. This is nearly, but not absolutely, accurate; and, in my opinion, it is at least remotely important to notice that it is not recited that the agreement of the mortgagee with the mortgagor to make future advances is in writing, as required by clause (*a*) of sec. 6. There is no affidavit of the character provided for by sec. 6, clause (*d*). In the absence of this affidavit, the claimant admitted at the trial that he has not a registered mortgage to secure repayment of future advances, but a mortgage only for the actual indebtedness at the date of the mortgage, and the learned Judge has so found.

The execution creditor, however, contends that, by reason of the matters referred to, the mortgage is void *in toto* as against the creditors of the mortgagor; and he relies mainly upon *Hughes* v. *Little*, 17 Q. B. D. 204, 18 Q. B. D. 32, as decided in the Court of Appeal. This case does not help the appellant; on the contrary —so far as it is safe to take English decisions founded upon statutes widely differing from our Act in scope, provisions, and intent, as guides—it is an authority in favour of the claimant. It is argued that the learned Judge erred in basing his judgment upon *Hughes* v. *Little* in the Divisional Court, and that he was not aware that the judgment of that Court, upon the question here to be decided, was reversed by the Court of Appeal. I do not know what is the fact as to this, but a careful reading of the cases convinces me that the judgment of Manisty, J., as to the points we are considering, is confirmed and strengthened by following the case to its final decision. Little was the execution creditor, and Hughes claimed to hold the goods of the debtor against him, under a mortgage given to Hughes as security for repayment of "£32 or thereabouts" which he had guaranteed

ONT.
S. C.
HUNT
v.
LONG.
LEDDY, J.

for the debtor in case he had to pay it—a mortgage to secure an endorsement we would call it here—and a present indebtedness of £40. A Judge of a County Court decided in favour of Hughes, the mortgagee, as to both claims. Little appealed, and the appeal came on before Manisty and Mathew, JJ. The statutes governing the case were the Bills of Sale Act, 1878, and the Bills of Sale Act (1878) Amendment Act, 1882. The objections were: (a) the Act of 1878, sec. 8, required that the consideration be truly stated in the mortgage, and it was contended that it was not truly stated as to the guarantee; (b) as to the £40, the mortgage did not comply with sec. 9 of the amending Act of 1882. Mr. Justice Manisty, who delivered the judgment of the Court, held that the claims were to be treated separately, as if two mortgages had been given; and both or either might be valid or invalid. Treating the mortgage in this way, he found that upon both objections the appellant failed. Little accepted the decision that the claims could be treated separately, and the result upon the £40 claim, and appealed as to the guarantee security. The correctness of the method pursued was not questioned in the Court of Appeal. The questions then raised were: (a) Was the guaranteed liability sufficiently stated within the Act of 1878? (b) Did the mortgage comply with the scheduled form in the Act of 1882, requiring certainty as to the amount of liability and time of repayment? The answer to the first point was "Yes," to the second, "No."

How can it be argued that this judgment was in effect a declaration that the mortgage, being bad in part, was bad *in toto*? This case enunciates a principle; and this, and the reliance placed upon it and the evident misconception as to its effect, is my apology for dwelling upon it at such great length. Indeed, even as indicating general principles, if the difference between our Act and English legislation is not kept well in mind, English decisions are not likely to be helpful. As said by Osler, J.A., in *Marthinson* v. *Patterson* (1892), 19 A.R. 188, at p. 193: "I should be more impressed than I am with the forcible language of the judgment below if I could see as clearly as the writer seems to do that the object of the Imperial Legislature in passing the Bills of Sale Acts and the object of our Legislature in passing our Act was the same, and that the principle of the decisions of the English Courts upon the construction of the English Acts, was entirely applicable to the construction of our Act. I think it

better to take our Act as it stands, without entangling ourselves in the maze of decisions upon the English Acts, the object of which, with all deference, is, as regards the Acts of 1878 and 1882, at all events, very different from that of ours. By those Acts it is required that the bill of sale shall set forth, or, which is the same thing, truly set forth, the consideration for which it was given, upon the penalty, under the Act of 1878, of being void against assignees and creditors, and under the Act of 1882, of being altogether void, even against the grantor: *Thomas* v. *Kelly* (1888), 13 App. Cas. 506." And, after referring to several cases, the learned Judge adds: "Manifestly these are decisions upon statutes passed, not as much in the interest of the borrower's creditors as of the borrower himself. As Bacon, V.-C., says of the Act of 1878 (and the Act of 1882 is an advance in the same direction): 'The intention of the Legislature was to endeavour to have a stop put, as far as practicable, to the fraudulent practices of lenders of money, and, but for that object, the provisions of the Act would, perhaps, not have been so severe and so strong as they are.''

The object of our Act, and I think a preamble in the earlier Acts so declared, is to prevent creditors from being defrauded, and the intention is to restrict contractual powers so far as is necessary, and only so far as is necessary, to this end. The inquiry in this case, and in every case of the kind, should be, what is there in the Act in words or purpose which vitiates this mortgage security for an entirely separate claim, the honesty of the transaction being undisputed, and beyond dispute, and $1,000 of which was paid upon the day of its execution? Treat it simply as a mistake, or surplusage, or the irrelevant recital of a purpose not fully executed, or as an unregistered mortgage binding upon the parties *inter se*, but not otherwise, and it is manifest that it cannot operate to the prejudice of creditors; rather in proportion as it disappoints the assumed expectation of the mortgagee it works to the advantage of the creditors of the mortgagor.

Every line in the mortgage and every statement in the affidavit is true.

There is Canadian authority quite as direct as *Hughes* v. *Little* that a mortgage may be bad in part (illegal is the wording of the report) and good in part. In *Campbell* v. *Patterson*, 21 S.C.R. 645, the Chancellor found as a fact (see *Campbell* v. *Roche* (1891),

ONT.
S. C.
HUNT
v.
LONG.
Lennox, J.

18 A.R. 646) that part of the consideration upon which the Mader mortgage was based was bad, and, following *Commercial Bank* v. *Wilson* (1866), 3 E. & A. 257, held that the mortgage was void *in toto* as against the creditors of Roche. This judgment was affirmed in the Court of Appeal. The Supreme Court held that the judgment of the trial Judge and that of the Court of Appeal were wrong as a matter of law. They found, however, as a matter of fact, that the consideration was wholly illegal, and the judgment, therefore, was not disturbed.

The consideration is that which the grantor received—the extension of credit, the cash loan of $1,000, and the agreement and actual receipt of further advances—and not necessarily the amount secured to the mortgagee: *Ex p. Challinor* (1880), 16 Ch. D. 260.

Honest mistake does not, necessarily at all events, avoid the security. In *Marthinson* v. *Patterson* the mortgage should have been for $2,000, and was taken for $2,500. In *Hamilton* v. *Harrison* (1881), 46 U.C.R. 127, the overcharge was only $117.20, but was still substantial in a transaction of about $1,000. In *Biddulph* v. *Goold* (1863), 11 W.R. 882, the misstatement of the consideration could hardly be called a mistake, and was proportionately very large. At the time instructions were given, both parties thought the true amount was £350, and the bill of sale—treated as a mortgage—was drawn up in this way. Before execution of the instrument, it was discovered that the debtor—a nephew of the mortgagee—owed less than £244, but the mortgage was executed without alteration; the understanding being that the accounts would be adjusted later. The nephew became insolvent, and, a jury having found that the transaction was honest, the full Court held upon a reserved case that the mortgage *was not void in toto*, and allowed it to stand for the amount actually owing by the insolvent. Wightman, J., said: "I am of the opinion that in this case our judgment must be for the plaintiff. It appears that there had been a mistake in drawing up the bill of sale as to the amount which was due, but that, before the deed was fully executed, the parties knew that the sum inserted in the bill of sale was not the exact sum due, and that, knowing this, but still without any fraudulent intent . . . they executed the bill of sale. It seems to me to be too much to say that this deed is therefore void *in toto*."

ONT.

S.C.

HUNT v. LONG.

Riddell, J.

See also *In re Isaacson, Ex p. Mason*, [1895] 1 Q.B. 333 (C.A.)

I think the appeal should be dismissed with costs.

RIDDELL, J.:—I have given this case much consideration, and have not been able to satisfy myself as to the meaning of the legislation. While in this state of uncertainty, it is a satisfaction to know, if the law as laid down by my learned brethren is not what the Legislature intended it to be, it can be speedily changed—and it is in that view that I think it unnecessary to urge considerations against the conclusion of the rest of the Court.

While not sure that the correct interpretation has been placed upon the statute, or the right conclusion drawn from the English cases, I do not dissent—"gravely to doubt is to affirm."

Appeal dismissed with costs.

HEMPHILL v. McKINNEY.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A., June 7, 1915.

1. DRAINS AND SEWERS (§ I—1)—RETROACTIVENESS OF STATUTE—REMEDIES FOR INJURIES TO LAND.

The Act of 1913, ch. 18, amending the Drainage, Dyking and Irrigation Act, R.S.B.C. (1911), ch. 69, is not of retroactive operation, and the remedy as to arbitration provided by sec. 58 of the amending Act for an injurious affection to land has no application to injuries arising before the passage of the amending Act.

2. NEGLIGENCE (§ I A—4*a*)—INSUFFICIENT EXECUTION OF WORK AUTHORIZED BY STATUTE—DRAINAGE—OVERFLOW.

No statutory remedy exists under the Drainage, Dyking, and Irrigation Act (R.S.B.C. 1911, ch. 69), nor under sec. 21 thereof which merely refers to damages resulting from the execution of the work carried out under sec. 11, for the negligence of the commissioners in carrying out the scheme of the work not under sec. 11; but since negligence in the execution of a work authorized by statute is actionable at common law, the commissioners are liable at common law for damages caused by the overflow of water from ditches constructed by them, in not providing, as authorized by their scheme, a reasonable and safe outlet, under proper municipal authority, in a way of averting such overflow.

[*Geddis* v. *Bann Reservoir*, 3 App. Cas. 430; *Sanitary Commissioners* v. *Orfila*, 15 App. Cas. 400; *Hawthorne Corp.* v. *Kannuluik*, 75 L.J.P.C. 7, referred to; *Raleigh Corp.* v. *Williams*, [1893] A.C. 540, distinguished.]

Statement

APPEAL from the judgment of Murphy, J., in favour of plaintiff in an action for damages caused by commissioners, acting under the Drainage, Dyking and Irrigation Act (R.S.B.C. 1911, ch. 69). Affirmed.

Joseph Martin, K.C., for appellant.

M. A. Macdonald, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—That there was a scheme of dyking and drainage formulated by the proprietors as contemplated by sec. 8

B. C.
C. A.
HEMPHILL
v.
MCKINNEY.
Macdonald, C.J.A.

of the Drainage, Dyking and Irrigation Act, ch. 69, R.S.B.C. (1911), is I think, apparent. I think it is outlined in ex. 8, but whether or not that scheme was subsequently altered, makes no difference in the result of this case because the defendants say that it was always part of the scheme that the northern outlet should be on road 4 from its intersection with road 20 to the river.

What the defendants appear to have done, was to dig the other drains forming part of the scheme, leaving the outlet to the last. The effect being that water was brought to road 20 before an outlet along road 4 was provided for it; instead of making this outlet, the defendants greatly enlarged a drain on road 20 from the corner of road 4 to the railway where they connected it with a large drain previously constructed by the municipality and the railway company along road 4 from the railway to the river. In other words, the defendants, instead of carrying the water as originally intended along road 4 to the river, carried it along road 20 to the river at a different point therein, the result being that waters which should never have come near the plaintiffs' lands at all were brought there and allowed to overflow them. This change in the scheme had been objected to by plaintiffs before it was made, and defendants were warned that injury would result to the plaintiffs' lands therefrom.

The immediate result of the defendants' act in carrying the waters down road 20 was to flood the lands of the two plaintiffs with alkaline water, causing injury to the soil as well as injury from inundation. The defendants subsequently made the outlet along road 4 as originally intended and thereafter flooding of the plaintiffs' lands ceased.

Now, the statute in question is a crude piece of legislation, but it was greatly amended and enlarged by a subsequent Act passed in 1913, ch. 18, about 4 years after the acts complained of. The appellants' counsel contended that the latter Act is retrospective and that, under it, the plaintiffs can obtain by arbitration the relief they seek, and hence cannot maintain this action. In my opinion that contention cannot be maintained.

If there is a statutory remedy open to the plaintiffs it must be found in said ch. 69 and not in the Act of 1913. In the former statute there is no such remedy provided, unless it be by sec. 21. That section refers to damage resulting from the execution of work carried out under sec. 11 of the same Act and in my opinion

sec. 11 is not applicable to this drainage scheme. That section applied only, I think, to work undertaken by commissioners in an application by a proprietor whose lands were not within the benefit or only partially within the benefit of the general scheme adopted under said sec. 8, and has no application at all to work carried on under a scheme adopted by the proprietors in virtue thereof or adopted by the commissioners themselves in the absence of such a scheme. If I am not in error in thus construing sec. 11, then no statutory remedy is available to these plaintiffs.

Now, had the original scheme, whether that of the proprietors or of the commissioners (the defendants), been carried out in good faith without negligence in the manner of carrying it out, though injury to the plaintiffs' lands resulted from defects in or insufficiency of the scheme as distinguished from the execution of the work, I think having regard to the language of sec. 18 of the said statute the plaintiffs could not maintain this action. Whatever may be the liability of public bodies exercising authority such as that exercised by the defendants, for defects or insufficiency in the general scheme of work decided upon, there can be no doubt that if the work is carried out negligently and there is no statutory remedy given to a person injured thereby, an action at law will lie.

The negligence of the defendants in this case was in not providing what has since proven to be a reasonable and safe outlet, the very outlet authorised by their scheme, and the substitution therefor negligently, I think, of an insufficient and unauthorised outlet.

Now, the excuse is that they were unable to secure the consent of the municipality to the digging of the outlet on road 4, but they do not appear to have attempted to get such consent until after they had brought the water from the south of road 20 to the intersection of that road with road 4. The municipality would not allow the defendants to construct that outlet because it would take up too much of the road allowance, but offered to permit part of it to be constructed along the road allowance if the defendants could procure the consent of the adjoining owners to a strip of their lands being utilized in aid of the work. That consent was not obtained and the evidence indicates that the defendants were not by any means diligent in seeking to obtain it. They chose rather to carry the water along road 20 to the plaintiffs' land notwithstanding the warning of what the result would be, and hence

B. C.

C. A.

HEMPHILL v. MCKINNEY.

Macdonald, C.J.A.

brought this suit upon themselves. The defendants had power to expropriate private land for the outlet under the statute referred to, and I think they were negligent in proceeding as far as they did before securing in one way or another the necessary outlet. At all events they were not justified in carrying the water down road 20 regardless of the injury which it might do to the plaintiffs' lands and contrary to the general drainage scheme.

Another ground of appeal was that the damage complained of had been caused by the act of the municipality in connecting its drain east of road 4 with the enlarged drain on road 20 from road 4 to the railway, thus greatly increasing the volume of water flowing to the plaintiffs' lands. That this act of the municipality increased the burden on that drain is not disputed, but to what extent it was increased is not made clear. It is suggested that without the municipal water, there would have been no flooding, but when it is made clear that a very large quantity of water was brought by the defendants themselves out of its natural course by artificial channels past the plaintiffs' lands, I think the defendants cannot relieve themselves of blame by saying that another party namely, the municipality, took advantage of the conduit which the defendants had made on road 20 to pour its water along with defendants' waters upon the plaintiffs' lands.

I think the conclusive answer to this contention of the defendants is that the municipality could not, by merely bringing water to the intersection of roads 4 and 20, have damaged the plaintiffs' lands, but for the defendants' act in making a conduit which conducted them thereto.

I see no reason for disagreeing with the result in the Court below, and would therefore dismiss the appeal.

Irving, J.A.

IRVING, J.A.:—Plaintiffs in 1914 sued for damages sustained by them in 1909-13 in consequence of the negligent construction of drainage and dyking works carried out by the defendants who were dyking commissioners, and obtained a judgment from Murphy, J., who ordered a reference to determine the damages.

On March 1, 1913, a statute was passed, ch. 18, amending the principal Act, 1911, ch. 69. Under the amendment of 1913, it is provided, sec. 58, when any lands not taken are injuriously affected by the works executed by the commissioners, the damage thereto shall, if not mutually agreed upon, be valued and assessed by arbitration (as therein provided).

The appellants obtained leave from this Court to amend their defence by setting up this section. Their contention is that the amendment of 1913 is merely a change in procedure and therefore retrospective, and that the plaintiffs have, since March 1, 1913, no right to sue in respect of injurious affection incurred in 1909. I cannot agree with that. The Act of 1913 is wholly different from the Act of 1909 or 1911, and the remedy given by the Act of 1913 does not fully cover the plaintiffs' cause of action.

The area originally proposed to be drained was a portion of Lulu Island, bounded on the north and west by the Fraser River. Later the north-western portion of the area proposed to be dealt with, was for reasons of policy, dropped out of the scheme.

The general slope of the land in the vicinity was to the west, but the land was very level, except that at the northern end as you approached within a mile of the Fraser River a slight ridge—called Willows Ridge—running parallel with the river prevented the land from being perfectly level. Along the river front there were a number of dykes to keep out the river water, and in these dykes have been placed two outlets about a mile and a half apart, the difference in the height between these two outlets is very slight.

The area retained is bounded on the north by road No. 20 of which the westerly end terminates at the edge of the Fraser River. This end is spoken of as the outlet at the church, and which, for convenience, we may call O., and at O. there is a gate through which the water which comes along road no. 20 is supposed to empty into the river.

This gate is constructed so that it will work automatically—when the tide is high the gate is supposed to close—with the result that the ditch fills up with drainage waters. This imprisoning of the drainage waters brings about what one witness aptly called a question of reservoir capacity for the drainage area between the tides and the time of the outlet. When the tide runs out, the gates open and the ditches discharge their waters. The gates will open for two or three hours when there is a full run out of the tide, and for 30 to 40 minutes at the half tides.

This gate was built before the commissioners were organized, by the municipal council as the outlet for road No. 3, and it is now the outlet for the ditches coming down No. 3 road as well as the ditch along road No. 20.

B. C.

C. A.

HEMPHILL v. MCKINNEY.

Irving, J.A.

Through the area retained running north and south are several parallel roads, viz.: roads Nos. 1, 2, 3, 4 and 5, about one mile apart. A railway embankment runs at the south between roads 1 and 2—then turning at right angles, it is carried easterly to a point halfway between roads 3 and 4 and from there it runs north to the Fraser River, crossing road No. 20 at right angles at a point called Cambie Station.

The plaintiffs own lots 33 and 4 which lie just to the west of the railway embankment, and to the south of road No. 20, and their complaint is that the plaintiffs have brought into a ditch which runs along road No. 2 so much water that the reservoir capacity of the ditch immediately to the north of them is overburdened—the gateway at point O. cannot carry it off and that their lands have been injuriously affected. For convenience, I shall call this western part of the ditch on road No. 20, west 20.

The water which they complain of is an alkaline water that comes from a bog lying to the east of the railway embankment and which were it not for the embankment would probably flow on to their lands.

Prior to the defendants undertaking their scheme, the plaintiffs were protected from this alkaline water by the railway embankment which was built about 22 years ago. On the eastern foot of this embankment, there was a small ditch which ditch carried the water flowing into it down to road 20 and there it passed under the embankment through a small culvert into the ditch which emptied itself at O. into the Fraser River.

The ditch west 20 was, prior to the defendants undertaking their scheme, a ditch some 14 ft. wide by 6 ft. deep, and had been built on the north side of road 20 by the railway company and the municipal council and was of sufficient reservoir capacity for the drains and ditches then emptying into it.

That was the condition of affairs when Hemphill came there some 8 years ago. The trouble began in 1909—when the defendants constructed or enlarged a north and south ditch down road No. 4 and an east and west ditch along the eastern portion of road No. 20, between the embankment and road No. 4, so as to carry the water of this new No. 4 ditch into ditch west 20. It was later aggravated by the construction of another ditch down road No. 5, and carrying its water by means of a ditch opened by another

authority on that portion of the road No. 20 lying to the east of road No. 4.

The No. 5 ditch and the enlarged ditch No. 20, between roads 4 and 5, which portion may be called east, were made by the municipal council and not by the defendants, just about the time the defendants had completed their scheme, which had its eastern extremity at the junction of roads 4 and 20.

To meet this increased flow of water, the defendants did not deepen or widen west 20, nor did they alter the outlet at O., but they employed a Chinaman to build a ditch 12-5 deep from road 20 in a northerly direction down towards the Fraser River, but as this passed through the Willows Ridge and the Chinaman did not dig to grade there was for a considerable period no outlet for these waters. The gate or intake of this Chinaman's ditch from ditch No. 20 was also defective in that it was 18 in. above the level of the bottom of ditch No. 20.

These two defects were remedied later, probably in 1911, and in 1914 a new large relief ditch 18 ft. wide and 7 ft. deep was built alongside road No. 4. This was built at the joint expense of the defendants and the municipal council and emptied into the Fraser River at the outlet, a mile and one-half above O.

The combined flow of ditches Nos. 4 and 5, passing through the gate at Cambie Station, swelled the waters in ditch west 20 to such an extent that the plaintiffs lands were inundated.

It is charged against the defendants that they were guilty of negligence in (1) bringing all this water from their ditch on road No. 4 into west 20; (2) in permitting the municipal authorities to empty in west 20 the water from No. 5 ditch; (3) in not enlarging the gate at O. so as to accommodate the increased supply and (4) in not constructing a relief ditch of sufficient capacity from road 20, in a northerly direction, so that the water from Nos. 4 and 5 could flow northerly into the Fraser River. This relief ditch, when built in 1914, proved sufficient.

The Judge found that the railway embankment acted as a complete protection to the plaintiffs' lands against the alkaline waters of the bog. He found that damage had been done to the plaintiff's lands by the alkaline waters of the bog and not by the river water as suggested by the defendants. That the alkaline water had come down by ditch No. 4, and also by ditch No. 5; that

B. C.
C. A.
HEMPHILL
v.
MCKINNEY.
Irving, J.A.

the commissioners had adopted the already constructed outlet at O. for the combined waters without looking at it to determine whether it required repairs or alterations for the increased service; that they were negligent in not properly constructing the Chinaman's ditch in 1910, and in not constructing earlier a sufficiently large relief ditch when the council turned into ditch east 20 the waters from road No. 5.

I agree with him in these findings of fact, and in the conclusion that there was negligence on the part of the commissioners in not calling in the services of skilled persons to advise them of their rights (if any), to resist the action of the council in bringing in this foreign water, and if they were unable to do that successfully, to secure competent engineers to advise as to and superintend the construction necessary to relieve the pressure on the reservoir capacity of west 20 instead of relying on their own ideas.

What gives a nasty look to this piece of negligence is that Alexander, to whom the other commissioners committed the management of the drainage of this bog water, was himself a sufferer from its ill effects in respect of a piece of property owned by him to the east of the embankment which protected the plaintiff's land. I would support the Judge's decision that the commissioners are liable for such negligence in an action.

Geddis v. *Bann Reservoir*, 3 App. Cas. 430, at 455:—

> An action (will) lie for doing that which the legislature has authorized, if it be done negligently. *Per* Lord Blackburn.

Sanitary Commissioners of Gibraltar v. *Orfila*, 15 App. Cas. 400:—

> It is an implied condition of statutory powers that when exercised at all they shall be executed with due care. *Per* Lord Watson, at p. 411.

And in the same case Lord Blackburn says, p. 412:—

> In the absence of something to show a contrary intention the legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities as the general law would impose on a private person doing the same thing.

Raleigh v. *Williams*, [1893] A.C. 540, did not say anything counter to this. That case was decided so far as the Bell Drain is concerned on the ground that although there was negligence in the execution of the scheme, yet as the commissioners had in good faith accepted the engineer's scheme and by by-law made the execution of it lawful, the persons prejudiced are limited to the statutory remedy. That was a wholly different scheme of legislation from that under our consideration.

The liability of a body created by statute must be determined upon the true interpretation of the statute under which it is created. We must, therefore, examine the Act at the time the damage was done—that is, in 1909. That Act then in force would be ch. 64 of the Revised Statutes of 1897.

The commissioners when appointed or selected were to be limited by the determination of the majority of land owners but the commissioners were "to have full power in all matters of detail." In the event of it being proposed to extend the payment for the works over a term of years, a plan was to be prepared, shewing the proposed scheme, and the lands proposed to be benefited. An estimate of the cost was to be made and an assessment roll prepared and a scheme devised, shewing how the cost of the works was to be met. In the case of works of small extent, where it was proposed to meet the cost by assessments levied as the work progressed, no plan or estimate was necessary. Provision was made for altering the plans. Then it was to be the duty of the commissioners to cause the works shewn upon the plan or in the determination deed to be executed, and to see that the same were "duly operated and maintained in a proper state of repair." These duties to operate and repair are specific statutory duties and would be enforceable by mandamus or indictment, irrespective of consequences. The common law liability (if any), would arise only in the event of damage being sustained.

Powers of expropriation were given and the compensation payable in respect thereof, which was to be regarded as portion of the cost of the works, was to be settled by arbitration.

No provision was made for compensation in respect of land injuriously affected though not actually taken, nor did the Act require preparation of the plan by an engineer (as in the *Raleigh* case, *supra*), nor was there any provision made (1) as to the utilization of highways, the possession of which is, by the Municipal Act, vested in the municipalities; or (2) as to the use of any municipal ditches either exclusively or jointly with the municipal authorities. On the whole, I read the Act as simply incorporating these persons so that they could conveniently exercise a scheme to be mutually determined upon and to that end borrow money by assessments to be levied. It was a substitute on a large scale for individual enterprise. In general, although the statute defines the relation of

B. C.
C. A.
HEMPHILL
v.
McKINNEY.
Irving, J.A.

the defendants to the subject matter, it is the general or common law which defines the legal results of that relation. It did not exempt them from the general law for liability to keep their waters within their ditches or reservoirs on the principles laid down in *Rylands* v. *Fletcher*, L.R. 3, H.L. 330: see on this point *Shipley* v. *Fifty Associates*, 106 Mass. 409.

In *Harrison* v. *Southwark*, [1891] 2 Ch. 409; 60 L.J. Ch. 630, Vaughan Williams, J., laid down that where a statute authorises the execution of a work it authorises all things reasonably necessary for the execution of the work, and to what extent the defendants might go under this Act is a difficult question. Certainly it would justify them in building a relief ditch to the north and taking all precautions possible to keep down risk of flooding.

In regard to the right of the defendants to make use of the roads and ditches, the property of the municipality, there is a difficulty in finding out how this was obtained. I suppose there was a licence to do so—no by-law was proved—the council therefore would be in a position to terminate the licence at any time, but in view of the injury that would be done by an untimely revocation, it may be argued that the making of these ditches and the construction of a reservoir, without taking steps to have the licence first obtained, was negligence on the part of the defendants. I think it was negligence.

Ex. 6, p. 260, which was signed in or about August, 1906, authorised the defendants to:—

> establish drainage for the lands within the above defined districts by widening and deepening the present existing ditches *running north and south* within the same; to put in large boxes sufficient to discharge the water carried by the said ditches from the said lands and to do everything that may be necessary to thoroughly . . . drain the said lands.

The north and south ditches at that time were two small ditches, one on each side of the embankment; two small ditches (choked up) on each side of No. 4. These were carried across road 20 ditch in boxes down to the Fraser River—the predecessor of the Chinese ditch. I presume there would be ditches at both sides of road No. 3, which terminates at point O. The road No. 20 was an east and west road, and it is questionable whether the omnibus clause would include it. In my opinion, it would not.

That ditch No. west 20 (I may be repeating myself), was then a 14 ft. ditch west of the embankment, but east of the embankment was a small 2½ ft.-deep ditch at the side of the road.

That was the original plan, and it bears out the plaintiffs' contention that the system was to be a north and south system of drainage. Then there seems to have been a change made. In what way and to what extent it is not clear—no document shewing any alteration of the general scope, extent and limits of the works was put in. A memorandum of work to be done was drawn up and registered. This memorandum, as I understand it, shewed no details, but authorised a north and south ditch on No. 4 and necessarily the carrying of that water westerly along road No. 20. The water that came down 5, and was also carried westerly was not included in the memo. filed.

The failure of the defendants to prevent this accumulation of waters being turned in west 20 was a failure on their part to "duly operate" the ditches built by them. I think that, under their duty to keep in a proper state of repair, they were required to close the ditch on No. 20 at their easterly terminus when they found that the municipal board had turned their foreign waters into them. If they were unable to prevent the council turning the waters of No. 5 into No. east 20, and the evidence is not satisfactory that they made any effort to do so, they should have appealed to parliament for relief to enable them to "duly operate" their scheme. A licensee is entitled to a reasonable time for the removal of goods placed by him on license on another's property: *Cornish* v. *Stubbs*, L.R. 5 C.P. 334; 39 L.J.C.P. 202; *Mellor* v. *Watkins*, L.R. 9 Q.B. 400, and the commissioners, I think, would have been entitled to time had they applied for it; and compare acquiescence in the case of a nuisance—*Davies* v. *Marshall*, 10 C.B.N.S. 697. The municipal council would not be estopped by their laches: *Islington Vestry* v. *Hornsey Urban Council*, [1900] 1 Ch. 695, 705 and 706, but time I have, no doubt, would have been given by the Courts to enable the commissioners to make other arrangements, as was done in that case.

Bigelow v. *Powers*, 20 O.L.R. 558, is a case that may have a bearing on the plaintiff's rights to recover damages from their co-operating neighbours if it should be held that the board is not an incorporated body.

When the commissioners began to convert the small road ditches along road 20 into drainage ditches and to enlarge the culvert under the embankment the plaintiffs protested again and again,

B. C.

C. A.

HEMPHILL v. MCKINNEY.

Irving, J.A.

but to no purpose. Hemphill's protest at a meeting was ruled out of order because he could find no seconder. I venture to think that was not the proper way to deal with the matter. He was before a board who had a certain duty to perform with reference to him and the matter should have been considered. Speaking generally, the defendants, having regard to their discretionary powers, did not give the plaintiffs the consideration they should have given. I think they were over-impressed with the powers of the council, or perhaps to speak more strictly that, in their desire not to lose the assistance the members of the council were willing to give to their scheme, they overlooked the plaintiff's rights.

I would dismiss the appeal.

Galliher, J.A.

GALLIHER, J.A.:—This is an action for damages caused by the overflow of water from ditches constructed by the defendants as commissioners acting under the provisions of the Drainage, Dyking and Irrigation Act, ch. 69, R.S.B.C. 1911. The trial Judge found in favour of the plaintiffs and ordered a reference to ascertain the amount of damages. From this the defendants appeal.

The principal contentions of appellants are: (1) That an action at law is not maintainable but the right of recovery (if any), is by arbitration; (2) If at law no damage has been proved; (3) That there was no negligence in the carrying out of the scheme by the commissioners and therefore no liability; (4) If damage has been proved the same was not caused by the construction of the works of the defendant but by the connecting up with the defendants' works (which were constructed along a public highway), of works done by the municipality in whom the highway was vested, the connecting up of which caused the damage (if any), by bringing in large bodies of water which otherwise would not have entered the defendants' works which the defendants could not prevent and which they are in no way responsible for.

Dealing with the first ground of appeal, ch. 69 of R.S.B.C. 1911, is repealed by ch. 18 of 1913, saving and preserving any rights and privileges acquired thereunder, and Mr. Martin, counsel for the appellants, argues that, although the damage sued for occurred prior to 1913, the writ was issued since that date and the right to recover must be under the procedure laid down in the latter Act and cites sec. 58 of the Act as governing the procedure.

Whether sec. 58 is applicable only where expropriation proceed-

ings have been taken under sec. 55, I do not think it necessary to determine as in my opinion there was not in the Act of 1911 any statutory remedy for compensation by arbitration or otherwise applicable to the case at bar, the plaintiff's remedy (if any), being by action at law, and this right was preserved to him by the saving clause in sec. 70 of the Act of 1913. It is, therefore, more than a mere matter of procedure.

Mr. Martin, however, contends that the Act of 1911 provides for arbitration and relies on secs. 19, 21 and 22.

Sec. 19 clearly has reference only to expropriation proceedings and the payment of compensation for lands taken.

Sec. 21 must be read with sec. 11, and sec. 22 we need not consider.

It has given me considerable difficulty to decide just what sec. 11 means.

After the best consideration I can give to this section, it appears to me that where commissioners have been appointed under sec. 3 or selected under sec. 4 and where, under sec. 8, the proprietors have determined the general extent, scope and limits of their works, then any one whose lands may not be within such limits may, under sec. 11, apply to the commissioners to have his lands drained or dyked, and that under sec. 21 anyone other than such applicant whose lands may be injured by the adoption and carrying out by the commissioners of the request of the applicant shall have his compensation assessed and valued as therein directed. In other words, secs. 11 and 21 seem to me to have reference to something apart from the general scheme.

The appellants relied very strongly on *Raleigh Corporation* v. *Williams*, [1893] A.C. 540, but I think the decision there insofar as it affects this case must be taken to have rested on sec. 591 of the Ontario Act 1887, ch. 184. We have no such section in our Act.

On the second ground, I think there was ample evidence of damage.

The 3rd and 4th grounds may be considered together.

The ditches constructed by the commissioners were along the highways within the municipality, the earth thrown up from the ditches forming the roadway for traffic, the ditches being on either side of the roadway.

B. C.
C. A.
HEMPHILL
v.
MCKINNEY.
Galliher, J.A.

At the time the commissioners were constructing these ditches along road 4 to carry the water down road 20 to the outlet, the municipality were constructing ditches from road 5 west of road 4, and carrying them along road 20, draining an area which otherwise would not have discharged its waters into the main drain along road 20 which conveyed the waters from the area along road 4 to the outlet, and it appears that this municipal ditch was completed and joined up at about the same time as the ditches constructed by the commissioners.

It is not quite clear from the evidence, whether the receiving ditch along road 20, which was constructed from road 4 to the B.C. Electric track on road 20 and the ditch with which it was connected from the B.C. Electric track to the outlet, would have been sufficient to carry off the water without injury to the plaintiffs, but certainly with the added water from the municipal ditches it was not, and the respondents contend that the appellants are liable because they could and ought to have prevented the municipality discharging the water through their ditches and connecting up with the ditches constructed by the commissioners.

The appellants, on the other hand, say they were at most licensees upon the municipal roads, and had no power to prevent the municipality so joining up and discharging water into their ditches and that the same was done by the municipality without their consent and without any application for leave so to do.

Among the powers and duties of the commissioners enumerated in sec. 18 of ch. 69, is that of seeing that the works are duly operated and maintained in a proper state of repair. There is here no question of state of repair so that I take it we are only concerned with the words "duly operated." I do not think it can be said upon the evidence that the gate at the outlet was insufficient for the purpose for which it was used. The outlet is below high tide level and consequently when the tide is in the gate is closed and no water can flow out except between tides and the difficulty seems to be that, owing to the volume of water poured into the ditch along road 20 from road 4 to the outlet by the ditches of the municipality and those built by the commissioners, it would have required a very large ditch practically in the nature of a reservoir to contain the waters without overflow which came in while the gate was closed by the tide.

If the language used by Lord Macnaghten in the *Raleigh* case, *supra*, is to be taken in its broad sense and not qualified by reason of the section of the Ontario statute before referred to, then I take it the plaintiffs cannot succeed in this action, unless the duty cast upon the commissioners by the Act is one within the purview of this case.

At p. 6 of 63 L.J.P.C., Lord Macnaghten says:—

> It was argued on behalf of the respondents that if a drainage work constructed under a by-law duly passed turns out in the result not to answer its purpose by reason of some other defect, which a competent engineer ought to have foreseen and guarded against; or if the result of a drainage work is to damage a person's land by throwing water upon it which would not otherwise have come there—that is actionable negligence on the part of the municipality. This argument, in their Lordships' opinion is wholly untenable. . . . If, however, acting in good faith, they accept the engineer's plan and carry it out, persons whose property may be injuriously affected by the construction of the drainage work must seek their remedy in the manner prescribed by the statute.

In view of the later judgment of Lord Macnaghten in the case of *Hawthorn Corporation* v. *Kannuluik*, 75 L.J.P.C. 7, I think the words above quoted must be taken to have been used having reference to the statutory enactments applicable; if indeed the last paragraph quoted does not itself suggest that.

There remains the question of appellants' negligence. Having abandoned the original scheme of carrying the water from these several ditches along road 4 north to the river (a scheme which has since been adopted and has proved sufficient), and having adopted an alternative scheme which caused the damage without I think proper sanction in that behalf, in my view they were negligent in that they, knowing the large quantity of water that would be brought down by their own works with the greatly added supply from the works being carried on by the municipality, and which were to be joined up with their works, did not greatly increase the size of the ditch along road 20 from road 4, or at all events from the railway crossing to the outlet.

I would dismiss the appeal.

MARTIN and MCPHILLIPS, JJ.A., dissented.

Martin, J.A.
McPhillips, J.A. (dissenting)

Appeal dismissed.

CAN.

S. C.

BROWNING v. MASSON, Ltd.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur, JJ. December 29, 1915.

1. CONTRACTS (§ IV B 2—330)—IMPOSSIBILITY OF PERFORMANCE—INCONSISTENCY OF CONDITIONS—DISCHARGE.

An agreement to purchase all the structural steel work needed under a municipal contract, if "consistent with the conditions" of the latter contract, is rendered impossible of performance and inoperative upon the municipality awarding such contract on condition that the steel and iron works should be purchased from another party.

[*Browning* v. *The Masson Co.*, 24 Que. K.B. 389, reversed.]

Statement

APPEAL from the judgment of the Court of King's Bench, appeal side, 24 Que. K.B. 389, whereby the judgment of Dorion, J., in the Superior Court, District of Quebec, in favour of the plaintiffs, was varied by reducing the amount of the judgment with costs. Reversed.

L. A. Taschereau, K.C., for appellants and cross-respondents.

St. Laurent, K.C., for respondents and cross-appellants.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—The appellants are general contractors and, as such, made, in competition with others, a tender for the reconstruction of the Dufferin Terrace in the City of Quebec. After consideration, the road committee decided to recommend the appellants' tender for acceptance by the council as the most advantageous, but on the condition that they—the appellants—would purchase the steel and iron required for the execution of their contract from the Eastern Canada Steel Co., a local concern engaged in the manufacture and erection of steel and iron structures. The respondent company also carried on the same business at Quebec. The council, adopting the recommendation of the road committee, awarded the contract to the appellants.

A letter purporting to set forth an agreement theretofore made between the appellants and the respondents was written about the time the tender was being considered by the council; but this letter, although drafted by the respondents on August 21, was not signed until August 24 by the appellants. That letter is in these words:—

Object: New Dufferin Terrace. Quebec, August 21, 1914.

Messrs. Sharpe Construction Company,
109 Fleurie Street, Quebec.

Gentlemen,—This will confirm our verbal agreement to the effect that you hereby bind yourself to sign a contract with us for furnishing and erecting complete the structural steel work for the New Dufferin Terrace for the sum of $11,400 (eleven thousand four hundred dollars), as soon as your contract with the City of Quebec for the work is executed, it being understood that

this price covers a structure comprising columns, beams, ties with fittings complete, capable of supporting wooden joists and wooden floor consistent with the requirements of the specifications for steel superstructures of bridges and viaducts of the Department of Railways and Canals of Canada, and it being further understood that this structure be subject to the approval of the City of Quebec.

This also confirms our verbal agreement that in case the City of Quebec does not approve of a structure as above mentioned, that immediately following the signing of your contract with the City of Quebec, you hereby bind yourself to sign a contract with us for the furnishing and erecting of the structural steel work completely erected in place for the New Dufferin Terrace, for the sum of $13,000 (thirteen thousand dollars). Said structure to comprise columns, beams, ties and fittings and to be capable of supporting a uniformly distributed live load of 140 lbs. per sq. ft., floor construction to be of wooden joists and planking.

It is further understood and agreed that either of the contracts mentioned above will be *consistent* with the conditions in your contract with the City of Quebec.

Accepted:
SHARPE CONSTRUCTION CO.,
A. Laurent.
W. Sharpe.

Yours very truly,
MASSON, LIMITED.
E. D. Kellog.
Eng. in charge.

It will not be necessary to consider the legal effect of the vague and ambiguous language used in the first two paragraphs. This appeal turns upon the meaning attributable to the last paragraph and more particularly to the governing word "consistent." To properly appreciate the effect of the language used, it is important to consider the circumstances under which the letter was written. It is apparent upon the evidence that the paragraph now directly in question was added to the letter at the instance of the appellants and for their protection and, in view of the then existing situation, it was a very elementary precaution to take because, at the date the letter was signed, not only did both parties know that the appellants' tender was accepted subject to the condition that the steel required should be purchased from the Eastern Canada Steel Co., but a contract containing that condition was actually prepared by the city notary and ready for appellants' signature. One should not lightly assume that in those circumstances the appellants would give an absolute undertaking to sublet the same work to the respondent company.

Let us now analyze the language used, because, of course, all contracts must be construed according to the primary and natural meaning of the language in which the contracting parties have chosen to express the terms of their mutual agreement.

Evidently the appellants must not be presumed to have intended to bind themselves to do more than to give the contract to the

CAN.

S. C.

BROWNING v. MASSON.

Sir Charles Fitzpatrick, C.J.

respondents if they could do so consistently with the terms of their own contract with the city. It is not to be assumed that their intention was to obligate themselves without consideration to give a contract which it was impossible for them to carry out. The respondents, who drafted the letter and are, therefore, responsible for the choice of words, say:—

It is further understood and agreed that either of the contracts mentioned above will be consistent with the conditions in your contract with the City of Quebec.

Bearing in mind that the dictionary meaning of the word "consistent" is "compatible with," "not contradictory of," the sentence must be read to mean that the appellants obligate themselves to enter into a contract with the respondents only if such a contract would be compatible with and not contradictory of the conditions in their own contract with the city. And could anything be more incompatible with or more contradictory of that condition of the contract with the city by which they bound themselves to give the preference to the Eastern Canada Steel Co., than an undertaking to give the respondent company the steel work for the terrace? And that it was not intended when the letter was written to enter into a binding agreement such as is now relied upon is made absolutely clear by the evidence of Masson, one of the chief officials of the respondent company. Speaking of the letter, he says:—

Q. Now, after the opening of the tenders, did you meet the representatives of the Sharpe Construction Co., at the time of the signing of the document produced as ex. p. 3?

A. We went to meet with them at the instance of Mr. Laurent and we have discussed that very question and about having it accepted in writing.

Q. Then what was the motive, the reason why your first price was reduced to thirteen thousand dollars ($13,000)?

A. Because there were precisely at that time parleys which might have embarrassed and we said: "If they were willing to sign that paper, we would agree to reduce the thing to that price so as to get the contract," for which we would have the contract and they would promise us that in as far as it might be in their power, the contract will go to no other.

In those words, "as far as it might be in their power," we have the key to the meaning which the word "consistent" had in the minds of both the parties.

The allegations of respondents' declaration also support that construction of the sentence. The claim for damages is largely, if not entirely, based not upon a breach of the written undertaking, but upon the allegation that, notwithstanding that undertaking,

the appellants allowed the city to insert in their contract a condition which made it impossible for them—the appellants—to carry out their agreement with the respondents and on the evidence it is clear that the appellants were not privy in any way to the action of the city council, but, on the contrary, did all they could to get the consent of the city officials to give the work to the respondents.

The judgment in appeal proceeds on the assumption that the appellants distinctly connived at the insertion in their contract with the city of the condition giving the preference to the Eastern Canada Construction Co. Pelletier, J., who gave the majority judgment below, says:—

> Mr. Sharpe signed this contract and accepted those conditions which caused him to break his contract with the respondent, without even speaking to the latter about it; his tender for the works to be made to the terrace was by $17,000 lower than the others and the city council would not have imposed that considerable difference upon the ratepayers if Sharpe had wanted to resist a little; he had only to offer a semblance of resistance and in a few days the affair would have been settled by the abandonment of the condition imposed by the city.

Upon the evidence I would reach a contrary conclusion. Laurent says:—

> Q. In so far as you were personally concerned, as a member of the Sharpe Construction Co., did you have any objection to the contract for steel being given to the Masson Co.? A. No, sir, on the contrary, I was very anxious, I would have been very anxious to give them the contract. Q. Why did you not give it to them? A. Because of that clause which was obliging us to give the contract to the Eastern Construction Co., it is what caused me . . . Q. To the Eastern Canada Steel Co.? A. Yes, sir, that is what the notary gave me to understand when we signed the contract. Q. You examined the thing with the notary? A. Yes, sir. Q. And the notary pointed out that? A. I would have liked to exact that he strike off that condition to allow us to give the contract to whomsoever we liked: and the notary pointed out that it was impossible; that the contract had to be signed as written and that we had to comply with the requirements. Q. What was the reason of that obligation? A. Because of an order of the council which was inserting a clause passed by the city, *i.e.*, by the road committee. Q. Approved by the council? A. Approved by the council.

To the same effect Sharpe and Drouin testify.

To repeat what I have already said, if the document relied upon is construed as it should be according to the primary and natural meaning of the language in which the contracting parties chose to express the terms of their mutual agreement, then the undertaking of the appellants was to give the steel work to the respondents if to do so would be compatible with the terms of

CAN.
S. C.
BROWNING v. MASSON.
Sir Charles Fitzpatrick, C.J.

their contract with the city. The language used, I submit respectfully, is not susceptible of being construed to mean that the appellants assumed to give respondents a contract which would in its terms conform to their contract with the city, as assumed by the trial Judge, but to give them a contract, if they could do so consistently with the conditions of their contract with the city; and that is the only contract which in the circumstances business men could reasonably be expected to have made.

I have gone carefully through all the evidence and can find nothing to justify in any way the suggestion of wrong-doing on the part of any member of the city council. They were all examined as witnesses and, judged by the ordinary standard of municipal ethics, there is no ground of complaint. In any event, our sole duty is to interpret the agreement which the parties made and we have no mandate or authority to sit in judgment on the conduct of the members of the Quebec city council.

The appeal should be allowed with costs and the cross-appeal dismissed with costs.

Davies, J.
Idington, J. (dissenting)
Duff, J.

DAVIES and IDINGTON, JJ., dissented.

DUFF, J.:—In construing this document (see judgment of Fitzpatrick, C.J.), there are two general considerations which I think it is important to keep in mind.

First, it is an informal letter containing proposals not intended to be proposals which, on acceptance, shall constitute a contract for the sale of steel or for the erection of a steel structure, but proposals for entering into a presently binding agreement that, in a certain event, namely, the awarding of a certain contract by the council of the city of Quebec to the appellants, the parties shall sign contracts for the erection of the steel structure of the Dufferin Terrace by the appellants and providing in a general way for the nature of the contracts so to be entered into.

Secondly, that in construing such a document all the parts of it must be read together and each construed by the light of all the others and that especially in case of such an informal document, it is important to read the language of the document in the light of the existing circumstances so far as known to both parties and with reference to which they must be assumed to have been contracting.

Now, at the time the appellants signified their acceptance of the respondent's proposal and some hours before that, it was known

to both parties that it was quite possible that the municipality would insist upon stipulating as one of the terms of their contract that the steel should be purchased from the Eastern Canada Steel Co. The parties, no doubt, hoped that they would succeed in inducing the council not to insist upon this condition, but the fact that they were threatened with it was known to them both; and it is in light of the fact that this contingency was present to their minds that the proposals contained in this letter must be read.

And what meaning are we then to attribute to the last paragraph?

> It is further understood and agreed that either of the contracts mentioned above will be consistent with the conditions in your contract with the City of Quebec.

The "contracts mentioned above" are the contracts which the parties proposed to enter into after the contract with the municipality should be signed. The parties bind themselves to enter into contracts of the general description set forth in the first two paragraphs of the letter, but subject to the proviso that these contracts must be consistent with the "conditions" of the municipal contract, that is to say, must be capable of being carried out consistently with due performance of the obligations created by the municipal contract. There can be no doubt in my view that the language taken in its primary sense limits the obligation of both parties to entering into contracts which shall be "consistent" with the contract with the municipality; an obligation, therefore, which only becomes operative in the event of the contract with the municipality being of such a character as to permit the parties making and carrying out the contracts proposed. That being the effect of the language of this letter, I confess that, with great respect to others who take a contrary view, I have no difficulty in reaching the conclusion that the proper construction of the document is this very construction which is suggested by an examination of the words themselves.

In truth the contention of the respondents seems to me, with great respect, really to involve a more or less palpable *petitio principii* (notwithstanding the disguises which skilful advocacy has designed for it). The argument really rests upon the assumption that the essence of the agreement was that the appellants undertook not to enter into a contract with the municipality which did not permit them to purchase the steel from the respondents. The

CAN.
S. C.
BROWNING v. MASSON.
Duff, J.

intention to enter into such an undertaking is not declared in express terms by this document which provides that any contract to be entered into by the appellants with the respondents must be capable of execution consistently with the obligations of their contract with the municipality. No such undertaking can be implied from the document read as a whole in the light of the circumstances because it is impossible to say from anything before us that such a stipulation was necessary to give effect to the objects of the parties as disclosed by the document; and still less can it be said that reasonable and honest business men, if they had thought of the contingency which happened, would certainly have stipulated expressly as it is contended they did stipulate impliedly, because the fact is that they had in mind that very contingency and this very document which was prepared by the respondents and proposed by them as expressing the terms of their contract contains no such stipulation.

It is needless to say that a very different question might have been presented for decision if the respondents had proved that the appellants had by their own conduct brought about the insertion in the municipal contract of the stipulation requiring the steel made use of to be purchased from the Eastern Canada Steel Co.

Anglin, J.

ANGLIN, J.:—With Pelletier, J., I have found some difficulty in giving to the concluding clause in the plaintiffs' letter of August 21, 1914, the construction for which the defendants contend. The word "consistent" is certainly not the most apt to express the idea which they maintain it was intended to embody. But, read in the light of the circumstances under which it was written, it would seem probable that, by the clause in question, the parties must have meant not merely to provide for alterations in the contract between the plaintiffs and the defendants so as to make it conform in minor details to the terms of any contract which the municipality should exact from the defendants, but also to provide against liability of the defendants to the plaintiffs if the municipal council should insist upon making their contract subject to any condition which would disable the defendants from entering into a sub-contract with the plaintiffs. The municipal council did insist on such a condition. There is nothing in the record which indicates anything in the nature of connivance or collusion on the part of the defendants. On the contrary, they appear to have acted with scrupulous good faith towards the plaintiffs.

CAN.
S. C.
BROWNING v. MASSON.
Brodeur, J.

I would, therefore, allow this appeal and dismiss the action with costs throughout, substantially for the reasons given by Cross, J., and concurred in by Lavergne, J., in the Court of King's Bench.

BRODEUR, J.:—This is an action in damages for breach of contract.

The appellants had tendered for the reconstruction of the Dufferin Terrace, at Quebec. The city of Quebec, which was having the works executed, was disposed to accept the tender of the appellants, but on the condition that, when buying their steel they would give the preference to the Eastern Canada Steel Co.

The appellants, who, to prepare their tender, had procured figures from the respondent company, acquainted the latter with that condition; and in concert with it took steps to induce the municipal authorities to purely and simply accept their tender.

During those steps, the respondent and the appellants entered into an agreement by which the appellants were binding themselves to take their steel from the respondent if the city of Quebec contracted with them for the rebuilding of the terrace according to either of the suggested plans, adding moreover:—

> It is further understood and agreed that either of the contracts mentioned above will be consistent with the conditions in your contract with the City of Quebec.

The negotiations went on with the city of Quebec and the latter refused to strike off the stipulation in favour of the Eastern Canada Steel Co.

The appellants then suggested to the respondents to decrease his price so that they might be freed from that preference which had to be given to the Eastern Canada Steel; but the respondent refused and then they had to give the sub-contract to that other company.

The whole question rests on the interpretation to be given to that convention between the respondent and the appellants.

The respondent claims that the appellants were bound as soon as they had the contract with the city of Quebec, to give to it the supplying of the steel.

The circumstances, it seems to me, cannot authorize such an interpretation of the contract. The parties, when they entered into their agreement, knew the demands of the city of Quebec; and to say that the appellants formally bound themselves to give

CAN.
S. C.
BROWNING
v.
MASSON.
Brodeur, J.

the contract to the respondent even if the city of Quebec did persist in its preferential clause would seem absolutely extraordinary.

The contract had been prepared by the respondent itself. In the case of any doubt, it must be interpreted against the one who has stipulated and in favour of the one who has contracted the obligation (art. 1019 C.C.).

If the stipulation which we have textually quoted did not exist, there might perhaps be some doubt as to whether the defendants would have bound themselves, in case they should get the contract from the city of Quebec, to give the sub-contract to the respondent. But that stipulation is to the effect that the obligations of the sub-contract will be "consistent" with the conditions of the main contract.

The word "consistent" in the present circumstances can lend itself to different interpretations. That contract was not prepared nor examined by legal minds; but it was so prepared and examined by business men and there is no doubt, to my mind, that the intention of the parties was that if they could succeed in getting rid of the condition inserted by the city of Quebec or if they could in any other way get rid of that stipulation, then the sub-contract would go to the defendant.

Even if we do examine the literal sense of the letter in question without examining the particular circumstances under which it was written, I think that the respondent could no more succeed.

In fact, the plaintiffs would have said: We are quite willing to give you the sub-contract for the steel, but on the very conditions imposed upon us by the city of Quebec.

Then, one of said conditions was to give the preference to a certain company for the purchase of the steel. Nothing easier then for the respondent than to accept that condition. He would simply have had to give the preference, when purchasing the steel, to the Eastern Canada Steel Co. So that if we carefully examine the circumstances of the case, if we take into consideration the intention of the parties, and if we even take the letter of the contract, the plaintiffs, respondents, have no right to sue the defendants-appellants for want of specific performance.

In those circumstances, I am of opinion that the judgment *a quo* should be reversed with costs of this Court and of the Courts below and that the action of the plaintiff-respondent must be dismissed with costs. *Appeal allowed.*

CANADIAN NORTHERN RAILWAY CO. v. CITY OF WINNIPEG.

MAN.

C. A.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. April 25, 1916.

1. TAXES (§ I—1)—WHAT INCLUDED IN—LOCAL IMPROVEMENT ASSESSMENTS.
Every contribution to a public purpose imposed by superior authority is a "tax"; a local improvement assessment or a special survey charge is taxation within the ordinary meaning of the word.
[*Halifax* v. *Nova Scotia*, 18 D.L.R. 649, [1914] A.C. 992; *St. Sulpice* v. *Montreal*, 16 Can. S.C.R. 399, referred to.]

2. TAXES (§ I F 2—80)—EXEMPTION OF RAILWAY PROPERTY FROM GENERAL TAXATION—LOCAL ASSESSMENTS—SPECIAL SURVEY CHARGES.
Sec. 16 of ch. 29, 1 Edw. VII. (Man. 1901), ratifying an agreement for the exemption of the properties, incomes and franchises of a railroad company from all assessments and taxation of every nature and kind within the province by whomsoever made or imposed, as provided by sec. 18 of the Railway Taxation Act, 1900, ch. 57, is subject to the limitation of sec. 1 (22), of the amending Act, 1900, ch. 58 (R.S.M. 1913, ch. 193, sec. 18), empowering municipal corporations to charge the real property of railroad companies for taxes for local improvements, the exemption, however, extending to special survey charges made in pursuance of ch. 158, R.S.M. 1902.

3. TAXES (§ III G—150)—RIGHT TO COSTS OF REDEMPTION.
Costs incurred and which were paid under protest to a municipality in order to redeem property from a wrongful sale for taxes claimed to be exempt may be recovered back.
[*Alloway* v. *Morris*, 18 Man. L.R. 363, followed.]

Statement

APPEAL from the judgment of Macdonald, J., in favour of the plaintiff in an action by a railway company to recover taxes paid under protest on property claimed to be exempt. Varied.

The judgment appealed from is as follows:

The plaintiff is now, and was at the time of the assessment and sale hereinafter referred to, the owner of lots 6 to 10 in block 5, as shown on a plan of survey of part of lots 25 to 27 of the Parish of St. Boniface, registered in the Winnipeg Land Titles Office as plan No. 1606, and said lands were, on November 28, 1910, sold by the defendant the City of Winnipeg for arrears of taxes.

On May 27, 1913, in order to prevent a certificate of title being issued to the purchaser at the said tax sale, the plaintiff paid, under protest, to the District Registrar the sum of $148.31. There is included in this amount the sum of $8.96, being the amount assessed against the property for a water-works tax, and the sum of $8.30 for a special survey tax.

The District Registrar had paid over to the defendant the City of Winnipeg the sums so paid by the plaintiff in redemption of the said property, less a certain portion of the costs of redemption.

MAN.
C. A.
C.N.R.
v.
CITY OF WINNIPEG.
Statement

The plaintiff claims to be entitled to a refund of the various sums so paid by it for the purpose of preventing certificates of title issuing for the properties, but the defendant the City of Winnipeg denies that the plaintiff is so entitled. The questions for the opinion of the Court are:—(a) Whether the said lots 6 to 10 in block 5, D.G.S. 25, 27, St. Boniface, plan 1606, are liable for any taxes and more especially whether the said and is liable for water rates or special survey tax, or any other local improvement tax. (b) Whether the plaintiff is liable to the defendant corporation for payment of taxes or assessments in respect of real property of the company fronting or abutting on any street or place for local improvements upon, in, under or upon any such street or place, according to the frontage of such real property so fronting or abutting on such street or place. (c) Whether the defendants, or either of them, are liable to repay to the plaintiff the costs of redemption included in the various sums paid by the plaintiff in order to redeem the said properties.

Chapter 57 of 63-64 Vict., sec. 5 (1900), provides that

In order to supplement the revenues of the Crown in the Province of Manitoba, every railroad company at present owning or operating, or which may hereafter own or operate, any line or lines of railroad within the said province shall pay to the Crown in this province a part or portion of the gross earnings of such railroad companies in the Province of Manitoba, as follows:—In and for the years 1900, 1901 and 1902, two per cent. of the gross earnings of such companies.

Section 18 of said ch. 57 provides that,

Every railroad company coming within and paying taxes under the provisions of this Act or any Act or Acts amending this Act, and the property of every nature and kind of every such railroad company, except the land subsidy to which the company is or may be entitled from the Dominion Government, and any land held by it for sale, shall, during the continuance of this Act or any Act or Acts amending this Act, be free and exempt from all assessments and taxation of every nature and kind within the Province of Manitoba by whomsoever made or imposed, except such as are made and imposed under the provisions of this Act, or any Act or Acts amending this Act, and no person or body corporate or politic having power to make assessments or impose taxation of any kind shall, during the continuance of this Act or any Act or Acts amending this Act, make any assessments or impose any taxation of any kind of or upon any such railroad company or any property of such railroad company except the land subsidy to which such company is or may be entitled from the Dominion Government, and any land held by it for sale as aforesaid.

Section 1, sub-sec. 22, ch. 58, 63-64 Vict. (1900), amends the Railway Taxation Act by adding thereto the following section:

Nothing herein contained shall take from any incorporated city any right or power which any incorporated city may now have of assessing and levying on the real property of any railroad company fronting or abutting on any street or place taxes for local improvements done in, under or upon any such street or place according to the frontage of such real property so fronting or abutting on such street or place, or relieve any railway or telegraph company owning or operating a telegraph line or lines in the province from the payment of the taxes imposed in that behalf under the provisions of The Corporations Taxation Act.

Chapter 57 and ch. 58 of 63-64 Vict. were passed at the same session and came into force on the same date.

Section 16, ch. 29, 1 Edw. VII. (1901), provides:

Notwithstanding its present exemption from taxation the company covenants to pay to the Government in each year after the year 1905, and up to the maturity of the bonds hereby agreed to be guaranteed, a sum to be fixed from time to time by the Lieutenant-Governor-in-Council not exceeding 2% of the gross earnings of the company from its lines in Manitoba covered by the mortgages securing bonds heretofore or hereafter guaranteed by the Government, and from the lines included in said lease and option and in consideration of the said payments the company and the lessors in said lease and option their properties, incomes and franchises shall be exempt from such taxation as is provided for by sec. 18 of ch. 57 of the Statutes of Manitoba of 1900 during the currency of the said bonds hereby agreed to be guaranteed. Provided, however, that any lands now exempt shall continue to be exempt from such taxation during the currency of said bonds.

Under par. 5 of the agreement the bonds mentioned are payable on June 30, 1930. The property, the subject of taxation herein, is in actual use. The above is the law which governs this case.

The taxes, the subject of dispute herein, were imposed subsequent to the year 1900 and the enacting of 63-64 Victoria.

The contention of the defendant is that the plaintiffs are entitled to exemption from general taxation but not to exemption from taxation for local improvements and that if such were intended the Act would have been explicit and have said so.

The contention of the plaintiffs, on the other hand, is that by virtue of sec. 18, ch. 57, of 63 and 64 Vict., as owners of the lands in actual use they are free and exempt from all assessments and taxations of every nature and kind within the Province of Manitoba by whomsoever made or imposed except such as are made and imposed under the provisions of this Act.

The agreement between the Province of Manitoba, ch. 39, 1 Edw. VII. (1901), and the plaintiffs provides that, for the consideration therein specified, the properties of the company shall be exempt from such taxation as is provided for by sec. 18 of ch.

MAN.

C. A.

C.N.R. v. CITY OF WINNIPEG.

Statement

57 of the statutes of Manitoba of 1900 during the currency of the said bonds.

Section 18, ch. 57, 63 and 64 Vict. and sec. 1, sub-sec. 22, ch. 58, 63 and 64 Vict. would appear in conflict. Both Acts were passed at the same session, and the latter Act must be intended to apply to then existing assessments and charges.

To remove doubt as to the meaning and intention of sec. 16, ch. 39, 1 Edw. VII. (1901), it is declared that the exemption so granted was and is the exemption specified in sec. 18 of the Railway Taxation Act as existing at the date of the passage of such last mentioned Act, and is unaffected by any amending Act or Acts passed concurrently therewith and subsequently thereto. Sec. 18, ch. 166, R.S.M. (1902).

In my opinion the meaning and intention of the agreement between the Province of Manitoba and the plaintiff and the interpretation to be put on the legislation affecting it is that the burden assumed by the plaintiff under the agreement was in lieu of all taxes, rates and assessments. The said agreement exempts the plaintiff from all assessments and taxation of every nature and kind within the Province of Manitoba, and this applies to all charges for local or municipal purposes.

The costs in connection with the tax sale and subsequently incurred through the Land Titles Office in connection with the application for title were improperly and illegally incurred by the defendant, and the plaintiffs were not under any obligation to redeem from the tax sale, but would be justified in assuming that the defendants would desist and abandon their proceedings and the plaintiffs, in protecting the property at the last moment, are entitled to a refund of all the moneys paid by them to accomplish that purpose.

The special survey charges seem to me to be in the same position. These charges are imposed at the request of the municipality and they are made a charge upon the land and in default of payment are treated in all respects as ordinary taxes due on said lands. The defendants have received the money thus expended and paid by the plaintiff under protest.

The questions submitted must in my opinion be answered: (*a*) and (*b*) in the negative; (*c*) in the affirmative. Costs to the plaintiff.

T. A. Hunt, K.C., and *J. Preudhomme*, for appellant, defendant.

O. H. Clark, K.C., for respondent, plaintiff.

HOWELL, C.J.M.:—The questions at issue and the statutes under which the plaintiff's rights arise are clearly set forth in the judgment of Macdonald, J., who heard this case.

Chapter 57 of 63 and 64 Vict. consists of 21 sections, and is followed by ch. 58, the first section of which is as follows:

1. The Railway Taxation Act, passed at the present session of the Legislative Assembly, is hereby amended by adding thereto the following sections:

and then follow as sub-sections to that section new secs. 22 and 23, the first of which is set forth in full in the judgment above referred to. These two chapters were enacted in the same session of the legislature and were assented to at the same time. The numbering of the sections shows that the legislature intended them to be parts of one statute, and I think that secs. 22 and 23 of ch. 58 should be read as if they formed part of the original ch. 57, sec. 18 of which is set forth in full in the above judgment.

In February, 1901, His Majesty, represented by the Executive Government of Manitoba, entered into a contract with the plaintiffs and by 1 Edw. VII., ch. 39, this contract—which is set out in full in a schedule to the Act—was made valid and, in the language of the Act,

is hereby confirmed and is and shall be valid, binding and operative, according to the tenor thereof and the parties thereto are and each of them is hereby authorized and required to carry out and abide by all the terms of the said indenture.

Clause 16 of the contract is set out verbatim in the judgment appealed from, and it grants the rights which the plaintiffs claim in this action.

By sec. 17 of the first mentioned Act all exemptions from taxation theretofore granted to a railway company by the Legislature of Manitoba are preserved notwithstanding anything in that Act, and this clause has been continued in the revisions of these statutes by sec. 17 in ch. 166 of the R.S.M. (1902), and by sec. 16 of ch. 193, R.S.M. (1913). It follows, therefore, that the exemptions from taxation granted by clause 16 of that contract, ratified by statute as above set forth, still exist in favour of the plantiffs.

There has been subsequent legislation on these questions of

MAN.
C. A.
C.N.R.
v.
CITY OF WINNIPEG.
Howell, C.J.M.

exemption from taxation, but I do not think the question in dispute has been affected thereby.

By ch. 166, R.S.M. (1902), secs. 18 and 22 of the statutes first above referred to are made secs. 18 and 19 of that Act and by ch. 74 of 10 Edw. VII. it is declared that under cl. 16 of the contract the exemptions granted are those set forth in sec. 18 of ch. 166 above mentioned, and is unaffected by any amending Act or Acts passed concurrently with R.S.M. (1902) or subsequently thereto. It is difficult to understand why this clause of the Act was put in, but as there was no concurrent or subsequent legislation, it need not be considered. It is apparent that the Act was not intended to grant exemptions not theretofore existing nor to create any new rights.

By the R.S.M. (1913), the above mentioned secs. 18 and 19 are continued as secs. 17 and 18, and thus the two secs. 18 and 22 of the Acts first mentioned, really one Act, have been continued through two revisions as portions of one Act.

The chief question to be disposed of in this case is, what is the meaning to be given to the words "their properties, incomes and franchises shall be exempt from such taxation as is provided for by sec. 18 of ch. 57 of the statutes of Manitoba of 1900" in cl. 16 of the contract?

The defendant the City of Winnipeg has, and then had, power to charge the real property which will be directly benefited by any proposed work or improvement which is of a local nature and to levy a rate on such property to pay the same, and this is commonly called local improvement assessments. Certain property of the plaintiff company in Winnipeg was so charged and the plaintiffs dispute the defendant's right to levy this charge, claiming that it is taxation from which their property is exempt.

In a similar case in Montreal the Court of Appeal for the Province of Quebec held that such local assessments would not come under the ordinary term of taxation, but on appeal to the Supreme Court in that case, commonly called the *Montreal* case (*St. Sulpice* v. *City of Montreal*), 16 Can. S.C.R. 399, the decision of the Court of Appeal was reversed and at 403, Strong, J., gives a wide definition to the word "tax" as follows:

> Every contribution to a public purpose imposed by superior authority is a "tax" and nothing less.

In this case the Chief Justice of the Supreme Court dissented.

An effort was made to take this case to the Privy Council, but failed without getting a decision of the Court of final resort on the question, see the notes at 16 Can. S.C.R. 407.

This point of law was finally settled in *Halifax* v. *Nova Scotia*, 18 D.L.R. 649, [1914] A.C. 992, and the result is that the local improvement assessment or charge is taxation within the ordinary meaning of that word.

It now becomes necessary to look closely into cl. 16 of the contract and find if the legislature intended to grant the exemption broadly given by sec. 18 of the first mentioned statute without the interpretation or limitation of explanation given to that section by sec. 22.

This legislation took place shortly after the decision of the *Montreal* case and perhaps sec. 22 was added because of the decision being brought to the attention of the legislature after sec. 18 had been passed. Considering, however, the fact that the two clauses have been continued in their original form through two consolidations, it would seem that the draftsman could best express the exemption by using in the chief clause the broad words "all assessments and taxation of every nature and kind" and then in a subsequent section declare that these inclusive words do not apply to local improvement assessments imposed by incorporated cities.

I do not think that a strict construction against the plaintiffs should be applied in this case because their claim is one of exemption from taxation; it is simply one of the terms of a bargain agreed upon and carried out by both parties. This is not an action between two contracting parties as in the *Halifax* case and the contract should not be construed favourably to the plaintiffs as it was in that case.

I have examined many cases involving the construction to be put on saving clauses, interpretation clauses and provisos in statutes but they, to my mind, give no assistance in this matter.

The object of the contract was to give exemption from taxation and the only section which gives exemption is sec. 18. Sec. 22 could only have been referred to in the agreement as an explanation of the kind of taxation intended by sec. 18. If the question was asked "what assessment or taxation was included in sec.

MAN.

C. A.

C.N.R.
v.
CITY OF WINNIPEG.

Howell, C.J.M.

18?" I would think that before an answer was given the whole Act would be read and the answer would be all taxes and assessments except local improvement charges in cities.

The matter might be looked at in another way. Sec. 22 gave a statutory right to the City of Winnipeg to charge the cost of local improvements upon the lands benefited, and can it be said that the contract and the statute ratifying it are to be read so as to deprive the defendants of that right?

The Railway Taxation Act was passed generally to apply to all railways within the legislative jurisdiction, and if the plaintiff's contention is correct, then they have a special exemption not granted to other railway companies.

I think that by giving the plaintiffs the exemption "from such taxation as is provided for by sec. 18" the legislature intended to grant them the same exemptions that are ordinarily enjoyed by railway companies, and that to find what these exemptions are that section is to be read as a part of a statute and its meaning is to be arrived at by considering its surroundings. The plaintiffs, therefore, are liable for the local improvements tax.

The special survey charges arise out of a special survey made of a portion of the city since the agreement, in which portion they have certain lands. This survey was made pursuant to ch. 158, R.S.M. (1902), and I assume that statutes with the same powers existed when the contract was ratified by the legislature. This survey was a public work for the benefit of a portion of the city in order to settle the boundary lines of streets and lots and was for the general good of the portion so surveyed. This charge was imposed by a superior authority and was to be a contribution to a public purpose and on the authorities above referred to it is a tax.

If the defendants set the Attorney-General in motion for this survey it might be a city tax, but it cannot in any way come within the subjects set forth in sec. 22 so as to be a local improvement tax, and therefore it is a tax from which the plaintiffs are exempt.

If it should be a tax to reimburse the Province of Manitoba it comes within the terms of exemption in sec. 18. It could not be held that the consolidation of statutes which were in force when the contract was ratified would, under general terms, re-

vive a power to tax the plaintiffs, contrary to the very terms of the agreement made between The King and the railway company.

The plaintiffs were put to costs in redeeming their various properties, and as the tax sale was clearly wrongful, they claim that they should recover these costs as damages. The defendants claim that they are not liable because of the wrongful acts of their statutory officers. It seems to me that the case comes directly within the principles laid down in *Alloway* v. *Morris*, 18 Man. L.R. 363.

The defendants are entitled to their charges for the local improvement tax and are not entitled to the special survey tax which must be repaid to the plaintiffs, and the latter are entitled to their costs of redemption from the tax sale.

Questions A and B are answered as follows: "The plaintiff's lands are liable for taxes for local improvements, but they are not liable for special survey tax. To question (c) the answer is "Yes."

There will be no order as to costs of this appeal.

Richards, J.A.

RICHARDS, J.A.:—I agree with the Chief Justice that the company are exempt from the special survey taxes. The wording of the exemption granted by sec. 18, both in the statute of 1900 and in that of 1902, is very broad and seems to cover these levies, especially as the Special Survey Act was in existence before 1900, and so would probably be in contemplation as one of the exempted assessments.

As to the frontage tax, I have had difficulty in coming to a conclusion. Par. 16 of the agreement of 1901, confirmed by ch. 39 of the statutes of that year, only gave the exemption provided by sec. 18 of the Act of 1900. That was qualified by sec. 22 enacted at the same time by a concurrent Act, as part of the Railway Taxation Act, and which expressly excepted frontage taxes from the operation of sec. 18.

So that if the Act, ch. 74 of 1910, had not been passed, there would, I think, be no difficulty in holding that the company were liable for the frontage taxes.

It is intituled An Act to amend the Railway Taxation Act and the only then existing Railway Taxation Act was ch. 166, R.S.M. (1902).

MAN.

C. A.

C.N.R.
v.
CITY OF WINNIPEG.

Richards, J.A.

Ch. 74 consists of two operative sections, the third affecting only the time of its coming into force. The amendment in the first section undoubtedly refers only to sec. 18 of the above ch. 166, which it expressly names.

Then follows sec. 2, which is the one in question here. It reads:

> 2. For the removal of doubts respecting the exemption from taxation granted under clause 16 of the agreement dated February 11, 1901, set out in schedule A. to ch. 39 of the statutes passed in the year 1901, it is declared that the exemption so granted was and is the exemption specified in sec. 18 of the *said* Railway Taxation Act as existing at the date of the passage of such last mentioned Act, and is unaffected by any amending Act or Acts passed concurrently therewith or subsequently thereto.

The question is: do the words, "sec. 18 of the said Railway Taxation Act as existing at the date of the passage of such last mentioned Act," refer to sec. 18 in the Act of 1900, or to sec. 18 in the Act of 1902?

If the former, then the right to levy frontage taxes on the company has been taken away, as the exemption in sec. 18 of the 1900 Act would be broad enough to include such taxes, if not modified by sec. 22; and, as sec. 22 was passed by an Act concurrent with that containing said sec. 18, it would cease to have any effect on the latter because of the last clause in the above sec. 2.

If the reference is to the Act of 1902, said sec. 2 does not interfere with the right to levy frontage taxes, which is continued as sec. 19 in the 1902 Act, and there modifies the effect of its 18 (as 22 did sec. 18 in the Act of 1900), by preventing the exemption in 18 from extending to frontage taxes. And, as sec. 19 would not come within the last clause of 2, as being an "amending Act, or Acts passed concurrently therewith, or subsequently thereto" it is not affected thereby, but is left in force.

The wording of sec. 2 is ambiguous and gives several grounds for arguments in favour of each contention. They need not be here stated. Weighing them, however, against each other they leave the meaning of the section in doubt.

There is no apparent consideration given, or reason stated, for increasing the exemptions bargained for in 1901, and it seems to me that we ought not to hold that the legislature meant to give such increase voluntarily and at the expense of the city, unless the language of the section, relied on as giving it, is sus-

ceptible of no other reasonable construction. I do not think that can be said of sec. 2 of 1910.

It is argued that unless it refers to sec. 18 of the 1900 Act, sec. 2 is meaningless. I am not prepared to so hold. In 1909 there was an Act, ch. 73, which added to the lands already excepted from exemption by sec. 18 of the 1902 Act "lands and property held by the company not in actual use in the operation of the railway." It may be that the legislature, by clause 2 of the 1910 Act, meant to prevent this exception added in 1909 from applying in the case of the Canadian Northern R. Co. considering it as an infringement on the exemption given that company by the 1901 agreement.

With some hesitation I think the railway company were liable for the frontage taxes in question.

I concur in the judgment of the Chief Justice as to the disposal of the appeal.

Perdue, J.A.

PERDUE, CAMERON and HAGGART, JJ.A., concurred with HOWELL, C.J.M. *Appeal allowed.*

Cameron, J.A.
Haggart, J.A.

WENBOURNE v. J. I. CASE THRESHING MACHINE CO.

ALTA.
S. C.

Alberta Supreme Court, Appellate Division, Scott, Stuart and Beck, JJ. March 24, 1916.

1. SALE (§ I C—16)—REGISTRATION OF CONDITIONAL SALES—FILING COPY OF LIEN NOTE—SUFFICIENCY OF AFFIDAVIT.

Section 2 of the Hire Receipts and Conditional Sales of Goods Ordinance (Alta.), 1911, ch. 44, requiring the registration of a true copy of the writing of sale, is sufficiently complied with as to the spirit and purpose of the statute, by registering true copies of the lien notes containing the usual provisions as to the retention of title by the vendor until payments are completed, though the original order on which the sale is based or a true copy thereof has not been registered; likewise sub-sec. 3 of sec. 2 which requires the agreement of sale or bailment, or a true copy thereof, to be accompanied by an affidavit, stating that it truly sets forth the terms, is substantially complied with by registering several such lien notes comprising the total amount to be paid, each note accompanied by the statutory affidavit and referring to the terms of the agreement as a whole, and is sufficient to charge a subsequent purchaser with notice thereof.

Statement

APPEAL from the judgment of Simmons, J., in favour of plaintiff in an action to declare certain machinery free of all liens or incumbrances, and for injunction against seizure of same. Reversed.

A. H. Clarke, K.C., for defendant, appellant.

C. F. Harris, for plaintiff, respondent.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—This is an appeal by the defendant from an

ALTA.

S. C.

WENBOURNE v. CASE THRESHING MACHINE CO.

Stuart, J.

order of Simmons, J., which order was in substance an answer to several questions of law which the parties had agreed to state for the opinion of the Court before the trial of the action.

The plaintiff alleges in his statement of claim that he had bought a J. I. Case 110 h.p. engine together with certain equipment from the defendant Haering on February 19, 1913, had paid the said Haering therefor and had obtained possession of the same from said Haering, that Haering had sold the engine to him as agent for the defendant and that on May 1, 1915, the defendant had wrongfully seized and taken possession of the same. By amendment he further alleges in the alternative that Haering had himself and on his own account sold to him the engine and other articles. He claims a declaration that the machinery is his free of all liens or encumbrances in favor of the defendants and an injunction.

The defendant company, after general denials of the plaintiff's allegations, pleads specially that on April 19, 1912, it sold the engine, etc., in question to Haering pursuant to an order in writing dated January 31, 1912, that pursuant to the order Haering delivered to the company four lien notes all dated April 19, 1912, which notes contained the usual agreement that the property should not pass until the notes were paid, that each of the said lien notes was duly registered in the proper office on April 24, 1912, that certain payments had been made by Haering, but that he became in default on some of his payments and that thereupon the company pursuant to the terms of the notes declared all the notes to be due and payable on February 24, 1915, that no payments were made thereafter, that on February 25, 1915, the company seized the said machinery and thereafter obtained from the Master an order for removal and sale under the Act respecting extra-judicial and the other seizures. The company also counterclaims for an injunction and damages on account of a sale to one Varty having been lost.

The plaintiff in his reply joins issue and then alleges that the order given for the machinery by Haering was an agreement for sale within the meaning of the Ordinance respecting Hire, Receipts and Conditional Sales, that that order was the only agreement of sale between the company and Haering, that it had never been registered, and that the lien notes referred to in

the defence are not in conformity with the ordinance, and that the plaintiff purchased the machinery from Haering in good faith and for valuable consideration without notice.

After the pleadings had closed, the parties submitted three questions of law to Simmons, J. In the agreement or stated case it was admitted that the plaintiff had paid Haering $1,600 for the machinery as alleged.

The questions submitted were:

1. Does the lack of registration of the document or a copy thereof, referred to in the defence and reply (*i.e.*, the order given by Haering for the machinery), prevent the J. I. Case Co. from setting up a right of property or right of possession in and to the subject matter of this action as against the plaintiff under and by virtue of the provisions of ch. 44 of the Ordinances of the N.W.T. being an Ordinance respecting Hire Receipts and Conditional Sales of Goods. 2. Was the registration of the notes referred to a sufficient compliance with the requirements of the said Ordinance to permit the defendant company to set up a claim of property or right of possession as against the plaintiff?

And if the first question is answered in the affirmative and the second in the negative:—

3. Will the plaintiff's claim to the ownership of the articles be altered in case it should be found at the trial of the action, that the plaintiff had a knowledge of the existence of the documents or notes referred to or of any lien upon or interest in the property on the part of the defendant company?

It was agreed that the pleadings, affidavits filed and exhibits thereto should be submitted to the Judge.

Simmons, J., without giving reasons answered the first question in the affirmative, the second question in the negative and the third question in the negative. The defendant company appeals from these decisions.

It is necessary to quote the opening clauses of the order for the machinery given by Haering. These are as follows:

J. I. Case T. M. Company (incorporated) New Machinery and Engine Order.

This order must be signed by all parties before delivery of goods; is taken subject to approval and is to be sent to the company for acceptance or rejection. The blank property statement on the back of the order must be filled out accurately and signed by each person signing the order.

Purple Springs, January 31, 1912.

J. I. Case T. M. Co. (incorporated), having its home office at Racine, Wisconsin, U.S.A., hereinafter called the vendor is hereby requested by the undersigned hereinafter called the purchaser, to ship or deliver for the purchaser or at his expense . . . at once or as soon thereafter as you can furnish for transportation or delivery to Purple Springs Station or other convenient station in the Province of Alberta in care of John Haering. . . .

ALTA.

S. C.

WENBOURNE v. CASE THRESHING MACHINE CO.

Stuart, J.

Then following are the words

One Case 110 h. p. simple steam engine traction C. and W. burning . . . with the usual fixtures and extras supplied by the vendor as part of its regular equipment. Also for the above machinery Loco cab. 2—12 barrel unmounted, tenders; 2 pumps and hose; 20-in. front wheels; the above designation of the goods is for the purpose of identification only and said goods are not ordered or sold by description.

It was then provided that the purchaser should receive and pay for the same on delivery the sum of $3,875, as follows: Cash none and execute and deliver on the vendor's form notes as below (then followed the amounts and due dates of four notes and the document proceeds):

and if the purchaser fail to receive said goods or do any of the things to be done by him as hereinbefore set forth the sale of the said goods shall thereby be cancelled. . . . The property in and the title to the said goods shall remain in the vendor and shall not pass to the purchaser until the vendor has received in cash the purchase price and interest. The purchaser shall have the possession of and the right to the use of the said goods except as provided in clause 3 hereof but during such possession and use the said goods shall be at the risk of the purchaser as to damage or destruction from any cause and the purchaser shall remain liable for the full purchase price of the same. (3) If the vendor should at any time consider that any part of the purchase money was insecure it may take possession of the said goods and if necessary repair the same and sell the same or any part thereof either by public auction or private sale, etc.

Then followed a clause providing that upon such taking possession or upon any default in payment the whole purchase price should become due and payable. Next came a clause providing that any judgment recovered should not effect a merger of the lien or of any other security given. Then followed certain warranties and other stipulations, one of which was a provision that the earnings of the machine should belong to the vendor until the price was paid and an assignment of the purchaser's rights under the Threshers' Lien Act. One stipulation was this "the whole contract is set forth herein." The remaining terms do not appear to be necessary to be set forth. The machinery in question was duly delivered on April 19 and four notes were then executed by Haering and delivered to the company. Each of these notes contains the words "given for 110 Horse S.T. Engine Loco cab. 2—12 bbl. unmounted tenders, 2 pumps and hose," and at the bottom of each note, there were numbers identifying the engine and the tanks, which latter no doubt are the same as the "tenders" spoken of in the order and in the phrase above quoted from the notes.

A true copy of each of the notes was filed within thirty days after the delivery of the machine and accompanied by an affidavit attached to each copy stating that the copy was a true one, that it truly set forth the agreement between the parties and that the agreement was *bonâ fide*, etc.

Each note contained the clause which is so well known as being usually inserted in such documents, that it is perhaps unnecessary to quote it in full. In substance it provided that the title to the property for which the note was given should remain in the company "until this note or any renewal thereof is fully paid with interest" and that upon "default in payment of this *or any other note in their favor* (the company's)" or should the purchaser sell his land or become insolvent or make an assignment, etc., or if the company should consider the note insecure it might declare "this and *all other notes* made by me in their favor" due and payable forthwith and might take possession and sell, etc., and that the purchaser would pay any deficiency.

The first question is whether the company must lose the benefit of the Ordinance respecting Hire Receipts and Conditional Sales of Goods owing to non-registration of the original order for the machinery.

Although my first impression was to the contrary I have come to the conclusion that upon the true interpretation of the section it is not necessary that all the terms of the agreement of sale should be put into writing and a copy then registered.

It is a well known rule for the interpretation of statutes that the evident purpose of the statute, the evil to be dealt with, and the remedy proposed, must be kept in view. The ordinance was, of course, intended to protect innocent purchasers of goods from persons having the actual possession of them against secret reservations of rights in the goods on the part of previous vendors. The whole purpose of the ordinance was to provide that such previous vendors making such reservations must give the public notice thereof by means of a registration system. It is obvious that what was mainly intended was that notice should be given of the reservation of rights of property or of possession. Looking, then, at the words of the ordinance we can easily see that the emphasis is continually placed upon this point. The section above quoted begins "whenever *on* a sale . . . it is *agreed*,

ALTA.

S. C.

WENBOURNE v. CASE THRESHING MACHINE CO.

Stuart, J.

provided or *conditioned* that the right of property, right of possession . . . shall remain in the vendor," etc. It then prevents the vendor from setting up, *not the whole terms of the sale*, but merely his right of property or possession as against certain specified classes of persons. Then when the condition is set forth upon which the vendor may do so the ordinance says "unless such sale *with such agreement*, proviso or condition is in writing, etc." The words "such agreement" are again used in sub-sec. 3 of sec. 2, thus "Every *such agreement* or a true copy thereof shall, upon such registration, be accompanied by an affidavit, etc." Of course, sub-sec. 1 of sec. 2 begins thus "such *writing* . . . shall be registered."

The whole point of the matter seems to lie in this, whether by the use of the bare word "sale" in the clause expressing the condition upon which the vendor may retain his rights it was intended to enact that all the terms of the sale must be in writing. The fact that the vendor is not prevented from setting up any other term of the sale except that which provides for the right or possession remaining in him points in my opinion very strongly to the view that all that the words of the section mean is that there must be a writing showing that there has been a sale, such writing disclosing the retention of a right of property or possession. It is obvious that this would fulfil entirely the purpose of the statute.

Moreover, it is not improper to pay at least some attention to the quite apparent danger that would be involved in insisting that all the terms of the agreement of sale must be in writing. There are no doubt thousands of small transactions going on throughout the province in connection with the sale of goods, such as a horse or two, or a wagon or plough, or a few cows or other animals, in which the parties may make special terms to suit their convenience. I cannot believe that it was ever contemplated that simply because one of these simple terms is such that the statutory notice by way of registration must be given of it therefore every other term agreed upon must be set forth in the writing which is to be filed.

For these reasons I think the proper interpretation of the ordinance is that *evidence of the fact of a sale* must be in writing and that such writing must contain the special condition as to the

retention of the right of the property or possession by the vendor. Clearly nothing more can be necessary to accomplish the purpose of the enactment.

I would, therefore, allow the appeal with regard to the first question and answer it in the negative. But of course this must be taken in the sense that it is not correct to say that the registration only of the order, and of nothing else, would be a compliance with the ordinance. If there had been no other writing in existence which could be registered the first question would have to be answered in the affirmative.

With regard to the second question, what I have already said will cover much of the ground. No doubt each of the notes indicated plainly that a sale had been made by the defendant company to Haering of the articles referred to in it. These articles are sufficiently identified by certain numbers.

There is, I think, only one point upon which there may be some doubt. The affidavit attached to the copy of each note states that the copy "truly sets forth the agreement between the parties." This is in pursuance of sub-sec. 3 of sec. 2 of the ordinance. Of course each note did not set forth all the terms of the agreement. Many things were omitted and besides each note only referred to a portion of the purchase money. The whole purchase price was not mentioned in any of the notes. But the document indicates plainly that other notes had been given because other notes are referred to on which payment must be made before the property is to pass.

I think, as before stated, that the proper interpretation of the meaning of the words "such agreement" in sub-sec. 3 of sec. 2 is that it refers to the special agreement regarding the retention of the rights of property or possession and were it not for the single fact that the total amount which had to be paid before the property would pass was not specified in any particular note there would in my opinion be no room for question as to the sufficiency of the registration.

There was no term in the original order imposing a condition as to the passing of the property which was not contained in each note except the one thing, the total amount to be paid.

The affidavit attached to each note is in the prescribed form. In that respect the ordinance was complied with. The only

ALTA.

S. C.

WENBOURNE v. CASE THRESHING MACHINE CO.

Stuart, J.

enquiry is, can it be said that any of the notes contains the whole terms of the agreement even in the sense in which I have interpreted it?

With some hesitation I have come to the conclusion that the ordinance was substantially complied with by the filing of the four notes. Even taking each one separately it expressly states that the property is not to pass until it and "any other note in the company's favor" are paid. The true interpretation of this phrase is in my opinion any other note given for the same goods. That must be the obvious meaning of the words. Now, that revealed the possible existence of other notes to any one making a search. A reference to the other notes filed would reveal the full amount which had to be paid. In the absence of fraud and where everything to which the public were entitled to notice was really on file I think it would be placing too technical a meaning upon the words of the ordinance to say that there had not been compliance with its provisions. It cannot be contended that a person making a search would be entitled to stop when he had examined one note. A person is never safe until he has ascertained all instruments filed against the property and executed by the person with whom he is dealing. Haering might properly have executed a chattel mortgage on his interest and the mortgage would have been protected by its proper registration. So that a purchaser from Haering was bound in order to protect himself to ascertain the nature of all instruments executed by him dealing with the property.

It is only by sheer technicality that the plaintiff can raise the objection that the agreement has, with regard to the amount to be paid, been split up into four agreements and therefore no individual one of them constitutes the true agreement. The four notes are connected by an obvious reference to each other and all are registered. I can see no substantial difference between what was actually done and attaching the four notes together, making one affidavit as to all and registering them as one filing which would undoubtedly have been a compliance with the ordinance.

The course adopted gave just as complete notice as the other would have done. For these reasons I think the appeal should be allowed also as to the second question and that it should be

ALTA.

S. C.

answered in the affirmative. In the result it becomes unnecessary to deal with the third question at all. The appellant should have the costs of the appeal.

Appeal allowed.

TOBIN v. COMMERCIAL INVESTMENT CO.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, Galliher and McPhillips, JJ.A. March 7, 1916.

1. PLEADING (§ VI—355)—COUNTERCLAIM FOR FRAUD—MISFEASANCE OF DIRECTORS—JOINDER OF OTHER PARTIES.

The paramount object of the Judicature Act and Rules is to enable all matters arising out of one transaction, particularly where the same parties are involved, to be disposed of in one action, and thus prevent multiplicity of suits; thus a corporation, in an action against it to recover certain moneys and securities claimed to be wrongfully obtained, has the right to counterclaim for fraudulent conspiracy and to set up an agreement that such property was given in restitution for fraudulent acts and misfeasance in office as directors, and may, for that purpose, join other persons jointly connected therewith.

[*Frankenburg* v. *Great Horseless Carriage Co.*, 69 L.J.Q.B. 147, followed.]

2. PLEADING (§ I S—149)—INAPT WORDING OF COUNTERCLAIM—STRIKING OUT —AMENDMENT.

If an alternative claim in a counterclaim is embarrassing by reason of the inapt terms in which it is worded, it is ground only for striking out the alternative claim and not the whole counterclaim, which can be readily cured by amendment.

Statement

APPEAL from an order of Hunter, C.J.B.C., dismissing a counterclaim to an action to recover property wrongfully obtained. Reversed.

Foresby White, for appellant.

W. J. Taylor, K.C., *A. P. Luxton*, K.C., and *O. C. Bass*, for various respondents.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The plaintiff sues to recover money and securities which he alleges the defendant company obtained from him by fraud and duress. The company denies this and says that the plaintiff was at the times in question its president, that one Green was its solicitor, and one Forsythe its secretary, the three being members of its board of directors, and the majority of the executive committee of its board, which committee had all the powers of the board when the board was not in session. The defendant company then alleges that these three persons were guilty of misfeasance in office, and of a fraudulent conspiracy to obtain a large sum of the company's money, which they actually did obtain for themselves. The defendant company further alleges that on discovery of the said conspiracy and misfeasance, the said Green, on behalf of himself, the plaintiff, and Forsythe,

B. C.

C. A.

TOBIN v. COMMERCIAL INVESTMENT CO.

Macdonald, C.J.A.

offered that the three of them should assume by way of restitution certain obligations and pay certain moneys apportioned among them as set out in the statement of claim, and that the defendant company accepted said offer, "and that in all negotiations looking towards restitution it treated the said restitutions as joint and not several, and had no knowledge of or concern in how the same were or was to be apportioned among the said plaintiff, Green and Forsythe." It is further alleged by the defendant company that in said agreement (which is not in writing), all and each of the said three directors agreed to use their best endeavours to protect and promote the financial credit and reputation of the defendant company and to assist in the business of the company. Defendant company further alleges that the plaintiff and the said Green and Forsythe failed to perform their said obligations, whereby the consideration for making the agreement has failed, and also that each of them has wrongfully committed breaches of the said agreed matters, and committed other wrongful acts against the company whereby the company has suffered damage. It also alleges that said three directors have so dealt with certain securities which they took over from the defendant company in pursuance of said agreement as to make it impossible to now return the same.

By way of counterclaim, the defendant company repeats all the allegations above outlined, joining the said Green and Forsythe in said counterclaim as defendants, pursuant to O. 21, r. 11, of the Supreme Court Rules, and therein alleges that the plaintiff and the said Green and the said Forsythe, defendants by counterclaim, have each made default in the performance of his undertaking, and also that the said Green by his subsequent conduct violated his portion of the said agreement. And the company prays that the agreement be performed on the part of these three defendants by counterclaim.

Alternatively the defendant company claims against the said three defendants: (a) Damages for the misfeasance and breaches of trust and of contract aforesaid, and (b) That an account be taken of all the various matters and things above set out, and such order of restitution made to the defendant company by the defendants by way of counterclaim as may be just.

An order was obtained from a Judge of the Supreme Court on motion to strike out the counterclaim, striking it out in so far as

the said Green and Forsythe are concerned, and dismissing them entirely from the same, and from this order the appeal is taken. No reasons for the said order were handed down. It was suggested by counsel for the respondents at the Bar that Hunter, C.J., who heard the motion, thought it would be more convenient if the issue of conspiracy raised in the counterclaim were to be tried at all, that it should be tried in a separate action. It was strongly pressed upon us that a discretionary order of this kind should not lightly be set aside, and with this I quite agree. It is clearly settled, however, that such discretion is a judicial one, and in a proper case may be reversed and overruled by an appellate Court, as was done by the Court of Appeal in *Frankenburg* v. *Great Horseless Carriage Co.*, 69 L.J.Q.B. 147. I do not think the order should be maintained. One of the paramount objects of the Judicature Act and Rules, after which our Supreme Court Act and Rules are fashioned, was to enable all matters arising out of one transaction, particularly where the same parties are involved, to be disposed of in one action, and thus prevent multiplicity of suits. In this case, the three defendants by counterclaim were all involved in what is alleged to have been a fraudulent conspiracy against the defendant company. They are alleged to have made a joint settlement, Green making the offer on behalf of the three, which was accepted. It is true that the restituion to be made was segregated and each was to do his part, but that does not affect the joint nature of the arrangement, but only the manner of its performance. But whether it be regarded in strictness as a joint settlement or not, which is an issue to be tried, it was referable to one transaction or series of transactions, and between all the parties concerned therein.

Now, what relief does the defendant company ask in its counterclaim? It alleges the non-performance of the agreement by these three men, and it asks to have it enforced against them. Even if each had to perform an integral part, all three might very properly be joined in one action, but the propriety of, if not the necessity for, joining them is greater even than that. One of the three is in effect seeking to set aside the joint agreement. If he should succeed, the defendant company seeks to fall back upon its claims for damages for the original torts, the conspiracy and misfeasance in office. It cannot succeed for the conspiracy unless Green and Forsythe are parties. Unless the order appealed from be reversed, the defendant company will be compelled to discon-

B. C.

C. A.

TOBIN v. COMMERCIAL INVESTMENT CO.

Macdonald, C.J.A.

tinue its counterclaim for conspiracy against the plaintiff. If the plaintiff should succeed in the action on grounds which would still leave him liable in tort, defendant company might find itself in the position of having to pay whatever sum was awarded against it and yet not be able to set off what it might have recovered on its counterclaim had all issues been tried together. To my mind, it is eminently a case in which all the parties in these alleged fraudulent proceedings should be before the Court in one action and counterclaim. On this point also *Frankenburg* v. *Great Horseless Carriage Co., supra,* is very much in point in appellant's favour.

An affidavit was admitted on the motion below exhibiting what purported to be a release from the defendant company to the said Green, and it was urged upon us that if said Green had been released it was improper and embarrassing to make him a party to the counterclaim. Without deciding whether such an affidavit should have been received, there are two other answers to that contention: first, a release when proved is a defence. It is not ground for striking out a statement of claim or counterclaim that a defendant will plead satisfaction. The second answer is that it is alleged in the counterclaim that Green has failed to perform obligations which he undertook with the company at the time of the said settlement, and which were to be performed subsequent to the settlement. These obligations, I take it, were the ones above recited, namely, that he would use his best endeavours to protect and promote the financial credit and reputation of the company and assist in its business.

Respondents' counsel also argued that the alternative claim made in said counterclaim is embarrassing by reason of the inapt terms in which it is worded. If that be so, it is ground only for striking out the alternative claim, and not the whole counterclaim. I think the alternative claim is perhaps not happily worded, and if so advised I would give defendant company leave to amend it.

The appeal should be allowed and the order appealed from set aside.

Irving, J.A. IRVING, J.A.:—I concur in allowing this appeal for the reasons set out in the judgment just read.

Galliher, J.A. GALLIHER, J.A.:—I agree with the Chief Justice.

McPhillips, J.A. MCPHILLIPS, J.A.:—I agree with the Chief Justice and would allow the appeal.

Martin, J.A. MARTIN, J.A., dissented. *Appeal allowed.*

ROBINSON v. ELLIS.

SASK.

S. C.

Saskatchewan Supreme Court, Newlands, Brown, Elwood and McKay, JJ. March 18, 1916.

1. ESTOPPEL (§ III E—70) — TO DENY VALIDITY OF SHAREHOLDERS' GUARANTY—CONDUCT.

A majority of the shareholders who have signed a personal guaranty of the credit of the corporation are by their conduct estopped from alleging that under a resolution the guaranty was only to be effective upon all the shareholders signing it.

Statement

APPEAL from a judgment in favor of defendants in an action on a shareholders' guaranty. Reversed.

J. Cowan, for appellant.

T. P. Morton, for respondent.

The judgment of the Court was delivered by

Elwood, J.

ELWOOD, J.:—The H. G. Baker Co., Ltd., being then indebted to the plaintiff applied to it for a further line of credit and in response to this application wrote the said Baker Co. as follows:

We have carefully gone over the statement of your affairs which you enclosed us in your letter of the 9th, and are sorry to see it is not nearly so strong a statement as we expected to get from you, and we do not feel disposed to grant the company any considerable line of credit under the circumstances.

Would it not be possible to give us the personal guarantee of a couple of your shareholders, say Mr. Ellis and Mr. F. J. Searles? If you could send us a guarantee signed by them for, say, $5,000, we would then be willing to fill your orders as taken by Mr. McNabb.

Please advise if this proposition is feasible and if not, perhaps, you have some other suggestion to make which would answer the purpose just as well, in which case we shall be glad to hear from you.

On September 2, 1913, a meeting of the members of the Baker Co. was held. At this meeting there were present: W. H. Ellis, H. G. Baker, F. J. Searles, E. W. Garrison, W. P. Bate and S. J. Wilson; and at that meeting it was moved:

That a letter be written to the Thos. D. Robinson & Sons Ltd. of Winnipeg signed by each shareholder guaranteeing their account.

Apparently at the time of this meeting there were two shareholders other than those above mentioned. On September 4, there was signed by the members who were present at the said meeting of September 2 the following letter.

This is to certify that we, the undersigned directors of the H. G. Baker Commission Co., Ltd., Cor. 12th St. and Broadway, Nutana, Saskatchewan, guarantee your account with the above company, for the supply of coal. Shareholders of the H. G. Baker Commission Co., Ltd., Nutana, Saskatchewan.

(Signed) W. H. Ellis, President; H. G. Baker, General Manager; S. J. Wilson, Sec.-Treas.; F. J. Searles, Director; William P. Bate, Director; E. W. Garrison, Director.

SASK.

S. C.

ROBINSON v. ELLIS

Elwood, J.

Which, together with the following letter, namely:

Enclosed you will find a letter signed by each of our directors, guaranteeing your account with us.

was sent to the plaintiff company.

This action is brought on the above guarantee to recover the sum of $4,508.98, owing to the plaintiff company for coal supplied to the Baker Co.

The Chief Justice, before whom the case was tried, held that the above guarantee having been signed in pursuance of the above resolution and two of the shareholders not having signed the defendants were relieved. The evidence does not shew how it was that the two shareholders did not sign and the evidence shews that the plaintiff company knew nothing about the above resolution, and had no knowledge or suspicion that any person other than the persons signing the guarantee were to sign.

At the trial the plaintiff's counsel asked leave to amend the reply by pleading estoppel. It does not appear very clearly whether the amendment was allowed, but I think from the minutes of the trial that the amendment was, in effect, allowed and, at any rate, no objection was raised before us to the plea of estoppel, and I am proceeding to deal with the case as if estoppel had been pleaded.

A number of cases were cited by the respondent in support of the proposition that, where a guarantee is given upon a condition, the failure to perform the condition is a defence.

In *Commercial Bank of Windsor* v. *Morrison*, 32 Can. S.C.R. 98, the agent of the plaintiff knew of the condition upon which the note was delivered, and it was, of course, held that the plaintiff took subject to such notice.

In *Evans* v. *Bremridge*, 8 DeG. M. & G. 100, the agreement was that a co-surety was to sign, the plaintiff had notice of this agreement and the question of estoppel did not arise.

In *National Provincial Bank of England* v. *Brackenbury*, 22 T.L.R. 797, the guarantee on its face was intended to be a guarantee of four and only three signed; no question of estoppel arose.

In *Pym* v. *Campbell*, 6 El. & Bl. 370, the question of estoppel did not arise.

It was contended by the respondent that the Baker Co. was the agent of the plaintiff company in procuring the guarantee

and that the plaintiff company left everything to Wilson or the Baker Co. and is, therefore, bound by what was done; and the case of:

Bank of Montreal v. *Stuart*, 80 L.J.P.C. 75, was cited as authority. There are a number of similar cases to *Bank of Montreal* v. *Stuart;* for instance, *Chaplin* v. *Brammall*, [1908] 1 K.B. 233; *Turnbull* v. *Duval*, [1902] A.C. 429, *Canada Furniture* v. *Stephenson*, 12 W.L.R. 603. These cases, however, are all cases of husband and wife, where the wife has signed as surety for the husband. The document so signed was prepared by the creditor, it was left with the husband to procure the signature of the wife and the Court held that the creditor must take the consequences of the husband having obtained the signature without explaining to the wife or she understanding what she was signing. Those cases, to my mind, are all very different in principle from the case at Bar. It will be noticed that the plaintiffs' request is to obtain the signature of two shareholders and the signatures of those two shareholders were obtained. Apparently the signatures of all of the directors were obtained. The shareholders who were present at the meeting of September 2 were the governing body of the Baker Co.; they were the directors and apparently empowered Wilson, who was also apparently a director, to circulate the guarantee among the various shareholders. They put it in his power to do just what he did and the forwarding to the plaintiff company of the guarantee and the procuring of the credit in consequence of it are the result of the action of these directors.

It seems to me that it is not necessary to determine whether or not the Baker Co. was acting as the plaintiff's agent in obtaining the guarantee. The cases in which that question is important are cases in which the person entrusted with obtaining the guarantee has used undue influence, or fraud or was aware of some condition attached to the giving of the guarantee. In this case the governing body of the Baker Co. and all of the persons present at the meeting at which the resolution was passed signed the letter guaranteeing the account. They authorised that letter to be forwarded to the plaintiff for the purpose of obtaining the very credit that was obtained; they put it in the power of Wilson to do just what was done and surely under those circumstances it is not possible to say that because they knew of the resolution and

SASK.

S. C.

ROBINSON v. ELLIS

Elwood, J.

because they represented the Baker Co. that therefore the plaintiff must be charged with that knowledge. This seems to me to be clearly a case in which the defendants are, by their conduct, estopped from alleging that the guarantee was only to be effective upon all of the shareholders signing it. See *Union Credit Bank, Ltd.* v. *Mersey Docks & Harbour Board*, [1899] 2 Q.B. 205; and *King* v. *Smith*, [1900] 2 Ch. 425.

In my opinion, therefore, the appeal should be allowed and there should be judgment entered for the plaintiff against the defendants for the amount claimed and costs. The plaintiff should have its costs of this appeal. *Appeal allowed.*

MAN.

C. A.

FREEMAN v. CALVERLEY.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. April 25, 1916.

1. VENDOR AND PURCHASER (§ I C—13)—COVENANT AGAINST ENCUMBRANCES—EFFECT OF TORRENS TITLE—SUBSEQUENT DISCOVERY OF TAXES.

An agreement to convey land by a transfer under the Torrens system (Real Property Act, R.S.M. 1913, ch. 171), free from all encumbrances, obligates the vendor to make good for taxes outstanding against the land under the Land Drainage Act, though not discovered until after the transfer has been completed.

[*Midgley* v. *Coppock*, 4 Ex. D. 309, followed. Review of authorities.]

2. ACCORD AND SATISFACTION (§ I—3)—TORRENS TITLE AS MERGER OF ORIGINAL AGREEMENT—ENCUMBRANCES.

A certificate of title issued under the Torrens system (Real Property Act, R.S.M. 1913, ch. 171), does not operate as a merger nor as accord and satisfaction of the liability under the original agreement to give title free of all encumbrances.

Statement

APPEAL by defendant from a judgment of the County Court in favour of plaintiff in an action for breach of covenant against encumbrances. Affirmed.

F. K. Hamilton and *H. Mackenzie*, for appellant, defendant.

W. H. Curle, for respondent, plaintiff.

The judgment of the Court was delivered by

Cameron, J.A.

CAMERON, J.A.:—By an agreement in writing, dated January 17, 1913, the defendants agreed to sell to the plaintiff the lands in question for the sum of $1,920, payable as follows: $480 upon the execution of the agreement and the balance

as soon as a Torrens title, free of any and all encumbrances of any kind, can be delivered to the Citizens Bank at Decatur, Illinois, said title to be delivered not later than March 1, 1913.

The agreement contains the further provision that

In consideration whereof and on payment of all sums due hereunder as aforesaid and the surrender of this agreement, the vendors agree to convey the said

lands to the purchaser by a transfer under the Real Property Act or a deed with the usual statutory covenants and free from all incumbrances except (blank space), subject to the conditions and reservations contained in the original grant from the Crown, etc.

The purchaser covenanted to pay taxes from and after January 1, 1913.

A transfer under the Real Property Act was made to the plaintiff and a certificate of title pursuant thereto issued and the purchase price paid according to the agreement. It was subsequently discovered that there were taxes under the Land Drainage Act against the lands, amounting to $418.46. For this amount the plaintiff brought this action, and the County Court Judge gave judgment in his favour. The existence of these taxes was unknown to either of the parties until after the transaction was completed.

Did the covenant to give a title under the Real Property Act free of any and all encumbrances become merged in the subsequent transfer and certificate? The right of a purchaser to recover compensation after conveyance was discussed in *Foster* v. *Stiffler*, 19 Man. L.R. 533, by Mathers, C.J., who there points out the contradictory character of the decisions of the English Courts. His conclusion was that in the absence of fraud, in the absence of a covenant in the conveyance which has been broken, or of some express provision for compensation which has not become merged in the conveyance or of some warranty, the purchaser, after conveyance and payment of his purchase money, has no remedy at law or in equity. On appeal to this Court it was held that the agreement having been only partially carried out, it could not be said to have become merged in the transfer accepted by the plaintiff.

In *Besley* v. *Besley*, 9 Ch. D. 103, Malins, V.C., held that there was no right to compensation. There was in that case no provision for compensation. An under-lease had been taken for 23 years and it was afterwards found that the original lease had only 16 years to run.

> Under these circumstances, what are the rights of the parties? It has been laid down as a rule that a purchaser must be wise in time and it is quite immaterial whether the rule is applied to a purchaser for valuable consideration or to a lessee. p. 109.

Manson v. *Thacker*, 7 Ch.D. 620, a previous decision of his own, was followed by the Vice-Chancellor, whose view of the law

MAN.

C. A.

FREEMAN v. CALVERLEY.

Cameron, J.A.

was reiterated in *Allen* v. *Richardson*, 13 Ch.D. 524, where he strongly dissented from that taken by Jessel, M.R., in *Re Turner* v. *Skelton*, 13 Ch.D. 130. In my own separate humble judgment there is a good deal to be said in favour of the common sense of Vice Chancellor Malins' view.

In *Palmer* v. *Johnson*, 13 Q.B.D. 351, there was a condition as to compensation. The previous cases were discussed and *Cann* v. *Cann*, 3 Sim. 447, and *Bos* v. *Helsham*, L.R. 2 Ex. 72, followed, while *Manson* v. *Thacker*, *supra*; *Besley* v. *Besley*, *supra*, and *Allen* v. *Richardson*, *supra*, were disapproved.

In *Clayton* v. *Leech*, 41 Ch.D. 103, there was no agreement as to compensation. There *Besley* v. *Besley* was approved and held not to be overruled by *Palmer* v. *Johnson*. *Re Turner* v. *Skelton*, 13 Ch.D. 130, where there was a stipulation for compensation, was distinguished. Bowen, L.J., who had been one of the Court which decided *Palmer* v. *Johnson*, held that that case merely decided that an agreement to make compensation for a misdescription of the thing sold was not extinguished by taking a conveyance, unless the agreement was so expressed as to limit it to defects discovered before the conveyance.

He (the purchaser), has chosen to complete without investigating the title, and cannot have any right to compensation, unless there is some stipulation entitling him to claim it, and there is none.

Williams on Vendor & Purchaser considers such a stipulation would probably survive, if implied, but certainly, if in express words, p. 523, n.

What are the meaning and effect of the covenant in the agreement? It is a covenant for, I take the words used to mean, "as soon as a Torrens title, which shall be free, etc., can be delivered by the vendor." The usual covenant in conveyances that the premises shall be free from any encumbrance is limited to indemnifying the purchaser against disturbance by reason only of some act, omission or sufferance of the vendor himself, or of any of his predecessors in title subsequent to the last sale of the land or the last conveyance thereof for other valuable consideration wherein proper covenants for title were given, or of any persons claiming under him or them. Williams Vendor & Purchaser, 652. Where covenants are restricted to acts of the vendor there is no breach in the case of taxes accrued previously to the vendor's ownership: Armour Real Property, 165.

This, however, is not a covenant in a deed of conveyance but a covenant in an agreement to give a conveyance free from encumbrances of any kind. The case is, therefore, similar to *Midgley* v. *Coppock*, 4 Ex. D. 309, where by the contract of sale the vendor agreed to discharge all rates, taxes and outgoings "up to the time of completion." After completion it was discovered that the premises were subject to a charge for work done under a local Act in improving the street before the houses belonged to the vendor and at the time of sale neither party was aware of the charge. The purchaser, having paid the charge, brought action for the amount and it was held the vendor was liable.

All outgoings of this kind the vendor was by the contract of sale liable to discharge, and as he failed to fulfil his contract, he is liable to repay the purchasers. Per Lord Coleridge, C.J., 313.

This decision was followed in *Tubbs* v. *Wynne*, [1897] 1 Q.B. 74.

We have, therefore, in this contract of sale a stipulation on the part of the vendors to convey the land free from encumbrances of any kind, which has not been carried out by them. It was evidently intended by the parties to lay particular force upon this stipulation, which is not confined but is unrestricted in its terms, makes no limitation of encumbrances to those discovered before the issue of the certificate, and is as comprehensive on the subject of encumbrances as language could well make it. It is to be observed that the purchaser is made responsible for taxes after January, 1913. This case would seem to be of that class, referred to by Bowen, L.J., in *Palmer* v. *Johnson*, 13 Q.B.D. 351, at 357

When one is dealing with a deed by which the property has been conveyed, one must see if it covers the whole ground of the preliminary contract. One must construe the preliminary contract by itself, and see whether it was intended to go on to any and to what extent after the formal deed had been executed.

The preliminary contract here contains this stipulation which is independent of, yet collateral to, the main duties of proving title, of conveyance and of payment and is, therefore, not discharged by the performance of those duties. Williams Vendor & Purchaser, p. 1024.

Apart from these general considerations, the case of *Midgley* v. *Coppock*, cited above, where the facts had a remarkable likeness to the facts now before us, seems to me so clearly in point as to be decisive of the questions here raised. *Midgley* v. *Coppock*,

MAN.

C. A.

FREEMAN v. CALVERLEY.

[Cameron, J.A.

4 Ex.D. 309, was the unanimous decision of three eminent judges and was subsequently followed in *Tubbs* v. *Wynne*, *supra*.

Neither the transfer nor the certificate in this case contains any express provision as to encumbrances. With reference to the implied reservations set out in sec. 78 of the Real Property Act, it is sufficient to observe that the taxes here in question are not municipal taxes under sub-sec. (*b*) of that section. In my opinion the appeal must be dismissed with costs.

Haggart, J.A.

HAGGART, J.A.:—The plaintiff, a resident of the United States, purchased from the defendants, who are real estate agents in Winnipeg, 160 acres in the rural municipality of St. Andrews for $1,920. The agreement was under seal and was signed by all parties. The plaintiff paid the $1,920, after which it was discovered that $418 of drainage taxes had been assessed against the land, for which the plaintiff brings this action. The defendants deny liability and say that the agreement has been fully performed by the delivery of conveyances or transfers by the defendants, which were accepted by the plaintiff.

When the bargain was closed in Decatur, Illinois, the cash payment of $480 was made, and in the agreement there are stipulations in these words:

at and for the price of one thousand nine hundred and twenty dollars ($1,920) in gold or its equivalent to be paid to the vendor at Winnipeg as follows: $480 in cash upon the execution of these presents (the receipt whereof is hereby acknowledged); $1,440 to be paid as soon as a Torrens title free of any and all encumbrances of any kind can be delivered to the Citizens National Bank at Decatur, Illinois, said title to be delivered not later than March 1, 1913. The said Torrens title to be delivered to the bank as above stated without cost to the purchaser. No interest on deferred payments. . . .

(3) The purchaser covenants with the vendors to pay taxes from and after January 1, 1913, and to insure the buildings now on or to be erected on said lands to the amount of their insurable value. The last two covenants shall have the meaning mentioned in the Manitoba Act respecting Short Forms of Indentures for the same covenants, substituting the word "vendor" for the word "mortgagee" and the word "purchaser" for the word "mortgagor" therein.

(4) In consideration whereof and on payment of all sums due hereunder as aforesaid and the surrender of this agreement the vendors agree to convey the said lands to the purchaser by a Transfer under The Real Property Act or a deed with the usual statutory covenants and free from all encumbrances except . . . subject to the conditions and reservations contained in the original grant from the Crown.

It is to be observed that the two covenants to pay taxes from and after January 1, 1913, and to insure are to be controlled

and interpreted by the Short Forms Act. I would say then that none of the other stipulations are to be qualified by that statute. *Expressio unius est exclusio alterius.* The covenant then for title, I would say, is an absolute covenant and in this respect we shall have to construe the agreement of purchase and sale as any other document.

The sale was concluded by the defendants executing and registering a transfer and procuring the issue of a certificate of title under The Real Property Act to the plaintiff, which certificate of title was forwarded to the bank at Decatur, Illinois, with a draft on him for the balance of $1,440. That amount was paid, after which it was discovered that there were $418 owing and rated against the land for drainage taxes.

The defendants contend that this certificate of title now takes the place of the original agreement and that there has been accord and satisfaction and further that the original agreement is now merged in the transfer and certificate of title. In the transfer there is no covenant as to encumbrances and I cannot find that the plaintiff accepted that certificate of title under the circumstances as a full performance of the agreement, and as the remedies under the certificate of title and transfer are not co-extensive with the obligations of the defendants in the agreement, I do not think there is any merger. Leake, p. 682.

Of course a new security, although not within the conditions required to effect a merger, by operation of law, may be given and accepted in discharge of the prior obligation by agreement of the parties and it there operates by way of accord and satisfaction. I cannot find that it was the intention of the parties that there should be a merger or a satisfaction as contended for by the plaintiffs.

The efforts of the defendants to procure a discharge of these taxes and the correspondence between the plaintiff and one Bolan, who was acting for the plaintiff, show that there was present to the defendants' minds the obligation to clear off this encumbrance.

I agree with the contention of Mr. Curle that the drawing and registering of the transfer and the forwarding of the certificate of title to the bank was in effect a representation that they, the defendants, had done all they had undertaken to do under the original agreement to entitle them to the balance of

MAN.

C. A.

FREEMAN v. CALVERLEY.

Haggart, J.A.

the purchase money, which was only to be paid "as soon as a Torrens title free of any and all encumbrances of any kind can be delivered to the Citizens National Bank at Decatur."

In regard to the satisfaction or extinguishment of this original agreement I find that in clause (4) the surrender of the agreement is expressly provided for and there is no evidence to show that it was surrendered, and the surrender does not mean simply the handing over of the document, but the extinguishment of all the obligations contained in it on the part of the defendants.

There is no merger, satisfaction or extinguishment of the covenants in the original agreement. The taxes are an encumbrance free from which the defendants were bound to convey the land.

I would dismiss the appeal. *Appeal dismissed.*

ALTA.

S. C.

HUFF v. MAXWELL.

Alberta Supreme Court, Appellate Division, Scott, Stuart and Beck, JJ. March 24, 1916.

1. BROKERS (§ II B 1—12)—SUFFICIENCY OF SERVICES OF REAL ESTATE AGENT—OPTION.

An agreement taking an option is not a sale, since the proposed purchaser need not express his readiness to buy until the period given by the option has expired; until that time when the purchaser actually binds himself as such a real estate agent cannot say he has found a purchaser ready and willing to buy, so as to be able to claim his commission.

2. BROKERS (§ II B 2—16)—ACT OF PRINCIPAL PREVENTING SALE.

A sale of land cannot be said to have been prevented by the wrongful act of the principal in refusing to accede to terms in variation with those first agreed upon between him and the broker.

Statement

APPEAL by the defendant from a judgment of Simmons, J., deciding in favor of the plaintiff upon a claim for a commission on the sale of real estate. Reversed.

Macleod & Gray, for defendant, appellant.

W. V. Poapst, for plaintiff, respondent.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—In response to an enquiry from the plaintiff, the defendant wrote the plaintiff the following letter:—

Mr. T. M. Huff, Brocket, Alta, June 24, 1915.
Lethbridge, Alta.

Sir:—I am enclosing you a list of the property. I will give you one dollar an acre commission with a premium of one thousand if you make a sale. Further, if you make a cash sale I will give you two dollars an acre without any premium. . . . (omitting something immaterial).

Joseph Maxwell.

P. S. $35 an acre will include everything on the farm but our clothing and a few pictures and books. J.M.

(Here followed a list of the chattel property with suggested values.)

The amount or description of the land was nowhere specified, but there was never any question on that point. It was throughout understood that the five sections of land forming the defendant's farm was the subject matter.

The plaintiff then endeavoured to find a purchaser and got into communication with one Gross and endeavoured to negotiate a sale. Gross could not handle so large a transaction alone and tried to get one McCallum to join him. The latter considered the matter and the plaintiff then proceeded to secure Maxwell's terms. During this discussion it was disclosed that Maxwell held the property under purchase agreement from the Crown and that payments on principal and certain interest, or at least the latter, were overdue. A suggestion was also made that Maxwell should take in part payment two sections of land belonging to Gross at the sum of $20,000. To this Maxwell agreed on the understanding that the property was clear of encumbrances. According to Huff's evidence Maxwell agreed that with respect to his own lands he would have to pay the *"back interest."* These first negotiations, however, fell through because McCallum wanted Maxwell also to take some timber limits in exchange, which Maxwell refused. Then Gross wired to his brother in Oregon to come and join him in the purchase. His brother came and Huff and the two Grosses went to Maxwell's place. There was even then very little direct discussion between the Grosses and Maxwell. Huff acted as a go-between, talking first to one and then to the other. Some calculations were made by Mr. Maxwell as to what their equity would amount to. Huff stated that in this calculation the interest was "figured for 2 years straight, all he wanted was to get his interest approximately." He also stated that neither he nor Maxwell on this latter occasion made any mention to the Grosses of the question of interest, although Gross said it was referred to in a very indefinite way. It appears that Huff wrote down on a piece of paper, whether at Maxwell's direct dictation or merely on his own account from what Maxwell had said is disputed between them, the following memorandum:—

$2,000 cash. $8,000 on or before thirty days. Contract made at that time showing how the balance is to be handled. Contract is to be handled.

ALTA.

S. C.

HUFF
v.
MAXWELL.

Stuart, J.

All property will remain in Maxwell until the balance of money coming to Maxwell is paid down to $8,000. Balance of money due Maxwell down to the $8,000 must be paid by November 5, providing we can get the returns from the grain by that date. The $8,000 remaining will give one year's time at 6% from November 5, 1915, and secured by mortgage on all personal property.

This statement was read over to the Grosses as a statement of the terms upon which Maxwell would sell. This took place just before the parties left to catch the train to Lethbridge where they had agreed to go to have an agreement in writing drawn up by a solicitor. The memorandum is obviously incomplete. No mention is made of the two sections of land to be taken in exchange, though that had been agreed upon through Huff.

The principal point in the matter, however, is that Maxwell wanted a cash payment of at least $10,000. The Grosses had not that much money available. It was, therefore, agreed that they should at first take merely an option and that they would not be bound to complete until they had taken the option up by paying the $8,000 at the end of 30 days. There is no question about this. It was made so clear by the evidence of all parties that it is unnecessary to refer to the evidence upon the point in detail.

When the parties met in the office of the solicitor at Lethbridge and he was proceeding to draw up the option agreement, a hitch occurred on the question of back interest. The Grosses insisted that Maxwell should bear all interest up to the date of the agreement. Maxwell insisted that all he had agreed to do was to bear interest up to the last due dates on the different parcels. This made a difference of about $1,200 in the amount that would be coming to Maxwell.

As a consequence of this dispute the negotiations were broken off and the parties separated, with a suggestion, as one said, or with a definite understanding, as the other said, that they would meet in Macleod the second day following. This meeting did not take place, but the Grosses on that second day purchased another property.

In my opinion, the plaintiff could not be said to have earned his commission, even if there had been no dispute about the terms to be inserted in the option and even if it had been signed, until it appeared that the purchasers had taken up the option and so bound themselves to become purchasers. This is apparent from

the terms of the agreement for the payment of the commission. The commission of one dollar an acre and $1,000 was only to be paid upon a sale. An agreement taking an option is not a sale, because *ex vi termini* the proposed purchaser does not need to express his readiness to buy until the period given by the option has expired. Until that time the agent cannot say that he has found a purchaser ready and willing to buy. No matter how confident the Grosses may have felt that they would take up the option they held themselves at liberty to refuse and in the uncertainty of future events something might have occurred to make them withdraw and forfeit the money paid.

It was contended, however, by the respondent that he was prevented by the wrongful act of the appellant from having the benefit of the chance that the purchasers would eventually accept. This contention is based upon the ground that all the terms of the proposed option had been agreed upon at the farm and that the appellant afterwards insisted in the solicitor's office upon a variation of the terms as to the payment of arrears of interest. I do not think the respondent can succeed upon this ground. It is quite clear from the evidence that what happened at the farm was merely a negotiation as to some of the main terms of the agreement. The plaintiff stated that nothing was ever said until they reached the solicitor's office about the date at which the two sections of land were to be transferred by Gross, although Gross stated that it was agreed that this should be done when the option was taken up. But Gross also stated that he understood Maxwell was to transfer his title at the same time, and yet the written memorandum would indicate otherwise. Gross told the Court that "he understood the details would be worked out in the lawyer's office."

Then, with respect to the question of interest, the most definite statement ever made on that subject by Maxwell was, according to Huff, during the previous negotiations with Gross and McCallum. When the two Grosses came in as purchasers, all that was done was that Mr. Maxwell and Mr. Huff made a calculation of Maxwell's equity approximately upon the basis of 2 years' interest. It does not appear from the evidence very clearly whether this would be interest to date or merely past due interest. Certainly the details of the matter of interest were not mentioned to the Grosses on that occasion. It may be that those persons assumed

ALTA.
S. C.
HUFF
v.
MAXWELL.
Stuart, J.

that buying as they were on a basis of $35 an acre the interest would be paid to date, and possibly that would be the correct legal result if such a contract had to be interpreted. But it seems to me to be abundantly plain that the parties intended to have the terms finally settled in the solicitor's office. They had a written agreement definitely in view and the very existence of this purpose would tend to induce the parties to refrain from absolute precision in their preliminary statements. I therefore think that no final agreement ever was arrived at on the farm.

It was contended that, in the solicitor's office, the only difficulty was about the interest and that as the plaintiff, either there or immediately after the parties separated, offered to take enough off his commission to meet Maxwell's wishes therefore Maxwell's refusal to go on with the option agreement was wrongful and without reason or justification and that therefore by this action he prevented the plaintiff from earning his commission and should be made to pay it.

But I am unable to conclude from the evidence that there would not have been some other obstacle or disagreement before the parties reached a *consensus ad idem*. And even if they had, it would not have been such an agreement as was contemplated in the bargain for a commission. Maxwell was not bound to have anything to do with an option. He would have done no wrong to Huff if he had refused to consider such a matter at all. And I can see no ground for legal liability because, having consented to deal on the basis of an option, he changed his mind, even if he in fact did so, as to the terms of it before he signed it.

If is true that Huff went to a great deal of trouble and some expense, and no doubt it was a great disappointment to find the parties failing to get together. But, under the terms of his commission agreement, he had only one of two courses open to him: first, to find a purchaser ready and willing to pay $35 an acre cash or, second, if he could not get a cash purchaser, to take his chance on bringing the parties together as to terms. He was driven to the latter course, and the chance failed him.

For these reasons, I think the appeal should be allowed with costs, the judgment below set aside and the action dismissed with costs.

Appeal allowed.

THE KING v. MURPHY AND GOULD.

CAN.

Ex. C.

Exchequer Court of Canada, Cassels, J. March 13, 1916.

1. MINES AND MINERALS (§ I—1)—YUKON PLACER MINING ACTS—GOLD COMMISSIONER ACTING AS MINING RECORDER — GRANT OF WATER RIGHTS—VALIDITY.

By sec. 3 of the statute 7 & 8 Edw. VII., ch. 77, it is provided that "mining recorders" shall be appointed by the Commissioner of the Yukon Territory, such appointment being subject to the approval of the Governor-in-Council. By sec. 5 of the last mentioned enactment it was provided that an officer called the "gold commissioner" should have jurisdiction within such mining districts as the commissioner directed, and within such districts should possess also the power and authority of a mining recorder or mining inspector. By sec. 9 it is enacted that no person shall be granted or acquire a claim or any right therein, or carry on placer mining, except in accordance with the provisions of the Act. On October 8, 1909, a certain grant of water rights was issued to the defendants. Although the grant purported to be regularly signed by the mining recorder of the Yukon Territory, it was admitted on behalf of the defendants that it was signed by him upon the order and direction of the gold commissioner of the said Territory without any adjudication thereon by the said mining recorder.

Held, that a mining recorder could only be appointed in the manner and by the authority mentioned in the Act referred to, and that as the grant in question was signed by a person who was neither *de facto* nor *de jure* a mining recorder, the grant was void. In such a case the Crown is entitled to take proceedings to avoid the grant in order that the public property may not be wrongfully alienated.

Statement

INFORMATION exhibited by the Attorney-General for Canada seeking the cancellation of a certain grant of water rights for mining purposes in the Dawson Mining District, Yukon Territory.

W. D. Hogg, K.C., for plaintiff.

F. T. Congdon, K.C., for defendants.

Cassels, J.

CASSELS, J.:—This is an information exhibited on behalf of His Majesty the King by the Attorney-General of Canada. The information alleges as follows:—

1. That on, to wit, October 8, 1909, a grant to divert and take for mining purposes 100 inches of water from Independence Creek in the Yukon Territory was issued by the mining recorder of the Dawson Mining District in the Yukon Territory to the defendants, the said grant to take effect on August 3, 1915, and to continue for a period of 10 years from the said date in priority after the said date to all other grants of water rights from the said Creek.

2. The said water grant, although signed by the mining recorder of the said Dawson Mining District, was so signed by him upon the order and direction of the gold commissioner of the said territory without any adjudication thereon by the said mining recorder, contrary to the provisions and requirements of the Yukon Placer Mining Act, R.S.C., ch. 64, and amendments, and the said grant was made and issued through improvidence, inadvertence and error, and should be cancelled and set aside.

In answer to the allegations in the information, the defendants plead as follows:—

CAN.
EX. C.
THE KING
v.
MURPHY
AND
GOULD.
Cassels, J.

3. The defendants say that the said gold commissioner at the time said grant was applied for, and also when it was issued, and for many years previous to such issue, had and exercised jurisdiction as such gold commissioner throughout the whole of the Yukon Territory, and as such gold commissioner possessed, and openly and notoriously exercised the powers and authority of mining recorder to the exclusion of any and all other mining recorders, and he so acted under the direction and with the knowledge and consent of the commissioner of said Territory, and of the Minister of the Interior of Canada, and of the Government of Canada, and his acts and decisions as such commissioner, exercising such powers and authority in relation to applications for water grants, were from time to time approved by the said commissioner of said Territory, and the application of defendants for said water grant was adjudicated upon by the gold commissioner exercising such powers and authority as aforesaid after hearing the applicants for such grant and all parties interested in opposing such application, and all such parties submitted to the jurisdiction of the gold commissioner exercising such powers and authority, and acquiesced in the same, and the decision of the gold commissioner upon such application was approved by the commissioner of the Territory and the said grant was issued by the mining recorder as a ministerial officer subordinate to the said gold commissioner, and its issue was approved by the administrator of the Territory, acting between the resignation of one commissioner and the appointment of his successor:

4. The application for said grant was made to the mining recorder and was heard and adjudicated upon by the said gold commissioner exercising such powers and authority as aforesaid without any choice on the part of the defendants as to whether such application should be heard and adjudicated upon by the said gold commissioner, exercising such powers and authority aforesaid, or by the mining recorder, and the said application was heard and adjudicated upon in the usual way adopted and in force in the Yukon Territory from the beginning of its government to the present time.

The evidence was taken under a commission and the case argued before me at Ottawa.

There is no dispute as to the facts. The determination of the rights of the parties depends on the true construction of the Yukon Placer Mining Act and amendments and whether the gold commissioner had the powers claimed for him by the defendants.

Before considering in detail the statutes governing the determination of the case it may be well to refer to certain facts. The Yukon Placer Mining Act was assented to on July 13, 1906, and came into force on August 1, 1906. It is to be found in the R.S.C. (1906), ch. 64. Amendments were enacted by the Parliament of Canada as follows: 6 & 7 Edw. VII., ch. 54 (April 27, 1907); 7 & 8 Edw. VII., ch. 77 (July 20, 1908); 2 Geo. V., ch. 57 (April 1, 1912). The last-mentioned Act is subsequent to the grant impeached. The grant is dated October 8, 1909. (Ex. No. 32 attached to the commission).

This grant is signed by G. P. McKenzie, mining recorder. There is nothing on its face to indicate that the mining recorder had not adjudicated on the questions involved. It is admitted, however, that the gold commissioner adjudicated on the questions in dispute and that the mining recorder merely signed his name on the direction of the gold commissioner and had no part in the adjudication on the merits.

The grant as alleged in the information among other rights granted the defendants the right from August 3, 1915, for a period of 10 years from that date to divert and take for mining purposes one hundred (100) inches of water from Independence Creek, in priority to all other grants of water rights from the said Creek.

The information was filed on January 9, 1915. On May 28, 1907, by order of the Governor-General-in-Council, F. X. Gosselin, was appointed gold commissioner. On February 1, 1912, Geo. Black was appointed commissioner of the Yukon and on April 1, 1912, he appointed the gold commissioner a recorder for the Dawson District. This is the earliest date since the enactment of the Yukon Placer Mining Act that the gold commissioner was appointed a mining recorder. Previously and on June 27, 1909, the then commissioner, Alex. Henderson, appointed George Patton McKenzie, mining recorder for the Dawson district, and he was such mining recorder at the time of the application for the grant and adjudication. His appointment was approved of by the Governor-in-Council (Ex. 62).

After a careful consideration of the statutes and the arguments of counsel, I am of opinion that the gold commissioner had no authority in the premises. He was not a mining recorder as contemplated by the statute and had no status as such to allow the grant in question. I will subsequently deal with Mr. Congdon's argument that he was acting *de facto* as recorder and that his decision cannot be questioned.

Turning to the statutes: For convenience, I have been furnished with a copy of the Yukon Placer Mining Act as consolidated with the amending Acts. Sec. 90 of 6 Edw. VII., ch. 39 (ch. 64 of R.S.C. 1906), enacts as follows: "No person shall be granted or acquire a claim or any right therein, or carry on placer mining in the Territory except in accordance with the provisions of this Act."

CAN.
EX. C.
THE KING
v.
MURPHY
AND
GOULD.
Cassels, J.

By the interpretation of the statute, sec. 2, sub-sec. (*h*), it is provided as follows:—

"mining" or "placer mining" includes every mode and method of working whatsoever whereby earth, soil, gravel or cement may be removed, washed, shifted or refined or otherwise dealt with, for the purpose of obtaining gold or such other minerals or stones, but does not include the working of rock in situ;

Sub-sec. (*a*) of sec. 2 is as follows:

"claim" means any parcel of land located or granted for placer mining, and "mining property" includes, besides claims, any ditches or water rights used for mining thereon, and all other things belonging thereto or used in the working thereof for mining purposes:

Sub-sec. (*e*) of sec. 2 is as follows:

"gold commissioner," "mining recorder" and "mining inspector" mean, each of them, the officer so named, appointed under this Act and acting within the limits of his jurisdiction;

I am of opinion that since this enactment came into force, its provisions govern and that the gold commissioner appointed as such cannot under earlier statutes, if any such exist, confer upon himself jurisdiction not conferred by this statute. By sec. 3 of the statute (1908), mining recorders shall be appointed by the commissioner subject to the approval of the Governor-in-Council. As stated, George Patton McKenzie was appointed recorder on January 27, 1909.

Sec. 5 of the statute is as follows:

The gold commissioner shall have jurisdiction within such mining districts as the commissioner directs, and within such districts shall possess also the powers and authority of a mining recorder or mining inspector.

This was a part of the original statute 6 Edw. VII. As stated, the gold commissioner was not appointed mining recorder until April 1, 1912.

An analysis of the statute shews that the gold commissioner had certain duties to perform as gold commissioner but was not clothed with the powers of a mining recorder until appointed by the commissioner. Under the statutes and the authority conferred upon him he had power to enter into and upon and examine any claim or mine. (Sec. 16).

Where a survey is protested (sec. 39), and in 1908 an appeal was given from his decision (sec. 39, sub-sec. 6), an appeal is given to the gold commissioner from the action of the mining inspector (sec. 59, sub-sec. 2). Under sec. 61, an appeal lies to the gold commissioner. An appeal also lies to the gold commissioner from the

decision of the mining recorder under sec. 66. Sec. 74 was enacted in 1912. Under sec. 88 an appeal is given.

When the application is for a water grant under sec. 54 and following sections, the recorder (with the approval of the commissioner), has to pass upon the question. *Commissioner* by the Interpretation Act is to have the same meaning as they have in the Yukon Act. The Yukon Act, ch. 63 R.S.C. 1906, defines Commissioner as follows: "The Commissioner of the Yukon Territory" and see sec. 4 of ch. 63.

It was strenuously argued by Mr. Congdon that the gold commissioner having acted *de facto* as mining recorder his action cannot be questioned by third parties. I have read the various citations referred to but do not agree with the contention. The Crown in the present case is not a third party within the meaning of any of the cases cited. It is primarily interested in protecting public property from being through error wrongfully alienated. Moreover, there was a "*de jure*" mining recorder, and a *de facto* and also a *de jure* officer can hardly exist together.

The contention that the action of officers of the Crown in acquiescing in the assumption of powers by the gold commissioner cannot prevail as against the statute. See *Booth* v. *The King*, 10 D.L.R. 371, 14 Can. Ex. 113, 146; 21 D.L.R. 558, 51 Can. S.C.R. 20, 56, and authorities cited. Laches forms no defence. *Ontario Mining Co.* v. *Seybold*, 31 O.R. 386, 393; L.R. App. Cas. 1903, pp. 83-84. *Black* v. *The Queen*, 29 Can. S.C.R. 693, 699.

I am of opinion that the grant in question was issued in error and improvidently and should be declared null and void. See *King* v. *Powell*, 13 Can. Ex. 300; *Atty.-Gen'l* v. *Contois*, 25 Gr. Ch. 346; *Atty.-Gen'l* v. *Garbutt*, 5 Gr. Ch. 181; *Atty.-Gen'l* v. *McNulty*, 11 Gr. Ch. 281; *Fonseca* v. *Atty.-Gen'l*, 17 Can. S.C.R. 612 at 650. The defendants must pay the costs of the action.

Judgment accordingly.

REPORTER'S NOTE:—For an instructive case on the general right of the Crown to impeach letters patent and grants for improvidence, see *Fonseca* v. *Atty.-Gen'l*, 17 Can. S.C.R. 612. Reference may also be had to the following Canadian cases: *Att'y-Gen'l* v. *Contois*, 25 Gr. 346; *Att'y-Gen'l* v. *McNulty*, 8 Gr. 324; 11 Gr. 281; *Martyn* v. *Kennedy*, 4 Gr. 61, 99; *The King* v. *Powell*, 13 Can. Ex. 300; and *The King* v. *Crumb*, 14 Can. Ex. 230.

SASK.

S. C.

NORTHERN PLUMBING AND HEATING CO. v. GREENE.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Newlands and McKay, JJ. March 25, 1916.

1. MECHANICS' LIENS (§ V—30)—TO WHAT PROPERTY ATTACHES—INTEREST OF "OWNER"—WORK AT REQUEST OF OTHERS—ASSUMPTION OF LIEN.

Under sec. 2 (3) of the Mechanics' Lien Act, R.S.S. 1909, ch. 150, a mechanic's lien can only attach upon the estate or interest of the person at whose request and upon whose behalf and for whose direct benefit the work is done; a lien which appears to be for work done at the instance of other persons, without indicating that the work was done for the "owner" of the property to be charged, is incurably defective and the owner's subsequent undertaking to assume such lien is not binding on him.

Statement

APPEAL from a judgment dismissing a mechanics' lien action. Affirmed.

G. A. Cruise, for appellant.

B. H. Squires, for respondent.

The judgment of the Court was delivered by

Haultain, C.J.

HAULTAIN, C.J.:—Sometime in 1913, the defendant Greene sold the land in question in this case under agreement to one Richard H. Shore. Some arrangements were made between Richard H. Shore and his son, the defendant T. E. Shore, and the defendant Miller by which Richard Shore was to apply for a hotel license for the premises and in the event of a license being granted the hotel business was to be carried on on a joint arrangement between the parties. Richard Shore accordingly applied for a hotel license. In order to make the premises comply with the regulations certain additions and alterations became necessary, among others the plumbing which is the subject of this action. The plumbing was done by the plaintiffs on the order of the defendant T. E. Shore, who was acting in that behalf for his father and on his instructions.

For some reason, which does not concern this case, Richard Shore's application for a license was refused and the conditional agreement between him and T. E. Shore and Miller came to an end. Richard Shore died sometime in 1914 and up to the time of his death remained in possession and occupation of the premises.

On November 12, 1913, the plaintiffs filed a mechanics' lien which is in part as follows:—

The Northern Plumbing and Heating Co. of Saskatoon, in the Province of Saskatchewan, plumbers, under the Mechanics' Lien Act, claim a lien upon the estate of Caleb Joshia Greene in the undermentioned land in respect

of the following service and material, that is to say: "Work and labor done and performed and materials supplied, which work was done or materials furnished for J. Miller & T. E. Shore, both of Saskatoon, in the said Province of Saskatchewan, on or before October 15, 1913. The sum claimed as due is the sum of six hundred and thirty-one (06/100) dollars. The following is the description of the land to be charged; lots 25, twenty-five and (26) twenty-six, block (16) sixteen, plan D.J. in the city of Saskatoon, Sask.

On August 25, 1914, Flora Jane Shore, the administratrix of the estate of Richard H. Shore, gave a quit claim deed to the defendant Greene of all her estate, right, title, etc., in and to the property in question and Greene went into immediate possession, which he has retained ever since. Sometime in October, 1914, the plaintiffs began the present action. The statement of claim alleges in par. 5, that:—

> The said building was constructed and said work and labor done and said materials furnished with the knowledge, privity and consent of the defendant Caleb Joshia Greene, who gave an undertaking to the plaintiff to assume and pay for the said work and labor and materials and the said building has materially increased the value of the said land.

The claim for relief is as follows:—

> The plaintiff therefore claims:
>
> (a) An order for the payment to the plaintiff by the defendants of the sum of $631.06, together with interest thereon at the rate of 5% per annum from the filing of the said lien, and the costs of this action. (b) A declaration that the said sum of $631.06 constitutes a valid lien upon the land hereinbefore mentioned and described subsequent to the mortgage thereon of the Inter-continental Mortgage Co. (c) That in default of payment of the said sum for a period of sixty days or such further time as may be decided by the Court, the said premises be sold subject to the said mortgage under the directions of the Court or the Sheriff of the Judicial District of Saskatoon, or the bailiff in that behalf, and that the proceeds of the said sale, after payment of costs incurred thereby, be applied in payment of the lien of the plaintiff and other liens, if any, according to priority. (d) That upon such sale being held there is not sufficient money realized with which to pay the plaintiff's claim, the plaintiff have judgment for any deficiency against the defendants. (e) That directions be given for the taking of all necessary accounts. (f) Such further and other relief as may be necessary.

On the trial of the action, the action was dismissed on the ground that the lien was filed against the estate of Caleb J. Greene and there was no evidence to shew that the work was done at his request or upon his credit or upon his behalf or with his privity or consent or for his benefit.

The trial Judge also held, and in my opinion quite rightly, that the alleged undertaking of the defendant Greene to assume the lien was not binding on him, at least so far as the plaintiffs are concerned. At the time the lien was filed, the only estate or

SASK.

S. C.

NORTHERN PLUMBING AND HEATING CO. v. GREENE.

Haultain, C.J.

interest it could attach upon was the estate or interest of Richard H. Shore in the land, as he was the person at whose request and upon whose behalf and for whose direct benefit the work was done. (See secs. 2 (3) and 7 of the Mechanics' Lien Act, R.S.S. 1909, ch. 150). There was no promise or undertaking at that time or for many months afterwards by Greene to assume the lien. The claim for lien, therefore is, in my opinion, absolutely and incurably defective as it does not indicate even indirectly the name of the "owner" of the property to be charged.

If a proper claim for lien had been filed the lien might have been entitled to rank upon any increased value in the selling price of the land by reason of the work done, in priority to Greene's rights as seller, under secs. 7 (3) and 13 (2) of the Act. But the appellants do not ask for that and, as I have already pointed out, even in that case the lien should have been claimed against Richard H. Shore as "owner."

By his subsequent transactions with the Shore estate, Greene in August, 1914, succeeded to the estate or interest of Richard H. Shore in the land and took that estate or interest subject to any liens attaching upon it, under sec. 2 (3) of the Act. But, as a sufficient claim for lien was not filed, the plaintiffs could not succeed even if their action had been brought to enforce the lien against Greene in that capacity. The appeal is, therefore, dismissed with costs. *Appeal dismissed.*

B. C.

C. A.

SMITH v. YORKSHIRE GUARANTEE CO.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, Galliher and McPhillips, JJ.A. April 4, 1916.

1. CONTRACTS (§ I A—2)—SEALED INSTRUMENTS—POWER OF AGENT—JOINT PURCHASE OF LAND.

A contract under seal is only binding upon those who sign it, and an agreement under seal for the purchase of land, which is executed by one of two purchasers, cannot, even on the principle of agency, bind the other who was not a party to it.

[*Re International Contract Co.* (1871), 6 Ch. App. 525, followed.]

Statement

APPEAL from the judgment of Gregory, J., decreeing the enforcement of an agreement for the sale of land. Reversed.

Douglas Armour, for appellant, plaintiff.

Bodwell, K.C., for respondent, defendant.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The appeal is by the plaintiff Smith from the judgment against him on his counterclaim. An agreement under seal was entered into between the defendants and the

plaintiff Alexander for the sale and purchase of land. In connection with the purchase Alexander and Smith paid several thousand dollars and then discontinued payment. There seems to have been an understanding between the two plaintiffs that the land was purchased for both of them but the agreement was taken in the name of Alexander alone.

Macdonald, C.J.A.

The action to recover back the moneys paid was dismissed, but the Judge gave judgment against both plaintiffs on the defendants' counterclaim for the balance of the purchase price. Alexander has not appealed, but Smith has appealed on the ground that as he was not a party to the purchase agreement, which is under seal, he could not be sued upon it, and I think that that contention is right.

The general rule is that, when the contract is under seal, the deed must be declared upon notwithstanding that the nature of the contract be such that, without the existence of the deed, an action of debt could have been maintained. *Att'y* v. *Parish*, 1 New Rep., referred to in note to *Evans* v. *Bennett*, 1 Camp. 303.

In *Beckham* v. *Drake* (1842), 9 M. & W. 79, Lord Abinger, C.B., at p. 91, clearly lays it down that a contract in writing by an agent signed by himself will bind his principal, and that the law makes no distinction except between contracts which are and contracts which are not under seal. A contract under seal can bind none but those who signed and sealed it. All other contracts, whether in writing or not, are treated as parol contracts: *Re International Contract Co.* (1871) (*Pickering's Claim*) 6 Ch. App. 525, is exactly in point, and is entirely in the appellant's favour. I would, therefore, allow the appeal.

Martin, J.A. (dissenting)

MARTIN, J.A., dissented.

Galliher, J.A.

GALLIHER, J.A.:—I think under the circumstances as disclosed in this case Mr. Armour's contention that Smith cannot be sued in respect of the contract by deed, to which he is not a party, is sound. The appeal should be allowed.

McPhillips, J.A.

MCPHILLIPS, J.A.:—I am of the same opinion as the Chief Justice. No agreement other than the agreement under the seal of Alexander was established and the law is clear that no person, not a party to a deed, is capable of suing or being sued. This is the case even though the deed in its terms set forth that the deed is made on behalf of someone not a party thereto or that the coven-

B. C.
C. A.
SMITH v. YORKSHIRE GUARANTEE CO.
McPhillips, J.A.

ants are made with him. Lord Ellenborough, C.J., in *Storer* v. *Gordon*, 3 M. & S. 308-323, 15 R.R. 499, at p. 503, said:—

> As to the release, the objection is this, that where there is such a deed as is technically called a deed *inter partes*, that is a deed importing to be between the persons who are named in it as executing the same and not as some deeds are general to "all people" the immediate operation of the deed is to be confined to those persons who are parties to it; no stranger to it can take under it except by way of remainder nor can any stranger sue upon any of the covenants it contains.

Smith was no party to the agreement under seal executed by Alexander—and he could not sue upon it either at law or in equity. In *Ex parte Piercy, Re Piercy*, L.R. 9 Ch. App. 33, Lord Selborne, L.C., at p. 40, said:—

> Mr. Piercy is no party to the deed and in no manner or form whatever entered into any contract upon that occasion—he is as free as if no such agreement had ever been made and it is not with him but between the companies *inter se* that this arrangement is made.

It is to be observed that Gregory, J., arrived at his judgment upon the counterclaim with some hesitancy and with great respect—I am of the opinion that it is not sustainable. I would allow the appeal.

Irving, J.A. IRVING, J.A., agreed. *Appeal allowed.*

SASK.
S. C.

ROGERS LUMBER CO. v. C.P.R. CO.

Saskatchewan Supreme Court, Lamont, Elwood and McKay, JJ. March 18, 1916.

1. CARRIERS (§ III D 2—402)—NOTICE OF ARRIVAL—LIMITATION OF LIABILITY AT STATION HAVING NO AGENT.

A carload of coal carried by a railway company under a condition in a bill of lading approved by the Railway Board (sec. 340 of the Railway Act, R.S.C. 1906, ch. 37), that "goods in carloads destined to a station where there is no authorized agent shall be at the risk of the carrier until placed on the delivery siding," manifests no intention as to require the carrier to give notice of the arrival of the car at such station, the failure of which cannot render the carrier liable for the contents stolen therefrom after the car has been placed upon the delivery siding.

Statement APPEAL from a judgment in favour of plaintiff in an action for negligence of a carrier. Reversed.

J. A. Allan, K.C., for appellant.

C. Schull, for respondent.

The judgment of the Court was delivered by

Elwood, J. ELWOOD, J.:—This is a case tried before the District Court Judge at Moose Jaw on certain admissions of facts. The admissions which are material to the consideration of the matter are the following, namely: "That a carload of coal was carried by the defendant company under the conditions contained in a certain

bill of lading and which bill of lading had been duly approved by the Board of Railway Commissioners for Canada.

"That the said carload of coal arrived at Pambrum, Saskatchewan, in due course and was by the defendant company placed upon a delivery siding at said station, which said siding was owned and operated by the defendant company in its business as common carrier, subject to the provisions of the Railway Act of Canada.

"That no notice of the arrival of said car was given by the defendant company to the plaintiff and the plaintiff did not become aware of the arrival of said car until several months thereafter.

"That the plaintiff never received said coal nor any part thereof and the same was stolen from the car containing said coal, by persons unknown, shortly after the arrival of said car at Pambrum, Saskatchewan, as aforesaid.

"That Pambrum is a station in Saskatchewan on the defendant company's line of railway where there was not at any of the times material to this action any authorized agent of the defendant."

The District Court Judge gave judgment for the plaintiff with costs; from this judgment the defendant appealed.

The bill of lading under which the coal was shipped *inter alia* contained the following:—

Sec. 6. Goods not removed by the party entitled to receive them within 48 hours (exclusive of legal holidays), or in the case of bonded goods, within 72 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 sent or 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.

Goods in carloads shipped from a private siding or a station, wharf, or landing where there is no duly authorized agent, shall be at the risk of the owner until the car is lifted or bill of lading is issued by the carrier, and thereafter shall be at the risk of the carrier. Goods in carloads destined to a private siding, or station, wharf, or landing, where there is no duly authorized agent, shall be at the risk of the carrier until placed on the delivery siding.

It is contended that the goods in question being a carload destined to a station where there was no duly authorized agent, the defendant's risk ceased on the placing of the car on the delivery siding. The respondent, however, contends that notwithstanding

SASK.

S. C.

ROGERS LUMBER CO. v. C.P.R.

Elwood, J.

that provision, there still remained the duty of giving notice; and a number of cases were cited in support of the contention that a common carrier in order to relieve himself from liability must give notice of the arrival of the goods.

In none of the cases cited, however, was there a condition such as is above mentioned. It seems to me abundantly clear that the liability of a common carrier may be limited by contract. Sec. 340 of the Railway Act provides that a limitation of liability must be approved by the Board of Railway Commissioners, and in this case the above limitation of liability was approved by the Board of Railway Commissioners. If the contention of the respondent is correct, then by whom is notice to be given? The defendant company had no agent at the siding and the only persons, I assume, that would know of the delivery of the car would be those in charge of the train that delivered the car; are they, then required to give notice? It seems to me, that a very slight reflection would easily convince one that this was never intended. If notice is required to evade liability then why was the paragraph in question placed among the conditions? It would seem to me that the whole matter would be covered by the first portion of the section, because it provides that on the expiration of the stipulated time after notice is given, the responsibility of the carrier, as a carrier, shall cease. The whole intention, to my mind, of the concluding portion of the section is this, viz., in cases where goods are shipped from a point at which the railway company has no authorized agent then the liability of the carrier shall only commence at the time that the carload of goods is actually moved by the carrier or at the time the bill of lading is issued and that that risk shall continue thereafter, in case of a carload of goods destined to a point at which there is no authorized agent of the carrier, the liability shall cease as soon as the carrier has delivered the car on the delivery siding.

To my mind there can be no other construction placed upon the condition under consideration.

Having reached that conclusion then, it follows that under the facts of this case, the defendant company is relieved from responsibility. In my opinion, therefore, the judgment below should be reversed and there should be judgment dismissing the plaintiff's claim with costs. The defendant should have the costs of this appeal.

Appeal allowed.

Y.M.C.A. v. RANKIN.

B. C.
C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Galliher, and McPhillips, JJ.A. April 3, 1916.

1. CONTRACTS (§ I C 2—29)—SUFFICIENCY OF CONSIDERATION—SUBSCRIPTION FOR CHARITABLE PURPOSE.

A subscription whereby a certain sum of money is promised towards the erection and equipment of a building for the Young Men's Christian Association, in reliance of which liabilities are incurred and other subscriptions obtained, forms a sufficient consideration for a contract and is enforceable even before the completion of the building.

[*Sargent* v. *Nicholson*, 25 D.L.R. 638, followed.]

Statement

APPEAL from the judgment of McInnes ,Co.J., dismissing an action to enforce a charitable subscription. Reversed.

D. A. McDonald, for appellant, plaintiff.

Craig, for respondent, defendant.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The legal question involved in this appeal was recently considered by the Manitoba Court of Appeal in the case of *Sargent* v. *Nicholson*, 25 D.L.R. 638, and holding the same view of the law as that expressed in the opinion of Cameron, J.A. (concurred in by the other members of that Court), I think no useful purpose would be served by going over the same ground in this case.

Considerable argument was directed to the respondent's contention that as the buildings had not been completed the action is not maintainable.

Reliance was placed on the language of Richards, J., in *Berkeley Street Church* v. *Stevens*, 37 U.C.Q.B. 9, that—

> When the work is completed, as in this case, if he does not pay he may be sued for the money so promised.

The fact that there the building had been completed, while here it has not, is one of the distinctions raised between the two cases, but I would point out that there is another distinction which nullifies the one just mentioned, that is to say, that the contract in question here fixes the due dates of the sums promised.

In the case just mentioned the time for payment not being specified it might perhaps, in the circumstances, have been thought that the moneys were not to be payable in advance, but only when the work had been completed. I am far from saying that apart from this fixing of the dates, the promised contributions could not have been recovered by action before the completion of the buildings; but it is enough to say that the dates having been fixed by the parties, and default having been made in

B. C.
C. A.
Y.M.C.A.
v.
RANKIN.
Macdonald, C.J.A.

payment, a right of action accrued. *Berkeley Street Church* v. *Stevens*, *supra*, is authority for the proposition, that the promise to contribute to the building funds was revocable only up to the time it was acted upon by the trustees by the incurring of obligations on the faith of it. Thereupon it became a contract in fact and not a mere offer of a gift.

While the facts concerning the obligations entered into by the appellants were not fully brought out at the trial, I think it sufficiently appears that the appellants, acting on the faith of the promised donations, entered into very heavy obligations. They appear to have let contracts which resulted in the erection of buildings which, while not yet complete, are in an advanced state of construction. The buildings appear to have been erected on the appellants' land, and what present or future obligations have been incurred in respect of taxes and rates is not disclosed, but it is manifest that the appellants cannot now be placed *in statu quo*.

Re Hudson, Creed v. *Henderson*, 54 L.J. Ch. 811, was greatly relied on by respondents' counsel, but the circumstances of that case I think differ very greatly from those of the case at Bar. There the donations were to be distributed in reduction of church indebtedness: if discontinued the trustees of the fund would have less to distribute, they would have smaller gifts to make to the different bodies intended to be assisted. That at all events was the view of the Judge. Here the parties must have clearly understood that once the undertaking was entered upon it would involve responsibilities which could not be displaced until the buildings were completed, that is to say, it would be absurd to suppose that either the appellants or respondents entertained the view that the buildings should be commenced and abandoned at any time the funds should fail by reason of subscribers not meeting their engagements. I would allow the appeal.

Galliher, J.A.

GALLIHER, J.A.:—Since this case was argued, the Court of Appeal for Manitoba has decided in a similar case (with one exception), that the subscriber is liable: see *Sargent* v. *Nicholson*, 25 D.L.R. 638. I agree with the reasons for judgment of Cameron, J.A., who delivered the judgment of that Court.

The exception to which I referred above is this:—I would infer from reading that case that the building had been completed, while in the case at bar it is left in an unfinished state requiring large

sums of money to complete it. There is no suggestion that the total subscriptions if paid would not have been sufficient to complete the structure undertaken by the appellants. The total subscriptions were $520,000, of which $230,000 has been paid up, and the contract price for the building was $350,000.

Over and above the contract price there would be extras and the installing of fixtures and furniture necessary for a building of this description, but the difference between the contract price and the total subscriptions leaves a handsome margin for this. Once the consideration for the contract is established—and under the authorities I think there can be no question as to that—it resolves itself into the one narrow point—can the subscribers be called upon to pay up while the building is incomplete and at a standstill for lack of funds? The money is subscribed for the very purpose of creating a fund out of which from time to time payments are to be made as the building progresses. Now, if any subscriber or combination of subscribers by refusing payment of the sums subscribed bring about a condition by which it is rendered impossible to proceed to completion though the work has been undertaken and large sums expended thereon, they are by their own act destroying the very purpose for which they subscribed, in other words, taking advantage of their own wrong to escape their liability.

In *Thomas* v. *Grace*, 15 U.C.C.P. 462, at 468, Richards, C.J., has this to say:

> Plaintiff, of course, could be called upon to show a proper expenditure of the money that he had received for a certain purpose; but it is no answer, if he has a right to receive the money, to say that he has not begun to expend it for the purpose for which it was paid to him. Besides, we must import into agreements like this that which was present to the minds of all at the time it was entered into. It was not contemplated nor made a condition precedent that the church and rectory should be built before the money subscribed was paid. The very money subscribed was undoubtedly to be employed for paying for the building, and would be required for that purpose, and, in the usual course of things, from time to time, to pay for the building as it progressed.

Should this statement of the law be considered too wide, we have before us in the case at Bar the fact of a contract let and an obligation incurred. I would allow the appeal.

McPHILLIPS, J.A.: I would allow the appeal for the same reasons as given by me in *Vancouver City Young Men's Christian Assoc.* v. *Wood*, *infra*. McPhillips, J.A.

IRVING, J.A., agreed. *Appeal allowed.* Irving, J.A.

B. C.

C. A.

Y. M. C. A. v. WOOD.

CONTRACTS (§ I C 2—29)—SUFFICIENCY OF CONSIDERATION—SUBSCRIPTION FOR CHARITABLE PURPOSE.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—This case is identical with *Y. M. C. A.* v. *Rankin*, *ante*, and the result will be the same.

Galliher, J.A.

GALLIHER, J.A.:—It follows from the decision just handed down in *Y. M. C. A.* v. *Rankin*, that this appeal also should be allowed.

McPhillips, J.A.

MCPHILLIPS, J.A.:—This is an appeal from the judgment of McInnes, J., in the County Court of Vancouver, dismissing the action. We are without the assistance of written reasons from the Judge, but it can be assumed that the judgment proceeded upon the ground that there was no enforceable contract. It cannot be gainsaid that the subject matter of the action is very close to the line, and the first glance at the contract sued upon and the attendant facts would seem to impel the conclusion that no legal obligation exists. The appellant is an incorporated association and within its corporate powers embarked upon the construction of a large building upon Georgia Street in the City of Vancouver which, when completed, will be an ornament to the city and designed no doubt to well supply the purposes for which it is intended. Before entering upon the work of construction subscriptions were obtained from some two thousand or more citizens of the City of Vancouver to defray the cost of the erection of not only one but three buildings. The form that the agreement took in the case of the respondent as well as all others follows:—

$100.00 Vancouver, B. C., Nov. 10, 1910.

For the purpose of erecting and equipping three buildings for the Vancouver City Young Men's Christian Association, and in consideration of the subscriptions of others, I promise to pay to the said Association one hundred dollars, payable as follows:—One-fifth December 1, 1910; one-fifth May 1, 1911, one-fifth November 1, 1911, one-fifth May 1, 1912, one-fifth November 1, 1912, or will pay in full on May 1, 1911.

(Signed) R. G. Wood,

(Address) 601 Hastings St. West.

The case for the appellant established the execution of the agreement by the respondent and no evidence whatever was led to show that the respondent at any time revoked the offer made or repudiated his promise in any way—in fact, the evidence is that he would pay the money agreed to be paid were he in a position to do so—reliance though is wholly placed upon the conten-

tion that there is no legal or enforceable contract, *i.e.*, that it is without consideration. The facts as adduced at the trial show that following subscriptions totalling $520,000—approximately $230,000 was paid up. When a considerable sum of money was in hand—in January, 1913—a contract was let for the first building—the building before referred to—for the sum of $350,000, and the building is roofed in and the structural work may be said to be completed—what remains to be done is the interior and ornamental work—no doubt still requiring a very considerable amount of work and outlay of moneys. The work upon the building is now suspended, owing to lack of funds—that is, owing to non-payment of subscriptions the appellant is without funds to complete the building. The evidence does not disclose the fact, but it was stated at the Bar upon the argument that to the extent that the building has been constructed—all moneys therefor have been paid to the contractors and no further liability exists upon the appellant to the builders. The building in its present condition is useless for the purposes intended—for that matter useless for any purpose. When all the surrounding facts are looked at—the agreement as executed by the respondent studied—and in particular the words "and in consideration of the subscription of others" given due weight—it seems to me that consideration for the promise upon the part of the respondent is in law well established. It would be highly inequitable that others should subscribe and in good faith pay up their subscriptions and that the respondent should escape liability. The countervailing equity impels and constrains the imposition of liability upon the respondent. There can be no question that, if not in express terms, there was an implied request from the respondent to the appellant to proceed in the construction of the building—and the contract for one of them was entered into and obligations incurred—that being the fact, the respondent, upon that state of facts alone, became and was obligated in law to pay the amount agreed to be paid by him in the furtherance of the adventure or undertaking which he in common with others was instrumental in launching. It is argued that because of the fact that to-day no further liability remains upon the contract with the builders—and that therefore it follows that the liability looked at as one of indemnification only—no longer exists.

B. C.
C. A.
Y.M.C.A.
v.
WOOD.
McPhillips, J.A.

This is, with deference, idle contention in my opinion. The legal liability commenced with the execution of the agreement when it was followed by the subscriptions and payments thereon of others—coupled also with the appellant embarking upon that which was contemplated and requested to be done—what was contemplated was a completed undertaking and the duty of the appellant is to carry out that undertaking in its entirety or to the extent that the funds capable of being got in will extend.

Sargent v. *Nicholson*, 25 D.L.R. 638, is a case very much in point. Cameron, J., refers to a number of authorities and at p. 643 says:—

> The weight of opinion seems to be, as I read the authorities, that in the case of a subscription such as this before me, when, in consequence and on the faith of it, advances have been made and liabilities incurred, before revocation, then the promise becomes binding on the subscriber. Other views have been taken of the nature of the underlying consideration in such cases, but, in my judgment, the one I have stated seems to commend itself most strongly.

And Haggart, J., at p. 644 says:—

> In addition to the grounds relied upon by him, namely, that on the faith of the subscription in question and other promised subscriptions, the Y.M.C.A. had erected buildings and incurred obligations which formed a sufficient consideration, I would observe that, in express terms, the document provides that, in consideration of the subscriptions of others, the defendant promises, etc.
>
> Now, supposing there are 100 subscribers all signing similar documents, then I think the 99 other promises and subsequent payments for the accomplishment of a common object would be a sufficient consideration for each of the individual promises.
>
> The person who drafted the subscription card intended to bind the subscriber with a legal obligation, and I think he has accomplished his object.

The agreement sued upon is equally forceful to that under consideration in the Manitoba case—in fact in like terms. I would allow the appeal.

Irving, J.A.

IRVING, J.A., agreed. *Appeal allowed.*

SASK.
S. C.

CITY OF REGINA v. TOWN OF GULL LAKE.

Saskatchewan Supreme Court, Lamont, Brown and Elwood, JJ., March 18, 1916.

1. MUNICIPAL CORPORATIONS (§ II G G—264)—LIABILITY FOR CARE OF THE SICK—RESIDENCE—RETROACTIVENESS OF STATUTE.

The residence required to charge a town with the statutory liability under secs. 171 and 172 of the Town Act, R.S.S. 1909, ch. 85, for hospital treatment of persons falling sick, refers to the place where the person happens to fall sick and not to the place where the person is admitted to the hospital; the fact that the statute has been amended as to make notice of receiving the patient a condition precedent to such liability cannot apply to cases arising before the passage of the amendment.

SASK.

S. C.

CITY OF REGINA. v. GULL LAKE.

Lamont, J.

APPEAL from a judgment dismissing an action to recover for care of the sick under the Town Act, R.S.S. 1909, ch. 85, secs. 171, etc. Reversed.

G. F. Blair, for plaintiffs, appellants.

N. Hoffman, for respondents.

The judgment of the Court was delivered by

LAMONT, J.:—The plaintiffs in this action claim from the defendants the sum of $111, for keeping and treating in the plaintiffs' hospital one Emma Ellingson, alleged to have been a resident of the town of Gull Lake at the time she was taken ill. The action is brought under the provisions of ch. 85, R.S.S. 1909. The sections of that Act bearing upon the question are as follows:

171. It shall be the duty of the council to make due provision for the care and treatment of any person who has been a resident of the town for at least thirty days who falls ill and who, for financial reasons or otherwise, is incapable of procuring the necessary medical attendance and treatment.

172. If such person is admitted as a patient by any hospital which receives aid from the general revenue of the province the board of such hospital may demand from the council the sum of one dollar per day for each day's actual treatment and stay of the patient in such hospital.

Sec. 173 makes provision for the recovery by the town from the patient of any sum paid to the hospital under the preceding sections.

The facts are as follows: Emma Ellingson's father lived near Gull Lake and was in poor circumstances. In March, 1912, Emma went to work as a waitress in Lakeview Hotel, Gull Lake. She worked there for 11 months, until February 1913, when she was taken ill with a disease of the hip joint. On February 12 she went to the hospital in Winnipeg for treatment and remained there 4 weeks and 3 days. She says the doctor in Winnipeg advised her to go to Regina and have the X-ray treatment. When she went to Winnipeg she had $90; the hospital and doctor's bill cost her $70. When she left Winnipeg, she returned to Gull Lake for a few days and then went out to her father's, also for some days. On April 10 she went to the hospital at Regina and remained there 111 days. She did not pay her hospital bill at Regina. After leaving Regina hospital, she returned to her father's for 2 or 3 months; then she earned $60, working for her brother, which, she says, she used for clothes. Subsequently, she worked in a hotel at Shaunavon at $30 per month, earning some $360, some of the money she thus earned she used for clothes, and the balance she sent to her father.

SASK.

S. C.

CITY OF REGINA v. GULL LAKE.

Lamont, J.

The District Court Judge, before whom the matter was heard, held that she had not been a resident of Gull Lake for the 30 days preceding her admission to Regina hospital, and that therefore the town was not liable. With deference, I am of opinion that this view cannot be supported.

Sec. 171 does not require the patient, for whose care and treatment the town must provide, to be a resident of the town for 30 days prior to admission to a particular hospital; the liability of the town arises when the following requisites have been complied with:—(1), If a resident falls ill; (2), If such person has been a resident for at least 30 days prior to falling ill; and (3), If such person is—for financial reasons or otherwise—incapable of procuring necessary medical attendance and treatment.

The residence required to create liability is residence for 30 days prior to falling ill; not for 30 days prior to admission to a hospital. The evidence in this case establishes that Emma Ellingson was a resident of Gull Lake at the time she fell ill, and had been for the preceding 11 months. It also establishes that the illness for which she was treated in the Regina hospital was the same illness which had forced her to cease work in February, 1913, and to go to the hospital at Winnipeg. Her treatment at Regina, on the advice of the Winnipeg doctor, being, as I take it, a continuation of the treatment considered advisable by him.

This being so, the only other question is: Was she, for financial reasons or otherwise, incapable of procuring necessary medical attendance and treatment?

It was not suggested to us that her going to the Winnipeg hospital was unnecessary, nor was it argued that the advice of the Winnipeg surgeon—that she go to Regina hospital for treatment—was otherwise than proper and necessary; we must, therefore, in my opinion, take it that her admittance to both hospitals was necessary for the proper treatment of her disease. Her hospital bill at Regina she did not pay; the reason she did not pay it was, she says, because she did not have the money. There is no evidence that when she left Regina hospital she had any money whatever. For financial reasons, therefore, she was unable elsewhere to procure the treatment necessary for her disease. That she subsequently earned certain moneys is immaterial. The

right of the plaintiffs against the defendants was complete when the woman left the plaintiffs' hospital. All the conditions precedent necessary to enable the plaintiffs to recover were shown to have been complied with. The defendants are therefore liable.

It was contended by defendants that the plaintiffs should have notified them that the patient was in their hospital, and it was pointed out that, under the Act as now amended, such notice must be given. The Act as it stood when the woman fell ill, and when her indebtedness to the plaintiffs arose, did not require such notice. We, therefore, cannot read into the Act a requirement respecting notice as a condition precedent to liability on part of the defendants when such liability arose.

The appeal should be allowed with costs, the judgment of the Court below set aside, and judgment entered for plaintiffs with costs. *Appeal allowed.*

DORRELL v. CAMPBELL.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher and McPhillips, JJ.A. April 3, 1916.

1. MECHANICS' LIENS (§ VIII—61)—ASSIGNEE AS PARTY DEFENDANT.

A bank holding an assignment of the balance of the contract price owing by the owner to the principal contractor has a sufficient interest to be added a party defendant in a mechanics' lien action.

[*Moser* v. *Marsden*, [1892] 1 Ch. 487; *Kitching* v. *Hicks*, 9 P.R. (Ont.), 518, referred to.]

Statement

APPEAL from order of Grant, Co. J., adding an assignee as party defendant to a mechanics' lien action. Affirmed.

E. A. Lucas, for appellant, plaintiff.

R. L. Read, K.C., for respondents, Campbell & Wilkie.

R. M. Macdonald, for respondent, Bank of Toronto.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—This is an appeal from an order of Grant, Co. J., adding the Bank of Toronto, a party defendant in a mechanics' lien action. The ground of the bank's application to be added as party defendant was that it held an assignment of the balance of the contract price owing by the owner to the principal contractor. If the lien claimants established their liens, the owner will have the right to pay them off out of the said moneys and thus relieve his property. The bank is therefore interested in defeating the liens, and as the owner has paid the said balance of the contract price into Court, which is a sum

B. C.

C. A.

DORRELL v. CAMPBELL.

Macdonald, C.J.A.

sufficient to meet all lien holders' claims in this action, and has admitted ownership of the property against which the liens are claimed, the bank desired to contest that ownership and thus defeat the liens. In these circumstances I cannot say that the Judge was clearly wrong in adding the bank as a party defendant. Rule 12 of O. 2 of the County Court Rules appears to me to be wide enough to permit him to do this. Such power, however, I think should be very sparingly exercised in mechanics' lien actions. The Act furnishes what I think was intended to be a speedy and inexpensive procedure for realizing liens. Incidentally a personal judgment may be given where there is privity of contract, but the primary object of the procedure is not to be lost sight of and except where the property of the party seeking to be added is affected, an order adding him should not be made: see *Moser* v. *Marsden*, [1892] 1 Ch. 487. This, I think, is a much stronger case in favour of adding the party than that was, because if the lien holders should succeed, that which otherwise would be the moneys of the bank would be lost to it. In other words, the title to the money assigned to the bank indirectly is at stake.

In these circumstances I would not interfere. The appeal should be dismissed.

Martin, J.A.

MARTIN, J.A.:— This is an appeal from the order of Grant, Co.J., adding the Bank of Toronto as defendants because it is the assignee, before action, of Campbell and Wilkie of all moneys due on the contract in question. It is urged that the bank being directly interested as assignee in the result of the claim for a mechanics' lien is entitled to dispute the existence of any lien, and that sec. 16 has no application to such a case, and I do not think it has.

In support of the contention that an assignee is of right entitled to be added as a defendant in order to protect himself, *Montgomery* v. *Foy*, [1895] 2 Q.B. 321 (in which *Moser* v. *Marsden*, [1892] 1 Ch. 487, was cited), is relied on, which is a case wherein the shippers of a cargo were added as third parties in order to enable them to counterclaim against the shipowners for freight, and though it is not on all fours with the case at bar, and Kay, L.J., was careful to guard against its extension, yet the general principle stated by Smith, L.J., p. 328, seems applicable:—

It is not disputed that the amount of freight due under the bill of lading is so much; but the shippers say that under the same contract they are entitled to damages for injury to cargo, and therefore they ought only to pay the difference, if any, over and above the amount of the damages to which they are entitled. I think we should be frittering away the effect of the rule if we held that the cargo owners were not interested in the settlement of the questions involved so as to disentitle them to be added as defendants.

I have, also, found an Ontario case, *Kitching* v. *Hicks*, 9 P.R. (Ont.) 518, which, though a decision of the Master in Chambers, nevertheless is indistinguishable from the present, and in it, after reviewing several apt authorities, certain creditors were added on the ground that, in common with the assignee, they had a substantial interest in the subject matter which they were entitled to more fully protect by being added as parties.

I think, in view of the authorities, that the Judge below was justified in the exercise of his discretion and that the appeal should be dismissed.

GALLIHER and MCPHILLIPS, JJ.A., concurred.

Appeal dismissed.

EXECUTORS AND ADMINISTRATORS TRUST CO. v. SEABORN et al.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Lamont, Elwood, and McKay, JJ. March 25, 1916.

1. SOLICITORS (§ II C 2—35)—NATURE OF LIEN ON CLIENT'S DOCUMENTS—PRIORITY UPON LIQUIDATION OF COMPANY.

Solicitors merely have a "passive" or "retaining" lien on documents coming into their hands in the general course of business for a client and not in the course of any action or proceedings or such as to entitle them to a charging order; and the production of such documents "without prejudice" to such lien under sec. 22 (16), of the Companies Winding-Up Act, R.S.S., 1909, ch. 78, does not thereby, in any wise, affect that lien so as to entitle it to priority over the claims of other creditors.

[*Re Rapid Road Transit Co.*, [1909], 1 Ch. 96; *Re Meter Cabs*, [1911] 2 Ch. 557, distinguished.]

APPEAL from a judgment of Newlands, J., declaring solicitors entitled to a lien on the funds in the hands of a liquidator. Reversed. Statement

H. J. Schull, for appellant.

J. A. Allan, K.C., for respondents.

The judgment of the Court was delivered by

HAULTAIN, C.J.:—The Canadian Standard Automobile & Tractor Co., Ltd. is a company incorporated under the provisions of the Companies Act. The respondents are solicitors practising in co-partnership at the City of Moose Jaw, who Haultain, C.J.

SASK.

S. C.

EXECUTORS, ETC., TRUST CO. v. SEABORN.

Haultain, C.J.

acted as solicitors for the said company, and as such solicitors received certain documents for the purpose of endeavouring to realize the amount due by subscribers to the capital stock of the said company. The company became indebted to the respondents for services rendered by them to the company. Thereafter proceedings were taken for the voluntary winding-up of the company, and one Harry Van Tassel was appointed as liquidator, to whom the respondents rendered a bill of their costs.

The appellant subsequently was appointed liquidator of the company in the stead of Van Tassel. Upon the application of the appellant, an order was made by Lamont, J., on September 24, 1914, directing the respondents, who claimed a lien thereon, to produce, for the purposes mentioned in the order, the papers, books and documents upon which the lien was claimed.

It was made a term of the order that all of such productions should be without prejudice to the solicitors' lien upon the documents so ordered to be produced, and it was ordered that the liquidator should not pay out any of the moneys realized from the contributories of the said company until the question of the validity of the solicitors' lien had been ascertained. After production by the respondents of the papers, books and documents referred to, a list of contributories was settled and certain sums were realized from the contributories.

Upon application by the appellant for, *inter alia*, an order disposing of the claim of the respondents to the moneys realized from the contributories herein, Newlands, J., by order made January 27, 1916, directed a reference to pass the accounts of the liquidator and to see if there is anything due the respondents in connection with the services rendered the company, and further directed that the respondents should have a lien upon the moneys in the hands of the liquidator for any amount so found due them.

From this decision the appellant appeals upon two grounds: —1. That the lien, if any, of the respondents did not extend to any of the moneys in the hands of the appellant. 2. That even if the lien did exist upon the said documents, the same could not be asserted so as to prevent production or inspection for the purpose of proceedings under the Winding-Up Act.

The whole question in this appeal turns on the meaning of the words "without prejudice to the lien" in sub-sec. 16 of sec.

22, of the Companies Winding-Up Act (R.S.S. ch. 78), which is as follows:

> Where any person claims a lien on papers, deeds or writings or documents produced by him, such production shall be without prejudice to the lien and the Court shall have jurisdiction in the winding-up, to determine all questions relating to such lien.

The same provision is found in the Winding-Up Act (R.S.S., ch. 144, sec. 120), and the Companies Act, 1862, sec. 115.

The lien in the present case is what is known as a "retaining lien" which is a "mere passive right of retainer" "and incapable of being actively enforced." Cordery on Solicitors (2nd ed.), p. 202. A lien of this sort is good against the client and (with certain exceptions), against any person claiming under the client. It is not good as against third persons.

It is well established that the solicitor for the parties in an administration action will not after a change of solicitors be allowed to assert his lien for costs on papers in his possession in such a way as to embarrass the proceedings but must produce the papers when they are required for carrying out the proceedings. *Re Boughton, Boughton & Boughton*, 23 Ch.D. 169; *Belaney* v. *French*, L.R. 8 Ch. 918.

The provisions of the several Winding-Up Acts mentioned above clearly enact that a solicitor whether he has a lien or not is bound to produce (but not to deliver), documents to the liquidator. *Re South Essex Estuary Co.; Ex parte Payne*, L.R. 4 Ch. 215, 38 L.J.Ch. 305, 20 L.T. 68; *Re Capital Fire Insurance Association*, 24 Ch.D. 408.

In *Re South Essex Estuary Co., Ex parte Paine and Layton*, 4 Ch. App. 215, the solicitors of a company were ordered under sec. 115 of the Companies Act, 1862, to produce documents relating to the company to the liquidator without prejudice to their lien for costs. On appeal from the Vice-Chancellor who made the order, Lord Hatherley, L.C., is reported as follows:

> No doubt, under the old Winding-Up Acts, a solicitor would not, on the application of the official manager, have been ordered to produce any documents belonging to the company upon which he claimed a lien, because it was then simply the case of a client asking production against his solicitor without having paid the solicitor's bill. But it was equally beyond doubt that the solicitor would have been ordered to produce them on a *subpœna duces tecum* obtained by a creditor or third party. Though it did seem a strong measure for the Legislature to have passed, His Lordship thought that the Vice-Chancellor had come to a right conclusion upon the Act of

SASK.

S. C.

EXECUTORS ETC., TRUST CO. v. SEABORN.

Haultain, C.J.

1862. It was true that the Act left a discretion on the part of the Judge; but it was a judicial discretion to be exercised according to the facts of the case, as there might be special grounds for non-production.

By considering the difference between this Act and the older Acts the object of the Legislature appeared clearly. The former Acts did not interfere directly with the rights of creditors, who were allowed to go on with their actions until they were stayed by the Court, but by the last Act the rights of creditors were largely interfered with, they were prevented from suing, and were compelled to come in under the winding-up. The official liquidator had therefore now to act for the benefit of the creditors as well as of the shareholders, and therefore the Legislature might well have considered it right to give him this power. His Lordship could not, in fact, read the section in any way except as saying that production might be ordered, but must be without prejudice to any lien; though in many instances, of course, this would render the lien valueless. The solicitors in this case were persons capabl eof giving information within the 115th section, and production must be ordered, but the Court would be very careful not to go beyond the powers conferred by the section.

The case of *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96, was much relied on by counsel for the respondents. In that case an action had been brought by a company against its directors for penalties for acting without qualification. Certain documents came into the hands of the solicitor for the company in the course of the action. The company was ordered to be wound up compulsorily and a liquidator was appointed. The liquidator continued the action and retained the company solicitor, but afterwards discharged him and appointed another solicitor to whom he required the first solicitor to hand over the documents. The solicitor claimed a lien for costs and a summons was taken out by the liquidator for an order for the delivery of documents. Neville, J., after a review of many authorities decided that the solicitor had a good lien on and was entitled to retain, until his costs were paid, all documents which had come into his possession and on which he had acquired a lien before the order for winding-up but must deliver those acquired in the course of the winding-up. The facts of this case distinguish it from the present one. The application was not an application under sec. 115 of the Companies Act, 1862, which was not referred to at all. If that section had applied there is no doubt that the solicitor would have been ordered to produce the documents but without prejudice to the lien.

Neville, J., in his judgment, at page 102, says:

> Delivery of the papers in an action is demanded in the present case. That action is by a company against its directors and is clearly not a representative action.

The case of *Re Meter Cabs, Ltd.*, [1911] 2 Ch. 557, is also not in point in the present case. The headnote in that case is as follows:—

A limited company employed a solicitor to establish a claim in an arbitration. Pending the arbitration the company went into liquidation, and, shortly after, the solicitor with the sanction of both liquidators compromised the claim for £29, which was paid to him and credited to the liquidators:—

Held, that as the £29 was recovered by the exertions of the solicitor in the arbitration he had a common law lien thereon for his costs of recovery, including the costs incurred prior to the liquidation.

Jones v. *Turnbull*, 2 M. & W. 601, *Enden* v. *Carte*, 19 Ch. D. 311, and *Guy* v. *Churchill* (1887), 35 Ch. D. 489 (bankruptcy cases); and *Re Massey*, L.R. 9 Eq. 367, and *Re Born*, [1900] 2 Ch. 433 (company cases), applied.

Held, also, that the solicitor's lien extended to the costs of establishing his retainer against one of the liquidators who disputed it. *Re Hill*, 33 Ch.D. 266, applied.

This case and the other cases mentioned in the headnote dealt with a common law lien on a fund recovered through the instrumentality of the solicitor. It was held in every case that the solicitor was entitled to his lien against the fund in priority to the liquidator or assignee in bankruptcy. In the present case the documents in question came into the hands of the solicitors in the general course of their business for the company and not in the course of any action or other proceeding. Their lien is therefore a "passive" or "retaining" lien and is not a "particular" or common law lien on property recovered or preserved by their efforts or such a lien as to entitle them to a charging order. This is not a case, such as in *Re Rapid Road Transit Co.* of solicitors retaining papers in an action. The documents in question were required for the general purposes of the winding-up and the solicitors cannot assert their lien to the prejudice of the due prosecution of the winding-up. The proceedings for which the documents were required by the liquidator were not proceedings in which they were concerned except as creditors or had been employed or in connection with which they could by virtue of any efforts or work of theirs claim a charging-order on the proceeds.

I cannot discover any principle upon which the lien of the respondents or the fact that production of the documents may make that lien worthless gives them any claim to priority over other creditors of the company.

The delivery over of papers "subject" or "without prejudice" to a lien gives the person handing the papers over no priority—26 Hals. 819.

SASK.

S. C.

EXECUTORS, ETC., TRUST CO. v. SEABORN.

Haultain, C.J.

Cordery on Solicitors, 299. *Batten* v. *Wedgwood*, 28 Ch.D. 317. *Re Capital Fire Ins. Asso.*, 24 Ch.D. 408.

The appeal must therefore be allowed and that part of the order appealed from declaring the respondent's lien a lien upon money is reversed.

The appellants will also have their costs of this appeal.

Appeal allowed.

ALTA.

S. C.

BABCOCK v. CANADIAN PACIFIC R. CO.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart and Beck, JJ. February 19, 1916.

1. VENDOR AND PURCHASER (§ I E—27)—REPRESENTATION AND WARRANTY — "IRRIGABLE LANDS" — BREACH — RESCISSION — BURDEN OF PROOF.

The term "irrigable lands" means lands, which by reason of their level, relative to the irrigation works, are capable of having water carried over them from the works by gravity, and which, having regard to the character of the soil and of the climate, will be rendered more productive by means of irrigation properly applied in the growing of crops adapted to the locality, and a sale of lands under such description amounts to an express representation and implied warranty that the lands will answer that description; but the burden of proof is upon the purchaser to shew either misrepresentation or breach of warranty to entitle him to a rescission of the contract on that account.

[*The Irrigation Act, R.S.C. 1906, ch. 61*, considered.]

2. EVIDENCE (§ XI K—836)—RELEVANCY—SIMILAR ACTS—CONDITIONS AS TO IRRIGATION AT OTHER PLACES.

To establish the question whether lands are irrigable within the meaning of an agreement warranting them to be, the evidence of adjacent owners as to the effect of irrigation upon their lands is irrelevant and therefore inadmissible.

[*Metropolitan Asylum* v. *Hill*, 47 L. T. (N.S.) 29, applied.]

Statement

APPEAL by plaintiff from the judgment of Hyndman, J., dismissing an action for rescission of an agreement for the sale of irrigable lands and decreeing specific performance on the counterclaim. Affirmed.

James Muir, K.C., and *A. H. Clarke*, K.C., for plaintiff, appellant.

O. M. Biggar, K.C., and *G. A. Walker*, for defendant, respondent.

Harvey, C.J.

HARVEY, C.J.:—I would dismiss this appeal with costs for the reasons given by my brother Beck.

I do not wish, however, to be understood as expressing any opinion as to the interpretation that should be put upon the term "irrigable lands" in the agreement between the parties, as I have not found it necessary to form any decided opinion as to

its meaning, since, even upon the construction for which the plaintiff contends, he has failed to show that he is entitled to succeed.

SCOTT, J., concurred.

BECK, J.:—This is an action for the rescission of an agreement with a counterclaim for specific performance. The trial Judge, Hyndman, J., dismissed the action and gave the defendant company judgment for specific performance in the counterclaim.

The agreement in question is dated August 16, 1907. The defendant company agrees to sell and the plaintiff agrees to buy part of the west half of sec. 14, tp. 23, r. 23, w. of the 4th mer., containing 306.40 acres more or less, of which 261 acres are irrigable lands in respect of 240 acres "of which water rental is payable and 45.4 acres are non-irrigable lands subject to the right of way and other reservations hereinafter mentioned and specified, for the sum of $7,206, being at the rate of $25 per acre for irrigable lands and $15 per acre for non-irrigable lands," of which the purchaser has paid the sum of $1,266. The residue of the instalments and interest was payable on August 16, 1908, 9, 10, 11 and 12.

There are special provisions in the agreement to which it will be necessary to call attention later.

There is also another agreement—an interim water agreement—of the same date wherein it is declared that the agreement for sale and purchase is "to be taken, read and construed as a part of this agreement." By this agreement the company, in consideration of the rents, covenants, agreements, conditions, provisions and stipulations, etc., covenants to supply to the lessee (the plaintiff) "according to the prevailing 'duty of water' during the 'irrigation season' of each and every year from the date hereof as fixed and provided by the rules and regulations now or hereafter made and prescribed under and by virtue of the authority of the Irrigation Act and amendments in that behalf, except when prevented by unusual storms, freshets, floods or other disasters, the Act of God, King's enemies, fire or any other causes over which it has no control, out of the waters then being in its main and secondary canals or any distributing ditches or branches thereof available for such purpose, 1 3-5 cubic ft. of water per second for the irrigation of the 240 acres of irrigable land afore-

ALTA.

S. C.

BABCOCK v. C.P.R.

Beck, J.

said, yielding and paying therefor half yearly in advance unto and to the company a clear yearly rental of $120, being at the rate of 50c per acre for the irrigable land aforesaid." In this agreement also there are special provisions to which it will be necessary to revert later.

The grounds upon which the agreement between the plaintiff and the defendant company represented by the two instruments of August 16, 1907, is attacked are set out in the statement of claim as follows:

7. The defendant or its employees made the classification of irrigable and non-irrigable lands set out in the said written agreement of August 16, 1907, which was entered into upon the basis of such classification being correct.

8. The said agreement of August 16, 1907, was entered into upon the belief and understanding of both parties that the said classification was correct and that 261 acres covered by the agreement were irrigable, whereas in fact there were not 261 acres of irrigable land and none of it was irrigable in the sense of irrigation being beneficial for the purpose of cultivation.

9. Both parties entered into the said agreement upon the belief and understanding that the 261 acres of the land in question would be benefited by the defendant's irrigation scheme and with the aid of irrigation, as proposed to be supplied by the defendant, the crops would be doubled and wheat would be successfully grown.

10. Both parties entered into the said agreement upon the belief and understanding that the land was of such character and the climate such that irrigation would be beneficial and profitable in the cultivation and farming of the said land.

11. The plaintiff was induced to enter into the said agreement by representations made by the defendant and its agents that wheat and other grain crops were safe from frost and that there had never been a killing frost before the 7th of September in any year in the locality of the lands in question and by the further representations that the soil and climate were suitable for raising wheat crops successfully by means of the proposed irrigation.

12. The defendant warranted that the land was suitable for irrigation and that the climatic conditions were also suitable therefor.

13. The plaintiff entered upon the said lands and began to farm and cultivate the same and, 1910 being a dry year, he irrigated some of the land with water from the defendant's works, and has at different times endeavoured to avail himself of the defendant's irrigation works, with the result that it has been amply demonstrated that irrigation is not suited to the land in question and other lands of like character in the locality. The grain does not ripen before the frost comes and destroys it; the representation that a killing frost had not been known before September 7 was untrue, and the water has the effect of bringing the alkali to the surface which destroys vegetation and renders the land unfit for vegetation and growth.

The claim for relief is as follows:

(a) That it may be declared that the contract in question was entered into by mutual mistake concerning the benefit to be derived from irrigation

of the said land and its adaptability and suitableness for irrigation and raising of wheat and other crops, and that the 261 acres classified as irrigable lands be reduced to $15 per acre, the purchase price for non-irrigable land, and that the water tax be discharged from the land.

(c) In the alternative, that the contract be rescinded by reason of the said mistake or by reason of misrepresentation and that the plaintiff be repaid the moneys paid by him to the defendant, also the sums paid for taxes and improvements with interest.

(d) Damages for breach of the defendant's warranty.

Particulars were given by the plaintiff as follows:

1. The representations alleged in par. 11 of the statement of claim were made verbally by C. W. Peterson, in the car at Strathmore, Alberta, in June 1907, and by George Walsh, William Payne and Shedd, in June, 1907, at Strathmore and Gleichen, and on the road between those places during the inspection of the defendant's lands being offered for sale, and also by printed pamphlet styled—"Facts Regarding Irrigation Lands in the Great Irrigation Project of the Canadian Pacific Railway Co. in Alberta," Canada.

2. The warranty referred to in par. 12 of the statement of claim is contained in the said printed pamphlet and in the written agreement between the parties, dated August 16, 1907.

3. The irrigation is not suited to the plaintiff's lands and other lands in the locality, as alleged in paragraph 13 of the statement of claim, for the reasons given in the said paragraph. The plaintiff irrigated a small portion of the land, about 8 to 10 acres, in 1907, and in 1910 he irrigated about 130 acres for grain and 38 acres on which timothy was sown and a mulch crop of oats cut for feed. The grain crop in 1910 was a failure on account of a frost coming before the grain ripened. The plaintiff did not irrigate in the years 1911, 1912, and 1913 except a small patch for potatoes. The grain did not ripen on irrigated lands in the years 1910, 1911 and 1912 before the frost came and immured or destroyed it on most of the irrigated lands in the Gleichen district, some of the lands referred to, besides the plaintiff's, being those owned by W. D. Trego, L. A. Moore, J. S. Odland, H. H. Steadman and William Walsh.

4. The plaintiff availed himself of the irrigation works in the fall of 1907 and in 1910 from the middle of June until some time in August.

One of the most important questions calling for our decision is the meaning of the term *irrigable* lands—when can lands be said to be irrigable? And then were these lands or any part of them not irrigable? Before answering the first question it will be best to have an account of the defendant company's general irrigation scheme, as explained by Mr. J. S. Dennis, one of the company's vice-presidents.

The scheme was started in 1906. The lands in question lie in what the company calls the western section of its irrigation project; and this section contains a million acres. The scheme was designed for the purpose of irrigating the lands of the company only, with the view of selling them. No experiments had

ALTA.
S. C.
BABCOCK
v.
C.P.R.
Beck, J.

been made by the company as to the suitability of the lands for irrigation before the construction of the company's irrigation works because, until they were in operation, no experiments could be made, as there was no other method of getting the water on the lands. The classification of the lands into irrigable and non-irrigable was carried on simultaneously with the construction of the main canal and was completed sometime before the finishing up of the lateral distribution system. This classification was done under Mr. Dennis' supervision, with Mr. Turner-Bone as chief engineer, with a corps of engineers. It was completed almost entirely in 1910 although the classification of some of the lands took place after that date. The basis of the classification was that all lands were classified as irrigable "which lay at the lower elevation than at the point of delivery which could be served at that point of delivery." Neither the question of the cost of service nor the question whether conduits were necessary to carry the water to any portion of the land was taken into account in the classification—"It was simply a question of physical possibility of irrigating the land."

With the assistance derived from a perusal of Mr. Kinney's elaborate and learned work, Irrigation and Water Rights, 2nd ed., and a consideration of the Irrigation Act (R.S.C. ch. 61) and of the evidence and of the agreements in question, noting par. 3 of the interim water agreement, I think that as between the parties the term "irrigable lands" means lands which by reason of their level, relative to the irrigation works, can have water carried over them therefrom by gravity and which, having regard to the character of the soil and of the climate, will be rendered more productive by means of irrigation properly applied in the growing of crops adapted to the locality.

And I think too, that the company, having sold the lands as irrigable, did, by so describing them, both expressly represent and impliedly warrant that the lands answered that description.

The next question, therefore, is whether the plaintiff has shown that this representation is not true or that this warranty is not fulfilled. On the evidence I have come to the conclusion that the plaintiff fails.

I find that I may take the plaintiff's case as proved as correctly stated in his own factum as follows:

In 1907, the plaintiff broke 30 acres south of the lateral ditch running southeasterly and irrigated 10 or 11 acres of it near the main ditch, and also irrigated 2 or 3 acres of grass just north of the lateral and near the main ditch, which was not broken. No land was cropped.

In 1908, the plaintiff broke the north quarter and 10 adjoining acres of the south quarter, all north of the coulee, but did not crop it; a tenant, Mr. Moore, cropped the 38 acres broken in 1907 with oats without irrigation. The irrigated land produced a better yield than the unirrigated but matured about 10 days later; there being no frost that season the crop was harvested.

In 1909, the only irrigation was a small patch of potatoes in the north-west corner of the south 38 acre piece, one-quarter of an acre; the plaintiff cropped with wheat and oats about 210 acres, both on the high land above the ditch and on the land below the ditch, there being no apparent difference in the yield from land first cropped that year above and below the ditch.

In 1910, the plaintiff cropped most of the land and broke up some new land. This was a very dry year and there was not sufficient water in the ditches to supply the demand. The plaintiff got water only in July, except a little turned on about the middle of June, and did considerable irrigation on the north quarter as well as the south. The crops were not good on either the irrigated or un-irrigated land, the yield on the former being less than on the latter, producing more straw and less grain. Frost came before August 25, and did much damage.

In 1911, there was no irrigation. Some crops were fair but were frosted. In 1912, no irrigation. Grain crops, hay and potatoes. In 1913, no irrigation, crops fair. In 1914, the land was worked on shares by M. A. Durkee.

The only alkali apparent before the commencement of the irrigation was a small patch of about 2 acres of low land in the north quarter, which was never cropped.

In 1911, alkali appeared on the surface at different places which had been irrigated in 1910, viz., a small spot on the north quarter about the south edge of the 45 acre plot, also a small patch in the south 38 acre plot. These have increased in size from year to year, until in the north quarter the alkali has spread over the surface of 20 acres, and over 4 or 5 acres in the south 38 acre plot, and has appeared and covered about an acre north of the lateral near the bend, the area affected increasing from year to year. Wherever the alkali comes to the surface it kills vegetation.

It is undisputed that the alkali is brought to the surface by the action of water.

On this state of facts it appears that, apart from alkali coming to the surface and injuring the soil, the only year in which there appears to be any ground for complaint is 1910.

But as to this year the evidence shows, as I understand it, that the plaintiff asked for water between June 10 and 15; that almost immediately the supply stopped; that it started again about July 3 and again stopped; the stoppage being owing to there being no water or a very insufficient supply of water in the canal; that on this account the defendant company asked for no water rent for that year.

ALTA.

S. C.

BABCOCK v. C.P.R.

Beck, J.

The contract, as I interpret it, relieves the company from liability under these circumstances.

As to the injury from alkali, as I read the evidence, the alkali coming to the surface is the result of the seepage of the water under ground primarily and mainly from the canal and laterals and not of the flowing of the water over the lands and its soaking in, though after some very considerable length of time, during which irrigation has been applied, the underground water causing the deposit of alkali on the surface may be increased or altogether supplied from the latter source. See Kinney, secs. 24 *et seq.*

Trego, a farmer with large experience in irrigation districts, Stewart and McCulloch, who gave evidence as experts, said that ground water would send alkali in solution to the surface through the force of capillary attraction; the two latter saying that in their opinion water from the canal would find its way by seepage to the level of the water below the surface, especially in the south part of the property which was not far from the canal but that seepage would not so easily account for the water in the north quarter where the alkali area was farther distant from the canal. It seems to me that the weight of the evidence is that the alkali which appeared on the surface of the ground came as the result of seepage from the canal.

But par. 6 of the interim water agreement reads as follows:

> 6. That the lessee agrees to waive, and doth hereby waive, any and all claims for loss or damage by reason of or resulting from any leakage or seepage from the said canals or any distributing ditches or branches thereof or from any reservoir or "works" of the company, either upon the lands hereinbefore mentioned and described, irrigable and non-irrigable, or any other tract of land belonging to him, anything in any statute, ordinance, law or custom to the contrary notwithstanding, but the lessee shall promptly give due notice to the company of any leakage or seepage complained of, and the company undertakes and agrees thereupon to take every reasonable means to prevent any loss or damage being suffered or incurred by the lessee by reason of such leakage or seepage.

I think this provision protects the company from liability arising from the effects of seepage. The remedy left to the plaintiff under the terms of this clause may appear to be very indefinite and difficult of effective enforcement, but a method of attaining relief seems to be provided by the Irrigation Act, which I suppose applies to the defendant company.

I feel that in a case of this kind—the establishment of an

irrigation system extending over a very large tract of country and a tract little of which has yet been placed under cultivation so as to furnish the results of the use of any particular varieties of seeds or to indicate better time for seeding, whether in the autumn or the spring, or to furnish the answers to other practical questions—there must almost of necessity be for a time some disappointments in the results, and that in order to place the responsibility for such events upon the company the circumstances exact that very clear and cogent evidence should be produced by the plaintiff. The burden of establishing his case is of course in any event upon the plaintiff but the considerations I have mentioned seem to me to have the practical result of making that burden somewhat heavy in a case like the present. As I have already said I think the plaintiff has failed to show either misrepresentation or a breach of warranty.

This view leaves it unnecessary to discuss any of the other questions raised except one.

What I have said remains subject to the consideration of a difficult and important question of the rejection of certain evidence tendered on behalf of the plaintiff. The question involved, as will have been seen, was whether the land bought by the plaintiff from the defendant company is irrigable land. Mr. Clarke, counsel for the plaintiff, sought to prove that the plaintiff's land was not irrigable, first by evidence directed to the plaintiff's own land and secondly (and this is the evidence which was rejected), by the evidence of owners or occupants of adjacent lands directed to their lands and the effect of irrigation upon them.

The question arose on the examination of the witness Moore, who resided on land separated by a half section from the plaintiff's land. Mr. Clarke was proceeding to examine Moore as to the character of his land as compared with that of the plaintiff and the effect of irrigation upon it. Mr. Biggar, for the defendant company, objected. It was distinctly stated by Mr. Clarke that he was not putting Moore forward as an expert but simply for the purpose of shewing how the same irrigation system affected what it was proposed to be proved were similar lands irrigated under similar conditions.

Mr. Biggar put his objection to this kind of evidence as follows:

ALTA.

S. C.

BABCOCK v. C.P.R.

Beck, J.

Your Lordship sees what that is going to lead to. I have made a note of some of the factors which may enter into a good result. These are some of the factors; whether the ground was recently broken or whether it was cropped the previous year, or whether in the first place it was summer fallowed in the previous year; at what time the work was done upon it in the spring; what the nature of the work was; if it was disced, or double disced, how deep it was disced, and how often, whether it was plowed, and when and whether discing followed the plowing, or whether discing both preceded and followed the plowing; whether it was rolled or sub-packed or not; whether it was smoothed or not; whether it was and to what extent it was levelled, in the case of irrigated land, and to what extent it was ditched, and what the nature, size and direction of the ditches were, and you do not then, by any manner of means, exhaust the different questions. When was the seeding done and how was it done, how deep was the seed placed and what the variety of the seed was, and what was the nature of the cultivation carried on during the growing season and how often it was done, and to what depth was the cultivation carried. I have not exhausted the factors yet; when was the irrigation done if it was done and how heavily was it done, and whether it was done more than once or once only, and what the weather was. How any one of these things may determine whether the result was an evidentiary result or not.

At first blush it would seem to me that such evidence was admissible. On consideration, however, I think that it was not improperly rejected.

In 16 Cyc., tit. "Evidence," at pp. 111 *et seq.*, the rules as to relevancy are discussed. It is there said:

> The basic rule of the law of evidence, subject to the requirement of a clear connection stated hereafter, is that whatever facts are logically relevant are legally admissible, and that facts logically irrelevant to the issue are not admissible; the onus of showing the relevancy, intrinsic or in connection with other facts, of a fact offered in evidence, being upon the party offering the evidence. . . . Not all facts which are in some degree logically relevant, have sufficient probative force to justify the expenditure of the time necessarily consumed in proving, testing, and weighing them. The practical conditions under which causes are tried require a somewhat higher grade of probative force which may be called "legal relevancy" and do not permit the Court to hear all facts which have a logical bearing on the issue. Whenever the Court feels that a fact is not of probative value commensurate with the time required for its use as evidence, either because too remote in time or too uncertain or conjectural in its nature, the fact may in the exercise of a sound discretion be rejected.

The principles involved in this rule and the arguments *pro* and *contra* for the admission or rejection or limitation of the evidence of a state of facts similar or dissimilar to those sought to be proved from which dissimilar or similar results flowed are discussed in *Metropolitan Asylum Dist.* v. *Hill*, 47 L.T.N.S. 29. This case discusses a much earlier case of *Folkes* v. *Chadd*, 3 Doug. 157.

Lord Watson says:

There appears to me to be an appreciable distinction between evidence having a *direct relation* to the principal question in dispute and evidence relating to *collateral facts*, which will, if established, tend to elucidate that question. It is the right of the party tendering it to have evidence of the former kind admitted, irrespective of its amount and weight, these remaining for consideration when his case is closed; but I am not prepared to hold that he has the same absolute right when he tenders evidence of facts collateral to the main issue. In order to entitle him to give such evidence he must, in the first place, satisfy the Court that the collateral fact which he proposes to prove will, when established, be capable of affording a reasonable presumption or inference as to the matter in dispute; and I am disposed to hold that he is also bound to satisfy the Court that the evidence which he is prepared to adduce will be reasonably conclusive, and will not raise a difficult and doubtful controversy of precisely the same kind as that which the jury have to determine—(what he and others of their Lordships denominate an attempt *litem lite resolvere*—).It appears to me that it might lead to unfortunate results if the Court had not the power to reject evidence of the collateral fact which does not satisfy both of the conditions which I have endeavoured to indicate. If it be the right of a litigant to offer just as much or as little testimony as he thinks fit in support of an alleged collateral fact which would admittedly be useful if proved, then it must be his right to submit to the jury any number of issues precisely similar to that which they are empanelled to try and to support these by proof far more unsatisfactorily than the evidence bearing directly upon the leading issue.

That would be a case as he would express it, of "an attempt to illustrate *obscurum ped obscurius*." I adopt this opinion, although Lord Watson refrained in the case cited from deciding whether or not the evidence there in question and rejected was properly or improperly rejected. I think, however, that in the present case it cannot be said that the evidence the rejection of which by the trial Judge was excepted to was properly rejected.

In the result I think the judgment of the trial Judge dismissing the plaintiff's action with costs and granting the defendant company specific performance with costs was right. I would therefore dismiss the appeal with costs.

STUART, J., concurred. *Appeal dismissed.*

Stuart, J.

SECURITY LUMBER CO. v. PLESTED.

SASK.
S. C.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Newlands and McKay, JJ. March 18, 1916.

1. MECHANICS LIENS (§ V—32)—RIGHT OF MATERIALMAN AGAINST SEPARATE LOTS—"OWNER."

A materialman is not entitled under the Mechanics Lien Act, R.S.S., 1909, ch. 150, to register as one individual claim, a lien for the amount due for materials supplied by him to the contractor, against all the lands jointly of the owners of different parcels, who had made separate contracts with the contractor for the erection of houses on their respec-

SASK.

S. C.

SECURITY LUMBER CO. v. PLESTED.

tive parcels; nor do they have such interest in one another's land as "owners" within the meaning of sec. 2 (3), so as to charge the other's land for materials furnished at the owner's request or benefit.

[*Dunn* v. *McCallum*, 14 O.L.R. 249; *Fairclough* v. *Smith*, 13 Man. L.R. 509, referred to. See also *Campaigne* v. *Carver*, 27 D.L.R. 76.]

APPEAL from a judgment for the defendant in a mechanics' lien action. Affirmed.

H. J. Schull, for the appellant.

G. E. Taylor, K.C., for respondent.

The judgment of the Court was delivered by

Newlands, J.

NEWLANDS, J.:—This is an action to enforce a mechanics' lien. The claim is that the defendant Alfred Hilton owned the east half of lot 26, block 54, Moose Jaw, and that the defendant Charles Huggett owned the west half of said lot. That they jointly employed the defendant Plested as contractor to construct for them two dwelling houses of similar design, one on the east half and the other on the west half of said lot 26. The defendant Plested ordered the lumber for both houses from plaintiff company who afterwards filed a lien against both of said houses for the full amount due them from Plested for lumber. Both defendants deny any joint contract with defendant Plested to build said houses.

This contract was made with Plested by Alfred Huggett, a brother of the defendant Charles Huggett, who, at the time in question, was in England. This contract was in writing in the following words:—

To Mr. Huggett:—

I will engage on contract for building the two houses situate lot 26, blk. 54, Old 96, Dominion Street East, Moose Jaw, in accordance with the plans and specifications for the sum of $1,500.00 (fifteen hundred dollars) for each house. The whole to be completed within eight weeks from time of commencement. Payment to be made every two weeks as the progress of the work shall warrant, the final payment to be made within thirty days after completion of the contract.

Date May 23, 1913. (Signed) Alfred Huggett.
Witness, Roy B. Hunter. W. C. Plested.

Alfred Huggett, according to the evidence, had no authority to bind Charles Huggett to be responsible for the building of Hilton's house nor had he any authority from Hilton to bind him for the building of Charles Huggett's house. Plested was told that the half lots were owned by these two defendants separately.

The trial Judge found:—

This contract, it appears to me, cannot be read in any other way than as a single contract for the two houses.

This finding, it was argued on behalf of the plaintiffs, was a finding that the two owners through their agent entered into a contract to build the two houses. This was not what the Judge meant. A little further on in his judgment he says:—

> The question, therefore, which I have to decide is as to whether a materialman is entitled, under our Mechanics' Lien Act, to register as one individual claim a lien for the amount due for material supplied by him to the contractor against all lands jointly of the owners of different parcels of land who have made separate contracts with a contractor for the erection of houses on their respective parcels.

and his conclusion is:—

> The result is, therefore, that I hold that the material man is not entitled, under our Mechanics' Lien Act, to register as one individual claim, a lien for the amount due for material supplied by him to the contractor, against all the lands jointly of the owners of different parcels of land who had made separate contracts with the contractor for the erection of houses on their respective parcels.

The Judge, therefore, held that the contract was a single one on the part of each defendant and not a joint contract to build two houses; and this is the interpretation which I think must be put upon it. Neither of the defendants Hilton or Charles Huggett authorized Alfred Huggett to bind them for the building of two houses nor had he any intention of doing so, nor is there anything in the written contract to so bind them. . . .

Sec. 4 of the Mechanics' Lien Act provides that any person who furnishes any materials to be used in erecting any building for any owner, contractor, etc., shall by virtue thereof have a lien for the price of such materials upon the building and the lands occupied thereby or enjoyed therewith.

Sec. 7 provides that the lien shall attach upon the estate or interest of the owner in the building and the lands occupied thereby or enjoyed therewith.

Sub-sec. 3 of sec. 2 describes "owner" as any person having any estate or interest in the lands upon or in respect of which materials are placed or furnished, at whose request or upon whose credit or on whose behalf or with whose privity or consent, or for whose direct benefit any such materials are placed or furnished.

The defendant Hilton not having any interest in the land or building of the defendant Charles Huggett, and the defendant Charles Huggett having no interest in the land or building of defendant Hilton, and neither one having pledged their credit for the building of the other's house, or was privy to or consenting party to the plaintiff's furnishing materials for the other one and not

SASK.

S. C.

SECURITY LUMBER CO. v. PLESTED.

Newlands, J.

benefiting thereby, is not an "owner," as described by the Act, of the other person's property. Nor are the lands of one defendant occupied or enjoyed by the building of the other.

The lien, therefore, for the materials furnished for the one building does not, by virtue of the Act, attach to the other building.

In Ontario and Manitoba in *Dunn* v. *McCallum*, 14 O.L.R. 249, and *Fairclough* v. *Smith*, 13 Man. L.R. 509, in which provinces the Mechanics' Lien Acts are similar to our own, the same conclusion has been come to.

The plaintiff, therefore, not having a lien against the lands of the one defendant for materials furnished to the other defendant, could not register one lien against the lands of the two defendants for the materials furnished for both. Nor could he join claims on two liens acquired under the above circumstances. In order to join two defendants in the same action, they must be either jointly, severally or in the alternative liable to the same relief—r. 34, S.C. Rules. In this case, neither one is interested in the relief against the other.

As to the lien itself, it does not give the name of the owner as required by sec. 17 of the Act, nor does it properly describe the materials furnished nor the sum due as provided by that section. Neither owner from this lien can tell how much material was furnished for his building and could pay or tender the amount due so as to release his property from the lien. Each of them is therefore prejudiced and sec. 19 will not make good what is otherwise a serious defect under sec. 17.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed.

CAN.

EX. C.

MOODIE v. CANADIAN WESTINGHOUSE CO.

Exchequer Court of Canada, Cassels, J. April 19, 1916.

1. PATENTS (§ V—56)—INFRINGEMENT—ESSENTIAL ELEMENTS—PRIOR ART.

There is no infringement of a patent where the element specifically claimed by the patentee as an essential element is omitted from the defendant's machine (electric toaster); a claim is bad where every element is shown in the prior art in combination.

[Patent Act, R.S.C. 1906, ch. 69, secs. 2, 33; *Johnson* v. *Oxford Knitting Co.*, 25 D.L.R. 658, 15 Can. Ex. 340; *Consolidated Car Heating Co.* v. *Came*, [1903] A.C. 509, referred to.]

Statement

ACTION for infringement of patent. Dismissed.

Fetherstonhaugh & Smart, for plaintiff.

Blake, Lash, Anglin & Cassels, for defendants.

CAN.

EX. C.

MOODIE v. CANADIAN WESTINGHOUSE CO.

CASSELS, J.

CASSELS, J.:—This was an action brought by Robert Preston Moodie against the Canadian Westinghouse Co., Ltd., claiming that the defendants have infringed certain letters patent granted to the plaintiff, bearing date March 11, 1913. The case came on for trial before me on Monday, April 10, instant, and the three following days. During the progress of the trial I had an opportunity of becoming familiar with the different questions that were raised, and I think it better while the matter is fresh in my mind to give judgment and avoid any extra expense to the parties of having a transcription of the evidence.

The patent in question of March 11, 1913, contains five separate claims. The plaintiff sued in respect of all of these claims. At the opening of the trial, plaintiff's counsel stated that they did not intend to proceed upon the first claim, and the plaintiff's case was confined to the 2nd, 3rd, 4th and 5th claims, all of which claims, he alleges, had been infringed by the defendant.

I am of the opinion that the 1st, 4th and 5th claims are invalid claims for reasons which I will give later.

If the 2nd and 3rd claims can be upheld, they can only be upheld as very strict construction claims, and, I am of opinion, that so construed the defendants do not infringe either of these claims.

I propose to deal with the construction of the patent in the way pointed out in the case of *Edison-Bell Phonograph Corp.* v. *Smith*, 10 T.L.R. 522, quoted in a judgment of my own in *Johnson* v. *Oxford Knitting Co.*, 25 D.L.R. 658, 15 Can. Ex. 340.

According to the evidence produced before me showing the state of the art, numerous electric toasters had been on the market prior to the alleged invention of the plaintiff Moodie. Taking up the specification of the patent, the patentee claims to have invented certain new and useful improvements in electric toasters, and he declares that the following is a full, clear and *exact* description of the same. He alleges that his invention consists of

a suitable base, a plate of insulating material, an inverted U-shaped frame, having rectangular upper corners, the said frame being secured at its lower ends to the base, heating elements secured at the top to the horizontal bar of the frame, and at the bottom by means of the wires of the heating elements, extending through holes in the aforesaid plate, a bar having cross slots in its upper surface designed to be secured to the cross bar of the frame, and inverted V-shaped wires or the like, having upper ends extending through the afore-

CAN.

EX. C.

MOODIE v. CANADIAN WESTINGHOUSE CO.

Cassels, J.

said slots in the bar, and being provided with outwardly extending projections near their lower ends designed to serve as rests for the toast, the lower ends of the said wires or the like being sprung into suitable holes in the plate of insulating material secured to the aforesaid base.

He then refers in detail to the drawings and he describes in detail the bar which is suitably secured to the horizontal portion of the frame. This bar has cross slots on the upper surface. He proceeds to point out that No. 6 of the drawing are wires of inverted V-shape. The apex 6a being designed to be held in the cross slots. He shows outwardly extending projections formed near the lower ends of the wires designed to form rests for the toast. The lower ends of the wires being designed to be sprung into holes in the insulating plate.

He then proceeds to describe the wires of the heating elements stating that they extended down through holes in the plate. The plates 2 of the heating elements have apertures 2x extending through the same near the top, and also toothed side edges 2y. And he goes on and describes the manner in which the wires are wound, as follows:—

> The upwardly wound wires of the heating elements fit into spaces between alternate teeth at the side edges, and at the top extend through the apertures 2x in the plate 2, and are then wound down the plate in the opposite direction to the direction in which they are wound up, and fit into the spaces between the teeth 2y left by the upwardly wound "wire."

This method of winding the wire was apparently adopted by the patentee at the instance of one of the examiners in the patent office, in order to avoid a previous patent referred to in the letter. According to the evidence, it is a method which is useless compared to the proper method of winding the wire and a method which the patentee himself in his evidence points out was never used by him. In his specifications, however, he has expressly laid stress upon that method of winding. The defendants, in the toaster manufactured by them, never adopted that meth d of winding.

According to the evidence the method of winding described in the specifications is old, having been disclosed in the art—and in fact the prior art discloses both the process of winding claimed by the plaintiff, and also the method of winding adopted by the defendant. The evidence before me also shows that the double helical winding is not as useful as the single helical one.

Now, turning from the specifications to the claim. In his first

claim the patentee claims an electric toaster comprising (1) a base; (2) heating elements and a frame of inverted U-shape extending longitudinally to the base—the lower ends of the frame being suitably secured to the base—the tops of the heating elements being suitably secured to the horizontal portion of the frame and insulated therefrom.

There is no claim in regard to the method of affixing and holding in position the wires used for the support of the bread to be toasted.

Having regard to the productions as to the prior art, this claim is absolutely void. It is forestalled by several of the productions of toasters in existence prior to the alleged invention of the patentee. He lays no stress in this claim to any particular kind of heating elements. There is no provision for the toasting wires, an essential feature of a toaster—no claim for any particular method of holding these wires in position.

I am of opinion that this claim is bad. If it be a valid claim without the other elements, which are requisite to a valid combination, every element is shown in the prior art in combination.

No. 4 claim is practically the same claim as No. 1 except that it describes the specific method of winding the wire as described in his specification, namely, the wire at the top of the heating element extending through an aperture in the insulating plate in the opposite direction to the direction in which it is wound up. That method of winding has never been adopted by the defendant. It is shown in the prior art. It is also shown that it is a useless method of winding compared to the one used in practice both by the patentee and the defendant. Placing what is practically a useless element into what is claimed by the first claim of the patent does not in my opinion make it a valid claim. If it did, the defendant has never used the heating element wound in the manner described by the patentee.

The 5th claim is the same, except he introduces into the plates around which the wire is wound two side edges. These edges form a guide as well as preventing the wires slipping.

Both of these claims in my opinion are met by the prior art, and if in point of fact they could be upheld the defendant does not use them. In my opinion both of these claims are invalid for lack of patentable invention or utility, and in any event neither

CAN.

EX. C.

MOODIE v. CANADIAN WESTINGHOUSE CO.

CASSELS, J.

of them does the defendant infringe. The patentee has deliberately described the particular method of winding so as to avoid if possible the prior art, and at the instance of the patent examiner. The specification was amended in order to cover the suggestion of the examiner, and the patentee is now confronted with a patent, prior to his invention, disclosing the exact method of winding, so that he has inserted an element into claim "1" which is old and practically useless as compared with the method of winding both adopted by the patentee in the manufacture of his toaster and the defendant.

Turning to the 2nd and 3rd claims, in my opinion, having regard to the prior art referred to by Mr. Beam in his evidence, and exhibited to me by means of previous patents, previous models of toasters in use and on the market and the catalogues showing toasters, all of which were known and described prior to the alleged invention, the only manner in which the patent could be upheld is by construing these two claims, Numbers 2 and 3, as strict construction claims, and in my opinion they are neither of them infringed by the defendant.

The second claim is for

> an electric toaster comprising a base, heating elements, a frame of inverted U-shape having rectangular upper corners and extending longitudinally of the base, a bar secured to the horizontal portion of the inverted U-shaped frame, said bar having depending tongues, and cross slots in its upper surface, the upper portion of the heating elements being designed to be secured to the said tongues, the ends of the wires thereof extending through holes in the base, wires bent into inverted V-shape, and having outwardly extending projections for supporting the toast, the lower ends of the wire being sprung into holes in the base.

This word "sprung" is an error in the language. The ends of the wires for supporting the toast are all according to the plaintiff's evidence formed by a bender.

The ends of the wires are pushed into the holes in the base. In point of fact they are not pressed into the base, but into the insulating material. The wires are placed in these holes to prevent any lateral movement, but these holes form no support to the wires themselves. The wires are held in place by the bar which is described as being secured to the horizontal portion of the inverted U-shape frame. This bar has an indicated cross slot. Into the slots the wire fits so that when fastened in place to the horizontal portion of the U-shape frame, it forms a close con-

nection. To my mind this method of construction is an essential feature of the plaintiff's claim. The defendant's toaster does not contain this bar. The wire supporting the toast in the defendant's is held from a lateral motion by a notch and obtains its rigidity by the particular method of fastening shown in the toaster by means of passing the ends of the wires through the insulated part of the base. I think it is quite obvious, if construing the plaintiff's patent in the way in which it has to be construed, as a strictly construction patent, there is no infringement.

I have had occasion to deal with these questions in *Barnett-McQueen Co.* v. *Canadian Stewart Co.*, 13 Can. Ex. 186. In the Privy Council case of the *Consolidated Car Heating Co.* v. *Came*, [1903] A.C. 509, it was held the defendant did not infringe, where an element specifically claimed by the patentee as an essential element was omitted from defendant's machine. This element of the bar with the slots was admitted by the plaintiff's counsel to be an essential element.

The first claim of the patent being void, the whole patent falls to the ground unless the provisions of the Patent Act, ch. 69, R.S.C. (1906) secs. 2 and 33, which permit the Court to discriminate, are invoked.

Arguments were addressed to me by the counsel for both parties—on behalf of the plaintiff that the provisions of these sections should be invoked—on the part of the defendants that under the circumstances disclosed the Court should not discriminate. As I have come to the conclusion that the defendants do not infringe the second and third claims of the patent, I do not consider it necessary to determine this question. There is no decision in our Courts, as far as I know, placing a construction upon these sections, and deciding in what class of cases the Court should exercise its discretion, and I prefer to reserve my views until a case arises in which it is necessary to give a decision.

In the case of *Johnson* v. *Oxford Knitting Co.*, *supra*, to which I have previously referred, I followed the precedent set by the Privy Council and did not pass upon the validity or non-validity of the patent as a whole, coming to the conclusion as I did that there was no infringement.

The action is dismissed with costs to be paid by the plaintiff to the defendants. *Action dismissed.*

CAN.

Annotation

Annotation—Patents—Construction—Novelty and invention.

BY RUSSEL S. SMART, B.A., M.E., OF THE OTTAWA BAR.

In the case of the *Consolidated Car Heating Co.* v. *Came*, [1903] A.C. 509, referring to the omission of part of the invention, judgment stated:—"But it must be a material element and not a mere detail in the complete machine, which may be varied or omitted altogether without serious detriment to the successful working of it."

On the question of construction of a patent, Cassels, J., in *Barnett-McQueen* v. *Canadian Stewart*, 13 Can. Ex. 186, 196, said:—"In construing the claim for a combination reference must, of course, be had to the preceding specification and the state of the art, and the patentee is entitled to a fair and liberal construction."

In *Short* v. *Federation Brand*, 7 B.C.R. 197 at 206, Walkem, J.A., quotes Chitty, J., in *Lister* v. *Norton*, 3 R.P.C. 203:—"Plaintiffs are entitled to have the paragraphs construed fairly, and "by a mind willing to understand, not by a mind desirous of misunderstanding. Inventors, and those who assist them, are seldom skilled adepts in the use of language, faults of expression may be got over where there is no substantial doubt as to the meaning."

If a device is new, very little invention is needed to support the patent (22 Hals. 136) (*General Engineering* v. *Dominion Cotton*, [1902] A.C. 570).

In *Mitchell* v. *Handcock Inspirator*, 2 Can. Ex. 539, it was pointed out that novelty may consist in trifling mechanical change if some economic or other result is produced some way different from what was obtained before.

Simplicity is no objection. (*Powell* v. *Begley*, 13 Grant 381.)

A better or cheaper result may shew invention. (*Crane* v. *Price*, 1 W.P.C. 409.)

In *Griffin* v. *Toronto Railways*, 7 Can. Ex. 411 at 413, Burbidge, J., said: "I am ready to concede that when one had once grasped the idea or conception that that was an advantageous and useful thing to do, and that in that way a better abrading shoe could be secured, no invention would be required to carry out the conception. But that does not conclude the matter, and in my view there was invention in becoming seized of the idea or conception mentioned."

HART v. JOHNSTON.

SASK.

S.C.

Saskatchewan Supreme Court, Lamont, Brown and Elwood, JJ. March 18, 1916.

1. TENDER (§ I—2)—CONDITIONALITY—SUFFICIENCY WHEN LARGER SUM CLAIMED—PLEADING IN REPLEVIN.

A tender is not necessarily conditional because the lien note of which the amount is due is asked in return, if its return is not made a condition precedent to the receiving of the sum; an offer of a sum exceeding the amount actually due on a lien note, which is refused because other items in the nature of expenses are also claimed, constitutes a sufficient tender, and may be successfully set up in an action for the replevy of animals seized under the lien note.

[*Richardson* v. *Jackson*, 8 M. & W. 297; *Norway* v. *Ashburner*, (1865) 3 Moore (N.S.) 245, followed.]

2. DAMAGES (§ III J—204)—REPLEVIN—NOMINAL DAMAGES.

If, in an action for the replevin of goods wrongfully seized, it appears that the plaintiff has suffered no special damage he is entitled to recover nominal damages.

Statement

APPEAL from a judgment dismissing a replevin action. Reversed.

A. L. McLean, for defendant Wyatt, respondent.

The judgment of the Court was delivered by

LAMONT, J.:—This is a replevin action, in which the plaintiff claims the return of certain cattle seized by the defendant Johnston under instructions from the defendant Wyatt. The defendant Wyatt had sold certain cattle to the plaintiff and had taken a lien note for the unpaid purchase money. The plaintiff, by payments in cash and the delivery of pigs to Wyatt, had paid the note in full as subsequently found, with the exception of $7.85. The plaintiff did not know the exact amount of the balance, but agreed with Wyatt to bring another pig into town and sell it and meet him at the Royal Hotel the following Saturday and there pay him the balance. On Saturday evening the plaintiff went to the hotel, but the defendant was not there. The plaintiff then put $15 in an envelope and gave it to the hotel proprietor to give to Wyatt. Wyatt came to the hotel and the $15 was handed to him. He refused to accept it, saying that it was not enough, and handed the money back to the proprietor. Wyatt claimed there was a balance of $54.65 still due. He made up this amount by adding to the balance due on the note certain expenses he had incurred in going out to see the plaintiff and in taking to town the pigs he had bought from him. It was, however, admitted at the trial that the balance on the note was only $7.85. The plaintiff not paying the $54.65, Wyatt sent out the defendant Johnston to seize the cattle covered by the lien. Johnston seized two cows and took them to town. The plaintiff then brought this action.

In his original statement of claim, the plaintiff did not plead a tender of the amount due but at the trial an amendment setting up the tender was allowed. Prior to the trial the plaintiff had, under a writ of replevin, received the cows back from the sheriff. The District Court Judge before whom the matter came dismissed the plaintiff's action on two grounds: first, that the evidence did not establish a tender, and second, that the plaintiff had suffered no damage. With deference, I am of opinion the Judge erred on both points.

The principle of a plea of tender is that the promisor has always been ready to perform the contract, and has, in fact, performed it as far as he was able, but has been prevented from completely performing it by the refusal of the promisee to accept performance.

The amount tendered ought to be the precise amount that is due. If, however, the debtor tenders a larger amount and does not require change, it is a good tender of the amount due. 7 Hals. 418.

SASK.

S. C.

HART v. JOHNSTON.

Lamont, J.

To be valid a tender does not always require to be formally made. If the creditor, either expressly or by necessary implication, informs the debtor that he will not accept the amount claimed by the debtor to be due and which the debtor says he is ready to pay, on the ground that it is insufficient in amount, the formality of making the tender is dispensed with and there is a good tender of the amount mentioned by the debtor. In the case of *Norway* v. *Ashburner*, (1865), 3 Moore (N.S.), 245 at 266, the Privy Council said:

> It is clear that the Master claimed more than was due to him. But it was conceded that this alone would not dispense with the tender. If, however, the demand of the larger sum was so made that it amounted to an announcement by the Master that it was useless to tender any smaller sum, for that, if tendered, it would be refused, that would amount to a dispensation with any tender, generally speaking.

See also *Cudney* v. *Gives*, 20 O.R. 500.

The offer of $15 by the hotel proprietor, on behalf of the plaintiff without requiring any change, was in my opinion a good tender of the balance due on the note. It was, however, contended that the tender could not be considered a valid one because the hotel proprietor asked Wyatt for the plaintiff's note. It is true he did ask for the note, but he did not make that a condition of Wyatt's receiving the $15. The money was handed to Wyatt without any condition at all. Moreover, the defendant did not object to the tender on the ground that it was conditional, but because the sum was insufficient. In *Richardson* v. *Jackson*, 8 M. & W. 297 at 298, Parke, B., said:

> The case of *Cole* v. *Blake* is a sufficient authority to warrant the Court in disposing of this application. There Lord Kenyon says undoubtedly, "that it had been determined that a party tendering money could not in general demand a receipt for the money." But where no objection is made on that account, but the creditor refuses the money because he considers the amount is not sufficient, Lord Kenyon held that he could not afterwards object to the tender because the party making it required a receipt.

The defendant having refused the money solely on the ground that the amount was insufficient, cannot now object to the tender on the ground that it was accompanied by a request for a return of the note.

The plaintiff having tendered the full balance due upon the cattle, the defendant Wyatt was not justified in making a seizure of them. The plaintiff was, therefore, entitled to a judgment declaring the animals seized to be his and to nominal

damages. If he had not obtained a return of the cows seized under his writ of replevin, he would have been entitled to judgment for their return.

The appeal in my opinion should be allowed, and judgment entered for the plaintiff declaring the cows to be his, and for nominal damages, say, $10.

As, however, the plaintiff does not appear to have paid to the defendant or brought into Court the $7.85 still due, judgment will not be entered until he has paid that sum into Court. Plaintiff is entitled to his costs both in appeal and in the Court below, and the $7.85 may be paid out to him on account of these costs.

Appeal allowed.

SASK.
S. C.
HART v. JOHNSTON.
Lamont, J.

DALES v. BYRNE.

ONT.
S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. February 4, 1916.

1. SOLICITORS (§ II C 2—35)—LIEN—FUNDS REALIZED BY GARNISHMENT—CREDITORS RELIEF ACT.

Solicitors securing the payment into Court of a sum of money under garnishment proceedings on a judgment recovered by them, the fund never having been in their possession or control, have no lien upon it for their costs, nor are they entitled, under r. 689, "to a charge upon the property recovered or preserved through their instrumentality," and under the Creditors Relief Act (R.S.O. 1914, ch. 81, secs. 4-6), the fund is distributable ratably among all creditors, subject to the payment thereout of the costs of the attachment proceedings.

[*Bell* v. *Wright*, 24 Can. S.C.R. 656; *Union Bank* v. *Stewart*, 3 Terr. L.R. 342, distinguished; *Mercer* v. *Graves*, L.R. 7 Q.B. 499, referred to.]

Statement

APPEAL by the plaintiff's solicitors from an order made by Denton, Jun. J. of the County Court of the County of York, in an action in that Court, upon an application by the appellants for payment out of Court to them of the amount of their costs of attachment proceedings and of the action; the appellants claiming a lien upon the fund in Court upon the ground that it was created or preserved by their exertions. The order made upon the application, and now the subject of appeal, while it allowed the appellants their costs of the attachment proceedings out of the fund in Court, the fruits of the attachment proceedings, directed that the balance should be paid to the Sheriff of Toronto for ratable distribution among creditors, under the Creditors Relief Act, R. S. O. 1914, ch. 81, secs. 4, 5, and 6.*

* 4. Subject to the provisions hereinafter contained, there shall be no priority among creditors by execution. . . .

5.—(1) A creditor who attaches a debt shall be deemed to do so for the benefit of all creditors of his debtor as well as for himself.

6.—(1) Where a sheriff levies money under an execution against the

ONT.

S. C.

DALES v. BYRNE.

Meredith, C.J.C.P.

T. N. Phelan, for appellants, the solicitors.

No one appeared to oppose the appeal.

MEREDITH, C. J. C. P.:—The solicitors assume that they have a lien upon the moneys in question, and then ask the Courts to hold that the Creditors Relief Act does not deprive them of it: but we must first be assured that they have a lien; and it is quite obvious that they never had any such right, never having had possession of or any control over the moneys. Having recovered the judgment for their client, and attached the moneys, they had a right to seek the equitable interference of the Court in aid of any equitable right they might have to payment of their costs out of these moneys: see *Hough* v. *Edwards* (1856), 1 H. & N. 171, and *Mercer* v. *Graves* (1872), L. R. 7 Q. B. 499: a right now expressly given in Rule 689.†

Under the Creditors Relief Act, moneys so attached, that is, attached in garnishee proceedings, as well as under other process of the Courts, shall be deemed to be so attached, etc., for the benefit of all creditors.

What equity then have the solicitors over these statutory rights of the other creditors of the common debtor?

Any right these solicitors can have cannot be greater than the right of their client. Anything that may have been preserved or recovered has been recovered for the client's benefit: there is no conflict of interests between solicitors and client: see *Francis* v. *Francis* (1854), 5 D. M. & G. 108; and *Re Harrald, Wilde* v. *Walford* (1884), 51 L. T. R. 441.

In view of the provisions of the Act providing for equality

property of a debtor, or receives money in respect of a debt . . . he shall forthwith make an entry . . .

(2) The money shall thereafter be distributed ratably among all execution creditors and other creditors whose executions or certificates given under this Act were in the sheriff's hands at the time of the levy or receipt of the money, or who deliver their executions or certificates to the sheriff within one month from the entry, subject to the provisions hereinafter contained as to the retention of dividends in the case of contested claims, and to the payment of the costs of the creditor under whose execution the amount was made; and subject also to the provisions of sub-sec. 6 of the next preceding section, and, as respects money recovered by garnishee proceedings, subject to the payment thereout to the creditor who obtained the attaching order of his costs of such proceedings.

† 689.—(1) Where a solicitor has been employed to prosecute or defend any cause or matter, the Court may, upon a summary application, declare such a solicitor . . . to be entitled to a charge upon the property recovered or preserved through the instrumentality of such solicitor, for his costs, charges and expenses of or in reference to such cause, matter or proceeding; . . .

among creditors, why should the client have a lien upon the moneys for his costs of the action? The judgment is not exhausted unless satisfied out of the client's share of the moneys: it may be otherwise enforced. If it is said, without the judgment there could have been no attachment, might it not also be said, without the debt there could be no judgment, and so there should be an equitable right to priority for all over other creditors, the very thing the Act was passed to prevent? Other creditors may have or may yet recover judgment; and they might have, as well, attached the moneys. So it is difficult for me to see any great inequity in the enactment giving to the plaintiff priority over other creditors to the extent of the costs of the garnishee proceedings only. The solicitors will have their lien upon their client's ratable share of the moneys attached, and that may be enough, with payment of their costs of the garnishee proceedings, to satisfy all their just claims for costs.

Much reliance was put, in the solicitors' behalf, upon the case of *Bell* v. *Wright*, 24 S.C.R. 656, though it is not in point, being a case of set-off of debts to the prejudice of a solicitor's claim: and it may be that that case, having been based so largely, if not altogether, on the view expressed by Cairns, L. J., in the case of *Ex p. Cleland* (1867), L. R. 2 Ch. 808—a case upon its peculiar facts a very strong one in favour of the solicitor—some of the expressions made use of in it must be modified, as those of Lord Justice Cairns must be, in view of the judgment in the case of *Mercer* v. *Graves*, L. R. 7 Q. B. 499, a case which does not seem to have been brought to the attention of the learned Chief Justice who pronounced the judgment of the Court in the case of *Bell* v. *Wright*.

The cases *Sympson* v. *Prothero* (1857), 26 L. J. Ch. 671, and *Eisdell* v. *Coningham* (1859), 28 L. J. Ex. 213, are not at all like this case. In them the client was the debtor of the attaching creditor, and his judgment debtor was the garnishee: so it was quite reasonable and fair for the solicitor to say: "Take the judgment debt, it is my client's, but leave the costs to me, for they are really mine, the reward of my labour and expense, which remains wholly unpaid; and let them be the first fruits, because, if not incurred, there might be no debt to attach, or, at the best for you, a debt which you would have to establish at a like cost."

ONT.

S. C.

DALES v. BYRNE.

Meredith, C.J.C.P.

In this case the judgment debtor is the common debtor and a third party the garnishee; so all that the solicitors reasonably and fairly can say is: "Give the costs of the garnishee proceedings to us, because we took them for the general benefit of the creditors—the Legislature having prevented the taking of them for any other purpose—and they are getting that benefit." It would be unreasonable and unfair to say, in view of the statute, pay us also for the work we did for our client, the full benefit of which he still has—his judgment; and doubly so to the extent that the solicitors can pay themselves out of the ratable share of the attached money coming to their client under the statute.

But, however all that may be, the statute in question, in unmistakable words, provides that the moneys in question shall go to the creditors who come within its provisions, ratably, less the costs of the garnishee proceedings, which the attaching creditor—the client in this case—is to have. How then can client or solicitor have more than that?

The appeal must be dismissed.

Lennox, J.

LENNOX, J.:—Robinette, Godfrey, & Phelan, as solicitors for the plaintiff, recovered a default judgment in the County Court against the defendant. The amount recovered for debt is not stated. The costs at this time could not have been very large, but I have no way of ascertaining them. While the matter was in this position, an attaching order was issued upon a debt accruing due by Zelinda Marshead to the defendant. The attachment was in February, 1915. The default judgment was in the previous July. After the attachment, the defendant applied to set aside the judgment, and Mr. Phelan says in his affidavit of the 30th September, 1915, that by consent the defendant was allowed in to defend, "upon the terms that the moneys attached should be paid into Court as soon as the contract was fulfilled." What was done, seeing that it was done by consent of the plaintiff's solicitors and the plaintiff, is important. The order taken out in the attachment proceedings contains this clause: "And it is further ordered that the costs of the judgment creditors upon this application shall be first paid from the said money, and that the balance be then paid to the Sheriff of the City of Toronto to be dealt with under the provisions of the Creditors Relief Act." The garnishee was not ordered to pay until the 26th April, 1915. This order has not been set aside or appealed against, and, I

presume, has been complied with. If the appellants had any right of lien, that would be the time to assert it, I would think. The Creditors Relief Act is explicit as to how moneys are to be dealt with. It is "An Act to prevent Priority among Execution Creditors." By sec. 4, there is to be no priority among execution creditors except as mentioned in the statute. By sec. 5, sub-sec. (1), a creditor who attaches a debt shall be deemed to do so for the benefit of all creditors of his debtor as well as for himself; sub-sec. (2) imperatively requires that the money attached shall be paid to the sheriff, and this even if there is no execution in the sheriff's hands: see sub-sec. (4). Money realised under the Absconding Debtors Act must also be brought in for general distribution, and all shall be entered in a book in a prescribed form and retained for a month, and distributed ratably subject to the specific exceptions. One of these is the costs of the creditor who has the first execution with the sheriff. The plaintiff has not been shewn to be an execution creditor. The other exception would apply to the plaintiff and possibly aid the appellants, that is, the costs of garnishee proceedings are also given priority, but this is provided for by the order referred to. The solicitors have got them.

I shall have to return again for a moment to the history of the case. The solicitors are not appealing from the order referred to. This was made on the 3rd February, 1915. They appeal from an order of the 25th November, 1915. Rule 689 empowers the Court to declare that solicitors are entitled to a charge upon "property recovered or preserved" through their instrumentality. It is a discretionary power, which the Court may or may not exercise: *Pierson* v. *Knutsford Estates Co.* (1884), 13 Q. B. D. 666; *In re Humphreys*, [1898] 1 Q. B. 520; *Harrison* v. *Harrison* (1888), 13 P. D. 180; *Nevills* v. *Ballard* (1898), 18 P. R. 134. A discretion will not authorise any Court to ignore the express provisions of a statute.

Mr. Phelan did not say that his application to His Honour Judge Denton was under this Rule; but, if it was well launched, it necessarily was so. He had no lien at common law, for that is a right of retainer, and can only arise where he has something to retain—where the money is in his own hands. The application was refused, and this appeal is from the order dismissing the motion.

ONT.

S. C.

DALES v. BYRNE.

LENNOX, J.

The obstacles in the way of the solicitors are many and very formidable. The order of the 3rd February has not been set aside or modified, and, while it stands, controls the situation: *In re Arthur Average Association* (1876), 3 Ch. D. 522, at p. 529; *In re London Marine Insurance Association* (1869), L. R. 8 Eq. 176, at p. 193.

The learned County Court Judge has no right or power to make an order inconsistent with his former order while it is in force. His power to amend or discharge it need not be considered, for the double reason that he was not asked to do so, and, if he had been, he would be confronted by the Creditors Relief Act, and he certainly could not amend it in disregard of the rights of creditors without notice to the parties to be affected.

The power of the Court, as I said, is discretionary, and this, if I may say so, would not have been well exercised in the face of the express object and provisions of the statute. It is a discretion in this case, fettered by a very rigid limitation.

The objection, however, that goes to the root of the whole matter is that the statute is plain and clear in its purpose, provisions, and exceptions, and cannot be ignored. To disregard its terms and substitute others would be legislation of a very daring character. It may be said that it is a hardship that the party and party costs of the earlier and later litigation should be distributed, but it is what the statute says, and these costs are not the solicitor's until he gets the proceeds of the judgment into his hands. Even then, it is only a right to retain until a bill of costs has been delivered, and, if so demanded, taxed.

In *Union Bank* v. *Stewart* (1895), 3 Terr. L. R. 342, the solicitor was aided to the prejudice of an attaching creditor, but that was by reason of a provision in the Solicitors Act which we have not here. The money, until it is in the solicitor's hands, whether for debt or costs, is the client's money. There is no separation. In *Hutchinson* v. *McCurry* (1903), 5 O. L. R. 261, a solicitor was allowed to sue directly for costs awarded to his client in an action in which he had acted, in Quebec; but this was because in that Province sec. 553 of the Code provides that "every condemnation to costs involves by operation of law a distraction in favour of the attorney of the party to whom they are awarded." Our law is otherwise; and, even in Quebec, an advocate is "not a party to the action," but an agent only; and in *Beaudin* v. *City*

ONT.

S. C.

DALES v. BYRNE.

Lennox, J.

Riddell, J. Masten, J.

of Montreal (1901), Q. R. 20 S. C. 32 (C. R.), it was held that the solicitor conducting a case in the Records Court of Montreal was not entitled to a distraction, as the Code did not apply to the Records Courts.

I think the appeal should be dismissed, and, being unopposed, should be dismissed without costs.

RIDDELL and MASTEN, JJ., agreed in the result.

Appeal dismissed without costs.

OUELLET v. JALBERT.

N. B.

S. C.

New Brunswick Supreme Court, Appeal Division, McLeod, C.J., White and Grimmer, JJ. November 26, 1915.

1. ADVERSE POSSESSION (§ I H—35)—AGAINST CROWN—TACKING PERIOD AGAINST CROWN GRANTEE.

Adverse possession does not begin to run until the date of the Crown grant; the period in which Crown lands are adversely held will not enure against the Crown grantee.

[Compare *Tweedie* v. *The King*, 27 D.L.R. 53, 52 Can. S.C.R. 197.]

2. PUBLIC LANDS (§ I C—15)—CONCLUSIVENESS OF CROWN GRANTS—PRESCRIPTIVE AND POSSESSORY RIGHTS.

The Act (N.B.) 4 Geo. V. ch. 36, coupled with the provisions of the Act 3 Edw. VII., ch. 19, notwithstanding any previous claims that might exist on the part of any person to the land designated therein, authorizes and empowers the Minister of Lands and Mines to sell such land and to issue a Crown grant thereof, which, when issued, is perfectly good and conclusive against all the world, and a prescriptive title can be of no avail against a grant from the Crown under these special statutes. (*Obiter dictum*).

Statement

APPEAL from a verdict in favour of plaintiff in an action of trespass to land tried before Crocket, J., and a jury. Reversed.

M. D. Cormier, for defendant.

J. E. Michaud, for plaintiff, *contra*.

The judgment of the Court was delivered by

Grimmer, J.

GRIMMER, J.:—This is an action of trespass tried before Crocket, J., and a jury, at the Madawaska County Circuit Court in March last, when on answers by the jury to questions submitted to them a verdict was entered for the plaintiff from which the defendant now appeals, seeking to have a verdict entered for him, or for a new trial.

The land in question is part of a tract in the county of Madawaska, granted by the Crown on February 7, 1876, to the New Brunswick R. Co.

On January 8, 1881, the railway company conveyed, along with other lands, the land in dispute, to the New Brunswick Land and Lumber Co., and on August 1, 1884, the Land and Lumber Co. reconveyed the land to the railway company, in which the

N. B.

S. C.

OUELLET v. JALBERT.

Grimmer, J.

documentary title to same was vested until July 14, 1913, when the last named company conveyed the same to His Majesty, in right of this province.

On July 8, 1914, the Crown granted to the defendant the land in question, comprising a block of 95 acres. All the above several conveyances were duly admitted or proved upon the trial.

In or about the year 1870, one Charles Jalbert, father of the defendant, squatted upon the land with his family, and proceeded to make a clearing, and continued to live and work thereon until November 19, 1887, when he conveyed the property to his son, Alphonse Jalbert. At the time of this conveyance he claimed possession of a block of land estimated to contain 150 acres, some 65 of which it is claimed had been cleared and fenced, and lines spotted about the remainder. The deed was given in consideration of support and maintenance of himself and wife during the balance of their lives, a writing being executed by the son to this effect. The deed purported to convey the whole 150 acres, but evidence was given by the defendant that 2 years before, or in the year 1885, his father had given him the so-called lower half of the lot and put him in possession thereof, and that immediately after the execution of the deed to Alphonse, he, Alphonse, executed a writing whereby he purported to convey to his brother, the defendant, the said lower half of the lot, on condition that the defendant should assist in the maintenance of his parents.

Alphonse took possession under his deed and supported his parents on the land until December 20, 1889, when his father died, and thereafter he continued to reside on the land and support his mother until July 24, 1893, when he left the place, took his effects and went to live in the State of Maine, United States of America, and never returned or occupied the property either personally, or as it appears from the evidence, by an agent or representative. Neither did he thereafter support his mother. On the day Alphonse left the property the defendant moved on the same, and resided on the upper half thereof for 14 years and provided for and supported his mother thereon until the time of her death, in the year 1899, and took and received the income and profits of the land as his own, and without let or hindrance from his brother Alphonse. The trespass for which this action is brought it is alleged was committed upon the upper half, so-called, of the

property, which was, as before stated, granted by the Crown to the defendent on July 8, 1914, but which had been, by a deed covering the whole lot of 150 acres, conveyed to the plaintiff by Alphonse Jalbert on October 14, 1912, he claiming a prescriptive title to the lot through the possession of his father and himself. Upon a question left by the learned Judge, the jury found that Alphonse Jalbert and his father, between them, had, prior to the making of the deed of October 14, 1912, maintained an open, continuous and exclusive possession of the land (the whole lot) for a period of 29 years. This question of possession is the only important issue in the suit.

From the evidence it appears Charles Jalbert first settled on the land in 1870, when it belonged to the Crown and in which it remained until 1876, so that his possessory claim could not, and did not, begin to run until the grant was made to the railway company in 1876. He conveyed his right to his son Alphonse in 1887, which would be a possessory right of 11 years. Alphonse remained on the land six years, thus making between the two a term of seventeen years, during which there was adverse possession of the land or so much as was cleared and occupied. The question now arises whether or not the possession of the land held by the defendant and his mother, one or both, after Alphonse left enured to his benefit, so that his possession became continuous until it ripened into a legal title.

In the stenographer's transcript of the evidence the following is found to be stated by Alphonse Jalbert on his direct examination:

Q. How long after your father died did you remain on the land? A. Almost four years. Q. And during that time did you take care of your mother? A. Yes. Q. Did you remain on the land from the time you got the deed from your father, until he died? A. Yes. Q. And continued remaining on the land for about four years afterwards? A. Yes. Q. You took care of your father up to the time he died? A. Yes. Q. And your mother up to the time you left the land. A. Yes, and I took care of father before I had the land. Q. And why did you leave the land? A. I left the land in my mother's hands. Q. You asked her to go over with you to where you were going? A. Yes. Q. And she refused? A. She refused, etc. Afterwards my brother came and took possession of the land. Q. Which brother? A. Ovide. Q. Did you tell him to? A. No, I didn't tell him to. He went there himself. Q. When did Ovide go there? A. I can't tell you when he went there; after I left I suppose. Q. Ovide was there the fall after you left? A. Yes. Q. What time did you leave? A. I left the 24th of July. Q. Then Ovide came there in the following fall? A. Yes, the same summer I left there. Q. Is that the time you say Ovide went there and took possession?

N. B.

S. C.

OUELLET v. JALBERT.

Grimmer, J.

A. Well I suppose he calculated to have possession. Q. He went there to live, anyway? A. Yes. Q. In the house? A. Yes. Q. How long was it before you found out that Ovide had gone on and taken possession? A. I found out a month and a half after he was there with my mother. Q. Then you found out when Ovide went there about the same time he actually did go there? A. No, I didn't tell him to go there. Q. How long did Ovide remain on the land after his mother died, to the best of your knowledge? A. He has been taking all the profit off the land since my mother died. Q. Up until when? A. From the time my mother died.

Further on he says he knows Ovide had the profits of the land, and that the year he left he sent his wife after a load of grain, and Ovide would not give her anything.

On cross-examination he says he left the land and the grain to his mother, the land in the hands of his mother.

Q. And you say that after that Ovide, your brother, took possession of the land? A. Yes, he went there to stay with her. Q. Did you say this morning that he took possession of it? A. That is what he calculated to do. Q. Did you say this morning that he took possession of it? A. That is what I say, that he must have taken possession of it. Q. Did you say you didn't tell him to go there? A. No, I didn't tell him to go there. Q. He went there himself? A. Yes he went there himself. Q. Did he ever render you any account of anything that was taken from the land? A. No. Q. Did you ever ask him to account for what was growing on the land, or whatever he was doing with the land. A. No. Q. Do you remember having sworn to this statement in that affidavit: "That during such period, between the year 1892 to the year 1911, my said brother, Ovide Jalbert, occupied my said farm and premises as my agent." Did you swear to that? A. If I swore to that I didn't understand it or I would never have sworn to it. Q. And do you say now that from the year 1892 to the year 1911, Ovide Jalbert was not occupying the Jalbert farm as your agent? A. I was letting him cut the stuff off the land for his own use. Q. Did you ever tell him to go there? A. No I never told him to go there. Q. Then he wasn't there as your agent? A. He went there himself. Q. Was he there as your agent? A. He took possession to go there himself. Q. Was Ovide Jalbert on this Jalbert farm as your agent after you left the country? A. I never put him agent.

In addition to the evidence of Alphonse, there is the statement of the defendant that he went to the premises the day his brother left. That he knew he had left from seeing his wife pass with the furniture, and that he found his mother crying, and she said to him come and live with me and take care of me, it will remain to you, and that he moved on to the place that day. That he and his mother lived there 6 years before she died. That he supported her without any help from his brother, and that he lived there 8 years after she died. That he paid the taxes on the property from the time he went there to live with his mother to the present time, and took and received the profits of the land,

claiming it as his. That he never renounced any rights to the land his mother gave him, this being the same land as was granted to him by the Crown, or the upper half of the lot. Further that the plaintiff on one occasion offered him $75 for his claim on the land; and that the plaintiff's husband had obtained from him the privilege of making maple sugar on the land. That in other respects he used and treated the land as his, without any protest or objection on the part of his brother Alphonse, and finally obtained a grant of it.

From this evidence it seems conclusive that the defendant was not the agent of his brother in his occupancy of the land, and was never so considered by him; and that his occupation of 14 years was not such as to enure to the benefit of Alphonse so as to justify the jury as reasonable men in finding an adverse possession of 29 years in Charles and Alphonse Jalbert, there being nothing to support the finding, and it is therefore against evidence and the weight of evidence. The most that can be made of the evidence gives only an adverse possession of 17 years, which is not sufficient to vest any title in Alphonse Jalbert to the land, and the deed from him to the plaintiff therefore does not convey any title, or render the grant from the Crown to the defendant ineffective or void, and this action fails.

Having arrived at this conclusion, it is unnecessary to consider the other points raised on the trial of the case, but without so deciding, I am very strongly of the opinion that the Act of Assembly, 4 Geo. V., ch. 36, coupled with the provisions of the Act, 3 Edw. VII., ch. 19, notwithstanding any previous claims that might have existed on the part of any person or persons to the land, authorized and empowered the Minister of Lands and Mines to sell the land in question to the defendant and to issue a Crown Grant thereof to him, which would be perfectly good and conclusive against all the world, and even if a prescriptive title had been proved it would not have availed against the grant from the Crown under these special statutes. The Judge on the findings of the jury, but against his own view, allowed the verdict to be entered for the plaintiff, and as I am of the opinion the finding as to the adverse possession is not justified and cannot be sustained under the evidence, the motion to enter a verdict for the defendant will be allowed with costs.

Verdict set aside; judgment for defendant.

CAN.

Ex. C.

MORRISETTE v. THE "MAGGIE."

Exchequer Court of Canada (British Columbia Admiralty District), Hon. Mr. Justice Martin, L.J. in Adm. March 21, 1916, March 22, 1916.

1. SEAMEN (§ 1—4)—WHO ARE—FISHERMEN—SLEEPING QUARTERS—LIEN FOR "LAY" WAGES.

Persons employed on a small launch on a salmon fishing "lay" and performing work thereon in the double capacity of sailors and fishermen, though most of their time is occupied in fishing and though not having any sleeping quarters on board the vessel, are nevertheless "seamen" and entitled to their maritime lien for seamen's wages; but the lien will not attach if the use of the vessel is no part of the agreement on which the "lay" is based and merely allowed by the owner as a matter of convenience.

[*Swinehammer* v. *Sawler*, 27 N.S.R. 448, followed; *Farrell* v. *The "White,"* 20 B.C.R. 576, referred to.]

2. COSTS (§ 1—19)—CONSOLIDATION ACTION FOR SEAMEN'S WAGES—JOINT OR SEVERAL LIABILITY.

Where a number of seamen, by consolidation, join in one action their individual claims for wages against the owner of one or more ships engaged in a common enterprise with resulting liens on different ships, each claimant is not thereby liable for costs consequent upon the failure of another claimant to establish a specific lien not set up by the former, but the costs in each case is awarded according to the discretion conferred by r. 132 (B.C.).

Statement

ACTION to enforce seamen's liens for wages. Dismissed.

Wintemute, for the four plaintiffs.

Brydon-Jack, for defendant, Wm. Bampton.

Martin, L.J. in Adm.

MARTIN, L.J. in Adm.:—These are consolidated actions by Chief Julius, an Indian, of Sechelt, and his two sons for $726.50 for seamen's and fishermen's wages, to answer which the gasoline fishing boat "Maggie" has been arrested. The wages are claimed on a salmon fishing lay of the three Indians and one H. J. Cook whereby it is alleged that the four men were to work on a lay with George Bampton who was to furnish the said launch and fishing gear and skiff, and after deducting the expenses of provisioning and running the boat the proceeds were to be divided between all parties as follows: two shares to Bampton and one share to each of the other four, based upon the following prices for various kinds of salmon, *viz*, 25 cents for cohoes, 5 cents for dogs, 3 cents for hump-backs and 40 cents for sock-eyes, which fish were to be sold to Sherman's cannery by George Bampton and a settlement made at the end of the fishing season, which ended with the closing of the cannery on September 16. Cook also joined in the action but at the trial it was announced that he had withdrawn his claim.

This subject of seamen's wages in the form of a lay has recently been considered by this Court in *Farrell* v. *The "White,"* 20

B.C.R. 576, a whale fishing case, and I have nothing to add to that decision except to say that it is in general accordance with the decision of the Supreme Court of Nova Scotia *en banc* in *Swinehammer* v. *Sawler*, 27 N.S.R. 448. That case was cited in answer to the contention on behalf of the owner of the "Maggie" that on the facts here the three Indians were fishermen only and therefore could not have a seaman's lien. But I am of the opinion that upon the evidence before me it must be held that each of the four lay men not only fished but took part in the working of the boat as a seaman, *e.g.*, in steering, or tending her, while fishing or taking on or discharging her cargo of fish, or cleaning her as occasion arose, or as was otherwise necessary, though most of their time was occupied in fishing, and they did not sleep on board of her but on the shore or in the Indians' rancherie near by. Much stress was laid by the defendant upon this fact of not sleeping on the vessel, but that, while important, is not the sole or true test of the capacity in which men are acting on or about a vessel either temporarily, as *e.g.* in the case of seamen camped for weeks on an island trying to salve their stranded ship from an adjacent reef, or permanently, as *e.g.* in the case of a crew of a river boat or ferry which ran only in the day time and had insufficient sleeping accommodation for all her crew. It is only a question of degree, the principle is the same in the case of mariners on a big ship on a long whaling lay or a small launch on a short salmon lay. Such being the facts, the *Swinehammer* case above cited decides that where one is

> employed in the double capacity of sailor and fisherman (he is) therefore clearly a seaman under the definition given in the sub-section—

now sub-sec. (*g*) of sec. 126 of the Canada Shipping Act, R.S.C. ch. 113, and *cf.* the definition of "ship" in sec. 2 (*d*), and also sec. 294 recognizing "contracts for wages by the voyage or by the run or by the share." It would follow, therefore, in the absence of other objection, that these Indian seamen would be entitled to their maritime lien.

But two further objections are raised to their right to recover; first, that under this lay there was to be no payment till after the proceeds had been received by George Bampton from the cannery; and second, that William Bampton, brother of George, was the owner of the "Maggie," on board of which he lived, and was also

CAN.
EX. C.
MORRISETTE v. THE "MAGGIE."
Martin, L.J. in Adm.

one of the lay men and as such allowed it to be used as a matter of personal convenience to himself and mere favour and friendly assistance to the others as his mates and fellow lay men, and therefore there could be no lien upon it as the use of it was *dehors* the contract with George Bampton who, it was alleged, did not agree to furnish the launch but merely the gear, skiffs, etc.

With respect to the first, it is to be noted that, as alleged, this is a different lay, in this particular, from that in *Farrell* v. *The "White"*, *supra*, wherein the wages were to be paid monthly, and according to the plaintiff's contention it is like that in *Swinehammer's* case, wherein they were to be paid on delivery to the market. But I must say I have much doubt on the point as to exactly what the lay was, the evidence being far from clear in several respects (particularly the price that was to be obtained from the cannery) and I think it better not to go into it fully now, because there are other similar claims to be tried in regard to two other fishing launches arrested in this action, the "Eva" and the "Echo." There is, however, something appreciable at least to support the defendant's contention that George Bampton was not to pay the claimants till he had been paid by the cannery, of which essential condition precedent no satisfactory evidence has been given, but as I have come to a clear decision on the second objection I do not, for the reasons above indicated, decide this point, as it is unnecessary. Then, as to the second objection, I find, as a fact, to put it briefly, after a careful consideration of the conflicting and unsatisfactory evidence, on both sides, that the plaintiffs have not discharged the onus cast upon them to prove that the use of the "Maggie" was part of the agreement on which the lay is based, and I am forced to the conclusion that, on the evidence, she must be held to be the property of William Bampton and to have been used by him personally, apart from the lay agreement, in the manner contended for, and therefore she is not subject to the lien from which she is hereby discharged, and also released from arrest, and the action as regards the claim of the three Indians and Cook is dismissed with costs.

Action dismissed.

MARTIN, L.J. in Adm., March 22, 1916:—This is a reference by the registrar and solicitors arising out of the taxation of costs after the judgment delivered on February 25, last. Nine

plaintiffs joined in one consolidated action for wages alleged to be due to them by George Bampton on a fishing lay in connection with the gasoline fishing boats "Maggie," "Eva," and "Echo," and the "Maggie" was arrested under a separate warrant, issued at the instance of their joint solicitor, founded solely on an affidavit of Thomas Julius, one of the plaintiffs, claiming a lien for $281.25 for his wages. By the indorsement of claim on the writ it clearly appears that only four of the plaintiffs, *viz.*: Chief Julius and his two sons, Thomas and Patrick, and Harry James Cook, set up any claim against the "Maggie," the others "respectively" claiming against the "Eva" and the "Echo." The various groups of claims against the respective vessels are properly segregated and alleged as being due to the respective laymen while operating the ship "Maggie," or "Eva," or as the case may be. George Bampton entered an appearance and denied that he was the owner of the "Maggie." His brother William Bampton claimed to be her owner, and was added as a defendant by consent and appeared by separate solicitor in order to support his claim.

The action as regards the four claims for a lien upon the "Maggie" came on for trial on February 28 and it resulted in favour of William Bampton, he being declared to be the owner thereof and she was declared free from any lien and released from arrest. On my reasons for judgment it was ordered that "the action as regards the claim of the three Indians and Cook is dismissed with costs," which left the claims of the other plaintiffs against the other vessels open for future trial, as well as the claims of the present four plaintiffs against George Bampton. The formal judgment, when first submitted to me for approval, to see that it was in accord with my judgment, was marked "approved" by the solicitors, and, after setting out the full style of cause including the nine plaintiffs, read thus:—

> The Judge having heard the plaintiffs, Chief Julius, Thomas Julius, Patrick Julius and Henry James Cook, the witnesses on their behalf, and their counsel, and William Bampton, and the witnesses on his behalf, and his counsel dismissed the action as against William Bampton and the ship "Maggie," and set aside the arrest of the ship "Maggie," and directed that the said ship "Maggie" be released forthwith.

I approved this order, but later the solicitor for William Bampton applied to me, on the 9th instant, just as I was leaving the Law Courts to return to Victoria and pointed out that by an oversight the direction as to costs given in my reasons had been omitted

CAN.
EX. C.
MORRISETTE
v.
THE
"MAGGIE."
Martin, L.J.
in Adm.

so I added the words "and condemned the plaintiffs in costs." On taxation of costs it was urged that these words extended to the other five plaintiffs named as such in the writ and warrant in addition to those recited in the said judgment as having been concerned in the trial against the "Maggie." This contention, in my opinion, cannot be supported in the circumstances of this case, whatever might be the result in other consolidated actions where general and undefined claims are set up and persisted in by consolidated plaintiffs as a whole. From the very beginning the liens claimed against the various vessels were clearly distinguished and at no time upon the record was the "Maggie" alleged to be liable for any liens except those of the four plaintiffs, and it was their claim alone against her that was in issue and adjudicated upon at the trial. Therefore it follows that they alone should be answerable for the failure of their claims and having regard to the issues, trial and context they are "the plaintiffs" who are referred to in my said addition to the judgment as being condemned in costs. This is the real "result," mentioned in r. 132, so far as they are concerned. There is, moreover, no hardship in this because if these four plaintiffs had brought this action apart from the other claimants the result would have placed the successful defendant William Bampton in no better and no worse position as regards the recovery of costs than he is now. It was quite proper, as well as convenient, to have consolidated all these claims according to the practice of this Court referred to in the judgment in *Cowan* v. *The "St. Alice,"* 8 W.W.R. 1256, at 1260, for by so doing considerable costs might have been saved (and indeed may be so yet, as regards the other pending claims) and in any event no additional costs would have been incurred; the various parties would have been and can be protected in this respect on taxation by a proper apportionment.

The point, in principle, and put briefly, is that merely because various seamen take advantage of the said convenient practice to join in one action their individual claims for wages against the owner of one or more ships engaged in a common enterprise with resulting liens on different ships, it does not follow that each claimant is liable for costs consequent upon the failure of another claimant to establish a specific lien which the former never set up. The costs in each case would be awarded according to the discretion conferred by said r. 132. To reverse the present position;

if the four plaintiffs who alone participated in the trial of this particular lien had been successful, I should not have felt justified in also awarding costs to the other five plaintiffs who were not concerned, and took no part therein, and could derive no benefit therefrom.

The result is that the submission of the four plaintiffs is upheld and they are entitled to set off any costs occasioned by this controversy.

Judgment accordingly.

BOWKER FERTILIZER CO. v. GUNNS LTD.

Exchequer Court of Canada, Cassels, J. April 28, 1916.

1. TRADE MARK (§ II—9a)—DESCRIPTIVE WORDS—SECONDARY MEANING—EXPUNGING FROM REGISTRY.
"Sure-Crop" or "Shur-Crop," as applied to fertilizers, are ordinary words descriptive of the quality of the article, incapable of acquiring a secondary meaning and not registrable as a valid trade mark, and should be expunged from the register.

Statement

PROCEEDINGS to set aside a ruling of the Commissioner of Patents refusing the registration of a trade-mark.

H. Fisher and *R. S. Smart*, for petitioners.

W. H. Clipsham, for respondents.

Cassels, J.

CASSELS, J.:—The Bowker Fertilizer Co. commenced proceedings pursuant to the provisions of the Trade Mark and the Exchequer Court Acts to have the ruling of the Commissioner of Patents, refusing to register the words "Sure-Crop" as a specific trade mark to be applied to the sale of fertilizers set aside.

The alleged ground of refusal by the Commissioner was the existence on the trade mark register of a trade mark registered on July 27, 1912, by the contestants Gunns Ltd. This trade mark consists of "a boy pressing the muzzle of a gun against a target on which appear the words 'never misses,' above the design being the name 'Shur-Crop' as *per* the annexed pattern and 'application.'" The Bowker Fertilizer Co., in addition to their application to have their trade mark registered, pray that the trade mark of the Gunns Ltd. may be expunged from the register.

The Bowker Fertilizer Co. are a foreign company incorporated in the United States of America. Gunns Ltd. are a corporation incorporated in Ontario with headquarters in Toronto.

I will first consider the application of the Bowker Fertilizer Co. to have the words "sure-crop" as applicable to fertilizers

CAN.
EX. C.
BOWKER FERTILIZER CO. v. GUNNS LTD.
Cassels, J.

registered as a trade mark. Dealing with this question irrespective of any secondary meaning these words may have obtained as denoting goods manufactured or sold by the Bowker Fertilizer Co., I am of opinion they are not words which should be registered. They are words merely indicative of the quality of the fertilizer. Two plain common English words without any pretence of being fancy words.

The construction of the Canadian Trade Mark Act is dealt with in *Standard Ideal Co.* v. *Standard Sanitary Manuf.*, decided by the Board of the Privy Council and reported in [1911] A.C. 78 at 84. A case in our own Courts is peculiarly apposite: *Kirstein* v. *Cohen*, 39 Can. S.C.R. 286, involving "shur-on" and "staz-on" as applicable to glasses for the eyes.

It is contended by counsel for the Bowker Fertilizer Co. that, even if these words do not come within the class of words capable of registration, yet by reason of long use they have obtained a secondary meaning as denoting the goods of the applicants. It is a question whether ordinary English words of this character ever could obtain a secondary meaning. See *Application of Joseph Grosfield & Sons Ltd.*, 26 R.P.C. 854 (1909). In this case the words "sure-crop" were not used as a trade mark. They were usually used in connection with the name Bowker. The goods sold by the Bowker Co. were sold in bags which were labelled "Bowker Sure-Crop." A case of resemblance is *Perry Davis & Son* v. *Harbord*, L.R. 15 A.C. 316. The application was to register the words "Pain Killer." The British Trade Mark Act of 1875 provided for the registration also of any special and distinctive word "or words or combination of figures or letters used as a trade mark before the passing of this Act may be registered as such under this Act."

It was pointed out in the reasons for judgment that the words "pain-killer" had not been used as a trade mark before the passing of the statute but always in conjuncton with other words, namely, "Perry Davis, etc." Registration was refused. Lords Halsbury and Morris also expressed strong views on the question whether these words were capable of registration as being merely descriptive. I think the application of the Bowker Co. to register must be refused.

The most prominent feature of the trade mark of Gunns Ltd. are the words "Shur-Crop." Douglas W. Gunn, an employee

of Gunns Ltd., was a witness. He states that Gunns Ltd. ceased using any part of their trade mark except the words "Shur-Crop" on their bags at all events as early as 1914, the reasons being they could not reproduce it on their bags. He states as follows: Q. That (referring to the words "Shur-Crop") is now the only thing that marks your goods? A. Yes and the analysis. Q. And all your goods are put up in bags? A. Yes. Q. So that you do not now mark your goods as originally registered? A. No. Q. Then in your opinion the words "Shur-Crop" were the important elements of your trade mark? A. Naturally a man in asking for a brand would not ask for the boy and gun on it he would ask for Gunns "Shur-Crop" fertilizer—he would always connect the manufacturer with the words. A. And that was your intention when you registered and proved to be the fact? A. Yes.

The Bowker Co. are a large corporation. For years prior to the commencement of business of Gunns Ltd. of the sale of fertilizer under the name "Shur-Crop" the Bowker Co. had their goods on the American and Canadian markets with the brand "shur-crop." Douglas W. Gunn may not have known about the Bowker Co. He is an employee of the company. There are other members of the company. It is not material whether they knew or not but the belief that they did not know may be commended to Judæus Apella. See *per* Burbidge, J., *Re Melchers and DeKuyper*, 6 Can. Ex. 83 at 101.

I think the existence of this trade mark is apt to lead to confusion and that the registration of the trade mark in question should be expunged.

Counsel for Bowker Co. are satisfied if the words "Shur-Crop" are removed and the registry amended accordingly, and if Gunns Ltd. prefer it, the order can issue in this shape.

As success is divided, each party should bear their own costs.

Judgment accordingly.

Annotation—Trade Mark—Descriptive and distinctive words—Secondary meaning—Right to expunge. Annotation

BY RUSSEL S. SMART, B.A., M.E., OF OTTAWA.

Under the Trade Mark and Design Act "any person aggrieved" may petition to expunge or vary a registered Trade Mark. The words "any person aggrieved" embrace any one who may possibly be injured by the continuance of the Mark on the Register in the form and to the extent it is so registered. (*Per* Davies, J., *Re Vulcan Trade Mark*, 24 D.L.R. 621, 51 Can. S.C.R. 411.)

In the present case only part of the trade mark was expunged. It is

CAN.

Annotation

Annotation (*Continued*)—**Trade Mark—Descriptive and distinctive words—Secondary meaning—Right to expunge.**

the practice in England to expunge a part of a trade mark where the registrant is not entitled to the same. (*Faulders Trade Mark*, 18 R.P.C. 37, 555. Word "Silverpan" and signature registered for preserves. Word "Silverpan" common to trade, held ought to be disclaimed. *Burland* v. *Broxburn Oil Co.*, L.R. 42 Ch.D. 274, "*Washerine*" ordered disclaimed from a label trade mark. *Re Biegel's Trade Mark*, 4 R.P.C. 525, "*Triangle*" expunged from registered trade mark.)

On the question of descriptiveness, the case of *Kirstein* v. *Cohen*, 39 Can. S.C.R. 286, is very close. The Supreme Court in this judgment said:—"The hyphenated coined words 'Shur-on' and 'Staz-on' are not purely inventive terms, but are merely corruptions of words, descriptive of the goods (in this case, eye-glass frames) to which they were applied, intending them to be so described, and therefore, they cannot properly be the subject of exclusive use as trade marks."

Davies, J., in the judgment said: "I hold these terms to be merely corruptions of words descriptive of the eye-glass frames to which they are intended to be applied—and that they were intended to be so descriptive."

In the case of the *Standard Ideal Co.* v. *Sanitary Manufacturing Co.*, [1911] A.C. 78, the judgment of the Judicial Committee of the Privy Council in part read as follows:—"Now the word 'Standard' is a common English word. It seems to be used not unfrequently by manufacturers and merchants in connection with the goods they put upon the market. So used it has no very precise or definite meaning. But obviously it is intended to convey the notion that the goods in connection with which it is used are of high class or superior quality or acknowledged merit."

Without attempting to define the essentials necessary to constitute a trademark properly speaking, it seems to their Lordships perfectly clear that a common English word having reference to the character and quality of the goods in connection with which it is used and having no reference to anything else cannot be an apt or appropriate instrument for distinguishing the goods of one trader from those of another. Distinctiveness is the very essence of a trade mark. The result is, in accordance with the decision of the Supreme Court in *Partlo* v. *Todd*, 17 Can. S.C.R. 196, that the word though registered is not a valid trade mark."

The possibility of acquiring a secondary meaning for a descriptive word was dealt with in detail in the well known *Camel Hair Belting* case—*Reddaway* v. *Banham*, 13 R.P.C. 218. The following English cases on this point may be noted: "*Slip-on*" *Burberrys* v. *Cording*, 26 R.P.C. 293, "*Health Cocoa*" (*Henry Thorne Co. Ltd.* v. *Sandow*, 29 R.P.C. 440), "*Yorkshire Relish*," *Powell* v. *Birmingham Vinegar Brewery Co.*, 11 R.P.C. 563.

The English cases have gone a long direction on this point. In the case of *W. N. Sharpe Ltd.* v. *Solomon Bros.*, 32 R.P.C. 15, the word "Classic" was held incapable of being treated as adapted to distinguish or acquire a secondary meaning.

In Canada a secondary meaning was referred to as having been acquired in at least two cases. (*Provident* v. *Canada Chemical Co.* (1902) 4 O.L.R. 545) and (*Gillett* v. *Lumsden* (1904), 8 O.L.R. 168).

In *Boston Rubber Shoe Co.* v. *Boston Rubber Co. of Montreal*, the word "Boston" was found to have acquired a special meaning. (32 Can. S.C.R. 31).

In *Re Elkington & Co. Trade Mark*, 11 Can. Ex. 293, it was pointed

Annotation (*Continued*)—Trade Mark—Descriptive and distinctive words—Secondary meaning—Right to expunge. CAN.

Annotation

out that a surname may acquire distinctiveness and become well known throughout the world through long continued use.

In *Bucyrus Trade Mark; Bucyrus Co.* v. *Canada Foundry Co.*, 8 D.L.R. 920, 14 Can. Ex. 35, a geographical name was found to have acquired a secondary meaning.

KOSKI v. CANADIAN NORTHERN R. CO.

MAN.

C. A.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A., March 27, 1916.

1. MASTER AND SERVANT (§ II E 2—215)—SAFEGUARDS AT BRIDGE OPERATIONS—DELEGATION OF WORK—COMPETENT MANAGEMENT—NEGLIGENCE OF SUPERINTENDENT—EMPLOYER'S LIABILITY.

Where operations for the lowering a wooden approach to a bridge have been placed under the competent management of men experienced in the work, and all materials and appliances for taking every needed precaution against accidents provided, an omission of the superintendent or foreman to sufficiently safeguard a false bent in the structure resulting in an injury to an employee, not attributable to a defect in any permanent structure in respect of which the master owes a duty to safeguard, is negligence of the management and not of the master, for which the latter cannot be held liable at common law, and recovery in such case can only be had under the Employers' Liability Act, R.S.M. 1913, ch. 61.

[*Can. North. R. Co.* v. *Anderson*, 45 Can. S.C.R. 355; *Smith* v. *Baker*, [1891] A.C. 325, distinguished; *Wilson* v. *Merry*, L.R. 1 H.L. (Sc.) 326; *Bergklint* v. *West. Can. Power Co.*, 50 Can. S.C.R. 39, applied; see also 24 D.L.R. 565.]

Statement

APPEAL from a judgment in favour of plaintiff in an action at common law and under the Employers' Liability Act, R.S.M. 1913, ch. 61. Varied.

O. H. Clark, K.C., for appellant, defendant.

W. H. Curle and *W. J. Wright*, for respondent, plaintiff.

The judgment of majority of the Court was delivered by

Perdue, J.A.

PERDUE, J.A.:—The defendants were performing the work of lowering the wooden approach to the Norwood Bridge. One Julian was appointed by them to oversee the work, and under him was a foreman named Beck. The main part of the work was performed while the bridge was in use for general traffic by the public and for street cars. The bridge is not used by the defendants as a railway bridge, but they had been ordered by the Railway Board to do the work for purposes connected with their railway viaduct which crosses the street leading to the bridge. The wooden approach appears to have been supported by false work until the necessary changes were made and then the superstructure was lowered upon the permanent supports and upon the first pier of the bridge. Immediately adjoining this pier a temporary bent, called in the evidence a loose bent, had been used to support the extreme end of the superstructure. This bent

MAN.

C. A.

KOSKI v. CANADIAN NORTHERN R. CO.

Perdue, J.A.

rested on jacks. As the jacks were lowered the intention was that the bridge would sink gradually and keep pressing upon the bent and, in this way, holding it in place. It appears that no precaution was taken to keep this loose bent in place by tying it up with ropes. The plaintiff, who was in the employ of the defendants, was at work upon one of the jacks under the bent. For some reason that is not clear, the bent appears to have been lowered faster than the superstructure, with the result that the bent was no longer held in place by pressure and fell, causing serious injury to the plaintiff. The action is brought both under the Employers' Liability Act and at common law.

The following is a copy of the questions submitted to, and the answers returned by the jury:—

1. Was the injury to the plaintiff caused by negligence? A. Yes. 2. If so, what did the negligence consist of? (State any act of negligence, or omission, or both.) A. By omitting to safeguard sufficiently the only false bent under the structure. 3. And whose negligence was it? A. It was the C. N. R. Co.'s, through their authorized bridge superintendent, Mr. Julian, and the bridge foreman, Beck. 4. Was the plaintiff guilty of contributory negligence? A. No. 5. And if so, how? No answer. 6. What is the amount of damages? A. $7,500.

The above answers show that the negligence which caused the injury was the omission to safeguard the bent which fell. The answer to the third question further shows that this negligence was caused "through," that is, "by," the defendant's authorized superintendent, Julian, and their bridge foreman, Beck. There is no finding upon the question of the competency of either of these persons. The evidence shows that Julian, who was on the spot and superintending the operation, was a person of great experience and competence in work of that nature. It is also shewn that Beck was competent. The trial Judge in charging the jury told them in effect that the evidence shewed that Julian and Beck were competent. I cannot find that any objection was taken to this. The operation was one which the defendants necessarily had to perform through persons appointed by them to direct and superintend the work. The common law duty of a master in such case is defined in the much quoted rule laid down by Lord Cairns in *Wilson* v. *Merry*, L.R. 1 H.L. (Sc.), 326, 332, as follows:—

What the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my

opinion, done all that he is bound to do, and if the persons so selected are guilty of negligence this is not the negligence of the master.

Now we find that the operation in question in the present case was performed under the superintendence and direction of a competent superintendent and foreman. The evidence shews that there were in hand the necessary materials or appliances for taking the very simple and sufficient precaution of tying the loose bent to the permanent superstructure of the bridge and preventing the bent from falling. Or, the bent might have been guyed up with ropes or lowered, as the other bents were, on that night, by block and tackle which was on hand for the purpose. No doubt, the jury has found, and the evidence was ample to support the finding, that there was negligence upon the part of both the superintendent and the foreman. But such an isolated act of negligence on the part of an otherwise competent fellow servant does not make the master responsible, and the negligence remains that of the servant and not that of the master: *Cribb* v. *Kynoch*, [1907] 2 K.B. 548; *Young* v. *Hoffman*, [1907] 2 K.B. 646. That the superintendent, Julian, was a fellow servant of the plaintiff must be taken as established: *Wilson* v. *Merry*, *supra*, at 334 and 345; *Hedley* v. *Pinkney*, SS.Co., [1894] A.C. 222.

In *Canadian Northern R. Co.* v. *Anderson*, 45 Can. S.C.R. 355, the jury found that the foreman from whom Anderson received his instructions was not competent. It is not an authority applicable to the facts in the present case.

Plaintiff's counsel contended that there was no evidence of any other system of doing the work in which the plaintiff received his injury and that the one employed was a dangerous one. He sought to apply the principles expounded in *Smith* v. *Baker*, [1891] A.C. 325. I cannot see how that decision applies in the present case. The accident caused to the plaintiff was due to a mere incident which happened in performing the work of changing the approach to the bridge. The accidental fall of the temporary bent did not differ substantially from the accidental fall of a loose piece of timber carelessly left leaning against the structure. The evidence of Dunisk, an experienced bridge builder, stated that it was usual to secure the top of the bent and that Beck, the foreman, had been in the habit of doing so before. The precautions to be taken in removing a temporary bent or in carrying out any matter incidental to the performance of the work,

MAN.

C. A.

KOSKI v. CANADIAN NORTHERN R. CO.

Perdue, J.A.

are duties of management or superintendence that the master may perform by employing competent persons to do for him. The neglect of the precautions which the foreman took in other cases, and which he should have taken in this, was not the neglect of his employer.

In *Bergklint* v. *Western Canada Power Co.*, 50 Can. S.C.R. 39, Duff, J., at p. 52, points out the distinction between the duty of the master in relation to the safety not only of structures, but of arrangements that are relatively permanent, and

> his duty as regards measures which are required from time to time to secure safety in the operations in which the workman is engaged and which must of necessity vary with the progress of the work and changing times and places. This latter (he says) is treated as a duty of management or superintendence which the master may discharge by employing competent persons whose duty it is to perform it and supplying them with the necessary resources to enable them to do so.

In support of this he cites several passages from *Wilson* v. *Merry*, *supra*, and refers to other cases which draw a distinction between the master's duty in relation to the safety of structures in the first instance and his duty in relation to maintenance as a part of the duty of superintendence. He points out that in *Ainslie M. & R. Co.* v. *McDougall*, 42 Can. S.C.R. 420, and *Brooks, Scanlon* v. *Fakkema*, 44 Can. S.C.R. 412, the breach of duty charged was the failure to make provision in the first instance.

Anglin, J., in the *Bergklint* case draws the distinction between that case and *Ainslie* v. *McDougall*, *supra*, that the nature and extent of the protection for workmen required in the first case must have varied at different spots in which they were from time to time doing their work.

> It was not (he says) a case of defective installation of a permanent structure for protection, as in *Ainslie M. & R. Co.* v. *McDougall*, *supra*, where the roof in a mine was defective, or of negligence in maintaining a permanent appliance as in *Canada Woollen Mills* v. *Traplin*, 35 Can. S.C.R. 424, where the elevator in a mill or factory was worn out. The protection alleged to have been lacking in this instance was not for a place where men would be required to work in the same spot and under the same conditions for any considerable time. (p. 65).

Further on he says:

> What kind and extent of safeguard would be necessary and best suited for each spot in which workmen were from time to time engaged was necessarily left to the determination of the superintendent or foreman. (p. 66).

He pointed out that in the *Fakkema* case the Court proceeded on the assumption that it was dealing with a permanent or quasi-permanent instalment of an engine in a place where the men who

were engaged about it would be required to work for a considerable period of time.

Now the accident in question in the case at bar did not arise from a defect in any permanent structure which it was the duty of the defendants to safeguard for the protection of their servants, but from an unforeseen situation and occurrence which suddenly presented itself in the course of the work and which the defendants, as masters, were not bound to foresee and provide against. I think the authorities support the view that the defendants had fulfilled their obligations towards the plaintiff when they placed the superintendence of the work in the hands of competent persons and provided the simple appliances the use of which would have prevented the accident. The negligence of the superintendent and foreman was not, in the circumstances, the negligence of the defendant.

The only negligence which the jury found, or which in fact the evidence would support, was "omitting to safeguard sufficiently the only false bent under the structure." The duty of safeguarding the bent was a matter of management or superintendence which the defendant was justified in delegating to competent persons; provided that the necessary appliances had been furnished, as actually had been done.

I regret that I have to come to the conclusion that the defendant is not liable at common law. The plaintiff's injuries were very severe and involved the loss of a leg. The amount recoverable in such a case under the Employers' Liability Act is quite inadequate, in my opinion, to compensate the plaintiff for his injury and the loss and expense attendant upon it. On the argument it was agreed by counsel for both parties that the limit of compensation in this case should be fixed at $2,800 in the event of it being found necessary to enter a verdict under the Employers' Liability Act. The plaintiff is entitled to damages under the Act and in view of his injuries I would allow him the utmost amount recoverable.

The judgment entered for the plaintiff should be reduced to $2,800 and costs in the Court of King's Bench. In view of the fact that the defendant applied to enter a non-suit or a verdict for the defendant and his appeal has failed in part, there should be no costs in this Court.

RICHARDS and CAMERON, JJ.A., dissented.

Appeal allowed in part.

ONT.

S. C.

PEARSON v. CALDER.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. February 4, 1916.

1. GUARANTY (§ 1—2a)—PROMISSORY NOTE FOR INFANT'S DEBT—ORIGINAL UNDERTAKING—LIABILITY.

A promissory note given by a third person for the purchase price of a business purchased by an infant is an original undertaking on which the maker is primarily liable and not a guaranty of the infant's debt. [*Harris* v. *Huntbach*, 1 Burr. 373, applied.]

Statement

APPEAL by the defendant from the judgment of Snider, Senior Judge of the County Court of the County of Wentworth, in favour of the plaintiff, in an action upon a promissory note. Affirmed.

W. S. MacBrayne, for appellant.

C. W. Bell, for plaintiff, respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The only ground upon which this appeal is brought here, and the only ground upon which it is now attempted to support it here, is that the appellant was in truth a surety only for the payment of a legal debt of her sister, and that there never was any such debt, and so never was any liability on the defendant's part.

At the trial it was urged also that, even if that were not so, there was no consideration for the making by the defendant of the promissory note in question, and so payment of it could not be enforced; but no such contention is made here, it could not reasonably be made: the goods and business in question formed the consideration, and it is quite immaterial whether the defendant herself took possession, and had the beneficial enjoyment of them, or let her sister have both.

The circumstances of the case are simple, and there was no conflict of testimony respecting any of the transactions upon which the legal rights of the parties depend. Neither the defendant, nor her sister, gave evidence at the trial; no witness was called for the defence.

The defendant's sister, who was about 18 years of age, had worked for the plaintiff, in her business of a milliner, carried on at Hamilton, with a branch shop at Brantford; and, desiring to go into business for herself, the sister approached the plaintiff with a view to obtaining first the Hamilton business, and afterwards that at Brantford: and eventually an arrangement was entered into for the acquisition of the Brantford business and the stock in trade there, by the sister, at what seems to have been

a reasonable price, amounting to a little over $300: and accordingly the purchaser was let into possession, and the plaintiff gave to her a bill of sale of the goods and an informal written assignment of the lease of the shop.

The purchase-money was to be paid by the purchaser's brother, out of her own money which he held in trust for her as her guardian, except as to a small amount, in excess of the $300, which the purchaser said she would herself pay. There was no expressed obligation on the part of the purchaser to pay the $300 or any part of it; it was never intended that there should be; that money was to be paid in cash by the brother. After some delay, and some negotiations with the brother, the parties met in a solicitor's office, and the brother then refused to pay; and thereupon the plaintiff proceeded to take back her property, no one denying her right so to do; but, before that was done, the defendant, who is the purchaser's elder sister, and is of age, stepped into the breach to do that which the brother refused to do—pay the $300. Not having the money, she gave the note in question, payable three months after its date, for the $300; and the plaintiff accepted it, abandoning her intention, and the steps taken by her, to retake the property in question; and the younger sister remained in possession and carried on the business, the plaintiff having nothing to do with it after that, very reasonably considering herself paid for it by the defendant's note. The younger sister was no party to the note in question, nor indeed to the transaction between the plaintiff and defendant, in which the defendant was given three months' time for the payment of the $300, instead of its being paid in cash in accordance with the first arrangement.

In these circumstances, how can the findings of the learned trial Judge—that the debt evidenced by the promissory note in question is the debt of the defendant, and that her obligation arising out of the transaction in question is not merely that of a surety for the payment only of a legal debt of her infant sister upon the sister's default in payment of it—be reversed here?

What we are asked to find is really this: that the parties, knowing of the sister's infancy and consequent incapacity to make a binding contract there, entered into an agreement by which the defendant got $300 worth of property, for her sister, in con-

ONT.
S. C.
PEARSON
v.
CALDER.
Meredith, C.J.C.P.

sideration of a promise to pay that sum if the infant sister were in law bound to pay it and did not. Milliners may make fantastical "creations" in the way of their trade; but no milliner, nor any one else, would make such a ridiculous creation as that in the way of a contract to pay money.

Primâ facie the defendant is, in writing, over her own signature, alone liable for the payment of the amount of the promissory note in question. Between her and the payee of the note it is quite open to her to shew the whole transaction out of which the apparent obligation upon the note arose, to shew it for the purpose of proving that her obligation was merely a secondary one, a liability to pay only if her sister were primarily liable for the debt and made default in payment: but the whole transaction, as I see it, shews the opposite of that, shews that the debt to the plaintiff is hers and hers alone; whether her sister has or has not already saved, or may not hereafter save, her harmless from any loss. If the parties had not known of the infant sister's incapacity to make a binding contract, and had not excluded her on account of that, can any one doubt that she would have had something to say about the new contract made in consequence of failure to get payment from the brother, or that she would have been a party to the promissory note, as maker, with her sister as endorser? Solicitors had come into the transaction before the note was given.

The case of *Harris* v. *Huntbach*, decided in the year 1757, 1 Burr. 373, was in principle quite the same as this case; and in it it was found that the promise created a debt—was not merely a promise to answer for a debt of another. In expressing their opinions, Lord Mansfield said: that the undertaking—of a grandfather to pay for work done in his grandson's garden— is clearly an original undertaking, and that it was indeed a matter of fact rather than of law: and Mr. Justice Foster added that "the infant was not liable, and therefore it could not be a collateral undertaking. It was an original undertaking of the defendant, to pay the money." I do not understand that learned Judge to have at all meant that it could not in law be a guaranty, but that, as in this case, it was in fact impossible in the circumstances of the case, which were not as strong against the defendant there, I think, as the circumstances of this case are against the defendant here: see *Baker* v. *Kennett*, 54 Mo. 82; *Conn* v. *Coburn*

(1834), 7 N.H. 368; and *Kun's Executor* v. *Young* (1859), 34 Penn. St. 60.

During the trial the plaintiff spoke more than once of the defendant as a surety; but whether that was because of the suggestion to her mind arising from the use of the word by counsel who desired its use, or not, it is not at all material; we have to decide what the defendant's legal position in the transaction was, not what the plaintiff called or miscalled it. But I may add that it was doubtless intended between the sisters that the younger should, and I have no doubt will, out of her own moneys, as soon as she can, if she has not already done so, or in as far as she has not, pay the money. One can hardly blame a milliner for using or adopting the use of the word surety as the plaintiff did. She professes to be artistic in the making of ladies' hats and bonnets, but not in the use of the English language.

As the defendant is, in my opinion, so plainly liable upon this view of the case, I do not stop to consider whether she would or would not be liable, even if only surety for a lawful debt of her sister, because the infant sister in such a case would be legally liable for the debt in question until she exercised her right to avoid it, and that she had not done when the note fell due, and indeed may not yet really have done. In the case of *Wauthier* v. *Wilson*, 28 Times L.R. 239, the money was borrowed by the infant, and he was a joint maker with his father of the note there sued upon, yet the father was held liable. The fact that the Imperial enactment of 1874 (Infants Relief Act) makes the contracts of infants for the repayment of money lent or to be lent or for goods supplied or to be supplied, with some exceptions, "absolutely void," must be borne in mind when seeking light from cases decided upon contracts coming under that legislation.

The findings of the learned trial Judge cannot be disturbed, and under these the plaintiff is entitled to the judgment she has recovered against the defendant.

The appeal must be dismissed.

MASTEN, J.:—If the question fell to be dealt with exclusively on the basis of the finding of fact by the learned County Court Judge, that the defendant undertook a primary liability to pay for the goods purchased, I might have found difficulty in agree-

Masten, J.

ONT.
S. C.
PEARSON
v.
CALDER.
Masten, J.

ing to affirm the judgment. But, without dissenting on that finding of fact, I think that in any case the defendant is liable.

(1) Even if Marguerite was the real purchaser, and primarily liable, and if both parties to the action contracted on the basis of knowing that she was an infant and not legally liable to pay, then I think the obligation undertaken by the defendant was to pay in any event if the purchaser (Marguerite) failed to do so, irrespective of whether such failure arose from infantile non-responsibility or from financial incapacity. Such a contract differs fundamentally from an ordinary guaranty ensuring payment to the creditor of whatever sum the principal debtor is legally liable to pay, and the rule invoked by the defendant has no application.

(2) In the alternative, if the defendant knew the purchaser's age and the plaintiff did not, then the situation is that the defendant, by giving a security now claimed to be valueless in law, induced the plaintiff to abandon rights which she was *bonâ fide* asserting to retake possession. To permit her to do so would be inequitable, and this point is covered by authority.

In *Mutual Loan Fund Association* v. *Sudlow* (1858), 5 C.B.N.S. 450, the defendant, being sued on a promissory note made by him, defended on the ground that he was really a surety, and had, by the action of the creditor, been released. Judgment passed against the defendant, and a new trial was moved for on the ground that the question whether he was a principal or surety must be ascertained by the terms of the instrument itself without the aid of extraneous evidence; and Byles, J., in his judgment says: "As between the makers and the payees of the note, at law both the makers are principals, and evidence would not be admissible to shew that one of them signed the instrument as surety. But, in equity, if it be made to appear that the lender was cognisant of the circumstances, you may shew what the fact is. They become joint principals, or principal and surety, according to the facts."

In the case of *Wauthier* v. *Wilson*, 28 Times L.R. 239, the note was signed by a father and son, the latter being an infant. The note had been given for a present advance to the son. The father claimed to be a surety only, and to be free from liability because the son was an infant. Pickford, J., in the Court below, found that the father was a surety, but held him liable notwithstanding.

The Court of Appeal found as a fact that the father intended at the time of the advance to become liable as a principal; but, even if he was a surety and not a principal, they would hold him liable. Farwell, L.J., referring to *Mutual Loan Fund Association* v. *Sudlow* (*supra*), says: "Since the Common Law Procedure Act an equitable plea might be raised in such a case on the ground that the circumstances were such that the Court of Chancery would have restrained the action as being against conscience. . . . If the nature of the transaction were as suggested the father could not . . . have maintained a bill in Chancery to restrain the action, and his equitable plea would come to nothing at all." Lord Justice Kennedy said that he agreed with Lord Justice Farwell that the equitable plea put forward on the part of the elder defendant could not be supported.

In the present case, the defendant signs the note in question as maker. There is no qualification of her liability on the face of the document. Her right to establish that she is a surety only, rests on the equitable principle above mentioned. The Judicature Act has made no alteration in rights, but only in procedure; and her equitable plea to be relieved from her common law liability as maker of the note, because she was a surety, would, in the circumstances indicated, have come to nothing.

Lastly, it has been laid down for many years that, if the third party be not by law liable for the demand, as in the case of goods, not being necessaries, furnished to an infant, the defendant's promise cannot be considered as collateral: *Harris* v. *Huntbach*, 1 Burr. 373; *Duncomb* v. *Tickridge*, Aleyn 94, cited in DeColyar's Law of Guarantees, 3rd ed., p. 98, and in Pingrey on Suretyship and Guaranty, 2nd ed., para. 380.

This doctrine was applied by Mr. Justice Kay in *Yorkshire Railway Wagon Co.* v. *Maclure* (1881), 19 Ch. D. 478, and by Mr. Justice Pickford in *Wauthier* v. *Wilson* (1911), 27 Times L.R. 582. The last two cases were otherwise dealt with on appeal, but without reversing the principle in question.

In view of the veiled doubts expressed by the Court of Appeal in *Wauthier* v. *Wilson*, 28 Times L.R. 239, I prefer to rest my conclusions on the basis first discussed rather than on this last point.

The appeal should be dismissed with costs.

RIDDELL and LENNOX, JJ., agreed in the result.

Riddell, J.
Lennox, J.

Appeal dismissed with costs.

ALTA.

S. C.

W. T. BAILEY v. IMPERIAL BANK OF CANADA.

Alberta Supreme Court, Scott, Stuart and Beck, JJ. March 24, 1916.

1. GARNISHMENT (§ I C 1—17)—MORTGAGE MONEY IN HANDS OF AGENTS—DEBTS DUE TO TRUSTEES.

Mortgage money transferred by a bank, at the mortgagee's instructions, to the credit of his agent to be paid to the mortgagor as trustee for a corporation, is not in the possession of nor constitutes a debt due by the agent to the mortgagor in his own right; and a debt due to a person who is merely a trustee, and who has no personal interest therein, cannot be garnisheed by his creditors.

2. INTERPLEADER (§ I—20)—MORTGAGE MONEY CLAIMED BY TRUSTEE—DISPOSITION BY COURT—PAYMENT TO LIQUIDATOR.

In an interpleader issue as to the right to mortgage money which has been assigned to one as trustee for the purpose of adjusting certain claims of a corporation, if it appears that none of the parties are entitled to it, the Court, in order to ensure a proper disposition of the fund for the benefit of all creditors, will of its own motion order the fund paid to the liquidator of the corporation.

Statement

APPEAL by defendant bank from the judgment of Hyndman, J., for the plaintiff in certain interpleader issues between the parties. Varied.

C. H. Grant, for appellant.

A. L. Marks, for respondent.

The judgment of the Court was delivered by

Scott, J.

SCOTT, J.:—The Camrose Stock and Dairy Co., Ltd., carried on as one of its undertakings a business in Camrose under the name of "The City Meat Market," of which R.H.M. Bailey, the president of the company, was manager. He, under the authority of the directors of the company, sold that business including its stock in trade to one Case, part of the consideration for such sale being the transfer by him of a quarter section of land owned by him. In carrying on this sale the solicitor for Case, being under the impression that the business was owned by R. H. M. Bailey personally and with the object of protecting his client under the Bulk Sales Act, required that provision should be made for the payment of those creditors whose claims arose in respect of that business. The company being the owner of another quarter section desired to procure a loan of $1,000 upon it and the Case quarter section to pay off those creditors and for other purposes. Being unable to procure the loan upon a mortgage direct from the company, by reason of the fact that those to whom application was made required some personal security, the company caused both quarter sections to be transferred to R. H. M. Bailey. He then applied to Hulbert & Co. for the loan and, they having agreed to advance the amount as agent for one Dennison, he mortgaged the two quarter sections to him for the amount and shortly there-

after he transferred the property to the company. At the time he executed the mortgage he gave Hulbert & Co. an order in writing to pay the proceeds of the loan to the plaintiff.

The amount of the loan was deposited by Dennison in a bank with instructions to pay same over to Hulbert & Co. upon their depositing the completed mortgage security. The mortgage was registered on July 16, 1915, and some time between that date and July 20 they delivered the completed security to the bank and, on the latter date, the amount of the loan was transferred by the bank to their credit.

In an action brought by the defendant bank against R. H. M. Bailey, a garnishee summons was issued against Hulbert & Co. and served upon them on July 16. On July 20, they paid into Court the amount then in their hands and, the plaintiff having claimed to be entitled to it, an interpleader between him and defendant bank was directed.

The issues directed were, (1) the plaintiff affirms and the defendant denies that at the time of the issue of the garnishee summons there was a debt due or accruing due from Hulbert & Co. to R. H. M. Bailey; and (2) the plaintiff affirms and the defendant denies that he is, on his own behalf or as trustee, entitled to the moneys paid into Court by reason of their having been assigned by R. H. M. Bailey to him.

The trial Judge found upon the first issue that at the time of the service of the garnishee summons there was no debt due by Hulbert & Co. to R. H. M. Bailey and he directed that the summons should be set aside. Upon the second issue he found that the order given by R. H. M. Bailey to Hulbert & Co. constituted an equitable assignment of the fund to the plaintiff and that, by reason thereof, he was entitled to it as trustee and had no personal interest therein. He directed that the fund with the accrued interest thereon should be paid out to him and gave him the cost of the issues including the cost of the action in which the issues were directed with the cost of the examination for discovery.

The grounds of appeal are, (1) that the trial Judge erred in holding that the order was an equitable assignment, (2) that he should have held that the plaintiff was an agent and not a trustee; (3) that, it appearing that he had no personal or beneficial interest, his action should have been dismissed, and, (4) that the

ALTA.

S. C.

BAILEY v. IMP. BANK OF CANADA.

Scott, J.

trial Judge ought to have given effect to the objection of the appellant that the plaintiff could not maintain the action.

In my opinion, the trial Judge was right in his finding upon the first issue. Irrespective of the question whether there was a valid equitable assignment of the fund to the plaintiff before the service of the garnishee summons—it is apparent that at that time there was no debt due by Hulbert & Co. to R. H. M. Bailey as trustee for the company or otherwise, as that firm at that time was not in possession of the mortgage money nor was it then in a position to demand payment thereof from the bank. Even though they then had the moneys in their possession, it would not constitute a debt due by them to him in his own right or otherwise than as a trustee for the company, and it is clear that a debt due to a person who is merely a trustee and who has no personal interest therein, cannot be garnisheed by his creditors.

But in my view the trial Judge should not have directed that the fund should be paid out to the plaintiff.

Although, it is not so expressed in the second issue, I think it should be treated as one in which the sole question to be determined is whether the plaintiff was entitled to the fund *as against the defendant* bank and not as one determining his absolute right to the fund.

The trial Judge expressed the view that the plaintiff was a trustee, but did not clearly state the nature of the trust, nor is its nature disclosed in the case submitted to this Court. I find, however, upon referring to the files in the Court below that, in an affidavit filed by the plaintiff in the proceedings leading up to the interpleader, he states that the fund was assigned to him in order that he should pay part of the moneys to Case's solicitor for the purpose of paying the claims of the creditors of the City Meat Market business, part to one Smith for the purpose of securing a transfer from him of certain lands other than that comprised in the mortgage, and part for Land Titles Office fees, and for plaintiff's own personal expenses.

This trust in so far as it applied to the payment of only those creditors of the company whose claims were for debts contracted in respect of the City Meat Market was an improper one and should not be fulfilled. All the creditors of the company were entitled to share in the purchase-money of the business and, if the fund were paid out to the plaintiff, he might consider that he

was bound to carry out the trust in its entirety and the creditors of the company, other than those whose claims were for debts contracted in respect of that business, would thereby be prejudiced. I am, therefore, of the opinion that, in order to ensure the proper disposition of the fund, it should be ordered to be paid out to the liquidator of the company, it having been shewn to be now in liquidation. This would protect Case the purchaser, to the same extent as if it were applied in payment of the creditors of the Meat Market business alone, and, as to the other trusts disclosed by the plaintiff, they can and should be carried out by the liquidator to the same extent that the plaintiff would be bound or entitled to carry them out.

It is true that, strictly speaking, the only matter before this Court upon this appeal is the judgment upon the interpleader issues, but as the Court has before it all the material and evidence necessary to enable it to determine what disposition should be made of the fund and, if it is of opinion that neither of the parties to the interpleader is entitled to it, I see no reason why it should not direct it to be paid out to the person entitled to it and thus avoid the necessity for a further application to the Court below to settle that question.

The plaintiff should have the costs of the proceedings in the Court below subsequent to his notice claiming the fund including the costs of the examinations for discovery.

At the trial of the interpleader counsel for defendant bank stated that the fund belonged to the company and that the bank could surrender to it. In view of this statement and, in view of the conclusions I have reached, I think that the plaintiff should have then consented that the money should be ordered to be paid out to the liquidator. Had he done so the question of the proper disposition of the fund would then have been finally disposed of.

The defendant bank is shewn to be a creditor of the company and, as such, is interested in seeing that the fund is applied in payment of all the creditors of the company. Up to the trial of the interpleader issue it appears to have claimed that it was entitled to the whole fund under its garnishee proceedings. Had it in the first instance contended that the fund should be paid out to the liquidator, I think they would have been entitled to the costs of the appeal, but in view of the conduct of both parties I would direct that there should be no costs of the appeal to either party.

Judgment accordingly.

N. S.

S. C.

COOKSON v. DRISCOLL.
Re ESTATE OF LEAHY.

Nova Scotia Supreme Court, Graham, C.J., Drysdale and Longley, JJ., and Ritchie, E.J. February 26, 1916.

1. EXECUTORS AND ADMINISTRATORS (§ III A 1—76)—DISBURSEMENTS—SOLICITOR'S FEES NOT TAXED.

As there can be no recovery of solicitor's costs without taxation, an agreement by a residuary legatee, authorizing an executor to retain an amount for legal services to be rendered the estate and the interest of the legatee, is illegal and affords no independent representation of the estate as to be capable of taxation, and the executor will not be discharged for disbursements made in respect thereto.

2. EXECUTORS AND ADMINISTRATORS (§ IV A 2—80)—"VOUCHERS"—UNSWORN DOCUMENT FOR SOLICITOR'S FEES.

An unsworn document authorizing an executor to pay an amount to a solicitor for professional services is not a "voucher," and cannot be allowed as an item in the executor's account.

3. SOLICITORS (§ II C 1—30)—BARRISTERS—FEES AND TAXATION.

There is no distinction, as regards the scale of fees and the rules of taxation, between the title of a barrister and that of a solicitor, neither of whom can change the scale by a stipulation.

[*Regina* v. *Doutre*, 9 App. Cas. 745; *McLeod* v. *Vaughan*, 31 N.B.R. 134, referred to.]

4. APPEAL (§ VI B—286)—GROUNDS FOR QUASHING—RELEASE—CONTESTING EXECUTOR'S DISCHARGE.

An appeal from an order ratifying an executor's account will not be quashed upon the production of a release to the executor, which has been previously considered in connection with the application for leave to appeal and the matter adjudged by granting leave, particularly where from the nature of the transaction it does not clearly appear that the instrument was obtained with the independent advice and with full information of the maker's rights.

Statement

APPEAL by the residuary legatee from a decree of the Probate Court passing executor's accounts and a motion on behalf of the executor to quash the appeal. Reversed.

J. B. Kenney, for appellant.

V. J. Paton, K.C., *contra*.

The judgment of the Court was delivered by

Graham, C.J.

GRAHAM, C.J.:—The deceased Leahy, otherwise Brown, a retired saloon keeper, made his will January 13, 1913. He died January 17, 1913. He then had according to the inventory real property valued at $1,200, cash in the bank $22,681.37 and cash in hand $35.25.

With the exception of $1,000 for his son, $200 for a brother, and $400 for Monsignor Daly, he left his estate as follows: To his clergyman, Rev'd M. J. Driscoll, $1,000 over any commission as sole executor and $200 for spiritual purposes, and the residue to Mrs. Catherine Cookson, a married woman. On the day of the petition for probate of the will, viz., January 21, 1913, this document was obtained from Mrs. Catherine Cookson:

N. S.

S. C.

COOKSON v. DRISCOLL.

Graham, C.J.

I hereby authorize the Rev. M. J. Driscoll to keep out of the money coming to me under the will of the late G. R. Leahy, ten per cent. of the gross value of the estate real and personal, which is not to be more than $2,500, to cover his outlay and what the lawyer's charges will be in connection with said estate or any contest in reference to Mr. Leahy being able to make a will. This amount is not to include what Father Driscoll will keep out of the estate, being 5 per cent. for his pay as executor. For this $2,500 the lawyer is to do all the work for the estate and for me to protect my rights and is to be in full of all he will get for his services. (Sgd.) Katherine Cookson.

And in the executor's account he appears to have paid the following items, namely:

1913. Jan. 2.	Paid executor's legacy	$1,200.00
" " 21.	Paid proctor's fees, etc., as per agreement, on Mrs. Cookson's order	2,388.14
" " 24.	Paid executor's commission at 5 per cent., including $10 for habit	1,144.07

There is but one other item to which I wish to refer. It is: "1914, November 6. Retained as per agreement in case Dr. Hawkins' claim vs. executor succeeds in Supreme Court, $1,300."

And on November 18, 1914, a decree was obtained from the Court of Probate finally allowing and passing the accounts, leaving the balance of $12,714.37 to be distributed, and on the same day there was a decree of distribution which directed distribution according to the terms of the will.

On November 18, 1914, there was obtained from Mrs. Cookson this document:

I acknowledge when Mr. G. R. Leahy died (whose residuary legatee I am), that I received with the consent of the executor the sum of $35.25, which he had on him when he died, and I agree that this amount be charged against me on the final settlement herein this day, and that the executor, for looking after my real property, has a right to 5 per cent. commission on its appraised value, being $1,200, in addition to the 5 per cent. which he ordinarily gets as executor's commission. For his kindness, I hereby present to Father Driscoll his $100 succession duties. (Sgd.) Catherine Cookson.

I extract the minutes of what took place before the Court at the final passing of the accounts, the final closing of the estate:

November 18th, 1914.

Rev. M. J. Driscoll, sole executor, appears with accounts and vouchers for final statement and account allowed and passed. Commission, five per cent. (The name of the proctor of the estate is given).

Indorsed on the executor's account:—

Court of Probate. Co. of Halifax.

Estate of G. R. Leahy, alias George Brown, deceased.

The Rev. M. J. Driscoll, sole executor of the will of G. R. Leahy, alias George Brown, makes oath and says that the within is a true statement of the dealings with said estate as such executor and that he has therein duly

N. S.

S. C.

COOKSON v. DRISCOLL.

Graham, C.J.

accounted for all the assets of said estate which have come to his hands for administration. (Sgd.) M. J. Driscoll.

Sworn to at Halifax in said Court this 18th day of November, A.D., 1914, before me,
(Sgd.) Douglas Howe, *Deputy Registrar.*

I may say in passing that there is no provision in the Probate Act (R.S.N.S. 1900, ch. 158) for such a document nor any form of it appended to the Act. Nor was there any verification of the vouchers made before the Judge of Probate.

It seems necessary to refer to certain provisions of the Probate Act relating to the powers of the Court of Probate. They are different, I think from those provisions prevailing in most other British or Colonial Courts, partaking more of the nature of those relating to such Courts in the neighbouring republic. They constituted the usual tribunal for the complete winding-up of the estate of a deceased person. It has been a very cheap and convenient Court and depends largely on statutory provisions for its jurisdiction and powers. Secs. 60 to 70 deal with the settlement of the estate. Secs. 70 to 75 with the distribution of the estate.

Mrs. Cookson has obtained from a Judge of this Court an order giving leave to appeal to this Court under sec. 131 of the Probate Act, the time for appealing having elapsed. This order was appealed against but the appeal was abandoned.

I think the payment by the executor of a gross sum of $2,388.14 to a solicitor for which the only kind of voucher is the document I have copied, and wholly in respect to future services and before any services were rendered and on the very day the will was proved, was illegal. By the terms of the alleged voucher "For this $2,500 the lawyer is to do all the work for the estate and for me" (*i.e.*, Mrs. Cookson) "to protect my rights and is to be in full of all he will get for his services." So at the final accounting this solicitor attending as the solicitor of the estate represented the interests of the estate. Mrs. Cookson did not apparently attend. His duty of course as such solicitor was to cut down this gross sum of $2,388.14 for a solicitor by insisting on having it investigated or referred for taxation, and as it was a payment made to him the day the will was proved his own interest was to have it allowed and the executor discharged. Three days after the will was proved not only was the executor's legacy prematurely paid to him but on the same say he obtained from the estate the

maximum commission for his services in advance. The words of the statute (R.S.N.S. 1900, ch. 158, sec. 65) are "not exceeding 5% on the amount received by him." This was before any services were rendered by him. And when the amount came to be dealt with on the final settlement of the account the executor is discharged in respect to this item. That payment made so prematurely and so excessively considering the services of just chequing out the amount was unjustifiable. Suppose another executor *de bonis non* had become necessary, where could his remuneration come from?

With all the statutes establishing the scales of fees for attorneys, solicitors, proctors and others from the first series in 1851 down to the present time, R.S.N.S. 1900, ch. 185, there have been provisions to this effect:

1. Fees and allowances for departments, officials or persons, in respect to the services mentioned in the schedule to this chapter, shall be as therein prescribed and shall be regulated by the provisions in such schedule.

2. Every person taking any other or greater fee or allowance shall, for each offence, forfeit to the person aggrieved forty dollars which sum with such excessive fee or allowance may be recovered by him in an action of debt.

I think that this may be said about that legislation that it is not merely directory but prohibits the taking of greater costs or fees.

In the Fourth series of the Revised Statutes (1873) I find this further provision, viz., ch. 94, sec. 256:

Attorneys' and Proctors' bills of costs may be sued for and recovered as any other debts and either party may have any such bill taxed at any time before or at the trial. Any bill duly taxed before trial shall be *primâ facie* evidence that the amount allowed is payable, but in cases where the taxation is contested the same shall be final.

That provision continued in force and is still, I believe, in force and will be found in the Judicature Rules, O. 17, r. 43. As the present Revised Statutes, 1900, treated all practitioners in the different Courts as solicitors, as they actually were so, the word proctor is not used either in the Probate Act or scale of fees and the scale of fees for the Probate Court is termed "Fees of counsel and solicitors" and not proctors as formerly. R.S. 1900, p. 847. But solicitors in that Court are clearly included.

In 1899, ch. 27, an Act was passed consolidating the law about barristers and solicitors and adding some new law. It became as amended ch. 164 of R.S.N.S. 1900. Costs of solicitors will be

N. S.

S. C.

COOKSON v. DRISCOLL.

Graham, C.J.

found dealt with in secs. 71 to 81 inclusive. Sec. 79 has been since repealed.

None of the provisions admit of a percentage on the estate nor an agreement or advance for future services. I turn now to the English law.

In *Box* v. *Barnaby*, Hobart's 117, this is said in the judgment:

> And I hold that if an attorney follow a cause to be paid in gross, when it is recovered, that is champerty.

This is cited in Comyns' Digest, Attorney, B 14. In the case of *Saunderson* v. *Glass*, 2 Atk. 296, Lord Chancellor Hardwick said at p. 298:

> It is truly said at the bar, that a security obtained by an attorney, whilst he is doing business for his client, or whilst a cause is depending, appears to this court in a quite different light than between two common persons; for if an attorney, *pendente lite*, prevails upon a client to agree to an exorbitant reward, the Court will either set it aside entirely, or reduce it to the standard of those fees to which he is properly entitled; and this was the rule that weighed with me in *Walmesley* v. *Booth*, heard May 2, 1741, and if the Court did not observe such a rule it would expose clients very much to the artifices of attorneys, especially *feme coverts* who are in Lady Saunderson's unfortunate circumstances.

The case of *Walmesley* v. *Booth*, to which he refers, is reported on the rehearing in 2 Atk. 25, 27.

In *Newman* v. *Payne*, 4 Bro. C.C. 351 (1793) the Lord Chancellor said:

> I do not go on any particular rule of equity but upon a principle that would operate in the same manner in any court of law. All courts will protect their suitors, and attorneys cannot act with respect to the parties for whom they are concerned as other persons may do. Secondly, as to bills of costs, they cannot be of an arbitrary amount but must be such as to be ascertained. They cannot be so settled as not to be open to examination.

In *Scougall* v. *Campbell*, 3 Russ. 545, at 550 (1826), the Lord Chancellor said:

> In reference to a topic which has been alluded to in the argument I will say that if any solicitor tells a client beforehand that he will not undertake his business if his bill is to be taxed; or if any solicitor in the progress of a cause gives his client to understand that he will go on with it or not go on with it according as his bills are to be taxed or not to be taxed I think it my duty to say that the judges of the land will not permit him to be a solicitor in any other cause. I do not believe that any judge would allow a solicitor who had so acted to continue on the rolls and I will not permit it to be intimated that a solicitor will act if his bills are not to be taxed, but will not act if his bills are to be taxed.

As there is to be no recovery in an action for costs without taxation and as the estate was not represented by an independent solicitor to require taxation the transaction was illegal and the

executor was not discharged in respect to this item. I refer to two cases in England, *Philby* v. *Hazle*, 8 C.B. (N.S.) 647, and *Re Newman*, 30 Beav. 196, which, although we have not the English provisions 6 & 7 Vict. ch. 73, sec. 37, are applicable in view of the provisions we have and to which I have referred. Upon them and the early English law I am of opinion that this agreement was illegal and the amount excessive and incapable of taxation.

It has been argued for the executor that the solicitor here being by statute a barrister also, there is something different about making such a stipulation. *Regina* v. *Doutre*, 9 App. Cas. 745, was cited.

That case shows merely what the law is in the Province of Quebec. It has so been held by a provincial Court in Canada, *McLeod* v. *Vaughan*, 31 N.B.R. 134.

It would be novel if it was held here that a barrister and King's Counsel, in spite of the etiquette and traditions which surround that class in the mother country and which to some extent in name at least were transplanted here, should have greater latitude and be able to do things in a commercial way which could not be done by solicitors. It seems to be repugnant to one's ideas of that great profession. I do not decide it. I put it in the form of a dilemma. Either a barrister as such cannot, the same as in England, make such a stipulation, *Kennedy* v. *Broun*, 13 C.B. (N.S.) 677, *Broun* v. *Kennedy*, 33 Beav. 133, or he is a merely statutory barrister, a solicitor with an additional title, barrister, and his fees are subject to taxation just as the solicitor's are. The fees for him are in the scale. Anyway, in my opinion, it is an excessive charge and should be reviewed.

I think there is no "voucher" for the gross sum of $2,388.14; that the alleged document of January 21, 1913, is in no sense a "voucher," and there being no sworn testimony the discharge in respect to that item is unjustifiable. It was not even binding on the solicitor. It will be noticed that his name is not given in it and when the solicitor appeared at the Court of Probate to attend the settlement of the estate it would not be disclosed to the Judge that he was the solicitor of the estate and the payee of that sum and that they were one and the same person. That may account for it having passed. The whole transaction is simply bad on its face.

I do not understand exactly why the bill of Dr. Hawkins for

N. S.

S. C.

COOKSON v. DRISCOLL.

Graham, C.J.

his services and which was in litigation should be dealt with in the exceptional way it was. Apparently to settle up the estate prematurely the full amount of the claim in money appears to have been retained out of the assets of the estate by the executor. If the Court in which the litigation is pending allows a much smaller sum, as it may do, to the doctor what becomes of the difference?

I am of opinion that this appeal should be allowed and the matter transmitted to the Court of Probate. The solicitor's actual costs and fees will have to be taxed according to law. The commissions of the executor will have to be adjusted by the Judge and the alleged gift of $100 struck out. The costs of the appeal will be paid by the executor.

Since the appeal in this case was reserved for judgment we have heard a motion by the executor to quash that appeal upon the ground that Mrs. Cookson had by release under seal discharged the executor. This release was given previously to the order granting leave to appeal and the point was taken before the learned Judge who gave that leave and upon affidavits.

There are two reasons for not quashing the appeal: One is that the matter is *res adjudicata*. The other is that Mrs. Cookson had upon affidavit clearly shown reasons for not giving effect to it as a release. It will not do pending litigation to obtain such a document from her without its being clearly shown that she had independent advice and was informed of her rights. Particularly in a case in which advantage was taken of her in securing the payments from her mentioned in the previous judgment. The alleged release is really part of the other transaction. If it is supposed that there is anything in the release it will, no doubt, come up at a later stage not now when, in order to get the matter before the Court, the supposed discharge of the executor in the Court of Probate must be opened up. The application must be dismissed with costs. *Appeal allowed.*

N. B.

S. C.

THE KING v. SHAW; Ex Parte KANE.

New Brunswick Supreme Court, Barry, J. December 17, 1915.

1. ASSAULT (§ II—8)—SUMMARY CONVICTION — FINALITY OF FINDINGS.

In a summary conviction of a fence viewer for common assault, the findings of the Justice, as to the degree of force or violence actually used to make the act unlawful, are final and not reviewable on *certiorari*.

2. SUMMARY CONVICTIONS (§ III—30)—EXAMINATION OF INFORMANT—WAIVER

The examination of the informant or his witnesses under oath before the issuance of the summons is not necessary to the validity of a con-

viction for common assault, particularly where the defendant waived it by appearing without objection.

[*The King* v. *Kay*, 41 N.B.R. 95, followed.]

3. JUSTICE OF THE PEACE (§ III—12)—JURISDICTION—COMMON ASSAULT——TITLE TO LAND.

The jurisdiction of the magistrate to try for an assault is not ousted as involving a title to land, where an assault by a fence viewer was not committed in the assertion or in the defence of any title to land.

4. CERTIORARI (§ I B—11)—CONVICTION FOR COMMON ASSAULT—RIGHT OF APPEAL.

Where there is a right of appeal certiorari will be granted only under very exceptional circumstances; a conviction for a trifling offence, such as common assault, involving a small penalty, is not reviewable on *certiorari*.

[*Ex parte Doucet*, 24 Can. Cr. Cas. 347, 43 N.B.R. 361; *Ex parte Price*, 23 N.B.R. 85; *Ex parte Damboise*, 39 N.B.R. 265, referred to.]

Statement

CERTIORARI to review conviction for common assault.

M. L. Hayward, in support of certiorari.

F. B. Carvell, K.C., & *J. R. H. Simms*, contra.

Barry, J.

BARRY, J.:—On October 14 last, on the information of one Robert Smith, Theodore Kane, a fence viewer, was convicted before Elijah F. Shaw, a justice of the peace in and for the County of Carleton, for having, on October 5, unlawfully assaulted the said Robert Smith, and was fined $5 with $10.25 costs.

On October 19, Landry, C.J., granted a rule absolute for a *certiorari* to bring the conviction and all the proceedings upon which it was based before such Judge as might be present at the court house in the town of Woodstock on Tuesday, November 23, and holding the adjourned sittings of the Carleton County Circuit Court; with a rule *nisi* calling upon the justice and the informant to shew cause why the conviction should not be quashed, on the following grounds: (1) That the alleged assault was committed by the defendant in order to prevent a breach of the peace, and that the defendant used no more force than was reasonably necessary for preventing a breach of the peace, or than was reasonably proportioned to the danger to be apprehended from such breach of the peace; (2) that the said Robert Smith or his witness was not examined on oath by the said justice of the peace touching the matter of said complaint before the summons was issued; (3) that the said justice of the peace had no jurisdiction as a question arose as to the title of the land on which the fence in question was situated; (4) improper rejection of evidence as to title of land.

Having been assigned by the Chief Justice to hold the adjourned sittings of the Carleton County Court, on December 14, Mr. F. B. Carvell, K.C., shewed cause before me on behalf of the jus-

N. B.

S. C.

THE KING v. SHAW.

Barry, J.

tice and the informant against the rule to quash the conviction, and Mr. M. L. Hayward supported the rule.

(1) In regard to the first ground of objection to the conviction, there can be no doubt that any person may interfere to prevent a breach of the peace, and that he may proceed to any extremity which may be necessary to effect that object; commencing, of course, with a request to the offender to desist, then, if he refuses, gently laying hands on him to restrain him: and if he still resist, then with force compelling him to submit. But in every case upon summary conviction, it is a question for the justice whether or no the degree of force actually used was necessary for the object which renders it legitimate; if there be any excess, it will be an assault. The slightest imposition of the hands, if not justified, is an assault; and the necessity for a greater or less degree of violence depends on the circumstances of the case, to be judged by the magistrate. Coming to a wrong conclusion upon the matter does not affect his jurisdiction.

(2) The second objection is met and answered by the case of *The King* v. *Kay, Ex parte Dolan*, 41 N.B.R. 95. That case decides that what the defendant here insists upon as a condition precedent to the issuance of the summons is unnecessary; and further, that by appearing without objection, the defendant waived any defect which might have occurred in the procedure before the issuing of the summons.

(3) In order to oust the magistrate of jurisdiction, there must be some show of reason in the claim of title, and such a claim avails a defendant nothing unless he can satisfy the justice that there is some reasonable ground for his assertion of title. The assault alleged to have been committed was not committed either in the assertion or in the defense of any title to land set up by the defendant. There was no dispute between the informant Smith and the adjoining proprietors in regard to the line fence which, on October 5, the defendant in his official capacity went to view, and the defendant himself admits that up to the time of the assault nothing had been said about the ownership of the adjoining properties or about the line fence between them. I do not think the title to land can be said to have been in even the remotest way in controversy here.

(4) Rejection of evidence is simply a question of procedure and does not go to the jurisdiction.

N. B.

S. C.

THE KING v. SHAW.

Barry, J.

On the merits, I think the rule must be discharged; but even had I come to a different conclusion on the merits, I should still have thought that, upon another and an entirely different ground, which I take the opportunity of again emphasising, although it has been time and time again stated by the Court, the rule should be discharged. The rule is that where, as here, there is a right of appeal, *certiorari* will be granted only under very exceptional circumstances. *Ex parte Price*, 23 N.B.R. 85; *Rex* v. *Murray, Ex parte Damboise*, 39 N.B.R. 265; *Rex* v. *O'Brien, Ex parte Doucet*, 43 N.B.R. 361, 24 Can. Cr. Cas. 347.

Although every Judge of the present day will be swift to do justice and slow to allow himself as to matters of justice to be encumbered with either precedents or technicalities, that does not mean that he must investigate and pass under review every conviction for so trifling an offence as a common assault, involving the small penalty of a $5 fine. In a case which I do not find reported, but a record of which I find in my notes, *1910, Rex* v. *Kelly, Ex parte Tait*, the Court in following the rule which I have stated, said that while there were some cases in which the rule had been departed from, they were not disposed to add to such precedents; and that they would not, upon *certiorari*, weigh the evidence or re-try the case. Since I do not see in this case anything so exceptional as to take it out of the rule which seems to have been quite firmly laid down by the Supreme Court of the province, the rule must be discharged, and the conviction affirmed.

Conviction affirmed.

BRITISH COLUMBIA EXPRESS CO. v. GRAND TRUNK PACIFIC R. CO

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, Galliher and McPhillips, JJ.A. April 3, 1916.

1. WATERS (§ I C 5—52)—OBSTRUCTING NAVIGATION—ACTIONABILITY.

The owners of a warehouse and wharf on a river bank, enjoyed by them not in common with others navigating the stream but for their own personal use, which use is interfered with and rendered impossible of access by the unlawful erection of a low level bridge, thereby suffer a special injury as distinguished from the public at large and are entitled to maintain an action for the wrongful obstruction.

[*Lyon* v. *Fishmongers Co.* (1876), 1 A.C. 622, followed.]

2. WATERS (§ I C 5—52)—OBSTRUCTING NAVIGATION—UNLAWFUL CONSTRUCTION OF BRIDGE.

Erecting a low level bridge across a river navigable at seasons, though authorized, without providing the required facilities for navigation, constitutes a wrongful obstruction of navigation at seasons in which the river is navigable.

B. C.
C. A.
BRITISH COLUMBIA EXPRESS CO. v. G.T.P.R.

3. DAMAGES (§ III K 3—221)—UNLAWFUL OBSTRUCTION OF NAVIGATION—DIRECT AND REMOTE LOSSES.

In an action for unlawfully obstructing a private right of navigation, the losses in respect of a warehouse and wharf and the wood piled thereon for steamer use, as well as the loss of business and profits are recoverable as elements of damage; but a depreciation in the value of the steamer is too remote and not a special damage as distinguished from the damage occurring to the others of the public plying on such waters.

[*Rainy River Navigation Co.* v. *Ont. and Minn. Power Co.*, 17 D.L.R. 850, applied.]

Statement

APPEAL from judgment of Clement, J., in an action for wrongful interference with navigation. Varied.

S. S. Taylor, for plaintiff, appellant.

A. Alexander, for respondent.

Macdonald, C.J.A.
Irving, J.A.

MACDONALD, C.J.A., and IRVING, J.A., agreed with GALLIHER, J.A.

Martin, J.A.

MARTIN, J.A.:—I would allow the appeal and direct a new trial to assess damages.

Galliher, J.A.

GALLIHER, J.A.:—In respect to damages claimed for the year 1914, I see no reason to differ from the conclusion reached by the trial Judge.

As to the interruption to navigation in 1913, by the bridge at mile 142, the trial Judge seems to have drawn the inference from certain letters which passed between the officials of plaintiffs and defendants and from the oral testimony that it was not the intention of the plaintiffs to continue navigation after their boats had been withdrawn to the lower reaches on account of low water.

If we take the letter of September 11, 1913, read by itself it would seem to warrant that conclusion, but we must regard the whole history in connection with this matter, and as it is not a question of deciding on conflict of testimony, but rather the drawing of inferences largely from written documents and uncontradicted testimony, I do not feel restricted in dealing with same by any finding of the trial Judge.

The Fraser River between Tete Jaune Cache and Prince George is navigable only during certain seasons of the year, and during the season navigation is sometimes interrupted by low water.

At times when this low water stage occurs navigation is ended for the remainder of the year, while in other years, as in 1913, the water rises again and navigation can be carried on for a much longer period.

The period when these low water stages occur is not always regular, and in that respect navigation in one year may differ

in length of time from that of another year, and hence navigation is more or less uncertain.

In view of this uncertainty then, it is not to be wondered at that Mr, West, or his accountant, wrote the letters we have been referred to.

These letters indicate only that, in plaintiffs' view, operations might at any time have to be suspended depending on the stage of water in the river, and their refusing to enter into binding contracts for carrying freight seems to me to be for good business reasons, designed not only to protect themselves but also shippers who might otherwise suffer by being induced to ship in that way.

Mr. West has sworn that it was the intention of the company to continue navigation as long as possible, and it is a reasonable presumption that steamers plying on rivers such as the Fraser, where the season of navigation is limited, while they may be withdrawn to other nearby points, or even laid up during low water stage, will take advantage of any change in conditions to resume traffic providing there is business to do, the object being to make the most of the season as they find it.

Whether the company's steamers were temporarily engaged at another point (which the evidence fully explains), or were laid up during low water stage above, makes no difference, and is not in the face of Mr. West and the Captain's evidence as to the intention to take advantage of the whole season when the water was fit for the purpose sufficient to enable us to draw the inference that whether there was any obstruction or not by the defendants, the plaintiffs intended to abandon navigation for that season.

Moreover, the plaintiffs were entitled to freely navigate the river at all suitable stages and defendants had no right to wrongfully prevent this. Supposing the plaintiffs and all the other operators of steamers had thought at the time the water fell early in September that navigation was over for that season, and that those letters were written in that view, that is no proof that when conditions changed navigation would not be resumed—in fact, Mr. West's evidence is to the contrary. The steamer "B. C. Express" was built expressly for the purpose of navigation on the upper river and the reasonable inference is that advantage would be taken of every available opportunity to ply on those waters. She was not hauled out, but kept in commission, and her captain

B. C.
C. A.
BRITISH COLUMBIA EXPRESS CO. v. G.T.P.R.
Galliher, J.A.

and crew retained. The advent of the railway and its operation to Fort George made it all the more necessary from the plaintiffs' standpoint that advantage of every opportunity to operate should be taken before that event occurred; hence the inference to my mind is all in favour of the plaintiff's contention.

Undoubtedly the defendants obstructed the navigation of the river for a part of the season when same was navigable and if they were not justified in doing so, the plaintiffs are entitled to damages if this action is maintainable.

It was practically conceded on the argument that the defendants proceeded with the construction of the low level bridge at mile 142 against the express directions of the department at Ottawa, having charge of these matters.

It is true, they were authorized to build a low level bridge and their plans for same approved, but with the proviso, that should it be deemed necessary in the interest of navigation swings to permit the passage of ships should be provided by the company at their own expense whenever required.

After part of the material for the bridge had been ordered and assembled, and when it became known that it was decided to build a low level bridge, the plaintiffs and other vessel owners plying there, and the Board of Trade and others vigorously opposed this and made representations to Ottawa with the result that the company were ordered not to construct their bridge without proper facilities afforded for navigation.

Nevertheless, the company proceeded in the teeth of this and constructed their low level bridge and there can be no doubt they were wrongdoers in this respect.

There remains only for determination the question whether the plaintiffs are specially injured as distinguished from the public at large so as to entitle them to maintain this action.

In *Rainy River Navigation Co.* v. *Ontario & Minnesota Power Co.*, 17 D.L.R. 850, Mulock, C.J. Ex., enunciates this principle:—

> The general principle is that a private action may be maintained in respect of a common nuisance where the complaining party has sustained some special damages not common to the general public, and thus in each case it becomes a question of fact whether the injury complained of specially affects the plaintiff or a limited few, the plaintiff being of the number: *Bell* v. *Corporation of Quebec* (1879), 5 App. Cas. 84.

And Lord Cairns in *Lyon* v. *Fishmongers Co.* (1876), 1 A.C. 622, thus expresses the principles:—

Unquestionably the owner of a wharf on the river bank has, like every other subject of the realm, the right of navigating the river as one of the public. This, however, is not a right coming to him *qua* owner or occupier of any lands on the bank, nor is it a right which *per se*, he enjoys in a manner different from any member of the public. But when this right of navigation is connected with an exclusive access to and from a particular wharf, it assumes a very different character. It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the right at the particular place; and it becomes a form of enjoyment of the land and of the river in connection with the land, the disturbance of which may be vindicated in damages by an action or restrained by an injunction.

The plaintiffs here were the owners of a warehouse and wharf on the river at Tete Jaune Cache, enjoyed by them not in common with others navigating the stream but for their own personal use, which use the defendants interfered with and rendered impossible of access by erecting the low level bridge at mile 142.

This seems to me to bring it clearly within the principle above enunciated and entitles the plaintiffs to maintain this action.

As to the measure of damages. The plaintiffs claim: (1) for loss of business; (2) depreciation in the value of the steamer "B. C. Express;" (3) loss in respect of wharf and warehouse at Tete Jaune Cache; and (4) loss of wood piled for steamer's use between South Ft. George and the Cache.

I do not think depreciation in the value of the steamer is a class of damage which can be recovered in this action. It is, I think, too remote and is not the special damage as distinguished from the damage occurring to others of the public plying on those waters.

The loss in respect of the warehouse and wharf, plaintiffs are entitled to and the same, I think, applies to the wood.

As to the loss of business and profits, I had some doubt as to whether these were recoverable, but in the *Rainy River* case, *supra*, in that respect very similar to the case at Bar, the Court of Appeal for Ontario, in the judgment of the Court delivered by Sir William Mulock, C.J. Ex., awarded these damages, and that seems to be warranted by authority: see *Drake* v. *Sault Ste. Marie Pulp & Paper Co.*, 25 A.R. (Ont.) 261; *Lyon* v. *Fishmongers Co.*, *supra*, and *Fritz* v. *Hobson*, 49 L.J. Ch. 321; 14 Ch. D. 542.

In the latter case Fry, J., in awarding damages for loss of business, says, at 325 of the Law Journal Report:—

Then arises the question, or questions, how far this state of circumstances gives rise to any legal right in the plaintiff? Now the cases of *Rose* v. *Groves* and *Lyon* v. *Fishermongers' Company* in the House of Lords appear to me to

B. C.

C. A.

BRITISH COLUMBIA EXPRESS CO. v. G.T.P.R.

Galliher, J.A.

establish this, that where the private right of the owners of land to access to a road is interfered with and unlawfully interfered with by the acts of the defendants, he may recover damages from the wrongdoers to the extent of the loss of profits of the business carried on at that place. The case of *Rose* v. *Groves* was that of an owner of riparian property, but it is referred to by the Lord Chancellor in the case of *Lyon* v. *Fishermongers' Company*, and he cites there the observation of Lord Campbell to this effect: "I apprehend that the right of the owner of a private wharf or of a road side property to have access thereto is a totally different right from the public right of passing and repassing along the highway on the river." Then the Lord Chancellor continued: "The existence of such a private right is recognised in *Ross* v. *Groves*. As I understand the judgment in that case it went not on the ground of public nuisance, accompanied by particular damage to the plaintiff, but on the principle that a private right of the plaintiff had been interfered with." Then, after more fully examining that case, and after expressing not the slightest intention to differ from it, his Lordship says: "Independently of the authorities, it appears to me quite clear that the right of a man to step from his own land on to an highway is something quite different from the public right of using the highway. The public have no right to step on to the land of a private proprietor adjoining the road, and though it is easy to suggest metaphysical difficulties, when an attempt is made to define the private as distinguished from the public right, or to explain how the one could be infringed without at the same time interfering with the other, this does not alter the character of the right." Applying that principle to the present case, it does appear to me that the evidence shews that the access to the plaintiff's door in the passage from the street was interfered with by the acts of the defendants, which I hold to be unreasonable, and therefore wrongful, and that being so, the cases which I have referred to are authorities for the plaintiff on that ground and entitle him to recover the amount of loss in his business carried on upon his property.

The matter should be referred to the registrar to assess the damages in accordance with the above findings.

As to costs, there were two issues. The claim for 1913, which event has been decided in plaintiffs' favour, and the 1914 claim, which has been decided in defendants' favour. Costs accordingly, here and below.

McPhillips, J.A.

McPHILLIPS, J.A., concurred. *Judgment varied.*

SASK.

S. C.

COWIE v. ROBINS.

Saskatchewan Supreme Court, Lamont, Elwood and McKay, JJ. March 18, 1916.

1. SALE (§ I A—1)—SALE OR AGENCY—BURDEN OF PROOF.

In an action for the price of goods, the burden of proof is upon the plaintiff to shew that the goods delivered were intended as a sale and not merely for the purpose of re-sale under agency.

2. APPEAL (§ VII L 3—485)—REVIEW OF FACTS—FINDINGS OF COURT—SALE.

An appellate Court will not interfere with the findings of the trial Judge that the burden of proof to establish a sale has not been satisfied. [*Greene Swift & Co.* v. *Lawrence*, 7 D.L.R. 589; *Western Motors, Ltd.* v. *Gilfoy*, 25 D.L.R. 378, distinguished; see also *Holt Timber* v. *McCallum*, 25 D.L.R. 445; *Morgan* v. *McDonald*, 27 D.L.R. 125; *McBride* v. *Ireson*, 26 D.L.R. 516.]

APPEAL from the District Court Judge of Saskatoon district, dismissing the appellant's action with costs. Affirmed.

T. P. Morton, for appellant.

The judgment of the Court was delivered by

McKAY, J.:—The action was brought by the appellant against the respondents for the price of a thresher drive belt, alleged to have been sold by him to them for $92.50, whereas the defence is that the respondents did not purchase the belt from him but only took the belt to sell it for him. That they sold the belt for $85 and offered the $85 to him less commission, but appellant refused to accept said sum, and demanded $100 or return of the belt, that the defendants returned the belt to appellant and he now has it.

It appears from the evidence that the appellant had a conversation with the respondents in June, 1913, concerning the belt, which he then had on hand. He had at that time, or very shortly after, gone out of business. Whatever arrangement was entered into between appellant and respondents, it must have been at this conversation as the appellant left Watrous shortly after and did not return until after the respondents had taken the belt, and there is no evidence of any other conversation before the selling of the belt by the respondents. The appellant and respondents give a different version of what took place at this conversation. The appellant contending that the respondents agreed to buy the belt at the wholesale price, and the respondents contending that they only agreed to sell the belt as agents for appellant. Be that as it may, the result was that the appellant authorized them to get the belt from his warehouse when they wanted it. No price was fixed on, as the appellant did not then know what was the wholesale price.

The respondents subsequently obtained the belt about the month of October, 1913, during appellant's absence, and some weeks later sold it for $85, having previously looked up a catalogue and found the wholesale price, of what they considered a similar belt, to be $72.50.

The appellant returned to Watrous in the fall of 1913, and in January, 1914, demanded payment, claiming he asked for $92.50, which he had, since the conversation of June, ascertained was the wholesale price, or the return of the belt if it had not been used. This was the first time that the amount of the wholesale price was mentioned, if it was then mentioned.

SASK.

S. C.

COWIE v. ROBINS

McKay, J.

The respondents say they offered to settle with appellant at $85, but he refused as he wanted $125 or the return of the belt. The respondents then got the belt back from the person they had sold it to, and returned it to the appellant's warehouse.

The appellant then brought this action.

The onus is on the appellant to prove the sale, and the only witnesses who gave evidence on this point are the appellant and the respondent W. E. Robins, who swears he was present with his father, J. E. Robins, at the conversation in June, 1913.

It will be noted that these two witnesses contradict each other as to what was agreed upon at the June conversation, and the trial Judge held that the plaintiff did not prove his case, and found that the story of the respondent W. E. Robins seemed a little more probable. I have carefully read over the evidence and I cannot find anything in it to cause me to disagree with this finding.

The appellant himself states that in the consersation in June, the respondents did not then buy the belt. His evidence, in answer to his counsel, is as follows:—

Q. You told us about offering the belt to the defendants, did they buy it? A. Not that time. Q. What did he say? A. He said it would be all right; I said the belt is in my warehouse and you can have it when you want it.

I gather from this that the appellant meant there was no sale then, but that there was to be a sale when they took the belt. But even so, according to his own evidence, there was only a conditional arrangement to buy. But in addition to this, he states that at this conversation they did not agree to pay the wholesale price. This comes out in his cross-examination at p. 10 of the appeal book, when being questioned as to the June conversation.

Q. What did you say? A. I had a belt to sell. Q. What did they say? A. He said he would see what he could do. Q. Any price set at that time? A. No. Q. Did you tell him what the wholesale price was? A. I told him what it cost me. Q. Did they ever agree to pay you the price of the belt that time? A. Whatever the agreement was, that would be whatever the wholesale price was. Q. Did they ever agree to pay you that time? A. Nothing more about it. Q. Never agreed to pay you the wholesale price? A. Did not say.

In my opinion this evidence means that the respondents did not agree to pay the wholesale price whatever it might be. And this corroborates the evidence of respondent W. E. Robins, when he says they never agreed to pay $92.50, or any sum, for the belt.

The important part of W. E. Robins' evidence as to the June conversation is as follows:—

Q. Tell his Honour what business you had with Cowie with this belt? A. Mr. Cowie had spoken to my father and myself regarding a threshing belt; and that he had gone out of business and asked us if we had an opportunity to sell it we might sell it. He also asked us to buy it, which we refused to do. Mr. Robins said if he had an opportunity to sell he would help him out. It was near towards the threshing time—it was June.

The appellant swears he had the conversation with E. J. Robins, meaning apparently the father, J. E. Robins, but W. E. Robins swears he was present and this is not denied, and he also goes further and says the conversation was with himself and father.

Counsel for appellant cited the following cases in support of his contention that the decision of the Judge should be reversed. *Coghlan* v. *Cumberland*, 67 L.J. Ch. 402. *Greene Swift & Co.* v. *Lawrence*, 7 D.L.R. 589.

These judgments are to the effect that the Appeal Court should overrule the trial Judge's findings of fact if it is satisfied he was wrong, as is stated by Anglin, J., in *Greene Swift & Co.* v. *Lawrence*, at p. 599.

> However loath we may be to reverse the decision of a trial Judge on the question of fact, "it is our duty to do so if the evidence coerces our judgment so to do." *The Gairloch*, [1899], 2 Ir. 1, 13; *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704, 67 L.J. Ch. 402.

But in the case at Bar, as above intimated, I cannot see any reason why I should reverse the findings of fact of the trial Judge.

Counsel for appellant also cited *Western Motors Ltd.* v. *Gilfoy & Son*, 25 D.L.R. 378.

In this case, the question was whether the contract to rent a motor car was made for the defendant firm or the individual, the son. The appeal was from the decision of the trial Judge, giving judgment in favour of the plaintiffs against the firm and the individuals, father and son. This judgment was reversed on appeal except as against the son, and Stuart, J., who delivered the judgment of the Court, at p. 381, states as follows:—

> Now, there is no doubt that this Court has the legal power to review a finding of fact made by the trial Judge upon contradictory testimony. It is true that we have frequently laid down the rule that the Court will not interfere where the trial Judge has clearly indicated his belief in the veracity of one witness and his disbelief in that of the opposing witness. Where he has done this merely upon his observation of the conduct and general appearance of the witnesses in the box, this Court has not felt itself free to interfere. But in the present instance it will be observed that the trial Judge expressed no opinion as to the veracity of the witnesses as evidenced by their demeanour in Court. From the passage above quoted, it is clear that he decided to accept Adamson's account merely because the outside circumstances, in his opinion, tended to corroborate his story.

SASK.
S. C.
COWIE
v.
ROBINS.
McKay, J.

The Judge then refers to how the trial Judge was mistaken as to the corroborative effect of the outside circumstances.

The above portion of this judgment would be clear authority for the appeal Court to reverse the findings of the trial Judge in the case at Bar if it were satisfied he was wrong. But it seems to me that this whole judgment is strong authority for not disturbing the findings in the case at Bar. The Judge in the *Western Motors* case goes on to say at p. 384:—

> In the result, therefore, I think the matter was left as oath against oath without any choice by the trial Judge on the direct ground of higher credibility on the one witness or the other. If the burden of proof was on the plaintiff to establish the fact that the son was acting for the firm in what he did or that the father ratified what he had done, this burden, I am of opinion, the plaintiff did not satisfy. I think, therefore, the appeal should be allowed with costs, the judgment below as against the defendants William M. Gilfoy and the firm Gilfoy and Son set aside and the action dismissed as against these defendants.

This is exactly what the trial Judge in the case at Bar has done. He found the two witnesses pledging oath against oath for what they asserted, and as the burden of proof was on the appellant to establish the fact that there was a sale of the belt to respondents, he was of opinion that this burden was not satisfied. In other words, the reason for the Appeal Court in the *Western Motors* case for reversing the trial Judge's findings is the reason the trial Judge in the case at Bar has dismissed appellant's action.

During the hearing of the appeal, it was suggested that the appellant might have a claim by way of damages against the respondents as agents, but, as this question was not in issue at the trial, I do not think the appellant should now be allowed to set this up, as the respondents had not an opportunity to meet this issue.

The result will be that the appeal will be dismissed with costs, without prejudice to the appellant's right to bring such action as he may be advised against the respondents as agents.

Appeal dismissed.

B. C.
C. A.

CHAMPION v. THE WORLD.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, Galliher and McPhillips, JJ.A. April 3, 1916.

1. MECHANICS' LIENS (§ III—13)—PRIORITY OVER MORTGAGE FOR INCREASE IN VALUE.

Under sec. 9 of the Mechanics' Lien Act, R.S.B.C. 1911, ch. 154, the value of the property before the lien attached is to be taken for the purpose of fixing the upset price for which the lien holder would have priority

B. C.
C. A.

CHAMPION v. THE WORLD.

over a mortgagee as against the increase in value of the mortgaged premises by reason of the work and improvements, the latter, however, must be limited only to the extent to which the specific contract enhances the selling value and not for work or improvements by others under independent contracts; if no greater sum than the upset price is obtained at the sale the lien holder has no priority, and his only recourse is against the equity of redemption.

Statement

APPEAL from the judgment of Grant, Co.J., in an action under the Mechanics' Lien Act, R.S.B.C. 1911, ch. 154. Affirmed.

R. M. Macdonald, for appellant, plaintiff.

E. C. Mayers, for Coghlans.

A. H. MacNeill, K.C., for mortgagee.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The County Court Judge took evidence of the value of the owner's property before plaintiff's lien attached, and for the purpose of arriving at the sum to which the lien holder should have priority over the mortgagee, fixed that value as the upset price and then ordered a sale. If no greater sum than the upset price were obtained at the sale, the lien holder would have no priority. Such a method of arriving at the increased value, where the market value of property has fallen greatly, must, I think, lead to unfortunate results to the lien holder, but it is authorised by the statute, and therefore must be upheld by the courts.

The lien holder, however, does not necessarily lose his security. If the sale should prove abortive, his lien still remains a lien against the owner's equity of redemption. It is only in such circumstances that the amount to which a mortgagee is entitled as against a lien holder who has failed to establish priority for increased value becomes of importance. That question is not involved in this appeal, but as argument was directed to it I refer to it lest it might be thought I had overlooked it.

The appeal must be dismissed.

Irving, J.A.

IRVING, J.A., agreed.

Martin, J.A.

MARTIN, J.A.:—We are asked, in effect, to hold that where there are, as here, several independent and consecutive contracts, extending it may be, in the case of a large work, over a period of many years, yet in the operation of sec. 9 they are all to be taken as relating back to the time the first sod was turned under the first contract. The Judge below was, I think, right in rejecting that view of the statute, and holding that the lien takes effect "where (the) works or improvements are put upon (the) mort-

B. C.

C. A.

CHAMPION v. THE WORLD.

Martin, J.A.

gaged premises" as the statute says, which means when they are done and made, and not that they shall be dependent upon, or determined by *e.g.* the contract for excavation which may have been and usually is, completed and paid for many months before the decorating contracts are even begun; otherwise the result would be that liens under later contracts might be thrown back upon and tied on works for which liens never existed. Illustrations were given on both sides showing how the Act would be made absurd and eventually partly unworkable by the adoption of either view, but this is not an infrequent result of such legislation. Our duty is to see that the statute is made workable to the extent that is permitted by the language employed.

Argument was submitted on what would be the rights and conditions under a general contract with several subsequent subcontracts, but I express no opinion on that point, reserving it for the occasion upon which it comes before us for adjudication.

I am unable to see any valid ground in support of an estoppel, and in other respects the evidence justifies the judgment. The appeal should be dismissed.

Galliher, J.A.

GALLIHER, J.A.:—The appellant's first contention is that the respondent's claim to priority as mortgagee is *res judicata*, and point to the pleadings and the judgment in the trial in the Court below.

Supposing the wording of the judgment was broad enough to support this contention looked at by itself, it could not be allowed to prevail.

Looking at the whole proceedings before us it is quite clear that any sale of the lands would be subject to the rights of the mortgagees except in so far as the liens might have priority over the mortgages—in fact the appellants' own proceedings after judgment were, among others, for the very purpose of settling these priorities.

I entirely concur in the conclusions of the trial Judge that the words "works and improvements" in sec. 9 of the Mechanics' Lien Act are in the circumstances of this case limited to the works and improvements of the plaintiffs themselves. There was no general contract but a number of separate contracts. Supposing the contract for the steel structure had been completed and an entirely new contractor under a distinct and separate contract with the owner came on to do the plastering, could the latter say

that he was entitled to share in the amount to which the selling value of the premises had been increased in value by the steel work.

That I take it would be so if there had been one general contract for the whole work, but as I view it the rule does not apply where there are separate and distinct contracts with the owner. In such a case it is only to the extent to which the specific contract enhances the selling value of the premises.

Galliher, J.A.

I also agree in the method adopted by the trial Judge in fixing the upset price. It seems to me he has followed out the course laid down in the Act, and the amount advanced by the mortgagees is not a matter for consideration in fixing the upset price.

McPHILLIPS, J.A.:—I would dismiss this appeal.

McPhillips, J.A.

Appeal dismissed.

NEWBY v. MUNICIPALITY OF BROWNLEE.

SASK.
S. C.

Saskatchewan Supreme Court, Lamont, Elwood and McKay, JJ. March 18, 1916.

1. MASTER AND SERVANT (§ I E—25)—DISMISSAL OF MUNICIPAL OFFICERS—NOTICE AND CAUSE.

Under sec. 126 of the Villages Act, R.S.S. 1909, ch. 86, all officers appointed by the council hold office during the pleasure of the council, the latter having the right to dismiss a person, appointed by resolution as constable and engineer at a monthly salary, without notice or cause.

[*Wilson* v. *York*, 46 U.C.Q.B. 289; *Vernon* v. *Smith's Falls*, 21 O.R. 331; *Hellems* v. *St. Catharines*, 25 O.R. 583; *Davis* v. *Montreal*, 27 Can. S.C.R. 539, followed.]

Statement

APPEAL from a judgment in favour of plaintiff in an action for wages and wrongful dismissal. Varied.

W. A. Beynon, for appellant.

Walter Mills, K.C., for respondent.

The judgment of the Court was delivered by

McKay, J.

McKAY, J.:—This action was brought by the respondent to recover $120 for two months' wages as constable and engineer, $140 for care-taking of a rink, and $60 damages in lieu of notice for wrongful dismissal.

The defence admits the wages of $120, less $29.75, for taxes collected and unaccounted for by respondent, which appellant sets off against the $120 wages, leaving balance of $90.25 which it paid into Court. Appellant alleges that the services for which respondent claims the $140 for care-taking are covered by the $60 per month wages.

The appellant also claims that it had the right to dismiss

SASK.

S. C.

NEWBY v. MUNICIPALITY OF BROWNLEE.

McKay, J.

respondent without notice and without cause, and that he should get costs of his action only up to the time of the payment into Court of the $90.25 when appellant filed its defence, and that on the small debt scale, and that appellant should get its costs of the action subsequent to the filing of its defence on the higher scale of the District Court, and the additional costs up to the time of filing of the said defence occasioned by bringing this action on the higher scale in the District Court.

The District Court Judge gave judgment for the respondent for the sum of $90.25 for wages due, and the sum of $60 damages for wrongful dismissal.

From this judgment the appellant appeals, claiming it had the right to dismiss respondent at any time without notice, and, further, that it dismissed him for cause.

The facts are shortly as follows: The appellant, by resolution passed on June 1, 1914, appointed the respondent constable and engineer of the appellant village at a salary of $60 per month, to commence duties not later than June 8, 1914. The respondent commenced his duties under said resolution on June 8, 1914. On January 18, 1915, the appellant dismissed the respondent without notice. He had been paid to the end of December, 1914, and had retained $29.75 taxes which he had collected; he retained this to be applied on account of his wages with the consent of one of the councillors of the appellant village.

With regard to his services for looking after the rink, respondent contends this was not included in the work he was to do for the wages of $60 per month; on the other hand, councillor Graham Bissett swears this was included, and he was expressly so told at the time of passing the resolution hiring him on June 1, 1914.

The trial Judge did not allow respondent anything for this work in connection with the rink, although he found this work was not included in the hiring under the resolution. But no notice was given by respondent to vary the decision of the trial Judge in this respect, although respondent's counsel did refer to it during the argument in appeal, and suggested that the Appeal Court could deal with it or refer it to the trial Judge to be dealt with. Still, under the circumstances of this case and as no notice was given to vary the decision of the trial Judge, I do not think it should now be dealt with.

The only question to decide therefore is that of dismissal. Had the appellant the right to dismiss respondent without notice and without cause?

The answer to be given to this question depends upon the construction of sec. 126 of the R.S.S. 1909, ch. 86. This section reads as follows:

126. All officers appointed by the council shall hold office during the pleasure of the council and in accordance with the terms expressed in the resolution by which they are appointed; and in addition to the duties assigned to them by this Act or by any general law of the province shall perform such other duties as may be required of them by the council.

The resolution under which respondent was appointed is as follows:

Moved by J. E. Sires that Thomas Newby be appointed constable and engineer at a salary of $60 per month, to commence duties not later than June 8, 1914.

Counsel for respondent contends that this was followed by a contract of hiring in writing, which provided that the respondent agreed to give or take 30 days' notice in writing as to the termination of this contract. This contract is signed only by the respondent and not by the appellant, and its admission was objected to by counsel for appellant at the trial.

Owing to the view I take of this section, it is immaterial whether the document is admissible or not as evidence against the appellant, as I do not think the council has power to change the effect of the above sec. 126 by anything contained in this contract. I am of the opinion that the section in question gives the power to the council to dismiss its officers at any time without cause. The section expressly says they shall hold office "during the pleasure of the council" and this, to my mind, can only mean that they may be dismissed at any time. The words "and in accordance with the terms expressed in the resolution by which they are appointed;" apparently refers to remuneration, the office, and the duties of the office to which they are appointed, and do not refer to the duration of the appointment. The intention being that the council may always have the right of dismissing its officers at any time without cause, and without being liable to an action for so doing. And as the legislature has given this power to the council as agent of the village municipality, I do not think the council has any power to change the effect of this section.

SASK.

S. C.

NEWBY v. MUNICIPALITY OF BROWNLEE.

McKay, J.

This question has come up several times in Ontario under similar sections, and the Courts there held that the officers of a municipality could be dismissed at any time without notice and without cause.

In *Willson* v. *York*, 46 U.C.Q.B. 289, which was an appeal heard by Hagarty, C.J., Armour and Cameron, JJ., at p. 298 Armour J., stated as follows:

> The plaintiff was, I think, rightly nonsuited upon the first and second counts of the declaration.
>
> The Municipal Act expressly provides that "all officers appointed by the council shall hold office until removed by the council."
>
> The effect of this is, that all such officers hold their offices during the pleasure of the council, and may be removed by the council at any time without any notice of such intended removal, and without any cause being shewn for such removal, and without the council thereby incurring any liability to such officers for such removal.
>
> There is no hardship in this, for such officers accept their offices upon these terms; and were it otherwise, councils might be greatly embarrassed in the transaction of their public duties by the forwardness of an officer whom they would have no means of immediately removing without subjecting themselves to the liability of an action.

It is to be noted that the wording of the section of the Ontario Act, under which the foregoing case was decided, is: "All officers appointed by the council shall hold office *until removed by the council*," and which words Armour, J., apparently did not consider as strong in favour of the corporation as the words "during the pleasure of the council" appearing in sec. 126 under discussion.

In *Vernon* v. *Corporation of Smith's Falls*, 21 O.R. 331, which was also an appeal case, and under a section similarly worded to our sec. 126, Meredith, J., in his judgment, is reported as follows:

> The action is for damages for wrongful dismissal from employment.
>
> The plaintiff was appointed by the defendants' council chief constable for the municipality, under sec. 445 of the Municipal Act, which section provides that such a council shall make such an appointment, and that the person so appointed "shall hold office during the pleasure of the council. . . . . ."
>
> It would, therefore, seem clear that the defendants had the power to terminate the plaintiff's tenure of the office at any time; and that the council had no power in making the appointment to curtail such power. The council are not the corporation; they cannot exceed the powers conferred upon them in such a case so as to bind the corporation. Their power was to appoint during pleasure only, and to settle the remuneration and provide for the payment of it. Sec. 278.
>
> In view of the powers and duties of the council the by-law, in my opinion, should be read as making the appointment for one year, provided there should be no exercise of the council's pleasure otherwise in the meantime; and fixing the remuneration at the rate of $500 per annum.

The effect of sec. 279 of the Act, seems to be very well stated by Armour, J., in *Willson* v. *York*, 46 U.C.Q.B. 289, at 299, in these words:

The Judge then quotes the portion of Judge Armour's judgment above recited, and adds:

The words of the section in question are plainer if not stronger in the defendant's favour, than those of that section (279); and the latter of the quoted paragraphs is peculiarly applicable to such an appointment as that in question in this section.

I am quite unable to perceive the force of the contention that the council exercised their pleasure under the section in question when making the appointment for one year. If that were so, what need of any provision that the office should be held during pleasure? Neither the council nor the corporation in that case would be in any better position than anyone entering into any contract, or making any appointment; the words in question would be futile; and the council would also be exercising not only their own pleasure but that of a future council, the discretion of the then members for that of the future members of the same and of another council, and destroying the very object of the provision. And if an appointment could so be made for one year why not, as was asked during the argument for five or for ten or for any other number of years.

This contention was perhaps too palpably erroneous to call for any observations upon it, but it may be better to shew that it has not been overlooked.

As to the defendants' unfettered right, through their council, to exercise their pleasure without assigning any cause, I refer, in addition to the cases mentioned during the argument, to *Hayman* v. *Governors of Rugby School* L.R. 18, Eq. 28; the cases collected in Shortt on Mandamus, at pp. 404, 395-6; see also *McIntyre* v. *Hockin*, 16 A.R. (Ont.) 498, and *Marshall* v. *McRae* 17 A.R. (Ont.) 139, reversed in Supreme Court of Canada, 11 C.L.T. (Ont.) 257.

The exercise of the council's pleasure was not expressed to be for any cause; but, as the resolution puts it, "his services are not wanted." And no reasons are given in the notice, to the plaintiff, of his dismissal.

In *Hellems* v. *City of St. Catharines*, 25 O.R. 583, the plaintiff was appointed street superintendent on March 13, 1893, by resolution of the defendant council.

On March 27, a resolution of the council was passed rescinding the former resolution. The plaintiff brought an action for wrongful dismissal. On appeal, at p. 586, Galt, C.J., states:

The Judge at the trial, held that under the provisions of the Consolidated Municipal Act, 55 Vict. ch. 42, sec. 279, the corporation had the right at any time to dismiss any officer appointed by a council. The words of the section are: "All officers appointed by a council shall hold office until removed by the council." I quite concur in the opinion expressed by my brother Rose.

This judgment was concurred in by MacMahon, J., the other Judge hearing the appeal.

Davis v. *City of Montreal*, 27 Can. S.C.R. 539, is also in favour of appellant in the case at bar.

In this case plaintiff-appellant was, on August 1, 1892, ap-

SASK.

S. C.

NEWBY v. MUNICIPALITY OF BROWNLEE.

McKay, J.

pointed by the city council as superintendent of the water-works. At that time nothing was mentioned of his salary, but two months later, on October 3, a resolution was passed by the council fixing it at $3,500 per annum. On May 21, 1895, the council passed a resolution dismissing him. He then brought an action for damages for wrongful dismissal, among other claims.

Taschereau, J., who delivered the judgment of the Court at pp. 543 and 544, in part says as follows:

> The answer of the respondent to those allegations consists in stating that the agreement entered into between the city and the appellant on August 1, 1892, was vague and uncertain; no time was therein mentioned for its duration, and even no salary of any kind was determined; that by 52 Vict., ch. 79, sec. 79, "the council may appoint such officers as it may think necessary to carry into execution the powers vested in it by the said Act, and may prescribe and regulate by by-law the duties of such officers respectively, and *at its pleasure* remove any such officer and appoint another in his place;" that this privilege of nominating and dismissing officers is absolute. . . . As to the claim for salary the appeal must also fail. When the legislature empowered the corporation to remove its officers at its pleasure, it must have intended to vest it with the power claimed by it in this case. . . The statute would otherwise have no meaning. It must be interpreted as giving powers which otherwise would not lie in the corporation.

In accordance with the foregoing authorities, I am of the opinion that the council of the village had the right to dismiss the respondent without notice and without cause. The appeal, therefore, should be allowed with costs.

And the respondent will be entitled to his costs of the action only up to the time of the payment into Court of the $90.25 and that on the small debt scale.

The appellant will be entitled to its costs of the action subsequent to the filing of its defence on the higher scale of the District Court, and the additional costs up to the time of filing of the said defence, occasioned by bringing this action in the higher scale in the District Court, and the costs of the appellant will be set off against the judgment of the respondent for the $90.25.

Appeal allowed.

CAN.

S. C.

ONTARIO ASPHALT BLOCK CO. v. MONTREUIL.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur, JJ. February 21, 1916.

1. DAMAGES (§ III A3—62)—SPECIFIC PERFORMANCE—LESSEE'S OPTION TO PURCHASE LAND—INABILITY TO MAKE TITLE.

Where under a lease the lessee is given an option to purchase the land in fee at the end of the term, and the lessor in good faith and without fault is unable to give title to the fee by reason of having only a life estate in

the property, the lessee, in an action for specific performance of the option, is entitled only to an abatement in the purchase price based upon the value of the interest in the lands which could be conveyed, but not for money expended on improvements or any other kind of damages resulting from the breach.

[*Bain* v. *Fothergill*, L.R. 7 H.L. 158, applied; *Day v. Singleton*, [1899] 2 Ch. 320, distinguished; *Ontario Asphalt Block Co.* v. *Montreuil*, 15 D.L.R. 703, 19 D.L.R. 518 (29 O.L.R. 534, 32 O.L.R. 243), varying 12 D.L.R. 223, 29 O.L.R. 534, affirmed.]

Statement

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (15 D.L.R. 703, 19 D.L.R. 518, 29 O.L.R. 534, 32 O.L.R. 243), varying the judgment at the trial 12 D.L.R. 223, 29 O.L.R. 534, in favour of the plaintiffs.

On February 2, 1903, the respondent leased to the appellants a certain parcel of land in the Township of Sandwich East, and extending from the front River Road to the water's edge and from there to the channel bank of the Detroit River, for a term of ten years at a rental of $1,000 a year. The lease contained a provision giving the appellants the right to purchase the premises at the end of the term of 10 years for $22,000, provided the company gave 6 months' previous notice in writing of its intention to do so.

The appellant company was incorporated for the purpose of manufacturing asphalt blocks, and upon entering the premises under the lease they erected a large expensive manufacturing plant and built expensive docks, partly on the land and partly on the water lot, the whole of the expenditure amounting to about $200,000, and from year to year the company spent some $8,000 to $12,000 a year for betterments and improvements, including the necessary repairs.

The company gave the required 6 months' notice in pursuance of the terms of the lease, and on February 2, 1913, at the end of the said term granted by the lease, tendered to the respondent the sum of $22,000 demanding a conveyance of the lands and premises. But the respondent refused to accept said sum and refused to make the conveyance as provided under the terms of the lease.

The company commenced an action on February 10, 1913, claiming specific performance of the covenant contained in the lease, and damages.

The action came on for trial before Lennox, J., without a jury on May 27, 1913, and it appeared at the trial from the evidence of the respondent, Montreuil, that he had made the lease in question

CAN.

S. C.

ONTARIO ASPHALT BLOCK CO. v. MONTREUIL.

Statement

under the assumption that he was the owner in fee simple of the property set out in the lease, but that he discovered in 1908 that he only had a life estate in the property.

The respondent was advised by counsel at that time that the property went to his children after his death, but no evidence was offered of any effort being made by the respondent to get in a title to the property, nor was any evidence offered of any refusal by the respondent's children to join in a conveyance of the property to the appellant company under the terms of the lease. But there is evidence that they did join with him in the conveyance of other portions of the property.

Evidence was given that the property had increased enormously in value since the making of the lease.

The trial Judge reserved judgment, and subsequently on June 19, 1913, delivered judgment decreeing specific performance of the agreement for the interest of the defendant in all the demised lands and an abatement in the purchase money for the difference in value on February 2, 1913, of an estate in fee simple and an estate for the life of the defendant in respect of so much of the land as the defendant was not able to convey in fee, and also in respect of the damages which the plaintiffs might suffer by reason of such breach of contract over and above the difference in value of an estate in fee simple and for the life of the defendant; and directed reference to the Master of the Court at Sandwich.

The respondent appealed to the Appellate Division of the Supreme Court of Ontario, which gave judgment on November 27, 1914, varying the judgment of the trial Judge by directing that the abatement in the purchase money should be based upon the assumption that the value of the fee simple was, at the date of expiry of the term, the proportionate part of the purchase price agreed upon attributable to the land in which the lessor had only a life estate and by directing further that the plaintiff company should have no damages for any loss sustained by reason of the money expended upon the property or by reason of any other matter except the abatement aforesaid. From this judgment the appellants now appeal.

D. L. McCarthy, K.C., and *Rodd*, for appellants.

Cowan, K.C., for respondent.

Idington, J.

IDINGTON, J.:—I think the judgment appealed from is right for the reasons assigned in support thereof by the Chief Justice

for Ontario. The case seems a hard one, but that is no reason for our adopting bad law and disturbing the minds of those who prefer that well-settled law should be upheld.

In truth we are asked to assess damages besides giving such relief in way of specific performance as can be given. Assuming for argument's sake damages recoverable at all in such a case (which I do not admit) the basis therefor must be proved as in any other claim for damages. It is not enough to rouse mere suspicion.

The respondent was a witness and counsel for appellant refrained from asking him a single question, much less anything tending to shew he had acted in bad faith or failed in any regard to do what his contract bound him to do. It can only be in such a case as shews a failure of duty on a defendant's part that damages would be assessable even if all questions relative to specific performance were out of the case. The circumstances relied on do not supply such proof as required.

The appeal should be dismissed with costs.

DUFF, J.:—I concur in the judgment of the Court dismissing the appeal.

Duff, J.

ANGLIN, J.:—Admitting the applicability of the rule laid down in *Bain* v. *Fothergill*, L.R. 7 H.L. 175, to the original option in this case, the appellants have sought to bring it within the qualification upon that rule recognised in *Day* v. *Singleton*, [1899] 2 Ch. 320. But in the latter case the Court of Appeal, as the judgment of Lord Lindley shews (p. 328), took the view that the correspondence between Singleton's solicitors and the lessor established that if Singleton (the vendor of the leasehold) did not actually procure the refusal of the lessors' assent to the assignment to Day, he

> certainly made no effort to obtain it . . . as it was his duty to do . . . and it ought to be inferred as against Singleton that the lessors would have accepted Day if Singleton had asked them to do so.

Anglin, J.

The decision there proceeded upon the fact, held to have been sufficiently proven, that it was within the vendor's power to carry out his contract and that he refused or neglected to take the means available. Here the plaintiffs rely upon the fact that the defendant maintained silence after his inability to make title had become known and they had asked him to obtain confirmation of the option from the remaindermen, the fact that the remaindermen had (under what circumstances, or for what consideration does not appear) confirmed the title of some other grantees of the defendant

CAN.
S. C.
ONTARIO ASPHALT BLOCK CO. v. MONTREUIL.
Anglin, J.

who were in like plight with the plaintiffs, and the further fact that, in answer to the plaintiff's suit for specific performance, other defences were set up in addition to that of inability to make title. I am quite unable to find in these bald facts—and the plaintiffs have nothing else—enough to warrant an inference that the defendant after discovery of the defect in his title made no effort to procure the concurrence of the remaindermen; still less do I find enough to warrant the inference that such an effort, if made, would have been successful.

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

Brodeur, J.

BRODEUR, J.:—I am of opinion that this appeal should be dismissed with costs.

Fitzpatrick, C.J.
Davies, J. (dissenting)

FITZPATRICK, C.J., and DAVIES, J., dissented.

Appeal dismissed.

B. C.
C. A.

FERRARA v. NATIONAL SURETY CO.

British Columbia Court of Appeal, Irving, Martin, Galliher and McPhillips, JJ.A. April 7, 1916.

1. PRINCIPAL AND SURETY (§ I B—14)—BUILDING CONTRACT—ALTERATIONS—NON-DISCLOSURE—DISCHARGE OF SURETY.

Permitting the use of mortar, with an improper proportion of cement mixed therein as called for by the specifications, amounts to a change or alteration in the plans, non-disclosure of which to the surety, as required by the terms of the bond, is sufficient to release the latter from liability thereon. (Court equally divided.)

Statement

APPEAL from the judgment of Murphy, J., discharging a surety from liability on a bond. Dismissed. (Court equally divided.)

Livingston, for appellant, plaintiff.

R. M. Macdonald, for respondent, defendant.

Martin, J.A.

MARTIN, J.A.:—This appeal should, I think, be dismissed for, substantially, the reasons given by the Judge below.

Irving, J.A.

IRVING, J.A., agreed.

Galliher, J.A.

GALLIHER, J.A.:—At page 10, A.B., and during the trial, reference is made to a decision of this Court in which it is stated that the Court has held that no sub-contractor is entitled to a lien, even where a lump sum is given for the contract unless they serve the material notice required under the statute, and that the Court had modified its decision later. I presume the case first referred to is *Rat Portage Lumber Co.* v. *Watson*, 10 D.L.R. 833, 17 B.C.R. 489.

In that case, what was decided by the Court, was that in case

of a sub-contractor who supplies material only, the notice is necessary.

A. H. MacNeill, K.C., argued for the appellants that the appellants having contracted to deliver certain material there was no delivery until all the material was in fact delivered.

The Court held that delivery meant actual physical delivery on the ground, and that no lien could attach to material actually and physically delivered prior to 10 days before the giving of the notice.

What was held in the later cases—*Irvin* v. *Victoria Home Construction Co.*, 12 D.L.R. 637, 18 B.C.R. 318; *Fitzgerald* v. *Williamson*, 12 D.L.R. 691, 18 B.C.R. 322; and *Coughlan* v. *Carver*, 20 D.L.R. 533, 20 B.C.R. 497, is that a sub-contractor doing work and supplying the materials is not required to give the notice necessary in the case of a materialman simply.

I refer to the above to make it clear that there is no inconsistency in the Court's judgments and to point out the danger of relying on newspaper reports of cases.

In the case at Bar, then, sub-contractors who supplied material and worked it into the building were not required to give notices, and those who supplied material simply were.

The trial Judge bases his decision on the ground that, at the interview between Ferrara, Perkins the architect, and the representatives of the defendants when the work was taken over by the defendants, certain material facts were not brought to defendants' attention which might have influenced them in deciding as to their liability on the bond, and whether they would assume the work and complete it and that the failure to do this voided the contract.

Whether it did or not depends entirely upon whether acts committed prior to or facts not disclosed at that meeting had at that time rendered the bond voidable.

If not, two courses were open to the obligors—they could either assume and carry out the contract (which they did), or refuse to do so when Ferrara could himself complete it and charge anything over and above the contract price up against defendants.

The trial Judge instanced the permitting of the contractors by Ferrara to use mortar with an improper proportion of cement mixed therein as a change or alteration in the plans sufficient to release the obligors.

B. C.
C. A.
FERRARA
v.
NATIONAL
SURETY CO.
Galliher, J.A.

Clauses 2 (A.B. 217 & 218) and 5 (A.B. 219), are referred to:—

2. The obligee shall, at the times and in the manner specified in said contract, perform all the covenants, matters and things required to be by the obligee performed; and if the obligee default in the performance of any matter or thing in this instrument, or in said contract agreed or required to be performed by the obligee, the company shall thereupon be relieved from all liability hereunder.

5. If any changes or alterations by the principal and obligee be made in the plans or specifications for the work mentioned in said contract, the obligee shall immediately so notify the company of such changes or alterations, giving a description thereof and stating the amount of money involved by such changes or alterations. Provided, however, that when the cost of said changes or alterations shall in the aggregate amount to a sum equal to ten per cent. of the penal sum of this bond, no further changes or alterations shall be agreed upon by the principal and obligee until the consent of the company shall first be obtained thereto.

The question is—have the dealings between the obligee and the principal been such as to release the obligor? I must say I do not consider the acquiescence of Ferrara in permitting a less quantity of cement to be used in the mortar a change or alteration within the meaning of cl. 5, and unless the results which followed can be said to be the cause of the contractor falling down in his contract, then that was not such an act as would void the bond.

There is no evidence that such was the case. The contractors remedied the defect before the work was taken over and we should not assume in the absence of evidence that their doing so brought about the disability which caused the architect to dismiss them from the work.

Other acts were urged upon us, such as that Ferrara gave his own personal note to certain sub-contractors, in effect guaranteeing that their claims for material and for work and material supplied would be paid, in other words, if the contractor fell down they could as to these amounts look to Ferrara personally.

This seems to me a system of financing which so far from impeding construction was calculated to assist it, and be to the advantage of the contractor who was guaranteed by the defendants and in their interest as well.

In any event any such sums paid by Ferrara, if they were paid for claims where notices should have been, and were not given, cannot be charged against defendants.

There should be a reference to the Registrar to take the accounts.

McPHILLIPS, J.A.:—This appeal is from the judgment of Murphy, J., who held that the respondent, the Surety Company, was discharged from liability because of the fact that disclosure was not made to the respondent that the cement mortar called for by the specifications was not being used—apart from this one ground of defence which was given effect to by the trial Judge, judgment would have gone for the appellant. The bond sued upon was one for the due performance of a building contract. The contractors having made default under the contract, the respondent stepped in to complete the same—the following letter explains what was done:—

F. H. Perkins, Esq., Vancouver, B.C., Feb. 8-13.
Architect, Vancouver.

Re Ferrara Building.

Acting for the National Surety Co., I am instructed to state that this company recognizes its liability to Mr. Ferrara, and as far as the information goes that has come to the company up to date, nothing has been done by Mr. Ferrara to disentitle him to the relief that the company may have to afford under the bond. My instructions are to request you to consult me personally in regard to any payments that you may make outside of labour. You are authorized to advance all labour accounts and requested on behalf of the National Surety Co. to take charge of the building and complete same, giving statements from time to time to R. V. Winch & Co. or myself of what expenditures you are called upon to make.

You will notice a judgment recently delivered by our Court of Appeal in this province, a copy of which has appeared in the papers and been commented on recently, in which it has been held that no sub-contractors are entitled to liens, even where a lump sum is given for their contract, unless they serve the material notices. I would, therefore, caution you to make no payment to sub-contractors, except for wages, that you can possibly avoid. If any contractor refuses to go on with his work and is asking or exacting more than you think that he is reasonably entitled to by way of advance, I request you to make other arrangements to have his work carried on and let him go off the job and resort to his right to file his lien. I do not hesitate, in view of the judgment of the Court of Appeal recently, to request you to take this stand firmly with all the sub-contractors who, in your opinion, are attempting to take the slightest advantage of the situation or asking more than they are, in your opinion, entitled to a certificate for. On the other hand, contractors who are worthy and acting within their reasonable rights, we will do all in our power to protect and not seek to take advantage of any strict interpretation of this notice re materials under the provisions of the Mechanics' Lien Act. My instructions, however, are peremptory to protect the National Surety Co. in every way and I have no right or authority from them to waive any just or reasonable requirement.

Mr. Ferrara will continue to make payments under your certificates, subject to our inspection thereof, from time to time, up to the full amount of his contract, and before you reach the end of his contract money please advise me in ample time. (Sgd.) J. Edward Bird.

B. C.

C. A.

FERRARA v. NATIONAL SURETY CO.

McPhillips, J.A.

Later, a disagreement took place between the respondent and the appellant relative to the Pacific Plumbing and Heating Co., culminating in a denial upon the part of the respondent of all liability in connection with the contract. In the result of things the appellant was compelled to complete the building at his own cost—claiming in the statement of claim $19,023.85—this amount being the claimed increase of cost to the appellant over and above the contract price of $80,000, but I understood during the argument that a sum considerably less was really claimed, viz.: $10,400. The letter denying liability reads as follows:—

A. Ferrara, Esq., Vancouver, B.C., April 22, 1913.
193 Hastings Street East,
Vancouver, B.C.

After giving a full explanation to the National Surety Co., of their situation with relation to your building contract, they wire us this morning authorizing us to deny all liability in connection with the contract, and to withdraw our superintendent from the building. This will be done forthwith. We will, therefore, accept service of any process you may desire to issue, on the completion of your building, against the National Surety Co. You will understand this action is taken by reason of the position taken by you and your architect recently with relation to the plumbing and heating contract, and in view of your thereby refusing to abide by the terms of the contract with the insurance company. MacNeill, Bird, Macdonald & Darling,
Per J. EDWARD BIRD.

It would not appear that, in the specifications, any proportions were given for the cement work. The following is an excerpt therefrom: "The brick work to include all of the exterior walls, etc., and all to be laid up in cement mortar." It would seem that some question arose about the cement mortar used and the architect Perkins (the architect the respondent continued in charge of the work by the letter of Feb. 8, 1913, above set forth), called the contractor's attention to this and the appellant spoke to the architect, and the agents for the respondent appeared disinclined to hear any reports from the architect. The evidence upon this point in the cross-examination of Perkins is as follows:—

Q. Now, as a matter of fact, this cement and mortar was specified in the specifications? A. Yes. Q. They were required to use a certain proportion of mortar? A. Yes. Q. And they were not using a sufficient proportion of mortar, and you called their attention to that, but Mr. Ferrara had you waive that? A. He didn't say to waive it, but he didn't want me to be hard on them. Q. He didn't ask you to have any of the wall taken down at all, and reconstructed, or anything of that kind? A. No. Q. And you passed it at his request? A. I passed it to keep peace in the family. Q. You permitted them to continue just the same as they had been doing? A. Yes. Q. With Mr. Ferrara's full knowledge and consent? A. He knew it. Q. And you want this $1,000 now occasioned by that slackness on Mr. Ferrara's

part? A. No, I say that was occasioned by their not using the proper portion of cement in the mortar, by keeping the cement out of the mortar. Q. Which was permitted and acquiesced in? A. Which was acquiesced in. He thought he could get the building up without any trouble, Mr. Ferrara did. Q. That was never submitted to R. V. Winch & Co., the agents in British Columbia of the National Surety Co., or to the National Surety Co. itself? A. No. Q. Why? A. I don't know; I brought it to their attention that the building was out of plumb, I went there a great many times and told them repeatedly about things, and they told me, they said, "Mr. Perkins, we don't want to hear about all your troubles." I went to them repeatedly, but that is what they told me. Q. That was while the contractors were on the job? A. And afterwards.

It would further appear that the inspector appointed by the respondent on March 25, 1913, was made aware of the cement mortar that had been used, and it was not until April 22, 1913, that the respondent wrote denying liability and then not on account of the cement mortar used, but for an entirely different reason. The cement mortar defence was one raised for the first time after the action was brought. The ground taken for the repudiation of the contract was not a justifiable ground—as found by the trial Judge. We find him saying: "I find that they (the respondent Surety Co.), were not justified in repudiating the contract when they did on the grounds they then acted upon." If it was the cement mortar which caused the walls to go out of plumb, this was remedied by the contractors, and the walls put in proper place and in good condition, and Williams, called by the defence, an engineer, said, speaking of the building, "it is of good construction—the building—good walls—very heavy walls." At the time the building was taken over from the contractors—the building was nearly finished—plastering was then going on. The jacking up or straightening up of the walls had been done early in the construction of the building. With the greatest respect to the trial Judge, I cannot agree that there was any change or alteration in the specifications with regard to the cement mortar. It was a matter for the architect, and to be determined by him, and there is really no evidence of any change or alteration having been made. Further, any alteration could only be by written order of the architect (see cl. 3 of contract). In so far as there was any question raised as to the cement mortar used and its alleged effect—causing the walls to go out of plumb—notice went to the respondent, and, in any case the conduct of R. V. Winch & Co., the agents of the respondent, constituted waiver of the requirement of notice.

B. C.
C. A.
FERRARA v. NATIONAL SURETY CO.
McPhillips, J.A.

Upon the whole case—in my opinion—it must be held that no change or alteration in the specifications was made. But should I be wrong in this—then there was sufficient notice to the agents of the respondent and to the inspector as well—or waiver thereof. Further, the action of the respondent in acknowledging liability as it did, and undertaking to see to the due completion of the building and the performance of the contract—in view of all the surrounding facts and the knowledge it had or ought to have had under the circumstances—does not now admit of it being heard in denial of liability.

I would allow the appeal, and there should be an assessment of the amount due by the respondent to the appellant.

Appeal dismissed; Court divided.

SASK.
S. C.

COWIE v. SAWYER-MASSEY CO.

Saskatchewan Supreme Court, Lamont, Elwood and McKay, JJ. March 25, 1916.

1. PRINCIPAL AND AGENT (§ III—36)—COMMISSIONS—REPOSSESSION OF GOODS.

A provision in an agency agreement that no commission is to be earned or paid on "goods taken back," includes goods "repossessed" from the purchaser, under the terms of the contract of sale, owing to a default in payment of the balance of the purchase price, and if any commission has been previously paid, it is the duty of the agent, upon repossession of the goods, to refund it.

[*Taylor* v. *Laird*, 1 H. & N. 266; *Button* v. *Thompson*, 38 L.J.C.P. 225, distinguished.]

Statement

APPEAL from the judgment of the District Court Judge for the judicial district of Saskatoon dismissing with costs the appellants' action for commission on the sale of machinery. Affirmed.

T. P. Morton, for appellants.

H. Y. MacDonald, K.C., for respondent.

McKay, J.

McKAY, J.:—The facts are briefly as follows: The respondent by agreement in writing appointed the appellants its agents at Watrous, Saskatchewan, to sell its machinery on commission, and, while such agents, the appellants, on or about October 20, 1910, sold a thresher and engine to J. Crittenden & Son for $4,970, on which a cash payment of $70 was made, and, for the balance the respondent received four promissory notes for the following amounts: $500 payable on October 1, 1911, $1134 payable on November 1, 1911, $1,633 payable on November 1, 1912, $1,633 payable on November 1, 1913. Collateral to the usual written agreement whereby the respondent could repossess the thresher and engine in case of default in payment, etc.

The respondents issued four commission certificates to the appellants in connection with the sale for the following amounts: $73.26, $166.18, $239.28 and $239.28. The purchasers, Crittenden & Son, paid the first two notes for $500 and $1,134 respectively and $130.79 for interest thereon, and paid no more; whereupon the respondent repossessed the machinery in question, subsequently sold part of it, realising $720, leaving a balance due to respondent of $3,500.

The appellants sued the respondent for payment of the commission represented by the two commission certificates issued to them for $73.26 and $166.18 in respect of the two promissory notes above referred to paid by Crittenden & Son, and also $20.11, being 15% of interest paid on said two notes, contending that as said notes were paid to respondent they are entitled to payment of said commission.

Respondent claims that the agreement with the appellants provides that no commission is earned or payable in the event of the machinery being taken back, and, as the machinery in question was taken back owing to default in payment and more than $3,500 is still owing thereon, the appellants are not entitled to payment of any commission.

The portions of the agreement entered into between appellants and respondent, under which the appellants claim the commission, material to this case are as follows:—

Commissions on time sales shall be evidenced as to each note taken, by a non-negotiable commission certificate payable, together with 15 per cent. of the amount of interest collected, when the note upon which the same has been issued shall have been paid in full, in cash, and the money received by the company, less the proportion of discount and expenses (if any) allowed or incurred by the company on said note. Provided, that in all cases where the payment due in any one season or year, shall be sub-divided into two or more notes, the commission certificate issuable under this contract shall be issued upon the last note of such sub-division and shall not become due and payable until such note and all other notes in such sub-division making the total of said season or year's payment, shall each and all have been paid in cash, and the money received by the company. The agent expressly agrees that any or all of the following transactions shall not be deemed a payment in cash, i.e.: when machinery, property either real or personal or both, is transferred, delivered, conveyed or sold to the company, and the consideration therefor is credited on any note or notes; when the proceeds of mortgage foreclosure or execution sales, either real or personal or both accruing from the purchase by the company or its agent in its behalf, of the property so sold, are credited on any note or notes, when notes are extended or renewed; when judgment is received on notes, liens or mortgages, or on any obligations given therefor or

SASK.

S. C.

COWIE v. SAWYER-MASSEY CO.

McKay, J.

to collaterally secure the same; when machinery or property is resold on credit. . . . . Said commissions on machines and repairs to be in full of all charges for selling, unloading, handling, setting up, exhibiting, storing, telegraphing, advertising, examining records, recording mortgages, procuring abstract of title, taxes, remittance of moneys to Winnipeg, and for all other business connected with the sale of the same, but only on machines delivered and settled for, it being agreed that no commission is earned or to be paid on orders not filled or goods returned, taken back, foreclosed, abandoned or condemned; and should any commission have been paid on sale or sales as above described, the agent will refund said commission to the company, and turn over any property or the proceeds thereof that may have been taken out in trade on such sales.

If the foregoing clause stopped at the words "but only on machines delivered and settled for" I think there would be something in the appellants' contention that they are entitled to the commission, as, in my opinion, this clause down to the words lastly quoted means that the commissions payable are restricted to machines delivered and settled for, and as the machinery in question was delivered and settled for by a cash payment and the taking of notes, the agreement, to that extent, was satisfied. But, unfortunately for the appellants, the clause goes on to put a further restriction on the commissions payable on these machines delivered and settled for, namely: that even in those cases it is agreed that no commission is earned or to be paid when the goods are taken back, and, if any commission has been previously paid, the agent is to refund such commission to the company, the respondent.

The clear intention, to my mind, of this clause is that no commission is payable where the goods are taken back or repossessed after delivery and settlement by taking of notes, and if commission has been paid before the goods are taken back or repossessed, then such commission is to be refunded.

Now the machinery in the case at bar was taken back or repossessed (I construe the words "taken back" in the clause as equivalent to "repossessed") and it is not yet paid for as there is still $3,500 due thereon. In my opinion, therefore, the appellants are not entitled to succeed.

It is also to be noted that each of the certificates of commission —after reciting that there will be due to the agents the amount stated in the certificate after payment in full is received in cash by the respondent of the amount of the note for which it is issued and other charges named—expressly recites "Subject also to the

terms of the agent's contract under which the sale was made," thus clearly indicating that the certificates are payable subject to the restrictions of the above clause in the agent's agreement, which says commissions are not payable if the goods are taken back.

Counsel for appellants cited the following cases in support of his contention that the agents were entitled to payment as each note was paid: *Taylor* v. *Laird*, 1 H. & N. 266, *Button* v. *Thompson*, 38 L.J. C.P. 225. These were wages cases where, in the *Taylor* case, it was agreed the pay was to be "a fixed pay of £.50 per month," and it was held that the wages there were earned at the end of each month as "per month" was held to mean "each month," and this was followed in the *Button* case. There was no expressed restriction in these cases to the effect that wages would not be payable if the voyages were not completed, and I think these cases, if for no other reason, are distinguishable from the case at bar on that account, as there is the expressed restriction in the case at bar that no commission is to be payable if the goods are taken back.

In my opinion the District Court Judge was correct in dismissing the appellants' action with costs, and as he has fully dealt with the case in his reasons for judgment, it is needless for me to add anything further, except to say that while I feel it is a hardship on the appellants not to get any remuneration for what they did, yet I fail to see how I can come to any other conclusion than above, under the wording of the agreement in question. The appeal will, therefore, be dismissed with costs.

ELWOOD, J., concurred. Elwood, J.

LAMONT, J.:—The question in this case is whether the words "taken back" in the clause: "It being agreed that no commission is earned or to be paid on orders not fulfilled or goods returned, *taken back*, foreclosed or condemned" includes goods repossessed by the defendants from the purchaser under a clause of the contract of sale entitling them to retake possession on default of the purchaser in the performance of his obligations. Lamont, J.

That the words in their ordinary meaning are wide enough to cover a case of repossession I think will not be denied; but, it may be, that in the mach nery business the term: "goods taken back" is understood to mean goods received back voluntarily, the company consenting that they be returned and that the pur-

SASK.
S. C.
COWIE
v.
SAWYER-MASSEY CO.
Lamont, J.

chaser shall not be held to his contract; while the term "goods repossessed" means goods taken without the consent of the purchaser under a right given by the contract. No evidence was given upon this point, and, until evidence is given that the terms are so understood by those engaged in that particular business, I do not think we would be justified in holding that the words "taken back" do not *prima facie* include repossession. The appeal should, therefore, be dismissed. *Appeal dismissed.*

B. C.
C. A.

TAI SING v. CHIM CAM.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, Galliher and McPhillips, JJ.A. April 3, 1916.

1. PRINCIPAL AND AGENT (§ II A—7)—GENERAL POWER OF ATTORNEY—POWER TO BORROW.

A general power of attorney to "draw, accept, make, sign, endorse, negotiate, pledge, retire, pay or satisfy any bills of exchange, promissory notes, cheques, drafts, orders for payment or delivery of money, securities, goods, warehouse receipts, etc.," confers no general power to borrow money.

[*Jacobs* v. *Morris*, [1902] 1 Ch. 816, followed.]

2. PARTNERSHIP (§ II—7)—PARTNER'S POWER TO BORROW—SCOPE OF FIRM'S BUSINESS.

The power to borrow money in the capacity of partner cannot be validly exercised where the transaction appears to be foreign to the firm's business.

Statement.

APPEAL from the judgment of Morrison, J. Affirmed.

Joseph Martin, K.C., for appellant (plaintiff).

S. S. Taylor, K.C., for respondent.

The judgment of the Court was delivered by

Martin, J.A.

MARTIN, J.A.:—This is a somewhat complicated matter, and the first question arises on the power of attorney to Chim Cam, *viz:* is it wide enough to include the transactions of the partnership with the general public within the limits specified as well as those with the Royal Bank of Canada. After careful consideration of its terms I feel bound, with every respect, to differ from the Judge below in his construction of it that it should be restricted to business with said bank; I can only read the earlier portion of it as general in its application: the fact that the plaintiffs were unaware of its existence does not affect the authority it confers.

But this does not end the matter, because a further question respecting the authority of Chin Mon arises on the face of the power of attorney as to whether or not the transaction is within its scope. I am of the opinion it is not. It authorises Chin Mon to "draw, accept, make, sign, endorse, negotiate, pledge, retire, pay or satisfy any bills of exchange, promissory notes, cheques,

drafts, orders for payment or delivery of money, securities, goods, warehouse receipts, etc.," but there is no suggestion of any authority to borrow money, which this transaction was, as the plaintiff Leong Wong (Tai Sing) admits, the note sued on not having been given for three months after it is dated (A.B., 17) or after the money was borrowed. The case comes within the principles set out in *Jacobs* v. *Morris*, [1902] 1 Ch. 816. Moreover, regarded either as a transaction by an agent under said power or as a partner it cannot stand because after a perusal of all the evidence, and in particular that of the plaintiff, it is quite apparent that this was a private speculation or venture of Chin Mon's, wholly apart from his relationship with any principal or partner and entirely foreign to the firm's business. Chin Mon through the solicitation of the plaintiff personally entered as a member (*i.e.* partner) into two (A.B. 28) Chinese mutual associations of twelve members, including the plaintiff, each contributing $100 to each association, and getting benefits in turns each month in some undisclosed way. The money was borrowed from the plaintiff for this purpose only, and it would be just as plausible to endeavour to fix the defendant with liability for Chin Mon's actions in running a fan tan game or keeping an opium joint. The whole suspicious and significant circumstances, including the subsequent giving of the note, its ante-dating, the claim that it was for goods, the concealment of the actual loan, and Chin Mon's abscondment, show conclusively that it was a scheme to defraud the defendant, and though fraud is not set up as a defence, yet the truth of the transaction is important as negativing the allegation of Chin Mon's authority from any point of view. The appeal should be dismissed.

Appeal dismissed.

SMITH v. BOYD.

Alberta Supreme Court, Scott, Stuart and Beck, JJ. March 24, 1916.

1. PARTIES (§ II B—55)—ACTION FOR SPECIFIC PERFORMANCE—NON-JOINDER OF PLAINTIFFS—DISMISSAL.
Where in an action for specific performance an agreement for the exchange of property, the statement of claim discloses a cause of action along with another party, the non-joinder of the latter as a co-plaintiff is no ground for a dismissal of the action but the defect may be remedied by leave to add and amend under penalty of dismissal.

2. PARTIES (§ II B—55)—MISJOINDER OR NON-JOINDER—MODE OF RAISING OBJECTION.
The proper method by which a party to an action may raise the question of non-joinder or mis-joinder (r. 28, Alta.), is by an application, substantively or on motion for directions, in Chambers, or summarily at

ALTA.

S. C.

SMITH v. BOYD.

the trial, to strike out or compel the opposite party to add, which is to be done at the earliest opportunity under the penalty of costs; raising the question in a defence as a point of law is not the proper method, except in the case when it appears on the facts alleged that the plaintiff or plaintiffs have no cause of action against the objecting defendant, which in reality is no objection on the ground of misjoinder, but merely that the facts alleged do not constitute a cause of action.

Statement

APPEAL by plaintiff from the judgment of Ives, J., dismissing an action on the ground of non-joinder of parties. Reversed.

F. S. Albright, for appellant.

H. P. O. Savary, for respondent.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—This is an appeal by the plaintiff from the judgment of Ives, J., at the trial, dismissing the action without hearing evidence on the ground of non-joinder of a co-contractor as plaintiff, notice having been given on behalf of some of the defendants that a motion for that purpose would be made before the presiding Judge.

The action is one for specific performance of an agreement in writing for an exchange of land on the one side and land and personal property on the other.

The agreement is dated January 19, 1915, and is between Joseph W. Smith and Melville D. Smith thereinafter called the Smiths of the one part and three persons named Boyd thereinafter called the Boyds and thereby the Smiths agreed to transfer to the Boyds certain lands and the Boyds agreed to transfer to the Smiths certain lands and certain personal property.

The action was brought by Melville D. Smith alone, his co-contractor Joseph W. Smith not being a party to the action and no reason being alleged why he was not made a party; there is however an allegation that the plaintiff tendered transfers from himself and J. W. Smith of the lands they had agreed to transfer to the Boyds.

In addition to claiming specific performance the plaintiff, alleging misrepresentation as to the quantity of land under cultivation, claims damages. One Manuel is also a defendant, the plaintiff, alleging that the Boyds had subsequently to their agreement with the plaintiff and Joseph W. Smith agreed to sell to him.

The defendant Manuel put in a defence alleging, in effect, that he had agreed to buy from the Boyds with the knowledge, consent and approval of J. W. Smith and in his assertion that the plaintiff

and J. W. Smith had abandoned their rights under their agreement. The Boyds put in a statement of defence which, besides some admissions and denials set up a memorandum of agreement, dated June 26, 1915, and executed by J. W. Smith for himself and the plaintiff, whereby it was agreed that the agreement of January 19, 1915, should be rescinded.

This defence was filed sometime in September, 1915. The case came up for trial on September 30. On the 27th, the defendants, the Boyds, had given notice of a motion to the presiding Judge to strike out the whole of the plaintiff's statement of claim and to enter judgment for the defendants on the ground that the statement of claim disclosed no cause of action or in the alternative to stay the action until J. W. Smith should be made a party here. On counsel for the Boyds making this motion, counsel for the plaintiff applied for leave to add J. W. Smith as a co-plaintiff producing his written consent to be so added. After hearing both parties the Judge said that he thought the interests of the parties would be best served by refusing the amendment and allowing the plaintiff to bring a new action making J. W. Smith a party, being of opinion that the amendment if allowed would involve great costs. A formal order was ultimately made dismissing the action with costs, reserving leave to bring a new action with J. W. Smith as co-plaintiff, and with a direction that no costs of examination for discovery should be taxed until the expiration of 30 days and then only on failure of the plaintiff to bring another action pursuant to leave reserved.

I think the Judge was wrong in acceding to the motion to dismiss the action and in not acceding to the application to allow J. W. Smith to be added as a co-plaintiff.

Before the Judicature Act the question of the proper parties to an action at law or a suit in Chancery whether as plaintiff or defendant, was often a difficult one to answer, and a mistaken decision might lead to the action or suit being defeated on a plea of abatement or on the ground of variance at the trial or on an objection or demurrer for want of parties.

Our rule 28 (corresponding to English O. 18, r. 11) says that no cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it

ALTA.

S. C.

SMITH v. BOYD.

Beck, J.

or order that the names of any parties improperly joined be struck out and that the names of any persons who ought to be joined or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added.

The proper method by which a party to the action may raise the question of non-joinder or mis-joinder is: An application (substantively or on motion for directions) in Chambers or summarily at the trial to strike out or compel the opposite party to add; and such an application ought to be made at the earliest opportunity under a penalty of the costs or some of the costs, which would have been avoided if the objection had been taken promptly, falling upon the successful applicant. To raise the question in a defence as a point of law is not a proper method of raising the objection, except in the case where it appears on the facts alleged, that the plaintiff, or if there are more than one of them, the plaintiffs, have no cause of action at all, or that the plaintiff or plaintiffs have no cause of action against the objecting defendants; and such a case is not really an objection on the ground of mis-joinder, but an objection that the facts alleged do not constitute a cause of action.

In the present case the facts set up in the statement of claim showed a cause of action by the plaintiff along with J. W. Smith against the defendants. More than that, it showed that he had a cause of action on his own behalf against the defendants had he joined J. W. Smith as a defendant. It was therefore clearly a case not for dismissing the action because there was no cause of action but a case of remedying a defect of non-joinder either by proceeding in spite of the non-joinder or by insisting upon the joinder under penalty of dismissal, not because of there being no cause of action but because of the non-compliance with the order to add. It may be that had the Judge permitted J. W. Smith to be added as a plaintiff, counsel for the plaintiffs might have felt compelled to ask leave to reply specially to the defence, by the Boyds setting up a rescission of the agreement sued upon.

I think it was admitted in the argument that they would in that event have asked leave to set up fraud by way of reply. Had the case reached this point, what in the ordinary course of things would have occurred would be that the Judge would have asked

counsel for the plaintiff to formulate his reply, which he might reasonably be in a position to do at once; then if the defendant's counsel asked for an adjournment, the Judge would have considered whether an application for an adjournment was justified in view of the examinations for discovery already had, of the presence in Court of J. W. Smith, and, as I presume, of all the defendants, and the present state of the pleadings, and I should think that the mere fact that J. W. Smith had not been examined for discovery was not a sufficient ground for adjournment. Considering the matter, the trial Judge might perhaps quite properly have allowed the amendment and refused an adjournment, he could not prima facie have imposed any heavier burden of costs on the plaintiff than the costs of the day and the costs occasioned by, or made useless by, the amendment; and these costs would undoubtedly have been less than the costs imposed by the order which the Judge in fact made. There was in the present case we were told another serious reason for taking the course suggested rather than the one he did, namely, that there was an interim injunction standing in force which ceased to be effective by reason of the dismissal of the action.

I think the appeal ought to be allowed with costs; that the order dismissing the action should be set aside; that the plaintiff should be given liberty to add J. W. Smith as a co-plaintiff upon filing the latter's written consent or to add him as defendant in either case making the necessary and appropriate amendments to the allegations of the statement of claim that the plaintiff, or plaintiffs, as the case may be, be at liberty to file a reply to the defence or either of them; that the defendants should have the costs of the day of the former trial; that these latter costs be set off against the appeal and the balance be included in the final taxation of the costs of the action; and that any further direction necessary to give effect to our decision be left to a Judge in Chambers.

Appeal allowed.

REGINA BROKERAGE AND INVESTMENT CO. v. WADDELL.

SASK.
S. C.

Saskatchewan Supreme Court, Newlands, Lamont, Brown and Elwood, JJ. March 18, 1916.

1. PRINCIPAL AND SURETY (§ I B—13)—DISCHARGE—REALIZING UPON SECURITIES—VENDOR'S LIEN AND PERSONAL JUDGMENT.

Where a creditor has securities in his hands for the debt guaranteed, he is entitled to realize upon those securities without releasing the surety; a vendor's assignment of the agreement of sale together with the land,

SASK.

S. C.

REGINA BROKERAGE AND INVESTMENT CO. v. WADDELL.

covenanting to guarantee the purchaser's defaults in payments, gives the assignee the right, immediately upon the purchaser's default, to a judgment against the guarantor for the whole amount claimed, and to the enforcement of a vendor's lien on the land for the unpaid purchase money, the judgment being enforceable to the extent that the sale of the property does not wholly satisfy it; and the assignor can not be heard to say, that being in the position of surety, he is entitled to the securities and that by ordering a sale of the land he is thereby discharged from liability.

[*Pearl* v. *Deacon*, 24 Beav. 186, applied; *Taylor* v. *Bank of New South Wales*, 11 App. Cas. 596, referred to.]

2. VENDOR AND PURCHASER (§ II—30)—INCONSISTENT REMEDIES—SPECIFIC PERFORMANCE—VENDOR'S LIEN—PERSONAL JUDGMENT—FORM OF ORDER—SURETY.

The remedies of the vendor for a judgment for the purchase price capable of immediate execution and the equitable relief of specific performance and foreclosure of the vendor's lien are inconsistent and cannot stand together; an order which provides for a personal judgment, on which execution can issue before the expiration of the period fixed for redemption, is objectionable, and likewise if it fails to provide for a reconveyance to the purchaser if he pays the purchase price; but these objections are untenable by a surety for the purchaser's defaults.

[*Lee* v. *Sheer*, 19 D.L.R. 36, 8 A.L.R. 161; *Standard Trust Co.* v. *Little*, 24 D.L.R. 713, 8 S.L.R. 205; *Cooper* v. *Morgan*, [1909] 1 Ch. 261, referred to.]

Statement

APPEAL from the judgment of McKay, J., varying the Master's order and declaring plaintiff entitled to a vendor's lien and personal judgment. Affirmed.

R. W. Hugg, for appellant.

C. M. Johnson, for respondent.

The judgment of the Court was delivered by

Lamont, J.

LAMONT, J.:—The facts in this case are as follows:—By an agreement in writing dated April 20, 1911, the defendant Elizabeth H. Porter sold the east half of sec. 5-10-5 W. 2nd to the defendant Waddell for the sum of $6,400, payable $400 in cash and the balance by instalments. By an assignment dated June 19, 1911, the defendant Elizabeth H. Porter assigned to the plaintiff company the said agreement and transferred to them the said land, and in addition thereto convenated that, in case of default by the perchaser (Waddell) in the payment of any sum or sums of money which should become due or owing under the said agreement, she would forthwith on demand pay or cause to be paid to the assignee any sum so in default. The defendant A. S. Porter joined in the said covenant. Waddell agreed to the said assignment, and, as collateral security, assigned to the plaintiff the benefit of a lease which he had granted on said premises. Default having been made in payment under the agreement of sale, the plaintiff commenced this action, and asked for judgment for the purchase money, a vendor's lien and the sale of the lands under the lien;

in case of a deficiency after such sale, judgment for such deficiency.

In their statement of claim, the plaintiff company alleged that they have not been in possession of the lands, nor in receipt of the rents and profits. The defendant Waddell did not appear to the action. The defendants Porter appeared and filed a statement of defence alleging that the plaintiffs were in possession of the lands, and setting up that they were sureties only for payment by Waddell of the moneys owing under the agreement, and alleging that the plaintiffs were not entitled to the relief asked.

The plaintiffs moved before the Master n Chambers for an order striking out the defence and for judgment. The Master in Chambers refused to strike out the defence, but gave the plaintiffs leave to enter judgment as prayed, except judgment of a vendor's lien and judgment against the defendants Porter for any deficiency.

From this order the plaintiffs appealed to my brother McKay in Chambers, who allowed the appeal and varied the Master's order by striking out the defence of the Porters and allowing judgment against each of the defendants for the amount claimed, and declaring the plaintiffs entitled to a vendor's lien on the land for the unpaid purchase money. The defendants were given 6 months within which to pay said purchase money and costs, and, in default of payment, the land was directed to be sold and the proceeds applied to the payment of the plaintiffs' claim. From this order the defendants Porter appeal.

I agree with my brother McKay that the allegation set up by the defendants Porter do not constitute a defence to the plaintiffs' action. In fact, it was admitted by counsel for the appellant, that as against personal judgment the Porters had no defence, or would have had no defence if the motion had been for judgment on the pleadings instead of to strike out the statement of defence. But it was contended that, in so far as the order directed a sale of the land to satisfy the vendor's lien on default of payment within the 6 months given by the Court, the order was wrong for the reason that the Porters, being in the position of sureties were entitled to all the securities held by the plaintiffs and that these securities, including the land itself, must be kept intact for them, otherwise they would have been discharged from their liability as sureties.

SASK.

S. C.

REGINA BROKERAGE AND INVESTMENT CO. v. WADDELL.

Lamont, J.

This is practically the same contention that was made in *Pearl* v. *Deacon*, 24 Beav. 186.

In that case, Messrs. Deacon, who were brewers, agreed to let a public house to one Pearson, and, to enable him to purchase the necessary furniture, they agreed to lend him $250, provided he got sureties for the amount. The plaintiff Pearl became surety for one-half, and one Castles for the other half. In addition, Deacon took a mortgage on Pearson's furniture and his pension as security for the loan. Pearson subsequently got behind in his rent to the Deacons, and they seized the furniture; but instead of selling it and applying the proceeds on account of the mortgage, they took the furniture at a valuation in satisfaction of the rent. The plaintiff thereupon brought action and contended that, as the defendants had disposed of the mortgage goods which were held as security for the debt, he was discharged from his liability. It was held that he was not so discharged, but that the defendants must apply the proceeds of mortgage on account of the debt guaranteed, and to that extent the liability of the sureties would be reduced and that each of them was liable only for one-half of the balance.

This case is referred to as an authority in *Taylor* v. *Bank of New South Wales*, 11 App. Cas. 596.

Even without authority, it would seem to me to follow that where a creditor has securities in his hands, for the debt guaranteed he is entitled to realise upon those securities without releasing the surety. A surety, it is true, is entitled to all the securities in the hands of the creditor if he pays the guaranteed debt. This is to enable him to proceed against the principal debtor and reimburse himself for the moneys paid out under his guarantee on behalf of such debtor; but where the creditor himself has realised on these securities and has credited the full value thereof on the guaranteed debt, the surety is in no way prejudiced.

It seems to me there is another reason why the contention of the Porters in this case cannot succeed. The land itself, which they now claim must not be interfered with, was assigned by the Porters to the plaintiffs. That assignment, I think, was for two reasons: 1st, to enable the plaintiffs to carry out the Porters' contract with Waddell in case he paid up, and 2nd, to give the plaintiffs the security of the land when they took over from the Porters the agreement for sale. It was, therefore, a security not given by the defendant Waddell but by the Porters themselves,

and given for the purpose among others of enabling the plaintiffs to enforce a vendor's lien upon the land in case of default. They cannot now be heard to say that the rights so given must not be exercised. The action against them is on their covenant to pay upon default; default having been made, they have no defence to that action.

As against Waddell, the form of the order as taken out might have been open to the objection that no provision was made for a conveyance to him if he paid the purchase money.

In *Cooper* v. *Morgan*, [1909] 1 Ch. 261, it was held that:

Where a motion for judgment in default of defence is made in a vendor's action for specific performance of an agreement for the sale of real estate, the title to which has been accepted by the purchaser, the minutes should provide for the delivery of a conveyance of the property to the purchaser on payment by him of the purchase money, interest, costs and damages (if any).

In so far as Waddell is concerned, this is an action for the specific performance by him of his contract and the enforcement of a vendor's lien, and the order as taken out does not make any provision for conveyance. It might also be considered objectionable in that it provided for personal judgment against the purchaser. I have consulted with the registrar of this Court, and he informs me that, according to our practice, an execution could immediately be issued against Waddell on the order taken out in this case, without waiting for the expiration of the 6 months within which the defendants were directed to pay. In my opinion this should not be allowed. In an action by a vendor against a purchaser for payment of purchase money of lands sold to him, the vendor is entitled to sue the purchaser on his convenant to pay, and, if he substantiates his claim, he is entitled to judgment against the purchaser on which he can issue immediate execution. If, however, the vendor is not satisfied to take this remedy, but claims also other equitable remedies, and the Court in the exercise of its equitable jurisdiction holds that he is entitled to such remedies but, also in the exercise of its jurisdiction, gives the defendant a certain time within which he is to pay, the vendor is not entitled to a judgment upon which he can issue execution until the expiration of the time fixed by the Court. To grant this would be to say to the defendant by the order: "You have until the expiration of the time fixed to pay the money," and, at the same time allow the plaintiff to issue execution which commands him to pay it at once.

SASK.

S. C.

REGINA BROKERAGE AND INVESTMENT CO. v. WADDELL.

Lamont, J.

These remedies are inconsistent and cannot exist together. If personal judgment is to be granted against the purchaser in such a case, it would have to be a judgment on which execution could not issue; as in *Lee* v. *Sheer*, 19 D.L.R. 36. But so long as our rules and practice authorise the issue of execution on a fiat for judgment against the defendant, the better way, in my opinion, is not to allow judgment to be entered for the purchase money until the expiry of the time given to the defendant within which he is directed to pay. See *Standard Trust* v. *Little*, 24 D.L.R. 713.

In the case at Bar, the defendant Waddell did not appear to the action nor does he appeal from the order made. Had he been before the Court he might have raised these objections but I do not see how the defendants Porter can be heard to raise an objection which affects Waddell alone. The order taken out contains a direction that judgment shall issue for any deficiency found to exist on the sale of the property under the lien. This, under the circumstances of the present case, was unnecessary and was not authorised by the fiat appealed from. It may be considered as surplusage. The judgment against the Porters is valid for the whole amount; if the sale of the property does not wholly satisfy that judgment, it will still stand for the balance. The appeal should be dismissed with costs. *Appeal dismissed.*

B. C.

C. A.

TAIT v. B.C. ELECTRIC R. CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A. April 3, 1916.

1. STREET RAILWAYS (§ III C—43)—COLLISION WITH AUTOMOBILE—CONTRIBUTORY NEGLIGENCE—VIOLATING RULE OF ROAD.

Driving an automobile contrary to the rule of the road as required by a municipal traffic by-law, particularly the reckless proceeding out from behind a street car in a diagonal course thereby hiding from view a street car approaching from an opposite direction, constitutes contributory negligence which will preclude recovery for injuries sustained in consequence of a collision with the street car.

[*B. C. Electric R. Co.* v. *Loach*, 23 D.L.R. 4, considered.]

Statement.

APPEAL from the judgment of McInnes, Co.J., dismissing an action for injuries in a collision accident. Affirmed.

R. M. Macdonald, for appellant, plaintiff.

L. G. McPhillips, K.C., for respondent, defendant.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would dismiss the appeal. In my opinion the plaintiff was clearly guilty of contributory negligence, which brought about the injury complained of.

Irving, J.A.

IRVING, J.A., agreed.

B. C.
C. A.
TAIT
v.
B.C. ELECTRIC R. Co.
Martin, J.A.

MARTIN, J.A.:—Unless the decision of their Lordships of the Privy Council in *B.C. Electric R. Co.* v. *Loach Co.*, 23 D.L.R. 4, 113 L.T. 946, is to be taken as deciding that a continuation of excessive speed up to the time of the accident constitutes ultimate negligence, this appeal ought to be dismissed: I do not think that case goes that far. If the gap between original and ultimate negligence is to be thus bridged by the continuity of excessive speed till impact, then there is no room for contributory negligence and the plaintiff could with impunity be as negligent as the humour took him.

Galliher, J.A.

GALLIHER, J.A., agreed with MACDONALD, C.J.A.

McPhillips, J.A.

MCPHILLIPS, J.A.:—This is an appeal in a negligence action tried before McInnes, J., without a jury, in the County Court of Vancouver—the Judge having dismissed the action holding that the appellant was guilty of negligence—not having complied with the rule of the road, *i.e.*, traffic by-laws of the city of Vancouver—by-law No. 963, sec. 22—sub-secs. (4) and (11). The appellant failed to obtain a finding of fact—from the trial Judge that the respondent had been in any respect negligent, or that the respondent could have by the exercise of reasonable care and diligence avoided the accident. The evidence being carefully weighed does not establish any negligence upon the part of the respondent or want of care or diligence, therefore the case resolves itself into the simple one—of the negligence being that of the appellant. It is plain that the chauffeur who was driving the automobile of the appellant—damage to which is claimed owing to a collision therewith—not only contravened the rule of the road, but he recklessly drove out and from behind the street car proceeding westerly in front of him, hiding from view the street car which was approaching from the opposite direction, and in a diagonal course brought the automobile in front of the street car proceeding easterly upon Robson St.—the negligent action of the chauffeur brought about that which under the circumstances was inevitable accident and the appellant's chauffeur was the author of the injury to the automobile that ensued.

The following cases may be usefully referred to in view of the facts of the present case—and well demonstrate the law applicable to these special facts—*Radley* v. *London & N.W. R. Co.*, 1 App. Cas., 754, 759; *Cayzer* v. *Carron Co.* (1884) 9 App. Cas., 875; *H.M.S. Sanspareil* [1900] P. 267 *per* Vaughan Williams,

B. C.
C. A.
TAIT
v.
B.C. ELECTRIC R. Co.
McPhillips, J.A.

L.J., at p. 287; *The Ovingdean Grange*, [1902] P. 208; *Reynolds* v. *Tilling Ltd.*, 19 T.L.R. 539; *Butterly* v. *Drogheda Corporation* [1907] 2 Ir. R., 134; *Mills* v. *Armstrong, The Bernina*, 13 App. Cas. 1, 15; *B.C. Electric* v. *Loach*, 23 D.L.R. 4.

I am of the opinion that the trial Judge was right in dismissing the action, and the appeal should be dismissed.

Appeal dismissed.

QUE.
K. B.

WARNER-QUINLAN ASPHALT CO. v. CITY OF MONTREAL.

Quebec King's Bench, Sir Horace Archambeault, C.J., and Trenholme, Lavergne, Cross, and Carroll, JJ. December 16, 1915.

1. CONTRACTS (§ VII B—427)—MUNICIPAL WORKS—TENDERS—PLANS AND SPECIFICATIONS—PAVING.

There is no clause either in the City Charter of Montreal (art. 21, sec. 7), or in the statute 1909 (9 Edw. VII., ch. 82), which prescribes as a necessary condition precedent, before awarding a contract for public works, that plans and specifications shall be prepared in all cases; they are only necessary for the construction of buildings, aqueducts, etc.; but a tender imparts sufficient data if it calls "to complete the ashphaltic pavement by the penetration method."

2. CONTRACTS (§ VII B—428)—MUNICIPAL WORKS—TENDERS—LOWEST BID—"SHALL."

The word "shall" of art. 564 of the Montreal Charter, that the city *shall* tender for municipal works and "when its tender is the lowest, it *shall*, if it deems expedient, have such work done," merely confers a discretionary and not imperative duty.

3. CONTRACTS (§ V C 3—403)—MUNICIPAL WORKS—CANCELLATION—ERROR IN AWARDING.

Unless the transaction is fraudulent or *ultra vires*, an error of judgment committed by a municipal body in the awarding of a contract does not give rise to an action at law to set it aside.

4. PARTIES (§ III—129*a*)—INTERVENTION—ATTACKING MUNICIPAL CONTRACTS—INTEREST.

Not merely the interest of a ratepayer but a special and distinct interest is required to entitle a person to demand that a contract awarded by a municipality be cancelled, unless it be established that the transaction at issue is fraudulent or *ultra vires*; the interest of an unsuccessful bidder, to whom the contract would not be awarded if set aside, is not sufficient as entitling him to intervene.

[*Robertson* v. *Autobus Co.*, 23 Que. K.B. 338, affirmed in 26 D.L.R. 228, 52 Can. S.C.R. 30, followed. See also *Norfolk* v. *Roberts*, 23 D.L.R. 547, 50 Can. S.C.R. 388; *La Cie D'Approv. D'Eau* v. *Montmagny*, 25 D.L.R. 292, 24 Que. K.B. 416. For injunctive relief of case, see 26 D.L.R. 72, 24 Que. K.B. 499.]

Statement.

APPEAL from the judgment of Martineau, J., Superior Court, maintaining an inscription in law taken by the City of Montreal, quashing an interlocutory injunction and dismissing the appellant's action and intervenant Langlois' intervention. Affirmed.

J. H. Dillon, for appellant.

Laurendeau & Archambeault, for City of Montreal.

Smith & Markey, for *mise-en-cause*.

Desaulniers & Charbonneau, for intervenant.

The judgment of the Court was delivered by

CARROLL, J.:—As to the inscription in law:—The appellant's declaration alleged, from par. 3 to 22 inclusive as well as by par. 35, the following facts, to wit: About April 10, 1915, the City of Montreal called for tenders relating to the supply of asphalt required for the year 1915. One John Baker offered to supply an asphalt called "Texaco" at the rate of $14.27 per ton; the appellant's tender was for "Montezuma" asphalt at $15.54 and $15.24 and the Aztec Co., also tendered at a price of $16.45 per ton.

Samples of asphalt accompanied the various tenders and were submitted to the city analysts who reported that the "Montezuma" sample was superior to the others. On June 4, 1915, the report of the analysts and also a report of the chief engineer of the city was submitted to the Board of Commissioners. On the same day, the appellant alleges, the Baker tender was set aside as not being acceptable and, instead of awarding the contract to the Warner-Quinlan Co., whose tender was next lowest and was recommended by the analysts and the chief engineer, the Board of Commissioners suggested to the agent of the Aztec Co. to fyle a new tender subject to conditions totally different from the original specifications mentioned in the advertisements. According to these new terms, the Aztec Co. was to supply asphalt at $15.50 per ton, the city to be bound for a period of ten years, conditional upon the said company erecting and operating a refinery in the City of Montreal.

The appellant's declaration further avers that it was not afforded the opportunity of bidding according to such new terms, but a letter was addressed to the City of Montreal whereby the appellant also agreed to erect a refinery in the city provided a ten year contract was entered into. The city declined to listen to such proposal, and, on June 4, the contract was awarded to the Aztec Co.

One Dubuc, representing the tenderer Baker, then obtained a writ of injunction with a view to cancelling the resolution of June 4. The contract was eventually annulled by consent of both parties.

On July 13, 1915, a second set of bids for the supply of asphalt was received and opened: the appellant company's tender was for $14.25 per ton and the Aztec Co., for $15.50.

Notwithstanding the difference in price and in the quality

QUE.

K. B.

WARNER-QUINLAN ASPHALT CO. v. CITY OF MONTREAL.

Carroll, J.

of the material and despite the report of the analysts, the Board of Commissioners (or a majority thereof) decided to award the contract to the Aztec Co. but the resolution was not inserted in the minute register, the legal advisers of the city having notified the said Board that they had no right to accept the highest tender without just cause.

It was then decided to award the contract to the appellant company, although the mayor deferred affixing his signature thereto until August 12, 1915.

The declaration further states that, during all that time, asphalt was being illegally purchased by the city to an amount aggregating $12,000.

The foregoing summarizes the allegations demurred to and finally struck out by the Superior Court presided over by Martineau, J.

The reason given in the judgment is that such allegations are irrelevant, have no bearing whatever on the issue and relate to a different question. As a matter of fact we must bear in mind that the contract we are now dealing with is not the same as that which came before the Court of King's Bench (criminal side), in a recent case, but is a new contract dealing with the laying of asphaltic macadam by the new method known as penetration.

Whatever may be the facts disclosed in that particular case concerning the previous contract, we must deal with the present matter according to the evidence adduced herein. The one guarantee of those who apply to courts of justice with a view to having their grievances adjusted, is that each and every case is to be tried and pronounced upon in the light of the evidence applicable thereto.

We are consequently of opinion with the trial Judge that the allegations struck out are irrelevant to the issue, do not relate to the same matter or to the same contract and the judgment on the inscription in law is well founded.

There then remains no allegation of fraud as regards the awarding of the present contract and the only questions to be solved are the following: 1. Did the Board of Commissioners exceed their powers under the circumstances? 2. Had the appellant company the interest required by law to institute its action?

The appellant says in effect: The city has exceeded or overstepped its authority in failing to provide specifications and to

fyle a tender of its own through its chief engineer, as required by the charter.

The blank form of tender reads thus:—

We, the undersigned. . . . . .hereby undertake to make, supply and lay the asphalt required to complete by the penetration method the asphaltic macadam pavement of certain streets at the following prices:—

The asphalt employed on these works shall be. . . and the method used in order to complete the asphaltic pavement by the penetration method shall be in compliance with the specifications furnished by the undersigned, copies of which are hereto annexed. The asphalt used shall be subject to the approval of the chief engineer.

This method of paving was new in Montreal and the contractors were better aware than any one else of what the city required for the purpose stated. However, if it be true that the preparation of specifications and a tender by the chief engineer were essential conditions precedent to the awarding of the contract, then the proceedings of the Board are "*ultra vires.*"

Let us look at the provisions of the city charter, on this question: Sec. 7 of art. 21 enacts that:—

It devolves upon the commissioners to prepare all plans and specifications, call for, receive and accept all tenders, award all contracts and see to the execution of all work.

Such enactment confers on the commissioners a power which was formerly vested in the council or in the committees appointed by the latter; the committees, however, never pronounced definitely without the sanction of the council. The statute of 1909 (9 Edw. VII., ch. 82) assigns to the commissioners what previously pertained to the council's jurisdiction.

The enactment in question simply provides that when plans and specifications are necessary, they shall be prepared by the Board of Commissioners. There is no clause which prescribes as a necessary precedent condition that plans and specifications shall be prepared in all cases. They shall be prepared when tenders are called for as calculated to properly enlighten the tenderers. But it seems to me that, in the present instance, the tender form elicited sufficient information, which is evidenced by the fact that eight tenderers submitted bids. Plans and specifications are necessary, for the construction of buildings, aqueducts and so forth, but in this case it was sufficient that the tenderer be not misled as to the kind and quality of the material to be delivered. I concur in the remarks of Martineau, J., when he says:—

QUE.

K. B.

WARNER-QUINLAN ASPHALT CO. v. CITY OF MONTREAL.

Carroll, J.

There are two kinds of tenders: the one which leaves no latitude to the tenderer, thus affording unscrupulous public representatives no pretense or loophole for turning down the lowest bid. The other tender consists in substantially specifying the nature of the work to be performed or of the material to be supplied, thus allowing the tenderer due liberty or discretion in devising plans and specifications concerned the object matter of the tender.

The work which the contractors were called upon to execute was, in this instance, very simple. It merely consisted in delivering the asphalt in liquid state and in spreading it over the roadway. The rest of the operation was to be performed by the city labor. Thus for this asphaltic macadam, a foundation of chipped stones is first laid over which a steam roller is run. After thorough rolling, the contractor pours liquid asphalt at high temperature at the rate of one and one-half gallon per square yard. The asphalt may be sprinkled by the hand or by means of mechanical device. Such asphalt coating is then covered with a layer of crushed stone of a smaller grade and again rolled. After another application of liquid asphalt at the rate of one half gallon to the square yard, the city employees cover it with finely crushed stone and the roller does the definite surfacing work.

As it readily appears, plans and specifications in this case would have been perfectly useless; the tenderers in fact were better aware than the city officials as to what was required and were merely to be informed of the kind and quality of asphalt they were expected to supply. On that score, the tender form imparted sufficient data, as the tenderers were called upon "to complete the asphaltic pavement by the 'penetration method' "—a method thus far unexperienced in Montreal.

The second question is: Was the city bound to put in a tender? Art. 564 of the charter provides that:—

When tenders are called for by the city for the performance of municipa works, the city shall tender for such works through its chief engineer; and when its tender is the lowest, it shall, if it deems expedient, have such works done and purchase all the material and plant it may need for such purpose.

The French version reads:—

Lorsque des soumissions sont demandées par la cité pour l'exécution de travaux municipaux, ladite cité, par l'entremise de son ingénieur en chef, soumissionne pour tels travaux et, lorsque sa soumission est la plus basse, elle fait exécuter, si elle le juge opportun, tels travaux et elle achète tout le matériel et tout l'outillage dont elle peut avoir besoin à cette fin.

Much stress was laid on the meaning of the French version. It has been contended that the wording of the English version

makes the provision therein contained more compulsory than does the French phraseology. Leaving out the French version which is still more ambiguous than the English version, let us look to the latter for the construction to be placed on art. 564 *l.*

In the first part of that article, the words "shall tender" are made use of and it is contended that the article in question constitutes an integer, an undividable whole which, according to the rules on the interpretation of statutes, cannot be severed, art. 15 C. C., containing a proviso to the effect that the word 'shall' is imperative.

According to the appellant, the awarding of the contract was conditional upon the stated formality having been complied with. It is often difficult to discover the meaning of statutory enactments though the Judges are none the less bound to interpret them. The present article, after imposing the obligation referred to, goes on to say that the city "shall, if it deems expedient, have such work done." Therefore, the legislator uses the word 'shall' in the first part of the article and again in the second part, to wit: "When its tender is the lowest, it 'shall' if it deems expedient, have such work done." It may then be said that although the use of that word 'shall' occurs in the second part of the article, it cannot be pretended that the legislator meant it to be construed imperatively, since the city is given discretion to have the work done or not, as it deems expedient.

It cannot be that the legislator intended to impose on the city an obligation which it would be at liberty to discharge or to ignore. I would rather think that the intention was to confer on the city a power with which it was vested prior to that amendment and not to subject it to a compulsory formality which, in most cases, would be utterly senseless. I am, therefore, of opinion that the ground of excess of authority cannot be maintained.

There remains the charge of error.—Appellant urges that the Board of Commissioners and the chief engineer committed an error of judgment inasmuch as the sample as well as the specifications submitted mentioned a penetration from 70 to 130, when, as a matter of fact, the sample clearly specified a penetration of but 56. As to the specifications, I do not propose to pronounce upon the appellant's contention; I suppose that the said specifications did mention a penetration from 70 to 130. To bring such asphalt to the required penetration meant to resort to fluxing

QUE.

K. B.

WARNER-QUINLAN ASPHALT CO. v. CITY OF MONTREAL.

Carroll, J.

oil into it, which course or process was deprecated by the engineer. I quote textually from witness Mercier's deposition:—

Quand mon premier rapport est arrivé devant les commissaires, on m'a demandé pourquoi je recommandais spécialement l'"Aztec." Alors j'ai parlé de la pénétration et en même temps du résultat des analyses des échantillons. J'ai attiré l'attention des commissaires sur le fait que l'échantillon de l'"Aztec" donnait un meilleur résultat, en général, que celui du Warner-Quinlan. D'abord, il contenait plus de bitume; ensuite, il y avait moins de matières étrangères et il était moins volatile. Ce sont les trois points sur lesquels j'ai attiré l'attention des commissaires.

The commissioners had before them the report of the acting chief engineer and of the expert analysts, Milton Hersey and Co., Joseph Haynes, R. de L. French and Crossby who all recommended the "Aztec" in preference to the "Montezuma" brand submitted by the appellant company.

If the majority of commissioners can be taunted for proceeding illegally in reference to the former contract, they are above reproach as regards the present one. If they declined to abide by the reports of the experts and their own engineer in the first instance, they did but submit to such direction in the latter case.

What possible blame attaches to their action? They had been shewn conclusively that the sample submitted by the appellant company was of inferior quality to that of the respondent.—Did the experts delude themselves? That is quite possible, but where is the evidence of fraud or of excess of authority which justifies the parties in applying to the Courts. An error of judgment committed by a municipal body in the awarding of a contract does not give rise to an action at law. Our Courts are not empowered to administer public affairs. Each power must remain within the sphere to it attributed by the constitution. To interfere with the transaction of public bodies unless such transactions be fraudulent or *ultra vires* would be tantamount to substituting the judicial to the administrative power. If public representatives are recreant to their trust in ministering to the common wealth, there is a recourse provided by our municipal institutions, a remedy often inefficient by reason of lack of public-spiritedness in those who should most be imbued therewith.

Has the appellant company the interest required to institute its action? The appellant states that it is a ratepayer of the City of Montreal. Its interest as such is the same as that of the other ratepayers and it has been held, time and again, that a special and distinct interest is required to entitle a person to demand that

a contract awarded by a municipality be cancelled, unless it be established that the proceeding at issue is fraudulent or *ultra vires*. Such has been held by this Court especially in *Re Thompson* v. *City of Quebec* (not reported), in 1910, confirmed by the Supreme Court, and also in the case of *Robertson* v. *Autobus Co.*, 23 Que. K.B. 338 (affirmed in 26 D.L.R. 228, 52 Can. S.C.R. 30). The appellant's interest as an unsuccessful competitor cannot either be of any avail, for even were the contract to be set aside, the city could not be adjudged to grant said contract to the said company.

The majority of the Supreme Court, in *Re Robertson* v. *Autobus Co.* went further and held that the one recourse given to a party who feels injured by a by-law or resolution is that granted by art. 304 of the charter which reads:—

> Any rate-payer may, in his own name, by petition presented to the Superior Court, of which at least ten days' notice must be given to the city, between the service of the same and its presentation to the Court, demand the annulment of any by-law on the ground of its illegality.

If I well grasp the import of that decision, such recourse would be the only one vested in a person aggrieved even in case of the awarding of a contract without due authority or *ultra vires* by a municipal body. If such be the opinion of the honourable justices who formed a majority of the Court, it must be admitted that our jurisprudence thus far uniform becomes seriously perturbed, though not actually done away with. The recourse by direct action of *ultra vires* proceedings has never been questioned.

But, as I believe has been demonstrated, it is not necessary to rely on that decision to nonsuit the appellants. It is sufficient to say that, having failed to establish fraud or excess of authority they cannot successfully bring an action.

There remains the intervention:—Intervenant Langlois alleges that he is a ratepayer of the city of Montreal. In pars. 3 to 25 of his proceeding are repeated the same allegations as have been struck out from the inscription in law and must be meted out the same fate.

Pars. 20 to 32 equally recite the same facts as contained in the appellant's declaration. When the intervention was fyled, the case had been taken under advisement, and the intervenant does not pretend that the appellant has failed to invoke certain grounds or reasons which should have been urged and that he suffers prejudice on that account.

As I had occasion to say in the case of *Ross* v. *Ross*, there are

QUE.

K. B.

WARNER-QUINLAN ASPHALT CO. v. CITY OF MONTREAL.

Carroll, J.

two grounds of intervention: the aggressive intervention and the conservatory intervention. In the aggressive intervention, the intervenant always proposes a demand. For instance: two litigants are each claiming the ownership of a property; a third party intervenes alleging that the property is his own. Such is the aggressive intervention. In that case the intervenant has the right to take conclusions other than those prayed for by plaintiff or defendant, but he cannot urge the same conclusions.

A conservatory intervention generally constitutes a plea to the action. For instance: a party is sued in connection with a certain right on him conferred by the Crown. He fyles a plea to the action and the Crown intervenes to sustain the right thus conceded to the defendant. The Crown takes up the defence of the defendant, but has a distinct interest in the issue.

There are cases when the conservatory intervention may constitute a demand, but it is useless to enumerate them. It is sufficient to say that in order to intervene in a case, a person must have an interest distinct and separate from that which actuates the other parties.

The intervenant, however, has added supplementary reasons to those set forth by the appellant, and in that respect his proceeding is legal, if such further reasons relate to the particular question at issue.

It is stated that, prior to April 10, a conspiracy was planned between the Aztec Company and certain other persons to defraud the rate-payers in bribing or attempting to bribe some of their representatives at the City Hall, and intervenant fyles photographed copies of certain documents which are indeed suggestive. As a matter of fact, those documents would shew that several parties had the intention to corrupt some of the people's representatives. The intervenant does not, however, allege whether the plot was carried out or whether any one was actually bribed. Such machinations are reported as having happened in the beginning of April. What effect or result can they have had, since it was only in July that it was decided to pave the streets with asphaltic macadam by the new system called "penetration."—Consequently the trial Judge was justified in denying the intervention.

Upon the whole, we find that the judgments *a quibis* should be confirmed. *Judgment affirmed.*

WAITE et al. v. GRAND TRUNK PACIFIC R. CO. ALTA.

S. C.

Alberta Supreme Court, Scott, Stuart, Beck and McCarthy, JJ. March 24, 1916.

1. RAILWAYS (§ II D 6—70)—LIABILITY FOR INJURY TO ANIMALS AT LARGE—"WILFUL ACT OR OMISSION OF OWNER."

The expression "wilful act or omission" has a meaning distinguishable from "negligence," in that the former denotes a deliberate and conscious intention; hence animals on the lands of new settlers, which are kept together by means of tethering one of the oxen and which escape as a result of the ox releasing himself from the fastening, are not at large through the "wilful act or omission of the owner," within the meaning of sec. 294 (4) of the Railway Act, ch. 37 (amended by 9-10 Edw. VII 1910, ch. 50, sec. 8), and entitles the owner to recover for their being killed or injured on the right of way of a railway company.

[*Parks* v. *Can. North. R. Co.*, 14 Can. Ry. Cas. 247, followed.]

2. RAILWAYS (§ II D 6—71)—INJURY TO ANIMALS—DUTY TO FENCE.

Sec. 294 of the Railway Act, R.S.C. 1906, ch. 37, must be read with reference to conditions of sec. 254, and where there is no obligation to fence there can be no liability for injury to cattle, whether "at large" or "at home;" but where there is an order compelling railway companies in general to fence, a special order partly relieving a railway company from such duty at certain portions of the locality in question does not relieve the company from liability, in the absence of evidence as to where the animals got upon the railway. (Per McCarthy, J.)

[*Higgins* v. *C.P.R. Co.*, 9 Can. Ry. Cas. 34, followed; *Parks* v. *C.N.R. Co.*, 14 Can. Ry. Cas. 247, disapproved.]

Statement

APPEAL by defendant from a judgment of Crawford, Co.Ct.J., in an action for damages for animals killed on railway. Affirmed.

M. D. McLean, for appellant.

G. H. Steer, for respondent.

Stuart, J.

STUART, J.:—In my opinion this appeal should be dismissed.

The plaintiffs were new settlers along the line of the defendant's railway 50 miles or thereabouts west of Edmonton. They were the first settlers that had gone into the district. They had settled, however, 6 or 7 miles from the railway line and had entered for their adjoining homesteads on March 17, 1913. They were joint owners of a team of oxen and the plaintiff Walker owned a cow. It appears that the plaintiffs had done no fencing as yet upon their lands. By July when the accident occurred other settlers had come into the neighbourhood. The plaintiffs seem to have been working on Walker's homestead and on July 6, had been using the oxen in hauling water. On going to get their dinner they tethered one of the oxen by tying a strap around his neck and attaching the strap to a chain, which I assume was fastened to a stake or a tree. The other ox and the cow were with the tethered ox. After an absence of half an hour the plaintiffs returned and found the animals gone. The strap had broken just at the hole where the tongue of the buckle passed through it. The strap was one which was used for tying the tongue of

ALTA.
S. C.
WAITE
v.
G.T.P.R.
Stuart, J.

their wagon to the neck yoke of the oxen and was apparently a strong strap. The plaintiffs had been in the habit of thus tethering one of the animals since March and this had so far always had the effect of keeping the other two with the one tethered. The country was well wooded and the animals had got out of sight. The plaintiffs searched for them continuously for a week and eventually found them on the defendant's railway line, the oxen practically dead and the cow somewhat injured. The plaintiffs sued the railway company for damages, and Crawford, Co.Ct.J., who tried the action, awarded them the sum of $225. From this judgment the defendant appeals.

An order of the Board of Railway Commissioners, dated April 17, 1913, was put in at the trial. There is something peculiar about this order which I find it difficult to understand. The order is stated to be made under sec. 254 sub-sec. 4 of the Railway Act which provides in effect that in unsettled districts the railway need not erect and maintain fences, &c, unless the Board otherwise orders. Yet the order is in terms a *relieving* order and gives the impression that but for the making of it there would otherwise have been an obligation to fence. It was certainly assumed upon the argument that had it not been for this order there would be no doubt about the defendant's duty to fence. But I am not able to discover what created that duty, because admittedly at the place or neighbourhood in question "the lands on either side of the railway were not enclosed and neither settled nor improved." My impression is that there exists a general order of the Board imposing the duty to fence generally throughout all unsettled districts and that the order put in was merely a relaxation of the stringent terms of this general order. But no such general order was proven at the trial and we cannot take judicial notice of its existence.

I am therefore in doubt as to the extent of the admission intended to be made upon the argument by the counsel for the defendant, i.e., whether it was merely intended to admit that the relieving order was not sufficient, taken with the evidence, to shew that at the *locus in quo* there was no duty to fence, and therefore that the case should be treated upon the footing that there was in fact a duty to fence, which, as it appears to me, could only rest upon the existence of a general order not proven; or whether

it was intended to admit that even if there was no duty to fence there would still be a liability upon the railway under sec. 294, sub-secs. 4 and 5, unless it could shew that the animals were at large through the negligence or wilful act or omission of the owner.

My impression is that the former admission only was intended and that there must have been a general order compelling fencing which counsel had in mind and from which the special order put in evidence was a partial relief.

Counsel for the respondent of course contended that all this made no difference and that even if there was no obligation to fence still the railway was absolutely liable unless it proved the negligence or wilful act or omission of the owners. For this see decision of Mathers, C.J., in *Parks* v. *Canadian Northern R. Co.*, 14 Can. Ry. Cas. 247. But for the purposes of the present case we do not need to go as far as that. Certainly there was an admission of a duty to fence whatever may have been the exact reason for that admission.

It becomes therefore merely a question whether the animals in this case were shewn to have been at large through the negligence or wilful act or omission of the owners.

The discussion upon this point in the case cited, particularly at p. 257 of the report, is helpful. The facts there were, of course, different, but it seems to me to be a sound interpretation of the meaning of the words of the Act to say as Mathers, C.J., said,

> It cannot be said that they were at large through his wilful act (and I should add "or omission") when the fact is they got at large against his will.

The matter seems to demand a careful examination of the words of the statute. It seems to me to be clear that the expression "wilful act or omission" must be given a meaning which will distinguish it from "negligence." A man may will to do a certain act at the immediate moment of doing it, but though he may will to do it he may not will its consequences. A farmer having a horse in a field may go out the gate and wilfully leave it open, thinking his horse will not get out. He neglects, that is, to shut the gate. Of course he *wills* this omission. If his horse escapes, although he thought the horse would not get out until he returned, he is no doubt guilty of negligence. Such a case would be covered by the word "negligence." In the *Parks* case the owner took the halters off some horses when turning them out of the stable to go to a spring near by to drink, intending to

ALTA.
S. C.
WAITE
v.
G.T.P.R.
Stuart, J.

turn them back to the stable when they had finished. This might have been termed "negligence" if one thought that it was in fact a negligent thing to do. Mathers, C.J., thought it was not negligence and, I think, properly so. But the taking off the halters was in the narrow sense a wilful act because the owner did it in the exercise of his will and intention. The intention, however, did not go to the ultimate result of the action, *viz;* that the animals should escape and get beyond control. It seems clear to me that in order to ascribe a real meaning to the phrase wilful act or omission by which it will add something not expressed already by the word "negligence" it is necessary to interpret it as meaning that the owner consciously willed, not merely the immediate act or omission, but also the ultimate result, *viz.*, that the animals should as a result of the act or omission be left at large to go where they pleased. In other words, the company must prove either negligence or a deliberate intention on the part of the owner that as a consequence of some act or omission of his the animals were free to go where they pleased. It would appear to be clear that every case where such a deliberate and conscious intention that the animals should go where they pleased is not shewn, must fall within the field of "negligence," and there would be no necessity for the use of the phrase "wilful act or omission" to cover such a default.

Applying this interpretation to the facts it is beyond question that the owners did not intend that the animals should get out of their control. True 2 of them were unfastened. True there was here an omission to tie those 2 up. But that omission was not wilful in the sense that the owners intended that the animals should go where they pleased. The owners thought they had taken sufficient precaution to ensure the animals remaining within control. They may or may not have been negligent, but that is another matter.

Were they, then, negligent in not taking greater precaution? In all the circumstances I do not think they ought to be so chargeable. New settlers cannot always get their homesteads into good working order immediately. The railway, the only source of danger, was 6 or 7 miles away. It had been found that the plan of tethering one of the oxen had worked efficiently and had served the purpose for some months. Had the strap not broken it would

presumably have brought the desired result on this occasion. The strap had been used for this purpose continuously. Possibly it had become worn, but this is not shewn in evidence. The evidence points to the conclusion that the tethered ox by an extraordinary effort, due to the attacks of flies, which were bad at the time, had broken the strap and that the 3 then went off together. They were found together on the railway track. I do not think we ought to assume that the untethered 2 just wandered off and that the tethered one broke away in anxiety to follow them. That had not happened during the 3 previous months. The appeal ought, therefore, to be dismissed with costs.

The respondents cross-appealed asking for an increase in the amount allowed, but I see no satisfactory reason for interfering with the assessment of damages which was made by the trial Judge.

Scott and Beck, JJ., concurred with Stuart, J. Scott, J. Beck, J.

McCarthy, J.:—I am of opinion that the appeal in this case should be dismissed. McCarthy, J.

Under the Railway Act the onus is on the appellant company to shew that the animals "got at large through the negligence or wilful act or omission of the owner." There is some evidence that as to 2 of the animals they were left in the open free from any sort of restraint except from natural instinct to stay together, and this in hot, dry weather when the flies and mosquitoes might molest them; that the third animal was at best insecurely tethered; that the animals were missed by the plaintiffs within half an hour after they strayed; that reasonable diligence on the part of the plaintiffs would have resulted in their being found before the expiration of the 8 or 9 days they were at large.

If the order of the Board of Railway Commissioners had relieved the appellants from their obligation to fence I would have been inclined to be guided by the language of Phippen, J.A., in *Clayton* v. *Can. North. R. Co.*, 7 Can. Ry. Cas. 355, at 366, 17 Man. L.R. 426, where he says

> Where an animal deliberately placed in a field with an open space to the highway, is left to its own inclinations and chooses, as it may, without restraint, to walk abroad, it is, as a matter of law, quite as much at large through wilful act as if originally turned loose upon the road.

See also the judgment of Harvey, J., in *Becker* v. *Can. Pac. R. Co.*, 7 Can. Ry. Cas. 29.

ALTA.

S. C.

WAITE v. G.T.P.R.

McCarthy, J.

An order of the Board of Railway Commissioners was referred to which relieved the defendant (appellant) from the obligation to fence the railway through portions of the locality in question. There is no direct evidence as to where the animals got upon the railway, but counsel for appellant took the position that they could not successfully contend that the animals got upon the railway at a place where the defendant (appellant) was under no obligation to fence.

The District Court Judge followed a decision of the Manitoba Court of Appeal in *Parks* v. *Can. North. R. Co.*, 14 Can. Ry. Cas. 247.

With great respect I am unable to appreciate the correctness of the construction of the statute laid down in that case. The anomaly that leads to this is pointed out in a note to the case at p. 264. I doubt that parliament intended to make such a sweeping change in the law as to impose liability upon railway companies for injury to cattle at large which got upon the railway at a place where the company was under no obligation to fence. It seems to me that sec. 294 of the Act must be read with reference to conditions of sec. 254, and where there is no obligation to fence there can be no liability to injury to cattle, whether "at large" or "at home." That was clearly the view held by Riddell, J., in the case of *Higgins* v. *Canadian Pacific R. Co.*, 9 Can. Ry. Cas. 34 at 37, where he says.

> All persons are forbidden (sec. 294) to permit cattle, etc., from being at large upon a highway within half a mile of the railway crossing; and if animals are so allowed to be at large and are killed at the inter-section, the railway is not liable. But if the railway have neglected the provisions of sec. 254, and either the fences or cattle guards should be wanting or so defective that the animal gets upon the railway from the highway and is killed, the railway must pay for the result of such a disobedience of the statute.

It is true that in *Arthur* v. *Central Ontario R. Co.*, 11 O.L.R. 537, and *Bacon* v. *Grand Trunk R. Co.*, 12 O.L.R. 196, cited in the judgment in the *Parks* case, the language used by the Judge is proper enough to support the conclusion reached in the *Parks* case, but it must be borne in mind that no question was raised in the *Arthur* or *Bacon* cases as to the obligation to fence, and as both cases arose in the old and well settled parts of Ontario, no question could be raised.

There is a further point in this case which, in view of the position taken by the appellant company as to the obligation to

fence, it will not be necessary now for this Court to determine, that if an order is made by the Board of Railway Commissioners with respect to fencing in the locality in question, must the plaintiff shew that the animals got upon the railway at a place where the defendants were bound to fence, or must the defendant company shew that they got on at a place where they were not bound to fence. For some reason, which does not appear clear to me, although reference was made to an order of the Board of Railway Commissioners relieving the appellant from its obligation with respect to fencing, counsel for the appellant stated that it would not rely upon the order of the Board as affecting the locality in question.

Under the circumstances, therefore, I am of the opinion that the judgment against the defendant company was properly obtained, and the appeal should be dismissed with costs.

Appeal dismissed.

KIMBALL LUMBER CO. v. ANDERSON.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Lamont, Elwood, and McKay, JJ. March 18, 1916.

1. GUARANTY (§ I—1)—VALIDITY—ILLITERACY—FRAUD.
The fact that a person signing a guaranty is a foreigner unable to read English, without the document being read over or the nature of the liability explained to him, will not, in the absence of fraud, relieve him from liability thereon; whether or not there was fraud is a question of fact ascertainable from the evidence by the trial Court.

2. GUARANTY (§ I—3)—INTENTION AS TO LIABILITY—ASSOCIATION PRIOR TO INCORPORATION—PARTNERSHIP.
A guaranty for the payment of all moneys which are now or shall at any time be due for lumber and building materials supplied to "the Ponteix Hotel Company, or The Ponteix Hotel Company, Limited," manifests an intention to treat the association as a partnership and that the guarantee shall accordingly apply to liabilities prior to the incorporation.

3. EVIDENCE (§ VII I—565*a*)—PAROL EVIDENCE VARYING WRITING—CONDITION OF GUARANTY.
A written guaranty cannot be varied by verbal evidence shewing that its operation was to be conditional upon the incorporation of a company.

4. NEW TRIAL (§ II—7)—IMPROPER EXCLUSION OF EVIDENCE—REVIEW ON APPEAL.
Improper exclusion of evidence may be ground for a new tiral, but the nature of the evidence excluded should be stated to the Appeal Court in order that it might arrive at a conclusion whether such improper exclusion is ground for a new trial.

Statement

APPEAL by defendant Lorenzino from a judgment in favour of respondent (plaintiff) with costs for the full amount of respondent's claim on a guaranty. Affirmed.

H. F. Thomson, for appellant Joseph Lorenzino.

SASK.

S. C.

KIMBALL LUMBER CO. v. ANDERSON.

McKAY, J.

P. M. Anderson, for respondent.

The judgment of the Court was delivered by

McKAY, J.:—The action was brought by the respondent upon three lien agreements in writing given by the Ponteix Hotel Co. Ltd., for an indebtedness due by it to the respondent, which indebtedness respondent claims it allowed the said Ponteix Hotel Co. Ltd., to incur, relying on a guarantee, hereinafter referred to, given to it by the defendants, and in the alternative for lumber and building materials sold and delivered by the respondent to the Ponteix Hotel Co. Ltd., under the said guarantee. The guarantee is as follows:

Guarantee to Kimball Lumber Company, Limited.

In consideration of your selling lumber and other building material from time to time to the Ponteix Hotel Company, Limited, or ordered by Daniel J. Dupuis or Hans L. Walberg, for the erection of or in connection with the hotel now being built at Ponteix, in the Province of Saskatchewan, on such terms of credit as you shall think fit,

We, the undersigned, jointly and severally guarantee to you the payment of all moneys which are now or shall at any time hereafter be due to you for such lumber and building materials, also due payment of all commercial paper which may at any time hereafter be due to you for such lumber and building material.

You shall have the right at any time to refuse further credit, to release any and all collateral, or other securities, and to extend the time for payment of such lumber and material to any person liable upon any collateral or other securities which you may at any time hold and to compromise or compound with him or them, without notice to us and without discharging or affecting our joint or several liability.

This guarantee to be a continuing guarantee.

In witness whereof we have hereunto set our hands and seals at Swift Current, in the Province of Saskatchewan, this 27th day of January, A.D. 1914.

WITNESS :	(Sgd.) Geo. W. Anderson.
(Sgd.) Fred C. Hayes.	" Dan J. Dupuis.
" Arthur Marcott.	" J. Lorenzino."

A number of defences are raised, but I think it is sufficient to state the following, as they were those relied upon in the argument on appeal: 1. That the guarantee was obtained by fraud and mis-representation of the plaintiff, particulars whereof are as follows:—

At the time of the execution of the alleged guarantee, the construction of a hotel building was projected at Ponteix aforesaid, by a joint stock company then in process of organization, such company to be known as the Ponteix Hotel Company, Limited, in which company this defendant had agreed to take shares. It was proposed to purchase lumber and other building materials for the said hotel from the plaintiff, but the said hotel company not then being

organized, the plaintiff represented to this defendant that it desired to have a document evidencing the concern to which the said lumber and building materials were being sold, and naming the concern which would be liable for payment therefor, and the plaintiff through its representative in that behalf, submitted to this defendant for signature by him a document which said representative stated and represented to this defendant to be such a document as is above referred to. This defendant is a foreigner and unable to read English and signed the said document without the same being read over or the contents explained and believing it to be as represented and not knowing that he was incurring any liability to pay for all lumber and building materials that might be supplied, nor was this defendant made aware of any of the terms or conditions of the said guarantee.

2. That the alleged guarantee was executed by the appellant conditionally, the condition being that the same should be effective and binding upon the appellant only in the event of the Ponteix Hotel Company, Limited, not being incorporated, and that upon the incorporation of the said company, the alleged guarantee should cease to be effective and should immediately become null and void, and that when the said hotel company was incorporated (which occurred long prior to action brought), the said alleged guarantee thereupon became and was thereafter null and void as against the appellant.

3. That, if the said guarantee is binding upon the appellant, he is liable thereunder only for the amount of lumber and other building material proved at the trial to have been sold by the respondent to the Ponteix Hotel Company, Limited.

It appears that the respondent is a lumber company doing business at Swift Current, Ponteix and Vanguard in Saskatchewan; and the defendants Dupuis, and Anderson, and Lorenzino—the appellant—in the fall of 1913 decided to build an hotel at Ponteix, intending to become incorporated under the name of the Ponteix Hotel Company, Limited. There was some delay in getting the company incorporated, which was not done until April 17, 1914, when Dupuis became its president, Anderson vice-president, and the appellant the secretary-treasurer. The defendants started to build the hotel in 1913, and obtained lumber and building material from time to time from the respondent which was charged to the Ponteix Hotel Co. and, on January 27, 1914, the respondent through its secretary-treasurer, Mr. Kimball, obtained the guarantee in question from defendants Dupuis and Anderson at Swift Current. Dupuis admits he read over the guarantee before he signed it, and knew all that was in it. I think this is important because he was the person who interviewed the appellant a day or two later and obtained his signature to the guarantee.

After the Ponteix Hotel Co. Ltd., was incorporated it gave the lien agreements sued on, which were for lumber and building

SASK.

S. C.

KIMBALL LUMBER CO. v. ANDERSON.

McKay, J.

material used in the erection of the hotel in question, and also gave other security. This is admitted by the appellant.

With regard to the defence of fraud. Counsel for appellant contended that the trial Judge did not allow him to adduce evidence thereon. But on reading the evidence I find that some evidence was given on the question of fraud, and the trial Judge apparently came to the conclusion that the fraud alleged was not proved or that the fraud alleged could not be successfully set up by the appellant under the circumstances of this case. Improper exclusion of evidence may be the ground for a new trial, but I think the nature of the evidence excluded should be stated to the Appeal Court in order that it might arrive at a conclusion whether such improper exclusion is ground for a new trial. And, in the case at Bar, even if the trial Judge did exclude evidence of fraud, counsel for appellant did not state the nature of the evidence excluded. And it could not have been evidence to substantiate what the appellant sets up in his particulars of fraud above quoted, as he admits in his evidence he was told it was a "guarantee" he was asked to sign, and evidence was admitted to the effect that it was a temporary guarantee, which apparently the trial Judge did not believe.

The evidence of the appellant, when examined by his counsel, is as follows:

Q. Do you remember the occasion on which this guarantee put in evidence as exhibit "A" was signed by you? A. About January 28 or 29, 1914. Mr. Kimball and Mr. Dupuis came down to me in the store. Q. Who was there? A. Kimball and Dupuis both of them came into the store. Q. Tell me what happened? A. Kimball and Dupuis came into the store and Dupuis presented two papers for me to sign. Q. Was one of those papers this guarantee, is that one of the papers presented to you? (Hands guarantee to witness). A. Yes. Q. Dupuis presented these papers? A. Yes, he asked me if I would sign it. I asked what it was for, that paper. He started to explain what it was for, *a guarantee to Kimball for lumber to the Ponteix Hotel Co., Limited*. That it was only a temporary guarantee and then Kimball took it from Dupuis and started to explain it. Q. Kimball was there? A. Yes, Kimball was right standing alongside the counter. Q. What did Kimball say? A. He says, "Look here, Joe. I sell lumber to the Ponteix Hotel Co., Ltd., this company not exist." He said that this company not exist at the present and he said, "I want you people to sign this paper and I will get something to shew what people I sell that lumber to." He says, "Just as soon as the company is incorporated this paper will be destroyed." I think Mr. Dupuis gave me his fountain pen and I sign it. Q. Did you read it? A. No. A. Was it read over to you? A. No, not read over to me at all.

The Mr. Kimball referred to, and who gave evidence at the

trial, is the secretary-treasurer of the respondent company, and Mr. Dupuis is the co-defendant of the appellant.

Mr. Dupuis corroborates appellant as to Mr. Kimball being present at above conversation, but Mr. Kimball most emphatically denies being present or that he ever asked appellant to sign the guarantee. The trial Judge apparently believed Kimball when he stated he was not present at the time appellant signed the guarantee, as his counsel offered to call witnesses to corroborate him on this point, but the trial Judge held that it was not necessary.

The evidence further establishes the fact that appellant, although a foreigner, can speak and read English, and he gave his evidence on his examination for discovery and at the trial in English. Two copies of the guarantee were presented to him and he kept one copy.

After the company was incorporated it gave the notes sued on and other securities. The appellant admits he did not ask for a return of the guarantee, nor does he appear to have ever said anything about it until after this action was brought.

Mr. Kimball denies he ever represented that it was a temporary guarantee, but, to the contrary, asserts it was intended to be just what it states; a continuing guarantee.

In my opinion the trial Judge was right in holding there was no fraud.

According to the evidence of Dupuis and the appellant, the latter knew he was signing a guarantee for the lumber and building material supplied to the Ponteix Hotel Co. Ltd., but he tries to make out that it was represented to him by Kimball that it was a temporary guarantee, and this Kimball denies. There is nothing in the evidence that I can find to justify me in reversing the finding of the trial Judge on this point who saw and heard the witnesses, if he did so find. And, on the other hand, even if he did not make any finding on this point, as above stated, I do not know what evidence was excluded to prove the fraud alleged. And dealing with the evidence of alleged fraud as appears in the evidence, I am of opinion it is not sufficient, and I come to the conclusion there was no fraud or misrepresentation on the part of the respondent in getting the guarantee signed by the appellant.

For the above reasons I also come to the conclusion that the guarantee was not a conditional guarantee, as contended by ap-

SASK.

S. C.

KIMBALL LUMBER CO. v. ANDERSON.

McKAY, J.

pellant. And, further, the guarantee cannot be varied by verbal evidence into a conditional guarantee to become operative only in the event of the Ponteix Hotel Co. Ltd. not becoming incorporated. The written document must speak for itself, and, in my opinion, is binding on the appellant.

This brings me to the third defence, that the appellant is liable only for the lumber and other building material sold by respondent to the Ponteix Hotel Co. Ltd. after its incorporation.

In considering the legal effect of this guarantee, I think it is important to bear in mind the situation at the time it was given.

The three defendants, of whom appellant was one, were building the hotel at Ponteix, and had been getting lumber and building material from respondents since the fall of 1913, and it was charged to "The Ponteix Hotel Co."

The account was getting large, and, according to Dupuis' own evidence, on or about the latter part of January, 1914, Kimball said before he could go any further and supply any further lumber they would have to give a personal guarantee. The company was not incorporated until April 17, 1914.

As considerable lumber and building material had already been supplied to the three defendants before the taking of the guarantee, there is no doubt that it was intended the guarantee was to cover this, as well as future supplies. The guarantee speaks of "all moneys which are now or shall at any time hereafter be due for such lumber," and, in my opinion, the lumber supplied to the three defendants for this hotel is covered by the words "The Ponteix Hotel Company" in the guarantee. Although there was no such incorporated company in existence at the time, there is evidence that these three defendants were treated as a partnership under that name in the building of the hotel, or perhaps to put it more correctly the account of the lumber and building material which they obtained for the hotel was kept under the name of The Ponteix Hotel Company.

Mr. Kimball, on being cross-examined as to the account prior to incorporation of the company, says:

Q. This was not signed then? (meaning the guarantee). A. It was charged to the Ponteix Hotel Co. Q. They had not been incorporated at that time? A. We were supplying it to the partnership.

(And again at p. 41 of the Appeal Book, this witness says): A. There was no such institution as the Ponteix Hotel Co. Q. Then to whom was the lumber supplied? A. It was supplied to the incorporated Company and be-

fore that to the three in partnership, Dupuis, Anderson and Lorenzino. Q. Those are the only two parties you supplied lumber to in connection with this action? A. Yes.

I do not hold, nor do I think it is necessary to do so, that there actually was a partnership; but there is evidence that they were so treated, and the lumber and other building material these three parties obtained from the respondent for the hotel in question was charged to them under the name of "The Ponteix Hotel Co." and, in my opinion, it was to cover this lumber and other material furnished to them prior to incorporation that "The Ponteix Hotel Co." was inserted in the guarantee, as distinguished from "The Ponteix Hotel Co. Ltd."

Clearly, the intention was that the guarantee was to cover all lumber and material supplied to this hotel, and I think the words used are sufficient to carry out the intention. And the appellant must have known that the guarantee given was to guarantee the account prior to incorporation, because his evidence tries to restrict the guarantee to that, or rather, that it was to be null and void after incorporation, but was to guarantee the account at any rate until then.

After the incorporation of the company, as above stated, it gave the lien agreements sued on for the balance of lumber and building material not paid for, that was furnished by respondent to the Ponteix Hotel Co., and the Ponteix Hotel Co. Ltd. for the hotel. This is shewn by the evidence of Kimball and the appellant. Part of the latter's evidence on this point, in his examination for discovery, is as follows:

Q. Do you know why these notes were signed? A. Signed because Kimball Lumber Co., Ltd., were asking for security for lumber that was bought and other material from the Kimball Lumber Co., Limited. (And at the trial): Q. These documents here, these notes here were signed by the proper officials of the company? (Indicates mortgages and notes B., C., D.) A. Yes. Q. These notes were given for lumber supplied to that hotel at Ponteix? A. Yes.

The guarantee covers commercial paper due to the respondent for lumber and building material sold to the Ponteix Hotel Company and the Ponteix Hotel Co. Ltd., for the hotel at Ponteix, and, as these notes sued on were given for such lumber and building material, the appellant is liable therefor under the guarantee.

I am, therefore, of the opinion the trial Judge was right in giving judgment for the plaintiff, and I would dismiss the appeal with costs. *Appeal dismissed.*

ALTA.

S. C.

SHEPPARD v. BULLETIN.

Alberta Supreme Court, Scott, Stuart, Beck and McCarthy, JJ. May 11, 1916.

1. LIBEL AND SLANDER (§ II E—580)—NEWSPAPER CHARGING CORRUPTION IN PUBLIC OFFICE—APOLOGY — FAIR COMMENT — INFERENCE—QUESTION FOR JURY.

Statements in a newspaper charging an alderman with being a member of the "Administration party," whose policy was to protect and encourage vice and crime, are not libelous *per se*, except by *innuendo* that the plaintiff knowingly and consciously supported that policy; where the publication is based on an inference as the result of a judicial investigation, it amounts merely to an expression of a result and may be pleaded as fair comment, and it is for the jury to say whether the words used are merely those of inference and conclusion; but asserting that the plaintiff was a member of a "Tammany organization," thereby insinuating his corrupt and dishonest practices in dealing with municipal paving contracts, imputes personal knowledge and participation, and if the defendant does not prove the truth of the insinuation and continues to repeat it in the statutory apology (Libel and Slander Act, 1913, 2nd sess. ch. 12, sec. 7), he will be liable in substantial damages, regardless whether the words related to the plaintiff's conduct as a public man or as a private citizen. [*O'Brien* v. *Salisbury*, 6 Times L.R. 137, applied.]

Statement

APPEAL by the plaintiff from a judgment of Ives, J., dismissing an action for libel. Reversed.

The facts of the case are as follows:

The plaintiff was an alderman of the city of Edmonton and the defendant company is the owner and publisher of a newspaper called "The Edmonton Bulletin." The alleged libel complained of arose out of certain questions connected with the municipal affairs of the city. The position taken by the Bulletin was in effect thus:

(1) There were in the city council two parties—a majority, called the administration, supporting the mayor; and a minority opposed to the administration.

(2) The plaintiff was a member of the administration.

(3) The policy of the administration was: (A) The toleration of vice resulting in encouraging and protecting "white slavers" and "red light conditions" and in making the city the rendezvous of the vicious and criminal, and (B) the building up of a "Tammany organisation," meaning thereby that the plaintiff conspired with other members of the council to conduct the business of the city so as to secure private ends instead of the public good and to introduce and carry out in the city of Edmonton corrupt and unlawful practices usually associated with the name of "Tammany."

E. B. Edwards, K.C., for plaintiff, appellant.

O. M. Biggar, K.C., for defendant, respondent.

STUART, J.:—The defendant company in its defence admits the publication of the articles complained of. It denies that the words were capable of the alleged or any other defamatory meaning and asks that reference be made to the whole of the articles. It alleged that in so far as the words might be construed as a reflection upon the plaintiff's character, apart from his record as a public man and in a public office, it had published an apology. It further alleged that in so far as the words relate to the plaintiff's conduct as a public man in a public office and consist of statements of fact they are true in substance and in fact and in so far as they consist of expressions of opinion they are fair comments made in good faith and without malice upon certain matters of public interest which were set forth and consisted of an account of a number of occurrences in municipal affairs during the previous months, including the appointment of committees and of commissioners, the investigation by Scott, J., the proposal for changing the method of choosing commissioners and other matters. The defendant also alleged that the plaintiff had not complied with the provisions of the Libel and Slander Act, 1913, ch. 12.

At the trial a great deal of time was devoted to the question whether or not there was what was termed an "administration party" in the council supporting the policies advocated by Mayor McNamara and whether the plaintiff was a member of that party.

I find a great deal of difficulty in discerning the materiality of this question. I can see nothing improper *per se* in the existence of such a party or in the plaintiff being a member of it. I cannot therefore see how it could be *per se* libellous to allege even untruthfully that the plaintiff was a member of such a party. An assertion that the policy of the party was contrary to the true public interest as distinguished from a policy of corruption and dishonesty, and that the plaintiff being a member thereof was promoting a policy contrary to public interest could also not be libellous. I think one can go a step farther and also say that an assertion that there was such a party, that the plaintiff was a member of it, that the policy of the party was one of corruption and dishonesty would also not be a libel upon the plaintiff except by an innuendo that the plaintiff *knowingly* and *consciously* assisted and supported such a policy. Assuming personal innocence of any corrupt or dishonest motive on the part of the plaintiff, that is, personal ignorance of the real aims and purposes of his party, there could

ALTA.
S. C.
SHEPPARD
v.
BULLETIN.
Stuart, J.

be nothing but legitimate and fair criticism and comment upon his action as a public man in charging him with supporting a party having such corrupt and dishonest purposes because, *ex hypothesi*, he would not be personally corrupt or dishonest, but only innocently mistaken in his course of action. The presence of an innuendo of personal knowledge and participation would in my opinion clearly be necessary before a charge against him of being a member of such a party could be considered libellous. The result obviously is that the question of the existence or non-existence of a party and of the adherence or non-adherence of the plaintiff to it is largely immaterial in so far as the form of the alleged libel is concerned, because in any case what is said must, before there can be a libel, amount to a charge that he knowingly and consciously aided in corrupt and dishonest schemes and actions. No doubt the fact of the existence of a party with such aims clearly proven, and the fact that the plaintiff was a member of it, would be relevant evidence upon a plea of justification as tending to shew that he personally and knowingly assisted in the prosecution of those aims, and also relevant as a possible basis for a plea of fair comment upon his actions. But in so far as the nature of the libel charged is concerned, I cannot see that there can be anything to complain of in stating, either truthfully or untruthfully, that the plaintiff belonged to a certain party in the council unless the statement can be said to contain the innuendo of which I have spoken.

It seems to me, therefore, that if we first decide just what the words used and complained of should be taken to mean it will go far to decide the whole case. Because, if the defendant's newspaper did use words whose proper meaning was that the plaintiff was consciously, knowingly and purposely encouraging and protecting vice and crime there can be no doubt that those words were libellous, while, if the words used can only be properly interpreted as expressing a result, not necessarily intended by the plaintiff, of his course of action in the council, then it is plain that we have the ground laid for a plea of fair comment.

It seems to me, moreover, that it must have been something of this kind that the editor had in mind when, in the article of November 28 and in the article apologising, he drew a distinction between the plaintiff "personally" and the plaintiff as an "alder-

man." This latter distinction is of course a fallacious one because it is just as libellous to say that a man in his capacity of alderman knowingly and intentionally encouraged and protected vice and crime as it is to say it of any private person. It is fallacious to say that any man leaves behind his personal character when he enters public life by accepting an office of honour, or that he can be safely though untruthfully accused of dishonesty and corruption merely because it can be pleaded that he was being referred to in his capacity as a public man. A man's moral character is the same whether in private or public life and is in either case equally entitled to the protection of the law from libellous attacks.

The real gist of the case, therefore, lies in the question: Did the words used, fairly interpreted according to the proper canons of interpretation, attribute corrupt and dishonest motives to the plaintiff, or did they merely amount to a statement of the results of his action or inaction in the council assuming them to be entirely innocent so far as any dishonest or corrupt motive or intention was concerned?

The trial Judge evidently took the latter view of the words complained of, because he concludes his judgment by saying that he found "that the comment on affairs of public interest as found in these articles was fair, in which case there can be no libel." I do not think the Judge would have used that language if he had interpreted the words complained of as attributing dishonest and corrupt motives to the plaintiff.

In considering the meaning of the words used it is necessary to bear in mind the distinction between an allegation of a fact and an expression of opinion. In general, comment can only be an expression of opinion, though there is an exception to this which I shall presently mention. And it is very often difficult, as Odgers on Libel and Slander, 4th. ed. p. 192, points out, to distinguish between an allegation of fact and an expression of opinion. In this connection I would refer to the words of Field, J., in the case of *O'Brien* v. *Marquis of Salisbury*, 6 Times L.R. 133 at 137:

> It seems to me that comment may sometimes consist in the statement of a fact, and may be held to be comment, if the fact so stated appears to be a deduction or conclusion come to by the speaker from other facts stated or referred to by him, or in the common knowledge of the person speaking, and those to whom the words are addressed and from which his conclusion may reasonably be inferred. If a statement in words of a fact stands by itself, naked, without reference either expressed or understood to other antecedent

ALTA.

S. C.

SHEPPARD v. BULLETIN.

Stuart, J.

or surrounding circumstances notorious to the speaker and to those to whom the words were addressed, there would be little, if any, room for the inference that it was understood otherwise than as a bare statement of fact; but if, although stated as a fact, it is preceded or accompanied by such other facts and it can reasonably be based upon them, the words may reasonably be regarded as comment and comment only, and, if honest and fair, excusable; and whether it is to be regarded as fact or comment, is a question for the jury to be determined upon all the circumstances of the case.

Look, then, first, at the surrounding and antecedent circumstances. The plaintiff had been a member of the city council for the current year and also a member of the Safety and Health Committee of the council, which had special charge of matters of police. There had earlier in the year been great agitation by public meetings and otherwise upon the question of houses of prostitution in the city, which agitation led to a judicial investigation asked for by the majority of the council, the plaintiff among them. The Judge had made a very exhaustive report upon conditions and that report had been published in full in the newspapers. In that report, which would therefore be matter of common knowledge to the electors of Edmonton, the Judge had found as facts that there had been grave laxity and misconduct on the part of police officers, and that the Commissioner of Safety and Health, who was the appointee of, removable by, and therefore subject to the control of, a majority of the council, had let it be known to the police officers that houses of prostitution were not to be vigorously prosecuted, but were to be tolerated, that is, not interfered with, so long as there was no complaint from the neighbours, and as long as too many prostitutes did not gather in one house. The Judge found that it was difficult to believe that the mayor was not aware of the attitude of the police, and also that the chairman of the Safety and Health Committee of which plaintiff was a member approved of that attitude. No reference was made in the report to the responsibility of individual members of the Safety and Health Committee other than the chairman. The report was published on July 18. Then when in November the question of an elective commission was being publicly broached the defendant published the first article complained of. I think it must be taken as a fact in the defendant's favour that all the occurrences in municipal politics during the current year, and particularly those just referred to, would be present to the minds of the readers of the Bulletin. The plaintiff

being in a public office cannot plead that the article might be read by persons who knew nothing about the municipal politics of Edmonton, because that would be limiting the possibility of comment upon public affairs on the part of newspapers to an extent which would practically destroy it.

Now the question is, would any resident of Edmonton, acquainted with all the antecedent circumstances to which I refer, interpret these words as a statement of fact or as an inference of fact being made by the writer? Would a reader acquainted with the antecedent and surrounding circumstances understand the words as imputing a course of conduct consciously intended to encourage and protect vice and crime?

It seems to me that it is clear that any ordinary intelligent reader would see at once that an inference of fact was being made by the writer. To such a reader it must have been obvious that to encourage and protect vice and crime could not be in itself an act, but rather a consequence of some act or omission, or series of acts or omissions. Surely when it is said of certain persons that they encourage and protect vice and crime it must be meant that some acts or omissions of theirs had that result?

It is quite noteworthy that even the plaintiff in his innuendo did not venture to assert that the words meant, that he had consciously and purposely encouraged and protected vice and crime. Of course he is not bound by his innuendo but may rely upon any meaning that the jury consider may in the circumstances be fairly attributed to the words used, taken in their ordinary sense. The trial Judge evidently took the view that the true meaning to be attributed to the words, in view of all the antecedent and surrounding circumstances, was that the course of conduct of the members of the council named, the plaintiff among them, had resulted in the encouragement and protection of vice and crime and not that there had been a conscious intention on their part to do so.

The case of *O'Brien* v. *Marquis of Salisbury, supra*, is in some ways very similar to this. O'Brien had addressed a large meeting in Tipperary upon the subject of evicted tenants and the treatment which should be accorded to those who took their places. The Marquis of Salisbury in a speech following shortly after said:

Mr. O'Brien, in language not so crude as I have used but perfectly distinct, urged upon all those who heard him, that men who took unlet farms should be

ALTA.

S. C.

SHEPPARD v. BULLETIN.

Stuart, J.

treated as they have been treated during the last ten years in the locality in which he spoke—that is to say, that they should be murdered, robbed, their cattle shot and ill-treated, their farms devastated.

O'Brien brought an action for slander, alleging these words to have been used and adding the innuendo that the defendant meant that the plaintiff had solicited and incited those who heard him to murder, rob, and commit other agrarian outrages upon men who took unlet farms. The presiding Judge at the trial, Stephen, J., had left it to the jury to say whether the defendant had used the concluding words of the above quotation as a direct statement of what the plaintiff had said in his speech or had been merely making an inference or conclusion as to the plaintiff's meaning, and also the Judge left it to the jury to say whether, in all the circumstances, evidence having been admitted to shew the history of eviction and boycotting in Tipperary during the past ten years, the inference as to O'Brien's meaning was a reasonable one or not. And, in concluding his judgment in appeal, Field, J., said:—

> It was for the jury to give due weight to and consider the language and evidence on both sides, and to consider all the facts which they reasonably thought upon the evidence were in the common knowledge of the speaker and those to whom his words were addressed; and if the jury came to the conclusion that the defendant's language reasonably conveyed no injurious meaning *but was only one of inference and conclusion*, that the effect of the commendation of boycotting, couched in the language used, led to the adoption of practices which ultimately resolved themselves into crime and that this was a fair and honest inference reasonably arrived at by the defendant, I cannot say that the verdict is unreasonable so that it ought to be set aside.

So in the present case, it was for the trial Judge, and there having been no jury I suppose it is equally for us, to say whether the words used were words of inference and conclusion and whether in all the circumstances to which I have referred that inference and conclusion was not absolutely the correct and proper one, but one which might reasonably and with fairness and honesty be made by the editor of a newspaper in the discussion of municipal affairs and of the conduct and public actions of municipal officers.

I have after a careful consideration of the words come to the conclusion that the words were words of inference and conclusion, and that they therefore amounted to comment and not to statement of fact and that this would be the sense which an ordinary intelligent elector, reading them, would attribute to them.

I am also of opinion, not that the inference and conclusion was the logically accurate and truthful inference to draw, because that is not material, but that the inference was one which a reasonable man could with perfect honesty and fairness draw from all the circumstances to which I have referred.

The Court, I think, is entitled to take judicial notice of the fact that in large municipalities like the city of Edmonton the administration of the criminal law, at least in its initial stages, is in the hands of the municipal council through its appointment and control either directly or indirectly of the police force of the city. That control is more immediate and direct than is the control by the provincial legislature of the administration of the criminal law throughout the province. The legislature cannot dismiss the Attorney-General directly as the council here could dismiss the Commissioner of Safety and Health. Yet what would be thought of a member of the legislature bringing an action for libel, if a newspaper attacked the Attorney-General for laxity in the administration of the law and charged all who supported h m in the legislature with encouraging crime and even untruthfully stated that the member bringing the action was a supporter of the Attorney-General? Of course, the analogy is not complete, but the difference is as it appears to me against the plaintiff on this point because of the more direct control by the council.

For these reasons, and particularly because I do not think that the articles complained of fairly and fully read in the light of all the circumstances could be taken as imputing a personal and corrupt intention to encourage vice and crime, I am of opinion that the Trial Judge was right so far as this aspect of the alleged libel is concerned.

With regard, however, to the charges alleging the existence of a so called Tammany organisation, the case, as it appears to me, stands in a different position. Throughout all the articles complained of, including even the apology, so called, there is in my opinion a plain assertion that the plaintiff was associated with such an organisation. The meaning of the expression used in the first article "A Tammany organisation on strictly New York lines" is not one which is obvious upon the face of it. The expression falls within the class of expressions as to which evidence may be directly given as to their meaning, *i.e.*, slang expressions, or words used in some special local, provincial or customary sense.

ALTA.

S. C.

SHEPPARD v. BULLETIN.

Stuart, J.

The innuendo alleged in regard to the first publication is, I think, rather futile. It is stated that the writer insinuated that the plaintiff had used the taxpayers' money for unlawful and improper purposes. I should be surprised if such an allegation, if that were all that could be inferred as to its meaning, could be considered libellous. A municipal council may quite innocently, and, indeed, I am sure often does, use the ratepayers' money for unlawful purposes. A mistake as to the meaning of a statute or a by-law may easily have that result; and any use of the money which sound policy would condemn may be said to be improper. And the plaintiff is in this case confined to his innuendo because it is only by an innuendo that the meaning can be revealed. Unless the words are such as to be libellous on their face without an innuendo, the plaintiff is confined to the innuendo which he alleges. In the absence, therefore, of an innuendo that the plaintiff knowingly and purposely used the ratepayers' money for unlawful purposes I think the plaintiff cannot succeed.

The article asserts that the plaintiff was a member of "Tammany," and the meaning is clearly explained in the article itself. After referring to the "Majority of Administration" to which it alleged the plaintiff belonged and which it described as "Tammany," and after referring to the question of the votes upon the paving contract, the article said: "The members of the council (clearly referring to the plaintiff among others) who were so careful not to let a printing contract of $10,000 or $12,000 to their friends will have to do a lot of explanation to satisfy the men who had to stint their families in order to get their taxes paid by last Monday afternoon that their split on the paving contracts running into the hundreds of thousands was for the protection of the city's interest and not because of a split as to a possible rake-off . . . We have had one year of Tammany. We can't stand another." The insinuation made there seems beyond doubt, and it is this, that the plaintiff was one of a number of aldermen who were acting corruptly and dishonestly in their dealing with the paving contracts. The interpretation given of the word Tammany in the article of December 1st, may, I think, also be taken as an admission by the defendant of the real meaning of the term and applying that interpretation to the article of the 2nd, I think it clearly supports the innuendo alleged in paragraph 5 of the claim

that the plaintiff conspired with other members of the council "to introduce and carry on in the city of Edmonton corrupt and unlawful practices." There can in this matter be no way open for an interpretation which would not impute personal knowledge and participation. And when personal corruption is charged there is no distinction between the plaintiff as an alderman and as a private citizen.

In the so called apology the assertion complained of is impliedly repeated by the recurrence of the insinuation at the end that the plaintiff was part of a Tammany organisation. There was no attempt to prove the truth of this insinuation so far as the paving contracts were concerned, and I think therefore the defendant is liable.

If there had been anything in the evidence to suggest the protection and encouragement of vice and crime in connection with prostitution as implied in the meaning of a "Tammany organisation," it would in my opinion have given a much different aspect to the alleged libellous character of the passages dealing with that subject. But there does not seem to have been anything proven suggesting such a meaning in the phrase.

With regard to the remaining passages about terrorism, libel suits and "unwritten law," I do not think it necessary to examine them in detail; because even if libellous, which may be doubtful, I should not be inclined to add much if anything to the amount of damages on account of them. After all, they do not constitute the real substantial ground of complaint.

The freedom of the press is of course to be carefully guarded by the Courts, and vigorous criticism of public men should not in the public interest be unduly restrained, but there is another side to be remembered which is that the willingness of good citizens to serve in municipal affairs is often repressed by fear of unjust and unfair attacks upon them.

I think therefore the appeal should be allowed with costs, the judgment below set aside, and judgment entered for the plaintiff for damages and costs of the action. As no special damages was suggested, only general damages can be given, and there would appear to be no reason why we should not ourselves fix the amount. The sum of $450 would appear to me in all the circumstances to be fair, and there should be judgment accordingly.

ALTA.

S. C.

SHEPPARD v. BULLETIN.

Beck, J.

SCOTT and MCCARTHY, JJ., concurred.

BECK, J.:—In effect the only grounds of defence relied upon are (1) apology, (2) fair comment. Libel and Slander Act, 1913 (2nd sess.), ch. 12, sec. 7.

The three propositions: (1) that there was an administration party; (2) that the plaintiff was a member of it, and (3) that its policy was toleration of vice and Tammany organisation are propositions of fact. If the defendant has proved these facts to be true I think all the rest comes in under the head of fair comment, because though many things are stated with regard to the conditions existing in the city as facts, they are not attributed to the plaintiff except as being the natural and, in the mind of the writer, the inevitable result of the policy attributed to the plaintiff.

Whether or not greater evils flow from a "toleration of vice," for instance, in the form of a supervised segregation of houses of ill-fame than from what those who favour toleration contend are utterly ineffective and everlasting attempts to eradicate the evil is a question upon which people's minds are, with perfect sincerity, widely divided, and the arguments *pro* and *contra* must be expected to be expressed with great vigor and illustrated with telling examples and accompanied by some vituperation of persons of contrary opinions; and all this if it is no more than "fair, honest, independent, bold, even exaggerated" comment is covered by the plea of fair comment. *Merivale* v. *Carson*, 20 Q.B.D. 275.

Some opinions, though honestly held by some individuals or by certain classes of the community, being held by others in reprobation or detestation, are a cause of disagreement and ill-feeling between the holders of such opposing opinions resulting in the building up of prejudice between them in the avoidance of one another and the refusal of support in social, municipal and political affairs by one or the other. It is therefore, I think, libellous falsely to attribute to one opinions of this character. Some instances occur in the books; for instance, imputing to a Presbyterian gross intolerance in refusing the use of his hearse for the funeral of his deceased servant because his body was to be interred in a Catholic burial ground; *Teacy* v. *M'Kenna*, Ir. R. 4 C.L. 374; charging a French Catholic candidate for parliamentary election in the Province of Quebec with being a "Freemason." *Lareau* v. *La Compagnie d'Imprimerie de la Minerve* (1883) 27 L.C.J. 336, 337; 6 L.N. 156.

So in the present case if the plaintiff was opposed in opinion to the "toleration of vice," it would, I think, be defamation to say of him that he held an opinion favourable to it because it would disparage him in the eyes of those of the community whose good opinion he was most desirous of securing.

The evidence completely satisfies me that the plaintiff was personally not in favour of the "toleration of vice."

He persistently and consistently urged the police investigation —a thing which was thought by many of the public, as indicated by several petitions and addresses before the council, to be the necessary first step towards the remedy of the evil conditions, and the result of which furnished the Bulletin with the foundation for its criticism of the administration party.

It was suggested that the plaintiff might have made, what he claimed was his attitude, clear, by resigning, but first it is not shewn to what extent if any he was, or in so short a time in office could have become aware, of the evil conditions; and secondly, it might, I think, be equally well suggested that being in office he could work more effectively for the eradication of the evils.

I cannot find that the defendant has established its defence of fair comment.

As to the defence of apology I think that had the so-called apology stopped at the point at which its quotation ends in the statement of defence it would have been sufficient. But the apology there set out was part of a lengthy article which proceeded to reiterate the assertion that the plaintiff was a member of the city administration—and the Bulletin must accept its own interpretation of "Administration"—and that the plaintiff was consequently responsible directly or indirectly for the evil results of the policy of the administration.

In my opinion therefore the verdict for the defendant ought to be set aside with costs and judgment entered for the plaintiff; if the plaintiff is satisfied with the nominal damages—which the statute fixes as $5—a judgment may be entered for that amount with costs, but if the plaintiff is not satisfied with the nominal damages, there should be an assessment of damages, the plaintiff to have the costs so far and the costs of the assessment to be in the discretion of the trial Judge on the assessment.

Appeal allowed.

ONT.

S. C.

Re RISPIN.

Ontario Supreme Court, Appellate Division, Mulock, C.J. Ex., and Clute, Riddell and Sutherland, JJ. December 24, 1914.

1. WILLS (§ III L—196)—LEGACY IN LIEU OF DEBT—ABATEMENT UPON INSUFFICIENCY OF ASSETS.

The principle that a legacy given in satisfaction of dower does not abate upon a deficiency of assets is inapplicable to the case of a legacy given to a creditor in satisfaction of an ascertained debt, as to a physician in full settlement for his services; nor is the physician entitled in such event to claim the full amount of his bill and to share pro rata for the balance of the legacy.

[*Re Wedmore*, [1907] 2 Ch. 277, followed.]

Statement

APPEAL from the judgment of Middleton, J., reversing the Judge of the Surrogate Court of the County of Middlesex, made upon the passing of the accounts of executors allowing a payment of $1,500 made by the executors to a physician, a legatee.

The judgment of Middleton, J., is as follows:

This motion is an appeal from the determination of the Surrogate Court Judge with reference to a payment of a legacy of $1,500, made by the executors to Dr. Tisdall. Some question was raised as to the jurisdiction of the Surrogate Court Judge to deal with this question upon an audit. To avoid doubt, it was agreed by all parties that this motion should be treated, not merely as an appeal from the order of the learned Surrogate Court Judge, but also as a motion, as upon originating notice, to determine the question now arising.

By his will the testator gave a number of pecuniary legacies, including among others a legacy of $1,500 to Dr. Tisdall, who had been attending him during his last illness. This legacy was to be taken in satisfaction of the doctor's bill against the testator. This bill at the time of the decease would amount to about $300. The question is, whether the fact that Dr. Tisdall was a creditor, and that the legacy was to be accepted by him in satisfaction of his claim, gives him priority over the other legatees. The estate has not turned out as well as contemplated by the deceased, and the general pecuniary legatees will not receive more than 50 cents on the dollar.

The precise point is determined in favour of the abatement by the decision in *In re Wedmore*, [1907] 2 Ch. 277, where it was determined that the principle by which a legacy given in satisfaction of dower was entitled to priority, and did not abate, was inapplicable to the case of a legacy given in satisfaction of an

Statement.

ascertained debt. The learned Surrogate Court Judge has declined to follow this decision, deeming it to be in conflict with the principles enunciated in a number of earlier cases.

No doubt, there are *dicta* looking the other way; but this is the only decision upon the precise question; and I think the safer course is to follow this decision, so long as it is not overruled by some Court of higher authority. In the last edition of Theobald, the case is accepted without question, and the statement, appearing in the earlier editions of that work, which favours the view entertained by the learned Surrogate Court Judge, has been modified so as to accord with the decision.

With all respect to those who entertain the contrary view, the decision in question commends itself to me. The law by which a legacy to a widow in lieu of dower is entitled to priority is now too well settled to admit of question. It is in truth based upon the doctrine of election. The testator, desiring to dispose of property which is not his, namely, his wife's dower interest, in effect offers her a price which he is willing to pay for it. Before those claiming under the testator can take a benefit under his will which deals with this property sought to be purchased from the widow, they must pay the price.

This has no application whatever to the case of a creditor. The testator is not purchasing anything from him; and, although his failure to rank as a creditor may benefit the legatees, it cannot be said that any assets pass from him to the testator or his estate. He takes the legacy by the bounty of the testator. The testator has chosen to limit his bounty by directing that it is conditional upon the creditor waiving his claim as creditor. The bounty is so much the less, because part of the money received in truth represents a debt. The creditor should have the right, and no doubt has the right, to decline to receive the legacy upon these terms. He could then assert his claim, but I can conceive no foundation for the statement that because a debt, which may be trivial in amount, has to be forgiven as a condition of the receipt of the legacy, the legatee, therefore, acquires priority.

The testator's bounty is limited by the inadequacy of his estate, so all the beneficiaries should abate.

If the intention of the testator is to be sought, it is inconceivable that this would justify the contention of the legatee. If

ONT.
S. C.
RE RISPIN.
Statement.

the testator had realised that his estate might not be sufficient to pay all, is it likely that he would intend his doctor, whose bill was only $300, to receive the $1,500 in full, at the expense of the near relatives, whose legacies would have to abate?

For these reasons, I think the appeal should be allowed, and that an order should now be made, on the originating notice, declaring that the legacy to Dr. Tisdall abates *pari passu* with the other legacies.

The costs will come out of the estate.

Buchner, for the appellant.

T. G. Meredith, K.C., for Charles Roe, the respondent.

J. Macpherson, for the executors.

The judgment of the Court was delivered by

Riddell, J.

RIDDELL, J.:—The late Luke Rispin by his will bequeathed his property to a number of beneficiaries. One clause of his will reads: "To my physician W. J. Tisdall the sum of fifteen hundred dollars in full settlement for his services during the past five years."

There is a deficiency of assets to pay all the legacies; Dr. Tisdall's bill is only $300; His Honour Judge Macbeth held that this legacy did not abate; Mr. Justice Middleton held the reverse; and this is an appeal from the decision of Mr. Justice Middleton.

A careful perusal of all the cases cited in the judgments and the arguments convinces me that the only case of authority in our Courts, which is a decision on the point, is *In re Wedmore*, [1907] 2 Ch. 277. There are many *dicta* and text-writers' statements, but no other decision; and I think it should be followed.

It was suggested that possibly the right decision would be to allow the appellant the amount of his bill in full and let him share *pro ratâ* for the balance; but that course is negatived in the case cited.

The appeal should be dismissed; but, in view of the difference of judicial opinion, of the long line of *dicta*, and of the difficulty having been occasioned by the testator himself, I would give costs of all parties out of the estate.

Appeal dismissed.

FORNELL v. NELSON.

MAN.

C. A.

Manitoba Court of Appeal, Howell, C.J.M., and Richards, Perdue, Cameron and Haggart, JJ.A. April 25, 1916.

1. MASTER AND SERVANT (§ II C 1—185)—CONTRIBUTORY NEGLIGENCE—KNOWLEDGE OF DANGER—NON-ASSUMPTION OF RISK.

A workman who, in pursuance of orders, operates a machine which he knows to be dangerous and unguarded, is not necessarily guilty of such contributory negligence as should absolve his employer from liability, unless the workman has in fact agreed to assume the risk involved. [*Williams* v. *Birmingham*, [1899] 2 Q.B. 338, *Smith* v. *Baker*, [1891] A.C. 325, *Montreal Park and I. R. Co.* v. *McDougall*, 36 Can. S.C.R. 1, referred to.]

Statement

APPEAL by the defendant from a judgment in an action for injuries.

H. J. Symington, for appellant.

T. J. Murray, for respondent.

Howell, C.J.M. Cameron, J.A.

HOWELL, C.J.M. and CAMERON, J.A. concur with PERDUE, J.A.

Perdue, J. A.

PERDUE, J.A.:—This is an action by a workman against his employers to recover damages for injury to his hand caused by a machine while he was engaged in his work. The action is brought both under the Employers' Liability Act and at common law. The facts of importance are as follows: The defendants' shop was a small one in which 5 men, including the working foreman, were employed. The shop contained certain machinery used in doing carpenters' and joiners' work. One of these machines was a jointer. It consisted of a table fitted with revolving knives and was used in shaping pieces of lumber. The machine was known to be dangerous and the defendants designed and provided a guard which was adjustable to the machine, but could be removed. This guard seems to have been approved by the inspector under the Manitoba Factories Act.

On the day the accident took place the plaintiff was ordered by the foreman to do some work which involved the use of the jointer. It was then within a few minutes of closing time and the work was to be done that evening. Just before this, the foreman himself had been working on the jointer with a man named Haas, who acted as helper. The foreman had removed the guard from the machine so as to operate it more easily. The foreman had been called away, leaving Haas at the machine. Plaintiff proposed to the latter that he would help him (Haas), do the rest of the work, which was almost finished, and that Haas would then assist him with his, the plaintiff's work. This was agreed to and while

MAN.

C. A.

FORNELL v. NELSON.

Perdue, J. A.

they were both engaged on the work which the foreman and Haas had been performing, the plaintiff's hand was caught by the knives and the injury was caused. The guard had not been replaced on the machine after the foreman had removed it. The trial Judge submitted a number of questions to the jury and these, with the answers returned, are as follows:—

1. Was the jointer in use a reasonably safe machine (having regard to all the circumstances) for the plaintiff to use in bevelling the boards? A. No. 2. If not, would it have been reasonably safe (having regard to all the circumstances) had the guard been attached? A. Yes. 3. Did the plaintiff know there was a guard? Not answered. 4. Was the plaintiff engaged in his master's business in working with Haas in the bevelling of the boards? A. Yes. 5. Were the defendants guilty of negligence? A. Yes. 6. If "yes" to the last queston, specify fully and in detail the acts of negligence? A. By not guarding the machine properly. 7. Was any employee, other than the plaintiff, guilty of negligence? A. Yes, the foreman. 8. If so, who, and specify the acts of negligence? A. The foreman by not following instructions as to guard. 9. Was the plaintiff guilty of negligence? A. To a certain extent. 10. If "yes" to the last question, specify fully and in detail the acts of negligence? A. By working the machine without being properly guarded. 11. Whose negligence really caused the accident? A. Foreman's. 12. If the plaintiff is entitled to recover, what is a fair amount to allow him by way of compensation? (a) Under the Common Law? A. $800. (b) Under the Employers' Liability Act? A. $800. 13. What is the amount of your verdict? A. $800. Four months' wages, $300; doctor's fees, $50; 10 per cent. on his wages for five years, $400."

The answers to questions 5 and 6 find the defendants guilty of negligence in not guarding the machine properly. Answers 7 and 8 shew that this negligence was that of their foreman, who had failed to comply with the defendants' instructions as to the guard.

It is objected on the part of the defendants that no answer was given to question 3, and that the answers to questions 9 and 10 shew that the plaintiff himself was guilty of negligence. In so far as question 3 is concerned, I fail to see its importance. Even if the plaintiff knew there was a guard, the fact remained that he was told by the foreman to do work which involved the use of the machine from which the foreman had himself removed the guard. The answers to 9 and 10 shew that the plaintiff was guilty of negligence to the extent that he worked the machine while it was not properly guarded.

Now, a workman who, in pursuance of his orders, operates a dangerous machine which is unguarded and who knows that in so doing he is incurring a risk is not necessarily guilty of such

negligence as would absolve his employer from liability. It must also be found as a fact that the workman had agreed to undertake the risk involved in the use of the dangerous machine: *Williams* v. *Birmingham*, [1899] 2 Q.B. 338; see also *Smith* v. *Baker*, [1891] A.C. 325; *Montreal Park & I. R. Co.* v. *McDougall*, 36 Can. S.C.R. 1. There is no finding in the present case that the plaintiff had so agreed. A finding similar to that made by the jury in this case, as to qualified negligence on the part of a workman in operating a machine which he knew to be dangerous and was unguarded, might be made in almost every case of this nature, but that would not be enough to absolve the master unless the workman had in fact agreed that he, and not the master, should assume the risk and responsibility.

The jury finds by answer 11, that the negligence which really caused the injury was that of the foreman. I think the objection that the plaintiff, in assisting Haas at the work the latter was engaged in, was acting on his own initiative and without orders, cannot be sustained. The answer to question 4 establishes that the plaintiff while assisting Haas was engaged in his masters' business and the evidence shews that in giving this assistance he was getting work, then occupying the machine, completed and out of the way, so that he could finish the work put in his hands by the foreman, work which had to be finished within the short time remaining before the shop closed.

Although not without doubts, I think the answers are sufficient to support the verdict. The appeal should, therefore, be dismissed with costs.

HAGGART, J.A.:—I have read the judgment of Perdue, J., and I agree with the conclusion at which he has arrived and concur in his disposition of the case. Haggart, J.A.

The answers of the jury to questions 5 and 6 are an express finding that the defendants were guilty of negligence which consisted in not guarding the machine properly, and the answer to question 11 finds that the negligence which really caused the accident was the foreman's.

The answers to questions 9 and 10 at first appeared to me to be a little inconsistent with other findings. To these questions they reply that the plaintiff was guilty of negligence to a certain extent by working the machine without being properly guarded. There is no finding in express terms that this contributed to the accident.

MAN.

C. A.

FORNELL v. NELSON.

Haggart, J.A.

Reading all the questions and answers together and giving full effect to every word and sentence I would conclude that the jury thought that the defendants' negligence was the *causa efficiens*.

The jury have drawn their inferences and have made their findings. There was evidence to support their findings and the trial Judge was on those findings justified in entering a verdict for the plaintiff.

As to disturbing the verdict, I think the observations in the judgment of Lord Atkinson in *Toronto R. Co.* v. *King*, [1908] A.C. 260, are applicable.

That was a case where the tram car ran against the van and killed the driver. He says:

> Their Lordships are therefore of opinion that the defendants were not entitled to a nonsuit and that there was evidence to go to the jury on the two issues, (1) whether the driver of the tram car was guilty of negligence and (2) whether deceased was guilty of contributory negligence. The jury have practically found these issues in favour of the plaintiffs. They are the tribunal intrusted by law with the determination of issues of fact and their conclusions in such matters ought not to be disturbed because they are not such as Judges sitting in Courts of Appeal might themselves have arrived at.

See *Brydges* v. *North London R.*, L.R. 7 H.L. 213; *Pickering* v. *G.T.P.R. Co.*, 24 Man. L.R. 544, and *Schwartz* v. *Winnipeg*, 12 D.L.R. 56, 23 Man. L.R. 483, and *City of Winnipeg* v. *Schwartz*, 16 D.L.R. 681, 49 Can. S.C.R. 80.

I would dismiss the appeal.

Richards, J.A. (dissenting)

RICHARDS, J.A., dissented. *Appeal dismissed.*

B. C.

C. A.

Re DOMINION TRUST; CRITCHLEY'S CASE.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A., April 17, 1916.

1. CORPORATIONS AND COMPANIES (§ VI F—344)—DUTIES OF LIQUIDATOR—CLAIMS—POWER OF COURT.

The Court has no jurisdiction to interfere with the statutory duties of a liquidator under sec. 73 of the Winding-up Act, R.S.C., 1906, ch. 144 (which requires him to give notice to all creditors to prove their claims), by making an order staying all proceedings taken by him until the final adjudication of certain selected claims, even if the intention of the order is merely to minimize costs and expedite proceedings.

The liquidator is not an officer of the Court in the same full sense as a registrar, etc. Certain things he may do with the approval of the Court, others he is authorized to do without the control of the Court.

Statement

APPEAL from an order of Murphy, J., under the Winding-up Act, R.S.C. 1906, ch. 144.

Joseph Martin, K.C., for appellant.

Douglas Armour, for respondent.

MACDONALD, C.J.A.:—Sec. 33 of the Winding-up Act (R.S.C. ch. 144) declares that the liquidator

> shall perform such duties in reference to winding-up the business of the company as are imposed by the Court or by this Act.

Sec. 72 authorises the Court to fix a date on or before which creditors shall send in their claims to the liquidator. When claims have been sent in, it is the duty of the liquidator to decide which claims, if any, he will require the claimant to prove before the Court. R. 21 of the Winding Up Rules directs him to leave at the registrar's office a list of the claims shewing those of which he does and those of which he does not require proof. Sec. 73 provides that the liquidator may give notice to creditors to prove their claims before the Court on a day to be specified in the notice.

The respondents are four creditors of the company in liquidation who appear to have foreseen that proof of their claims would be required by the liquidator. They, therefore, moved and obtained an order of the Court directing the liquidator to leave the list above mentioned with the registrar, but the order went further and also directed the liquidator to co-operate with the respondents' solicitors in selecting a limited number of disputed claims to be brought before the Court for adjudication. The liquidator filed the list as directed, but neglected to participate in such selection. The respondents thereupon again moved the Court and obtained an order that the claims of the respondents be entered for adjudication on a day to be thereafter fixed. The claims of two other creditors were apparently without prejudice, as leave to the liquidator to appeal was included in the same order. It was further ordered that until final disposition of these claims all proceedings in respect of the other claims on the list should be stayed.

I can find no warrant for such an order in the Act or rules, nor have we been referred to any other authority for it. There are certain things which may be done by the liquidator only with the approval of the Court. They are specifically set out in the Act. There are others which the liquidator is authorised to do, and it is manifest to me that in respect to these the Court cannot control him so long as he keeps within the authority given him. It is idle to speak of the inherent jurisdiction of the Court over its officer where the officer acts in pursuance of authority given to him by statute. The statute says the liquidator may give notice to claimants requiring them to prove their claims in Court. The

B. C.

C. A.

RE DOMINION TRUST; CRITCHLEY'S CASE.

Macdonald, C.J.A.

order complained of in effect says that the liquidator shall not give such notice. Under the statute what the liquidator has to do is plain enough. He has to decide the questions left to his discretion alone. If he should decide that a claim ought to be proved before the Court he must bring the claimants before the Court in the manner provided by sec. 73. This section has to do with judicial proceedings in which a liquidator brings the question of the right of the creditor to rank on the estate into Court for adjudication.

The respondents, and as intimated by counsel, a large body of others in the same situation, think that a saving in costs to all parties concerned would be effected if certain questions of law affecting all creditors of that class should be decided without bringing more than a limited number of them before the Court. I have every sympathy with that desire, but the responsibility in this instance rests with the liquidator. The statute has placed it there. He ought not to incur unnecessary expense, and while his counsel intimated in his argument before us that he intended to give notice to all the creditors concerned requiring them to attend and prove their claims yet, it may be that after what has been said he will adopt the course which the Judge in the Court below apparently thought a very proper one.

Mr. Martin seemed to think that it was in the interest of the estate to bar every creditor who was either unwilling or unable through lack of means to verify his claim. I do not agree with that notion of the liquidator's duty. I think his duty is more correctly stated by the Lords Justices in *Gooch's Case* (1872), 7 Ch. App. 207 at 211. They said:—

> In truth it is of the utmost importance that the liquidator should as the officer of the Court maintain an even and impartial hand between all the individuals whose interests are involved in the winding-up; he should have no leanings for or against any individual whatever.

It is not the liquidator's duty to get rid of a single creditor whose claim is just, and if the justice of his claim depends upon the decision of legal questions equally pertinent to the claims of a large body of creditors and can be decided in an adjudication upon six of such claims at a saving of expense it is the liquidator's duty to assist and not to retard the accomplishment of this end. If the Court below had power to make the order appealed from I should unhesitatingly sustain it, but in my opinion it had not the authority to make it.

It may be noted that the English Winding-up rule No. 102 differs from sec. 73 by providing that the liquidator "unless otherwise ordered by the Court" may from time to time fix the date for proof of claim. The appeal should, therefore, be allowed.

MARTIN, J.A.:—Sec. 73 imposes the duty upon the liquidator of giving a notice to all the creditors, or those so claiming to be, of the company

> requiring such creditors to attend before the Court on a day to be named in such notice and prove their claims to the satisfaction of the Court,

in default of which their claims "shall be disallowed."

The order complained of assumes the power to arrest the hand of the liquidator in the performance of this clear statutory duty by directing that all proceedings taken by him to obtain that end shall be stayed till the final adjudication of the claims of certain creditors selected out of several thousand claims against the company. In my opinion it is clear that there is no power to make such an order; nowhere in the statute is any authority given to a Judge to over-ride the directions of the statute by the exercise of his discretion or otherwise, nor is there any inherent power to do so, so that of itself ends the matter.

But apart from this, what is done by the order is to seek to make test cases in certain classes of creditors, but this has none of the advantages, such as finality, of a test decision, and there can be no consolidation of the claims, because thousands of these creditors are unrepresented and no one is authorised to speak for or bind them, yet they may, in effect, ultimately claim the benefit of any favourable decision on these selected cases while escaping any responsibility for the costs thereof if unfavourable or being bound thereby. And in the meantime the much-to-be-desired object of the liquidator to carry out the provisions of the statute by clearing up the list of claimants as quickly as possible, and weeding out bogus creditors, or those who have no desire to litigate is frustrated.

The further suggestion is made, however, that the action of the liquidator amounts to an abuse of the process of the Court which ought to be restrained by the exercise of the inherent jurisdiction. Though the liquidator, like a trustee in bankruptcy, may in general terms be said to be an officer of the Court—*Re Silver Valley Mines* (1882), 21 Ch.D. 381; and *Re Carnac, Ex parte Simmonds* (1885), 16 Q.B.D. 308, yet Sir George Jessel, M.R.,

B. C.

C. A.

RE DOMINION TRUST; CRITCHLEY'S CASE.

Martin, J.A.

in the first mentioned case, p. 386, more precisely described him as a "paid agent of the Court" and Cotton, L.J., says, p. 392, that "he is a person appointed by the Court to do a certain class of things." It is obvious that at best he is not an officer of the Court in the same full sense as its regular officers are—such as the registrar, etc. For this reason any question of an abuse of the process of the Court by the liquidator could only arise to a very limited extent and I am unable to see how the inherent jurisdiction of the Court to prevent such an abuse can be invoked in a case like this where he is merely doing what the statute directs that he alone shall do. On the contrary, to prevent him from discharging this definite statutory duty by staying his hand would, in my opinion, be an abuse by the Court itself of its inherent jurisdiction. No case has been cited to us, nor, I think, can be found, approaching the great length thus contended for.

McPhillips, J.A.

MCPHILLIPS, J.A.:—I am of the opinion that the order made—with great respect to the Judge—was made without jurisdiction. I have no doubt it was made, as the facts shew, with the desire to minimise costs and expedite the proceedings, had there been the jurisdiction to make the order, and it was the exercise of a discretion capable of being exercised, I would have been in entire agreement with the order made. The appeal in my opinion should be allowed.

Galliher, J.A. (dissenting)

GALLIHER, J.A., dissented. *Appeal allowed.*

ALTA.

S. C.

SALTER v. CITY OF CALGARY.

Alberta Supreme Court, Scott, Stuart, Beck, McCarthy, JJ. March 24, 1916.

1. JURY (§ I A—1)—DISCRETION AS TO GRANTING JURY TRIALS—PERSONAL INJURY ACTIONS.

Rules 172, 173 and 176 (Judicature Ordinance, Alta.) are not intended to leave the questions of jury or no jury to the arbitrary discretion or prejudice of the trial Judge or Master, but each case must be considered on its own merits, as to the character of the action, the amount involved, with special regard as to whether the case is of a class which would traditionally be tried without a jury; but such discretion is exercised on a wrong principle, when the Judge or Master, while considering an application for a jury trial of an action for damages for personal injuries, is influenced by an opinion, that it is more for the interests of the administration of justice that all cases should be tried by a Judge alone, and thus refusing a jury trial in an action where one should be granted.

[*Salter* v. *City of Calgary*, 9 W.W.R. 1201, reversed.]

Statement

APPEAL from the judgment of Ives, J., refusing an application for a jury in an action for damages for personal injuries.

A. A. McGillivray, for (plaintiff) appellant.

Geo. H. Ross, K.C., and *C. J. Ford*, for respondent.

SCOTT, J., concurred with BECK, J.

STUART, J.:—I regret that I cannot with a good conscience concur in the judgment of Beck, J. If I felt free to act as a legislator I should heartily concur in the general principles he has laid down. But when it is suggested that it is possible to deduce his results from the bare wording of r. 173 I cannot bring myself to follow.

Rule 173 has been presented to the nine Judges, nine local Judges and two Masters of this Court for their guidance and each of them is liable at any time to be asked to interpret its meaning. I venture to say that the interpretation presented in my brother Beck's judgment is one which very few of them would ever have dreamt was concealed within the cryptic words of the rule.

Prior to the adoption of the new rules, for over twenty-five years we had a law with regard to the right to trial by jury which was contained in the old rule 170. Then in the Supreme Court Act of 1907 the Legislature gave the Lieutenant-Governor-in-Council power to alter or amend or annul the old rules. I have no doubt that this statute gave the Lieutenant-Governor-in-Council power to pass the present rules 172 and 173.

But difficulties have arisen. An appeal came before the Appellate Division some months ago upon this very question, and although an order was made no reasons for judgment were ever given because the members of the Court were unable to agree upon any satisfactory interpretation of the rule. But for my part I am unable to depart from the views I entertained upon the former application, which were that the words of the rule are incapable of any interpretation which will furnish a definite guide.

It may be that it was intended that as a result of a number of decisions extending over a period of years laying down the principles upon which a Judge in chambers should exercise his discretion litigants and the profession may eventually after a long period of uncertainty be able to form a more or less accurate guess as to whether they will be able to get a jury or not. That is a situation, however, against which I think it my duty to enter an

ALTA.

S. C.

SALTER v. CITY OF CALGARY.

Stuart, J.

earnest protest. If the Lieutenant-Governor-in-Council really intended to throw the whole matter open to a search for a rule of guidance based upon traditional practice, whether in England or in Territories or in other Canadian provinces, I know not which, then I do not think this contributes much to the certainty of litigation, or rather in another sense it will have contributed a great deal. By its very name a "rule" is supposed to be a means of guidance. Under the old rule litigants knew fairly well where they stood. At present even under the judgment of Beck, J., they will still be largely at sea. Formerly there was some precision and definiteness. Now there is none.

All this may be a criticism of the rule which is out of place here rather than an interpretation of it. But on one occasion in Chambers, following an opinion given me upon the meaning of the rule which I was bound to treat with great respect, I held that it places upon the party applying for a jury the burden of showing that the case could be, not *as well*, but *better* tried by a jury and I refused a jury. Ives, J., took the same view in the judgment appealed from. I still think there is strong reason for this interpretation, although it is not entirely satisfactory. But it would certainly leave the matter in a more definite position, even though the result may have been to abolish trials by jury altogether.

I should really prefer this interpretation to one which in effect drives us to rules in force in distant jurisdictions, or a rule plainly repealed, in search for guidance.

McCarthy, J., will be unable to take part in the judgment to be delivered in this case. In order to settle the matter I therefore exercise my whim in favour of a jury, but it is simply *ipse dixi*. This is contrary to the decision I formerly gave in Chambers, but the rule being such as it is and the divergence of opinion such as it is, no one can complain of that.

Beck, J.

BECK, J.:—It involves the construction and the principles involved in the construction and application of one or two rules of Court about which it must be confessed there is much difference of opinion among the members of the Court.

The rules requiring consideration are the following:

172. In actions of slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage, if either party signify his desire that the action be tried with a jury the action shall be directed to be tried with a jury.

173. In any other case upon the application of either party, the Judge may, in his discretion, direct that the action or that any particular issue in the action be tried with a jury or that the amount of damages only be ascertained by a jury.

176. Unless the trial is directed to be with a jury the mode of trial shall be by a Judge without a jury; provided that, in any case, the Court or a Judge may at any time order any cause, matter, or issue, to be tried by a Judge with a jury or by a Judge sitting with assessors or by a special referee with or without assessors.

As some help in understanding these rules, it must be remembered that rules 225-232 deal with orders for directions and amongst other things provide that ordinarily the first step in the action after defence is a motion for directions, and (rule 228) that upon such a motion the Judge—the Master usually exercising these powers—is as far as practicable to make such order as may be just and necessary in respect to all proceedings to be taken in the action and as to the costs thereof and more particularly with reference to the following matters: Security for the claim in part thereof for the costs, pleadings, particulars, admissions, discovery, or inspection of documents, inspection of real and personal property, examinations for discovery, commissions, examination of witnesses, time, place and *mode of trial*, issues to which the evidence at the trial is to be directed.

This latter rule is similar in its term to English Order 30, rule 2.

Briefly, the English rules (O. 36, rr. 2–7) as to mode of trial are as follows:—1. A rule corresponding with our rule 172 (r. 2). 2. Causes or matters assigned by the Judicature Act to the Chancery Division shall be tried without a jury unless otherwise ordered (r. 3). 3. Questions or issues of fact or law which before the Judicature Act could without the consent of parties be tried without a jury *may* be directed to be tried without a jury (r. 4).

(This rule seems to cover in addition to Chancery proceedings only actions with which this Court cannot deal, *e.g.*, Admiralty actions, patents actions.)

4. Issues requiring prolonged examination of documents, accounts, or any scientific or local investigation not conveniently triable with a jury, *may* be directed to be tried without a jury (r. 5). 5. In any other cause or matter, if either party demand a jury it shall be tried with a jury (r. 6). 6. In every other cause or matter, unless under the provisions of r. 6, a trial with

ALTA.

S. C.

SALTER v. CITY OF CALGARY.

Beck, J.

a jury is ordered, or under r. 2 either party has signified a desire to have a trial without a jury, the mode of trial shall be by a Judge without a jury; provided, etc., as in our rule 176 (r. 7) (a).

The effect still more briefly of the English Rules, so far as they are applicable to actions with which this Court deals, it would appear is this:—Actions or proceedings in the nature of Chancery actions shall be tried *without a jury* unless otherwise ordered; those involving prolonged examinations, etc., *may* be tried *without a jury*; in both cases without regard to the desire of either party. All other actions shall be *tried with a jury* if either party so request.

The first part of rule 7, it seems to me, quite unnecessarily says that if one or other of the parties has not insisted upon his right to have the case tried with a jury the mode of trial shall be by a Judge without a jury—a consequence which follows as a matter of course; subject to the proviso that the Court or Judge may intervene at any time and direct any cause, matter or issue to be tried either by: (a) a judge without a jury; (b) a Judge sitting with assessors; (c) a referee with assessors; or (d) a referee without assessors.

Leaving out of consideration these special modes of trial, the English practice recognizes that there are certain classes of actions which by reason of their character have traditionally been and should still be tried by a Judge without a jury; that similarly there are others which have been and, if either party requests it, should still be tried by a Judge with a jury; in the latter case in the absence of a request by one of the parties or the intervention of the Court the trial must by the necessity of the constitution of the Court be tried by a Judge without a jury.

The distinction between the two classes of cases is, as I have pointed out, based upon the difference in their character and the difference in the modes of trial which historically have been applied to them.

Our own rules, like the present English Rules, were obviously enacted not in a vacuum, but in a certain traditional atmosphere, and what that was must be a considerable aid to their interpretation.

The North-West Territories Act, 1875 (38 Vict ch. 49), provided (sec. 71), that where the claim was for tort, wrong, or

grievance in which the amount did not exceed $500 or debt or contract in which the claim did not exceed $1,000 the trial should be without a jury; and that in all other cases than those just mentioned or in cases for the recovery of the possession of real estate the case should be tried by a jury if either party demanded it. The same provision was contained in the North-West Territories Act 1880 (43 Vict. ch. 25) and in the Consolidation of 1886 (R.S.C. 1886, ch. 50).

The Judicature Ordinance of 1888 (ch. 58, sec. 127) enacted this provision:

> On application to set a cause down for trial, if the action be for slander, libel, false imprisonment, malicious prosecution, seduction, breach of promise of marriage, or if the action arises out of tort, wrong, or grievance in which the damage claimed exceed $500, or if the action be for a debt, or founded on contract wherein the amount claimed or the damages sought to be recovered exceed $1,000, or if the action be for the recovery of real property and either party signify his desire to have the issues of fact therein tried by a judge with a jury or the Judge so directs that same shall be tried by a jury.

This provision was carried into the Judicature Ordinance of 1893 (ch. 6, sec. 155), and doubts of its validity having been raised, it was confirmed by Dominion Act (60-61 Vict. (1896-97), ch. 32, sec. 1), and this remained standing as the law relating to trials by jury (Judicature Ordinance, C.O. 1898, ch. 21, r. 170) until the passing of the present rules which we are now called upon to interpret.

The foregoing provision gave either party a right to a jury in six designated actions of tort irrespective of the amount involved, in all actions for tort where the damage claimed exceeded $500, in all actions of contract where the amount claimed exceeded $1,000, and in all actions for the recovery of real property irrespective of the value; and obviously there were left a large number of cases of the nature of chancery actions which, neither being tort nor contract nor for the recovery of land nor being for the recovery of money, did not fall within the rule, and therefore must be tried by a Judge without a jury unless a Judge should otherwise order.

Our present rules give a right to either party to a trial by jury in the six designated cases, five of tort, and one of contract. All other cases are left to the discretion of the Judge (or the Master), on the motion for directions. I would interpret the words of rule 176, "unless the trial is directed to be with a jury, the mode

ALTA.

S. C.

SALTER v. CITY OF CALGARY.

Beck, J.

of trial shall be by a Judge without a jury," as I have interpreted the corresponding English rule, that is, as stating what, by reason of the constitution of the Court, is a thing of course, and therefore as not indicating that the Judge or Master, when considering on the motion for direction the question of the mode of trial, is to be governed by a presumption that all actions except the six designated ones are to be tried without a jury. In dealing, on a motion for directions, with the question of the mode of trial, I think he should deal with it in the same way in which he deals with the various other questions which arise on such a motion, such as particulars, discovery or inspection of documents, examinations for discovery, etc., that is, consider each case as it arises on its merits. And just as in dealing with these latter matters his decision will be grounded upon the character of the action and, to some extent at least, upon the traditional practice; so in dealing with the question of the mode of trial his decision should be similarly grounded.

Now, it seems to me that the rules themselves indicate an inclination to adhere to the traditional practice permitting actions for damages in tort or contract—paying some regard to the amount involved—to be tried by a jury; while obviously there must always be a large class of cases corresponding to suits in Chancery which, by reason of their character and the traditional practice, ought, almost in every case, to be tried without a jury.

It cannot be supposed that the rules intended to leave the question of jury or no jury to the arbitrary discretion or the predilection or prejudice of a particular Judge or Master before whom the question happens to come. Some principle must be taken to have been involved in the rules; and it seems to me that the only one which can be found is that which I have indicated and which I may express more precisely, thus: Each case must be considered in its own merits; the things for consideration are the character of the action, the amount involved, what would have been the right of the party applying for a jury under the traditional practice of the Court, or in other words: does the case fall rather to the side of that class of cases of which the six designated cases are instances or to the side of that class which traditionally would have been tried without a jury? If the former, presumptively trial with a jury should be directed; if the latter, presumptively trial by a Judge without a jury should be directed.

If I am right in this view, then it must be wrong for a Judge or Master to come to the consideration of the question whether a particular case ought or ought not to be tried with a jury under the influence of an opinion that it is more in the interests of the administration of justice that all cases should be tried by a Judge alone; and it seems to me that the Judge of first instance was influenced by such an opinion and consequently exercised his discretion in refusing a jury upon a wrong principle, and that therefore the question is at large before us.

It seems to me that many of the objections that are made to trials by jury, in contrast with the trials by a Judge alone, can be met by the trial judge putting questions to the jury.

In *Toll* v. *Can. Pac. R. Co.*, 1 A.L.R. 318, I said in the course of a judgment concurred in by the rest of the Court:—

> It is clear, however, that there is no obligation on the part of the Judge to put questions to the jury; that is wholly in his discretion, but that some eminent Judges deem it expedient to do so in an action of negligence. It is clear, too, that in this jurisdiction, a jury is not bound to answer questions; the submitting to them of questions is, in effect, asking them to give a special verdict. They are undoubtedly at liberty nevertheless to give a general verdict.

This statement, though quite correct, calls for an addendum. In most cases which go to trial whether with or without a jury there may be several issues. For instance in an action for a debt (1) a denial (2) Statute of Limitations; in an action of libel (1) a denial of publication (2) justification; in an action of negligence (1) a denial (2) contributory negligence.

A general verdict is usually in effect, we find for the plaintiff with so much damages; or we find for the defendant; but a verdict is still a general and not a special verdict where there is a finding for the plaintiff on one or more issues and for the defendant on another or other issues. Chittys' Q.B. Practice 9th ed. 233, 14th ed., p. 655; Co. Lit. 226; *Davies* v. *Lowndes*, 1 Sc. N.R. 328; Holmested and Langton, 4th ed., p. 221; Tidd's Prac. 9th ed., p. 869, 38 Cyc. tit. Trial 1868. And a jury in a proper case, though not bound to give a special verdict, or in effect to do so by answering questions, may be required to give a general verdict upon every material issue raised by the pleadings—to use the expression current in the United States, they may be required to make their verdict "responsive to the issues." See authorities

ALTA.

S. C.

SALTER v. CITY OF CALGARY.

Beck, J.

already cited and Abbott Trial Brief, 2nd ed., p. 508; 38 Cyc. tit. Trial, p. 1884.

Included in this rule, too, would be the obligation for a jury to state a separate sum for damages found in respect of more than one cause of action.

It is seldom that juries refuse to answer questions submitted to them; should they do so and bring in a general verdict the trial Judge may insist, if there was more than one material issue raised by the pleadings or the evidence, if he directs that the pleadings shall be taken to be amended so as to raise another issue introduced by the evidence, that the jury shall find a verdict upon each of the issues and in the case of their finding a sum of money payable by either party to the other to state the amount found in respect of each cause of action, if there is more than one.

As I have said, keeping in mind this control of the trial Judge over the conduct of juries and remembering that there is much to be said in favor of the likelihood of six men of the world, of probably much the same condition in life as the parties, arriving at as correct a decision as a single Judge, though more learned in law and more accustomed to the weighing of evidence, I think much of the prejudice against trials by jury will disappear.

Applying the principles which I have laid down, I think the Judge of first instance ought to have acceded to the request of the plaintiff for a trial with a jury, and, therefore, in my opinion his order and the order of the Master which he affirmed ought both to be set aside with the costs and this appeal be allowed with costs.

McCarthy, J.

MCCARTHY, J., took no part in the judgment.

Appeal allowed.

ONT.

S. C.

CRANE v. HOFFMAN.

Ontario Supreme Court, Appellate Division, Garrow, Magee, and Hodgins, JJ.A., and Kelly, J. January 24, 1916.

1. SALE (§ I C—19)—CONDITIONAL SALE—REPOSSESSION OF GOODS—RIGHTS OF GUARANTOR—INDORSER.

A provision in a conditional sale contract entitling a vendor, upon default in payment, to repossess machinery, and apply the proceeds to payment of the purchase notes, does not entitle the vendor to use the property as his own after repossession, and after such use he cannot recover against an indorser of the unpaid notes.

[See also *Wade* v. *Crane*, 27 D.L.R. 179, 35 O.L.R. 402.]

Statement

APPEAL by plaintiff from the judgment of Middleton, J., dismissing an action to recover upon two promissory notes indorsed by the defendant. Appeal dismissed, Court equally divided.

ONT.

S. C.

CRANE v. HOFFMAN.

Statement

The judgment appealed from is as follows: This action arises out of the transactions giving rise to the action of *Wade* v. *Crane*, 27 D.L.R. 179. The material facts, so far as this case is concerned, are that Crane, the owner of a brick-yard, agreed to sell it, the deed to be held in escrow until the payment of the purchase-price. The assignee of the purchaser, the Excelsior Brick Company, in carrying on its business, desired to replace a broken-down machine by one which was new and up-to-date. Crane purchased the machine desired, and agreed to sell it to the company, under the terms of a conditional sale contract, by which the property was not to pass until the price was paid. This stipulation is added to each of the notes sued upon. The defendant is an indorser of the notes. The machine was annexed to and became part of the realty; and, default having been made in carrying out the purchase of the land, Crane took possession of the land, and, with the land, possession of this machine. He operated the yard, and in the course of the operations has used the machine as an integral part of the plant, treating it as his own property. He now sues the surety. The defence is rested upon the theory that, the property not having passed, and the vendor having retaken possession and treated the machine as his own, he cannot recover for the price. The contract contains a provision that upon default of payment of the notes the vendor shall be at liberty to take possession of and sell the property and apply the proceeds upon the notes, after deducting costs of repossessing and selling.

I do not think that the vendor can recover that which is in truth the price of the chattel sold, because his conduct has been inconsistent with his obligations as vendor. Although the property in the machine was not to pass until the price was paid, and although the vendor was within his rights in taking possession upon default, he was, I think, bound to keep the machine in the same plight and condition as when he repossessed it, and to hold it ready at all times for delivery, unless the contract gave him some other and wider right.

The contract here has given a wider right, but not the right to do what he has done. He was at liberty under the contract, on resuming possession, to sell the property and apply the proceeds upon the note. He has not sold the machine, but he has used it as part of his own brick plant; and he cannot, I think, now call

ONT.

S. C.

CRANE v. HOFFMAN.

Statement

upon the purchaser to accept a machine which he has applied to his own purposes. It is no answer to say that the machine has not been much depreciated by this use, and that compensation can be made. It is sufficient that the use which he has made of the machine was not contemplated by the contract, and is inconsistent with his obligation to hold it ready for delivery.

There may be other difficulties in the plaintiff's way, but they need not be investigated or discussed. The action fails, and must be dismissed with costs.

W. M. McClemont, for appellant.

S. H. Bradford, K.C., for defendant, respondent.

Garrow, J.A.

GARROW, J.A.:—The action was brought to recover the sum of $1,925 and interest due upon two promissory notes for $962.50 each, made by the Excelsior Brick Company, an incorporated company, both in the form following: "Toronto, August 28th, 1913. On the 28th day of October, 1913, I promise to pay George Crane or order, at the Union Bank of Canada, Grimsby, Ont., nine hundred and sixty-two dollars and fifty cents with interest at the rate of eight per cent. per annum both before and after maturity until actually paid. This note is given in payment of Four Mould Boyd Brick Press, being number . The title of the above property for which this note is given is not to pass, but to remain in the payee of this note until the note is paid, and in case of default in payment the payee shall be at liberty without process of law to take possession of and sell the said property and apply the proceeds upon this note, after deducting all costs of taking possession and sale. Excelsior Brick Company Limited."

The defendant and one Vane were directors of the brick company, and gave upon the back of each of the notes the following written guaranty: "We hereby guarantee the payment of the within note and interest upon maturity in accordance with the terms thereof. C. Vane. J. H. Hoffman."

The making of the notes and the giving of the guaranty are not in dispute. The substantial defence is, that the dealings of the plaintiff with the machine for the price of which the notes were given, after they fell due, had the legal effect of cancelling the notes, or at all events of discharging the surety.

It appears that in the month of March, 1913, the plaintiff, who had theretofore carried on the business of brick-making, con-

tracted to sell his brick-yard and premises to the guarantor Vane, who subsequently, with the plaintiff's consent, transferred the contract to the then recently organised Excelsior Brick Company. Under the contract, immediate possession was to be given, but the conveyances were not to pass until the purchase-money was paid, and upon default the vendor was to be at liberty to resume possession, and all money theretofore paid on account of purchase-money was to be forfeited. And the purchaser, while in possession, agreed to operate the plant so as not to impair its value or that of the lands connected therewith.

The Excelsior Brick Company, after making certain payments on the purchase-money and carrying on business for almost a year, made default, and on the 26th March, 1914, the plaintiff took possession under the terms of the contract of sale, and excluded the brick company.

Before that, namely, in the previous month of August, the plaintiff sold to the brick company the machine for which the notes now sued on were given.

The brick company displaced an older machine used by the plaintiff for many years, and in its place affixed the new machine for which the notes were given, and thereafter used it as part of the brick-making plant until the plaintiff resumed possession. After the plaintiff resumed possession, he also resumed the business of brick-making, and in so doing continued to use the new machine as part of the plant.

In consequence of such action on the part of the plaintiff, Middleton, J., was of the opinion that the plaintiff had lost his right to maintain this action. [GARROW, J.A., then quoted from the judgment of Middleton, J., the paragraph beginning "I do not think that the vendor can recover" and the paragraph next following, and continued:]

The judgment, it will be seen, proceeds entirely upon the theory that the plaintiff had taken possession of the machine under the lien contained in the notes, and that his retention and use of it were inconsistent with his duty. The duty referred to is, I assume, that prescribed by sec. 8 of the Conditional Sales Act, R.S.O. 1914, ch. 136, not to sell within twenty days, nor, if a balance is intended to be claimed, without notice in writing of the intended sale.

ONT.
S. C.
CRANE
v.
HOFFMAN.
Garrow, J.A.

But, with deference, this pronouncement seems entirely to ignore the important circumstance that the machine had, before the notes became due, been affixed to the freehold, thereby losing its character of a personal chattel, and, *primâ facie* at least, becoming subject to the title to the land.

The general law of fixtures, a very wide subject, is not, I think, involved, but merely an elementary rule or two. And the first is that of the intention of the party who affixes. There can be no doubt that the brick company, then the equitable owner of the land under the agreement to purchase, intended the new machine to take the place of the old one and to become a necessary part of the permanent plant. The next is the mode and extent of the affixing, which in this case was by placing the new machine upon a cement foundation specially prepared for it, bolting it down to prevent vibration, and connecting it up with the other steam-driven machinery of the plant. These circumstances seem ample to determine, for the purposes of this action, the character of the machine thereafter as that of a fixture. See *Hobson* v. *Gorringe*, [1897] 1 Ch. 182; *Reynolds* v. *William Ashby and Son Limited* (1904), 20 Times L.R. 766, [1904] A.C. 466.

The effect upon the title to chattels affixed, and the modern application of the ancient maxim *quicquid plantatur solo, solo cedit*, is also discussed in *Gough* v. *Wood & Co.*, [1894] 1 Q.B. 713, at pp. 718, 719, and in *Wake* v. *Hall* (1883), 8 App. Cas. 195.

The affixing, it must be assumed, was done with the full knowledge and consent of the defendant, a director of the company.

At that time no default had occurred in payment of the purchase-money by the brick company. Had that default not subsequently occurred, the situation would, of course, have been very different. But nothing is more distinct upon the evidence than that when, in March, 1914, the plaintiff took possession, he did so, not under the lien-notes, but entirely as owner of the freehold and by virtue of the forfeiture provided for in the agreement of sale to the brick company. He now stands upon that title, and I am not able to see a good reason why he may not, and may not also claim payment of the lien-notes, which have not been paid, from the brick company, and this defendant as guarantor.

The machine, as before pointed out, was purchased, or at all events was used, the plaintiff thinks unnecessarily, to replace an

old machine of the same kind which had belonged to the plaintiff, forming part of the plant agreed to be sold to the brick company, but which the brick company discarded as worn out. The fact that the machine itself, after several months' use and wear by the brick company, came back to the plaintiff by virtue of his original and superior title as owner of the land, is clearly not in itself an answer to the claim; and the Conditional Sales Act seems to have little or no application. The law of fixtures has, of course, been altered by the provisions of sec. 9, but only to the extent therein described, which clearly is confined to giving the seller a right, which otherwise he would not have, to follow the goods, with a corresponding right on the part of the owner of the land to keep them on paying what is unpaid upon them. But the seller here is also the owner of the land—a case not contemplated, or at least not provided for, by the statute.

The plaintiff did nothing to bring about the position of which the defendant complains. He has been guilty of no negligence or bad faith. He may have known that annexation of the machine to the freehold was intended, but he had nothing to do with making it. At that time he expected to be paid both for his land and for the machine.

The defendant was familiar with all the material facts from the beginning. As a director of the brick company, he knew of the agreement to purchase the brick-yard premises, and he knew of its terms, which, among other things, provided for the maintenance by the company of the premises until the conveyance was obtained, and for a forfeiture of its rights by the company upon default in payment of the purchase-money. He knew, when the machine was purchased, that it was intended to affix it as a permanent part of the plant in the place of the older discarded machine, and with such knowledge he consented to become and became a guarantor. He, as surety, is, of course, entitled for his indemnity to the benefit of all the securities for the debt held by the creditor, the plaintiff. But the plaintiff no longer holds the machine as security for the debt. The title to it as a chattel merged, by the annexation with the defendant's consent, in the freehold. If it had even been paid for in cash, the defendant company would have had no right, under the circumstances, to remove it after the forfeiture. It stands, I think, very much upon the same footing as if it had been lost or destroyed without fault

ONT.
S. C.
CRANE
v.
HOFFMAN.
Garrow, J.A.

on the plaintiff's part: see *Goldie and McCulloch Co.* v. *Harper* (1899), 31 O.R. 284, in which a Divisional Court held that the destruction by fire of machinery (part of which had become fixtures) was no answer to a claim for unpaid purchase-money.

But, in any event, the defendant, by his conduct, has in advance waived any right to complain. In *Hollier* v. *Eyre* (1842), 9 Cl. & Fin. 1, at p. 52, Lord Cottenham says: "The surety cannot be discharged by any arrangement with the principal, of which he is informed and approves, or which he permitted the opposite party to conclude upon the supposition that the surety approved." See also to the same effect *Woodcock* v. *Oxford and Worcester R.W. Co.* (1853), 1 Drew. 521.

For these reasons, I think the appeal should be allowed and the plaintiff should have judgment for the amount of the notes with interest and his costs throughout.

Magee, J.A.

MAGEE, J.A.:—I agree.

Hodgins, J.A.

HODGINS, J.A.:—The Excelsior Brick Company obtained the machine in question upon giving the agreement which permitted the appellant to retake possession on default, and to sell. The company placed it upon its land and attached it so as to make it a fixture, so far as it could do so. I am, however, unable to agree with the view that this annexation, if of such a character as to make the machine in law a fixture, determines the case. The appellant and the Excelsior Brick Company and the respondent are the parties to the contract under which the machine was acquired. The brick company obtained it, and, if the company annexed it to the soil, it did so subject to sec. 9 of R.S.O. 1914, ch. 136, which is as follows: "Where the goods have been affixed to realty they shall remain subject to the rights of the seller or lender as fully as they were before being so affixed, but the owner of such realty or any purchaser or any mortgagee or other incumbrancer thereof shall have the right as against the seller or lender or other person claiming through or under him to retain the goods upon payment of the amount owing on them."

At that time the land was in equity the land of the company; and, while the statute operated, neither it as owner nor a purchaser from it nor a mortgagee or other incumbrancer, even without notice, could claim the machine as against the seller without paying the price. This seems to have been the law in this Province

even before the statute. See *Joseph Hall Manufacturing Co.* v. *Hazlitt* (1885), 11 A.R. 749. Burton, J.A., in that case, which involved the right of a landlord, to whom the tenant, after annexing a chattel, the property in which remained in the plaintiffs, to the soil, had surrendered his term, thus deals with a case as between the immediate parties to such a contract as exists in this case (p. 750): "The owner of the property would not cease to be owner, but there might be a difficulty in asserting his rights; if, for instance, a man should convert a quantity of bricks and erect them into a house they would have lost their legal identity as chattels so as to be incapable of recaption by the original owner; but if the purchasers in this case had placed these wheels on their own property could they have successfully resisted a claim by their vendor on the ground that they had converted them into freehold, although the vendor must be held to have known that it was intended so to use the property that it would be annexed to the freehold? He would be entitled to rely on the agreement between him and his vendee that, as between them, it should under all circumstances be regarded as personal property."

It may be that subsequent English cases have rendered some expressions in the judgment of doubtful authority, but this quotation I have given is not one of them.

In *Hobson* v. *Gorringe*, [1897] 1 Ch. 182, a case between the owner of a gas-machine, Hobson, and a mortgagee, Gorringe, whose mortgage was taken after annexation but without notice of the agreement between King and Hobson, the Court says (p. 192): "It seems to us that the true view of the hiring and purchase agreement, coupled with the annexation of the engine to the soil which took place in this case, is that the engine became a fixture—i.e., part of the soil—when it was annexed to the soil by screws and bolts, subject as between Hobson and King to this, that Hobson had the right by contract to unfix it and take possession of it if King failed to pay him the stipulated monthly instalments. In our opinion, the engine became a fixture—i.e., part of the soil—subject to this right of Hobson which was given him by contract. But this right was not an easement created by deed, nor was it conferred by a covenant running with the land. The right, therefore, to remove the fixture imposed no legal obligation on any grantee from King of the land. Neither could the right be enforced in equity against

ONT.

S. C.

CRANE v. HOFFMAN.

Hodgins, J.A.

any purchaser of the land without notice of the right, and the defendant Gorringe is such a purchaser. The plaintiff's right to remove the chattel if not paid for cannot be enforced against the defendant, who is not bound either at law or in equity by King's contract. The plaintiff's remedy for the price or for damages for the loss of the chattel is by action against King, or, he being bankrupt, by proof against his estate." And again (p. 195): "That a person can agree to affix a chattel to the soil of another so that it becomes part of that other's freehold upon the terms that the one shall be at liberty in certain events to retake possession we do not doubt, but how a *de facto* fixture becomes not a fixture or is not a fixture as regards a purchaser of land for value without notice by reason of some bargain between the affixers we do not understand, nor has any authority to support this contention been adduced."

That case must now be read, so far as a mortgagee is concerned, as subject to our statute. But it is clear authority for the position that, prior to the forfeiture of the company's title, at all events, the annexation did not deprive the appellant of this right to enter and remove the machine, to sell it, and to recover the balance of the contract price.

The real question, therefore, is, whether the forfeiture of the company's title and the entry of the appellant changed the rights of the parties. I am unable to see how the appellant can both claim the machine and yet seek to recover from the respondent, as guarantor, the price of it. The fact that the guarantor, as president of the insolvent company, had knowledge of an antecedent agreement which gave the appellant the right to take possession of substituted machines, does not impair his right to contend that the contract of suretyship was based upon a modification or even a contradiction of that right. The appellant must be willing, if he recovers judgment on the footing of the contract, the performance of which the respondent has guaranteed, to perform it on his part. The principle applied in the case of a mortgagee who has foreclosed and yet sues the mortgagor is one which is applicable here, as it is founded on justice and common sense. He opens up the foreclosure and becomes again a mortgagee, and must restore the land if he proceeds to collect the mortgage moneys: *Stark* v. *Reid* (1895), 26 O.R. 257.

If the respondent is liable upon the notes and pays them, then he is entitled to have assigned to him all the securities of the appellant, of which the contract is one.

He would also be entitled to the possession of the machine, which the appellant must give him, and he could detach it from the realty and remove it. The operation and use of the machine by the appellant would not impair that legal right, but the question is, whether it has disabled the appellant from effectively giving the respondent that to which, upon payment, he would be entitled. To my mind, the fact of user by the appellant of the machine of which he was owner is not, under some circumstances, inconsistent with his contract rights. If the property in a chattel has passed, its sale and its user would be tortious acts for which the purchaser would have an action. Where the property has not passed, the owner must, if he take possession, retain the chattel so as to enable him to fulfil the contract.

If the user was a necessary one, and if it was temporary only until the vendor exercised the rights given to him by the contract, it could hardly be said that it was improper and a breach of duty, especially if it was accompanied with notice of intention to put into operation the remedies provided by the contract.

In the case in hand the rights given on default are "to take possession of and sell the said property and to apply the proceeds upon the note after deducting all costs of taking possession and sale."

Construing this power literally and grammatically, "to take possession of and sell" means, I think, that the vendor, if he takes possession, must sell. His remedy is not to do one and not the other, but to do both. This is helped by the provision that the proceeds are to be applied in reduction of the liability on the note, something of great importance to the surety, who may have no knowledge of the vendor's proceedings.

The appellant here was not bound to use the machine. He could have detached it or let it lie idle. If he found it commercially necessary to utilise it, he could have notified the parties liable that he did so only while his hands were tied by the Conditional Sales Act, and without prejudice to his right and intention to sell.

But he cannot, I think, retain it and make it part of his manufacturing plant and continue its employment as such without

ONT.
S. C.
CRANE
v.
HOFFMAN.
Hodgins, J.A.

seriously prejudicing those who became sureties upon the condition that if default occurred his remedy was repossession, sale, and application of the proceeds upon the notes.

The only other possible view is that, if the user affects the value and merely reduces it, the purchaser may have to pay the price subject to the remedy which, in an ordinary case of sale, he would have, if the vendor delivered, in pursuance of his contract, the article sold, but inferior in character.

I think the answer to this view is, that the vendor, owning the goods, but parting with their possession, has reserved to himself only the remedies stipulated for, and not those which, under other circumstances, the law would imply.

Upon the whole, I think the actions of the appellant indicated an intention not to realise his security, according to its terms, but to treat the contract in a way not authorised. His continued use of the machine for his own profit and as part of his own possessions, and his failure to sell or take any steps to that end, are inconsistent with the position he now desires to take. The basis of the sureties' liability has been changed by him, it is said, to their detriment. But, whether that is so or not, the alteration of their rights discharges them from liability, because they can insist on literal compliance with the contract, the performance of which they guaranteed. And this is so, notwithstanding that it may work out in a way not contemplated by the vendor when he took their obligation. The cases of *A. Harris Son & Co.* v. *Dustin* (1892), 1 Terr. L.R. 404, *Moore* v. *Johnston* (1909), 9 W.L.R. 642, and *North-West Thresher Co.* v. *Bates* (1910), 13 W.L.R. 657, proceed upon views similar to those I have expressed.

The appeal should be dismissed with costs.

Kelly, J.

KELLY, J.:—The learned trial Judge has found that the appellant, when he repossessed the machine for the price of which the notes sued upon were given, exceeded what the contract authorised, and, instead of complying with the terms which required him to sell, he treated the machine as his own and made use of it as part of his brick-making plant. His right under that contract was, upon default in payment of the notes, to take possession and sell and apply the proceeds upon the notes after deducting the cost of taking possession and sale. Had he pursued that course, he would have been entitled to claim against the guarantors for any deficiency resulting from the sale.

The position which he takes, as it appears from his evidence, and it was so urged on the argument, is, that he did not retake possession on the lien reserved in the notes, but in pursuance of the terms of the earlier sale by him of the brick-making plant, one of which terms is, that "on default in payment of any instalment of principal, or failure to carry out any of the conditions imposed by the agreement, the vendor" (the appellant) "shall be at liberty to cancel and rescind this agreement and to enter into possession and resell the said lands"—any payments theretofore made by the purchaser to be retained by the vendor.

Standing alone, this would undoubtedly be authority for possession of the machine as part of the lands to which it was, after the agreement, affixed, and to deal with it as part of the lands so taken. But, on the sale of the machine in question by the appellant to the brick company, special terms were introduced into the notes guaranteed by the respondent, giving to the appellant a new and different right, namely, in case of default in payment to take possession without process of law and sell the property (the machine) and apply the proceeds upon the notes after deducting all costs of taking possession and sale. What the respondent guaranteed was payment of the notes and interest "in accordance with the terms thereof." It is to such a contract that, under ordinary circumstances, sec. 9 of the Conditional Sales Act, R.S.O. 1914, ch. 136, applies, that section being: "Where the goods have been affixed to realty they shall remain subject to the rights of the seller or lender as fully as they were before being so affixed, but the owner of such realty or any purchaser or any mortgagee or other incumbrancer thereof shall have the right as against the seller or lender or other person claiming through or under him to retain the goods upon payment of the amount owing on them."

The question, therefore, that presents itself is, whether the appellant had the right to take possession of the machine by virtue of the earlier agreement, ignoring the terms of the later one, or was the latter to be treated as independent of the other and so binding upon him to deal with the machine, upon default in payment, strictly upon the terms of sale as expressed in the notes? If the latter, then, to the extent of the amount that might have been realised, the notes would have been satisfied and the liability of the guarantors extinguished. That, in my opinion, is the

ONT.
S. C.
CRANE
v.
HOFFMAN.
Kelly, J.

position in which the appellant is placed; and the fact that the respondent was associated with the brick company does not alter that position. Assuming that he was aware of the conditions imposed by the earlier agreement and the appellant's right to possession thereunder in the event of default, there is nothing opposed to the position that the later contract was to be taken as a modification of the terms of the earlier agreement. The language of the contract contained in the notes, and of the respondent's guaranty, is quite consistent with that view, and the interpretation may readily be put upon it that the guarantor assumed liability having in mind the degree of protection against that liability which realisation by sale of the machine afforded in the event of the purchaser's default in payment. If the appellant had in mind that the agreement for sale of the machine was to be subject to his rights under the earlier agreement, he should have so expressed himself; and he cannot now complain if he is held strictly to compliance with the express terms of the later agreement. To hold otherwise would be to ignore the element of protection which the guarantor would have if the property were repossessed and resold in the event of default.

Viewing the transaction in the manner I have indicated, and apart from other reasons, I am of opinion that the appeal should be dismissed with costs.

Appeal dismissed, The Court being equally divided.

SASK
S. C.

SASK. ELEVATOR CO. v. CAN. CREDIT MEN'S TRUST ASSOC.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Newlands, Lamont and Brown, JJ. March 18, 1916.

1. PARTNERSHIP (§ III—13)—ASSIGNMENT FOR CREDITORS—CLAIMS FOR FUNDS COLLECTED AS AGENTS—FIRM OR INDIVIDUAL LIABILITY.

The estate of a partnership, in an assignment for the benefit of creditors, is not liable for amounts collected by the active partner of the firm acting in his individual capacity as the local agent of an elevator company, though the partnership benefited by such agency.

[*Sask. Elevator Co.* v. *Can. Credit*, 21 D.L.R. 658, reversed.]

Statement

APPEAL from the judgment of Elwood, J., 21 D.L.R. 658, allowing the plaintiff to rank as a creditor against the estate of a partnership in liquidation.

H. Y. MacDonald, K.C., for defendant, appellant.

J. A. Allan, K.C., for plaintiff, respondent.

The judgment of the Court was delivered by

Brown, J.

BROWN, J.:—The facts in this case are briefly as follows:—

John R. Black and H. A. McHugh carried on a co-partnership business as general merchants at Thackeray and Cloan, in the Province of Saskatchewan, for some time previous to and until the end of March, 1914, when they made an assignment to the defendants for the benefit of creditors.

The business at both places was carried on under the firm name of "Black & McHugh." Black resided in Ontario and apparently only visited the places of business once. McHugh, on the other hand, was the active member of the firm and had the management and control of same at both points. The plaintiff company own and operate an elevator at each of the points in question.

It appears to be a practice more or less common with elevator companies such as the plaintiffs at points where there are no chartered banks to arrange with some local merchant to act as the elevator company's paying agent at such points. In accordance with this practice, McHugh, on his own behalf or that of his firm, arranged to act as such paying agent for the plaintiffs at both points in question and received from the plaintiffs from time to time large sums of money to disburse on their behalf.

At the time of the assignment referred to McHugh had on hand, or at least had unaccounted for, some $8,002.14 of such funds.

The plaintiffs seek to rank as a creditor of the estate of Black & McHugh in the hands of the defendants for this amount.

The defendants contend, firstly, that McHugh and not the firm was the plaintiff's agent, and, secondly, that if McHugh arranged that the firm should act as the plaintiff's agent he exceeded his authority in that respect.

An issue was directed to settle the matter in dispute and came on for hearing before my brother Elwood, who held the estate liable and from that judgment this appeal is taken.

Sometime before the plaintiffs erected their elevators at the points in question it appears that McHugh had a conversation with the manager of the plaintiff company at Winnipeg in which he requested that his firm be made the paying agents of the plaintiffs at Thackeray when the elevator was operating—no mention seems to have been made at that time of the business at Cloan—McHugh received the assurance that as soon as the

SASK.

S. C.

SASK. ELEVATOR CO. v. CAN. CREDIT MEN'S TRUST ASSOC.

Brown, J.

elevator was completed the plaintiffs would take up with him the question of the firm being made such agents; all subsequent negotiations were apparently carried on by correspondence.

All the correspondence produced, with the exception of one unimportant letter, together with all the other documentary evidence bearing on the matter, indicates that the plaintiffs dealt with McHugh personally and not with the firm. The plaintiff's letters were addressed to McHugh and McHugh's letters to the plaintiffs were signed in his own name and not that of the firm. The drafts for the money were made out to McHugh; the reports were all signed by McHugh; but what is more significant and what, in my opinion, puts the matter beyond question, is the application for the fidelity bond. The plaintiffs required such a bond by way of security: McHugh filled out the form which they sent. In it McHugh is described as the paying agent of the plaintiff company; McHugh signs the application in person, and the questions asked and answers given in the application clearly contemplate McHugh and McHugh alone as the paying agent. The obligations assumed by McHugh in the application for the bond, to quote from same, are in part as follows:

> I hereby declare that all the above answers are true; and in consideration of the issue of the indemnity bond or security hereby applied for, and of any further or other bond or security hereafter issued by the said the U.S. Fidelity and Guaranty Co. in my behalf, *in my present or any other position in this service*, I hereby agree to protect and immediately indemnify the company against any loss, damage or expense it may sustain, or become liable for in consequence of this or any such other bond or security *granted in my behalf*. It is understood by me that the scope of said bond or security hereby applied for is to make good all loss sustained by the employer *by reason of shortages in my cash, grain or other accounts*.

The above obligations seem to me to be quite inconsistent with the idea that the firm and not McHugh the applicant are the parties against whom the bond is to be a protection. This application form when completed was sent to the plaintiffs by McHugh and, while the bond itself was not put in evidence, it was not questioned that the bond as issued was issued in harmony with this application.

In view of all this documentary evidence, which goes to shew that McHugh and not the firm are the paying agents, I am of opinion that the conversation which took place at Winnipeg between McHugh and the plaintiffs' manager cannot affect the question at all.

SASK.

S. C.

SASK ELEVATOR CO. v. CAN. CREDIT MEN'S TRUST ASSOC.

Brown, J.

The trial Judge seems to have been largely influenced by the view that the firm and not McHugh alone profited by the agency. In this connection he says (21 D.L.R. 659):

> Black and McHugh were the only ones who could receive any benefit from handling this money, and the evidence shews that it is a benefit to merchants to handle money for grain companies, because it attracts custom and assists the merchant in the collection of his debts. There was no possible benefit that I can see that would accrue to McHugh alone, and I therefore find from the evidence that—as I said above—this work was undertaken by McHugh for and on behalf of his firm, and that it was never intended that McHugh alone should be the person responsible.

The mere fact that the firm and not McHugh profited by the agency cannot alter the effect of the documentary evidence. Moreover, McHugh as a partner in the firm profited by the agency and a finding that he and not the firm was the agent does not involve the idea that his acceptance of the responsibility of agency was altogether altruistic.

In my view, therefore, McHugh and not the firm was the paying agent of the plaintiffs; and the estate is, therefore, in no way responsible for the claim that has been made against it; and in view of the conclusion which I have reached on this branch of the case it is not necessary to consider the other question raised by the appellants.

I would, therefore, allow the appeal with costs.

Appeal allowed.

REX v. JOHNSON.

ONT.

S. C.

Ontario Supreme Court, Boyd, C. December 24, 1915.

1. GAMING (§ I—6)—BETTING-HOUSE OFFENCES—SEARCH ORDER—FINDING OF BETTING SLIPS.

That the place was kept as a common betting-house may be inferred from the finding, as the result of a search order under Cr. Code, sec. 641, of numerous betting slips on defendant's person when arrested and of bank books found on search of his personal belongings where he lived, which disclosed continuous deposits of large amounts from month to month, quite out of proportion to his cigar store business, and as to which the defendant offered no explanatory evidence, particularly where he had said, after his arrest, that he had been "too long in the game."

[See Annotation on "Betting-house Offences" at end of this case.]

Statement

MOTION to quash a conviction of the defendant, by the Police Magistrate for the City of Hamilton, for keeping a common gaming-house or common betting-house.

C. W. Bell, for the defendant.

J. R. Cartwright, K.C., for the Attorney-General.

Boyd, C.

BOYD, C.:—The usual methods by law permitted and prescribed were followed in this case. The police had an eye

ONT.
S. C.
REX
v.
JOHNSON.
Boyd, C.

on this house, 126 James street north, in Hamilton, used and occupied by the defendant as a cigar-store and barber-shop combined, until the Chief Constable was able to swear that he had good grounds for believing and did believe that the house was kept or used as a "common betting-house." Thereon a search-warrant was obtained and the premises "raided" on the 27th November by the police; and the officers found on the person of the defendant 92 slips of paper, with words, names, and figures written on them, and $232 in bills. In his vest-pocket were next found 3 more slips and $3 in money; and from another pocket was taken a parcel of "dead" slips. There were also found in his trunk five savings bank books in different banks. At the gaol was found concealed on the person of the defendant a further sum in bills of $690.

The bank books shew moneys on hand to the credit of the depositor up to date as follows: $3,189 (Hamilton); $1,500 (Union); $3,487 (Molsons); $9,119 (Nova Scotia); and $8,256 (Montreal).

After the first haul was made downstairs, the Deputy Chief spoke of going up to the bed-room, and Johnson (the defendant) said: "You have enough there, you have all you want there in that pile;" or, as related by another witness: "No; you have got all the evidence you want." Nothing was found upstairs except some little slips. On his way to the station, the prisoner said, "I have been too long in the game." The earliest date in the bank books is October, 1912, in the Molsons Bank. The slips were "betting-slips," as proved by the police.

Upon this evidence and these productions, the magistrate convicted the defendant of unlawfully keeping a common betting-house in the building aforesaid.

The application is now made to quash the conviction for want of evidence. The prisoner himself gives no testimony under oath, and so there is no manner of explanation, from any one who knows, as to the two salient facts of the case: the multitude of betting-slips and the thousands of dollars deposited month after month, and frequently week after week, for these years, besides the large sum of money in his hands when arrested, amounting in all to over $900. It is an easy inference to connect the two as shewing one outcome of his betting transactions.

Two main purposes are specified in the Criminal Code, secs.

ONT.

S. C.

REX v. JOHNSON.

Boyd, C.

227 and 228,* as to be prohibited: first, keeping a house for the purpose of betting with persons resorting thereto; and, next, keeping it for the purpose of receiving deposits on bets as consideration for a promise to pay on the event of the race. There is evidence on both heads, which, had the prosecution proceeded by indictment, could have formed the basis of accusation by the grand jury, and which, if left unexplained by the defence, could have been submitted as *primâ facie* evidence of the character of the house as kept by the accused, upon which a verdict of "guilty" might pass. As put by Darling, J., in a like case, though there was no actual evidence of people attending to bet or to make deposits, yet the Justice might properly conclude that they did so: *Reynolds v. Agar* (1906), 70 J.P. 568 (journal part).

The examination of the betting-slips, coming from the defendant's possession, affords the most cogent evidence of betting transactions on a large scale, though some of the amounts may be small. The statute not only forbids bets being made by the keeper or occupier of the house, but also bets made through him with others who resort there for that purpose. As pieces of evidence, these slips shew bets taken in which the defendant is an actor, and it is immaterial whether the defendant should be responsible for the payment of the bet or whether it was to be made through him as acting for another not named or known. Presumably he was the principal in the different transactions disclosed in the slips. These betting-slips are of various contents in details, but all shew the names of the horses and how much is bet on the race and the name or initials of the person making the bet. In many cases, the amount paid or deposited appears, and some shew how much has been paid on the bet by the defendant, and again a note of how much is owing.

For instance, one slip reads thus on its face:—

Humiliation	50	0	0
Any Come.			
Borgo	50	50	50
Belamaire	50	50	50
Irene & Billy Limited.			

And on the back is written: "Will pay you 2 bucks and owe you next week. Irene X."

*227 as amended 9-10 Edw. VII. Can. ch. 10; and 228 as amended 8-9 Edw. VII. Can. ch. 9, and by 3-4 Geo. V. Can. ch. 13, sec. 10.

ONT.

S. C.

REX v. JOHNSON.

Boyd, C.

The large moneys deposited by the defendant could not have been derived from the smokes and shaves, but represent large betting transactions carried on at his place in James Street. That, at all events, is a fair and reasonable inference which a jury might make. The importance and significance of these slips is shewn by many cases, among which I may note: *Regina v. Worton*, [1895] 1 Q.B. 227; *Wyton's Case* (1910), 5 Cr. App. Cas. 287; *Mortimer's Case* (1910), *ib.* 199, at p. 200; and *Lester* v. *Quested* (1901), 20 Cox C.C. 66.

Most of the slips give three sets of figures after the name of the horse, indicating what is put up in case the horse comes in first or second or third in the race. Another is set down thus: "Black Sheep $1.00 to win;" and so as to 12 other horses named, and signed "Lane." Others have noted on the face or endorsed the money paid or deposited at the time. This is called in the cases "Ready-money betting." One slip in yellow, signed "A. I.," puts 1. O. O. on T. McTaggart's mount, 2nd race, and same on his mount, 5th race, and same on his mount, 1st race, and at the end 4.95 is marked as deposit.

On one slip (initialled "A. M.," betting on 4 horses) is endorsed, "$1.00 received wrapped in this paper." This is precisely the *modus operandi* described in *Regina* v. *Worton*, *ubi supra*. Many of the slips used are of the same shape, size, colour, and material as this one.

These various indications have a cumulative effect, and carry the charge beyond one of suspicion into something properly evidential; and, though to some the evidence may appear slight, it is more than a mere *scintilla*, and cannot be withdrawn from judicial consideration. In this it differs from the case cited, *Regina* v. *Bassett* (1884), 10 P.R. 386, and is more in line with the case cited by Mr. Cartwright, where some slight evidence was given pointing towards guilt: *Rex* v. *Corrie* (1904), 68 J.P. 294. The Court thought that it lay upon the defendant, if he could, to make some explanation, if he wished to escape the consequences of what had been proved. It is analogous to the case of stolen goods being found in the premises of one who, to extricate himself, should shew how he came honestly by them. See also *Lee* v. *Taylor* (1912), 107 L.T.R. 682.

Upon the whole circumstances and evidence the Police Magis-

ONT.

S. C.

REX v. JOHNSON.

Boyd, C.

trate has passed, and has found the defendant guilty. I am not disposed to interfere with this result, and the conviction stands affirmed, as well as the forfeiture of the money seized (i.e., excluding what was discovered in the gaol.) *Conviction affirmed.*

Annotation

Annotation—Gaming (§ I—6)—Betting-house offences.

The term "common betting-house" is construed for the purposes of the Criminal Code in accordance with the extended definition enacted by sec. 227 (amendment of 1910); and its application relates specially to the offence of keeping a disorderly house under Cr. Code sec. 228, as amended 1909 and 1913. This latter section makes it an indictable offence and punishable on indictment by one year's imprisonment to "keep" any disorderly house, and it proceeds to define what is meant by a "disorderly house" by reference to four prior statutory definitions of other terms, all of which are to be covered by the generic term "disorderly house." These four are as follows: Section 225, "common bawdy-house"; sec. 226, "common gaming-house"; sec. 227, "common betting-house"; and sec. 227A, "opium joint." Any of these constitute a disorderly house.

Keeping a betting-house.—By sub-sec. (2) of sec. 228 the penalty is not restricted to the real owner or keeper of the place, but includes

"(*a*) Any one who appears, acts, or behaves as master.

"(*b*) The person having its care, government or management.

"(*c*) The person assisting in the care, government or management."

The sub-section as to acting or appearing as the master of the house originated in the English "Disorderly Houses Act, 1751," 25 Geo. II., ch. 36. By sec. 8 of that statute it was enacted that any person who shall appear, act or behave himself or herself as master or mistress, or as the person having the care, government, or management of any bawdy-house, gaming-house, or other disorderly house, shall be deemed and taken to be the keeper thereof, and shall be liable to be prosecuted and punished as such, notwithstanding he or she shall not be in fact the real owner or keeper thereof.

In *R.* v. *Spooner* (1900), 4 Can. Cr. Cas. 209, a plea of guilty to the charge of "*appearing* the keeper of a house of ill-fame" was held equivalent to an admission that the accused kept a house of ill-fame. It is submitted, however, that those words used in a charge do not charge an offence known to the law, and while one who appears to have the management of the house is deemed to be the keeper, the offence is the keeping and not appearing to keep.

A "banker" in a faro game who has "bought the bank" is

ONT.

Annotation

Annotation (*Continued*)—Gaming (§ I—6)—Betting-house offences.

guilty of assisting: *Derby* v. *Bloomfield*, 20 Cox 674, 20 Times L.R. 549.

Keeping a common gaming-house and keeping a common betting-house, either of which are declared to constitute the indictable offence of keeping a disorderly house by the same section of the Criminal Code (sec. 228), are distinct offences: *R.* v. *Mah Sam* (1910), 19 Can. Cr. Cas. 1.

Subject of summary trial without consent.—The offence of keeping a disorderly house may be the subject of a "summary trial" under Part XVI., sec. 773 (*f*), of the Code by any "magistrate" having power of summary trial under sec. 771, and for this offence the consent of the accused is not essential to that mode of trial, nor is he to be asked if he consents to be so tried: Code sec. 774. These provisions apply alike to the keeping of a "common betting-house" and to the other specified classes of disorderly houses. In some provinces of Canada the "magistrate" empowered by sec. 771 is necessarily one individual, but in other provinces it may be either the one person having statutory power to do what ordinarily would require two justices of the peace to do, or it may be the two justices acting together. If the one individual exercises the power of summary trial there is no appeal as such, although there may be a review on the question of jurisdiction by *certiorari* or *habeas corpus* process. But if the summary trial for this offence should take place "before two justices of the peace sitting together," then sec. 797 as amended in 1913 (Can. Statutes 1913, ch. 13) applies to enable the accused to appeal from the conviction in the same manner as from a summary conviction under Part XV. of the Code: see Code secs. 749, 750.

Where a police magistrate proceeds with a charge of keeping a disorderly house or common betting-house (Code sec. 228 as amended 1909 and 1913), without taking the defendant's election, it is to be assumed that the magistrate is proceeding under Code secs. 773 (*f*), 774 and 781, under which the defendant's election is not required on a summary trial for keeping a disorderly house, but the amount of the fine must not exceed, with the costs of the case, $200, by virtue of Code sec. 781 as amended 1913: *Rex* v. *Booth*, 23 Can. Cr. Cas. 224. (*R.* v. *Honan*, 6 D.L.R. 276, 20 Can. Cr. Cas. 10, 26 O.L.R. 484, and *R.* v. *Helliwell*, 18 D.L.R. 550, 30 O.L.R. 594, considered.)

Being found in a betting-house.—Every one who, without lawful excuse, is found in any disorderly house shall be liable on summary conviction to a penalty not exceeding one hundred dollars and costs, and in default of payment to two months' imprisonment: Cr. Code sec. 229, as amended 1913.

Annotation (*Continued*)—Gaming (§ I—6)—Betting-house offences. ONT.

Annotation

Landlord's liability.—Any one who, as landlord, lessor, tenant, occupier, agent or otherwise, has charge or control of any premises and knowingly permits such premises or any part thereof to be let or used for the purposes of a disorderly house, shall be liable upon summary conviction to a fine of two hundred dollars and costs, or to imprisonment not exceeding two months, or to both fine and imprisonment: Cr. Code sec. 228A (added 1913).

Where a lessee, though acting in good faith and without knowing of the objectionable character of the proposed sub-tenant, sub-lets to a person who intends to keep a disorderly house, the original lessor is entitled to ask in an action of ejectment under Quebec law that the lease be rescinded, in order to avoid the responsibility enacted by sec. 228 (2) of the Cr. Code; but where the objectionable sub-tenant abandons the premises pending such action the Court has a discretion to maintain the original lessee's rights and not resiliate the lease, but he will be required to pay costs, although entitled to sub-let without the land owner's consent: *Alliance* v. *Picard* (1914), 16 D.L.R. 82, 20 Rev. de Jur. 182.

"Place," other than a building, used for betting.—What is a "common betting-house"? It is a house, office, room or *place*, opened, kept or used for any of the betting purposes described in sec. 227 as amended in 1910 by 9-10 Edw. VII., Can., ch. 10. As to gaming-houses, the definition of sec. 226 uses the phrase "house, room or place." And where the offence did not take place in a house or in an office or room, there was difficulty in determining whether the facts disclosed that localization necessary to such a continuing offence as "keeping" a place opened, kept or used for betting or gaming purposes.

In construing the words "other place," the doctrine of *"ejusdem generis"* is applicable, and the meaning of the word "place" must be controlled by the specific words, "house, office or room": *Powell* v. *Kempton Park*, [1897] 2 Q.B. 242, [1899] A.C. 143; *R.* v. *Moylett* (1907), 13 Can. Cr. Cas. 279, 10 O.W.R. 803, 75 O.L.R. 348.

In *The Queen* v. *Humphrey*, [1898] 1 Q.B. 875, an archway which was a private thoroughfare leading from a public street into a yard containing dwelling houses, stables and workshops, which the prisoner was accustomed to resort to for the purpose of betting with persons who came to him there, was held to be a "place" within the meaning of the Betting Act, 1853, 16 & 17 Vict. (Imp.), ch. 119, secs. 1, 3. And see *Brown* v. *Patch*, [1899] 1 Q.B. 892; *Belton* v. *Busby*, [1899] 2 Q.B. 380.

In *R.* v. *Fisher* (1913), 9 Cr. App. R. 164, decided under the Betting House Act, 1853 (Eng.), it was held that the localization of the betting was a question of fact for the jury. Lord Chief Justice Isaacs referred with approval to the following statement

ONT.

Annotation

Annotation (*Continued*)—Gaming (§ I—6)—Betting-house offences.

of the law by Lord Alverstone in *R.* v. *Deaville*, [1903] 1 K.B. 468, 72 L.J.K.B. 272, 20 Cox C.C. 389, as follows:—

"If you get sufficient localization of the betting business, as is the case where the betting man is in possession of the particular plot of ground or structure on which he carries on his business, the question of the permission or license of the owner of that plot or structure to use it for betting purposes is immaterial. That is what was pointed out in *Brown* v. *Patch*, [1899] 1 Q.B. 892, 68 L.J.Q.B. 588, 19 Cox C.C. 330."

Moylett's case, cited above upon another point, was decided in 1907 before the addition of sub-sec. (2) to sec. 227. It had held that in order to constitute a "place" within the meaning of sec. 227 of the Criminal Code there must be a measure of fixity, localization and exclusive right of user. The defendants were two of a number of bookmakers who, on payment of the usual entrance fee, were admitted, along with the general public, to a fenced enclosure owned and controlled by the Ontario Jockey Club, an incorporated racing association. These bookmakers laid bets from day to day, through their assistants, with members of the general public attending the races. They did not use any desk, stool, umbrella, tent or booth, or erection of any kind to mark any place where bets were made, and no part of the general enclosure was especially allocated to them, nor did they occupy a fixed position, but during each race stood as much as possible about the same spot within a radius of from five to ten feet. The betting operations were carried on in the same method as in the case of *Rex* v. *Saunders*, except that in that case the bookmakers used a wooden box or booth, moved about on castors from one part of the grounds to another during the progress of the race meeting:—*Held*, that the defendants did not occupy a "house, office, room or other place" within the meaning of sec. 227 of the Code, and were, therefore, not guilty of the offence of keeping a "common betting house" under sec. 228. *Rex* v. *Saunders* (1907), 12 Can. Cr. Cas. 174, 38 S.C.R. 382, was distinguished.

The amendment made in 1910 to Code sec. 227 declares that the word "place" in secs. 226 and 227 includes any place "whether inclosed or not, and whether it is used permanently or temporarily, and whether there is or is not exclusive right of user."

The ruling in *Moylett's* case is in consequence superseded by the statute, at least so far as it had held an exclusive right of user essential to the keeping of a "place," and had applied the decision of the House of Lords to the like effect reported in *Powell* v. *Kempton Park Racecourse Co.*, [1899] A.C. 143.

A person with a fixed place of business at which other persons find him when desirous of making bets on foreign horse races, is criminally liable in respect of betting arrangements there institut-

Annotation (*Continued*)—Gaming (§ I—6)—Betting-house offences. ONT.

Annotation

ed, although the actual bargain of betting was made in each case on the public street adjacent to such place of business, the participants purposely going to the street with the intention of making the bet elsewhere than in a common betting house as defined by sec. 227: *The King* v. *Johnston*, 16 Can. Cr. Cas. 379 (Ont.).

Book-making and betting on race-tracks.—By sub-sec. (2) of sec. 235, as amended in 1912, the provisions of secs. 227 and 228 as well as those of sec. 235 (1) are not to extend to bets made or records of bets made upon certain race-courses during the progress of a race-meeting, conducted by an incorporated association under the limits of time and place which sec. 235 imposes. The same sub-section declares a like exception or immunity in respect of (*a*) the sale by an incorporated association of information or privileges to assist in or enable the conducting of book-making, pool-selling, betting or wagering upon the race-course of such association during the actual progress of a race meeting conducted by such association upon races being run thereon, and (*b*) book-making, pool-selling, betting or wagering upon such race-course during the actual progress of a race-meeting conducted by such association upon races being run thereon. For prior cases reference may be made to *R.* v. *Hendrie*, 10 Can. Cr. Cas. 298, 11 O.L.R. 202; *R.* v. *Hanrahan* (1902), 5 Can. Cr. Cas. 430, 3 O.L.R. 659; *Walsh* v. *Trebilcock*, 23 Can. S.C.R. 695; *R.* v. *Giles*, 26 Ont. R. 586, and *R.* v. *Osborne*, 27 Ont. R. 185.

The custodian or depository of a stake to be paid to the *winner* of any lawful race, sport, game, or exercise, or to be paid to the *owner* of any horse engaged in any lawful race, is exempt, and by sec. 235 (2), as amended 1912, the provisions of secs. 227, 228, and 235 are not to apply to a *private bet* between individuals not engaged in any way in a business of betting.

Other betting restrictions.—Subject to the above-mentioned exceptions, sec. 235 deals with various collateral offences connected wtih betting, pool-selling and book-making. It enacts (as amended in 1910, 1912 and 1913) as follows:—

"235 (sub-section 1). Every one is guilty of an indictable offence, and liable to one year's imprisonment, and to a fine not exceeding one thousand dollars, who—

"(*a*) Uses or knowingly allows any part of any premises under his control to be used for the purpose of recording or registering any bet or wager, or selling any pool; or

"(*b*) Imports, makes, buys, sells, rents, leases, hires, or keeps, exhibits, employs or knowingly allows to be kept, exhibited or employed, in any part of any premises under his control, any device or apparatus for the purpose of recording any bet or wager or selling any pool, or any gambling, wagering or betting machine or device; or,

ONT.

Annotation

Annotation (*Continued*)—Gaming (§ I—6)—Betting-house offences.

"(*c*) Becomes the custodian or depository of any money, property or valuable thing staked, wagered or pledged in any case or transaction in which such staking, wagering or pledging is itself contrary to the provisions of this Act; or,

"(*d*) Records or registers any bet or wager, or sells any pool upon the results,—

"(i) Of any political or municipal election;

"(ii) Of any race;

"(iii) Of any contest or trial of skill or endurance of man or beast;

"(*e*) Engages in pool-selling or book-making, or in the business or occupation of betting or wagering, or makes any agreement for the purchase or sale of betting or gaming privileges, or for the purchase or sale of information intended to assist in book-making, pool-selling, betting or wagering; or,

"(*f*) Advertises, prints, publishes, exhibits, posts up, sells or supplies, or offers to sell or supply, any information intended to assist in, or intended for use in connection with, book-making, pool-selling, betting, or wagering, upon any horse-race or other race, fight, game or sport, whether at the time of advertising, printing, publishing, exhibiting, posting up or supplying such news or information, such horse-race or other race, fight, game or sport has or has not taken place; or,

"(*g*) Advertises, prints, publishes, exhibits or posts up any offer, invitation or inducement to bet; or,

"(*h*) Wilfully and knowingly sends, transmits, delivers or receives any message by telegraph, telephone, mail or express conveying any information relating to book-making, pool-selling, betting or wagering, or intended to assist in book-making, pool-selling, betting or wagering; or,

"(*i*) Aids or assists in any manner in any of the said acts which are by this section forbidden."

The second sub-section of 235 deals with the exemption of certain stakeholders and of book-making on the authorized race-tracks, as summarized above from the amending statute, 2 Geo. V. (Can.), ch. 19.

The publication in a newspaper of an advertisement soliciting bets to be placed upon horse races and also of the results from day to day of said races, is illegal; and the newspaper proprietor is liable for the indictable offence of using the newspaper office for the purpose of facilitating the making of bets upon a horse race, and keeping a common betting-house within the statutory definition of that offence: *R.* v. *Smallpiece* (1904), 7 Can. Cr. Cas. 556.

The mere taking of personal bets with individuals on horse-races is not "gaming," and the admission of the accused that he made his living principally by making such bets in the streets

Annotation (*Continued*)—Gaming (§ I—6)—Betting-house offences. ONT.

Annotation

is not sufficient on which to convict him of vagrancy under subsec. (*l*) of Code sec. 238: *R.* v. *Ellis*, 15 Can. Cr. Cas. 379, 20 O.L.R. 218.

The unrepealed Lord's Day Act, C.S.U.C., ch. 104, sec. 3, in force in Ontario, makes it a criminal offence to be engaged in playing cards for money in a private place, on a Sunday: *Rex* v. *Quick*, (Ont.) 17 Can. Cr. Cas. 61, 17 O.W.R. 250.

C.S.U.C., ch. 104, sec. 3, reads as follows:—

"It is not lawful for any person on that day to play at skittles, ball, football, racket, or any other noisy game, or to gamble with dice or otherwise, or to run races on foot, or on horseback, or in carriages, or in vehicles of any sort."

Where two parties enter into a voidable betting or gaming contract, each putting up his own cheque post-dated the day on which the result of the bet would be ascertained, the fact that the loser's cheque was dishonoured because he had no account at the bank will not support a charge that he obtained the execution of the winner's cheque delivered to the stakeholder for a like amount by false pretences with intent to defraud. The giving of a post-dated cheque implies no more than a promise to have sufficient funds in the bank on the date thereof, and is not, in itself, a false representation of a fact past or present. Intent to defraud could not be found because the complainant was legally entitled to withdraw from the voidable contract even after the event upon which the bet was placed: *The King* v. *Richard*, 11 Can. Cr. Cas. 279.

Recent cases under the English betting laws.—The appellant, a police inspector, preferred an information against T. for that he, T., on certain specified dates, used a certain public-house for the purpose of betting with persons resorting thereto, and also a further information against G., the licensee of the said public-house, for that he, G., suffered the house to be used for the purpose of betting with persons resorting thereto, contrary to the Betting Act, 1853, and the Licensing (Consolidation) Act, 1910. The metropolitan magistrate by whom the case was heard found as a fact that T. had used the public bar of the public-house for the purpose of betting with persons resorting thereto on each of the dates alleged, and that G. and his servants had ample opportunity of seeing and ought to have seen the passing of the betting slips and other things being done which should have made them aware that betting was taking place, but that the prosecution had failed to give any evidence that anybody about the house had, as a fact, seen that betting was actually taking place:—*Held*, that the case must go back to the magistrate with a direction to consider whether the respondent G. had connived at betting being carried on. Where the facts constitute a *prima facie* case not amounting

ONT.

Annotation

Annotation (*Continued*)—Gaming (§ I—6)—Betting-house offences.

to positive proof of knowledge, there is evidence upon which a magistrate can find knowledge: *Lee* v. *Taylor*, 23 Cox C.C. 220, 107 L.T. 682, 77 J.P. 66, 29 T.L.R. 52.

A firm of printers and publishers was convicted upon a charge of contravening the Betting Act, 1853, secs. 1 and 3, as extended to Scotland by the Betting Act, 1874, in that they, being the occupiers of certain premises, did keep or use these premises "for the purpose of money or other valuable thing being received" by them or on their behalf "as the consideration for an undertaking, promise, or agreement, to pay money thereafter, on events or contingencies of or relating to football." The accused were proprietors of a weekly newspaper, in certain issues of which they had inserted a notice offering a money prize, varying in amount according to the success of the competitor, to the persons who should most accurately forecast the result of certain football matches, specified in a coupon attached to the paper. These newspapers, with the coupons attached, were bought by newsagents at the price of ninepence per dozen, and retailed by them to the public at one penny per copy. The coupons, when filled up, were posted to the publishers. In several instances more than one paper was purchased by the same individual for the sake of the coupons. No papers were proved to have been sold by the accused directly to members of the public; but successful competitors were paid by the accused by cheques or postal orders: —*Held*, on appeal, that no offence had been committed against the statute: *Leng (John) & Co., Ld.*, v. *Mackintosh*, Just. Ct. (Sc.) 7 Adam, 356.

The respondent was the tenant of a house on the ground floor of which was a shop with a room at the back. Outside the house there was an entry from which a side door opened into the house. The respondent's father occupied the house. Betting was carried on by the respondent in this way: A person wishing to bet wrote on a paper the name of the horse and the amount of the bet; he wrapped up in the paper the coin representing the bet and handed the same to the respondent in the entry or street. Several packets were so received by the respondent, but none were received in the house. Papers and coins which had been so handed to the respondent outside were found in the back room of the house, and the rooms of the house were used merely for paying out the money won on bets previously made outside. Upon an information under sec. 4 of the Betting Act, 1853, against the respondent as the occupier of the house for receiving moneys as a "deposit" upon bets, the justices dismissed the information on the ground that the betting having been completed outside the house, the mere taking of the papers and money to the back room without the knowledge of the persons making the bets was not a

Annotation (*Continued*)—Gaming (§ I—6)—Betting-house offences. ONT.

Annotation

"receiving" of the moneys within the meaning of the statute:—*Held*, that the justices were wrong in holding that the mere taking of the papers and money to the back room without the knowledge or connivance of the persons making the bets did not constitute a "receiving" within the meaning of the statute, but that sufficient facts had not been found to bring the case within sec. 4, and upon that ground the case ought not to be remitted to them. *Held*, further (Avory, J., dissenting), that "deposit" in sec. 4 includes the payment or handing over of the whole sum staked as well as of a part only of that sum: *Boulton* v. *Hunt*, 23 Cox C.C. 526, 109 L.T. 245, 77 J.P. 337.

The appellant was convicted of using his premises for the purpose of "unlawful gaming" being carried on thereon. Proof was given of the user on the appellant's premises of an automatic machine. On the insertion of a halfpenny in the machine, a marble was released, which by the operation of a trigger manipulated by the player was shot up to the top of the machine, whence it descended through a series of pins which deflected its course. The player, while the marble was falling, tried to bring beneath it a cup in the machine. The cup was fixed to a movable lever which could be moved laterally right or left at the option of the player. The object of the player was to catch the marble in the cup. If he succeeded, by an automatic action, a disc was released which entitled him to a pennyworth of the appellant's goods; if he failed, the halfpenny inserted became the property of the appellant without any return to the player. Proof was given of the user of the machine on the appellant's premises, and he was convicted under 17 & 18 Vict. ch. 38, sec. 4. The justices found that the game played with the machine was predominantly one of chance; that skill did not enter substantially into the game; that, having regard to the players contemplated by the appellant as using the machine, the chances were not alike equal to all the players, including the appellant; that the chances were in the appellant's favour; and that the game could not be converted from one of chance to one of skill. Upon a case stated by the justices:—*Held*, that the findings of the justices as to the character of the game played with the machine were questions of fact, and consequently not reviewable by the Court, and that the finding by the justices that the game was one of chance, and one in which the chances were not equal alike to all the players, including the appellant, brought the game within the provisions of 8 & 9 Vict. ch. 109, sec. 2, and consequently that the game played with the machine was unlawful gaming within the provisions of 17 & 18 Vict. ch. 38, sec. 4, and the appellant was rightly convicted: *Donaghy* v. *Walsh*, Div. Ct. (Ir.), [1914] 2 I.R. 261. (*Fielding* v. *Turner*, [1903] 1 K.B. 867, applied and followed.)

ONT.

Annotation

Annotation (*Continued*)—**Gaming** (§ I—6)—**Betting-house offences.**

In *Taylor* v. *Monk* [1914], 2 K.B. 817, 83 L.J.K.B. 1125, the prosecution was for keeping a betting house contrary to the statute, Betting Act, 1853. The defendant used a house in the following way: He employed two servants to stand respectively close to the doorway, one inside and the other outside. Persons passing along the street handed betting slips to the man outside, who handed them on to the man inside without moving from his position, who subsequently sent them to the defendant at another address. The slips related to bets on horse races. The defendant was convicted and on a case stated by the justices, the Divisional Court affirmed the conviction.

Police raids and statutory presumption from finding betting equipment.—A statutory presumption may arise under Code sec. 986 if an officer having an order or warrant to search under sec. 641 is wilfully prevented, obstructed or delayed in carrying out the same and the place is found fitted with contrivances for unlawful betting or devices for concealing, removing or destroying such contrivances. Those circumstances are declared by sec. 986 to be *prima facie* evidence that the place is a common betting house.

But the fact that an officer on seeking admittance to a place suspected, finds the door locked, does not constitute a wilful prevention, obstruction or delay of his entrance sufficient to raise the *prima facie* presumption created by sec. 986 of the Criminal Code that the place was used as a common betting house; the presumption is created only when something active is done amounting to a wilful obstruction or prevention: *Rex* v. *Jung Lee*, 13 D.L.R. 896, 22 Can. Cr. Cas. 63, 5 O.W.N. 80.

In the absence of evidence that a constable was armed with a warrant when he was prevented from, obstructed or delayed in entering a place supposed to be used as a common gaming house, or that the person obstructing him knew that he was a constable, no presumption arises under secs. 985 and 986 of the Criminal Code, 1906, that such place was used as a common gaming house: *Rex* v. *Hung Gee* (No. 1), 13 D.L.R. 44, 21 Can. Cr. Cas. 404.

Upon a trial for keeping a common betting house in violation of secs. 227 and 228 of the Code, articles for recording bets which were seized upon the premises by police officers were held in an Ontario case to be admissible in evidence against the prisoner, irrespective of a claim by the accused that the alleged search warrant was illegal and that the police officers had obtained possession of the articles by means of their own trespass: *R.* v. *Honan*, 6 D.L.R. 276, 20 Can. Cr. Cas. 10, 26 O.L.R. 484.

And in the later case of *R.* v. *O'Meara*, where the charge was for keeping a common gaming house (Cr. Code sec. 226), it seems to have been assumed that sec. 986 would raise the statutory pre-

Annotation (*Continued*)—Gaming (§ I—6)—Betting-house offences. ONT.

Annotation

sumption although there was no search order under sec. 641, and the constable merely deposed to what he found on calling at shop premises to investigate an alleged gaming machine publicly in operation there: *R.* v. *O'Meara*, 25 D.L.R. 503, 25 Can. Cr. Cas. 16.

The two classes of cases are quite distinct, the one relating to actual evidence which it was sought to exclude because of alleged irregularity in the manner of obtaining it; and the other the application of a statutory presumption which should be strictly construed so as to limit it to the conditions which the statute declares. The difficulty arises in interpreting the word "found" in sec. 986. When is a place "found fitted" with any means for unlawful betting? Why is use made of the word "found" if the meaning is to be the same as if the word were omitted? Is it sufficient that the place *is* fitted, etc., and that such circumstance is proved, or must it have been "found" fitted, etc., when an entry and search was made under provision of law appropriate to that enquiry? Code sec. 641, as amended 3 & 4 Geo. V., ch. 13, makes provision for a search order being issued by a magistrate on a written report from a constable that he has good grounds for believing and does believe that the place is kept or used as a disorderly house as defined by sec. 228, or for betting, wagering or pool selling contrary to sec. 235. The person issuing the search order may judicially determine that the equipment seized on the police raid which it is the purpose of the search order to authorize, shall be confiscated on its being determined that the articles seized are instruments of "gaming, wagering or betting." See *O'Neil* v. *Attorney-General*, 1 Can. Cr. Cas. 303, 26 Can. S.C.R. 122. It is at least arguable that the word "found" in sec. 986 is to read in conjunction with the words "constable or officer" authorized "to enter any house, room or place" which are used in the first section. Section 641 provides for the authorization. With that authorization, if he is unlawfully obstructed the statutory presumption arises, no matter what class of disorderly house it may be alleged to be, but if the ground of the raid is that it is a common betting house, and if the place is "found fitted or provided with any means or contrivance for . . . unlawful betting," it shall be *prima facie* evidence that the place is a common gaming house.

The interpretation which seems preferable is that which limits the latter part of sec. 986 to the finding of the fittings and contrivances for unlawful betting, etc., upon a lawful search by a constable or officer empowered by law to enter as of right, and where the obstruction of the officer would in itself be an indictable offence (Code sec. 230).

The context seems to distinguish the application here of the

ONT.

Annotation

Annotation (*Continued*)—**Gaming** (§ I—6)—**Betting-house offences.**

word "found" from that given to it under the English Licensing Act, 1872, sec. 25, imposing a penalty on a person "found" on licensed premises during closed hours and not being an employee, etc., or *bona fide* traveller, as to which reference may be made to *Thomas* v. *Powell* (1893), 57 J.P. 329.

N. S.

S. C.

SUTHERLAND v. VICTORIA STEAMSHIP CO. Ltd.

Nova Scotia Supreme Court, Graham, C.J., and Russell, Longley and Drysdale, JJ. April 22, 1916.

1. ACCOUNTS (§ I—2)—OPENING UP—FRAUD—PARTIES—CORPORATE OFFICERS.

In an equitable action by an executrix to open up, on the grounds of fraud and misrepresentation, a settled account of dealings by the testator with the credit of a company of which he was manager, paid by her, judgment should not be given for the amount claimed, but proper accounts should be ordered taken upon a reference as between the company and the estate of the testator. The pleadings were ordered to be amended by adding the treasurer of the company as a defendant where he appeared to be involved with the testator in manipulations of the company's credit for their personal advantage.

(Judicature Rules, N.S., 0.16, r. 10 referred to.)

ED. NOTE.—See also *Tobin* v. *Commercial Investment Co.*, 27 D.L.R. 387.

2. CORPORATIONS AND COMPANIES (§ IV F—100)—FRAUDULENT ACTS OF OFFICERS—FALSE ACCOUNTS—LIABILITY.

Fraud by the treasurer of a company, in his own interest, in making up accounts rendered to an executrix, purporting to be between the company and the deceased, is not attributable to the company.

3. PLEADING (§ I N—110)—AMENDMENT—WHEN EFFECTIVE.

Under the Judicature Rules (N.S.), O. 28, rr. 7-10, merely making an entry of an order granting an amendment is sufficient even though no order is taken out; but the amendment must be made to give the defendant an opportunity to plead to it, and failure to do so within the prescribed period renders the order itself *ipso facto* void.

Statement

APPEAL by defendant from the judgment of Harris, J., in favour of plaintiff, an executrix, in an action to recover moneys paid under undue influence and false representations.

T. S. Rogers, K.C., and *J. McG. Stewart*, in support of appeal.

H. Mellish, K.C., and *H. Ross*, K.C., *contra*.

Graham, C.J.

GRAHAM, C.J.:—The plaintiff is the executrix of the late A. H. Sutherland, who died in November, 1911. He was the manager of the defendant company from 1904 until his death. One A. S. McDonald was the secretary-treasurer of the company during all times in question. The defendant company owned the steamship "Blue Hill," a passenger boat plying between Iona, the government railway station, and Baddeck. It received, besides its freight and passage money, an annual subsidy from the Government of Canada. There are other officials whose names appear in the record, M. G. McLeod, a director, and Capt. Moffat, president, and there are other shareholders.

The late A. H. Sutherland carried on a coal business at Baddeck, and coal was brought there to him in small schooners and he sold that coal no doubt in the usual way. Now it happens that the coal company (The Dominion Coal Co. in this case) gives a reduction in price, called in the invoices a commission, of 10c. per ton to steamship companies for the coal sold to them. And the late A. H. Sutherland bought not only the coal to be used in the "Blue Hill" but the coal for his own trade at the reduced rate. It was all invoiced to this defendant company; but the coal for the "Blue Hill" and used by the company was shipped by rail from the mine to Iona and the coal that was for Sutherland's use went, as I said, by small schooners to Baddeck—all purporting to be for the defendant company. There is no particular blame for doing that perhaps, but Sutherland used the company's credit and funds in payment for this coal. Much of this was arranged for during the period of his lifetime but part was not. Of course this could not be carried on openly to the knowledge of the officers and shareholders of the company, and it could not be done by himself; but it was carried on by the assistance of the treasurer, McDonald. None of the coal for sale by Sutherland at Baddeck could appear in the expense account of the "Blue Hill" but only the coal used by her, nor in the yearly balance sheets for the shareholders. But Sutherland as manager kept in his possession the invoices of coal. And in order that the amounts used by the "Blue Hill" might go into the expense account these amounts from time to time were furnished by him. The payments for the coal, or rather the return to the company of moneys paid for the coal, so far as they were returned, were to some extent financed by A. S. McDonald. Some one, I think the plaintiff's counsel, said at the hearing that he was receiving a commission for this assistance but I have found no evidence of it in the record. But the bank at Baddeck had given the company the right to overdraw to the limit of $2,000, and it was used for this purpose. McDonald had to see that the account was not overdrawn.

There were auditors, but the auditors were Sutherland himself and also Mr. McLeod. The bank accounts, for there were more than one which were made use of to pay for Sutherland's coal, were, in auditing the accounts, not resorted to.

Mr. McLeod swears to that and there is no reason to doubt his word.

N. S.

S. C.

SUTHERLAND v. VICTORIA STEAMSHIP CO., LTD.

Graham, C.J.

After the death of Sutherland an account was made up in respect to those matters and it was handed to the executrix. It includes the items in respect to the different coal cargoes which went to him and includes in its totals a freight account, which is entirely disputed; also a small balance on a cash account, some of the items being disputed.

It is not to be wondered at that the attempt to keep the coal that went to Sutherland out of the books of the company and the balance sheets and from the knowledge of the other members of the company landed the accounts in some confusion. The invoices of the Sutherland coal were as I said kept in his custody, and apparently, in order to keep the "Blue Hill's" expense account straight, he handed to McDonald the items of the amounts actually consumed by her.

The executrix gave a cheque for the balance claimed against her husband, $5,636.20. I call attention here to the receipt given by McLeod to the executrix at the end of the account: "Received payment for A. S. McDonald and Victoria S. S. Co. Ltd., April 4, 1912." The company apparently, if proper books had been kept, were crediting A. S. McDonald with the payments he made in Sutherland's interest, and in this receipt Mr. McLeod is plainly saying part of this money goes to McDonald on that account, and the part McDonald had failed to cover or meet, that goes to the credit of the company. The plaintiff, after the payment, with the assistance of a relative, made further investigation and apparently discovered items which were paid out erroneously by the executrix.

Thereupon, on August 19, 1915, she brought this present action against the Victoria S. S. Co. It is an equitable action to open up the settled accounts and to surcharge and falsify. She not only charged mistake, but fraudulent representation and undue influence.

She also claimed, among other things, "an accounting of the dealings between the defendant company and the late A. H. Sutherland and a judgment for such amount as shall be found due from defendant company on such accounting: Also a return of the moneys, namely, $4,037.36."

Now, the practice is well settled in respect to such a suit. Lord Westbury said in *Parkinson* v. *Hanbury*, 2 Eng. & Ir. App. 1 at 19:

Nothing is more requisite than to abide by the old rule clearly enunciated by Lord Hardwicke and constantly followed that if you desire to set aside or to open a stated and settled account so as to have liberty to surcharge and falsify you must in your bill specially charge some, at least one, definite and important error and support that charge with evidence confirming it as it is laid. Having regard to the manner in which evidence is taken in Courts of equity, there would be no protection to a defendant if he had not, by proper averment in the bill, distinct notice of the allegation that he had to meet, more especially when the whole of the relief turns entirely on the power of the plaintiff to aver, and to prove satisfactorily, some particular error in his account.

At the opening of the trial there was indeed very little to be tried to entitle the plaintiff to have the account taken in such a case, and O. 32, sec. 2, enabled the Judge to order it at once. The plaintiff made an application to amend, and this is the note in respect to it:

Mr. Ross moves for amendment to statement of claim, adding a claim for the return of total amount of cheques for $5,636.23. Said motion granted by the Court.

No order was ever taken out. Under the rules a note of it is sufficient but the amendment must be made and a defendant given an opportunity to plead to it. I refer to the Judicature Rules, O. 28, rr. 7-10. If the amendment is not made within the time limited in the order, or within 14 days if no time is limited, then the order to amend becomes *ipso facto* void. I do not wish to be technical, but I rely upon those rules because the defendant later applied for an amendment, and it was refused, and they would have been entitled to get one as of right if they only had been served with the plaintiff's amendment and could have pleaded to it. I say that that note in the minutes does not indicate what relief the plaintiff was really asking for or had obtained. I think it has resulted in a miscarriage. I will refer to this later—but surely if every item was then made open to attack the accounts should still have been taken.

In this equitable action a reference would be ordered as a matter of course to take the accounts. The case cannot even now by the Court be conveniently dealt with in any other way. The plaintiff had submitted to the taking of the accounts. The defendant had a right to claim not only in respect to the counterclaim for the coal, freight and cash, and so on, but the right to claim that as the plaintiff was endeavouring to set aside or open up a settled account and recover back money obtained by fraud-

N. S.

S. C.

SUTHERLAND v. VICTORIA STEAMSHIP CO., LTD.

Graham, C.J.

ulent misrepresentation and undue influence that the burden of proof was on the plaintiff, and the reference, the only feasible way of taking the accounts, would dispose of the whole matter. Instead there is a judgment for the whole account without taking the account. Surely the company is not to forfeit its whole account because its officer in mistake or fraud in his interest as to some items of the account charged the executrix too much? To that extent but no further she was entitled to relief. To have the accounts taken and the excess repaid—that is what she prayed for in her action. The plaintiff is not entitled to recover from the company that which the company could recover from Sutherland. The fact of the parties being reversed seems to tend to confusion. The defendant would naturally rely upon the accounts being taken. No harm could come to it if that course were pursued. We must look at the rights of this defendant—as if it had brought the action, as it turns out it should have done, instead of trying to settle quietly with a woman for the sake of her husband's reputation.

The plaintiff made at least three contentions in support of the judgment. 1. That the books of the company which were put in by him shewed that nothing was due by Sutherland to the company when the money was paid by the executrix. That is very flimsy. The whole theory is that the account books were kept by the two officials, McDonald at the instance of Sutherland, in such a way that these irregular transactions outside of the "Blue Hill" would not appear in the company's accounts. The reverse is proved. 2. That there was really no coal purchased in the name of the defendant company by Sutherland and paid for out of the company's funds, putting the burden on the defendant.

I make a preliminary observation that a party calls a witness for better or for worse. There are well known ways for discrediting an unfavourable witness but the party must have other affirmative testimony. The counsel after calling a witness cannot say in respect to the testimony favourable to him "that is a clear admission" but in respect to the unfavourable parts, "oh he is a bad man." "He is untruthful there, the opposite to what he says must be true."

It is quite clear that cargoes of coal were brought to Baddeck for Sutherland, shipped by the Dominion Coal Co. I have gone

over invoices in evidence covering parts of 1909, all of 1910, part of 1911. How easy to prove all these invoices for the whole period on a reference, all in the Dominion Coal Co.'s books. All the shipments are contained in the account ex. H. 11. It was entered in one of the books by McDonald, which McDonald states contains the total shipments of coal from the Dominion Coal Co., giving the vessels' names, shipped really to Sutherland in the name of the defendant company. This exhibit the executrix received and had the opportunity of investigating and falsifying. That was not the point of attack.

It was rather that Sutherland had paid for the coal that came to him. Two cheques were produced, as I have already mentioned. Where are the other cheques if they shewed payment for any of this coal? That is a matter for a referee to go carefully into. McDonald says that this coal was paid for out of the company's funds or upon money raised by him for Sutherland on the company's credit. How readily, if he is telling an untruth, can the referee confound him with the bank officials and the books of account in their possession!

This brings me to the third contention. 3. There is a contention like this: Mrs. Sutherland, the executrix, was induced to believe when she paid the money that the whole sum was due to the Victoria S. S. Co. Part of it was due to McDonald. Therefore the whole should be paid back to the executrix, and the parties start over again. I cannot understand this interposition of McDonald. The defendants had hinted at it in their pleadings, and the plaintiff by his amendment at the opening of the trial (so we were told at the hearing, for it is guesswork), made it a basis for recovering the whole sum back from the company—that was the alleged misrepresentation that it was due to McDonald and they represented that it was due to the company. I think it is perfectly clear that the company was entitled to look to both Sutherland and McDonald for every dollar of this money of which it had been defrauded. It was money used by its own officials and not paid back, and a profit made by using its credit and its funds by the said officials. These two officials, trustees of the company, in collusion had defrauded the company and the company was entitled to have accounts taken with both of them jointly or with Sutherland alone, for he had got the coal and the profits derived from using the defendants' funds to pay for it.

N. S.

S. C.

SUTHERLAND v. VICTORIA STEAMSHIP CO., LTD.

Graham, C.J.

All persons concerned in the commission of a fraud are to be treated as principals.

In *Cullen & Thomson's Trustees* v. *Kerr*, 4 MacQueen 424, at 433 Lord Westbury said:

> All persons concerned in the commission of a fraud are to be treated as principals. . . . If an agent in the course of his employment commits a fraud on another party whereby damage ensues to the party injured he will be liable to the party injured though his principal would be so likewise.

Kerr on Fraud, 4th ed. 442, *Weir* v. *Bell*, 3 Ex. D. 238, at 248.

And here, where both occupied a fiduciary relationship to this company, there can be no doubt that the company would be entitled to go directly against both Sutherland and McDonald to have the accounts taken, and to pay over the balance. The amount to be contributed one way or the other could be adjusted in the case. I do think it is a misfortune that since the Judicature Act has given to this Court comprehensive powers and it is required as an equity Court to complete the matter, and when the action already brought had gone so far and had produced so much useful material, that all this should be wasted, and that we should have to go back to a common law procedure, and a common law notion of parties. And this is the result of the suggestion: a. That the executrix should recover back from the company every dollar of the money she paid to it and with interest. b. Then that the company sue McDonald to recover the whole amount from him. c. That McDonald in turn should sue the executrix of Sutherland for the amount of his account as it stood in 1911.

I copy from the judgment:

> It is I think clear that McDonald can be compelled to repay the money to the company and that McDonald is also free to sue the estate and he will recover if he has a just claim.

And all this when (except for the overpayment made by the executrix), the bulk of the money has reached its proper destination. The money received from the executrix was paid out by the company as follows:—the sum of $1,943.29 to the Royal Bank, which sum the company was liable for on the overdraft. McDonald had not covered it. And the sum of $3,692.94 was paid to McDonald because he had to that extent (of course subject to the excess paid by the executrix), covered Sutherland's liabilities to the company for the amounts used to purchase this coal, with interest and freights.

Now, suppose the company had brought a proper action in

respect to the amount of which it had been defrauded and asked to have the accounts taken, surely Sutherland or the executrix of Sutherland could not answer, "You are not to have the accounts taken in respect to $3,692.94, because my agent McDonald, my assistant in the fraud, has actually covered or met or paid back a portion, namely, that sum." I think the whole accounts must be taken. Preferably but not necessarily with McDonald as a party. Preferably because his rights could be adjusted at the same time, and the contribution payable by Sutherland to him ascertained. There is no doubt now in law that contribution may be ordered where two persons participate in although only one profited by the fraud, committed by them on someone else.

If that is so, I do not, with deference, see why any distinction should be made as was made in this case between what McDonald has covered or met and what was still due. If these were accounts which the company had nothing to do with, that was a matter between Sutherland and McDonald alone and these could not be taken. And we find this ruling at p. 48 of the case:

> Mr. Ross at the request of the Court does not go into the state of the accounts between Mr. McDonald and Mr. Sutherland, the understanding being that he shall go into that branch of the case after finishing the first question that arises if the trial Judge thinks it is necessary to do that.

I infer, for I can only guess, that that means the question which the amendment opened up, namely, the right to recover all because it had been represented as due to the compnay instead of part being due to McDonald. And the Judge in his judgment says:

> As McDonald was not a party to the suit I eventually stopped the taking of further evidence as to the condition of the accounts between Sutherland's estate and McDonald, upon the understanding that this evidence should be taken later if found to be necessary. In my opinion it is not necessary.

That is adopting the same theory on which the amendment was granted.

With deference, I think it was very necessary to have all the accounts taken and I have endeavoured to shew that the company was entitled to it. Sutherland in his lifetime, and his executrix stands in no better position, could not surely interpose McDonald, because McDonald had paid something (in dispute and suspicion as to amount), between the company and himself. It was for the executrix of Sutherland to exonerate him by shewing exactly what his agent had covered or discharged for him, and as to parties,

N. S.

S. C.

SUTHERLAND v. VICTORIA STEAMSHIP CO., LTD.

Graham, C.J.

as I have suggested, I think it was not necessary to have McDonald on the record to take that account, but supposing it was—why not join him then or at any time before going to the referee? He was in the witness box for days; his evidence covers 35 pages of the printed book. I do not know how many provisions in the Judicature Rules exist for dealing with the want of such a party. Further, there is an express provision, O. 16, r. 10, and even if the parties do not suggest it for remedying any such defect, namely:

> No cause or matter shall be defeated by reason of the non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, order . . . that the names of any parties whether plaintiffs or defendants who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added.

And the subsequent orders of that rule provide the subsequent procedure. At this very sitting such an amendment is being made in taking accounts in the case of *Roop* v. *Pickels*. Indeed, it was the plaintiff's place to make McDonald a defendant if he had any separate answer as to or in the taking of the accounts. The plaintiff took a receipt shewing that part of it as claimed by McDonald. I refer to *Walsham* v. *Stainton*, 33 L.J. Ch. 68. If it was the want of McDonald as a party to the suit that induced the trial Judge to stop taking further evidence as to the condition of the accounts, as appears in the judgment, I think when that ruling was made, p. 48, if it had only been intimated to both counsel that it was for want of McDonald as a party that it was stopped, the defendant would at least have had the opportunity of applying to make him a party and not meet it for the first time in the reserved judgment. And when it came out there, and an application was made on the part of the defendant, it was refused on the grounds mentioned in the second decision. As a fact there was nothing further to try to justify an order that the accounts be taken.

I think that nothing turns on the fact that Mr. McLeod was, when he was asked about it in the witness box, hazy as to whether the company ought to look to Sutherland or to McDonald who was the assistant of Sutherland and in his interest had covered or met a part of the amount which should really have been repaid

to the company by Sutherland. Instead of claiming that the company was looking to both as any lawyer would have advised him—and naturally he claimed the right of the company to retain what McDonald had repaid to the company, as they looked to him as the treasurer. The receipt he gave to the executrix shewed that he was taking the money for both. There was absolutely no election of which either Sutherland or McDonald could avail himself. The company's rights were not prejudiced by any election to look to one more than the other. I have gone carefully through the evidence of Mr. McLeod on that subject. He insisted, at first any way, that the company was entitled to look to Sutherland's estate, but any layman might well be puzzled to know which he was to look to without considering the question that both might be liable to account, conspicuously the estate of Sutherland who had all the profits and owed the money, but I do think it could not be put as strongly by the trial Judge as an admission. Even if McLeod had done so he could not bind the company by any such admission made in the witness box. His legal opinion is not useful or binding. I suppose the defendant's counsel always being entitled to make inconsistent contentions had made that untenable contention, and the Court might have said "If that contention is correct you must fail in the case." It is usual, I think, in deciding the case eventually to decide the point and say whether it is untenable or not, and if it is so to determine the whole case without that element. But I apprehend that it is not usual to adopt an untenable contention of counsel (if there is anything besides to decide), and apply that contention as an admission and decide the case upon it alone when there is a real question to decide irrespective of that. And this reasoning seems to have prevailed in respect to the counterclaim. If the action should have been brought against McDonald then the defendant is admittedly not to have the benefit of the counterclaim because that is the defendant company's counterclaim.

I do not see how or why it lost the benefit of its counterclaim. Then as to the part that McDonald had not paid, surely Sutherland's estate remained liable for that. I think it remained liable to account for that to the company and particularly as the company would clearly have to meet it at the bank. In the result the plaintiff, instead of having the accounts taken and the amounts recovered back which exceeded what was erroneously paid by her,

N. S.

S. C.

SUTHERLAND v. VICTORIA STEAMSHIP CO., LTD.

Graham, C.J.

has recovered a judgment for the whole amount paid, leaving the various parties by a multiplicity of actions and in the teeth of the Statute of Limitations and notwithstanding the loss of interest to try and work out their rights when it could have been done and should have been done so simply in this action and with all the parties before it. Nothing could be simpler. The plaintiff had but to prove a *primâ facie* case. I say the matter cannot be worked out in the way suggested. Suppose the money is paid back and all start over again. The Royal Bank can never be made to pay back the sum of $1,943.29 drawn out of the credit account in favour of this company by McDonald in collusion with Sutherland to pay Sutherland's indebtedness to the Dominion Coal Co. for coal. The accounts cannot be taken or the true account ascertained until again the company and the executrix are brought face to face in an action. That involves going into the whole accounts. And why, if McDonald paid for Sutherland the other amount, $3,692.94, in the way suggested, why not settle his right to contribution against Sutherland's estate in this case? This evidence having been stopped the whole transaction between McDonald and Sutherland does not appear. But I fail to see why the company is barred from going into these accounts and having the benefit of anything it has saved by way of McDonald.

A new ground was put forth before us to sustain the judgment, namely: extreme cases of fraud as to part where the person had not been permitted to recover even what was due, but there was no such fraud of the company itself here. The acts of officials of the defendant company, such as McDonald, in making up the accounts to render to this executrix at the worst in the interest of himself are not to be attributed to this company. The trial Judge did not decide the case on any such ground. I apprehend that, even in a fraudulent account, the accounts are to be taken: *Clarke* v. *Tipping*, 9 Beav. 284 at 293.

I think the appeal should be allowed and the judgment set aside. There will be a reference of the accounts to a referee and an amendment to the statement of claim making McDonald a defendant. The costs reserved, except the costs of the appeal which should go to the defendant.

Russell, J.

RUSSELL, J., concurred with GRAHAM, C.J.

Drysdale, J.

DRYSDALE, J. (after reciting the facts):—In the light of the

evidence as to the purchase of coal for Sutherland's private affairs it seems that justice cannot reasonably be done herein by an order without the accounts being taken at least between Sutherland and the company. Every argument advanced by counsel for plaintiff alleging the right to recover this money is so evidently based on this view of the accounts that it is not reasonable to say justice can be done without an accounting. The treasurer McDonald seems to have been very much mixed up in the manipulation of the buying of coal in the name of the defendant company for Sutherland's business, and it is said was entitled to a large portion of the moneys collected from the plaintiff and actually received for himself out of the payment made by plaintiff a large portion of her cheque of $5,636.23. However, this may be, it is perfectly obvious that no adjustment of Sutherland's position ought to be attempted without a proper taking of the accounts as between Sutherland and the company, and if this involves McDonald he ought to be made a party and the various questions arising out of the admittedly irregular use of the defendant company's position for the private coal business manipulated by both McDonald and Sutherland properly adjusted. I have no doubt this could be accomplished by a taking of the accounts between Sutherland and the defendant company, but inasmuch as allegations are made against McDonald, I think the proper order would be to direct McDonald to be made a party and thereafter have the accounting proceeded with. I am of opinion that the appeal ought to be allowed, the judgment vacated and an order made directing all proper accounts between the parties.

LONGLEY, J., dissented. *Appeal allowed.*

Longley, J. (dissenting)

The KING v. DALKE.

MAN.
C. A.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. November 29, 1915.

1. HOMICIDE (§ I—2a)—MANSLAUGHTER BY NEGLECT—SON'S CRIMINAL NEGLIGENCE OF INFIRM FATHER LIVING WITH HIM—CR. CODE SEC. 241. A son who has received his aged father into his household and undertaken his care and support may be convicted of manslaughter if the father dies from exposure while under the son's charge and from insufficient care and food where the son had the means to supply the food and the means to prevent the father from suffering from exposure, but was reckless whether the father died or not and was wickedly negligent with respect to the duty owed to the father who was incapacitated by old age, infirmity and illness from looking after himself or from withdrawing himself from the son's charge; the charge is one imposed upon the son "by law" within the meaning of Cr. Code sec. 241, under such circumstances.

MAN.

C. A.

THE KING v. DALKE.

Statement

CASE stated by Macdonald, J.

The prisoner was tried on a charge of manslaughter at the Assizes holden at Portage la Prairie, in the Province of Manitoba, before Mr. Justice Macdonald with a jury, on the 15th, 16th and 17th days of November, 1915, and found guilty, but during the progress of the trial a motion was made by counsel for the accused, to take the case from the jury on the ground that, under the circumstances disclosed in the evidence, there was no duty imposed upon the accused by law who was the son to provide for the deceased who was the father. The application was refused, but the following case was stated.

"At the present Fall Assizes for the Central Judicial District of the Province of Manitoba, the grand jury returned a true bill against Henry Dalke on the following indictment (omitting formal parts):—

"The jurors for our Lord the King present:

"1. That Henry Dalke, on the fourth day of April, in the year of our Lord, one thousand nine hundred and fifteen, at the Rural Municipality of Westbourne, in the Central Judicial District, in the Province of Manitoba, unlawfully killed and slew Samuel Dalke.

"2. The jurors aforesaid do further present:

That Henry Dalke, on or about the fifteenth day of March, in the year of our Lord, one thousand nine hundred and fifteen, at the Rural Municipality of Westbourne, in the Central Judicial District, in the Province of Manitoba, being then and there the son of Samuel Dalke and in charge of him, the said Samuel Dalke, who was a member of Henry Dalke's household and unable, by reason of age and sickness, to withdraw himself from such charge or to provide himself with the necessaries of life, and the said Henry Dalke being as such, under a legal duty, and bound by law to provide sufficient food, clothing and lodging and all other necessaries for the said Samuel Dalke, did omit, without lawful excuse, to provide necessaries for the said Samuel Dalke, by means whereof, the life of the said Samuel Dalke was then and there endangered.

(Signed) S. M. MACDONALD,
Deputy Clerk of the Peace."

MAN.

C. A.

THE KING v. DALKE.

Statement

"The prisoner was tried before me, with a jury, on the 15th, 16th and 17th days of November, 1915, and found guilty on the first count of said indictment.

"The evidence adduced at the trial shewed that Henry Dalke (the accused,) lived at the municipality of Westbourne, in Manitoba with Mrs. Newman, a woman who was not his wife, and her three children. The said Henry Dalke undertook the care and keep of his father, Samuel Dalke, who was a member of Henry Dalke's household. Samuel Dalke was an old, infirm man, and unable, by reason of old age, sickness and general infirmity, to look after himself and to supply himself with the necessaries of life, and was thereby further unable to withdraw himself from the charge of his son, Henry Dalke. The evidence adduced at the trial further shewed that the said Henry Dalke executed the charge of his said father in a wickedly, negligent manner, that is, the said Henry Dalke was reckless and careless whether Samuel Dalke died or not, and that as a result of the manner in which the said Henry Dalke executed his said charge, the said Samuel Dalke died. The evidence clearly shewed that the death was due to exposure while under the charge of Henry Dalke, and from insufficient care, attention, nourishment and food being supplied to the said Samuel Dalke by the said Henry Dalke. The evidence shewed that Henry Dalke had the means to supply the said Samuel Dalke with food and nourishment and had the means of preventing the said Samuel Dalke from suffering from exposure.

"Counsel for the accused, both before and after verdict, submitted that, under the Criminal Code, the accused could not be found guilty of manslaughter unless there was duty imposed on him by contract or by law to supply the father with the necessaries of life. Counsel for the accused further submitted that there was, in this case, no evidence of a contract by the son to supply the father with the necessaries of life, and that neither by statute or by the common law did the son owe any obligation to supply the father with the necessaries of life, and hence, there was no duty imposed on the accused by law.

"I held that section 241 of the Criminal Code applied, and

MAN.

C. A.

THE KING v. DALKE.

Statement

that as the son had undertaken the care of his father, he was bound to execute his charge without wicked negligence, and, as he had not done so, he could, as a matter of law, be convicted of manslaughter when the death of the father was due to such negligence. I further held that there was an implied contract on the part of Henry Dalke to care for the said Samuel Dalke. I further ruled that 'necessaries' included care and attention as well as food and nourishment.

"Upon application of counsel for the said Henry Dalke, I postponed sentence after verdict and remitted the said Henry Dalke to gaol to await sentence, and reserved for the opinion of the Court of Appeal the following question:—

"Was I right in holding that the said Henry Dalke could, as a matter of law, be convicted of manslaughter, under the circumstances indicated herein?"

"If the answer to the above question be in the affirmative, the said Henry Dalke to appear before me for sentence for manslaughter, as aforesaid.

"If the answer to the above question be in the negative, the said Henry Dalke to be discharged from custody or to be otherwise dealt with, as the Court of Appeal may order.

"Dated at Winnipeg, in Manitoba, this 25th day of November, 1915."

W. R. Sexsmith, for the prisoner: Section 241 of the Criminal Code must be read in its entirety, and to come within the section the charge of another must be either (*a*) undertaken under contract (*b*), imposed by law, or (*c*) by reason of an unlawful act, and there was no unlawful act in this case, neither was the duty imposed by law, or by any contract, or anything that would make an implied contract. On the question of duty, see Eversley on Domestic relations, 3rd ed. 575; *R.* v. *Instan* (1893), 17 Cox Criminal Cases 602, which is distinguishable as the evidence there supported the finding of an implied contract. So also in *R.* v. *Brooks*, 5 Can. Cr. Cas. 372, 9 B.C.R. 13, there was a clear common law duty.

John Allen (Deputy Attorney-General), and *W. D. Card*, for the Crown: There is a duty imposed on a son by the common law to provide necessaries for his father where he has

undertaken to do so or where he has commenced to provide the same; and such duty extends not only to persons between whom there is relationship, but to all persons who undertake or commence to provide for others. See *Rex* v. *Nichols*, 13 Cox C.C. 76; *Rex* v. *Handley*, 13 Cox C.C. 79; *Rex* v. *Elliott*, 16 Cox C.C. 710; *Rex* v. *Smith*, 10 Cox C.C. 94; *Rex* v. *Instan*, 17 Cox C.C. 602, and 1 Russell on Crimes, 800 and 802.

THE COURT OF APPEAL answered the question in the affirmative. *Conviction affirmed.*

FLETCHER v. PENDRAY.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, Galliher and McPhillips, JJ.A. April 3, 1916.

1. LEVY AND SEIZURE (§ II—32)—SHERIFF'S SALE OF EXEMPT PROPERTY—NULLITY.

A sheriff's sale under execution of property claimed exempt under secs. 17 and 18 of the Homestead Act, R.S.B.C. 1911, ch. 100, is not merely an irregular exercise of legal powers but an unlawful act in defiance of statute and void, and can confer no title thereto upon the purchaser.

Statement

APPEAL from the judgment of Lampman, Co.Ct.J., on a claim for property exempt under the Homestead Act, R.S.B.C. 1911, ch. 100.

W. J. Taylor, K.C., for appellant (defendant).

D. S. Tait, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I am of the opinion that the sheriff had no right to sell the oats in question. They were clearly of a value of less than $500, and when rightly claimed, as I think they were, by the plaintiff, the execution debtor, as an exemption under the Homestead Act, the sheriff was bound to release them. There is to my mind a clear distinction between this case and such cases as *Emmett* v. *Thorn* (1813), 1 M. & S. 425. Where there is legal authority to sell, the fact that the judgment upon which the *fi. fa.* issued is afterwards set aside will not, it appears, affect the purchaser's title. And the same is true where the sheriff, having lawful authority to sell disregards some legal formality.

On the other hand, it appears to be equally clear that where the sheriff sells the goods of a stranger, the sale is void and the owner can treat the purchaser who has taken possession of them as a trespasser, and either recover the goods, or damages for their conversion.

In *Turnor* v. *Felgate* (1656), Raym. T. 73, damages for the conversion were awarded against the purchaser.

B. C.

C. A.

FLETCHER v. PENDRAY.

Macdonald, C.J.A.

In *Farrant* v. *Thompson*, 5 B. & Ald. 826, the Court held that no property in the goods passed to the vendee, and that an action of trover would lie for their recovery, Abbott, C.J., saying: The sheriff wrongfully took the goods of the plaintiff instead of those of the tenant; he could acquire no title by his wrongful act, *and could, therefore, convey* no title to the defendant.

The principles to be applied to the case at Bar are the same as those applied in that case. The *fi. fa.* gave the sheriff no right to take the goods in question. His selling of them was unlawful, not merely irregular, and the sheriff not having sold in market covert could confer no title upon the purchaser. I would dismiss the appeal.

Irving, J.A.

IRVING, J.A., agreed.

Martin, J.A.

MARTIN, J.A.:—The neat question before us is what, if any, right or interest does a purchaser at a sheriff's sale acquire to or in goods which are exempt from sale under the Homestead Act, and which have been claimed as exempt, pursuant to the statutory option given to the judgment debtor by sec. 17. No question of selection under sec. 18 arises here because the goods (a crop of grain) seized were of less value than $500. It is submitted that in such case the immediate duty of the sheriff after notice of the exercise of said option and claim is to withdraw from possession, and that if he nevertheless thereafter proceeds to sell the exempted goods it is an illegal and void act and no interest of any kind passes to the purchaser. In my opinion this is the correct view of the matter. A sale in such circumstances is not an irregular exercise of lawful powers, but an unlawful act in defiance of a statutory prohibition not to sell at all in such circumstances. It is just as though the statute in terms forbade the selling of the debtor's bed and yet it was put up for sale. That is the distinction between this and such cases as *Hoes Case*, 5 Co. Rep. 89 b; *Manning's Case*, 8 Co. Rep. 94 b, and *Doe d. Emmett* v. *Thorn* (1813) 1 M. & S. 425, in which last it was said "the term (of a lease) was legally sold, for the sheriff had authority to levy the money and the property passed by the sale." Here the sheriff did not have authority to levy upon these goods after exemption claimed, nor had he "lawful authority to sell" them, as in *Manning's Case*, *supra*. The present is a very strong case because it is not one where the "precise interest" whatever it may be, of the debtor in the goods passes

(as to which see 14 Hals. 57 and cases cited) to the purchaser by the sale (which is not in market overt), but one wherein the statute says no interest of the debtor in the goods shall be sold or pass at all. The purchaser in this case was, we are told, unaware of the fact of the exemption, but even though he was thus unwittingly participating in an unlawful proceeding he does not for that reason acquire any better title to the goods. Here there was no interest that could be sold or bought, and so the purchaser acquired nothing. The reasoning in the case of *McCracken* v. *Adler* (1887) 4 S.E.R. 138, relating to exemption of lands, which I referred to during the argument, and *Mobley* v. *Griffin* (1889), 10 S.E.R. 142, wherein it is approved, supports this view.

The purchaser was referred to as an "innocent" one, but from my point of view that does not affect the situation, and I do not think the term is appropriate to these proceedings, because the statute is notice to all of the right to exemption and it puts a purchaser upon his inquiry as to the exercise of that right. The observations in the cases above cited on this aspect of the matter apply in principle to goods as much as to lands.

Then it was urged that the plaintiff had waived or lost his right to object to the sale, but I am unable to accept this view of the facts before us. It follows that the appeal should be dismissed.

GALLIHER, J.A.:—I agree with the Chief Justice. Galliher, J.A.

MCPHILLIPS, J.A.:—This is a hopeless appeal. There was a flagrant denial of the right of exemption, and the conduct of the sheriff cannot be approved. It may be that the sheriff was acting upon legal advice—I trust he had that excuse. The sheriff in my opinion must discharge his duty. In the way of the absolute recognition of the right of exemption under the Homestead Act (R.S.B.C. ch. 100, secs. 17 and 18), when the exemption is claimed thereunder—and here it admittedly was—it is further the duty of the sheriff to acquaint the judgment debtor with the right of exemption and admit of it being claimed. An officer exercising the high office of sheriff should proceed regularly, not illegally, and obey the statute law and directions of the Court implicitly. It is matter for regret that the purchaser at the sheriff's sale should be the sufferer in this case; but it is impossible to hold that any title was obtained, through void proceedings—void *ab initio*. The appeal in my opinion should be dismissed. McPhillips, J.A.

Appeal dismissed.

N. S.

C. C.

REX v. HATT.

Nova Scotia County Court, District No. 2, Forbes, J. December 4, 1915.

1. APPEAL (§ III E—91)—NOTICE OF APPEAL FROM SUMMARY CONVICTION —"PARTY AGGRIEVED."

A notice of appeal given under Cr. Code, sec. 750, by the person convicted and which shows on its face that he appeals as such from the summary conviction made against him, need not specifically state that he is the "person aggrieved" (Cr. Code, sec. 749).

[See Annotation to this case.]

2. HIGHWAYS (§ II C—68)—REMOVING OBSTRUCTION—FENCE PLACED BY MUNICIPAL AUTHORITY—CR. CODE, SEC. 530.

The defendant charged under Cr. Code, sec. 530, with breaking down a fence erected across a road which had been a public highway, may set up in answer that the proceedings by which the Municipal Council purported to order the diversion of the highway and the closing of that portion thereof were irregular and invalid, and on its so appearing is entitled to have the charge dismissed by reason of his lawful right to remove the obstruction.

[*McQuarrie* v. *St. Mary's*, 17 N.S.R. 497, referred to.]

Statement

APPEAL from a summary conviction made by a justice of the peace under Cr. Code sec. 530.

The notice of appeal, the regularity of which was contested, was as follows:—

"Canada, Province of Nova Scotia, County of Lunenburg, S.S.

"To Abram Rafuse of Beech Hill in the county of Lunenburg, farmer, and the informant and prosecutor in the proceedings mentioned below, and to Francis Holloway, Esquire, of Mahone Bay in the said county of Lunenburg, a Justice of the Peace in and for the said county of Lunenburg.

"Take notice that I, the undersigned, Moran Hatt of Beech Hill in the county of Lunenburg, farmer, and the defendant in the proceedings mentioned below, do hereby appeal and intend to enter and prosecute an appeal to and at the next sittings of the County Court for the District No. 2 to be holden at Lunenburg in the said county of Lunenburg on Tuesday, the 2nd day of November, 1915, against a certain conviction made and bearing date on or about the 13th day of July, 1915, and made before and by the said Francis Holloway, a Justice of the Peace in and for the said county of Lunenburg, whereby I, the said Moran Hatt, was convicted for that he the said Moran Hatt on the 2nd day of July, 1915, at Beech Hill in the county of Lunenburg did unlawfully and wilfully and without legal justification or excuse and without colour of right, damage two gates set up on certain land which land was then the property of Louisa Rafuse, wife of Abram Rafuse, and situated at Beech Hill in the county of Lunenburg;

and whereby the said Moran Hatt was adjudged to forfeit and pay the sum of five dollars penalty and the sum of seventy cents damage and the sum of twenty-two dollars and forty-five cents costs, and in default of payment forthwith to be imprisoned in the common gaol of the said county of Lunenburg at Lunenburg for the space of 30 days, and there kept at hard labour unless the said sums and costs and charges of conveying the said Moran Hatt to the said common gaol were sooner paid.

"Dated at Mahone Bay, N.S., this 17th day of July, 1915.

"Moran Hatt."

Arthur Roberts, for defendant, appellant.

D. Frank Mathcson, for the prosecutor, respondent.

Judge Forbes.

JUDGE FORBES:—The defendant was convicted under the provisions of sec. 530 of the Criminal Code for breaking and wilfully destroying two gates or parts of a fence set up as a boundary on certain land in Lunenburg county, and was fined $5 and damages (70c.) and costs ($22.45), in all $28.15, or in the alternative given 30 days in gaol.

The defendant appealed under the provisions of Part XV., Criminal Code (or Summary Convictions Act), secs. 749 and 750.

On opening the case the informant's counsel arose and objected that there was no appeal, as no sufficient notice had been given inasmuch as the notice did not state that the appellant "thinks himself aggrieved" by the conviction, in the words of sec. 749. The notice of appeal reads as follows: "Take notice that I, the undersigned, Moran Hatt of &c., &c., farmer and the defendant in the proceedings mentioned below, do hereby appeal," &c., &c., and goes on fully to describe the Court appealed to and the particulars of the conviction appealed from.

This notice complies in form with sec. 750, sub-sec. (*b*). Does it comply with sec. 749, which says: "Unless it is otherwise provided for in any special Act under which a conviction takes place," &c., &c., "*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."

Then the Act names the various Courts to which the appeal can be carried, and sec. 750 gives the procedure on appeal.

I am inclined to the view expressed by counsel for defendant that the legislation meant to afford the widest scope for an appeal,

N. S.
C. C.
REX
v.
HATT.
Judge Forbes.

and limited it only to any person who might be interested, meaning thereby that any person aggrieved as well as the prosecutor or defendant might appeal. 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. And in that view I am constrained to follow the line of reasoning adopted by Abbott, C.J., in *Rex* v. *Justices of Essex*, 5 B. & C. 431, cited by plaintiff's counsel.

In that case the learned Chief Justice said: "The matter in question, the stopping up or diverting of a public highway, affects in a certain degree all His Majesty's subjects, and therefore as the statute has not given a right of appeal to all persons, but merely to the party aggrieved, we must suppose that the Legislature intended to confer that privilege upon those persons alone who have sustained some special and peculiar injury, and not to extend the power of appealing to any captious person whomsoever," etc. And as the appellant was a rated inhabitant of the parish and not the defendant, therefore he should have described himself in his appeal notice as a person who "thinks himself aggrieved by the conviction or order."

But if I am correct in my interpretation of sec. 749, then the defendant, being an independent appellant, does not require to describe himself as a person who "thinks himself aggrieved."

The same view is taken by Lord Halsbury in his celebrated work, "The Laws of England," vol. 19, p. 647, when he says:— "Where the right of appeal is given to an aggrieved party the notice of appeal must shew that the appellant is an aggrieved party, but it is otherwise where the appellant is appealing against an order or conviction made against himself."

In *The King* v. *Bryson* (1905), 10 Can. Cr. Cas. 398, Judge Carleton of N.B. held, in a very carefully prepared judgment, that a notice of appeal, otherwise perfect but not signed, was good, and Mr. Justice Gwynne, afterwards of the Supreme Court of Canada, held, in *Reg.* v. *Nichol*, 40 U.C.Q.B. 46, that a notice of appeal was good although not signed, and he used this language:

"We must, I think, read these notices, not with a critical eye, but liberally *ut res magis voleat*, and so as to uphold, not to defeat, the rights of appeal given to parties summarily convicted."

I must therefore hold the notice of appeal in the case before me as good and sufficient, and dismiss the objection.

I have examined a number of other cases on the point, but they are not in point, as the case of *The King* v. *Justices of Yorkshire*, 7 B. & C. 678, which was similar to the case of *Rex* v. *The Justices of Essex*, 5 B. & C. 431, where the appeal was asserted by a ratepayer, but not a party to the action, neither prosecutor nor defendant, and he did not describe himself as aggrieved.

In *The King* v. *Jordan*, 5 Can. Cr. Cas. 438, the appeal was under a B.C. Act, not very different in language from the Summary Conviction Act of Canada, hence, although the notice was held good, it does afford a fair precedent.

As to the merits of the appeal: The defendant on the new trial before me urged two points in his defence. The first was that the gates were put across a public highway or road and he had a right to remove them, and secondly that the road had never been legally closed to the public; and lastly he claimed under the provisions of sec. 541 that he had a "colour of right" to force his entry.

The evidence shews that a road has been used by the public for the last 50 or 60 years leading from Chester through Beach Hill district to New Ross, and one Abram Rafuse induced the municipal council to close it up to the public, and he gave a deed of another roadway over another part of his property. The defendant objected, and later on passed over the old road with his team as he had often done before, and broke down two gates to enable him to do so; and for this he was convicted and fined as aforesaid. The proceedings of the municipal council in closing one road and opening another one is in evidence before me.

The municipal council of Chester township have made a mistake. They wrongfully assumed power to close up a great road under the provisions of ch. 70, sec. 122, sub-sec. (*a*), known as the Municipal Act.

Chapter 76, R.S.N.S., of Public Highways, and known as the Act for laying out and closing of roads, by sec. 31 vests the legal title to all public roads of the province in the Crown.

Section 32: "Every public road now opened or used as such shall be deemed to have been laid out under the Prov. Statutes."

The roads of Nova Scotia are of two kinds only, according to the provisions of the Road Act, ch. 76, viz., "public roads," and "private roads." A public right-of-way cannot be lost by aban-

N. S.
C. C.
REX
v.
HATT.
Judge Forbes.

donment or non-user, as, "once a highway always a highway," and the evidence establishes positively that this road was a common highway used by the public for passengers and teams in winter and summer and in passing from the village of Chester to New Ross village or settlement, and was so used for from 45 to 60 years. I must find this road to be a "great road" or public highway. Chapter 70, sec. 122, gives the council power to "stop up," &c., &c., any road, "not being a great road."

In *McQuarrie* v. *Municipality of St. Mary's*, 17 N.S.R. 497, Mr. Justice Thompson held as follows:

"The great roads are not excepted from the provisions of the County Incorporation Act, but only from those provisions which enable the council to stop up, alter, etc."

I also cite *Rideout* v. *Howlett*, 13 D.L.R. 293 (affirmed 15 D.L.R. 634), a New Brunswick case, in which Judge Barry found the public had acquired right in passing over the plaintiff's land and that the right became a public highway.

There is no "body" or "person" who can grant away the property of the public except the Legislature, and then only by specific legislation.

The history of the "great roads," as re-enacted by the statutes and decisions of England, is very complex and very interesting; see the Encyc. of Laws of England. Our provincial evolutions have been along the same line, but not so definite, for want of intelligent legislation.

All the English "highroads" were of two kinds, "main roads" and "ordinary highroads," and "main roads" were the great arteries, and known as the "King's highways."

Then came the "turnpike" or "toll roads." Then in 1878 Parliament said all "due turnpiked roads" should become "main roads," and the "county councils" could declare any important "highway" between great towns or leading to a railway station to be a "main road." I can see no difference between the English "main road" and our "great roads"; nor under our ch. 76 can I see any difference between a "great road" and a "public highway."

Under ch. 76, R.S.N.S., secs. 2 to 23 inclusive deal with opening up a new road or altering an old road. Sections 24 to 26 inclusive deal with laying out a private way either "open" or "pent," and sec. 27 deals with "closing up" a "public road."

The municipality has not followed the statute. There is no petition as called for in sec. 27, sub-sec. (*1*). The notice required in sec. 27, sub-sec. 3, was not given.

I must hold that the municipal council of Chester township have not proceeded regularly and the road has not been closed up, and the defendant cannot be convicted for breaking down an obstruction illegally put across a highway.

I need not discuss the other point of "colour of right," as it depended on the regularity of the council's proceedings, and under the findings I have made the defendant has not only some "colour" but he had "good right," "full power and lawful authority," to go along the road and remove obstructions.

The conviction will be set aside and vacated. Costs, I suppose, must follow this decision, and be for defendant, and if I can save the informant and make the municipality pay them I will do so. *Appeal allowed and conviction set aside.*

Annotation—Appeal (§ III E—91)—Who may appeal as a "party aggrieved" under the Summary Convictions Act. Annotation

The sections of the Criminal Code specially dealing with notices of appeal in summary conviction matters are secs. 749 and 750.

Section 749 states who may appeal, in the following words:—

"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."

The phrase, "any person who thinks himself aggrieved," appeared also in the corresponding sections in Canadian statutes, from which sec. 749 is derived, *viz.*:—

(*a*) 32-33 Vict. Canada Statutes, 1869, ch. 31, sec. 65; 40 Vict. Canada Statutes, 1877, ch. 27, amending said sec. 65.

(*b*) Revised Statutes of Canada, 1886, the Summary Convictions Act, sec. 76.

(*c*) The Criminal Code, 1892, sec. 879, and continued in the various amendments to the Code, down to the present time, as it is now in said sec. 749.

The statutory enactment dealing with the notice of appeal is sec. 750. A glance at the history of this section is interesting and instructive.

If the words are really and fairly doubtful, then, according to well-known legal principles, and principles of common sense, historical investigation may be used for the purpose of clearing away the doubt which the phraseology of the statute creates: *The Queen* v. *Most* (1881), 7 Q.B.D. at p. 251, per Lord Coleridge, C.J.

N. S.

Annotation

Annotation *(continued)*—**Appeal (§ III E—91)—Who may appeal as a "party aggrieved" under the Summary Convictions Act.**

(*a*) 32-33 Vict. Canada Statutes, 1869, sec. 65, the material part reads:—

"Provided that such person (*i.e.*, the aggrieved person) shall give to the prosecutor or complainant a notice in writing of such appeal, and the cause and matter thereof." In the schedule thereto a "General Form of Notice of Appeal against a Conviction" is given, but there is no statement or reference in such form requiring a recital that the appellant is a person aggrieved.

(*b*) Revised Statutes of Canada, 1886, the Summary Convictions Act, sec. 77 "b," reads:—

"The person aggrieved shall give to the prosecutor or complainant, or to the convicting justice, for him, a notice in writing (R) of such appeal." Form (R) is the form in the schedule of "Notice of Appeal against a Conviction," but there is no statement or reference therein requiring a recital that the appellant is the person aggrieved.

(*c*) The Criminal Code, 1892, sec. 880 "b," reads:—

"The appellant shall give to the respondent, or to the justice who tried the case for him, a notice in writing, in the form N.N.N. in schedule 1 to this Act, of such appeal."

The form referred to contains no statement or reference that the appellant is the person aggrieved.

This section has been amended, and no form is now prescribed by the amended section.

The Nova Scotia Summary Convictions Act also says (sec. 55), "any person who thinks himself aggrieved" may appeal, and sec. 56 (*b*) says that the appellant shall give a notice of appeal in the form D D in the schedule, but the form contains no statement or reference that the appellant is the person aggrieved.

Code sec. 750 reads:—

"(*b*) The appellant shall give notice of his intention to appeal by filing in the office of the clerk of the Court appealed to a notice in writing setting forth with reasonable certainty the conviction or order appealed against, and the Court appealed to, within ten days after the conviction or order complained of, and by serving the respondent and the justice who tried the case each with a copy of such notice."

Halsbury's Laws of England, in vol. 19, under the title "Magistrates," at p. 647, note, says with respect to summary convictions:—

"Where the right of appeal is given to an 'aggrieved party,' the *grounds* of appeal must shew that the appellant is aggrieved . . . but it is otherwise where the appellant is appealing against a conviction or order made against himself."

R. v. *The Justices of the West Riding of Yorkshire*, 7 B. & C.,

Annotation (*continued*)—Appeal (§ III E—91)—Who may appeal as a "party aggrieved" under the Summary Convictions Act. N. S. Annotation

p. 678, and *R.* v. *The Justices of Essex*, 5 B. & C. 431, were cases under the Highway Act, where the justices, as our municipal councils under certain conditions now have, had the power to stop up or divert a highway. There were no parties to the proceedings, but any "person aggrieved," *i.e.*, a ratepayer or resident in the district, could appeal. Those cases are authority for the proposition that anyone appealing under such a statute and who is not a party to the record, must shew by his notice of appeal that he is appealing as a "person aggrieved," and when the appeal is heard he must qualify accordingly.

Further, in *R.* v. *Essex Justices*, the judgment expressly states that it was the construction the Court put upon the particular statute there in question, "without giving any rule for the construction of others."

And see *R.* v. *Somersetshire*, decided the same year, and reported in the note to *R.* v. *Yorkshire*, *supra*.

The opinion delivered in *R.* v. *Jordan*, 5 Can. Cr. Cas. 438, an appeal under the British Columbia Summary Convictions Act states:—

"Another point taken before me was, that the notice did not state that Jordan was the person aggrieved; the Act does not, nor does the form in the schedule require that to be alleged. It would be quite superfluous to state that fact, as the man does say that he was convicted and fined $50. The inference that he is the person aggrieved is plain."

In *R.* v. *McKay* (1913), 10 D.L.R. 820, 21 Can. Cr. Cas. 211, it was held on an appeal from a summary conviction on a charge of assault that it is not essential that the notice of appeal given by defendant shall state explicitly in the language of Crim. Code sec. 749 that the defendant is a "person aggrieved."

In the judgment in that case Judge McLorg of the Saskatoon District Court said:—

"I know that for the past fifteen years notices of appeal without this allegation have continually been held sufficient, and I think it is too late now to entertain this objection, which is of the most technical character."

In *R.* v. *Nichol*, 40 U.C.Q.B. 46, cited in *The King* v. *Bryson* 10 Can. Cr. Cas. 398, the notice of appeal was held good although not signed by anyone. Mr. Justice Gwynne (afterwards of the Supreme Court of Canada) said:—

"We must, I think, read these notices, not with a critical eye but literally *ut res magis valeat*, and so as to uphold not to defeat the rights of appeal given to parties summarily convicted."

The expression, "party aggrieved," has been held not to be a technical expression, but one to be construed according to the

N. S.

Annotation

Annotation (*continued*)—Appeal (§ III E—91)—Who may appeal as a "party aggrieved" under the Summary Convictions Act.

ordinary meaning of the words: *Robinson* v. *Currey*, L.R. 7 Q.B. 465.

Where a statute gives a right of appeal "to any person who may think himself aggrieved" it is necessary that the appellant should have legal grounds for thinking himself aggrieved by what he appeals against: *Harrap* v. *Bayley* (1856), 6 Ellis & Bl. 218 (Lord Campbell, C.J., Erle, J., and Crompton, J.).

In that case Lord Campbell said: "The Act . . . gives an appeal to any person who 'may think himself aggrieved'; but that does not mean to any person who says or fancies he is aggrieved. Giving it a reasonable construction, the enactment means to give an appeal to any one who has legal ground for saying he is aggrieved. Now, how can such a provision apply to a person who wishes to complain of the act which he himself authorized and expressly required to be done?"

Crompton, J., in the same case, said: "The parties all thought that the application of the (town) funds would not be legal though it would be beneficial . . . Now, though others not parties to that resolution may be entitled to complain that it was acted on, I think the appellant is precluded from saying that he is aggrieved by what was his own act."

Where a prosecution under a special Act may be brought only by "a person aggrieved," a summary conviction will be quashed unless the informant be a person who has sustained a loss or liability recognized by law by reason of the alleged offence: *R.* v. *Frankforth* (1904), 8 Can. Cr. Cas. 57.

Section 749 is by its terms limited to the following adjudications made by a justice:—

(*a*) Convictions;

(*b*) Orders made by the justice for the payment of money;

(*c*) Orders dismissing informations or complaints.

The party who may appeal from any of the above is described in sec. 749 in the following terms: "Any person who thinks himself aggrieved by any such conviction or order or dismissal, the prosecutor or complainant as well as the defendant."

Part XV. of the Code outlines a general scheme of procedure applicable to summary conviction matters, and its provisions are not limited to such matters arising under other provisions of the Criminal Code. Part XV. applies, subject to any special provision to the contrary, wherever any person commits an offence for which he is liable under Federal law on summary conviction to punishment, and it also applies to cases where a justice can under Federal authority make any order "for payment of money or otherwise." See Code sec. 706.

It will be noted that the words "or otherwise" are not carried

Annotation (*continued*)—Appeal (§ III E—91)—Who may appeal as a "party aggrieved" under the Summary Convictions Act. N. S.

Annotation

into sec. 749 which gives the right of appeal. Section 749 applies to an order made by the justice "for the payment of money." There are various enactments where justices may make orders of forfeiture or orders for the destruction of property and which are not orders for the payment of money, and could not be made the subject of appeal either under that heading or under the heading of convictions. See Code sec. 623 as to seizure and forfeiture of copper coin unlawfully imported; sec. 622, as to orders for impounding and destroying weapons carried by persons convicted under secs. 122 to 124 inclusive; and see the Canada Temperance Act as to orders for destruction of intoxicating liquors seized under process of search under that Act, and similar provisions under Code secs. 613 and 614 as to liquors found in proclaimed districts in the vicinity of public works.

The words "persons aggrieved," as applied to appeals from justices' orders seem to have come down through the various statutes of Canada above referred to from English statutes under which the right of appeal was not so limited as that given under Code sec. 749. The phrase, "any person who thinks himself aggrieved," was an apt one to include not only the party to the proceedings against whom the decision of the justice had been given, but a person who had some direct and special property interest which was adversely affected by the justice's order. It was in fact applied to various orders which justices were empowered to make in furtherance of local government regulations. This is exemplified by the case of *Draper's Co.* v. *Haddon*, 57 J.P. 200.

The Drapers Company, who were freeholders of the roadways and footways of London Wall Avenue, considered themselves "aggrieved" by a conviction of a carrier for allowing a wooden case to remain on the footway longer than was necessary. The carrier contended the place was not a highway, as it was a *cul-de-sac*, and led only to houses belonging to the company, who paid the expense of repairing the roads, and claimed the right to put up a gate, but the carrier did not appeal, and the Q.B. Division held that persons whose legal rights were directly affected by the decision were the only persons "aggrieved" within sec. 33 of the S.J. Act, 1879, and entitled to apply for a case to question the conviction: *Drapers' Co.* v. *Haddon*, 57 J.P. 200, 9 T.L.R. 36.

It has been held by Judge Ouseley, of the Moose Jaw (Sask.) District Court, in *Gates* v. *Renner*, 24 Can. Cr. Cas. 122, that the effect of the words, "the prosecutor or complainant as well as the defendant," which are used in Cr. Code, sec. 749, in reference to the appeal given to "any person who thinks himself aggrieved" is to limit the right of appeal from the dismissal of an information in a summary conviction proceeding to the prosecutor or com-

N. S.
Annotation

Annotation (*continued*)—Appeal (§ III E—91)—Who may appeal as a "party aggrieved" under the Summary Convictions Act.

plainant. And in the same case it was held that it is ground for quashing an appeal under Cr. Code, sec. 749, from the dismissal of a summary conviction proceeding that the appellant has not shewn upon the appeal that he is the complainant and so within the limitation of Code sec. 749 as a party aggrieved by the order of dismissal; the Court to which the appeal is taken under a notice of appeal which does not state the appellant to be the complainant in the proceedings below is not bound to look at the information transmitted under Cr. Code, sec. 757, to ascertain whether the appellant was such complainant if the information was not put in evidence on the appeal.

Where an information is laid in the name of an individual describing himself as the agent of a society named, the society does not thereby become a party to the proceedings and it has no *locus standi* to appeal from the justices' order dismissing the charge. The notice of appeal must in such case be taken in the name of the agent personally, otherwise it may be quashed: *Canadian Society* v. *Lauzon* (1899), 4 Can. Cr. Cas. 354 (Que.), 5 Rev. de Jur. 259.

Mr. Crankshaw, at p. 876 of his Annotated Criminal Code, 4th ed., says that a notice of appeal from a summary conviction "should state that the appellant is aggrieved by the conviction order appealed from." In support of this statement he cited the cases above referred to: *R.* v. *West Riding*, 7 B. & C. 678; *R.* v. *Essex*, 5 B. & C. 431. It will be seen, from the summary of these cases given above and the extract from Halsbury, that this statement is too wide and does not apply where the defendant himself is appealing from the conviction made against him. If anyone but the complainant or the defendant can have a status to appeal from a summary conviction, those cases would shew that such other party must state in his notice of appeal that he is a person aggrieved. Furthermore, Mr. Crankshaw cites at p. 877 the case of *R.* v. *McKay*, 21 Can. Cr. Cas. 211, in support of the conflicting proposition that upon an appeal from a summary conviction for common assault it is not essential that the notice of appeal shall state explicitly in the language of sec. 749 that the defendant is a "person aggrieved."

The Licensing Act, 1872, 35-36 Vict. (Imp.), ch. 94, sec. 52, had provided that if "any person feels aggrieved" by any order or conviction made thereunder by a Court of summary jurisdiction, he might appeal. It was held that the "person aggrieved" is the person who has been convicted, or against whom an order has been made. Where a license-holder was convicted, it was held that the landlord has no right to appeal to quarter sessions, though his interest may be indirectly affected by the conviction: *R.* v. *Andover JJ.* (1886), 16 Q.B.D. 711, 50 J.P. 549, 55 L.J.M.C.

Annotation (*continued*)—**Appeal** (§ III E—91)—**Who may appeal as a "party aggrieved" under the Summary Convictions Act.** N. S. Annotation

143, 55 L.T. 23, 34 W.R. 456. Mathew, J., said: "I am of opinion that sec. 52 applies to a person directly aggrieved by the order, and that a person who, like this owner, feels himself indirectly aggrieved by the order cannot appeal against it."

By a "person aggrieved" is meant *prima facie* the person against whom the proceedings were originally instituted (*ibid.*, A. L. Smith, J.).

But a mortgagee has been held under the Licensing Act to be sufficiently aggrieved by the refusal of the renewal of the tenant's license to be able to appeal to quarter sessions, if the mortgage made the mortgagee the attorney in fact for the license-holder in that respect: *Garrett* v. *Middlesex JJ.*, or *R.* v. *Garrett* (1884), 12 Q.B.D. 620, 53 L.J.M.C. 81, 48 J.P. 357, 32 W.R. 646. In general, the landlord, as such, is a stranger to the license (except in those cases where notice of a conviction is to be sent to him), and cannot insist on appealing in his own right to quarter sessions against a conviction of the license-holder: *R.* v. *Andover JJ.* (1886), 16 Q.B.D. 711, 50 J.P. 549, 55 L.J.M.C. 23, 34 W.R. 456, 2 T.L.R. 546. Where, however, the renewal or transfer of a license is refused to his tenant, the landlord may join with the applicant in an appeal to quarter sessions as he is an aggrieved party under 9 Geo. IV. (Imp.), ch. 61, sec. 27. Compare *Ex parte Stott*, [1915] W.N. 362, 32 Times L.R. 84; *Re Imperial Tobacco Co.'s Trade-mark*, [1915] 2 Ch. 27.

And in a later case it was held that a prosecutor is not "aggrieved" by the defendant being acquitted: *R.* v. *Keepers of Peace, etc., of London* (1890), 25 Q.B.D. 357, 59 L.J.M.C. 146, 63 L.T. 243, 39 W.R. 11; *R.* v. *London JJ., Re Fulham Vestry* (1890), 55 J.P. 56.

These English cases shew the necessity for the present form of Code sec. 749 as regards the words "the prosecutor or complainant as well as the defendant." The complainant might be excluded as a "party aggrieved," were it not for those words in sec. 749.

In *R.* v. *Law* (1915), 25 Can. Crim. Cas. 251, it was held that a complainant was a "person aggrieved" so as to entitle him to proceed by certiorari to quash the defendant's summary conviction made by a justice in excess of his jurisdiction where the latter should have held a preliminary enquiry only.

FIDELITY OIL & GAS CO. v. JANSE DRILLING CO.

ALTA. S. C.

Alberta Supreme Court, Harvey, C.J., and Scott, Stuart and Beck, JJ. March 24, 1916.

1. CONTRACTS (§ IV E—366)—BREACH—INSUFFICIENT DRILLING APPARATUS —ONUS.

In an action for damages for breach of contract, alleging failure to provide good and sufficient drilling apparatus of a kind specified in

ALTA.

S. C.

FIDELITY OIL ETC., CO. v. JANSE DRILLING CO.

the contract, the burden of proof is upon the plaintiff to shew that the system used, which was different from that specified, was insufficient for the purpose required.

2. CONTRACTS (§ V C 3—407)—CANCELLATION FOR NON-PAYMENT—TRUST FUND—ESCROW—EFFECT.

Where under the terms of a contract a fund has been deposited in a bank, in escrow, to be paid by the bank to the defendant from time to time, upon receipt of a letter signed by the parties to the contract, the bank becomes a trustee for both parties, and after the plaintiff has directed payment out of the fund, but it has not been accepted by the defendant, the latter cannot cancel the contract under a provision therein for cancellation in case of non-payment.

3. EVIDENCE (§ X J—740)—TELEPHONE CONVERSATIONS—JUDICIAL NOTICE OF SYSTEM—ADMISSIBILITY AS NOTICE.

A telephonic communication by the accountant of a bank, that the bank has funds to pay to a defendant, made in the usual way, and replied to by persons apparently in the office of the defendant is *prima facie* notice to the defendant that the money is available, and if it has not been stipulated that notice shall be given to a particular person, the identity of the recipient need not be proven, in the absence of denial by the defendant; where the automatic system of signalling is used, the Court will take judicial notice that no call to "central" is necessary.

[*Warren* v. *Forst*, 8 D.L.R. 640, 46 Can. S.C.R. 642, affirming 24 O.L.R. 282, referred to; Review of American decisions, 6 L.R.A. (N.S.) 1182].

4. DAMAGES (§ III A—42*a*)—MEASURE—BREACH OF DRILLING CONTRACT—COUNTERCLAIM.

The proper measure of damages, in case of an abandonment of drilling operations in breach of a contract, is the cost of completing the contract over and above the contract price; but where the plaintiff fails to complete the contract as required by the terms thereof, and adduces no evidence as to the probable cost of completion, and of his intention to complete, no damage is proven, to form any proper basis to reckon compensation for the breach.

Statement

APPEAL from the judgment of McCarthy, J., dismissing an action for breach of contract, and giving judgment on the counterclaim.

J. J. McDonald, for plaintiff.

J. M. Carson, for defendant.

Harvey, C.J.

HARVEY, C. J.:—I agree in the conclusions reached by my brother Stuart and in the main for the reasons stated by him.

I do not, however, think that the judgment entered at the trial for the defendants in the counterclaim in respect of their claim for hauling should be interfered with, both, because in my opinion, it was not intended to be questioned in the appeal, and because it appears to me to be correct, inasmuch as it is founded on provisions of the contract quite independent of the general contract for drilling.

I would, however, allow the plaintiff damages equal to the amount of that judgment. It may be that this seems to partake of the nature of a compromise, but in my opinion, though there is

no evidence upon which the plaintiff's damages can be accurately measured, it is clear, from the character of the contract, the location of the operations, and the other circumstances, that the damages are substantial and it seems to me that it would be quite reasonable to conclude that they would amount to that sum.

Likewise, as neither party obtains anything by the action, both losing in respect to their claims about which there was any contract, there appears no reason why either should have any costs of the action.

Stuart, J.

STUART, J. (after reciting the facts):—The plaintiff company, in its statement of claim after setting forth the terms of the contract, alleged that the defendant commenced drilling operations under the contract on or about August 18, 1914, and continued until November 11, 1914; that during this whole period the defendant was in default and in breach of the contract "in failing to provide a good and sufficient drilling apparatus under the terms of the said contract," and in continuing to use this imperfect apparatus, knowing all the time that it was impossible by the use thereof to perform the contract; that on October 21, 1914, the plaintiff notified the defendant of this breach; that the defendant company in further breach of the contract on November 10, 1914, instructed its workmen to cease work and, on November 11, did, in fact, cease all operations under the contract; that the plaintiff had performed all its obligations; and that the plaintiff had suffered special damages to the extent of $16,697.48 which included two payments on the contract price and also actual cost and expenses. It claimed to recover this amount and also $50,000 general damages and the cancellation of the contract.

The defendant, after general denials and setting forth some of the terms of the contract, alleged that a certain amount of drilling had been done, that $10,000 had been paid, but that on November 4, 1914, the defendant made demand on the plaintiff for payment of amounts then due under the contract for drilling and hauling, and gave notice that, unless payment was made in compliance with the terms of the contract on November 10, 1914, the defendants would declare all money then due or accruing due from the plaintiff due and payable and the contract at an end, and that, in such case, payment would be demanded for the minimum of 1,800 ft.; that payment not having been made as demanded by No-

ALTA.

S. C.

FIDELITY OIL ETC., CO. v. JANSE DRILLING CO.

Stuart, J.

vember 10, the defendant then gave formal notice that the moneys were due, the contract terminated and that operations ceased. The defendant then counterclaimed for the sum of $12,454.85.

The action was tried by McCarthy, J., who dismissed the plaintiff's claim and gave the defendant judgment on the counterclaim for $11,600 and costs.

From this judgment the plaintiff appeals.

The appellant contends that, when once it appeared that the defendant had not used the kind of rig first particularly specified in the contract, namely, "A California Standard Rig in proper working order," but had used a rig of a different character, then the burden of proof was thrown upon the defendant to shew affirmatively that the substituted rig was a good and sufficient one and that the plaintiff was not bound to prove the negative, that is, that the substituted rig was not good and sufficient. The trial Judge having apparently taken the latter view, it was contended that he was wrong.

It seems to me very clear upon the evidence that the defendant had adopted a well-known system, and that the burden lay upon the plaintiff to prove that it was insufficient. That burden, I do not think, the plaintiff met. It is also clear from the evidence that at least good average progress had been made in the drilling. There was, it is to be observed, no limit of time fixed by the contract for the completion of the well to the required depth except that it was to be completed as quickly as conditions would reasonably permit. It may be that it would have been more advisable to change from the use of the rotary to the so-called percussion or standard method, but that was a matter left by the terms of the contract largely to the discretion of the defendant. It seems to me quite evident that the plaintiff preferred on October 21 not to open reasonable discussion on the subject but to take a rigid attitude which the terms of the contract and the plaintiffs' previous acquiescence did not justify.

I cannot see, therefore, that it was possible for the trial Judge to do otherwise than dismiss the plaintiff's claim as far as this ground of complaint is concerned.

The other branch of the case presents greater difficulty. On May 28, the date of the contract, the plaintiff addressed and delivered a letter to the manager of the bank, which, so far as material, was as follows:

We hand you herewith cheque $20,000 which amount is to be held by the bank in escrow to be paid to the (defendant) by yourselves subject to the following conditions:

$5,000 upon delivery to yourselves of drilling contract duly signed by the (defendant) duplicate of which is enclosed herewith for surrender to the (defendant) with payment of $5,000. . . .

The balance of the sum of $20,000 is to be paid to the (defendant) in accordance with the terms of the contract, which terms, however, will be set forth from time to time as occasion shall arise by letter signed by ourselves and the (defendant) stating the amounts due which letter will be your authority for the payment of such amount.

The letter of November 4 from defendant's solicitors to the plaintiff's contained also the defendant's account for drilling during August, September and October, aggregating $11,808 but, after deducting the two payments of $5,000 each, the sum really due was $1,808, and it was this sum which was in fact demanded. The letter contained a notice:—

That unless payment be made in compliance with the terms of your contract by the 10th November next the (defendant) will declare all moneys then due or accruing due from your company due and payable and the contract entered into at an end, in which case you will be held responsible for a depth of 1,800 feet as provided therein.

A meeting of the directors of the plaintiff company was held on the evening of November 9, at which it was decided to dispute the accounts for hauling and to instruct the bank to pay the defendants the sum of $1,808 under protest. Although there was an attempt on the part of the defendant to dispute the fact, it is well established by the evidence that on the 10th, shortly before three o'clock in the afternoon, the plaintiff sent a messenger to the bank with the following letter:—

This is to authorize you to pay under protest to the (defendant) the sum of $1,808, being the amount due November 1, 1914, for drilling well of the (plaintiff), etc.

The letter did not in fact reach the hands of the manager until a few minutes after three, owing to his being engaged with a customer. It was then read by him and sent by a clerk to the accountant with instructions to attend to it as it was especially important. The accountant, as I think the evidence clearly establishes, called up the defendant's office by telephone. A woman's voice answered and the accountant asked for the manager. Then a man's voice answered and the accountant stated that it was the Bank of British North America speaking, and that the bank had a certain amount of money to pay over for the Fidelity Oil Co. under protest, and the man at the other end of

ALTA.

S. C.

FIDELITY OIL ETC., CO. v. JANSE DRILLING CO.

Stuart, J.

the wire said, "All right." The defendant made no attempt to dispute the fact that such a telephone message had been received at its office. No person who was in the office on November 10 was asked in regard to the matter at all. The evidence given by the accountant was not objected to. The question is whether this constituted a notice to the defendant that the money was available at the bank.

In 6 L.R.A. (N.S.), 1182, there is a review of American decisions upon the question of telephonic communications. The annotator sums up the result as follows, 1185:—

> The foregoing review of the authorities shews at least a tendency on the part of the Courts to hold that a sufficient *primâ facie* identification of the office or place of business with which the telephonic communication was had is made by evidence that such office or place of business was connected with the telephone system used by the witness; that the witness asked "central" for connection with such office or place of business and that the person who responded said, or apparently assumed, that such connection had been made. It also reveals a tendency to hold that if the communication was such that it might have been properly made to one found at such office or place of business who assumed to have authority to receive it, and who, so far as the contrary appears, did have such authority, the telephonic conversation is admissible without further evidence to identify the particular person with whom it was had.

And he goes on to point out that the position is different where the case is such that the communication can only properly be made to a particular individual. In that case the individual must be identified in some way, and recognition of the voice is conceded to be *primâ facie* sufficient. This was the position in the case of *Warren Gzowski & Co.* v. *Forst & Co.*, 8 D.L.R. 640, 46 Can. S.C.R. 642; where the question involved was the terms of a *contract* made by telephone. In the Ontario Court of Appeal, Maclaren, J., does indeed impliedly say that the individual must first be identified, but there the question involved was quite distinct from that involved here. In the present case, it is simply a question whether notice was given to the defendant company. The general principle of the reasoning in *Warren Gzowski* v. *Forst*, *supra*, can be applied in this way. If the notice had been sent by letter, by a messenger, and the messenger had gone to the defendant's office and asked for the manager and said he had a letter for him and a man appeared and received the letter, could it be said that the written notification had not been properly delivered? I think not. Or to put a more closely analogous case,

if the message sent was a verbal one, the notice not being by law or contract required to be in writing, and the messenger had gone to the defendant's office, spoken to a lady clerk, asked for the manager, been referred then to a man then standing there, and stated to him that there was money in the bank ready to be paid to the defendant under protest, could it be said that the evidence did not go far enough but that it should have been proven that the man was in fact the manager and not the janitor? I think not in such case also. I think that would have been a notification to the defendant of the fact intended to be conveyed to it. The Courts having heard this appeal in Calgary, where the members of it frequently use the telephone, may properly take judicial notice of the fact that there is no necessity to call "central," but that by the automatic system there in use, the office required is obtained by ringing a certain number. I gather from the accountant's evidence that he was informed that he had connection with the defendant's office and that the automatic device had, on that occasion, worked correctly.

For these reasons, therefore, and in view of the fact that the defendant made no attempt by evidence to dispute the receipt of a notice, I think the only proper conclusion is that the defendants were properly notified on November 10 that the money was available for them at the bank on behalf of the plaintiff company.

On the next day, November 11, the solicitor for the plaintiff wrote a letter to the solicitors for the defendant referring to the letter of November 4 and informing them that the plaintiff had instructed the bank to pay the sum of $1,808 under protest for drilling account without prejudice to the plaintiff's right to claim damages on the grounds set forth in the letter of October 21; *i.e.*, the use of insufficient apparatus and also taking objection on various grounds to the hauling bills. The letter concluded:—

> As soon as the contractor will render to the company an itemized account of all material hauled and present freight bills of the same my client will be pleased to pay for such material as they owe for under the contract, which amount will also be paid for under protest in pursuance of enclosed copy of notice.

This enclosure was apparently a copy of the letter of October 21. This letter of November 11 was received by the defendant's solicitors on the 12th, but before receiving it they had sent a letter to the plaintiffs on the 12th in the following terms:—

ALTA.

S. C.

FIDELITY OIL ETC., CO. v. JANSE DRILLING CO.

Stuart, J.

As we are advised that you have ignored our letter of 4th inst. addressed to your secretary and have done nothing towards complying with the terms of your contract with the (defendant) we are therefore instructed by the (defendant) to notify you that pursuant to the provision in that behalf contained in the contract between the two companies ..... all moneys due or accruing due from you to the (defendant) are immediately due and payable and the said contract terminated.

The letter then went on to demand the sum of $12,454.85, being made up as follows:—

Drilling 1,800 feet at $12 per foot	$21,600 00
Unpaid hauling account rendered	757 40
Hauling account for October	97 45
	$22,454 85
Credit	10,000 00
Balance due	$12,454 85

The letter then stated that drilling operations ceased from this date and threatened suit if the amount demanded was not paid.

On the same day defendant's solicitors replied to the letter from the plaintiff's solicitor of the 11th stating that they had already sent the foregoing letter and then proceeding:—

Regarding the items you refer to in the account for hauling, if you will be kind enough to give us a statement of the items objected to we shall be glad to have them taken up and endeavour to adjust them. If your clients are unwilling to settle on the basis of our letter of even date herewith, we shall be glad to join in an action, etc., etc.

On November 17, the manager of the bank, having heard nothing in the meantime from the defendant since the telephone message a week before, wrote the defendant stating a payment of $1,808 was held at the bank and would be paid over to the defendant under protest under application.

On November 23, the defendant's solicitors wrote a letter to plaintiff's solicitors saying:—

You have not yet furnished us with a statement of your client's objections to the hauling account. We would like to get this amount adjusted if possible. Our clients have authorized us to commence an action, etc., etc.

To this, plaintiff's solicitor replied on the 25th saying that plaintiff's secretary was unable to specify the items without having received the freight bills from the contractor and suggesting a personal meeting. Nothing more seems to have occurred between the parties and on December 24 the plaintiffs began their action.

The question is whether, on this state of facts, the defendant

was legally entitled under the contract to terminate it and cease drilling operations. In order to be in the position to take so stringent a course, it seems to me that the defendant was bound to bring itself strictly within the terms of the contract, as properly, and for such a purpose, strictly interpreted. The payments for hauling were to be made "on the 10th day of each calendar month for all work done during the preceding calendar month."

There is certainly nothing in that clause obliging the plaintiff to pay for June hauling on September 10. It was, of course, obliged to pay on July 10, but then only provided it had been informed of the amount of the account. This was not done until October 30.

The August account as originally incorrectly made up is dated September 10, but there is no evidence to shew that it was received on that date and there is therefore nothing, even aside from its incorrectness, to shew that the plaintiff was in default in not paying it on September 10. The September account is dated October 9 but there is nothing to shew when it was mailed or received and, therefore, the position is the same in regard to it.

Quite aside, therefore, from other reasons I am unable to see how the plaintiffs can be said to have been in default in regard to these 3 accounts. There was no provision for shifting the time of payment to the 10th day of a later month or for attaching the penalty of cancellation to non-payment on that later date.

The account for October is dated November 5, although it was enclosed in a letter of November 4. It, of course, reached the plaintiff at least before the 9th because it was considered on that day by the directors of the plaintiff. This is really the only account for hauling in regard to which there can be any reasonable argument made for a right of cancellation for non-payment. The contract says the accounts for hauling must be paid on the 10th of the month for the month preceding but it says nothing as to when they must be rendered. Surely it is but a fair interpretation of the contract that they should be rendered a reasonable time before the date fixed for payment, otherwise the contract would mean that an account could be presented on the 10th and payment demanded forthwith and if not forthcoming cancellation could ensue. What was a reasonable time, depends on the circumstances. The account, of course, could not be rendered before the end of

ALTA.

S. C.

FIDELITY OIL ETC., CO. v. JANSE DRILLING CO.

Stuart, J.

the month. Then what part of the 10 days was the defendant entitled to take up in preparing its account and what part should it leave to the plaintiff for considering it. Inasmuch as the particular knowledge was all in the hands of the defendant, it seems unreasonable for the defendant to take up at least one-half of the 10 days before conveying the information to the plaintiff. The offices were in Calgary but the goods hauled were 14 miles from Okotoks. The plaintiff had a man at the well. The hauling accounts or the items could have been handed to him from day to day during October as the work was done. This course was not adopted. The plaintiffs were not bound to have a man there and I cannot accede to the argument that it was Brown's duty to get this information. It was the defendant's duty to give it to him in a reasonable time to allow him and his employers to enquire into its correctness before the 10th of the month. This, I am of opinion, they did not do even with respect to the October account. More than that, it was admitted on the trial that the October account which was rendered at $97.45 should be reduced to $83.24, that is, that a greater amount was demanded than was really due. It may be that there was some compromise at the trial between the parties but the evidence does not disclose it.

It was contended that the fact that something had been included in the account which was not due did not relieve the plaintiff from the obligation of paying what was, in fact, due. That could, at least, only be the case where the debtor had as much information on the subject as the creditor. A dealer at a store knows what he has bought, as a general thing. Here the plaintiff was not in a position to know what had been hauled until informed by the defendant. That information was expected to be given by the defendant is shewn by the provision as to production of freight bills.

I think, therefore, the defendant had no right to cancel the contract on the ground of non-payment of the hauling bills.

Then we come to the question whether the plaintiff was in default in respect of the sum of $1,808 for drilling account. The contract shews that a fund of $20,000 was specifically provided by the plaintiff to meet payments under it and this fund was in pursuance of the contract made a trust fund in the hands of a third party, the bank. This provision of the contract was in-

serted by alteration after the clause in regard to payments at the defendant's office had been drawn and is inconsistent with this latter clause because the latter provides that the *plaintiff* shall pay. But when a trust fund was created out of which payments were to be made, it became impossible for the plaintiff to pay. Payments could only be made by the trustee, the holder of the fund. The fund was held in trust for both parties because there would be no sense in the trust being only for the plaintiff. That would have furnished no guarantee or security to the defendant. It was obviously arranged as it was in order to give such a security and, therefore, the bank must have been intended to be, and I think was in fact, trustee as well for the defendant as for the plaintiff.

The question, therefore, is whether the defendant was not bound to go to the bank for the $1,808 when it was notified that money was available for it. In my opinion, the defendant was bound in the circumstances to go to the bank. The bank was trustee for both. Cheques were drawn on the trust or escrow account not by the plaintiff but by the bank officials. The plaintiff had not control of the money. The bank could not properly pay money out of the fund until it had the assent of both parties that the amount paid was the proper amount to pay. It had no such information from the defendant.

I think, therefore, the defendant had no right to cancel the contract for non-payment of the sum in question. It is worthy of observation that the defendant did not betray any anxiety whatever to get the money. No officer of the defendant, so far as the evidence shews, went near the bank thereafter or made any enquiries although some official had said "all right" when informed that there was money there.

I cannot avoid the conclusion, from all the evidence, that the trial Judge was right in his view that both parties were anxious to get out of the contract. That alone can account for the course pursued by them.

The plaintiff would, therefore, be entitled to damages for breach of the contract by the defendant in abandoning the drilling operations. But the proper measure of damages in such a case is the extra cost of completing the contract over and above the contract price. The plaintiff neither attempted to complete the

ALTA.

S. C.

FIDELITY OIL ETC., CO. v. JANSE DRILLING CO.

Stuart, J.

contract, as was provided in clause 4 (*d*), by entering into possession of the site and all materials and machinery, and employing other persons to do the work, nor did it attempt at the trial to shew what it would cost to do this or that it had any intention of proceeding to do it. The cost and expenses claimed for had no connection with the contract. They could not have been charged up against the contract price and I do not think they can be recovered for a breach of it.

In the circumstances, therefore, I think the plaintiff's action should be dismissed simply on the ground that it has proven no damages upon any proper basis for the breach of the contract.

The defendant's counterclaim for hauling and for drilling should also be dismissed because, having wrongfully broken its contract, it has no right to recover under it. These payments only fell due on the condition that the defendants were ready and willing to go on and complete. If the plaintiff had gone on and completed and proven the extra cost as damages the defendant would then, of course, get the benefit of the extra 25% and the October drilling and of the hauling because all these would have decreased the cost of completion, but as the matter stands, the defendants, for the reason given, cannot recover.

The appeal should be allowed with costs, the judgment below set aside, the plaintiff's claim dismissed and the defendant's counterclaim dismissed, and there should be no costs of the action to either party.

Scott, J. SCOTT, J., concurred.

Beck, J. BECK, J., who was absent through illness, took no part in the judgment. *Appeal allowed.*

ONT.

S. C.

STONEHOUSE v. WALTON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., and Riddell, Lennox and Masten, JJ. February 4, 1916.

1. CONTRACTS (§ V C 3—406)—CANCELLATION—VOLUNTARY RELEASE OF INTEREST IN LAND—UNDUE INFLUENCE—LACHES.

A voluntary deed whereby a woman purports to release to the remainderman her contingent life interest in a farm "in the event of her marrying or leaving the property," procured under undue influence and executed by her without independent advice, will be set aside by the Court: delay for twelve years in commencing the action will not disentitle her to relief.

[*Stonehouse* v. *Walton*, 35 O.L.R. 17, reversed.]

Statement. APPEAL by the plaintiff from the judgment of Sutherland, J., 35 O.L.R. 17, dismissing an action to set aside a deed. Reversed.

ONT.

S. C.

STONEHOUSE v. WALTON.

Meredith, C.J.C.P.

W. Laidlaw, K.C., for appellant.

J. E. Jones, for defendant, respondent.

MEREDITH, C.J.C.P.:—This action was commenced by the plaintiff in April, 1914, for the purpose of having a deed executed by her, which purports to release a part of her right to the land in question in the action, under the last will of Elizabeth Walton, deceased, set aside, on the ground of fraud.

The action was tried by Sutherland, J., without the intervention of a jury, and was dismissed, without costs. At the close of the trial, the learned Judge took time to consider the case, and eventually expressed his opinion in writing, setting out the facts very fully and coming to the conclusion that, if the action had been brought in due time, the plaintiff would have been entitled to the relief which she seeks, but that, by reason of the long delay, she had lost her right to any relief in this Court.

Upon this appeal the judgment is sought to be supported, upon the ground that the transaction was a valid one, and the Judge's finding in that respect erroneous, as well as upon the ground upon which he based his decision; therefore, it is necessary for us to consider both questions.

In order that the first of them may be dealt with intelligently, it is needful that the main facts of the case be first stated. There was really no very serious conflict of testimony at the trial, and there is little, if any, difficulty in understanding now, pretty accurately, all the circumstances under which the execution of the deed by the plaintiff was obtained.

The plaintiff was an adopted daughter of Thomas Forfar and Elizabeth Forfar, his wife. She was adopted by them when about three years of age, and continued to live with them, as if their daughter, and as their servant, until she married in the year 1908. She seems to have performed her duties, as daughter and servant, very satisfactorily, and to have been well-content with her place in the Forfar family.

Elizabeth Walton was the wife of George Walton, who is a brother of Mrs. Forfar, and the father of the defendant.

Forfar owned a farm, not far from Toronto, which was, and always had been, his home, and is the land in question in this action. Through some unfortunate transaction he was about to lose that farm when George Walton stepped in and purchased it,

ONT.
S. C.
STONE-HOUSE v. WALTON.
Meredith, C.J.C.P.

in order to save his sister, and her husband, from being turned out of possession. For some purpose, and in some way not disclosed in the evidence, the land was conveyed to Elizabeth Walton, and it was her property at the time of her death.

The right which the Forfars had to it, after Walton had acquired the farm, was as tenants at a nominal rent, but in fact they remained in possession of it precisely in the same manner as they had done when it was owned by them.

Elizabeth Walton died in June, 1902, having first made her last will and testament, under which she disposed of the lands in question in this action, in these words: "My Scarborough farm to be leased at five dollars a year to Thomas and Elizabeth Forfar, now occupying same, during their lives, respectively, and after their death their adopted daughter Edith is to have the same privilege of renting at five dollars per year during her lifetime, after which it is to go to my son William Ralph or his heirs;" and she appointed her son William Ralph, the defendant, and George Hogarth, and her husband, executors of the will, and the will was duly proved in this Province and probate of it granted to them.

On the 4th July, 1902, the deed in question was drawn up, and was executed by the plaintiff, her foster-mother being present and being the attesting witness of the daughter's signature. It was also executed by the defendant, and, some time afterwards apparently, by the other two executors. The purpose of this deed was to obtain a release from the plaintiff of the gift to her under the will of Elizabeth Walton to this extent, that upon her marriage and upon her leaving the property so that she should no longer have the direct personal use and enjoyment of it, she should lose all her rights in the land.

The execution of the deed appears to have been procured by Joseph Walton, and his son, the defendant, through the sister and aunt, Mrs. Forfar. There seems to have been some communication by letter between the elder Walton and his sister, and some request from the younger Walton that the plaintiff should come to his office.

The plaintiff asserts, and there is no reason to doubt that assertion, that she did not know the purpose of her being brought to the defendant's office until she got there and was asked to sign the document.

It was said that some mistake had been made in the will of Elizabeth Walton; that it was not her intention that the plaintiff should have any interest in the land if she married.

The plaintiff asserts, and there is no reason to doubt the truth of that assertion, that the defendant stated to her foster-mother, during the time they were in his office and before the document was signed, that the plaintiff could be compelled to sign it if she were not willing.

She also asserts, and there is no reason to doubt the truth of that assertion, that she really did not know the meaning and effect of the deed which she signed until she read a copy of it, which had been given to her by the defendant, on her way home, some time after she had executed the original.

Although the plaintiff was, at the time, about twenty-four years of age, she had had no business experience; her whole life, generally speaking, had been that of daughter and servant of the Forfars, living upon their farm with them and serving them faithfully, and she seems to have recognised that she was to a considerable extent beholden to them and to have been willing and anxious to do their bidding.

This, of course, is not the whole story; the defendant gives a reason for taking from the plaintiff so largely her rights to the land in question without giving her a farthing for them. The story is: that Mrs. Walton, some time before her death, stated to her husband that she had made a mistake in her will; that she had not intended the plaintiff to have the land in question if she married; and that it was her intention to alter the will to that extent at some convenient time; but that she died suddenly before that was done.

It can hardly be that there was any mistake in the making of the will; the will was drawn by her husband, and is in his handwriting. The most that reasonably can be said is, that the testatrix did not think about the marriage of the plaintiff when the will was made; or that, afterwards, she changed her mind in regard to the will and thought that the plaintiff should not have an interest in the farm if she married. It is unquestionable that the will, as it stands after having been proved by the executors, is the last will and testament of Elizabeth Walton, deceased, and that, under it, the plaintiff takes an interest in the land in question

ONT.
S. C.
STONE-HOUSE v. WALTON.
Meredith, C.J.C.P.

unfettered to any extent in the manner provided for in the deed which was taken from her by the defendant. So that the most that can be said in the defendant's favour is: that Elizabeth Walton at some time intended to change her will to the extent of depriving the plaintiff of any interest in the land if she married; whether Elizabeth Walton would have ever altered that will, no matter how long she lived, no one can tell. She might have changed her mind again and again; she did not alter it in any manner before her death.

How extremely dangerous a thing it is to make a will, of one who is dead, out of the verbal statements made in the lifetime, every one knows. An example is not necessary; but, as this case affords one, it may not be entirely a waste of time to call attention to the fact that, when the only witness upon the subject, George Walton, first stated, during the trial, in examination in chief, that which his wife had said upon the subject, he stated it in these words.—

"She says, 'I did not intend Edith to have that all her life after she got married'."

In cross-examination, the cross-examiner, not content with that, seems to have nagged the witness into amplifying it to this extent: "She said she had been reading from the will, and she saw there was a mistake in the will, she never intended that, she thought I had made a mistake in taking down what she told me. I said I might have done so, but she says, 'I never intended Edith to have the farm if she got married and got a home; I wanted that for my son.'"

When the defendant, so much personally and directly interested in the matter, came to deal with it, in the deed in question, he too amplified it to this extent: "upon her leaving the property so that she shall no longer have the direct personal control, use, and enjoyment of it."

So that it is quite obvious that no rights should be given, or taken away, under such circumstances, except after the most full and careful consideration of all the evidence bearing upon the question—I mean of course in a moral sense, as a family arrangement, or in any other manner, apart from the legal rights of the parties.

The plaintiff had no time for consideration, she had no sort

of advice, independent or otherwise; she was asked to sign and signed accordingly: a thing not at all improbable, or what one would not expect, under all the circumstances; the defendant being a man living in the city of Toronto, and carrying on business there, one of the executors of the will, and nephew of Mrs. Forfar.

Under these circumstances, it seems to me impossible to contend, with any hope of success, that such a transaction as this could stand if rightly attacked.

In the case most relied upon by the plaintiff, *Turner* v. *Collins*, L. R. 7 Ch. App. 329, it was said by the Lord Chancellor (p. 338): "I think that nothing can be more important to maintain than the jurisdiction, long asserted and upheld by the Court, in watching over and protecting those who are placed in a situation to require protection as against acts of those who have influence over them, by which acts the person having such influence obtains any benefit to himself. In such cases the Court has always regarded the transaction with jealousy, and, as was laid down by the Master of the Rolls in *Hoghton* v. *Hoghton*, 15 Beav. 278, 302, two things are required to be proved by a parent setting up a deed in such a case: First, that the deed was the real and actual deed of the child, and was intended by the child to have the operation which it has; and secondly, that that intention was fairly produced."

Thus the case would stand if the deed in question merely gave effect to the alleged intention of the testratrix to alter her will; and, that being so, what must be said of the case, having regard to the extension of that alleged intention, contained in the deed, an extension regarding which no explanation has been given, and an extension not attempted to be justified or excused at the trial?

The character of that further exaction is peculiar, and peculiarly unfair; the plaintiff was not to marry; and, though this prevented her from having some one, and the proper one, a husband as well as a husbandman, to work the farm for her, was not to be permitted to let it, but was tied down to a personal use and enjoyment of it.

If it were necessary, to entitle the plaintiff to relief, that actual fraud should be found in the procuring of the deed, this exaction would afford sufficient proof of it. It was something taken, by the defendant, from the plaintiff, without any sort of moral justification, or excuse, and without any pretence of a legal right to it

ONT.
S. C.
STONE-HOUSE v. WALTON.
Meredith, C.J.C.P.

or to anything else the deed took from the plaintiff, and gave to the defendant: the defendant could not but have consciously wronged the plaintiff to that extent. And, before parting from this branch of the case, I should point out that the impeached agreement, literally read, provides for forfeiture only after coming into possession, though doubtless it was intended to apply at all times; and this action is brought to get free from it altogether.

Then is the plaintiff precluded from having relief in this Court by reason of her delay in bringing this action? Within a few hours after the deed was executed she knew its meaning and effect; and was, quite naturally, much dissatisfied with it; yet this action was not commenced until about twelve years afterwards.

The main reasons for the delay are, that her foster-mother said she would take up the matter with her brother and nephew in her behalf, and her position in life, and especially in the Forfar family, upon which she was so largely dependent, and which, in turn, was so largely dependent upon the Waltons, gave her no opportunity for entering into litigation with the men upon whose benevolence they were all living, and who were city men of means and business affairs: but her sheet-anchor seems to have been, faith in her foster-mother to right every wrong.

She was not at any time quite her own mistress, quite independent; from the servitude of her foster-parents she passed into that of her husband, no mere formal service on the part of a farmer's wife; though a status now so largely relieved of its one-time legal disabilities.

There was never an abandonment of her dissatisfaction; there were rumblings of discontent throughout, culminating in this action; rumblings which Joseph Walton heard some time before action taken, and, having heard, went to the plaintiff about, evidently to prevent litigation. She made her complaint of the unfairness of taking everything from her after her long and faithful service of the Forfars. Joseph Walton agreed to some extent in her complaint; but, instead of restoring what had been taken from her, directed her attention to Forfar's son, who had property and was a bachelor; and spoke of his intention to speak to him in her behalf, but there is not a word, in all the testimony, indicating that he did. He made no complaint then of the staleness of her claim.

The plaintiff's right to the property under the will has not yet arisen—it may never arise; and no kind of substantial prejudice has been caused to the Waltons by the delay. The utmost that can be said against the plaintiff is that in the meantime Mrs. Forfar has died, and so any testimony she could have given is lost; and that all memories get more or less rusty in twelve long years. But there is no reason for thinking that Mrs. Forfar's testimony would have been unfavourable to the plaintiff; there is reason for thinking the contrary, in the fact of her concurrence in the plaintiff's dissatisfaction and her promise to speak to her brother in the plaintiff's behalf. And eliminate all the evidence, except the defendant's own testimony, and yet the plaintiff's right to relief would be proved.

Whilst stale claims are always, and rightly, in disfavour, and generally, rightly, looked upon with suspicion, when once they are clearly established, and when the delay has caused no substantial prejudice to any one, there is no reason why they should not be enforced.

So that, if the plaintiff had only an equitable right, that right would not be counterbalanced by anything that would make it inequitable to give effect to it now; the defendant will not be obliged to give up anything, but the mere piece of paper; he has enjoyed nothing under it, nor done anything on his faith in it; and the mere lapse of twelve years is not in itself enough; and if Equity were to act upon this question in conformity to statutes of limitations, I know of none that would preclude the plaintiff.

The case relied upon by the trial Judge—*Allcard* v. *Skinner*, 36 Ch. D. 145—was one very different from this case. The money there sought to be recovered had been paid to the defendant by the plaintiffs for religious purposes and had been expended accordingly. The claim was substantially one for money "had and received," to which the statutory bar of six years would apply, and the Court by analogy applied it. And in the case upon which, I have said, the defendant most relies, *Turner* v. *Collins*, the Lord Chancellor gave these reasons, among other reasons, for giving effect to the defence of laches (p. 341): "It is not reasonable for the Court to allow the child to hang, as it were, a sword over the parent's head, and to keep him in suspense for an indefinite length of time;" and "that the father should not be al-

ONT.
S. C.
STONE-HOUSE v. WALTON.
Meredith, C.J.C.P.

lowed to go on, until he is upwards of seventy years of age, thinking that such is a certain provision for his wife, and then to find out that he has been mistaken, and that there is a very much smaller provision for his wife and his daughter." But the Damoclesian danger in this case being not over the defendant, but over the plaintiff, and a two-edged sword at that: if she married, one edge cut off all her rights; if she lived and died an old maid, the other edge cut off her right to let the farm: it seems to me to be time for the removal of the sword, rather than giving effect to its worse edge because the defendant has so long held it over the woman's head. It may also be said that in the case of *Turner* v. *Collins* the trial Judge had held the transaction there in question to have been not an unreasonable one : see *In re Sharpe*, [1892] 1 Ch. 154.

Besides all this, if there were, as if necessary I would find there was, actual fraud, the lapse of time would plainly be no hindrance to the plaintiff: see *Hatch* v. *Hatch* (1804), 9 Ves. 292, and *McDonald* v. *McDonald*, 21 S. C. R. 201.

At law the plaintiff's action would be brought for possession—and could only be brought after the death of the first two life-tenants; the defence would be the release contained in the deed; and the replication, fraud—which avoids all things—in procuring it: and in such an action the plaintiff would recover, the fraud being proved.

In my opinion, the trial Judge was right in his ruling upon the first branch of the case, and wrong upon the second; and so I would allow this appeal with costs; and set aside the direction of the trial Judge, for the entry of judgment dismissing the action, and would direct that judgment be entered, instead, setting aside the deed in question, with costs.

Lennox, J.

LENNOX, J.:—I agree in the result.

Masten, J.

MASTEN, J.:—I agree.

Riddell, J.

RIDDELL, J.:—This is an appeal from the judgment of Mr. Justice Sutherland dismissing an action to set aside a conveyance, the ground of the dismissal being laches.

The facts are set out in sufficient detail in the judgment complained of, and I agree with the finding that the plaintiff had an equity to set aside the conveyance: I am unable to agree that she has disentitled herself to this relief by delay.

There is nothing here of change of position of the defendant, expenditure of money or time by him, or the like; nothing of unsettling family settlements; nothing of estoppel—there is mere delay and nothing more. In such a case it is said, "twenty years may be taken as the period which in practice will bar a claim on the ground of delay:" Halsbury's Laws of England, vol. 13, p. 172, para. 207—but no number of years can be fixed.

Sir Pepper Arden, M.R., sitting for the Lord Chancellor in *Hercy* v. *Dinwoody* (1793), 2 Ves. Jr. 87, at p. 93, asks himself the question, "whether I am bound by any rule that has been laid down," and answers emphatically: "certainly not. Every case must depend upon its particular circumstances." There a delay of seven years, followed by another of thirty-three years, was held fatal. In *St. John* v. *Turner* (1700), 2 Vern. 418, Lord Keeper Wright thought a claim "within one year of its grand climacteric" should rest in peace.

The Irish Lord Chancellor Hart in *Byrne* v. *Frere* (1828), 2 Molloy 157, at p. 176, says that "length of time of more than twenty years" will bar such a claim: twelve years we find suggested in *Williams* v. *Thomas*, [1909] 1 Ch. 713, at p. 722, per Cozens-Hardy, M. R.: but more than forty did not prevent relief in *McDonald* v *McDonald*, 17 A. R. 192, 21 S. C. R. 201. We should not attempt to put the law more definitely than it is put in *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 221, at p. 240: "In every case, if an argument against relief, which otherwise would be just, is founded on mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable;" and the claimant is barred (p. 239) "where it would be practically unjust to give a remedy."

On no principle of equity would there arise any injustice in compelling this defendant to abandon his unrighteous advantage.

I would allow the appeal with costs in this Court and below.

In so deciding we are giving the judgment the learned trial Judge would have given, had he not thought that the cases forbade that course.

Appeal allowed.

B. C.
C. A.

YUKON GOLD v. BOYLE CONCESSION.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, Galliher and McPhillips, JJ.A. April 3, 1916.

1. MINES AND MINERALS (§ I C—15)—CREEK AND RIVER CLAIMS—SLOUGH—MINING RIGHTS.

A river claim may be staked only on one side of the river; a creek claim is of the same nature, except that it may include the bed and both banks of the creek; the ground between a creek or slough and a river may be located either as a creek or river claim, but if located as a creek claim it cannot be carried across and include the bed of the river, as mining rights in a river bed cannot be acquired by grant of either a creek or river claim.

2. WATERS (§ II B—76)—ACCRETION AND EROSION—MINING RIGHTS—TRESPASS.

Title under a dredging lease of the bed of a river extends only to low water mark. A lessee's rights to a river claim do not change in case of a sudden erosion. There is nothing in the Yukon Placer Mining Act (R.S.C., 1906, ch. 64, as amended by 6-7 Edw. VII. ch. 54), to shew that sudden erosions from land under lease, caused by the overflow of a river, revert to and become the property of the Crown as against the person whose lands have been eroded or submerged. The lessee may maintain an action for trespass on such eroded or submerged land.

[*Yukon Gold Co.* v. *Boyle*, 19 D.L.R. 336, affirmed.]

Statement

APPEAL from the judgment of Macaulay, J., Yukon Territorial Court, 19 D.L.R. 336, in favour of the plaintiff in an action for trespass in mining operations.

E. P. Davis, K.C., for appellant, defendant.

F. T. Congdon, K.C., for respondent, plaintiff.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The argument before us was confined to much narrower limits than that before the Judge of the Yukon Territory. Apart from some minor considerations which I shall refer to presently, two substantial questions are involved in this appeal, referred to in argument as the south trespass and the north trespass, respectively. The south trespass has to do with the taking of gold from plaintiffs' river claim No. 12 under colour of right claimed by defendants as owners of the lower half of creek claim No. 105 below Discovery on Bonanza Creek. Accepting as I do the finding of fact of the Judge, that what is called the slough is an arm of the Klondyke River, the next question of law is whether or not a creek claim may extend across a river. The said creek claim, if given its full width of 1,000 ft. north from its base line, would be carried across the slough and would come in contact with plaintiffs' said claim No. 12, which was granted to them subsequently to the grant of the creek claim to the defendants. If therefore the creek claim could be carried across the river the placer ground in dispute belongs to the defendants and not to the plaintiffs. Defendants' counsel argued that

admission No. 2 of the defendants' admissions of fact (ex. B.) concluded the question of the ownership of the ground in dispute, but I think this cannot be so. The said claim No. 12 was granted subject to the existing rights of others, and if the creek claim was lawfully located to the full distance of 1,000 feet from its base line, notwithstanding that this would carry it across the river, then the disputed ground was not within the plaintiffs' claim No. 12 because of the exception just mentioned.

The policy of the mining laws in force at that time in the Yukon Territory would, it seems to me, exclude the acquisition of mining rights in the river bed except under dredging leases. A river claim might be staked only on one side of the river. A creek claim is of the same nature as a river claim except that it may include the bed and both banks of the creek. I think the ground between the creek and the river might have been located either as creek claim or river claim, but I think that if located as a creek claim it could not be carried across and include the bed of the river, any more than could a river claim. The river was the obstacle beyond which the creek claim could not extend because mining rights in the river bed could not be acquired by grant of either a creek or a river claim.

In view of this conclusion, it becomes unnecessary to consider other grounds of appeal relating to the south trespass as the appellants are not concerned with the validity of the creek claim in respect of ground south of the slough.

The Judge applied the severer rule to the measure of damages in respect of this branch of the case, and I am unable to say that he was clearly wrong in doing so.

The question involved in the other branch of the appeal, the northern trespass, arises out of the encroachment of the Klondike River upon the northern end of the plaintiffs' said claim No. 12. The defendants' predecessor in title obtained from the Crown in 1898, under dredging lease No. 23, a grant of mining rights in the bed of the Klondyke River from the mouth thereof to a point five miles upstream. Under the regulations then in force the side boundaries were declared to be low water mark as it was on August 1 of the year in which the lease was granted. In the year 1907 new regulations were made and river bed was therein declared to mean "the bed and bars of the river to the foot of

B. C.
C. A.
YUKON GOLD v. BOYLE. CONCESSION.
Macdonald, C.J.A.

the natural boundaries." It was further declared that "every lessee under these regulations *or under the regulations hereby rescinded* shall have the exclusive right to dredge the river bed within the length of the river leased to him." In 1910 plaintiffs obtained their grant of said claim No. 12 situated on the south bank of the main arm of the river about two miles from its mouth. By the action of the river and of surface water, part of the river bank included within the boundaries of said claim No. 12 have become eroded and submerged. This erosion was not gradual or imperceptible, but occurred in the spring of each year: the encroachments in the three years in question here approximate one hundred feet. The trespass complained of is that the defendants dredged this accretion to the river bed which plaintiffs claim to be still part of their claim No. 12.

The authorities to which we were referred shew that as between land owners on opposite sides of a river ownership does not change in case of sudden erosion or accretion, such as took place yearly in this case. This is a rule of common law, and unless it be inapplicable to conditions under which placer mining is carried on in the Yukon Territory, which was not suggested by counsel in argument, or was abrogated by statute, it must be given effect to here. Mr. Davis, defendants' counsel, did contend that the regulations above mentioned enlarged the defendants' rights. He contended that on the true construction of the regulations, the dredging lessee was entitled to dredge to the natural banks as they existed from day to day during the period of the lease.

The Yukon Placer Mining Act as enacted in 1906 (ch. 64 R.S.C.), declared that no placer mining rights should be acquired except under that Act, but in the following year an amendment was passed (6–7 Edw. VII., ch. 54, sec. 1), declaring that:

> Nothing in this Act shall prevent the enactment by the Governor-in-Council of regulations under which dredging leases may be issued of the whole bed of any river in the Territory.

This would authorise the making of the regulations of 1907, so far as they relate to leases thereafter to be granted, but in my opinion would not authorise the enlargement by regulations alone of the rights of the holder of then existing leases. To do this it would be necessary to grant new leases.

The defendants therefore have title under their lease only in the bed of the river to low water mark as it was on August 1, 1898, and have no title to the ground in dispute.

B. C.

C. A.

YUKON GOLD v. BOYLE CONCESSION.

Macdonald, C.J.A.

But as it was contended that plaintiffs had no title to and could not be in actual possession of the disputed area, I must go a step farther and examine the plaintiffs' title. The Governor in Council had authority to define for the purpose of all leases to be granted thereafter, "River bed," and he defined it in the regulations of 1907. Plaintiffs' claim No. 12 was granted after the passing of the regulations and their rights would be governed by the law as it stood at the date of their grant. They could take only down to the foot of the natural bank, and if their boundary is fixed for all time except as regards imperceptible erosion or accretion, then the northern boundary is the foot of the natural bank as it was at that date. Under the provisions of the Yukon Placer Mining Act and also under the Dredging Regulations, the grantee may be required to survey his claim, which goes to shew that fixed boundaries were contemplated. In my opinion, therefore, there is nothing in the statutory law governing this case to support the claim of the appellants that sudden accretions to the river bed revert to and become the property of the Crown as against the person whose lands have been submerged, and hence their contention that, even if the ground in dispute were not within the area leased to them, the respondents were neither the owners nor were they in possession of the same, cannot in my opinion be supported.

An attack was made upon plaintiffs' said claim No. 12 on the ground that it was located on a townsite without due authority. I think this is met by defendants' admission of facts.

Another point raised by the defendants' counsel had to do with the measure of damages, but I see no reason for disturbing the finding of the Judge with respect thereto. The appeal should be dismissed.

Galliher, J.A.

GALLIHER, J.A.:—This is an action for trespass for entering upon and dredging upon lands claimed by the plaintiffs and for the value of the gold recovered therefrom by the defendants.

The ground in question is what is known as Lee Pate Island in the Klondyke River, and being lot 8, group 1, Yukon Territory.

On December 5, 1901, Lee Pate obtained a Crown patent for those lands from which was reserved a strip of land 100 ft. wide around the shores of the island from the river banks, and also the precious metals under the island. On January 28, 1903, a

B. C.

C. A.

YUKON GOLD v. BOYLE CONCESSION.

Galliher, J.A.

new Crown patent was issued to Lee Pate in which the 100 ft. reserved in the original grant was granted, but the minerals reserved as in the former patent. The present plaintiffs have acquired these lands through Lee Pate and his successors in title.

On July 31, 1906, by order-in-council the Yukon Consolidated Gold Fields Co. Ltd., the holders of the surface rights, were granted the right to stake out and acquire the ground included in said lot 8 for placer mining purposes upon their complying with the placer mining regulations subject to all and any existing rights and that such right should not be transferable.

It is objected that it is not proved that the Yukon Consolidated Gold Fields Co. and the plaintiffs are one and the same, but I think that is covered by the admissions in this case.

The plaintiffs did not stake out the said lands as placer claims until 1910, since which time they have been kept fully in force as existing claims as River Claims Nos. 12 and 13.

Two trespasses are charged—one on the northern side of the island and one on the southern side. The defendants deny trespass and claim that they are working on their own ground—on the north under dredging lease prior in time to the plaintiffs' rights acquired under the order-in-council above referred to of July 31, 1906, and to the staking in 1910—and on the south under rights acquired also prior in date to plaintiffs' rights, and being under a creek claim staked on Bonanza Creek and extending over and upon the plaintiffs' claim 12 on the island.

Dealing with the southerly trespass first. The first matter to decide is whether the slough which separated Lee Pate Island from the mainland on the south is a part of the Klondike River. The trial Judge has found as a fact that it is, and I do not see any reason to differ from his conclusion. Having so found, the next question is, can the creek claim under which the defendants justify be staked so as to cross the slough and take in any portion of the island? If so, the defendants have committed no trespass—if not, they have—provided claims 12 and 13 are valid claims.

Two classes of claims mentioned in the regulations only need be considered—"River claims" and "Creek claims." These are described in the regulations of 1901 as follows:—

A river claim shall be situated only on one side of the river and shall not exceed 250 ft. in length, measured in the general direction of the river. The

rear boundary of the claim which runs in the general direction of the river shall be defined by measuring 1,000 ft. from low water mark of the river. A creek or gulch claim shall not exceed 250 ft. in length, measured along the base line of the creek or gulch, established or to be established by Government survey. The rear boundaries of the claim shall be parallel to the base line, and shall be defined by measuring 1,000 ft. on each side of such base line. In the event of the base line not being established, the free miner may stake out the claim along the general line of the creek or gulch, but it will be necessary for him to conform to the boundaries which the base line, when established, shall define.

In spite of the ambiguous nature of the language used in describing a creek claim, I do not think that a creek claim can be staked so as to cross and occupy land on both sides of a river.

The class of claims to be staked on a river are designated "river claims" and can only be staked on one side of a river, so that, supposing there had been no Bonanza Creek at this point, anyone desiring to occupy ground on the Klondike River would have had to stake as a river claim and on one side only of the river: then does the fact that Bonanza Creek happens to be at this point close to Klondyke River enable the defendant to stake as a creek claim and acquire lands that he could not possibly have acquired even under the class of claims applicable to lands situate on a river?

I think that cannot have been the intention of the Act or the regulations, if so, it might be that large areas of lands lying on both sides of a river could not be staked as river claims at all if some one came in and occupied these lands under creek claims.

Of course, it may be said that if the Act and regulations are defective, that is a matter for legislation and not for the Courts, but looking at it broadly I cannot think that such was the spirit or intent of the Act.

As to plaintiffs' claims 12 and 13, it is objected that these are wrongly staked as river claims, the defendants claiming that if the slough is a part of the Klondyke River then the southerly bank of the slough is the bank of the river and not the northerly bank of the slough from which plaintiffs staked. In my judgment the waters which wash the south shore of the island and are the northern boundary of the slough are as respects the island the southern boundary of the Klondyke River. This as to location then would make them valid and they have been kept alive ever since, and as I have held that the defendants' claim cannot cross the river or a part of it to the island, the defendants had no

B. C.
C. A.
YUKON GOLD
v.
BOYLE.
CONCESSION.
Gallihier, J.A.

rights in the ground trespassed upon in the south which were, so far as damages were awarded, all comprised in the plaintiffs' lands a cross the slough on the island.

The trial Judge below in awarding damages for this trespass applied the severer rule allowing nothing for cost of working. This finding is of course based on the evidence, and should not be lightly interfered with. In that view, and further in view of the decision in *Lamb* v. *Kincaid*, 38 Can. S.C.R. 516, which as I view it is at all events no stronger than the present case, I would refuse to interfere. I think this disposes of the main features urged in respect of the southern encroachment.

As to the northern trespass, a somewhat different condition arises. In 1898 the defendants obtained a dredging lease for dredging certain areas of the bed of the Klondyke River, the boundary to be fixed as of August 1 of the year the lease was issued, but subsequently, in 1907, and before the plaintiffs had exercised their right to stake the minerals in question, new dredging regulations for the Yukon were by order-in-council put in force and the old regulations rescinded.

In these regulations "River bed" is defined to mean the bed and bars of the river to the foot of the natural banks and by sec. (4) Every lessee under these regulations or under the regulations hereby rescinded shall have the exclusive right to dredge the river bed within the length of river leased to him subject (sec. 9) to the rights of persons who received entries for claims under the Placer Mining Act or former regulations prior to the issue of the dredging lease.

When Morrison staked placer claims 12 and 13 for the plaintiffs in 1910, he did so to a bank shewn on plan 1.2 as line of Morrison river bank.

This bank is some distance south of the river bank established by Gibbon in 1897, due to the fact that the original bank had eroded by action of water and melted snow—see plan 1.2.

The trial Judge has given judgment only for such areas as have been dredged by the defendants to the south of the Morrison river bank line established when the plaintiffs' placer claims were staked; as the plaintiffs' right to the minerals did not extend beyond the river bank as it then was.

The defendants could not under their dredging lease or the

dredging regulations of 1907 work beyond that river bank in 1910, but since 1910 the river bank has further eroded and was in 1913 (when the alleged trespass complained of was committed), as shewn on plan 1.2.

It is as to the area (or so much of it as the defendants have dredged) lying between the bank of the river as it was in 1910 and the bank as it existed in 1913 that the dispute arises.

The mineral rights in this area were undoubtedly granted to the plaintiffs in 1910, but the defendants say that as the river has encroached and washed away the surface of this area and was covered by the waters of the Klondyke River, we have the right to follow the bank from time to time as it recedes and recover any minerals we find between bank and bank under our lease and the regulations.

That depends upon whether the plaintiffs have lost their rights by reason of the advance of the river and erosion of its banks.

In regard to this two things have to be decided—one a question of fact—the other a question of law.

The trial Judge has decided as a fact that the erosion does not belong to the class which is referred to in the authorities as gradual or imperceptible, nor yet to the class where it is caused by sudden changes that occur by a violent effort of nature, but rather to an intermediate class, being due to the nature of the soil forming the surface of the land being principally composed of muck and the action of the waters caused by the melting of the snow in or about the month of June in each year.

I have scaled the distance on map 1.2 and roughly I should say that the bank has eroded at the average rate of 25 feet per year between the years 1910 and 1913. I do not think this could by any stretch of imagination be deemed to be gradual or imperceptible, but occurs at certain periods of the year and in very considerable quantities, so that the trial Judge in my opinion put the case rather favourably to the defendant in terming it an intermediate change.

I should say it partakes rather of the nature of sudden change and in that view the authorities are clear that the plaintiffs do not lose their right.

Mr. Davis objected that in the area marked on map Q where

B. C.

C. A.

YUKON GOLD CO. v. BOYLE CONCESSION.

Gallihier, J.A.

the value of 63c. is noted, that 63c. should not be included in striking an average of the gold values recovered and that the damages should be reduced by some $2,000—but beyond stating that generally, failed to point to anything which would warrant me in excluding it.

I can ascertain nothing from map Q to guide me as to why it should be excluded, and I would infer from the examination of Boyle for discovery that this map was prepared by him at the plaintiffs' request to shew the yardage and values respectively in the areas dredged upon the ground in dispute. It follows in my view that the appeal should be dismissed.

McPhillips, J.A.

MCPHILLIPS, J.A.:—I agree with the Chief Justice and concur in dismissing the appeal.

Martin, J.A.

MARTIN, J.A.:—This case has been a lengthy one but the important points are few and short, in view of the finding of fact that Lot 8 is an island in the Yukon River and that the slough in question is part of the same. I see no reason whatever for disturbing this finding, quite apart from the fact that the Judge had the great advantage of having taken a view of the *locus*, which I have found in my experience as a trial Judge in cases in connection with watercourses, may be, as here, of much importance. It has been said that a Judge cannot "put a view in the place of evidence," *London General Omnibus Co. Ltd.* v. *Lavell*, [1901] 1 Ch. 135, 139, *per* Lord Alverstone, C.J., and applied in *Rex* v. *De Grey*, 77 J.P. 463, yet Vaughan Williams, L.J., said in the first case, p. 141, that "it may very well be that in some cases no proof is required beyond that of the mere resemblance" observable upon a view, and in *Blue* v. *Red Mountain R. Co.*, 12 B.C.R. 460, 467, 6 Can. Ry. Cas. 219, I pointed out the restricted application of Lord Alverstone's said expressions and cited authorities in support of a much more extended application of the benefits of a view which I now refer to merely, adding thereto *Holdsworth* v. *M'Crea*, L.R. 2 E. & I. App. 380, a patent case, wherein Lord Westbury said, p. 388:—

> Now, in the case of those things as to which the merit of the invention lies in the drawing, or in forms that can be copied, the appeal is to the eye, and the eye alone is the judge of the identity of the two things. Whether therefore, there be piracy or not is referred at once to an unerring judge, namely, the eye, which takes the one figure and the other figure and ascertains whether they are or are not the same.

This language was adopted by Lord Watson in *Hecla Foundry*

Co. v. *Walker*, 14 App. Cas. 550, 557, respecting a registered design, and Lord Herschell said, p. 555: "the eye must be the judge in such a case as this"; and in *Payton* v. *Snelling*, [1901] A.C. 308, a case respecting two similar coffee labels, Lord Macnaghten said, p. 311, after referring to the evidence of certain witnesses on the likelihood of deception:—

> But that is not a matter for the witness; it is for the Judge. The Judge looking at the exhibits before him and also paying due attention to the evidence adduced must not surrender his own independent judgment to any witness.

Which, as Fry, J. says in *Bourne* v. *Swan & Edgar Ltd.*, [1903] 1 Ch. 211, 226:—

> I take to mean that the Judge is not to take the answers of any witness on the very question that he is to try, to the surrender of his own judgment.

A striking recent illustration of the value of a view wherein it was the turning point of the case and "the appeal to the 'eye'" established the obvious truth at a glance is to be found in the *City of New Westminster* v. *The "Maagen,"* 21 D.L.R. 73, 21 B.C.R. 97, an action before me in the Admiralty Court.

I pause here to note for correction that there is an incomprehensibly careless and inaccurate footnote of the editor of the B.C. Law Reports in *Blue* v. *Red Mountain*, *supra*, p. 467, wherein he wrongly says that the decision I referred to in *Star* v. *White* as "not yet reported" was "not yet decided" on November 15, 1906, as I correctly stated it was, as appears by the report thereof in 2 M.M.C. 401, at 407–8.

To resume: I think the Judge rightly decided that the northerly (side) boundary of the defendant's creek claim on Bonanza Creek (the lower half of 105) of which the side lines have never been defined, does not in any event extend beyond the bank of the slough, *i.e.*, the southerly bank of the Yukon River. This view of the application of the regulations is in accordance with the principle more or less involved in previous decisions of the Yukon Court, both of single Judges and on appeal, extending over a period of 15 years, and much weight should be attached to the working application of the regulations as construed by the Courts of the country in which they are in operation, which Courts are in a much better position than we are, from their local experience and knowledge, to grasp and give effect to the true intent of the regulations as enacted for, and to facilitate practical mining operations in, that district which has peculiarities of its own.

B. C.

C. A.

YUKON GOLD v. BOYLE CONCESSION.

Martin, J.A.

Of course, if the construction were one not in our opinion consistent with any reasonable view it would be our duty to give what we think is the true one, but nothing of that kind presents itself in this case which is one where the constructions put forward by both sides will lead to difficulty in their ultimate application in the various circumstances which have been postulated. For example, the argument advanced by the defendant involves the construction that a creek claim might be so located that one of its side lines would extend beyond the bank of an adjacent river across the water to a narrow island in the stream 200 ft. from the bank and again extend across that narrow island and across the intervening water to the further bank and up into that bank a considerable distance, so long as the whole extension did not exceed one thousand feet. But these difficulties will have to be met when they arise and do not now prevent the present adoption of the Judge's construction.

I am also in accord with his view that, entirely apart from original lot 8, the mining rights and areas secured by the due location of river claims 12 and 13 are fixed by said location once and for all, and are not subject to diminution by erosion any more than they are entitled to augmentation by accretion and therefore the plaintiff is entitled to the damages caused by the defendant's operations on the Yukon River under its dredging lease whereby said claim 12 was trespassed upon at both its northerly and southerly ends.

This is quite apart from the admissions which go to the unusual length of admitting that the plaintiff is "the owner and in possession of" said river claims, all the boundaries of which have always been defined, and that they "are now in good standing," which really establishes the plaintiff's case, because a free miner who "owns" and "possesses" a mining claim "in good standing," which in mining parlance means original valid location and subsequent compliance with the regulations, can hold his ground against all comers.

As regards the defendants' right to dredge the bed of the river, I share the view that the statutory amendment of 1907 did not authorize that to be done in the case of existing leaseholders who did not apply for and obtain a new lease; the mere general declaration of the right by the 4th Regulation of 1907 is not a sufficient

compliance with the statute. In other respects I am of the opinion that no good ground has been shewn to justify our interfering with the judgment and therefore the appeal should be dismissed.

I only add by precaution that while I agree as aforesaid with what was held below respecting the side line of 105 ending at the Klondyke River under the Yukon Regulations, yet my views as to lode locations on land covered by water, frozen (glacial) or otherwise, under our British Columbia laws, as set out in *Sandberg* v. *Ferguson*, 10 B.C.R. 123, 2 M.M.C. 165, have not changed.

Appeal dismissed.

B. C.

C. A.

YUKON GOLD v. BOYLE CONCESSION.

Martin, J.A.

REX v. DUGAS; Ex parte PAULIN.

N. B.

S. C.

New Brunswick Supreme Court, Appeal Division, McLeod, C.J., White and Grimmer, JJ. November 20, 1914.

1. CERTIORARI (§ II—36)—SUMMARY CONVICTION—COSTS NOT FIXED IN STATUTORY MINUTE OF CONVICTION—C.S.N.B., 1903, CH. 22, SEC. 89—CR. CODE, SEC. 1124.

A summary conviction under the Liquor License Act, C.S.N.B., 1903, ch. 22, will not be quashed on the ground that the amount of the costs of the prosecution and of the costs of commitment and conveying to gaol were first fixed in the formal conviction and that the "minute of conviction," which the magistrate is directed to make by sec. 29, adjudged the fine "besides costs" and in default three months' imprisonment, without specifying either the amount of such costs or the costs of commitment and conveying to gaol in the event of the fine and costs not being paid; *semble*, the minute of conviction was not defective, but, if it were, the defect was cured by sec. 89 of that Act (similar to Cr. Code, sec. 1124), so far as the conviction was concerned, where the latter was in due form.

[*Ex parte Van Buskirk*, 13 Can. Cr. Cas. 234, 38 N.B.R. 335; *Ex parte Bertin*, 10 Can. Cr. Cas. 65, 36 N.B.R. 577, referred to.]

Statement

MOTION to quash a conviction under the Liquor License Act on the return to a certiorari and an order nisi to quash granted by His Honor the Chief Justice of the King's Bench Division. The grounds argued before this Court were (*a*) that the minute of conviction did not correspond with the conviction in date or effect; (*b*) that the costs were excessive.

J. J. F. Winslow showed cause against the order nisi.: The minute of conviction is sufficient to support the conviction. The magistrate has adjudicated as to the costs. The making up of the amount is a ministerial and not a judicial act and does not go to the jurisdiction, and if irregular is not a ground for quashing the conviction. It does not appear from the return that the conviction was not made up at the time of making the minute, if so, there was no need of a minute and the conviction being regular will not be quashed: *The King* v. *Davis, Ex parte VanBuskirk*, (1907), 13 Can Cr. Cas. 234, 38 N. B. R., 335.

N. B.

S. C.

REX v. DUGAS.

P. J. Hughes, in support of the order nisi.: The minute of conviction is made under C. S. 1903, c. 123, s. 29, and must in a summary way be a complete judgment.

MCLEOD, C. J.:—Is not this minute of conviction that?

Hughes—I submit not. It is defective in that it does not state the amount of costs and does not award the costs of commitment and conveying to gaol in default of payment of the penalty and costs. I rely upon *Reg.* v. *Perley, In re White*, (1885), 25 N. B. R., 43; and *Ex parte Hill*, (1891) 31 N. B. R., 84. See also Paley on Convictions 228.

The following judgments were delivered:

Grimmer, J.

GRIMMER J. This was an application to set aside a conviction for selling intoxicating liquors, contrary to the provisions of the Liquor License Act, Consolidated Statutes of New Brunswick, Chap. 22, and amending Acts, which provides for the infliction of a penalty of not less than $50.00 and not more than $100.00, besides costs, for a first offence, and in default of payment imprisonment in the county gaol.

The grounds upon which the order nisi was granted are as follows:

(1) That the defendant was not found guilty of the charges laid against him.

(2) That the minute of adjudication, and the conviction, did not correspond in date or effect.

(3) That the costs of commitment and carrying defendant to gaol were not specified or indicated.

(4) That the costs were excessive and not according to law.

The first and third grounds were abandoned at the argument, and will not therefore be considered.

The second ground contains the only difficulty in the case.

Section 23 of c. 123 of the Con. Stat. 1903 (The Summary Convictions Act), provides that, "when the law imposes a penalty in money or a fine, and provides that in default of payment the defendant shall be imprisoned, the conviction shall be according to the form (16)."

Section 29 of the same chapter provides that, "if the justice convict or make an order against a defenadnt, he shall make a minute thereof, and afterwards draw up the conviction or order, etc."

Section 62 of c. 22, Con. Stat. 1903, provides that any person who sells or barters intoxicating liquors of any kind, without a license, shall for the first offence on conviction, forfeit and pay a penalty of not less than $50.00, besides costs, and not more than $100.00, besides costs, and in default of payment he shall be imprisoned in the county gaol for a period not less than three months.

In this case a proper information was laid, the justice heard the evidence, and finding the defendant guilty made the following minute thereof: "Having heard the evidence I adjudge the defendant, Octave Paulin, guilty of having sold spirituous liquors on his premises at Caraquet, on or about the 28th day of February, 1914, and I adjudge the said Octave Paulin for his said act to forfeit and pay a penalty or sum of one hundred dollars besides costs, and, in default of payment thereof, that he be imprisoned in the common gaol of the county of Gloucester, for a period of three months."

The conviction which was afterwards drawn up is strictly according to form (16) as provided by Section 23 of The Summary Convictions Act.

The question to be determined therefore is whether or not the conviction which is legal and according to the form provided by law in this particular case should be set aside and quashed because the minute of adjudication, while providing for the payment of costs, did not specify the amount thereof.

The conviction is complete, and it was held in *The King* v. *Davis, Ex parte VanBuskirk*, (1907), 13 Can. Cr. Cas. 234, 38 N. B. R., 335, that if the conviction is complete there is no necessity for a minute of the conviction.

This was a conviction for a violation of the Liquor License Act, tried under the provisions of The Summary Convictions Act, and it must follow, that, if a conviction good in itself, can stand without any minute thereof at all being made, it certainly will not be quashed, because a minute was made, but with a minor defect.

In *Reg.* v. *Smith*, (1881) 46 U. C. R., 442, it was held the Court could only take notice of the conviction that was returned with the certiorari, and when it was regular and sufficient in form it declined to quash the conviction for a variance between the minute and the formal conviction.

N. B.

S. C.

REX v. DUGAS.

Grimmer, J.

If the conviction is defective there is ample authority for amending the same when the proceedings are before the Court, so that the purpose of the statute may not be defeated.

It is also abundantly clear from the authorities that the magistrate is not bound by the conviction first drawn up, whether it be merely a note of the conviction, or drawn up in a formal manner as the conviction itself, but that he may, when called upon by certiorari, or otherwise, to return the proceedings, draw up and return a more formal conviction, correcting errors in the first, provided the new conviction be according to the truth and facts disclosed before the justice.

I cannot find any authority which establishes (save as hereinafter referred to) the power of the Court to amend the minute or adjudication of the magistrate, but I do not think that is necessary in this case, as in my opinion the minute of conviction drawn up fully authorizes the drawing up of the formal conviction returned with the amount of the costs stated therein: See *Reg.* v. *Hartley*, (1890) 20 O. R., 481, *Rex* v. *Melanson, ex parte Bertin*, (1904) 10 Can. Cr. Cas. 65, 36 N.B.R. 577, *Ex parte Conway*, (1892) 31 N. B. R., 405.

I am also of the opinion the conviction must stand in that the Liquor License Act restricts the power of the Court to set aside proceedings under the Act in cases of technical defect and when the merits have been tried out.

Section 89, provides as follows: (1). "No conviction or warrant enforcing the same, or other process or proceeding under this chapter, shall be held insufficient or invalid by reason of any variance between the information or conviction, or by reason of other defect in form or substance; provided it can be understood from such conviction, warrant, process or proceeding, that the same was made for an offence against some provision of this chapter, within the jurisdiction of the justice, justices, or police magistrate who made or signed the same, and provided there is evidence to prove such offence, and no greater penalty or punishment is imposed than is authorized by this chapter.

"(2). Upon any application to quash such conviction, or warrant enforcing the same, or other process or proceeding, whether on appeal or upon habeas corpus, or by way of certiorari, or otherwise, the Court or judge to which such appeal is made,

or to which such application has been made upon habeas corpus, or by way of certiorari or otherwise, shall dispose of such appeal or application upon the merits, notwithstanding any such variance or defect as aforesaid, and in all cases where it appears that the merits have been tried, and that the conviction, warrant, process or proceeding is sufficient or valid under this section, or otherwise, such conviction, warrant, process or proceeding shall be affirmed, or shall not be quashed (as the case may be), and such Court or judge may, in any case, amend the same if necessary, and any conviction, warrant, process or proceeding, so affirmed and amended, shall be enforced in the same manner as convictions affirmed on appeal, and the costs thereof shall be recoverable as if originally awarded."

The Liquor License Act, 59 Vic., c. 5 (1896), repealed the Act of 1887, and for the first time contained the provisions that are found in s. 89, c. 22, Con. Stat., above referred to.

There can be no doubt the conviction in this case was made for a violation of the Liquor License Act, within the jurisdiction of the justice hearing the cause, and there is ample evidence to sustain the finding. There is no greater penalty or punishment provided or intended to be imposed by the conviction, than is authorized by the Act, and the statute prevents the same from being declared invalid on account of a defect in form or substance.

I am of the opinion that under sub-s. (2) of s. 89, the minute of adjudication, which must be a proceeding in the cause within the meaning of the section, may be amended by the Court if necessary to sustain the conviction.

At the time of the decision in *Reg.* v. *Perley* and *Hartt, In re White*, (1885) 25 N. B. R., 43, the section of the statute above herein quoted had not become law, otherwise the result therein would undoubtedly have been different.

In respect to the fourth ground that the costs were excessive, it was held in *The King* v. *Davis, Ex parte VanBuskirk* (supra), that the Court would not interfere unless it was shown (which was not done in this case) wherein the costs were excessive.

For the reasons above stated I am of opinion that the application must be refused.

WHITE J. While I agree in the conclusion reached by my brother Grimmer in this case, I doubt the power of this Court,

White, J.

N. B.

S. C.

REX v. DUGAS.

White, J.

under s. 89 of the Liquor License Act, to amend upon certiorari the minute of conviction, where, in order to make such amendment we would have to adjudicate upon and fix the amount of the penalty or the mode or extent of the punishment.

In this case, however, the magistrate adjudged the defendant to pay costs and so stated in the minute of conviction. The amount of these costs were then, or later, I assume later, fixed by the magistrate and inserted in the conviction. That, I am disposed to think, makes the conviction good apart altogether from the provisions of s. 89 referred to; but in view of the provisions of that section I entertain no doubt that the conviction must be sustained. In *Bott* v. *Ackroyd et al*, (1859) 28 L. J., M. C., 207, 5 Jur. N. S. 1053, which is cited in Paley on Convictions, in Burn's Justice and in Oke's Magisterial Synopsis, the conviction and warrant of commitment, as signed by the justices, contained blanks left therein for the amount of costs. These blanks were afterwards filled in by the magistrate's clerk. In an action against the justices for false imprisonment, brought by the accused, it was held that the signing in blank by the defendants was a mere irregularity, and not an excess of juridsiction, notwithstanding the provisions of 11 & 12 Vic., c. 44, s. 1, which requires the amount of costs to be specified in the conviction, and although the conviction had been quashed on appeal. In a note to that case it is stated: "Whether the magistrates on giving their decision specified the amount of costs was disputed. The Court in refusing the rule treated the fact as immaterial." And see *Ex parte Holloway* (1831) 1 Dow. P. C. 26, and 1 Burn's Justice p. 1142, title, "Fixing Penalty."

McLeod, C.J.

MCLEOD C. J. (oral):—I agree with my brother Grimmer that the order nisi to quash the conviction in this matter should be discharged, but I do so on the ground that the only substantial objection to the conviction, viz., that the minute of conviction does not correspond with and is not sufficient to support the conviction, fails. In my opinion the minute of conviction is sufficient. I wish to expressly guard against being taken as having decided that a defective minute of conviction may be amended by this Court on the return to a certiorari removing a conviction for an offence against the Liquor License Act.

Order nisi to quash conviction discharged.

DAVID v. DOW.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Walsh and McCarthy, JJ. May 10, 1916.

1. SALE (§ III A—45)—SHARES OF STOCK—LIABILITY OF PURCHASER—DEFENCES—SALE OF GOODS ACT.

Where an agreement for the sale of shares of stock is absolute and unconditional, it is no defence to an action on a promissory note for the purchase price thereof, that the plaintiff agreed to obtain the shares from a party to whom he hypothecated them and failed to do so, or that the note was delivered on condition that it be subject to the approval of the pledgee who refused to accept it, if the plaintiff can otherwise be required to give title to those shares; the Sale of Goods Ordinance (Alta.) does not apply to a sale of company shares, as under sec. 2(1) of the Ordinance the word "goods" does not include choses in action, and, therefore, the liability for a refusal to pay the purchase price note is not to be fixed by the statutory measure of damages for breach of contract of sale.

[*Colonial Bank* v. *Whinney*, 11 App. Cas. 426; *Lee* v. *Sheer*, 19 D.L.R. 36, 8 A.L.R. 161, referred to.]

2. SPECIFIC PERFORMANCE (§ I D—26)—SALE OF COMPANY SHARES—BY WHOM ENFORCEABLE.

A contract for the sale and purchase of company shares is enforceable by specific performance not only at the suit of the company but at the suit of an individual holder of shares already issued.

[See also *Dorchester Electric Co.* v. *King*, 24 D.L.R. 373, annotated.]

Statement

APPEAL from the judgment of Simmons, J., in favour of plaintiff in an action on a promissory note for the purchase price of shares.

J. F. Lymburn, for defendants, appellants.

J. K. Burgess, for plaintiff, respondent.

Walsh, J.

WALSH, J.:—This action is upon a promissory note for $2,000 and interest which with certain other notes not yet matured represents the purchase price of 187 shares in the capital stock of the Strathcona Brewing & Malting Co., Ltd., which the plaintiff agreed to sell to the defendants and which they agreed to buy from him. The real defence to the action as disclosed by the pleadings and developed at the trial was, that under the agreement of sale the plaintiff undertook to obtain the certificate of these shares from a party to whom the plaintiff had hypothecated it and lodge it with the company to complete the transaction, that he failed to do so after proper notice and that the defendants thereupon cancelled the agreement and demanded the return of the notes. Simmons, J., who tried the action, very properly held against this contention and gave judgment for the plaintiff.

Upon the hearing of this appeal from that judgment the defendants abandoned the defence upon which they had so relied up to the trial and substituted for it as a complete defence to the action something which though not set up in their pleadings was disclosed

ALTA.
S. C.
DAVID
v.
DOW.
Walsh, J.

at the trial. They say that these notes were delivered to the plaintiff solely for submission to and the approval of the party to whom these shares had been so hypothecated, that it was a condition of such delivery that they should be acceptable to such party, who refused to accept them, that the plaintiff thereupon attempted, but unsuccessfully, to get from the defendants other notes which would be acceptable to such party and to make a new agreement, but the negotiations were never completed and no agreement was ever entered into.

I do not think that effect can be given to this contention. The agreement of sale of these shares is in writing and under the hands and seals of the parties. It is an absolute and unconditional agreement for the sale and purchase of these shares. It contains a provision for its determination upon the happening of an event which has not occurred and which is not the event upon which the defendants now rely, but otherwise there is absolutely nothing in it suggestive of its being of a tentative character. The notes given by the defendants are in strict conformity with the provisions of this agreement. The facts are that these notes were made and given to the plaintiff when he was to the defendants' knowledge not in a position to have the shares transferred to them, that they were so made and delivered in order that he might by means of them place himself in a position to have them transferred, that the party to whom they were hypothecated objected to the form of the notes because they were joint and not joint and several and that negotiations thereupon took place between the plaintiff and the defendants looking to the substitution of other notes for them which negotiations ended in nothing. There is nothing in all of this to detract from the binding character of the arrangement as evidenced by the written agreement and the notes themselves. In spite of the objections put forward to the form of the notes, the plaintiff put himself in a position to transfer the shares to the defendants according to his agreement, and it surely cannot be that simply because he tried to get the notes put in a form which would have been more satisfactory to the pledgee of the shares the defendants are thereby entirely relieved from liability under their agreement and upon the notes which they did make, especially when they never made the new notes, but on the contrary, endeavoured to completely evade liability to the plaintiff upon another ground.

It is suggested that the defendants' liability is not upon this note, but in damages for breach of their contract to purchase these shares, the measure of their liability being the difference between the contract price and the market value of the shares at the date of the breach. This defence is not raised by the pleadings, was not suggested at the trial and is not taken in the notice of appeal. It might, therefore, quite properly be disregarded now, but as it was argued before us without objection, we should, I suppose, dispose of it.

The Sale of Goods Ordinance does not apply to a contract for the sale of shares in the capital stock of a company and no assistance therefore, can be derived from its provisions in determining this question. Under sec. 2 (i) of the Ordinance the word "goods" includes all chattels personal other than things in action or money," and shares are things in action. See judgment of Lord Blackburn in *Colonial Bank* v. *Whinney*, 11 App. Cas. 426, at 439. That a contract for the sale and purchase of shares is one of which specific performance will be enforced not only at the suit of the company itself, when the contract is with it, but at the suit of an individual holder of shares already issued, all of the text writers on the subject agree. It is so stated for instance in the 6th ed. of Lindley on the Law of Companies at p. 680, and in the 5th ed. of Fry on Specific Performance at p. 36, and in the chapter dealing with contracts for the sale of shares beginning at p. 717. Such cases as *Shaw* v. *Fisher*, 2 De G. & Sm. 11, 5 De G. & Sm. 596; *Ward's* case, L.R. 2 Eq. 226; *Wynne* v. *Price*, 3 De G. & Sm. 310, and *Walker* v. *Bartlett*, 18 C.B. 845, are cited in support of this proposition, in each of which cases the vendor was not the company but an individual holding some of its shares.

If, therefore, the plaintiff had brought his action not upon this promissory note, but for specific performance of his contract, he would have been entitled to the usual judgment in such an action, and what that is, is determined by the judgment of this Court in *Lee* v. *Sheer*, 19 D.L.R. 36, 8 A.L.R. 161.

No question is seriously raised as to the plaintiff's title to these shares. At any rate, the trial Judge has amply protected the defendants by his direction that the judgment in favour of the plaintiff is to be of no effect until the shares have been transferred into their names and until the clerk has such control of them as will allow of the delivery of the certificate to the defendants when

ALTA.
S. C.
DAVID v. DOW.

the last note has been paid. The formal judgment is practically a specific performance judgment in which the rights not only of the parties but the pledgee of the shares are completely taken care of, and I think it should stand. I would dismiss the appeal with costs. *Appeal dismissed.*

N. B.
S. C.

REX v. COMEAU.

New Brunswick Supreme Court, Appeal Division, McLeod, C.J., White and Grimmer, JJ. November 10, 1914.

1. THEFT (§ 1—8)—MENS REA—MISDIRECTION—DEPRIVING PERSON OF SPECIAL PROPERTY OR INTEREST—PURCHASER OF GOODS UNDER HIRE-PURCHASE CONTRACT—RE-POSSESSION WITHOUT THE DEMAND STIPULATED FOR—CR. CODE, SECS. 347, 1019.

It is a question to be passed upon by the jury upon a charge of theft in repossessing a sewing machine under a hire purchase contract in default of payment, whether the accused, acting under the instructions of the conditional vendor, took possession under colour of right and in the honest belief that the contract so authorized, where he re-possessed the machine in the absence of the conditional vendee, and without a demand for its return in terms of the contract, although the contract stipulated for entry and re-possession without resort to legal process in case of default of payment, and of failure to deliver back the machine upon demand; and it is a substantial wrong entitling the accused to a reversal of the conviction or a new trial (Cr. Code, 1019), if the trial Judge in such case practically withdrew that question from the jury by an instruction that if no demand had been made for the machine itself, as distinguished from the arrears of the hire-purchase price, the prisoner ought to be found guilty.

[*R.* v. *Lyon*, 2 Can. Cr. Cas. 242; *R.* v. *Johnson*, 8 Can. Cr. Cas. 123, 7 O.L.R. 525 and *R.* v. *Ripplinger*, 14 Can. Cr. Cas. 111, cited.]

Statement.

CROWN case reserved.

The prisoner was tried at the November sitting of the St. John County Court before Forbes, J., and a jury on an indictment containing two counts, the first charging that the prisoner unlawfully did break and enter by day the dwelling-house of Halvor Hanson with the intention of committing an indictable offence therein, to wit, to steal one sewing machine; the second count charging the prisoner with breaking, entering and stealing one sewing machine.

The prisoner was acquitted on the first count and found guilty on the second, and a fine of five dollars in lieu of all other punishment was imposed. The facts as disclosed by the evidence were that the prisoner was in the employ of the Williams Manufacturing Company, which had placed a sewing machine in the possession of Hanson under an agreement by which he was to pay a sum agreed upon in monthly instalments, the machine to remain the property of the company until it was fully paid for. It was also agreed that in case Hanson failed to make any of the monthly payments he should deliver the machine to the company

on demand and the company or its agent was authorised to enter the domicile of Hanson or other place where the machine might be and take possession of it, removing it without resorting to any legal process. Hanson having failed to make some of the payments, the prisoner, under instructions from the company, went to Hanson's house in the absence of Hanson and his wife, forced his way into the house and took the machine. On several occasions Hanson had been informed that if the payments were not made according to contract the company would retake the machine, but it did not appear that any formal demand for the surrender or return of the machine had been made.

At the close of the case the prisoner's counsel asked the Judge to direct an acquittal on the ground that no *mens rea* had been proved, and to instruct them that they must be satisfied that the prisoner took the machine without colour of right.

His Honor declined to so direct, and charged the jury that if no demand had been made for the surrender of the machine in compliance with the terms of the contract the prisoner was guilty of the offence charged in the second count; that a demand for the money due was not sufficient, the demand must have been for the sewing machine.

At the request of the prisoner's counsel His Honor reserved the following questions:

"1. Whether or not the facts proven are sufficient to sustain a conviction.

"2. Whether the charge in the indictment could be sustained without proof of *mens rea*.

"3. Whether the person could properly be convicted unless it was proved that he had taken the property without colour of right.

"4. Whether or not the charge as set out was correct in law.

"5. Whether or not the charge to the jury unfairly expressed an opinion upon the evidence.

"6. Whether or not the trial Judge directed a conviction instead of leaving the question to the jury.

"7. Whether or not under the circumstances the Judge should have imposed a penalty."

G. Earle Logan moved to quash the conviction. The evidence discloses that the prisoner took the sewing machine under a claim of right, under an agreement for hire and purchase. If he believed

N. B.

S. C.

REX v. COMEAU.

Statement

he had a right to take it he was not guilty of theft even though he was in error and had no legal right to take it: *Reg* v. *James* (1837), 8 C. & P. 131; *Reg* v. *Lyon* (1898), 2 Can. Cr. Cas. 242; *The King* v. *Wade* (1869), 11 Cox C.C. 549; *The King* v. *Ford* (1907), 12 Can. Cr. Cas. 555, 557, 13 B.C.R. 109; *Reg* v. *Hemmings* (1864), 4 F. & F. 50; *Reg* v. *Johnson* (1857), 14 U.C.Q.B. 569; *King* v. *Towse* (1879), 14 Cox C.C. 327; *Reg* v. *Ripplinger* (1908), 14 Can. Cr. Cas. 111 note; *The King* v. *Johnson* (1904), 8 Can. Crim. Cas, 123, 7 Ont. L. R. 525, per Chancellor Boyd. The belief, though erroneous, of an accused of his right to do an act complained of excludes criminal liability.

The trial Judge refused to leave to the jury the question whether the prisoner took the machine believing that he had a right to take it. He practically directed them to convict on the second count.

George H. V. Belyea, in support of the conviction: Most of the cases cited in support of the application to quash the conviction were indictments for larceny at common law and did not apply to a prosecution under section 347 of the Criminal Code: *Reg* v. *Ripplinger* (1908), 14 Can. Cr. Cas. 111 at 115.

White, J.

WHITE, J.:—I do not understand Mr. Logan to argue that the property was not a subject of theft but that it was taken under colour of right and therefore not stolen.

Belyea:—The evidence shews that the prisoner knew that no demand for the machine had been made, and he knew the terms of the contract. His action in going to the house, forcing an entrance in the known absence of Hanson and his wife, shews that he did not believe he was justified in taking the property.

MCLEOD, C.J.:—That was evidence for the jury in answer to the defence set up, but it was not left to them.

Belyea:—Under section 1019 of the Code the Court will not set aside a conviction or grant a new trial if no substantial wrong has been done.

WHITE, J.:—The charge of the trial Judge is a very substantial wrong.

McLeod, C.J.

MCLEOD, C.J.:—This conviction cannot be sustained. If the jury followed the direction of the Judge they would be bound to convict if they came to the conclusion that no demand had been made for the return of the property.

N. B.

S. C.

REX v. COMEAU.

WHITE, J.:—It appears to me that the evidence shews that the defendant took the property honestly believing he had a right to take it under the contract and without the least idea that he was stealing it. At all events the jury should have passed on the question and it was not left to them. In my opinion there is no evidence to justify the conviction and it should be quashed.

GRIMMER, J.:—I agree that the conviction should be quashed. It cannot be successfully contended that under the circumstances of this case the accused was acting without colour of right.

Grimmer, J.

Conviction quashed.

RIVET v. The KING.

QUE.

K. B.

Quebec King's Bench, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Carroll and Pelletier, JJ. November 2, 1915.

1. EVIDENCE (§ XI K—837)—OTHER CRIMES—CONNECTION WITH ACT CHARGED AND THE PLAN OF DEFENCE—EVIDENCE BROUGHT OUT BY QUESTIONS PROPOUNDED BY THE DEFENCE.

   Where, in answer to questions to a Crown witness by counsel for the accused on the trial of a charge of theft, the witness divulges facts tending to prove another theft of about the same time from the same employer, and no objection is taken to the admission of that part of the testimony, the admission of the same will not constitute a ground for appeal from the verdict against the accused, and, *semble*, the evidence was admissible, as in answer to the plan of defence which was to throw the crime upon a fellow employee.

   [*Makin* v. *Att'y-Gen'l. of New South Wales*, [1891] A.C. 57, 63 L.J. P.C. 41, referred to.]

2. APPEAL (§ VII J—435)—CRIMINAL TRIAL—QUESTION OF LAW—WHETHER THERE IS LEGAL EVIDENCE FOR THE JURY—CR. CODE, 1014.

   If the trial Judge should wrongly tell the jury that there was competent evidence of the offence, his direction in that respect would raise a "question of law," which could be reserved under Cr. Code, sec. 1014, for the opinion of the Court of Appeal, although the appreciation of the facts where there is competent evidence of the offence pertains exclusively to the jury. (Per Carroll, J.)

3. TRIAL (§ III A—200)—JUDGE'S CHARGE IN CRIMINAL CASE—TAKING DOWN IN SHORTHAND.

   It is not obligatory in other than capital offences that the Judge's charge to the jury should be taken down in shorthand.

4. APPEAL (§ VII M—630)—CRIMINAL CASE—OPINION EXPRESSED BY JUDGE IN HIS CHARGE TO JURY.

   It is not a ground for appeal that the trial Judge told the jury what verdict he would give if he were a juror.

Statement

MOTION for leave to appeal and for a direction to the trial judge to state a case under Cr. Code, secs. 1014, *et seq.*, following the conviction of the applicant at the Assizes on a charge of theft.

The motion was dismissed.

QUE.

K. B.

RIVET
v.
THE KING.

Carroll, J

Brodeur, Bérard & Calder for applicant.

Lafortune & Walsh for the Crown.

The following opinion was handed down.

CARROLL, J.:—Jos. Rivet was found guilty of theft at the assizes in the month of June last. He complains of this verdict and has requested the judge presiding at the trial to reserve for adjudication by this Court certain questions of law which the latter refused to reserve.

These questions may be summed up as follows: (1). The judge did not draw the attention of the jury to the contradictions from the evidence of witnesses Ostigny and De Bellefeuille: (2) The judge should not have told the jury what verdict he would give if he were a juror; (3) The charge of the judge should have been taken down in shorthand; (4) The judge should not have told the jury that the boxes containing the money had not yet been put in the vault; (5) The proof of other thefts committed by the accused should not have been permitted.

Let us say at first that some confusion seems to exist on the subject of the procedure intituled "Case reserved." When a trial has taken place in the Court of King's Bench with a judge and a jury, only questions of law can be reserved for adjudication by this Court. These questions of law can arise from all the proceedings preliminary, during or subsequent to the trial, but which had relation to it. These questions may also arise from the charge of the judge to the jury. Outside of these questions of law, that which is called "reserved case" cannot be obtained. When it is a case of inferior courts a "stated case" can comprise not only questions of law but the question of jurisdiction of the Court which pronounced the sentence (art. 761). The procedure by way of stated case can never extend to the facts of the case. A court of appeal is not to consider the weight of the evidence; it cannot, so long as there is evidence, enquire whether the case was well or badly disposed of. The appreciation of the facts pertains exclusively to the jury if the trial was with a jury and to the judge when the latter tries it alone.

It is necessary, however, not to be mistaken upon this point: A jury cannot condemn an accused if there is no proof. It is the judge's duty to tell the jury if there is evidence and if it is legal evidence, and it is for the jury to appreciate this evidence. But

if the judge should wrongly tell the jury that there is evidence when there is none, this direction to the jury would be erroneous in law. This direction would be no longer upon a question of fact but upon a question of law which could be reserved for the opinion of this Court.

In a reserved case the evidence generally is not transmitted to the Court of Appeal. The judge who reserves the question *proprio motu*, or upon application, prepares a summary of the facts proved at the *enquête* and asks if these facts justify the conclusions in law that he draws from them.

The Court of Appeal does not revise the judgment on the merits. The judge of the Assises may comment on the facts; his comments may be erroneous but a verdict cannot be set aside for this reason, because the jurors should definitely decide upon the facts and not the judge.

These remarks shew our opinion on the questions set out in paragraphs 1, 2 and 4. They deal only with the facts of the case. To deny to the judge the right to comment on the facts of the case would be contrary to the practice regularly followed in England and here. A judge, if he properly explains the facts to the jury, may reveal his opinion as to the guilt or innocence of an accused. It is not necessary that his opinion should be expressed in formal terms; it results from the narration of the facts as he understands them.

The charge of the judge need only be taken in shorthand in cases of murder. The Criminal Code does not make it obligatory for other offences.

The only serious question in the present case is whether or not the evidence of other similar thefts by the accused should have been admitted.

This is how this evidence was placed on the record: The plan of the defence consisted in accusing another employee named Ostigny against whom the employer had had suspicions of the theft. The witness De Grosbois representing the employer on the trial, began to give explanations as to the change of attitude by the employer (after having suspected Ostigny, he had accused Rivet), when the counsel of the accused asked preliminary questions on this matter and it was in giving his answer that the witness divulged that at the time of the arrest there had been found upon

QUE.
K. B.
RIVET
v.
THE KING.
Carroll, J.

the person of the accused seven packages of playing cards, the property of the Maison Beauchemin and that two days before the arrest he had received $2.70 that he had kept. There was no objection to this evidence.

The witness Isidore Gagné is the one who had given this information to De Grobois and seeing that certain portions of the evidence of De Grobois were opposed by the defence, the Counsel for the Crown did not examine Gagné upon these facts. But counsel for the accused complained of this, that counsel for the Crown did not examine Gagné upon the point, saying that the accused would prefer that everything was disclosed.

In these circumstances I do not see that the accused has any ground of complaint. I would, however, say that in my opinion this evidence was legal even if the accused had objected to it. Without doubt proof cannot be made of another crime committed by an accused in order to show that he is really capable, from his character, of committing that of which he is charged. Such proof would be unjust and illegal for it does not follow that having committed a crime under certain circumstances he would also have committed that of which he is charged. But there are exceptions to this rule. If by his plan of defence (as in this case) the accused wishes to throw upon another person the crime of which he is charged, if the irregularities charged against an accused are of the same nature as the principal act imputed to him, if they have been committed very nearly at the same time in the same place and to the detriment of the same person, I believe that these irregularities are so connected to the principal charge that they become incorporated with it and may legally be proved.

Makin v. *Attorney General of New South Wales*, [1891], A. C. 57, 63 L.J.P.C. 41.

However, it is so difficult to establish the true line of demarcation between legal and illegal evidence in these cases that usually the judges will not permit this class of evidence. At all events in this case the difficulty cannot present itself seeing that it is the accused who has produced this evidence. I would dismiss the motion.

Leave to appeal refused.

GREER v. CLARK.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Scott, Stuart and McCarthy, JJ. May 10, 1916.

1. VENDOR AND PURCHASER (§ I E—25)—RESCISSION—DEFICIENCY IN QUANTITY—PROCURING TITLE.

Where a vendor, believing that he is the owner, agrees to sell a house and lot, and partial payments have been made by the purchaser, rescission of the agreement, and repayment of the money, will not be ordered because the house encroaches on adjoining land if the vendor has obtained title to the land encroached upon, and tendered it to the purchaser. [*Chamberlain* v. *Lee*, 10 Sim. 444, followed.]

Statement

APPEAL by the plaintiff from the judgment of Ives, J., dismissing an action for the rescission of an agreement for the sale of land with costs.

H. H. Parlee, K.C., for plaintiff, appellant.

Frank Ford, K.C., and *J.J. Lamont*, for defendant, respondent.

Scott, J.

SCOTT, J.:—The action is brought for the rescission of an agreement for the sale of land and for the return of the moneys paid by the plaintiff on account of the purchase money and the payment of sundry expenses incurred by her in connection therewith.

In April, 1913, the defendant agreed in writing to sell to the plaintiff lot 71 block 9 in Edmonton, according to plan No. 63, for $3,900, the purchase money being payable by instalments, the last of which became due and payable on April 14, 1915. The evidence clearly establishes that the subject matter of the contract was a lot with a dwelling house erected thereon. Before the agreement was entered into the plaintiff in company with the defendant's agent inspected the premises, including the dwelling house, and defendant informed her that the lot was worth $900 and that the dwelling house had cost him about $3,000.

A short time before the last instalment of the purchase money became due the plaintiff ascertained that the dwelling house projected nearly 3 ft. upon lot 72, being the lot adjoining the south side of the lot described in the agreement, and on April 6, 1915, her solicitor notified the defendant that she repudiated the agreement upon that ground and demanded from him the return of the moneys paid by her thereunder and payment of the moneys expended by her upon the property. Upon receipt of this notice the defendant purchased from the owner of lot 72 a strip of land 3 ft. wide on the north side thereof extending the whole length of lot 71, and on April 6, 1915, his solicitor gave plaintiff's solicitor notice that he had done so and that he was ready to convey

ALTA.

S. C.

GREER v. CLARK.

Scott, J.

it to her along with lot 71 on payment of the balance of the purchase money. The plaintiff appears to have been unwilling to accept this and she commenced this action some time during the following month.

There is no evidence that the defendant knew that the dwelling house was not entirely situated upon lot 71 before his attention was called to the fact by the notice of April 6, 1915. As he appears to have himself erected the house, the reasonable inference is that he thought he was building it upon his own property.

In *Chamberlain* v. *Lee*, 10 Sim. 444, 59 E.R. 687, Shadwell, V.C., says at 450:

> It is said that this Court will not sanction a contract made by a person to sell to another that which at the time he knows he has not. I admit, if the case is that "A." with reference to an estate which he knows belongs to "B." contracts to sell to "C.," that it is a very wholesome rule that the Court ought not to aid such a contract. But general rules do certainly admit of variation: and, in my opinion, it would be vastly too harsh an interference with the common mode of the management of the business of mankind if such a rule were taken to be applicable to a case where a party, apparently in the ownership and *primâ facie* appearing to have a title, sells land and it afterwards turns out that a very small portion of it is not his (although he was in possession), but is the property of another person. It would be a harsh application of the first principles of this Court were I to say that in such a case the contract was so radically bad that, even if the vendor could honestly procure his title to be made good by purchasing the property for himself from the rightful owner, in order that he might hand it over to the purchaser, he should not be at liberty to do so.

This language is peculiarly applicable to the circumstances of the present case, and I cannot find that the principle there laid down has ever been questioned. I would, therefore, dismiss the appeal with costs.

McCarthy, J.

MCCARTHY, J.:—This is an appeal from Ives, J., dismissing the plaintiff's action.

The plaintiff sought to repudiate a contract entered into by her with the defendant on April 14, 1913, for the purchase of a house and lot. In April, 1915, the plaintiff ascertained that the house projected over on the adjoining lot and immediately sought to rescind the contract. The defendant thereupon acquired title to the small strip of land.

It would appear from the evidence that the breadth of this piece of ground was less than 3 ft. and what the vendor had not at the time of the contract was a very small portion of the property sold and which he acquired title to before the last instalment

of the purchase money was due under the agreement of purchase. If there is any precedent for enforcing this contract in law or in equity I think it should be enforced. In Dart on Vendors and Purchasers, 7th ed., p. 1065, I find,

> In several cases specific performance has been decreed at the suit of vendors who, contracting under the *bonâ fide* belief that they could make a good title, afterwards, on discovering that they had no title, either legal or equitable, procured the concurrence of the necessary parties.

While it may be the authorities do not bear out such a conclusion, the headnote to the case of *Chamberlain* v. *Lee*, 10 Sim. 444, there referred to, would indicate that in a case somewhat similar to this such a course has been pursued and is as follows:—

> If A. agrees to sell an estate, and it is afterwards discovered that a small portion of it is the property of another person; the Court will not discharge the purchaser from his contract without giving A. an opportunity of acquiring a title to that portion.

I would follow the reasoning of Sir L. Shadwell, V.C., in the above case and consider it a precedent to follow. The appeal, I think, should be dismissed with costs. I cannot find that the above authority has ever been questioned.

STUART, J., concurred. *Appeal dismissed.*

Stuart, J.

O'LEARY v. THERRIEN.

QUE.
K. B.

Quebec King's Bench, Cross, J. October 19, 1915.

1. ANIMALS (§ I B—14)—KILLING TRESPASSING DOG—CRIMINAL LIABILITY—DEFENCES.

   On a charge under Code sec. 537 for wilfully killing a dog, reference may be had to the rules of the common law under Code sec. 16 for ascertaining whether the dog was killed under circumstances amounting to a legal justification or excuse, and by Code sec. 541 a conviction is not to be made unless the killing of the dog was done not only without legal justification or excuse but without colour of right.

2. ANIMALS (§ I B—14)—WILFULLY KILLING DOG—PERIL TO DEFENDANT'S PROPERTY—CR. CODE, SEC. 537.

   A defence to a criminal charge of wilfully killing a dog which was trespassing on the property of the accused is made out if it be shewn that the dog was killed under necessity for the purpose of protecting the defendant's hens in the stable where the dog had gone; and where it is shewn that the defendant's property was in peril from the dog at the moment when the shot was fired because of the probability that the dog would attack the hens, it was not obligatory on the defendant to await the actual attack before shooting the trespassing animal.

Statement.

APPEAL by complainant from the dismissal of a charge in a summary proceeding.

The appellant charged the respondent with having wilfully shot and killed a dog worth $500.00 belonging to the appellant (Cr. Code, sec. 537).

The charge was dismissed by District Magistrate J. F. Saint

QUE.
K. B.
O'LEARY
v.
THERRIEN.
CROSS, J.

Cyr and the complainant has brought up this appeal against the order of dismissal.

Louis Gosselin, K.C., for appellant.

Leopold Houle, for respondent.

CROSS, J.:—The appellant has a place at St. Genevieve in which he raises setter dogs and has them for sale. The respondent lives nearby and keeps hens. On the day in question, the respondent, being told that one of the appellant's dogs had come upon his premises, took a gun and went out and shot the dog. The dog when shot was in the building used as a poultry house and there were hens there at the time. The respondent had previously been heard to speak about the appellant's dogs and to have said that he had a gun ready, as if he expected that the dogs might do harm to his poultry.

For the appellant it is said that the respondent clearly intended to kill the dog and that his offence was "wilful" within the meaning of sec. 537 wherein it is enacted that every one is guilty of an offence "who wilfully kills . . . any dog, bird, beast or other animal, not being cattle, but being either the subject of larceny at common law, or being ordinarily kept in a state of confinement, or kept for any lawful purpose."

Reference was made to the provincial law respecting vicious dogs, art. 7355 R.S.Q., as indicating not only that the respondent had an available legal remedy and should not have taken the law into his own hands, but also as specifying the single case in which the law justifies the killing of another person's dog, namely, when the dog "pursues or is known to pursue and strangle sheep." For the respondent, it is said that the shooting of the dog was not done "wilfully," seeing that it was done on the respondent's own premises and while the dog was in the act of chasing the hens.

It was further contended that, inasmuch as the dog at the time in question was not in charge of anybody, it could be treated as a "stray dog" which anyone might kill without committing an offence, the reasoning, so far as I can grasp it, being in substance that a living dog is not a chattel—though the skin of a dead dog might be—and not a subject of larceny at common law; that the dog in question was not being kept in confinement and that consequently it could not be the subject of the purely statutory offence created by the Act now reproduced in sec. 537 as that section should be read as applying, as far as concerns dogs,

only to such dogs as are kept in confinement or in charge of somebody. In a general way, reliance was placed upon *Miles* v. *Hutchings*, [1903] 2 K.B. 714, 72 L.J.K.B. 775.

It may be said that, inasmuch as the enactment which creates this offence declares that the act which is made an offence is an act done wilfully, it is for the prosecutor to make out as an essential part of his case that the act was done wilfully. To that intent the argument for the respondent is sound. I do not feel called upon to follow or discuss it further than that.

The appellant answers that the act of shooting the dog, particularly in view of the respondents previous statement about having a gun ready, makes it clear that the shooting was wilful.

It may be added that in the part of the Code which includes sec. 537 there is a definition of wilfulness. It is in sec. 509:—"Any one who causes any event by an act which he knew would probably cause it, being reckless whether such event happens or not, is deemed for the purposes of this part to have caused it wilfully."

In *Miles* v. *Hutchings* (*supra*) the facts were that an information had been laid against a gamekeeper for unlawfully and maliciously killing a dog, that the dog was at the time near an aviary, in which pheasants, the property of the gamekeeper's master, were at the time confined for breeding purposes; and the Court held that the test of the gamekeeper's liability was whether he acted under the bona fide belief that what he was doing was necessary for the protection of his master's property and that it was the only way in which the property could be protected.

Counsel for the appellant here have pointed out that where our Code in sec. 537 uses the word "wilfully" the Imperial Malicious Damage Act 1861, sec. 41, uses the words "unlawfully and maliciously." Respecting these words as employed in the Imperial Act just cited, it is said in Russell on Crimes, Can. Ed. 874, "maliciously" in the enactments above set forth appears to mean deliberately and intentionally or recklessly as distinct from inadvertently or accidentally," citing *R.* v. *Latimer*, 17 Q.B.D. 359, 16 Cox C.C. 70, and *R.* v. *Senior*, [1899] 1 Q.B. 283, 68 L.J.Q.B. 175.

I can make no distinction between this definition of "maliciously" and the definition of "wilfully" above quoted from the Code, and so far, that decision would be favourable to the re-

QUE.
K. B.
O'LEARY
v.
THERRIEN.
CROSS, J.

spondent, but I would not feel safe in being guided by it here, because the Imperial Act provides, secs. 52 and 53, that there is no criminal liability if the damage has been done under a fair and reasonable supposition that the accused had a right to do the act complained of, the very provision on which the decision seems to have turned, whereas that provision in our Code sec. 540 applies only to cases under sec. 539 and not to cases like the present under sec. 537.

For the appellant it is said that no hens had been killed or hurt and that the respondent did not need to kill the dog, and should have either caught it or driven it off or laid a complaint before a magistrate instead of taking the law into his own hands. I recall that the appellant, in his testimony, said that the dog was only seven months old and would not have killed a hen but merely sought to play with the fowls.

It appears to me that the substantial question for decision is whether or not the respondent, in doing the act charged against him, acted in justifiable defence of his property.

With the exception of the rule of sec. 56, which justifies the owner or lawful possessor of moveable property in resisting the taking of it by a trespasser, the Code contains no provision to the effect that a person may use force in defence of his moveable property. Nevertheless sec. 16 makes it clear that "all rules and principles of the common law which under any circumstances a justification or excuse for any act or a defence to any charge" remain in force.

This brings me to consider, in the light of decided cases, how the respondent's act is to be regarded, as affected by the common law, at the same time bearing in mind that, by virtue of sec. 541, the act charged is not an offence unless it has been done without legal justification or excuse and without colour of right.

In *Wills* v. *Head*, 4 C. & P. 568, a dog having worried sheep was shot by defendant, the owner of the sheep, "when he had left the field in which the sheep were, had crossed an adjoining close and was in a third." The defendant was held liable in damages for "the dog was not shot in protection of the defendant's property."

A somewhat similar conclusion is expressed in *Protheroe* v. *Mathews*, 5 C. & P. 581. In *Janson* v. *Brown*, 1 Camp. 41, there is an observation by Lord Ellenborough, C.J., to the effect that the dog "should have been in the very act of killing the fowl."

The case of *Aldrich* v. *Wright*, 53 N.H. 398, was an action for penalties for having killed minks in the close season, and a defence of justification was held good, in that the defendant honestly believed that the animals were at the time pursuing his geese. I mention that case because an act admittedly done in contravention of a statute was held to have been justified in defence of property.

It was for the complainant to prove the intent in this case. He contends that he has proved it. That being so I take the general rule to be as stated in Halsbury's Laws of England (Criminal Law and Procedure No. 505):—"When the existence of a particular intent or state of mind is a necessary ingredient of the offence, and prima facie proof of the existence of such intent or state of mind has been given by the prosecution, the defendant may excuse himself by disproving the existence in him of any guilty intent or state of mind, *e.g.*, by showing that he was justified in doing the act with which he is charged—note 'K,' *e. g.*, 'by acting in self-defence or in the exercise of some legal duty or right'—or that he did it accidentally . . ."

And in No. 507:—"In cases when a particular intent or state of mind is of the essence of an offence, a mistaken but bona fide belief by a defendant that he had a right to do a particular act may be a complete defence in showing that he had no criminal intent."

And in the same work in the treatise on animals it is said at No. 857:—"To kill, shoot or injure another man's dog without legal justification is an actionable wrong at common law. It is no legal justification that the dog was trespassing. In order legally to justify such an act it must be proved that it was done under necessity for the purpose of protecting the person or saving property in peril at the moment of the act. . . . A similar rule exists in criminal cases. It is no defence to a charge of unlawfully and maliciously killing, wounding or maiming a dog, that it was trespassing at the time; but if the accused proves that he bona fide believed that the act was necessary and that he could save his property in no other way, he is entitled to be acquitted."

If a justification of the kind here ruled upon could be effective in defence of a civil action in damages, it might be said *a fortiori* that it ought to prevail where as here it is sought to attach penal consequences.

QUE.

K. B.

O'LEARY v. THERRIEN.

Cross, J.

For that reason I consider it appropriate to refer to the result of decisions in France as summarized in Fuzier-Herman, Arts. 1382–1383, at Nos. 414 and 415. It is true that the case there figured is that of a stray dog, whereas in this case the dog was the neighbour's dog and not a stray one. Nevertheless, when it is conceded in principle that there can be justification of the act of killing by shewing it to have been done in defence of person or property, the fact of the dog being a stray or otherwise can only be a fact in the case to be considered in deciding whether the justification is sufficiently made out or not.

While on the one hand the Courts will construe strictly the defence of any one who has "taken the law into his own hands" as the common expression is, it is nevertheless clear that circumstances may be such as justify a defendant in destroying another person's property, for example where such destruction is necessary or reasonably believed by him to be necessary to save his own property.

The circumstances of the shooting in this case go to make out a strong case for the respondent. It is true that he had a gun available and had it so because he had in view possible or probable trespasses by appellant's dogs. Had he used the gun prematurely on the one hand or after the dog had ceased to hunt on the other there would probably not be justification, but the evidence is to the effect that the dog was actually in the stable where the hens were and was killed there. I am not convinced that the dog was only about to play with the hens and not to kill them. Neither do I consider that the respondent had to wait to see what the dog would do to a hen when he would get hold of it. Sport for the dog might mean death to the hen, and it would be a matter of a very few seconds. I consider that in the circumstance, the respondent is not penally liable for not having tried to catch or drive off the dog or for not having contented himself with resort to a magistrate. Upon the whole I conclude that the appellant has not shown that the magistrate erred in dismissing the complaint or information. I cannot say that the respondents act was done "without legal justification or excuse and without colour of right," to use the language of sec. 541.

The appeal is dismissed with costs to be paid within fifteen days. *Appeal dismissed.*

MEMORANDUM DECISIONS

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases decided by local or district Judges, Masters and Referees.

STANDARD BANK v. FABER.

ALTA.

S. C.

Alberta Supreme Court, Simmons, J. January 8, 1916.

CONTRACTS (§I E 2—71)—*Guaranty by company directors—Statute of Frauds—Promissory note—Consideration—Bills of Exchange Act—Excessive charge of interest by bank—Bank Act.*]—Action upon guaranty and promissory note against directors of a company in liquidation.

A. B. MacKay, for plaintiff.

H. P. O. Savary, for defendants.

SIMMONS, J.:—The defendants were directors of the Alberta Engineering Co., Ltd., and in June 1913 winding up proceedings of the latter was instituted on account of its inability to meet its liabilitites.

The plaintiff claims that on March 10, 1913, the defendants Faber and Heeney guaranteed to the plaintiff, payment of the indebtedness of the company to the plaintiff, consisting of demand notes given to the plaintiff by the company, which indebtedness amounts to $14,024.14, and that "the said defendants executed a promissory note payable at 2 months for the sum of $30,000 to the plaintiff, at the Standard Bank of Canada, Calgary, as further collateral security for the payment of this indebtedness."

The defendants make a general denial of the indebtedness of the Alberta Engineering Co. Ltd., and in addition claim that an excessive rate of interest has been charged the company by the bank contrary to sec. 91 of the Bank Act (Statutes of Canada 1913, ch. 9).

The real defence of the defendants is the plea that the said note was given by way of guarantee and that the Statute of Frauds has not been complied with in respect of the promise contained in the alleged contract of guarantee, based on the promissory note.

Sec. 53 of the Bills of Exchange Act (R.S.C. 1906, ch. 119) provides that —

ALTA.
S. C.

Valuable consideration for a bill may be constituted by—
(*a*) Any consideration sufficient to support a simple contract;
(*b*) An antecedent debt or liability;

The plaintiff has alleged in his claim that the said note was given in pursuance of a contract of suretyship:—Something which he was not under the necessity of doing as the document was a promissory note and *primâ facie* for a good consideration. The plaintiff took upon itself by the form of pleading, the burden of proving the real consideration.

Eedes v. *Boys*, L.R. 10 Eq. 467. The evidence was clear and explicit on this head and it is to the effect that the bank was not willing to carry the account of the customer unless the defendants, who were directors of the company, should give the security in question; and as a result the security was given.

Steele v. *McKinlay*, 5 A.C. 754, 780, relied upon by the defendants is not an authority in favour of their contention that a promissory note given under a contract of suretyship is not enforceable on the ground that it does not comply with the Statute of Frauds. In that case it was a question whether a person other than the drawee who had signed his name on the bill could be treated as a guarantor of the acceptors aside from any separate contract of suretyship, and the House of Lords decided that he could not.

Lord Watson drew the distinction however in such cases between an acceptor of a bill and the promisor of a note in these terms:—

There is obviously no principle of the law merchant which can prevent any number of persons becoming bound as promisors along with the original grantor of the note.

If they can be held as guarantors by virtue of joint promisors with the principal debtor there seems to be no principle preventing them from being bound when the note is executed by the guarantors alone. I conclude that is not open to the defendants to raise the Statute of Frauds as the consideration of the note is a valid one under the law merchant and the document is a valid promissory note and subject to the Bills of Exchange Act.

As to the application of the moneys collected by the bank and by the liquidator of the company under the assignment the contract of suretyship was ample authority for the application. In regard to the rate of interest I am of the opinion that there was no authority to collect more than the legal rate of interest

ALTA.
S. C.

subsequent to April 30, 1913, as on that date the company acknowledged and verified the statement of account between it and the bank and fixed the overdraft of the company at $2906.19 and the principle of *Union Bank* v. *McHugh*, 10 D.L.R. 562, [1913] A.C. 299, would apply with the result that the bank should only receive interest at 5% subsequent to that date.

The defendants object to a payment of about $250 by the bank to the liquidator on the ground that this account has not been approved by the Court under the winding-up proceedings. The charge is not excessive and in my opinion is not improper and should not be deducted from the bank's claim.

The evidence substantiates the claim that the guarantee was a continuing one and the plaintiff is entitled to judgment for the amount of its claim and costs less the excess of interest charged, subsequent to April 30, 1913.

As this is a matter of somewhat simple computation there will be a reference to the Clerk to ascertain the amount to be deducted if the parties cannot agree upon the same.

Judgment for plaintiff.

SPRINGER v. ANDERSON.

Alberta Supreme Court, Walsh, J. December 27, 1915.

[*Springer* v. *Anderson*, 19 D.L.R. 886, varied.]

VENDOR AND PURCHASER (§ I D—20)—*Deficiency in quantity —Specific performance — Substantial misdescription—Compensation for deficiency.*]—Action for specific performance of a contract for the sale of land (see also 19 D.L.R. 886.)

G. B. O'Connor, K.C., for plaintiff.

John Cormack, for defendant.

WALSH, J.:—I tried this case in November, 1914, and at the close of the trial gave judgment against the plaintiff and decreed the specific performance by him of the contract in question which is a contract for the purchase by him of certain lands. The facts sufficiently appear from the report of the case in 19 D.L.R. 886. It has been established to my satisfaction that the plaintiff bought this land according to a plan of it then shewn to him which gave to it a frontage of 142 ft. of which 90 ft. was given to the corner lot and 50 ft. to the other and adjoining lot and that according to the new plan of sub-division which has since been made this corner lot now has a frontage of but 82 ft. so that, of course,

ALTA.
S. C.

there is a deficiency of 10 ft. from the plan of purchase. It has also been proved that the stake set to mark the dividing line between these two lots is at the same point on each of these plans so that the shortage in question cannot be looked for at that side of the corner lot. At its other side a street is laid out.

The question for determination therefore is, can I decree specific performance of this contract against the purchaser's will when by reason of an innocent misdescription of its size the vendor is unable to give him all of the land contracted for but is able and willing to make ample compensation for the deficiency? My examination of the authorities leads me to the conclusion that this cannot be done if the misdescription is in respect of a material and substantial part of the property bargained for, but that if it is not, specific performance with compensation for the deficiency may be decreed, in *Re Arnold, Arnold* v. *Arnold*, 14 Ch. D. 270, 279.

Flight v. *Booth*, 1 Bing. (N.C.) 370, 131 E.R. 1160.

Deptford Bridge Co. v. *Beven*, 28 Sol. J. 327.

Brewer and Hankins's Contract, 80 L.T. 127; *Jacobs* v. *Revell*, [1900] 2 Ch. 858; *Re Puckett and Smith's Contract*, [1902] 2 Ch. 258. I am not unmindful of the fact that in each of these cases one of the conditions of the sale was, that if there was any error, misstatement or misdescription of the property it should not vitiate the sale and that there was no such condition on this sale. But I read the judgments in these and other cases as expositions of this branch of the general law of vendor and purchaser and not as being limited to cases in which the vendor is protected by such a condition.

Applying then the law as I understand it to the facts of this case, I must decide whether or not these extra ten feet constituted a material or substantial part of the property, and whether or not I may reasonably conclude, that but for them, the plaintiff would not have bought these lots. I have no hesitation in saying that I cannot reasonably reach any such conclusion. I have not a particle of doubt but that if this plan and the stakes on the ground had shewn the frontage of this lot at 82 ft. and located it as it is according to the new plan the plaintiff would have bought it just as readily. The first 10 ft. of the corner lot as it now stands take the place of the missing 10 ft., and I cannot believe that between these two latter strips there is any practical difference

ALTA.

S. C.

even for the plaintiff's purposes. In the result the side boundaries of the parcel are shifted ten feet with negligible consequences. As therefore, in my opinion, this deficiency is not in a material and substantial part of the property, I cannot by reason of it allow the plaintiff to escape from his contract.

I suggested on the argument that the defendants might be able to amend their plan so as to include in the plaintiff's land the 10 ft. in question. If they can do so, I think they should be allowed to and they can then make title to the identical land contracted for. If the defendants are unable to make title to this strip the plaintiff may within ten days after being notified thereof by the defendants elect which method of compensation he will accept and if he does not do so the defendants may elect which it will give. My former judgment (19 D.L.R. 886) will be varied accordingly but not otherwise.

As each party has succeeded in part on this new point there will be no costs of it to either. If there is a reference to fix the compensation, the costs of it will be reserved until after the referee has made his report. *Decree accordingly.*

INNIS v. COSTELLO.

Alberta Supreme Court, Hyndman, J. February 17, 1916.

VENDOR AND PURCHASER (§ I C—13)—*Title free of incumbrances—Coal rights—Materiality—Rescission or compensation.*]—Action for specific performance of an agreement for the sale of land.

O. M. Biggar, K.C., for plaintiff.

I. C. Rand, for defendants.

HYNDMAN, J.:—By instrument dated January 28, 1913, the plaintiff agreed to sell to the defendants 400 lots of land. It was agreed that on payment of all sums due or to become due thereunder the plaintiff would convey to the purchasers or their assigns, by a transfer in fee simple free from incumbrances, "*and subject to the conditions and reservations contained in the original grant thereof from the Crown*," transfer to be prepared by the vendor's solicitors at the expense of the vendor. It was further agreed between the parties that, in consideration of the vendor agreeing to sell to the purchasers the said lots at the price of $125 each, the purchaser undertook to erect a steel and concrete traffic bridge of sufficient width to accommodate a double-car line and pedes-

ALTA.
S. C.

trian traffic across Seven Persons Coulee on the north side of "Central Place," in the most feasible position between the east and west boundary in said Central Place, or not more than 100 feet outside of the said boundary, work on the said bridge to commence not later than March 15, 1913, and to be completed not later than January 1, 1914, and that if the purchasers did not erect the said bridge that the price of the said lots should be $175 per lot instead of $125, and the terms on which the additional $50 per lot should be payable was one-third cash (meaning as soon as the vendor discovers that the work was not being carried out according to contract), the balance to be equally divided and added to the other two instalments under the agreement when due with 7 per cent. interest.

On the date of the agreement sued on the plaintiff was the registered owner of the lands or entitled to call for title, "*except the coal rights.*" As a matter of fact, the original grant was to the C.P.R. Co., and did not reserve the coal and mineral rights which at the date of the agreement remained vested in said company. The C.P.R., on May 27, 1907, transferred the said quarter section to one William Houghton,

excepting and reserving unto the C.P.R. Co., their successors and assigns, all the coal on or under the said lands and the right to enter on and occupy such portion of the said land as may be necessary or convenient for the parties to work, mine, remove or otherwise obtain the benefit of the said coal.

Plaintiff's certificate of title, after describing the lands, reads,

excepting thereout all coal and subject to the incumbrances, liens, and interest notified by memorandum underwritten or endorsed hereon or which may hereafter be made in the register.

No mention is made in the certificate of title of the rights of the C.P.R. to enter on and occupy the land as set out in their transfer to Houghton, so I take it, in the absence of a caveat or other means to preserve these rights to the company, the provisions in the transfer allowing them to enter upon and occupy the lands, etc., are of no effect, and the company are in no better position than if the transfer had read merely "excepting all coal on or under the said land."

The defendants not having proceeded with the construction of the bridge referred to, on July 29, 1913, the plaintiff called upon them to pay the increased price, namely, $175 per lot, agreed upon in case of such failure to build, and threatened action in case they should not make payment of $6,666.66, being one-third of $20,000.

After considerable correspondence with regard to the non-payment of this amount between July 28, 1913, and December 11, 1913, on December 22, 1913, the defendants having discovered that the plaintiff was not the owner of the mineral rights, notified the plaintiff in writing that they repudiated the agreement.

Shortly thereafter the plaintiff took steps to acquire the coal underlying the said lands, and subsequently purchased from the C.P.R. "all coal within, upon or under the said quarter section." The price paid was the sum of $1,600, or $10 per acre. On December 14, 1914, a certificate of title was duly issued to him by the South Alberta Land Registration District, by which he became the registered owner thereof in fee simple. Action was commenced by the plaintiff on February 10, 1915, which was consequently after the expiration of the time for payment of the full amount of purchase money provided for in said agreement. It was admitted at the trial that before action tender of a proper transfer was made by the plaintiff to the defendants. Nothing has been paid on account of the agreement with the exception of the $12,000 above mentioned, nor has the bridge been proceeded with. The defendants contend that, inasmuch as the plaintiff did not control to any extent whatsoever title to the coal rights at the date of their notice of repudiation, that the contract should be declared rescinded, and they counterclaim for rescission and return of the moneys paid by them with interest. There is no positive evidence that any coal exists in or under the lands, as no tests have ever been made there, but I do not think it necessary for defendants to prove this, which would, in fact, be an attempt to prove a negative. Prior to or at the time of the agreement nothing was said by any of the parties about coal or coal rights, and I am satisfied that mineral rights were never thought of as forming a serious or important part of the property sold or purchased. The land was bought solely as a subdivision for re-sale and for speculative purposes. The property as a subdivision is a long distance from the recognised centre of the city of Medicine Hat, and at the time of the purchase apparently there was a considerable boom in suburban lots of this character, and the defendants, as real estate agents and speculators, were exploiting this land and other properties in its vicinity. The area of the subdivision included in the purchase would be about one-fifth of

ALTA.
S. C.

the whole quarter section of which it was a fraction, and working any possible coal that might exist in the lands was never entertained for a moment in the minds of the purchasers. It was, in my opinion, in no way a material or substantial part of the purchase.

Unfortunately for all concerned, the value of the land has greatly depreciated, and in the earlier portion of the year 1913, after the contract was made, a financial stringency set in which prevented defendants from financing and going on with the construction of the proposed bridge. Property of this kind became more or less a drug on the market, and ever since property of this character has remained practically unsaleable, and it would be greatly to the advantage of the defendants if they could be relieved of their obligations thereunder. I think if the coal rights referred to in fact formed a material and substantial part of the purchase the notice of repudiation would have been effective, but it appears to me the case is analogous in principle to *Springer* v. *Anderson*, 27 D.L.R. 709, recently decided by Walsh, J., and his reasoning there is applicable to the case at bar.

The presence or absence of coal rights had nothing to do with the decision of defendants to purchase. If the plaintiff had brought action against the defendants before acquiring title to the coal rights perhaps the case for the defendants might be stronger, but having perfected his title before bringing action and immediately after this defect was pointed out to him, and before defendants demanded title to the whole or any of the lots, it seems to me that this defence should not be considered effective. Under the circumstances I think it would be a proper case for compensation supposing the plaintiff had not acquired the coal. The only evidence of value, if any, of the coal rights, is the price which the plaintiff paid for same, *viz.*, $10 per acre. Granting that the lots comprise an area equivalent to one-fifth of the whole quarter section, then the value of the coal would be about $350, which is a very inconsiderable portion of the purchase as compared with the price of $70,000. But inasmuch as the plaintiff is now in a position to carry out the contract specifically, there is no necessity for awarding compensation. In my view the $50 per lot stipulated for conditionally on the bridge not being constructed should not be considered as damages, but as an increase of the purchase price, which accordingly would be $70,000.

There will therefore be judgment for the plaintiff that the defendants do specifically perform the agreement and there will be a reference to the clerk to ascertain the amount due by defendants to the plaintiff according to the terms of the contract. On failure to pay the amount found to be due as aforesaid within three months from the date of formal entry of judgment, in exchange for which the plaintiff shall deliver a proper transfer of the land, upon registration of which the defendants shall become the registered owners thereof, the plaintiff may apply for further directions.

In the meantime the plaintiff shall have a lien on the interest of the defendants in said lands. The defendants' counterclaim is dismissed. Plaintiff to have cost of the claim and counterclaim. *Judgment for plaintiff.*

INTERNATIONAL HARVESTER CO. v. CAMPBELL.

Alberta Supreme Court, Walsh, J. February 10, 1916.

INSOLVENCY (§ II—5)—*What constitutes—Preferences—Security for pre-existing debt.*]—Action to set aside assignment as fraudulent preference.

F. S. Albright, for plaintiff.

A. B. McKay, for defendant.

WALSH, J.:—The plaintiff being a creditor of the defendants attacks an assignment from them to their co-defendants of a certain sum of money owing to them for grain sold. It is alleged that the assignors were at the date of this assignment in insolvent circumstances or unable to pay their debts in full and that the assignment which was admittedly given as security for a pre-existing debt owing by them to the assignee or rather to the person on whose account it was given had the effect of giving the assignee a preference over the other creditors of the assignors and of prejudicing, delaying, &c., such other creditors, including the plaintiff.

I see no reason to change the opinion to which I gave effect in *Walter* v. *Adolph Lumber Co.*, 23 D.L.R. 326; as to what it is that constitutes insolvency under the Assignments Act. Judged by that test I must hold that the plaintiff has failed to prove the insolvency of those debtors at the date of the impeached transaction. It is admitted that their liabilities at this date were $43,467.86. Their partnership assets consist of a farm of 1150 acres with

ALTA.
S. C.

chattel property thereon, in the shape of machinery, horses, cattle, &c. I have had the benefit of the opinions of a good many witnesses as to the values of these assets and I think that a fair value to be put on them from the evidence as a whole would be $53,740.

This statement shews a surplus of over $10,000 and that being so I cannot consistently with my opinion in *Walter* v. *Adolph*, *supra*, find insolvency.

This relieves me from the necessity of considering the other questions raised, namely that insolvency of the debtors has not been proved in any event because there is no evidence as to the financial standing of the individuals who comprise the firm and that the antecedent verbal agreement upon which this written assignment was made is sufficient to save it under *Trusts and Guarantee* v. *Whitla*, 16 D.L.R. 185.

The action will be dismissed with costs. *Action dismissed.*

DREWRY v. DREWRY.

Alberta Supreme Court, Scott, Stuart and Beck, JJ. March 24, 1916.

DESCENT AND DISTRIBUTION (§ I E—20)—*Married Women's Relief Act—Rights of widow—Defences available to executor.*]—Appeal by the members of the estate of John C. Drewry, deceased, from a judgment of Walsh, J., given upon an application by the widow of the deceased under the Married Women's Relief Act (Alta.) Stat. 1910, ch. 18), whereby he allowed the widow the sum of $12,500 out of the estate pursuant to the provisions of that Act.

C. T. Jones, K.C., for defendant, appellant.

J. W. McDonald, for plaintiff, respondent.

The judgment of the Court was delivered by

STUART, J.:—The applicant and the deceased were married in Ontario in the year 1883, and lived together, first at Napanee and afterwards in Toronto, until the year 1890, when the applicant left the home of her husband, and never returned. The deceased subsequently removed to Alberta, where he died in 1914.

Section 10 of the Married Women's Relief Act, Stat. 1910, chap. 18, says:—

> Any answer or defence that would have been available to the husband of the applicant in any suit for alimony shall equally be available to his executors or administrators in any application under this Act.

The executors did not seriously, if at all, complain of the

ALTA.
S. C.

amount of the allowance made. The appeal was based upon the terms of sec. 10 above quoted.

It appears to me that a proper interpretation of the section was given by the Judge whose judgment is appealed from. He discussed at length the cause of the separation, and although he concluded that the wife could not have succeeded in an action for alimony, yet he was of opinion that the real meaning of sec. 10 was that unless the husband could have raised some substantive defence such as adultery, or a regular separation agreement by which the wife was given an allowance, and the husband relieved from all further liability, the section could not be resorted to by the executors. I think he was right in the view he took, and there is really little if anything that could usefully be added to the reasons he gives. Perhaps, however, this much may be added, that a perusal of the evidence leaves a strong impression in my mind that the husband was never at all anxious that his wife should return, and that they simply tacitly and mutually acquiesced in living apart. In that situation, and in the absence of express misconduct on the part of the wife, or of an agreement which gave her a definite allowance, and released him from further liability for her support, I think the matter should be treated as if they had been living together so far as the application of the Act in question is concerned. I would dismiss the appeal with costs. *Appeal dismissed.*

CRISTALL v. LONEY.

Alberta Supreme Court, Ives, J. January 19, 1916.

ASSIGNMENT FOR CREDITORS (§ VIII A—65)—*Claims for rent —Unliquidated damages—Breach of covenant in lease.*]—Action for rent.

Frank Ford, K.C., for plaintiff.

H. H. Parlee, K.C., for defendant.

IVES, J.:—Upon a breach of covenant on the part of the lessee, which has taken place, because the work was to be done forthwith, the plaintiff could claim and would no doubt be awarded as damages the amount of the cost to complete what the lessee failed to do. But it appears to be pretty well settled that the term "creditor" in the Assignments Act does not include one whose claim is for unliquidated damages, and who has not obtained his judgment until after the assignment. A number of

ALTA.
S. C.

authorities are cited by Cassels in his work on the Ontario Act and among them the case of *Grant* v. *West*, 23 A.R. (Ont.) 533. He who has a claim for damage does not become a creditor until judgment is rendered and entered. *The Queen* v. *Hopkins & Ferguson*, [1896] 1 Q.B. 652.

The undertaking of the lessee to perform an isolated piece of work on the demised premises cannot be treated as rent. The service is not periodic, and the lessor could not recover by distraint.

The action is dismissed as against the assignee MacKinnon with costs and judgment against defendant Loney for $1,519 and $6,600 or as may be found upon reference and costs, such judgment, however, not to rank upon the estate in the hands of the assignee.

BATT v. BATT.

Alberta Supreme Court, Hyndman, J. January 19, 1916.

DIVORCE AND SEPARATION (§ V A—45)—*Alimony—Desertion—Sufficient cause—Duty to testify in person—Property and incomes.*]—Action for alimony.

McCaul & Valens, for plaintiff.

A. F. Ewing, K.C., and *G. B. O'Connor*, K.C., for defendants.

HYNDMAN, J.:—The plaintiff, although present with her counsel, did not go into the witness box. It may not be an absolute condition precedent to the right to recover that the wife should personally testify at the trial, but it would appear to me to be the policy of the Courts to refuse alimony unless she does so, and the fact of her not doing so I think must be regarded as militating strongly against her. It will be noticed from the evidence that there is no proof that her husband was living separate from the plaintiff "against her will," nor anything which would disclose the fact that she was willing to cohabit with him or that he was living separate from her without sufficient cause. It seems that it is the duty of and the onus is upon the wife to prove not only desertion, but that the husband went away against the will of the wife. I do not think it is sufficient merely to shew that the defendant went away from home and has not been back since and that he knew at the time of his departure that he was not coming back. The domicile of the husband is the domicile of the wife, and if it was her desire to live with her husband I think it was her duty first to have ascertained if possible where

ALTA.
S. C.

he was and offer to go to him. On the contrary, there appears to have been no communications of any kind between the dates of his departure and the trial. I think when she had the opportunity of doing so it was her duty to testify at the trial and prove clearly that the husband was living separately from her against her will and possibly that he left her without sufficient cause, although perhaps the onus is upon the defence to shew sufficient cause. *Smith* v. *Smith*, 28 L.J. (P. & M.) 27; *Ward* v. *Ward*, 27 L.J. (P. & M.) 63; *Forster* v. *Forster*, 14 O.W.R. 796; *Gracey* v. *Gracey* (1870), 17 Gr. 114.

The plaintiff's claim is under sec. 16, ch. 3, Statutes of Alberta 1907, wherein the Supreme Court is given jurisdiction to grant alimony in three cases.

(1) To any wife who would be entitled to alimony by the law of England, (2) to any wife who would be entitled by the law of England to a divorce and to alimony as incident thereto, (3) to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights.

This action is based on the third of the above cases. As above mentioned it would appear to me to be necessary for the plaintiff to shew clearly that the husband is living separately against the will of his wife. The English practice requires an affidavit to be filed by the wife to satisfy the registrar that a written demand for cohabitation and restitution of conjugal rights has been made by the petitioner. This exact condition precedent does not apply in this province, but I think the principle is the same, namely, that there must be proof of her willingness to cohabit with him.

There is a further point, namely, the absence of any evidence as to whether or not the wife is separately seised or possessed of any property or income. Consequently the Court is left quite in the dark as to what amount of alimony, if any, should properly be granted. The rule, as stated in 16 Hals. 518, appears to be an allowance of one-fifth of the joint income of husband and wife. In the absence therefore of any evidence in this regard it seems to me very difficult if not impossible to say what alimony should be assessed. This is only one other reason why I think the plaintiff's action must fail.

As to that portion of the plaintiff's claim which seeks to set aside the transfer to the defendant Albert Hughes, I am informed

ALTA.
S. C.

that other proceedings are being undertaken with respect to this, and it will not be necessary for me to decide the point. If, however, it becomes necessary I am willing to hear further argument. In the meantime I will reserve the question of costs.

Action dismissed.

Re DOBSON.

Alberta Supreme Court, Appellate Division, Scott, Beck and Hyndman, JJ. May 10, 1916.

SOLICITORS (§ II C 1—30)—*Costs—Probate—Foreign letters of administration.*]—Appeal from an order for solicitor's costs.

C. B. F. Mount, for appellants.

R. D. Tighe, for respondents.

The judgment of the Court was delivered by

SCOTT, J.:—Where letters probate or letters of administration granted by the Courts of another country are sealed by the District Court of this province under rule 945, the solicitors for the applicant are, in my opinion, entitled only to costs based upon the value of the property devolving which is situated within this province.

The appeal should, therefore, be dismissed with costs.

B. C.
S. C.

QUEBEC FIRE INSURANCE CO. v. MacVICAR.

British Columbia Supreme Court, Morrison, J. January, 1916.

MORTGAGE (§ IV—53)—*Assignment—Foreclosure by assignee—Right to proceeds of insurance policy—Mortgage clause.*]—Action for foreclosure of a mortgage.

Cecil Killam, for plaintiff.

M. A. Macdonald, for defendant.

MORRISON, J.:—The defendant MacVicar, who owned certain lands and premises in Vancouver mortgaged the same on February 16, 1911, to one Robertson to secure the repayment of $2100, the principal being payable on February 16, 1914. The defendant Foster joined the defendant MacVicar in the covenant to repay. The premises were to the extent of $1800 insured by MacVicar. On February 25, 1911, MacVicar agreed to sell the said property subject to the mortgage to one Maurice who also insured the premises with another company for $2800 without notice to and without the consent of the plaintiffs. This agreement was duly registered. On or about the same date MacVicar sold his equity of redemption to one Stevens. On March, 29, 1911, MacVicar

B. C.

S. C.

conveyed his interest in the lands and premises to Stevens subject to the mortgage. On November 24, 1911, Maurice assigned his aforesaid agreement to the defendant Kelly, Douglas & Co. On January 29, 1913, the premises were destroyed by fire. The policy was not assigned. On April 11, 1913, Robertson assigned his mortgage to the plaintiffs. Notice of this assignment was given. On October 21, 1913, Stevens conveyed the lands and premises subject to the mortgage to the defendants, Kelly, Douglas & Co., who are now the owners, subject to the mortgage. Interest has accumulated since May, 1911, and remains together with the principal sum of $2100 due and unpaid. This is an action for foreclosure in which the defendants, Kelly, Douglas & Co., claim to have deducted from the amount found to be unpaid under the mortgage the sum of $1800 for which the premises had been insured. Malcolm Macdonald for defendants, Kelly, Douglas & Co., contends that the plaintiffs, when they took over the mortgage from Robertson on April 11, 1913, did not take the position that the policy was void, but treated it as alive by invoking the mortgage clause therein. That they should have claimed, that as against the assured no liability existed by reason of his alleged breaches of the condition of the policy.

It seems to me that the short answer to that submission is that the defendant MacVicar had parted with all his interest in the premises before the date of the fire. Robertson had not been assigned any interest in the policy. The policy was never assigned. The question of insurance was in no way a subject matter of contract between him and MacVicar, express or implied, the contract of assurance was a collateral contract made solely between the plaintiffs and MacVicar for the payment of money.

There will be judgment for the plaintiff as claimed.

Judgment for plaintiff.

Re BOSCOWITZ.

British Columbia Supreme Court, Gregory, J. April 26, 1916.

SOLICITORS (§ II C 1—30)—*Taxation of solicitor and client Bill of Costs—Scale.*]—Summons to review taxation of costs.

Oscar Bass, for Boscowitz.

C. B. S. Phelan, for himself, solicitor.

The following written direction was given by Gregory, J., on the hearing of a summons to review the taxation of a solicitor

B. C.
S. C.

and client's bill of costs in which the registrar had held himself bound by the scale of fees in Appendix M to the B. C. Supreme Court Rules 1912.

Matter referred back to registrar to revise his taxation as he is not bound by scale, but can allow a reasonable sum for the services rendered, using the scale M only as a guide to enable him to fix what amount is reasonable.

The above direction was given following *Re Ermen*, [1903] 2 Ch. 156, and *Christin* v. *Lacoste*, 2 Que. Q.B. 142, and interprets the authority given to the taxing officer under B.C. Supreme Court Rules 0.65 r. 27 sub-sec. 29 as overriding the limitation apparently placed on him by 0.65 r. 8 not to exceed the scale of costs set forth in Appendix M to the rules.

ALBERTA NORTH WEST LUMBER CO. v. LEWIS.

British Columbia Supreme Court, Morrison, J. December 4, 1915.

CONTRACTS (§ V E 3—402)—*Sale of timber limits—Misrepresentation as to quantity and quality—Substantial misdescription—Rescission.*]—Action for rescission of a contract and return of purchase money.

R. S. Lennie, for plaintiff.

E. V. Bodwell, K.C., and *E. P. Davis*, K.C., for defendants.

MORRISON, J.:—The plaintiffs purchased from the defendants certain timber limits situate on the west side of Howe Sound, B.C., in the neighbourhood of Boulder Creek, a rugged, mountainous and somewhat inaccessible territory, for the sum of $25,000. The defendants represented that the limits contained approximately 125,000,000 feet of timber. There were representations also made as to the quality. It turned out that the "quantity" was substantially and materially short of what was represented and the quality materially inferior. In short, there was a difference in substance in the nature of the thing.

I find that the defendants misrepresented both the quantity, which is the real element involved, and the quality of the timber, which was not of a merchantable quality nor located so as to make it a reasonable business venture to attempt to log it. The representations thus made were untrue and material, and went to the root of the transaction and induced the plaintiffs to enter into the agreement: *Kennedy* v. *Panama, New Zealand and Australian Royal Mail Co.*, L.R. 2 Q.B. 580. It was a representation *dans locum contractui*: *Pulsford* v. *Richards*, 17 Beav. 87, 22 L.J.Ch. 559,

562. Nor does it matter that, in an action of this kind, the misrepresentations were innocent, for contracts of this kind fall under a special class of cases in which innocent misrepresentations affect the validity of agreements: Anson on Contracts. B. C. S. C.

The representations in this case cannot be put in the category of cases which turn upon "dealer's talk," on which persons are not supposed to rely. Seeing both the plaintiff and the defendants, I think the plaintiff relied on them. Nor is it a case where the means of knowledge were at the plaintiff's hands in the sense in which the plaintiff would be presumed to have had the knowledge of the defendants, as in the case of *Bayley* v. *Merrell*, Cro. Jac. 386; but rather in the class such as *Aaron's Reefs* v. *Twiss*, [1896] A.C. 273; *Reynell* v. *Sprye*, 1 De G.M. & G. 660; *Rawlins* v. *Wickham*, 3 DeG. & J. 304.

As the case of *Foulger* v. *Lewis*, where the parties at the trial were the same, the judgment in which I have just written was tried at the same sittings as this one, I shall not repeat my views of the law as there stated, which is applicable to this case as well.

In this case there was a misdescription, to put it mildly. Even though it did not proceed from fraud, where it is a material, substantial point so far affecting the subject matter of the contract that it may reasonably be supposed that but for such misdescription the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject matter of the sale: Tindall, C.J., in *Flight* v. *Booth*, 1 Bing. (N.C.) 370, 377.

There will be judgment for the plaintiff as claimed for a rescission of the agreement and a return of the moneys.

Judgment for plaintiff.

SIMMONS v. ROYAL BANK OF CANADA.

British Columbia Supreme Court, Murphy, J. December 2, 1915.

HUSBAND AND WIFE (§ II F 2—99)—*Wife's mortgage to bank—Husband's debt—Consideration—Pressure—Acknowledgment by telephone.*]—Action to set aside mortgage.

R. J. Maitland and *H. A. Heggie*, for plaintiff.

N. P. Buckingham and *A. O. Cochrane*, for defendant.

MURPHY, J.:—I found at the trial that the deed from Simmons to his wife was a voluntary conveyance. I am further of

B. C.
S. C.

the opinion that the transaction was not bona fide in the sense defined by *Koop* v. *Smith*, 25 D.L.R. 355, 51 Can. S.C.R. 554. It was therefore voidable at the suit of creditors. I find that whilst there was no independent advice there was no undue influence exercised on the wife either by her husband or the solicitor. I find that she was aware that she was giving a mortgage to the bank on the house, but that she was not aware that by its provisions default might occur almost immediately enabling the bank to proceed to realise the security. I find that there was no misrepresentation or concealment in connection with the execution of the mortgage and that she was sufficiently intelligent and informed to have gathered a sufficient knowledge of the purport of the mortgage by a perusal of it to at least have led her to seek legal advice as to when it would become enforceable. She did not read it, but in my opinion that does not give her a ground for having it set aside when she was aware of its nature though not of all its provisions. I find she knew it must be signed, otherwise the bank would take further proceedings against her husband, though I think I cannot hold it proven that she knew these would take the form of attacking the transfer from him to her. I find she executed it because she desired that such further pressure be not exerted by the bank, and that consequently there was consideration for such execution, as the bank did stay its hand for a time and altered its position. In other words I hold she did not know exactly what the bank was to do, but she did know execution by her of the mortgage would enure to her husband's benefit as a result of some action or stay of action by the bank, and this benefit she desired to secure for him. I find that the acknowledgment was taken by the solicitor over the telephone at a time when her husband was in the house and probably within hearing. In my opinion such acknowledgment was not taken in accordance with the provisions of the Land Registry Act, but whatever may be the effect of this I hold it does not make out the cause of action set up in these proceedings. In this view of the facts I hold on the decision of the *Bank of Montreal* v. *Stuart*, [1911] A.C. 120, that her action must be dismissed.

The counterclaim is set up alternatively and counsel for the defence, as I understood him, desired it dismissed if he succeeded in the defence. The action is dismissed with costs and the counterclaim dismissed without costs. *Action dismissed.*

B. C.
S. C.

BRITISH COLUMBIA TRUST CORPORATION v. AICKIN.

British Columbia Supreme Court, Murphy, J. February 7, 1916.

EVIDENCE (§ VI I—568)—*Parol evidence as to additional equitable mortgage—Admissibility.*]—Action to establish mortgage.

A. D. Taylor and *H. Campbell*, for plaintiff.

Wood, for defendant Amane.

J. A. MacInnes, for defendant Aickin.

MURPHY, J.:—In my opinion Mr. MacInnes' point that plaintiffs have no mortgage is well taken. *Ex parte Hooper*, 19 Ves. Jr. 477, decides that a legal mortgagee cannot prove by parol evidence that he is entitled to an additional equitable mortgage on the property on which he holds a legal mortgage. Admittedly the legal mortgage here has been satisfied. I can find nothing in the Land Registry Act doing away with the decision in *Ex parte Hooper, supra.* *Action dismissed.*

C. A.

SERVICE v. MILNE AND CENTRAL OKANAGAN LANDS.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A. March 7, 1916.

DISMISSAL AND DISCONTINUANCE (§ I—3)—*Substitution of parties—Right to discontinue action—Plaintiff suing on behalf of himself and debenture holders.*]—Appeal by plaintiff from order of Murphy, J.

Joseph Martin, K.C., for appellant.

Sir Charles Hibbert Tupper, K.C., for respondent.

The judgment of the Court was delivered by

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

On May 28, 1915, Murphy, J., made an order adding Thomas H. Milne as a party defendant and giving the said Milne the conduct of the action instead of the plaintiff Service. This order stands, and has not been appealed from.

On June 10, 1915, the plaintiff Service, filed and served a notice of discontinuance of the action and this notice was set aside by order of Murphy, J., dated June 22, 1915, and by the same order the writ of summons was amended by striking out the name of George Service as plaintiff and substituting therefor Thomas H. Milne as plaintiff, and by striking him out as an added defendant. It is against this order that the appeal is taken. While it is true that a plaintiff even when he sues on behalf of himself and all other debenture holders can before

B. C.
C. A.

judgment discontinue, he being *dominus litis*, such was not Service's position at the time he discontinued.

The order of May 28 had transferred the conduct of the action to Milne.

Then it was objected that Milne could not be made plaintiff without his written consent, but it is pointed out that Milne was already a party defendant by the order of May 28th, and was at his own request made party plaintiff in the order appealed from, and filed a consent in writing signed by his attorney, sworn to as such, and which is not contradicted. I think such a consent is sufficient: See *Morton* v. *Copeland*, 16 C.B. 517; 24 L.J.C.P. 169.

MARTIN, J.A., dissented. *Appeal dismissed.*

Re B.C. PORTLAND CEMENT CO.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, Galliher and McPhillips, JJ.A. March 7, 1916.

[Re B.C. Portland Cement Co., 22 D.L.R. 609, affirmed.]

CORPORATIONS AND COMPANIES (§ IV D1—74)—*Power to issue bonds to raise loan—Securities—"Pledge"—Priorities.*]—Appeal from judgment of Macdonald, J., 22 D.L.R. 609.

S. S. Taylor, K.C., for appellant.

R. M. Macdonald, for respondent.

MACDONALD, C.J.A: I would dismiss appeal.

MCPHILLIPS, J.A., concurred.

MARTIN, J.A.:—This appeal turns on the short point that the power to raise money by way of a loan, (which I agree might have been done by pledging or selling the bonds in question) was not properly exercised by handing them over to creditors as security for existing debts. That, either in the ordinary business acceptance of the term, or in the circumstances of this case, cannot be fairly said to be a "pledge" of the bonds to raise money for the purposes of the company.

It follows that the appeal should be dismissed.

IRVING and GALLIHER, JJ.A., agreed with the trial Judge.

Appeal dismissed.

ROACH v. GRAY.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Galliher and McPhillips, JJ.A. April 3, 1916.

PRINCIPAL AND AGENT (§ III—31)—*Secret profits—Fiduciary relationship—Agency vel non.*]—Appeal by defendant from judgment of Schultz, Co.J.

B. C.
C. A.

Douglas Armour, for appellant, defendant.

W. C. Brown, for respondent, appellant.

MACDONALD, C.J.A.:—I think the appeal should be allowed, and the cross-appeal dismissed. The question involved in the appeal is entirely one of fact. The plaintiff's own evidence is conclusive in shewing that the only person recognized by him as his agent in the transaction was the defendant's stenographer. The plaintiff could not succeed in recovering a secret profit unless he could shew that the defendant stood in a fiduciary relationship towards him. He might have done so by shewing a partnership between the stenographer and the defendant, but he has not succeeded in doing so.

IRVING and MCPHILLIPS, JJ.A., concurred.

GALLIHER, J.A.:—I would allow the appeal and dismiss the cross-appeal. The evidence establishes that Gray was not the agent of Roach, and is not in my opinion sufficient to establish a partnership between Gray and Miss Linehart. *Appeal allowed.*

CORPORATION OF NORTH VANCOUVER v. VANCOUVER POWER CO.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin and Galliher, JJ.A. April 3, 1916.

MUNICIPAL CORPORATIONS (§ II F 1 — 165) — *"Adjacent" municipalities — Districts — Incorporation — Power franchises — "Adopted"—Rights of company.*]—Appeal from judgment of Murphy, J.

L. G. McPhillips, K.C., for appellant, defendant.

E. P. Davis, K.C., for respondent, plaintiff.

MACDONALD, C.J.A.:—I would dismiss the appeal for the reasons given by Galliher, J.

MARTIN, J.A.:—In my opinion this appeal should be dismissed for the reasons given by the trial Judge. Section 23 and the 5th clause of schedule A should be read together and really mean the same thing. The word "adopted," used in said sec. 23, on which much stress was laid for the appellant, has several meanings which do not conflict with this view—see Murray's New English Dictionary. There are often difficulties in the practical operation and carrying out of powers and contracts in cases where traction, power, light and water properties and franchises are situate in different municipalities, but that is contemplated by secs. (12) and (15) of the Municipal Clauses Act 1906, passed in the same year as schedule A, and one municipality is none the less

B. C.
C. A.

"adjacent" to another because the latter happens to be surrounded by the former.

GALLIHER, J.A.:—Had there been no incorporation of the City of North Vancouver, there could be no doubt but what the District of North Vancouver could take over the defendant's undertakings in the terms of the agreement.

We have then to examine what effect (if any) such incorporation has had upon the agreement.

The schedule to the Act of Incorporation, being ch. 35 of 1906, proceeds first to grant and convey from the district municipality to the city municipality certain properties set out in secs. 1 to 13 inclusive, none of which sections in any way affect the matter in issue herein.

Clause 5 at p. 306 of the statute, deals with the agreement between plaintiff and defendant in these words:—

> The city covenants to carry out and give effect to all the undertakings of the district corporation so far as they relate to any part of the city area under the agreements entered into between the district corporation and the B. C. Electric R. Co. for tramway service, electric lighting, heating and power system, and street lighting service. . . .

Of course when the area included in the city municipality was cut off from the district municipality, and the city incorporated, the district municipality could not exercise any powers within that area, and in order to keep faith with the company under the agreement, clause 5 was inserted, which, as I view it, creates no rights in the city under the agreement other than (in the area comprised in the city), administrative and regulating rights, and imposes on the city the obligation of carrying out within that area the agreement entered into between the plaintiff and defendant.

Sec. 23 of the Act ratifies and confirms the agreements between plaintiff and defendant.

The adoption and carrying into effect of these agreements by the city does not, as the trial Judge puts it, affect the rights of the district corporation to take over the undertakings of the company at the expiration of the ten-year periods. What has taken place under the Act is as regards the city area to substitute the city for the district to carry out and give effect to the district undertakings with the company. It was optional with the district whether they took over the undertaking or not, there was no obligation as between them and the company that

they should do so, and hence no such obligation was imposed on the city by the Act. That option, which was a right held by the district, was never transferred, still exists, and, in my opinion, is enforceable. *Appeal dismissed.*

B. C.
S. C.

Re PHELAN, A SOLICITOR.

British Columbia Supreme Court, Macdonald, J.

SOLICITORS (§ II C 1—30)—*Taxation of solicitor's bill of costs—Form of Summons.*]—Application to tax a solicitor's bill of costs under O. 55 2, sub-sec. 15.

O. C. Bass, for J. Boscowitz.

C. B. S. Phelan, for himself.

This was an application by the client for an order of course under sec. 76 of the Legal Professions Act ch. 136, (2 Geo. V., R.S.B.C.) for the taxation of a solicitor's bill of costs. The application was made by ordinary summons intituled in the matter of the Act and the solicitor.

Held per Macdonald, J., following Chitty's Forms p. 10, and Daniell's Chancery Practice, 8th ed. p. 1696, the application should have been made by originating summons.

Application dismissed with costs and leave to restrain proceedings refused. *Application dismissed.*

MAN.
K. B.

Re NORTH WESTERN LIFE INSURANCE CO.

Manitoba King's Bench, Metcalfe, J. January 17, 1916.

INSURANCE (§ I A—9)—*License to do business—Statutory requirements—Capital stock—Subscribed and paid—Premium funds—Application.*]—Case submitted for interpretation of par. (*a*) of sec. 10 of the Manitoba Insurance Act, R.S.M. 1913, ch. 98, as amended by sec. 9, ch. 33, Manitoba Statutes 1915.

J. Allen, Deputy Atty-Gen'l., for the Crown.

I. Pitblado, for the company.

METCALFE, J.:—This company is incorporated under the Statutes of Manitoba, 1914, ch. 151. It has applied to the Provincial Treasurer for a license under the Manitoba Insurance Act, R.S.M. ch. 98. Thereupon the Lieutenant-Governor-in Council has referred to me for hearing and consideration the interpretation of par. (*a*) of sec. 10 of the Manitoba Insurance Act, being ch. 98, R.S.M. 1913, as amended by sec. 9, ch. 33 of 1915 Statutes of Manitoba.

It is admitted that this Act as amended applies to the North

MAN.

K. B.

Western Life Insurance Co. It is also admitted: 1. That the authorized capital is $500,000. 2. That $200,000 of the said capital stock has been *bona fide* subscribed for and taken up. 3. That over $50,000 in cash has been paid to the company and applied on account of premium, the stock having been sold at a premium as provided in sec. 5 of the Act of Incorporation, 4 Geo. V. ch. 151. 4. That if the amount so applied be deducted from the money paid, the company has in its treasury less than $50,000, and 5. That the company has in its treasury more than $25,000 in compliance with sec. 5 of its said Act of Incorporation.

Sec. 5 of the Act of Incorporation is as follows :

The shares of capital stock subscribed for shall, after the first payment thereon, be paid in by such instalments, and at such times and places, as the said directors shall appoint. No such instalment shall exceed 10%, and not less than three months' notice of any call upon stock shall be given; and trustees, executors, administrators and curators paying instalments upon the shares of deceased shareholders shall be and are hereby respectively indemnified for paying the same; provided always that it shall not be lawful for the said company to commence the business of life insurance until at least $200,000 of the said capital stock shall have been subscribed at a premium of not less than $15 per $100 share, and $25,000 shall have been actually paid in in cash on account of subscribed stock, but no costs, charges or expenses incurred in applying for and obtaining this Act, and all other expenses, preparatory or relating thereto, shall be paid out of the said $25,000.

I am not satisfied that the moneys having been applied on account of premium stand in the same position as though paid in and applied on capital account. Neither am I satisfied that sec. 5 of the Act of Incorporation precludes the company from spending its capital account on promotion expenses subsequent to the obtaining of the Act.

For the company it may be said that if the premium money cannot be paid out for any other purpose than could capital, the application of the moneys is a matter of accounting only. I think it safer for all parties that money received from stock subscriptions should be applied to capital account. Any other proceeding may tend to a larger expenditure of the company's funds. Unless I am satisfied that these premium moneys cannot be expended in dividends I cannot hold that the application is a matter of accounting only. I think the legislature intended that the $50,000 should be paid in on capital and applied to capital account.

Judgment accordingly.

DOUCET v. SALEM SODE & CO.

N. S.
S. C.

Nova Scotia Supreme Court, Graham, C.J., and Russell and Drysdale, JJ. February 26, 1916.

FRAUDULENT CONVEYANCES (§ II—8)—*Voluntary transfer of merchandise by insolvent—Doctrine of confusion and mixture of goods.*]—Appeal from the judgment of Harris, J., in favour of plaintiff, in an action by plaintiff as official assignee for the general benefit of creditors, to recover a large quantity of goods alleged to have been transferred by the insolvent to defendants volunt rily and by collusion with defendants with the intention of defeating, defrauding and hindering creditors.

D. McNeil, K.C., for respondent.

RUSSELL, J.:—I am of opinion that the appeal from the decision of the trial Judge must be dismissed with costs for the reasons fully stated in the judgment appealed from and which it is wholly unnecessary to repeat here. The only question that was in the least degree arguable was whether the doctrine as to confusion or mixture of goods could be properly applied to goods of the character of those in question here, being a stock of boots and shoes and, generally, such goods as would be found in a country store. In the Massachusetts case of *Ryder* v. *Hatheway*, 21 Pick. 298, the principle on which the trial Judge has acted was applied to a lot of wood improperly mixed with that of another party. That would not necessarily be applicable to such a case as this because there would be nothing to enable one to distinguish one stick of wood from another in a wood pile. But in the later case of *Willard* v. *Rice*, 11 Met. 493, the goods were palm leaf hats which it should seem would be as likely to be distinguishable from other hats with which they were mixed as the boots and shoes in the present case. The decision in this case was that of Shaw, C.J., a recognised master of the Common Law, who states the doctrine in the same terms as those followed in the judgment appealed from.

GRAHAM, C.J., concurred.

DRYSDALE, J.:—I agree that the appeal should be dismissed. I do not think it is necessary to deal with intermixing. The goods taken were fraudulently removed to defendants' premises and I think defendants failed to establish that the goods replevined were ever mixed with any of the defendants' property.

Appeal dismissed.

N. S.

S. C.

DOUCET v. SIDE SODE.

Nova Scotia Supreme Court, Graham, C.J., and Russell and Drysdale, JJ. February 26, 1916.

FRAUDULENT CONVEYANCES (§ VI—30)—*Transactions between husband and wife—Presumption of fraud—Burden of proof of good faith.*]—Appeal from the judgment of Harris, J., setting aside as fraudulent and void as against creditors, two deeds mentioned in the statement of claim and ordering them to be struck off the records of registry.

The action was brought by plaintiff as official assignee for the county on behalf of creditors of the defendant Side Sode for the purpose of setting aside a deed dated August 14, 1914, whereby the defendant Side Sode conveyed to the defendant Salem Sode and his heirs certain lots of land described. Also a deed bearing the same date whereby the defendant Salem Sode conveyed the same lots of land to the defendant Jennie Sode. It was alleged that at the date of the conveyances the defendant Side Sode was insolvent and unable to pay his creditors and that the deeds were made voluntarily and collusively and with the intention of defeating and delaying creditors.

The trial Judge held that the transaction was to be regarded in the same way as a deed direct from the husband to the wife, both being dated the same day, in the same handwriting, proved before the same solicitor on the same day and both having been recorded the same hour of the same day. That the transaction being one between husband and wife was open to suspicion. That the transfer being part of a scheme to defraud creditors the burden was upon those seeking to support the conveyance to prove that the grantor was able to satisfy his creditors after taking into consideration his subsequent illegal and fraudulent transactions and that this they had failed to do. That it was a suspicious circumstance that the parties interested were not called to give evidence. That the burden was upon defendants to show that the property bore a fair and relative value to the consideration. That under the circumstances in evidence the burden was upon the parties to the transaction to shew *bona fides*.

D. McNeil, K.C., for respondent.

RUSSELL, J.:—It did not occur to me that there was any arguable question presented on the appeal in this case. Portions of the reasoning and one or more of the legal propositions stated

in the decision of the trial Judge were criticised by the appellant's counsel, but it is not necessary to pronounce upon the validity of those criticisms. The fraudulent intent and corresponding effects of the transaction assailed were too obvious and palpable to leave any hope of its being supported. N. S. S. C.

The appeal should be dismissed with costs.

GRAHAM, C.J., and DRYSDALE, J., concurred.

Appeal dismissed.

SCHWARTZ v. WILLIAMS. ONT. S. C

Ontario Supreme Court, Middleton, J. November 29, 1915.

MORTGAGE (§ VI E—90)—*Short Forms Act—Additional covenants— Acceleration clause — Bonus — Power of Court to relieve against penal provisions—Costs*]—Motion to dissolve an interim injunction which restrained the mortgagee from proceeding to exercise the power of sale contained in the mortgage.

L. Davis, for defendant.

W. J. McLarty, for plaintiffs.

MIDDLETON, J.:—By mortgage dated the 20th February, 1915, the plaintiffs mortgaged to the defendant certain lands to secure $4,000, with interest at 7 per cent., repayable $300 in six equal consecutive half-yearly instalments of $50, and the balance on the 20th February, 1920; the interest and instalments of principal being payable on the 20th February and 20th August in each year.

The mortgage is in pursuance of the Short Forms of Mortgages Act, but contains many added covenants and provisions. *Inter alia*, there is a provision that if the mortgagors "make default as to any of the covenants or provisos herein contained the principal hereby secured shall at the option of the mortgagee . . . forthwith become due and payable." There is also a covenant that if the principal is not paid at maturity the mortgagors shall not be at liberty to pay the same except after three months' notice in writing or upon payment of three months' interest in lieu of notice; and a further covenant that if an action is brought or the lands are sold the mortgagee shall be entitled "to be paid as an indemnity three months' interest in advance on the principal so paid or recovered in addition to interest to the date of payment." There is the ordinary covenant for payment of taxes.

The taxes for the year 1915 became in default, and the interest

ONT.
S. C.

was also in default. The mortgagors tendered the amount of the interest, and are ready to pay the taxes and the costs incurred in serving notice of intention to exercise the power of sale; but the mortgagee refuses to stay her hand, claiming: (1) that, default having been made in payment of taxes, the Court has no power to relieve from the stipulated consequences of default; and (2) that the mortgagee is entitled, as a condition of any relief granted, to three months' interest on the principal money as a bonus, in addition to the interest earned and to be earned.

The mortgage being subsequent to the 4th August, 1914, the provisions of the Mortgagors and Purchasers Relief Act, 1915, cannot be invoked to aid the mortgagors.

In *Todd* v. *Linklater* (1901), 1 O.L.R. 103, it was held that where under clause 16 of the Short Forms of Mortgages Act the mortgagor is entitled to relief, all the consequences of default are at an end, and the mortgagee has no right to exercise the power of sale.

What is here contended by the mortgagee is, that this covenant provides solely for acceleration upon default of payment of interest and for relief upon payment of arrears of interest, and that, where the acceleration takes place not by default of payment of interest, but by default of the performance of the covenant to pay taxes, there is no provision for relief. As I would read the mortgage, this addition to the statutory covenant is in effect a qualification of or addition to the covenant, and I think I am warranted in reading into the power to relieve, the same qualification and addition; and, as the mortgagee has added to the one clause the acceleration upon default in payment of taxes, I should read into the other clause, giving the Court power to relieve, the corresponding addition to the power.

I am by no means satisfied that the power of the Court to relieve against oppressive and unfair forfeiture is as narrow as contended for by Mr. Davis. *Kilmer* v. *B. C. Orchard Lands*, 10 D.L.R. 172, [1913] A.C. 319, appears to recognise the existence of a much wider power to relieve against penal provisions than has sometimes been supposed; and my brother Britton found a way of affording relief in *Empire Loan and Savings Co.* v. *McRae* (1903), 5 O.L.R. 710.

I am also against the contention of the mortgagee that she is entitled to a bonus of three months' interest. Interest is money

ONT.
S. C.

paid for the use of money. On the mortgagors being relieved from the default, the interest up to date will be paid, and the interest for the future must also be paid. I cannot see why there should also be paid another sum equivalent to the interest which will be normally earned and paid. If, on default of payment for one day, three months' interest must be given, although the loan continues and interest is thereafter earned, this so-called interest is clearly in the nature of a penalty. It is quite a different thing to demand a bonus of interest where the mortgage is paid off and the money must be idle for some time in the mortgagee's hands while seeking reinvestment. There, it may be a reasonable sum allowed for compensation for the premature or unexpected payment and the incidental trouble imposed upon the mortgagee.

In the result, this litigation appears to have been occasioned by the unfounded claims of the mortgagee, and she must bear the costs.

I much regret to find that in these times, when the Legislature has intervened to aid those unfortunately incumbered with a burden of debt, by means of the salutary provisions of the Moratorium Act,* this mortgagee—whose security does not come under the provisions of that Act—should seek to enforce these harsh, I might say unconscionable, provisions of the mortgage security against the debtor; and I am not sorry to find my way clear to afford relief.

It is not inopportune that I should draw the attention of those in authority to the nature of the provisions sometimes found in mortgage securities. At one time, fire insurance policies contained so many provisions which were deemed unjust and oppressive that the Legislature intervened, providing a statutory form; and now no departure from that statutory form is of any validity unless the variation from the statutory provision is printed in conspicuous type and in red ink, nor unless it is held by the Court to be just and reasonable. Mortgagors now append their signatures at the end of a voluminous and compactly printed document, which they do not read, and which they could not understand or apprehend if they did read; and against many of the provisions embodied in this mass of printed matter the Court has no power to relieve. Without being unduly paternal, the

*The Mortgagors and Purchasers Relief Act, 1915, 5 Geo. V. ch. 22 (O.)

ONT.
S. C.

Legislature might well afford to mortgagors a protection analagous to that afforded to policy-holders.

[There was an appeal by the defendant from the judgment of MIDDLETON, J., in favour of the plaintiffs as above; but, after the appeal had been in part heard by a Divisional Court of the Appellate Division, on the 17th December, 1915, a settlement was effected between the parties, and the judgment was varied by the Court, by consent, according to the terms of the settlement.]

K. AND S. AUTO TIRE CO. v. RUTHERFORD.

Ontario Supreme Court, Hodgins, J.A. November 23, 1915.

GUARANTY (§ II—12)—*Increase of liability as no ground for discharge—Limitations and terms of guaranties—Definiteness—Sealing—Alteration of sealed contract by unsealed instrument.*]—Action upon two guaranties signed by the defendant.

Leighton McCarthy, K.C., for plaintiffs.

George Wilkie, for defendant.

HODGINS, J.A.:—The amendment to paragraph 5 of the statement of claim, asked for at the trial, is granted.

The action is upon two guaranties signed by the defendant in favour of the plaintiffs, dated the 7th February, 1914, and the 27th February, 1914, both set out in the pleadings. They are as follows:—

"Whereas the Kelly Tire Company Limited, heretofore carrying on business in Montreal, is indebted to the K. and S. Company in the sum of four thousand dollars, and the MacDonell Tire Company, also carrying on business in Montreal, is indebted to the K. and S. Company in the sum of twenty-eight hundred dollars.

"And whereas a new company is about to be incorporated, under the name of "Motor Tire Limited," or such other name as may be given to it (hereinafter called the new company), for the purpose of taking over the business of the Kelly Tire Company and the MacDonell Tire Company.

"And whereas the K. and S. Company has agreed to supply goods to the new company upon the guaranty of the said Rutherford as hereinafter mentioned.

"Now it is witnessed:—

"That the said Rutherford, in pursuance of the premises and in consideration of the K. and S. Company supplying goods to the new company from time to time to such extent and on such terms of credit as the K. and S. Company shall think fit, doth

ONT.

S. C.

hereby guarantee to the K. and S. Company the payment to it of the said sum of four thousand dollars now owing by the Kelly Tire Company and the sum of twenty-eight hundred dollars now owing by the MacDonell Tire Company, and any interest at the usual bank rates on any extension of the payment of the said sums, and doth also guarantee to the K. and S. company payment for all goods which may be sold by the K. and S. Company to the new company, and the due payment of all paper, notes, or other collateral which may be at any time given to the K. and S. Company or held by it in respect of the said indebtedness or for goods to be supplied as aforesaid upon which the new company shall or may be liable.

"This guaranty shall be a continuing guaranty for the benefit of the K. and S. Company and its assigns to the extent of fifteen thousand dollars in addition to the sums now owing by the Kelly Tire Company and the MacDonell Tire Company as aforesaid, and shall extend to and be security for all and every sum or sums of money to the extent aforesaid which shall or may at any time be due from the new company to the K. and S. Company over and above any moneys which shall be received from the said new company or which may be realised from any securities which the K. and S. Company hold or may hereafter hold in respect of any such indebtedness.

"The K. and S. Company shall have the right at any time to refuse credit to the new company, and to release any collateral or other securities, extend the time for payment to the new company, or to any person liable upon any collateral or other security which the K. and S. Company may at any time hold, or compromise or compound with the new company or with any other person liable as aforesaid without notice and without affecting or discharging the liability of the said Rutherford.

"And the said Rutherford further agrees with the K. and S. Company as and when required to endorse the notes and other paper of the Kelly company, the MacDonell company, or the new company, in respect of the present indebtedness, or to endorse the notes or paper of the new company or of its customers in respect of the new company's future indebtedness to the K. and S. Company, and to guarantee the bankers of the K. and S. Company, on the usual guarantee forms of such bankers, in respect of any

ONT.
S. C.

sums owing as aforesaid to the extent aforesaid as may be from time to time required by the K. and S. Company.

"In witness whereof the said Samuel J. Rutherford has hereunto set his hand and seal."

(Dated the 7th February, 1914, and signed, sealed, and witnessed accordingly.)

"Toronto, Ont., Feb. 27th, 1914.

"K. and S. Auto Tire Co. Ltd., 527 Yonge Street, Toronto.

"Gentlemen: Owing to financial reasons, I understand it is not your intention to have the name of the Kelly Tire Co. Ltd., of Montreal, Quebec, changed, or a new company incorporated. Our agreement of the 7th February will hold good for the Kelly Tire Co. Ltd. just as if you had incorporated a new company.

"Yours truly,

"S. J. Rutherford."

The defendant is in business in Toronto as a manufacturer of glass, and is a brother-in-law of James B. McLaren, who appears in the transactions preceding and following the giving of these guaranties. The MacDonell Tire Company and the Kelly Tire Company were Montreal concerns, neither very prosperous, and McLaren was in the former until the 10th February, 1914, when he became manager of the latter. While engaged in the MacDonell Tire Company, he became desirous of acquiring the Kelly Tire Company and getting the agency for the plaintiffs' goods, and, after some negotiations with Mr. Stanyon, president of the plaintiffs, interested the defendant in the matter.

The arrangement which led up to the signing of the first guaranty was discussed at the Mossop Hotel, in Toronto, in the latter end of December, 1913, when Stanyon, McLaren, and the defendant were present. The defendant was called in by his brother-in-law, and his assent was gained in order to help him. The defendant appears to have been rather easy-going in his methods of business; and, throughout, he has done what he was asked to do without much question or inquiry. He details the conversation in the Mossop Hotel.

Stanyon, according to him, stated that the Kelly Tire Company owed the plaintiffs considerable money, and was in difficulties, and that he, Stanyon, could get control of the stock, but the company itself was in bad odour, and that another name would be advisable. Stanyon also mentioned that he would give the

ONT.

S. C.

agency to the new company, but said nothing about charging therefor. The defendant says that in the discussion about the new company he was asked to take 100 shares, but declined, and that McLaren, who wanted stock in it, suggested taking 100 shares and paying for it as he could. Further, the defendant said that, if he could guarantee so that they could raise money at the bank, he would be pleased to do so.

It appears ultimately to have been agreed that a new company was to be formed to take over the MacDonell Tire Company and the Kelly Tire Company. The plaintiffs were creditors of both, and McLaren was to become manager of the new company, after it absorbed both the other companies. The difficulty was, as usual, money; and the defendant finally became the backer of the project as guarantor to provide this essential for carrying on the new venture. Stanyon was to get control of the Kelly Tire Company, and the assets of that company were to go to the new company to pay up his stock therein; McLaren was to get stock, and was to pay for it later, as he was able.

The project was ultimately carried out in Montreal on the 10th February, 1914, by Stanyon, O'Mara, and McLaren. Before Stanyon went to Montreal, he asked for and obtained the first guaranty. While there, these parties, during the negotiations, found out that to incorporate a new company would be expensive in several ways, and decided to acquire the Kelly Tire Company and let it continue in business.

The plaintiffs, therefore, bought control of that company, which had previously taken over the assets and assumed the liabilities of the MacDonell Tire Company. This was effected by the purchase from one Smith and his associates of 290 shares in the Kelly Tire Company, out of a total of 500 shares. The price of these shares was agreed at $4,250, and the plaintiffs gave twelve notes in favour of Smith for varying amounts, spread over twelve months. These notes were handed over to Smith, and the stock was duly transferred. When this was done, and the directorate of the Kelly Tire Company consisted of Stanyon, O'Mara, McLaren, MacDonell, and a brother of McLaren, the Kelly Tire Company made an agreement with the plaintiffs by which the former should have the exclusive agency in the Province of Quebec for certain goods controlled by the plaintiffs, namely, the Kelly Springfield Tire Company's products, Horsey patches,

ONT.
S. C.

Racine tires, and other articles. The amount to be paid for this exclusive agency was $13,350, which was to be satisfied by the transfer to the plaintiffs of 91 shares of the Kelly Tire Company and the payment of $4,250. This was carried out, but the notes for this latter $4,250, which were originally intended to correspond with those given to Smith, were made out in the form of three notes for $1,466.66 each, payable in four, eight, and twelve months. These notes were made by the Kelly Tire Company in favour of the plaintiffs, and are now in their possession. The 91 shares, when transferred, gave the plaintiffs a holding of 381 shares, which they directed to be divided as follows: 128 shares to the defendant; 253 shares to the plaintiffs; providing, at the same time, that the shares held by the plaintiffs should, in ranking for dividends, be treated as being only 123 shares, so that the plaintiff company and the defendant would be practically on an even footing as to dividends. The defendant says he did not know of this transfer to him, but McLaren knew, and a certificate in favour of Rutherford was received by McLaren and put among the latter's papers in the safe in his office at Montreal.

On the return of the parties to Toronto, an agency contract was sent down to the Kelly Tire Company, which has disappeared. It was never signed, but a document purporting to be a copy of it was produced, and it appears to have been, with slight differences in the prices or discounts, but as an exclusive contract in the Province of Quebec, excepting the city of Hull, acted on by both parties since that date, although not formally signed.

After the return of Stanyon and O'Mara from Montreal, leaving McLaren in charge as managing director and treasurer, the second guaranty was obtained, owing to the project having been changed from the formation of a new company to the carrying on of the old Kelly Tire Company.

The substantial objection, as urged, to the method adopted of acquiring control of both companies and installing McLaren as manager, is, that the cash price paid for the majority stock of the Kelly Tire Company, i. e., $4,250, was in effect added to the liabilities of the Kelly Tire Company. There is little doubt that the arrangement by which the Kelly Tire Company purchased the desired agency for the Springfield tires, etc., for $4,250, was a device by which the plaintiff company would be recouped out

ONT.

S. C.

of the profits of the business for the amount paid to Smith for the majority stock.

But I am unable to see how that fact affects the liability of the defendant.

The Kelly Tire Company legally made itself liable for $4,250 in order to arrive at an arrangement to increase its volume of business; and, when that arrangement was concluded and acted upon, it received value therefor.

The rights of majority shareholders are far-reaching, and not always fair to the minority, but here no shareholder is involved. The complaint made is, that this increase in the liabilities of the Kelly Tire Company was of moment to the guarantor, and that it changed the basis of his contract, and so released him.

This argument overlooks the fact that the basis of the contract was not fixed and definite as in *Holme* v. *Brunskill* (1877), 3 Q.B.D. 495, but was nebulous in the extreme, and contemplated the acquisition of two companies, and the launching of a new venture under the management of McLaren, with money provided on the credit gained by the guaranty. No stipulations were exacted, but the whole matter was left to shape itself in the way finally adopted by the negotiators. The defendant admits that the assets of the Kelly Tire Company were to go to the plaintiffs to pay for the acquisition of the majority stock; and the plan finally settled upon carried this out in effect, and indeed was more favourable to the defendant. There was no idea in what was done of prejudicing him. The $29,000 of stock was divided between the plaintiffs and McLaren, and the latter's share was, at McLaren's request, put in the defendant's name, and the plaintiffs agreed to allow the dividends to go equally upon both portions. The final arrangement put McLaren, his brother, and McDonell in as directors of the Kelly Tire Company; and, Stanyon says, they represented the defendant's interests and controlled the directorate.

I cannot find that there was any deliberate concealment. It seems reasonably clear that it was intended to make the Kelly Tire Company, out of its profits, provide the amount paid for the stock. McLaren, on whose behalf the defendant went into the matter, was involved in the transaction, knew it all, and helped to carry it out. The defendant admits that McLaren was trying, in the original negotiations, to arrange with Stanyon so that he

ONT.
S. C.

could handle in Quebec the tires controlled by the plaintiffs. McLaren was free to communicate with the defendant, so that those representing the plaintiffs had no opportunity to deceive the defendant, even if they had desired to do so. McLaren further admits that nothing was withheld from him, and that he did nothing but what was right to the defendant. Stanyon and O'Mara assert that they did communicate everything to the defendant; and I think the circumstances corroborate their evidence, and that the defendant, on whom I cast no reflection, must have forgotten or paid little attention to details which had McLaren's concurrence. The statement made by Stanyon that the defendant requested them not to write letters to him, as he did not want his connection with them to become public, was not denied by the defendant. The only thing changed which had been at all definitely stated, viz., the formation of a new company, was communicated to the defendant practically at once, and the second guaranty was given to approve the alteration.

The subsequent actions of the defendant bear out the view I have taken as to his position. In June of 1914, he went to Montreal with Stanyon and O'Mara, to assist McLaren to get banking facilities for the Kelly Tire Company. They tried but were not able to make any arrangements. He frequently discussed the finances with Stanyon and O'Mara. He was shewn statements, though not itemised ones, which he did not read over. He gave them in May, pursuant to his guaranty, a $6,000 note, and in July two notes for $5,000 each. It should not be overlooked that on paper the Kelly Tire Company looked prosperous, and that, although Stanyon at the end of December said the company was in difficulties, McLaren was aware, when the company was taken over, that the statement which had been got from independent auditors shewed an apparent surplus, and Stanyon says he acted upon the statement and on Smith's representations in purchasing the stock.

The agency might well have been considered by McLaren to be a profitable one and one worth paying for, because the cancellation of a previous agency contract with the Kelly Tire Company had caused their business to fall off, between August and December, from $3,000 or $4,000 per month to $700 per month.

The conclusion I have reached is, that there never was any clear and definite basis stated on which the guaranties were based,

ONT.

S. C.

but that the idea under which all parties acted was that the plaintiffs and McLaren were to make such arrangements as they could to effectuate the end in view; and that whatever those arrangements necessitated would be acceptable to the defendant; his point of view being that McLaren would act in his interest in the matter. The case must be decided upon the principle illustrated by such cases as *Stewart* v. *McKean* (1855), 10 Ex. 675, *Webster* v. *Petre* (1879), 4 Ex. D. 127, and *Stewart* v. *Young* (1894), 38 Sol. J. 385, where the basis of the contract was indefinite and lacked the precision which would enable a departure from it to be readily ascertained. There is no universal obligation to make disclosure in cases of guaranty: *Davies* v. *London and Provincial Marine Insurance Co.* (1878), 8 Ch. D. 469.

Mr. Wilkie argued that the guaranty of the 27th February, 1914, was an attempted alteration of a contract under seal by an instrument not sealed, and, that being ineffective, the original guaranty remained as expressed, and, owing to the changed conditions, did not bind the defendant.

The answer to that contention is this: if the original guaranty was to operate only on the formation of a new company, then it was competent for the parties to change that condition and to agree to substitute a new state of affairs, which, upon completion, caused it to become effective. A guaranty need not be under seal, and the reason for the rule asserted, if now existent, is absent in cases where the agreement, though under seal, is not one which requires a seal to make it valid.

It was further contended that the later guaranty included only so much of the earlier one as dealt with the indebtedness of the Kelly Tire Company recited therein, viz., $4,000. I do not think this is the correct construction of the letter of the 27th February, 1914. The words "just as if you had incorporated a new company" mean, I take it, to the full extent contemplated in case a new company had been incorporated.

But I do not think the guaranties extend to cover the three notes (forming exhibit 4) given for the acquisition of the exclusive agency. Both in the recital and in the obligation the liability is limited to payment for goods to be supplied, and these notes are not included in that description. The contract of guaranty is *strictissimi juris*, and the defendant is entitled to object to anything not expressly mentioned therein.

ONT.

S. C.

On the whole case, I am of opinion that judgment must be entered for the plaintiffs, with a reference to the Master in Ordinary to take the accounts. In that reference the Master is to have regard to the fact that the two sums of $2,800 and $4,000 are admitted as being due on that date, but the defendant will have the right to shew that since then they have been reduced either by payment or by set-off, or by allowances, if the allowances have been made upon a basis existing prior to or at the date of the guaranty. On the reference, of course, the Master must disregard the Smith notes, which appear to have been improperly charged up to the Kelly Tire Company, as well as the three other notes, exhibit number 4, which notes, as I have said, are not properly chargeable under the guaranty.

The plaintiffs should have their costs up to and including the trial. Further directions and costs of reference will be reserved.

Under the order made by me at the opening of the case, on the motion for directions, the third party is to be bound by the account, while its liability is to be the subject of subsequent trial.

Judgment for plaintiff.

[February 18, 1916. An appeal by the defendant was heard by Meredith, C.J.C.P., and Riddell, Lennox and Masten, JJ. The appeal was dismissed.

OSHAWA LANDS AND INVESTMENTS LTD. v. NEWSOM.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee, and Hodgins, JJ.A. January 10, 1916.

VENDOR AND PURCHASER (§ I E—27)—*Fraud and misrepresentation—Rescission—Third parties—Res judicata.*]—Appeal by the plaintiff company from the judgment of Middleton, J., 21 D.L.R. 838, dismissing an action to recover the purchase price of land sold and ordering a rescission of the contract.

I. F. Hellmuth, K.C., and *H. C. Macdonald*, for appellant company.

N. W. Rowell, K.C., and *E. M. Rowan*, for defendant, respondent.

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

HODGINS, J.A., delivering the judgment of the Court, said that so far as the evidence and exhibits enabled the Court to comprehend the standards recognised and the methods employed in the sales which were the subject of this action, there was no reason to differ from the learned Judge's conclusion. Necessarily, in a case involving the making and the truthfulness

ONT.
S. C.

of representations, the view of the trial Judge was entitled to great weight; and the evidence, when analysed, did not support the position taken by counsel for the appellant company on the argument, nor that put forward in the notice of appeal.

There was no satisfactory evidence that the defendant made independent inquiries and relied solely, or even principally, upon them. The remarks of Lord Halsbury, L.C., in *Aaron's Reefs Limited* v. *Twiss*, [1896] A.C. 273, at p. 284, seemed applicable: "You may use language in such a way as, although in the form of hope and expectation, it may become a representation as to existing facts, and if so, and if it is brought to your knowledge that these facts are false, it is a fraud."

The disposition made by the trial Judge of the action, as between the appellant company, the respondent, and the third parties before the Court, although only on a third party notice, was right and proper: *Strathy* v. *Stephens*, 15 D.L.R. 125, 29 O.L.R. 383. The presence of the third parties was clearly necessary to enable the Court effectually and completely to adjudicate upon the questions involved in the action; for without them the lands could not be released from all claims. They ought, however, to be formally added as defendants, and the pleadings amended, before the order on this appeal is issued

As to Medcalf, the plea of res judicata could not be established. The former action was dismissed as against the present appellant, on the ground that Medcalf had not bought from it, but from Newsom. As against him it was dismissed because his representations were not then proved to be untrue; so that, as to both the appellant company and the respondent, there was no estoppel in the present action, and the principle of res judicata had no application.

The appeal should be dismissed with costs as to the respondent and third parties—the latter to tax one bill only.

Appeal dismissed.

LLOYD v. ROBERTSON.

Ontario Supreme Court, Meredith, C.J.C.P. January 3, 1916.

WILLS (§ I D—38)—*Action to set aside after probate—Want of testamentary capacity—Undue influence—Suspicious circumstances—Senility—Reasonableness of disposition—Onus of proof—Stare decisis—Finding of facts—Adjudication—Binding effect on bene-*

ONT.
S. C.

ficiaries not parties—Costs.]—Action for a declaration that a certain testamentary writing admitted to probate was not the true last will and testament of the deceased, and to set aside the grant of letters probate.

J. C. Makins, K.C., for plaintiff.

J. J. Coughlin, for defendants.

MEREDITH, C.J.C.P.:—There is but one question involved in this action, and that question is entirely one of fact:—Is the will in question the last will of John Lloyd, deceased?

The plaintiff attacks it on the grounds of want of testamentary capacity and undue influence; the defendants pleading that the testator "was of sound mind and testamentary capacity;" that the will was "not obtained by any undue influence;" and that "it is the true last will and testament" of the said "John Lloyd."

Probate of the will was granted to the executors named in it, by the proper Surrogate Court; the proceedings there having been taken in common form, without notice to the plaintiff, who is one of the two sons of the said John Lloyd, they two being his only heirs at law and next of kin him surviving.

The proceedings in the Surrogate Court do not stand in the way of a determination here of the questions involved in this action; it is now so expressly provided by legislation; see the Judicature Act, R.S.O. 1914, ch. 56, sec. 3; and the Judicature Act, R.S.O. 1897, ch. 51, sec. 38.

There is no conflict of testimony as to the circumstances under which the will was made. In regard to all things about which there might be expected to be disagreement, the whole of the testimony comes from those who support the will, and who have some personal interest in supporting it, one very much, another little, and the third the solicitor for him who has much interest in supporting it.

John Lloyd was 74 years of age when the will was made. He had never made a will before, nor ever before expressed any desire or intention to make a will, as far as the evidence shews; but he had, if the plaintiff's testimony be true, expressed the opposite intention, and his satisfaction with the will that, if he made none, the law made for him, giving to each of his sons an equal share of his property.

ONT.

S. C.

John Lloyd died on the 23rd day of May, 1915; his wife had died on the 22nd day of March, 1902, and he had not married again. She had left a will, of which she appointed him, and their two sons, executors. Under this will the plaintiff got much less than his brother of their mother's property.

John Lloyd had long owned a house and lot in Stratford, and there, for many years before giving it to his son Albert, had carried on business as a vendor of groceries and such other things as are usually sold in what are commonly called "corner stores," far enough removed from the central business part of the city or town to create a local trade of more or less extent.

The plaintiff, when an infant, had been adopted by an uncle; and, although they quarrelled and separated, the plaintiff had never lived at home with his father and mother but for short periods. Albert, the other son, with few and short exceptions, had always so lived at home, and had worked for his father, in carrying on the business of the store, until he married and moved to a house of his own, yet however so remaining in his father's service until the business was made over to him, in the year 1910. Albert, from the time he was grown up until that time, was paid wages for his services by his father; not large wages, but enough apparently to enable him to keep himself and his family comfortably, and to acquire some property.

In the year 1910, Albert acquired from his father all the property that his father had except money amounting to about $7,000; the son giving to the father the right to occupy a room at the back of the store; and the son also agreeing to maintain his father "in a manner equivalent to that in which he had lived in the past," and to pay to him $50 a year, during his life.

For some years before his death, the father had lived quite alone in "the room at the back of the store;" the son having a house of his own, not far away. The son's wife sent over a "hot dinner" every day to the father in his room at the back of the store, any other food that he ate he got, and, if cooked, cooked for himself, and his room was attended to by a charwoman once a week at the cost of the son, the charwoman doing the work in the half day she worked for the son cleaning the store. In these uninviting conditions—"morbid" one of the learned coun-

ONT.
S. C.

sel described them—this old man lived, entirely alone in the building at night, until he was taken to the city hospital suffering from mortification in one foot, and pronounced diabetes. The foot was soon after amputated, and about six weeks afterwards the man died in the hospital, from, it is said, diabetic collapse.

It is quite plain to me, upon the whole evidence, including the demeanour of the son Albert in giving his testimony, that he, Albert, had long been entirely convinced that he had, and has, a natural right to all of his father's property, because of having been always with or near his father and serving him for so many years in the business, as I have mentioned; and that his brother was not really entitled to any of it.

An early manifestation of this kind of selfishness took place at their mother's death; she had made a will giving to him the largest share of her property, as he well knew. The plaintiff was with his mother before she died, and has testified that on her death-bed she was troubled about something that had been done, and that she expressed, in a not unnatural and rather pitiful manner, a strong desire to make some change so that each of her sons might share equally her bounty, for, as she said—if his story be true—each was alike her son. The plaintiff, according to his story, went at once to his brother and told him of their mother's wish, and asked if any will had been made. The brother's answer was a denial of any knowledge of a will: a denial expressed thus: "You know as much about it as I do," or words to the like effect; and, although the brother Albert denies part of this story, he does not deny saying that which was untrue regarding any knowledge of a will. So that there is, in his own testimony, that which amounts to an admission that he falsely denied knowledge of the existence of this will, in order that he and his family might have the lion's share of the mother's estate. And it is plain that he is a man who is not scrupulous, when he can gain by being otherwise, though doubtless in the belief that he ought to have it anyway. And it may be added that in one of the plaintiff's letters to his father, written soon after the mother's death and put in as evidence against him, he refers to his mother's dying wishes, which he says he thinks his father and brother should have listened to, even though not in

ONT.

S. C.

black and white. I am inclined to believe the plaintiff's story wholly.

In the year 1910, Albert procured from his father a conveyance to himself of all the father's property, except ready money amounting to some $7,000, as I have already mentioned. The son really retained, and actually paid, the solicitor through whom the legal part of this transaction was effected. The father had no independent advice; and the transaction, self-evidently, would have been a very improvident one if the father had not other means—that is, the $7,000—beyond that which he had had in the property given to the son: whether, under all the circumstances, it was so improvident that it might be set aside, I have not to consider now.

This was the second step in the acquiring by this son of his parents' property, in the comforting belief that he ought to have it because he had stayed at home.

Having regard to the father's age and loneliness, and to his not only natural confidence, but practically necessary trust, in his son, this transaction ought not to have been carried out without competent independent advice first had by the father.

After the mortification had set in and become serious, and long after the diabetic condition had become also a serious ailment, and not long before the man was taken to the hospital, and about a month before his leg was amputated, at the age of 74, the will in question was made.

There is no evidence that he had ever before made a will, or even thought of doing so; the only testimony on the subject is that of the plaintiff, to which I have already referred: testimony which, to say the least of it, accords with his father's conduct, and rather unusual conduct, in not having made any will in all his life up to that time.

Albert admits that the will was made at his suggestion. He said that, in answer to his suggestion about making a will, his father said, "he might as well he guessed." Albert employed the solicitor who drew the will; that solicitor being the solicitor who also drew the transfers of the property in 1910. He said that his father assented to his suggestion that he should—or rather, his request whether he should—telephone for this solicitor.

ONT.
S. C.

The son also admits having discussed, with his father, the will, and that he knew what it was to be, before the solicitor came to get his instructions.

The instructions were given by the father to the solicitor, but in the son's presence. The son was in the store when the solicitor came, and went with him to the father's room; the father being confined to his room by the condition of his foot. The son went out to the store again, but came in again whilst the solicitor was taking his instructions. The solicitor then asked if the father wanted the son in; and the father said emphatically that he did—so the solicitor testified—and the son did remain; taking no part, it is said, in giving instructions, except in supplying his wife's christian name, which the father could not remember.

This, it need hardly be said, was all unwise. If Albert were not pulling the strings, if the instructions would have been the same in his absence, and after reasonable precautions taken to learn the truth as to this, then in his own interests it was unwise; otherwise, in the interest of justice, it was unwise. And, if honest, there was no kind of need for any such methods.

There was a circumstance of some consequence in connection with the taking of these instructions which ought not to be passed over in silence. The solicitor testified that on this occasion John Lloyd asked him if he thought it was wise to make a will. The solicitor's present interpretation of the question is that it had reference to a Judge's understanding the meaning of the will—broadly put, was it worth while making a will when the Judges were not likely to understand it?—and that it was not asked in any fear that the Court might set it aside. But, if that were the man's thought, his mind could not have been able to form a reasonable view of even so simple a matter as that; his will was so simple and plain that even a Judge could hardly stumble over its meaning. If I had to find the man's object, I should have little difficulty in concluding that the question corroborated that which the plaintiff testified to as having been said to him by his father on the same subject; so that what was in the man's mind, more or less beclouded, was whether it would not

ONT.
S. C.

be better to let the will which the law makes stand; equal division among his children of all that was left.

The instructions for the will plainly and admittedly affected only the ready money the man owned, which was all that he or his son Albert or the solicitor thought he owned. Yet the residuary clause disposes expressly of all lands and goods; a thing absolutely unjustified in any shape or form. To contend that, without instructions or authority, the draftsman of a will should, or might, include a general residuary clause, is to contend for something obviously wrong, indeed obviously inexcusable. To do so, and call attention to it, in cases in which it may be necessary, or advisable, is quite another thing. If the man had no other property, then there was no need of it; if he had, it was not his will but the will of the draftsman, to that extent. Under no circumstances can this residuary clause, in so far as it might affect any property except the $7,000, stand. That it might affect other property is obvious. It is not an unknown thing to own, unknown at the moment, property; and in this case it would actually, if the will were valid, carry the property deeded to Albert in 1910, if that deed were invalid by reason of improvidence of the transaction or otherwise. And there is more than that in this fact; it goes to shew that the reading over of the will did not convey to the man's mind its character and effect; that he did not, to this extent at all events, know and approve of its contents.

The will was prepared at the solicitor's office, and, the next day after the instructions were given, it was signed by the testator in the presence of the two witnesses to it—the solicitor and one of the executors. Albert was also there, as usual, in the store; and went in with the witnesses, and attended to his father's foot, so that the executor, who is the partner and father of the physician and surgeon of John Lloyd, might have a professional look at it. After that was done, he went back to the store, the door was closed, and the will executed.

Notwithstanding the man's age and infirmities, including partial deafness, and all the circumstances leading up to the making of the will, and although the one witness directly connected with the transaction was a partner and the father of the man's medical and surgical adviser, and was to be an executor

ONT.
S. C.

of the will, not one step was taken, or one question asked, with a view to testing the man's capacity or whether he really knew and approved of the contents of the will. The solicitor's testimony is that he read the will over and asked Lloyd if it was as he wanted it, and Lloyd said that it was. That is all.

It is to be regretted that that was all. I cannot think that that should be all in such a case. Witnesses should be real witnesses; witnesses to a will, and especially in such a case as this—the man being very old and very sick and alone in the world, except for the presence of his son, by whom the transaction was set in motion, and the witnesses being one who knew all about the contents of the will and the other him who was to carry it into effect—ought to be much more than automatons—or, as vulgarly said, "rubber stamps."

Another circumstance, indicative of Albert's self-righteous selfishness and care for the main chance, occurred just before his father's leg was amputated. Until then he had said nothing to his brother about their father's illness; and then telegraphed only when it was too late for the plaintiff to reach Stratford and see his father before the operation, though he lived in Hamilton; and refused the plaintiff's earnest entreaty to endeavour to have the operation put off until the plaintiff could see his father; and all this though at the man's time of life such an operation—amputation of a gangrenous leg—was likely to prove fatal.

The son Albert testified that up to the time of the making of the will there was nothing irrational in his father to his knowledge; that his father's will was stronger than his; and that he was always a strong, healthy man.

In truth he was a very old and lonely man, suffering from two fatal ailments. I prefer very much the testimony of the father himself, upon that point, to that of this son. On the 7th April, 1902, in his own hand he wrote these words: "Please remember that I have went through a lonely time never to be forgotten, not being well, having a smothering sensation part of the time. I have started to take the South American nervine tonic, Saturday evening first dose after supper. Aunt Maria is keeping house for me yet and are running the store yet same as usual, but do not know how long, do not know what is best to

do, mind is not strong enough to do anything different as yet, and not strong enough bodily for to do any work, have a good appetite, that is one thing that favours me."

These words form part of a letter written by him to his son the plaintiff, just thirteen years before the death of the writer of them.

Dr. English, of much experience in lunacy matters, expressed the opinion that the man was not of sound and capable mind at the time when the will was made.

The young man who was assistant to Albert in the store at the time the will was made, called by the defendants to prove the man's mental capabilities, spoke of him as being a little childish.

A number of witnesses, mainly neighbours, who saw him occasionally, and some of whom made small purchases from him in the store, testified to his capability; though it is obvious that they had no opportunity for testing his mental capacity in "passing the time of day" with him, or making small purchases of tobacco or such things, even though some of them were in the habit of calling him "Daddy," a nick-name not commonly applied to a man vigorous in body and mind.

In these circumstances, as a juror, or judge of fact, I decline to accept the paper writing in question as and for the last will of John Lloyd, deceased, unless the son Albert has proved—that is, upon the whole evidence in the case, has satisfied the onus of proof—that the transaction by which he obtained the will was "a righteous one," as the cases put it, or, as I would put it, that the will is really the will of John Lloyd, deceased.

That the circumstances attending the making of the will shift the onus of proof from the plaintiff to the defendants is very plain. It can make no difference in this respect that this is an action to set aside a will of which probate has been granted in the Surrogate Court, as I have before mentioned. It would be an intolerable state of the law if it depended upon the Court in which the action was pending where the onus of proof rested. The plaintiff, attacking the will as he does, admits *primâ facie* its existence, and so does away with further formal proof of its execution and all that flows from that proof; but the onus shifts

ONT.
S. C.

again under the suspicious circumstances attending the execution of it; and now, in this Court, in an action such as this, just as it would be in the Surrogate Court or in this Court in an action to establish the will, he who obtained the will under those circumstances must satisfy the conscience of the Court that the paper writing in question contains and expresses really John Lloyd's last will: and throughout the trial this case has been so treated on both sides: though the better way of raising these questions might have been in the long-established probate practice of calling for proof of the will in solemn form.

If John Lloyd were incapable of making a will, or, if capable, the will was obtained by undue influence, or if the man did not know and approve of the contents of the will, it is not really his last will, and should be set aside.

The defendants have not satisfied the onus of proof in any one of these respects; and they have very far from satisfied my conscience or judgment that the paper writing in question contains and is the last will of John Lloyd, deceased.

It is not needful to go further; but, if it were, I should have no great difficulty in finding that, though the voice that gave instructions, as to the will, was the voice of John Lloyd, the hands that pulled the strings controlling that voice were the hands of his son Albert.

But it is contended that because Samuel Adams' will was upheld in the Supreme Court of Canada in the case of *Adams* v. *McBeath* (1897), 27 S.C.R. 13, I am bound to uphold John Lloyd's will in this case; overlooking the facts that, however, it may be as to two blades of grass, no two cases of wills, such as these, ever can be quite alike; that each must be determined upon its own facts; and that not only is a finding of fact in one case not binding in any other case in which it does not operate as an estoppel, but that no Judge or juror has a right to shirk his duty to find the facts in the case he has to try, because some other Judge or juror had made a finding in another case under which he might like to shelter himself. It is labour, and unpleasant labour, to find all the material facts in this case upon the evidence adduced; but that I have to do, and that the Judges concerned in the *Adams* case had not to do.

ONT.
S. C.

It is all very well for Judges to lay down rules for their own guidance in dealing with questions of fact; rules generally indicating only the course which every rational man would pursue in seeking the truth of the matter, and to that extent harmless, if also helpless; that is, helpless as the information is that the sun shines by day and the moon by night—subject, so far as some mortals are concerned, to exceptions: it is all very well, but, after all, the real question in such a case as this is: has the will in question been proved to be really the will of the person appearing in it to be the testator?

Every one of ordinary common sense will subscribe to the grounds upon which the *Adams* will case was decided: that, in order to set aside a will on the ground of undue influence, it is not sufficient to shew circumstances consistent with the exercise of undue influence, provided they are also consistent with due influence. So, too, it might be said, with equal solemnity, that where the evidence is no more than consistent with a due execution of the will and equally consistent with undue execution, due execution is not well proved.

But that decides nothing conclusive until it is determined upon whom the onus of proof lies. In that case a majority of the Court acted as if it rested on the appellant, who opposed the will. In this case I hold that unquestionably it rests on the defendants, who support the will; and, giving full effect to Lord Cranworth's dictum, which the majority of the Supreme Court of Canada in the *Adams* will case adopted and attempted to act upon, my finding must be against the defendants.

Sedgewick, J., in expressing his views in the *Adams* will case, said (p. 21): "Stress was laid upon the fact that McBeath, the beneficiary, was the person who gave instructions to the solicitor who drew up the will, and it was contended that in consequence the full burden was placed upon the beneficiary to prove that that transaction was a proper one. I am not disposed to question that propostion. It has, in my view, however, been shewn that the disposition that the testator made of his property was a reasonable and proper one, a disposition which might have been made, and which I believe was made, without any improper influences operating in favour of the beneficiary."

ONT.
S. C.

So that in that case the course which I take in this case was admitted to be the proper one; it could not be thought otherwise by any one at all familiar with the law as expressed and acted upon in such cases as *Fulton* v. *Andrew* (1875), L.R. 7 H.L. 448, *Tyrrell* v. *Painton*, [1894] P. 151, and *Wilson* v. *Bassil*, [1903] P. 239.

But the learned Judge, from whose opinion I have quoted, seems to have thought that the onus of proof is a much wider and different one from that which I hold it to be; that it includes shewing that the "disposition which the testator has made of his property" in the will "is a reasonable and proper one."

The disposition which a testator makes in his will may afford evidence for or against the validity of the will, sometimes very strong evidence, but always evidence that must be considered with great care; for no person is required to make a will such as others may think reasonable or proper; every one capable of making a will can be as unreasonable as he or she pleases. For any juror, Judge or Court, to act with any degree of confidence upon the little, shallow, and narrow knowledge of all the circumstances affecting the mind of any one in making his or her will, obtained in a short trial, circumstances sometimes extending over a long lifetime and sometimes secret circumstances, to form a confident judgment as to what dispositions of the property willed ought to have been, would be foolhardy, and pretty sure to afford additional proof of the truth of the saying that a little knowledge may be a very dangerous thing.

So, too, it is difficult for me to understand why, in the *Adams* will case, if the onus of proof rested on the beneficiary because of the manner in which the will was obtained, the dictum of Lord Cranworth, before mentioned, was not applied to him instead of to those who were opposing the will. In the case with which Lord Cranworth was dealing — *Boyse* v. *Rossborough* (1856), 6 H.L.C. 2—the onus of proof was upon those opposing the will. It had not been procured by the beneficiary—had been prepared by the testator's solicitor, and was executed in the absence of the beneficiary and in the presence of the testator's medical adviser and legal adviser—his family physician and solicitor. It is a poor rule that does not work both ways.

ONT.

S. C.

The "righteousness" of the dispositions made in the will in question has been the main ground of the argument made in support of it; but, if that righteousness is more accurately described as only the self-righteousness of the son Albert, the argument loses force. It is asked what else should the father have done but have given the bulk of his property to the son who was near him, and little to the son who roamed. Little to the son who complained somewhat bitterly to his father and mother when they did not help him and his wife in their want, though they had given $500 to his brother upon his marrying; and who successfully opposed his brother, and possibly his father, in an attempt to pay some of the debts of the father out of the money coming to this son under his mother's will.

But, as I have already said, this is dangerous ground—ground upon which conceit alone can make one feel that he has a firm footing. And, besides that, we all know how prodigal sons are often treated; that the ninety and nine are sometimes left when the lost one is sought for, even though sometimes a very black sheep; help given to those who need it, not to those without need; that even an Esau's first-born right could be taken from him only by deception.

And, besides all this, the plaintiff seems to be a man of whom his father had no more reason for being ashamed than he had of his son Albert; not a word was said against his moral and business standing in the community; and that his mother was not turned against him, her letter in answer to his request for money, as well as her death-bed desire to put her two sons on an equal footing, shews. Nor did the father remain resentful, if he ever were resentful, as his affectionate letter, written after his wife's death, to the plaintiff, shews; the letter from which I have quoted, and a letter which contains these words also: "do not see my way clear as yet to come down; would like nothing better than to come to Hamilton for a week or two, as I think it would do me a great deal of good;" and "I give my love to all; I give my love to you and Maggie; this letter is not from mother, but don't I wish it was, but from your father, John Lloyd."

So too in regard to the contest over the accounts rejected in

ONT.
S. C.

administering the mother's estate; in the hours spent by the plaintiff with his father after the operation, the same fatherly, affectionate spirit prevailed; why should there be resentment when the plaintiff was seeking and got only the whole of the lesser share of his mother's estate of which it was sought unjustly to deprive him of part; as the Surrogate Court Judge's judgment shews?

That there was resentment, and more than resentment, on the part of the brother Albert, the circumstances attending their mother's will and death, and the circumstances attending the operation, as well as the testimony of the plaintiff, all make plain; a resentment continuing until the present day and evidenced on the day of their father's funeral in the refusal to have his brother at his house on the paltry excuse that they were to have only a cold dinner, an excuse rebuked humanely and not unfilially in the spontaneous words of his daughter: "But surely, father, we shall have enough for uncle Frank too,' or words to that effect.

I see no reason why the father might not have desired very reasonably to put his two sons on an equal footing in regard to such of his property as his son Albert had not already absorbed. But I place no great weight upon this consideration. No two men are quite alike; and every man may do as he wills with his own; so, even if it were possible to know all that a testator knew, it would yet be unwise to imagine that one knew what he would do in such circumstances.

The onus of proof is upon the son Albert; he has not satisfied it; he has not satisfied the conscience of this Court that the paper writing in question is and contains in truth the last will of John Lloyd, deceased; and that is enough for the determination of the case adversely to those parties to this action who support the will.

And, if it were necessary to go further, my finding upon the whole evidence would be: that it is not the last will of John Lloyd; that, although it was the voice of John Lloyd that gave the instructions, and spoke at the execution of the will, it was the hands of his son Albert that pulled the strings, as I have already said—that it is in truth his will.

ONT.

S. C.

It was said, and rightly said, that the last will of one who is dead should be inviolable. Assuredly it should, whatever juror, Judge or Court, might think of the wisdom or unwisdom of its provisions; but that makes it only the more essential that it shall be proved to be a last will before being accorded that inviolability; and not only is that so, but every heir at law has a right to proof that he has been deprived rightly of the property birthright which the law gives him, by reason of heirship, unless cut off from it by the freewill of him who owns it. And, when one of two brothers obtains from their father, a feeble man and old —infirm and old in mind and body and partially deaf—with no one but the one son to confide in, and dependent much upon—obtains from such a father a large share of his brother's birthright, by deed as well as will, the proof required should be convincing, and the more so because the will, if really the will of the father, could so easily have been proved to be his will. However it may have been morally, it was not in law needful that the brother should have been informed of the will and given an opportunity to inquire as to its validity of his father, in his lifetime; but, at the least, some independent person should have made the inquiry and have learned the truth, the truth which a mere reading over of the will, with the son obtaining it no further away than the other side of the door when read over and signed, might be far from revealing. Instead of that, the absent brother was, intentionally I find, kept in ignorance of his father's dangerous illness until too late to see him before the operation—an operation often fatal at his age—took place. Nor was any kind of inquiry made, even by the solicitor, with a view to learning the condition of the mind of the man or whether the will was really his own will.

It must be adjudged, accordingly, that the will in question, in so far as it confers any benefit upon any party to this action, is not the will of John Lloyd, deceased.

By some oversight, none of the beneficiaries, except the two sons, is a party to this action; indeed, the son Albert was not made a party to it until the trial of it. No judgment or order can therefore be made affecting the rights of the other beneficiaries. The result is, that the will stands as to all their rights

ONT.
S. C.

under it, and there is, and may be adjudged to be, an intestacy as to the rest of the estate.

Under ordinary circumstances, the plaintiff would have been awarded his costs from those who supported the will and failed; but, as the son Albert was not made a party until the trial, and then of course only with his consent, he ought not to be ordered to pay any costs but those of the trial.

Executors supporting a will, and failing, should ordinarily pay costs personally and look to those who have indemnified them for reimbursement, if indemnified as they should be; but, whether indemnified or not, should not have costs out of the estate ordinarily. But this case is not an ordinary one, because of the failure to bring all proper parties before the Court, with the result that the attack upon the whole will fails in part.

Under all the circumstances of the case, the proper disposition as to costs is that the defendant Albert Lloyd pay to the plaintiff the costs of the day of the trial, fixed at $100, and that no other order as to costs, in any respect, be made; it may be ordered accordingly.

Proceedings upon my findings and order are to be stayed for one month, so that the parties may have time to consider the question of appealing against them before they are acted upon.

Will annulled.

Appeal by the defendants from the above judgment.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

J. J. Coughlin, for the appellants.

Glyn Osler, for the plaintiff, respondent.

THE COURT directed that all proper parties should be added and a new trial had; the order for a new trial not to issue for one month; in the meantime counsel may make such arrangements as they deem best, and, if necessary, speak to the Court; costs reserved.

Re SOVEREIGN BANK OF CANADA; NEWMAN'S CASE.

Ontario Supreme Court, Boyd, C. November 9, 1915.

DISCOVERY AND INSPECTION (§ IV—31)—*Inquisitorial power of liquidator—Winding-up bank—Right of persons charged as contributories to examine former bank manager.*]—Appeal by persons whom the liquidator of the bank sought to make contributories

ONT.

S. C.

in the winding-up of the bank, from an order of J. A. C. Cameron, Official Referee, in the winding-up, refusing to allow the appellants to examine for discovery one formerly general manager of the bank.

W. R. Smyth, K.C., for appellants.

M. L. Gordon, for liquidator, respondent.

BOYD, C.:—Section 117 of the Winding-up Act, R.S.C. 1906, ch. 144, is copied from English legislation, and confers a special power, of inquisitorial character, intended to be used by the liquidator for his own guidance in the conduct of the liquidation. It has been spoken of by the English Judges as the means of conducting a preliminary inquiry for the information of the liquidator alone; and that it is a compulsory proceeding for the purpose, not of taking evidence, but of getting information. It is also intimated that it is not to be used for the purpose of establishing a claim adverse to the liquidator, which would be contrary to its spirit and object: *In re Norwich Equitable Fire Insurance Co.* (1884), 27 Ch. D. 515, 521, 522.

The Legislature has provided, for contestants who litigate in the winding-up as to their rights and claims, that the procedure shall be as in ordinary civil proceedings in the Courts: sec. 108; and that is a clear intimation that such a litigant is not also to have and be allowed to exercise the special and extraordinary powers of sec. 117: *In re Imperial Continental Water Corporation* (1886), 33 Ch. D. 314. It is meant that the private litigant shall not, for the purpose of aiding his claim in the winding-up, have greater powers of investigation or a greater scope of discovery than he would have if he were proceeding in the Courts; he is not to be in a better position because of the winding-up.

Such cases, considered by themselves, would justify the conclusion of the Official Referee acting for the Court. But there is another line of cases which shew that in given circumstances there may be some defined right of discovery open to a contributory. They are referred to by Jessel, M.R., in *Whitworth's Case* (1881), 19 Ch. D. 118, 120. The liquidator here refuses to enter upon the examination proposed by the contesting contributories. It is for the Referee then to determine whether the right to examine should be entrusted to the applicants, to any extent, or with what limitations. As said in the case cited, he knows more about the condition and facts of the case than the appellate Judge. I

ONT.
S. C.

think, therefore, that he should consider the application in the view that the contributories may have a claim to invoke the aid of sec. 117: see *Re Penysflog Mining Co.* (1874), 30 L.T.R. 861.

The contributories seek to attack a transfer to the International Assets Company and an acquisition of a large number of shares in the bank by that company, as illegal, and to have the three shareholders who turned over their shares to the assets company placed on the list as contributories. It was said before me that this Assets company is able to meet all the calls made. If this is established as a preliminary, it may obviate or may postpone further proceedings now; or it may be made to appear to the Official Referee that the line of investigation proposed is unnecessary and vexatious, as was suggested before me. But these, and it may be other, aspects of the application, should be considered and dealt with by him.

No costs of appeal. *Case remitted.*

EXCELSIOR MINING CO. v. LOCHEAD.

Ontario Supreme Court, Boyd, C. December 13, 1915.

TAXES (§ III F—145)—*Tax sale—Return—Unoccupied land—Sufficiency of advertising—Adequacy of price—Notice to redeem by non-resident owner—Failure to state address—Statutory period for attacking sale.*]—Action to set aside a sale of land for taxes.

A. B. Cunningham, for plaintiffs.

J. L. Whiting, K.C., for defendant.

BOYD, C.:—The validity of the tax sale and deed is to be considered as under the Assessment Act of 1904 (4 Edw. VII. ch. 23, Ontario). The plaintiffs purchased the surface rights in lot No. 10 in the 9th concession of Loughborough from one McNaughton, in February, 1909. The mining rights were acquired (probably) later, in 1910, from one Mace, through the co-operation of one Williams, who was assessed for the land in 1909. The taxes were not paid, and this default occasioned the sale now impeached.

Some mining work for mica had been done on the land, but these operations ceased in 1910. It is a wild, rough country, difficult of access, and the particular lot (200 acres) lay vacant, unfenced and unoccupied.

There is strange confusion in the evidence and in the papers of the municipal officers as to the buildings. There were build-

ONT.
S. C.

ings in connection with the mining camp: boarding-house, stable, sheds, and store; and the assessment is $250 for land and $250 for buildings, and this is carried on to 1912 in some of the papers. But I have no doubt that the whole resulted from a mistaken conception of the site of the buildings from a distant inspection by the Assessors and Collectors. None of these seems to have been on the lot, and the man most conversant with the premises, who has known the place for a number of years, and has lived all his life within two miles of it, on Kronk Lake, says that the buildings were not on this lot. One of the final documents preliminary to the sale, i.e., the Clerk's return under the corporate seal to the Treasurer, dated the 20th July, 1912, of lands liable to be sold, contains this lot as one "not occupied," and that was based on the Assessor's return under oath to the Clerk. This return is made of evidential force by the statute (sec. 122); and, if not displaced by superior evidence, forms a sufficient basis for the sale of the lands. And none such has been offered by the plaintiff.

The point is, however, taken that the officers were acting on obsolete forms, applicable under the superseded law in R.S.O. 1887, ch. 193, sec. 141; and that appears in the form of an official letter from the Treasurer to the Clerk, transmitting the list of lands liable to be sold (exhibit 19).

The one point of difference between the earlier and later statutes is, that the Act of 1904 requires the Assessor to ascertain whether any of the lots are "built upon," as well as "occupied" or "incorrectly described;" and, according to his observation, he is to enter in the proper columns, "occupied or built upon and parties notified," or "not occupied," or "incorrectly described."

The return in this case describes the lot as "not occupied;" and the plaintiffs' contention is, that the lot should have been described as "built upon," and that notice should have been sent to the owners, and the item for taxes of 1909 included in the current tax-bill for 1912. This claim rests upon the question of fact whether the lands were "built upon," and I think the weight of evidence is against that contention. The only thing approaching a structure was an old derrick attached to

ONT.
S. C.

the soil, formerly used in mining; but, after the cessation of work, the derrick remained as a mere derelict, worth less than $5. It was a fixture, no doubt, but it did not amount to a building.

Another objection is as to the advertising and time of sale. The Treasurer advertised first in the Ontario Gazette on the 10th August, and three times after that, i.e., four weeks in all: and the sale was advertised in the Kingston "Standard" for 13 weeks beginning the 8th August. The sale was on the 7th November, 1912. According to the statute (sec. 144), the day of the sale "shall be more than 91 days after the first publication of the list in the Ontario Gazette." Counting from the 8th August, the 91 days would be up on the 9th November, a Saturday; and to be strictly regular the earliest day would have been Monday the 11th November. Counting from the first publication in the "Standard" on the 8th August, the 91 days would end on the 7th November, and that would have been sufficient under the Act of 1887, by which the 91 days are after the first publication of the list (sec. 166). The substantial part of the statute, calling for an advertisement for 13 weeks (91 days), was complied with, but there was an error in not allowing for the delay in publishing in the Gazette, which appears only on Saturday.

The next objection is that the sale was carried on in an unfair and unconscionable manner, whereby lands worth at least $1,000 were sold for $18.62. The discrepancy is not really so great—as farming lands the lot would bring $200 or $300—in a mining aspect the price would be a guess. But, granting a considerable discrepancy between value and sale price, what follows? In tax sales the Court does not interfere on the ground of inadequacy of price: *Henry* v. *Burness* (1860), 8 Gr. 345, 350; *Borell* v. *Dann* (1843), 2 Hare 440, at pp. 450, 451.

Apart from values, I do not find it proved that the sale was other than fairly and openly conducted. The evidence is, that there was an audience of 12 or 15 people, and that it was conducted in the usual way, and to the mind and eye of the Treasurer there was no evidence of collusion. No doubt, the acquisition of the whole lot for the taxes was what is called a "bon-

anza" for the purchaser; but that is what the persons who frequent these forced sales go for. The purchaser knew no more of the lot than did the Treasurer—the former bought at a venture —and the law does not cast any duty on the officer who sells before the sale to inquire into or form any opinion of the value of the land (sec. 142). This statutory provision displaces what was said by Spragge, V.-C., in *Henry* v. *Burness*, 8 Gr. at p. 357. See also *per* Lennox, J., in *Errikkila* v. *McGovern* (1912), 9 D.L.R. 873, 27 O.L.R. 498, at p. 501.

Earlier Canadian decisions, based on the theory that a duty lay upon the Treasurer to inform himself as to the value and condition of the land before selling, led to the expression of doubt as to whether the sale of a whole lot for a small amount of taxes could be accounted a fair sale. Hence we find Esten, V.-C., saying in *Schofield* v. *Dickenson* (1863), 10 Gr. 226, 229: "It may . . . be questioned whether the Sheriff would, in any case, be justified in allowing the whole lot or piece of land, charged with the taxes, to go for a very small part of the value in the first instance without an effort, by reserving the lot, or adjourning the sale, to protect the interests of the owner; or in allowing a sale to proceed in the face of a determination manifested by the audience to act in a manner inconsistent with a proper sale, as where they evince a fixed resolution to purchase none but whole lots, especially where it arises in some degree from uncertainty as to the value, it being the duty of the Sheriff, as it appears, to make himself acquainted with the value of the property."

The same idea appears in the judgment of Patterson, J.A., in *Donovan* v. *Hogan* (1888), 15 A.R. 432, 447, where he says: "It is a misnomer to speak of a fair sale when neither the man who sells nor the man who buys knows anything of the article sold." And again (also at p. 447): "What is aimed at is that these [tax] sales shall be conducted as ordinary business transactions are where property is sold by auction with a view to obtain its fair market value."

The test to be applied is not that of obtaining the fair market value as upon an ordinary business transaction, but how much may be expected upon an enforced sale by a public official. The

ONT.
S. C.

statute does not speak of a fair sale, but of a "sale fairly and properly conducted." It is so conducted when it has been properly advertised, when a sufficient number of bidders attend to satisfy the judgment of the officer, reasonably exercised, when every one has an equal chance, and when, there being no evidence of collusion or pre-concerted action in the audience, the highest bid or the only bid prevails: *Eagleton* v. *East India Co.* (1802), 2 B. & P. 55; *Metropolitan Street R. Co.* v. *Walsh* (1906), 94 S.W. Repr. 860. 'None such has been imputed in this case—the whole *gravamen* of the attack is an inadequate price. And I find no case in which that has been *per se* in a tax sale held to be sufficient to nullify the sale. See *per* Lord Eldon in *White* v. *Damon* (1802), 7 Ves. 30, at p. 35. Different considerations apply when the land sold is well known and when it is not easily accessible. These things are to be regarded by the Treasurer in selling.

The Collector's return in April, 1910, shews this lot assessed to A. J. Williams and classed as "vacant land" in annexed affidavit and returned as in arrear for the taxes of 1909, with "no property to distrain" (sec. 113).

The Treasurer's list of lands, dated the 1st February, 1912, shews the lot as liable to be sold in 1912.

The Clerk's return thereto I have referred to as shewing this lot "not occupied." Thereupon the Warden issued his warrant, 5th August, 1912, directing the sale, and the lot was sold on the 7th November to the defendant.

On the 10th November, 1913, a notice was sent by the Treasurer in a letter addressed to "Excelsior Mica Mining Company Limited, Toronto," which was returned marked "not found—not asked for." This was a notice that the land, if not redeemed in a month, would be conveyed to the purchaser (sec. 165). The Treasurer searched the register and got such address of the owner as he could therefrom, and sent the notice aforesaid, and also one to a registered incumbrancer, which was also returned. It is not shewn that the plaintiffs had given any notice of the correct address of the corporation, or that the municipal authorities had or knew of any other local designation beyond "Toronto." The sale was completed without any notice coming home

to the plaintiffs as to the state of the arrears and the impending tax-deed.

The machinery of taxation moves; and if a non-resident owner does not avail himself of the simple means afforded by the statute of lodging his proper address where all notices may be sent by the municipal officers, he can only blame himself if disaster ensues. The municipality cannot protect an owner more than he cares be protect himself in this regard; and indeed legislation has developed to validate the outcome of taxation in tax sales as against a dilatory or negligent land-owner. And this brings up the defence pleaded under secs. 172 and 173.

The sale was on the 7th November, 1912; the deed was dated the 11th December, 1913; and the writ was issued on the 12th October, 1915. More than two years had elapsed after the sale, and less than two years after the deed, before the transaction was questioned in the Court.

Section 172 gives a conditional bar to any litigation to set aside the deed if the taxes have been three years in arrear (as here), and if the land is not redeemed, and provided that the sale was openly and fairly conducted. Granted these conditions, the sale and the official deed shall be final and binding upon the former owner—and this, according to the sweeping language introduced by the legislation of 1904, "notwithstanding any neglect, omission or error of the municipality or any agent or officer thereof in respect of imposing or levying the said taxes or in any proceedings subsequent thereto." The section, 172, repeats the earlier language, that the intent of the Act is that the owner shall be required to pay the taxes within three years after they are in arrear, and in default (using a new iteration of the result) "the right to bring an action to set aside the said deed or to recover the said land shall be barred." (*Cf.* sec. 172 with R.S.O. 1897, ch. 224, sec. 308.)

All the defects pointed out or proved in this case fall under one or the other head of neglect, error, or omission, whether it be in respect of imposing the tax or in any subsequent proceeding prior to the deed. These words cure defects which prevailed in earlier decisions, and indicate the intention of the Legislature to give more stability to tax sale deeds. This has been touched

ONT.
S. C.

upon by Meredith, C.J., in *Blakey* v. *Smith* (1910), 20 O.L.R. 279, at p. 283.

Donovan v. *Hogan*, 15 A.R. 432 (1888), expounds the original form of sec. 173. It stands substantially thus in the R.S.O. 1887: "Whenever lands are sold for arrears of taxes and the Treasurer has given a deed for the same, such deed shall be to all intents and purposes valid and binding . . . if the same has not been questioned . . . by some person interested . . . within two years from the time of sale:" ch. 193, sec. 189. That decision was, that the two years counted from the giving of the deed, and not from the time of the sale; or, in other words, that *sale* meant conveyance or *deed*. Before this decision, I had held the contrary in several cases, thinking that such a result savoured more of legislation than of exposition: *Dalziel* v. *Mallory* (1888), 17 O.R. 80, 94.

In 1904, the section was amended, and reads: "Wherever land is sold for taxes and a tax deed thereof has been executed, *the sale and the tax deeds* shall be valid and binding . . . unless questioned before some Court of competent jurisdiction within two years from the time of sale." This plain language seems to render it impossible for a Court of construction to say that the final word "sale" means deed or conveyance—renders it impossible to say that the last use of "sale" is different from the first use of it in the section, where the *sale* is contrasted with and set down as distinct from the tax *deed*. Emphasis is thereby laid on the importance of the sale in measuring the lapse of time as against the view of the Court of Appeal that emphasis was to be laid on the deed. The same emphasis was laid on the sale in the original of sec. 172 before the amendment of both sections in 1904.

The Privy Council regards the certificate of sale as the emphatic point under which the purchaser becomes the effective owner upon failure to redeem within the statutory period, and as a consequence he is absolutely entitled to a conveyance of the land thereafter: *McConnell* v. *Beatty*, [1908] A.C. 82.

As was pointed out also by Mr. Whiting, the Privy Council, as to curative Acts respecting sales of lands for taxes, lays it down that the statute should, when the words permit, be con-

ONT.
S. C.

strued so as to effect that purpose and attain that object—which is not exactly the trend of prior provincial decisions: *Toronto Corporation* v. *Russell*, [1908] A.C. 493, 501. The rule in the *Russell* case on this head has been applied in *Cartwright* v. *City of Toronto* (1913), 13 D.L.R. 604, 29 O.L.R. 73, 76, affirmed (1914), 20 D.L.R. 189, 50 S.C.R. 215; and see judgment of Duff, J., in *Temple* v. *North Vancouver* (1914), 6 W.W.R. 70, at p. 103.

In this case, where the sale was openly and fairly conducted, with the arrearage of taxes for three years, and the land was not redeemed within a year from the sale, such sale was final and binding, as was the official deed afterwards granted. Under sec. 173 the bar is absolute against recovering, as I read the law, in regard to sale and deed, within two years from the date of the sale. My conclusion is that both sections apply for the protection of the purchaser against the plaintiffs.

The effect of the legislative amendment of sec. 173 was before my brother Falconbridge in *Burrows* v. *Campbell* (November, 1912), 6 D.L.R. 877, 4 O.W.N. 249, in whose opinion I concur, that the effect of the change was to remove the foundation of *Donovan* v. *Hogan*. My brother Riddell, in *Sutherland* v. *Sutherland*, 4 D.L.R. 591, 3 O.W.N. 1368, declined to consider the effect of the amended section, and thought it should be left to an appellate Court to consider the case in appeal. But it seems to me that the change in the law leaves it open for the Judge of first instance to decide for himself what it means.

The matter came before the Appellate Division in Errikkila v. *McGovern*, 9 D.L.R. 873, 27 O.L.R. 498, upon appeal from Lennox, J., but only incidentally, as the decision rested on the interpretation of a private validating Act. Lennox, J., was of opinion that "sale" in the private Act should be construed by the light of *Donovan* v. *Hogan*. Riddell, J., quotes the recent cases I have cited, and thinks it inexpedient to say more than to point out the divergent opinions. Such appears to be the state of judicial opinion on the statute in question. I do not regard *Donovan* v. *Hogan* as binding upon me, owing to the change in the statute. And the way is clear, in my opinion, to decide against the plaintiffs. *Action dismissed with costs.*

ONT.

S. C.

LINSTEAD v. TOWNSHIP OF WHITCHURCH.

Ontario Supreme Court, Masten, J. November 25, 1915.

HIGHWAYS (§ IV A1—120)—*Non-repair of bridge forming part of highway—Collapse under weight of traction engine—Liability of municipality for death caused to person on engine—Non-compliance with Traction Engine Act—Notice or knowledge of defects.*]—Action by a widow, under the Fatal Accidents Act, to recover damages for the death of her son by reason of the defendants' breach of duty in failing to keep in repair a bridge forming part of a highway in the township of Whitchurch.

T. Herbert Lennox, K.C., for plaintiff.

W. M. Douglas, K.C., and *James McCullough*, for defendants.

MASTEN, J.:—This is an action brought by Sarah Jane Linstead against the Corporation of the Township of Whitchurch to recover damages for alleged breach of duty on the part of the defendants in failing to maintain in proper repair a bridge on the highway known as the Bogarton road, situate in the defendant township.

The plaintiff, who is a widow, alleges that such want of repair resulted in the death of her son, Walter Linstead; and, no personal representative having been appointed, she brings this action on behalf of herself as the sole beneficiary of the said Walter Linstead, under the statute.

The defendant corporation set up two main defences:—

(1) That the bridge in question was, shortly before the accident, regularly and thoroughly inspected on behalf of the defendants and reported sound, and that the defendants had no notice of any want of repair in connection with the said bridge.

(2) That the deceased Walter Linstead, when he met his death, was crossing the bridge in question on a traction engine, and that it was the duty of the deceased, before attempting so to cross the bridge, to lay down planks as required by the statute known as "The Traction Engine Act," 2 Geo. V. ch. 53, sec. 5; that, as the deceased failed to lay down planks, he was illegally on the bridge, and the plaintiff cannot recover.

The facts are shortly as follows:—

On the 1st August, 1913, the deceased Walter Linstead had been in the employ of George Drury at his farm in Whitchurch, where Lemuel A. Pipher had, during the same day, been operating

ONT.

S. C.

his steam-thresher. Threshing was concluded late in the afternoon, and at about 6 o'clock in the evening Pipher, with his traction engine and thresher attached, left George Drury's farm on his way to his next assignment. It chanced that his route lay in the direction of the home of the deceased Walter Linstead, and the latter, therefore, mounted the front platform of the tractor, and at the time when the accident occurred was actually engaged as a volunteer in steering it, while Pipher stood beside him regulating the speed of the tractor. At the time of the accident the tractor is said to have been travelling at about the rate of one mile per hour. No criticism is made by the defendants of the rate of speed of the motor, nor of the method of steering.

Shortly after leaving Drury's farm, the tractor entered the highway, and, travelling in a westerly direction, it attempted to cross the bridge where the accident occurred. It had safely crossed this bridge on the morning of the same day when coming to Drury's farm, and at the time when the bridge collapsed it had, after passing wholly upon the bridge, partly crossed to the westerly side. The front wheels were over on the westerly bank about five and a half feet, and the rear wheels were still on the bridge, about two and a half feet from the westerly abutment. At this juncture the bridge suddenly gave way. The tractor was precipitated some 10 or 11 feet to the bottom of the shallow stream over which the bridge passed. The steam-couplings of the engine are said to have broken, and Walter Linstead was found dead, probably from being scalded by the escaping steam.

The bridge in question was a wooden structure, which had been built from 17 to 20 years. The abutments consisted of square cedar timber, 8 by 8. The support of the floor of the bridge consisted of 5 cedar stringers, 6 by 8. These stringers rested on the abutments into which they were partly set. Across these stringers were laid planks 12 feet long and from 4 to 5 inches in thickness. The span of the bridge was about 10 feet, and the depth from the bridge down to the stream below, from 9 to 11 feet. There were three or four inches of dirt on top of the planks forming the surface of the bridge. The top surface of the bridge so covered with dirt was from 2½ to 3 inches lower than the travelled surface of the highway east and west of the bridge. The stringers broke at the abutments at both the east and west side of the bridge, and the whole bridge took a drop to the bottom

ONT.
S. C.

of the stream below. A subsequent examination of the stringers of the bridge shewed that the stringers were more or less rotted at both ends, and that they were all in substantially the same condition.

In June, 1911, the bridge was examined by George Drury, who was then pathmaster over the Bogarton road, including this bridge. In that year he made certain repairs to it by putting in a plank on the west side. He examined the bridge at or about that time along with his assistant, one John Williamson, and, through Williamson, sent a notification to Samuel Foote, the then Reeve of the township, which he says made it very clear that the bridge was unsafe, and that it ought to have attention. Drury says that in order to fix the bridge he would have been compelled to replace it with a new one. He is confirmed as to its condition by John Williamson, who recollects inspecting the bridge along with Drury, and says that he told Foote that those two bridges (which included the one in question) needed fixing; and Foote, the Reeve, said he would look after it. Albert Flintoft, who lives near the bridge, examined it carefully in 1911, when he was fishing, as he noticed that it shook when people were passing over it. At that time he examined two or three of the stringers at both ends and found them rotten, and he afterwards told Howlett, the pathmaster who succeeded Drury, about this and another bridge which were unsafe.

For the defence, Thomas J. Spalding says that in the month of May, 1913, prior to this accident, he and one Baker were on a tour of inspection of bridges of the township, and they examined the bridge in question and got under it for that purpose, and found it, so far as their examination proceeded, to be in good condition.

For convenience, I make certain findings of fact supplementing the above narrative.

The engine in question did not exceed 10 tons in weight; its actual weight, according to the evidence, was 17,075 pounds. The engine was carefully and properly driven upon and over the bridge so far as it went. There was no breach by the persons in charge of the engine of any duty incumbent on them in regard to the driving of the engine over the bridge, except a breach of the duty imposed by the statute requiring the placing of planks upon the bridge before running the engine over it.

ONT.

S. C.

I find that the bridge was in a condition of disrepair, the stringers having rotted to a considerable extent at both ends, and that the bridge in consequence was inadequate and insufficient for the carrying of the traffic entitled to pass over it.

I find that the damages to the plaintiff arose in consequence of the disrepair of the bridge. The accident happened by reason of the stringers giving way under the weight of the engine, and this collapse was owing to the rotten condition of the stringers.

The obligation of the defendant municipality is created by the Municipal Act, 3 & 4 Geo. V. ch. 43, assented to on the 6th May, 1913. Section 460, sub-sec. 1, of that Act, reads as follows: "Every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it, or upon which the duty of repairing it is imposed by this Act, and in case of default the corporation shall be liable for all damages sustained by any person by reason of such default."

Having regard to the last clause of this section, I am of opinion that a statutory obligation having been imposed on the municipality, together with a liability for all damages sustained by any person by reason of default, the question of notice to or knowledge of the defects by the corporation is, in the circumstances here shewn, immaterial. I refer to *City of Vancouver* v. *Cummings* 2 D.L.R. 253, 46 Can. S.C.R. 457; *City of Vancouver* v. *McPhalen* (1911), 45 S.C.R. 194; *McClelland* v. *Manchester Corporation*, [1912] 1 K.B. 118.

But, if notice is necessary, I find that the defendants had, as early as in 1911, adequate notice of the disrepair into which the bridge had fallen. The fact that officials of the township inspected the bridge in May, 1913, without appreciating its defective condition, cannot, in my opinion, operate to relieve the defendants of liability.

I come now to deal with the second ground of defence above mentioned, namely, the failure to lay down planks on the bridge before attempting to run the traction engine over it. A similar question was considered in 1908 by Mr. Justice Anglin in the case of *Goodison Thresher Co.* v. *Township of McNab* (1908-9), 19 O.L.R. 188, and was ultimately determined by the Supreme Court of Canada in December, 1910. The decision is reported in 44 S.C.R. 187.

ONT.

S. C.

The statutory provision as it then stood is set forth in the Supreme Court report at p. 190. Before the present cause of action arose, this statute was re-enacted with certain amendments, and is to be found (as it stood on the 1st August, 1913) in 2 Geo. V. ch. 53, sec. 5, sub-sec. 4. I have, for convenience of reference, brought together in parallel columns the statute applicable to the *Goodison* case, and the statute applicable to this case.

Section 10, sub-sec. 3 (with amendments as it stood in 1908).

"The two preceding subsections shall not apply to engines used for threshing purposes or for machinery in construction of roadways of less than eight tons in weight. Provided, however, that before crossing any such bridge or culvert it shall be the duty of the person or persons proposing to run any engine or machinery mentioned in any of the subsections of this section to lay down on such bridge or culvert planks of such sufficient width and thickness as may be necessary to fully protect the flooring or surface of such bridge or culvert from any injury that might otherwise result thereto from the contact of the wheels of such engine or machinery; and in default thereof the person in charge and his employer, if any, shall be liable to the municipality for all damages resulting to the flooring or surface of such bridge or culvert as aforesaid. 3 Edw. VII. ch. 7, sec. 43; 4 Edw. VII. ch. 10, sec. 60."

2 Geo. V. ch. 53, sec. 5, sub-sec. 4 (1912).

"Before crossing any such bridge or culvert the person proposing to run any traction engine shall lay down on such bridge or culvert planks of sufficient width and thickness to fully protect the flooring or surface of such bridge or culvert from any injury that might otherwise result thereto from the contact of the wheels of such engine; and in default thereof the person in charge and his employer, if any, shall be liable to the corporation of the municipality for all damage resulting to the flooring or surface of such bridge or culvert. 3 Edw. VII. ch. 7, sec. 43; 4 Edw. VII. ch. 10, sec. 60. *Amended.*"

ONT.

S. C.

I have anxiously compared the statutory provisions above quoted, with the view of determining whether they effect a change in the law as it was determined in the *Goodison* case. While I think that the alterations in phraseology indicate a tendency or inclination on the part of the Legislature to alter the law as it was determined by the six Judges who pronounced the decision in that case, and to make it accord with the view entertained by the five Judges who held the opposite opinion, I am by no means clear that the Legislature have, by the words used in the amending statute, given such clear expression to the supposed desire as enables the Court to declare that any change in the law had been effectively made. It turns out, however, that a determination of this question is unnecessary, because the point next to be mentioned seems to me decisive.

I am unable, in the present action, to justify a finding of fact similar to that made by Mr. Justice Anglin in the *Goodison* case. He found (19 O.L.R. at p. 200) that "the use of planks by Jones when crossing the bridge would have added to the sustaining power of the stringers sufficiently to have enabled them to carry the weight of the engine with safety."

From the evidence in the present case it appears that, if Pipher had laid across this bridge elm planks 3 inches thick and 14 feet long, so that the ends rested on the elevation of the highway east and west of the bridge, and so that the planks reached from one side to the other as an independent superstructure 2½ inches clear above the surface of the bridge proper, the sustaining power of the stringers supporting the bridge might have been supplemented sufficiently to have obviated the accident. But I find no statutory obligation to lay planks 14 feet long or of any other particular length. The omission in the statute of any reference to the length of planks appears to me to be significant.

Considering then that all the statute requires is, that there be laid down "planks of sufficient width and thickness to fully protect the flooring or surface of such bridge or culvert from any injury that might otherwise result thereto from the contact of the wheels of such engine;" considering that nothing is said about the length of the planks, and that short planks, 3 or 4 feet long, placed end to end, would have fully protected the flooring and surface; considering that such planks might have been of cedar or hemlock or basswood; considering that planks of such length

ONT.
S. C.

and quality would not have strengthened in any way the carrying powers of the stringers that collapsed—I am unable to find that, if such planks had been laid in compliance with the statute, the bridge would not have fallen, and I think it probable that planks complying with all the requirements of the statute could have been put down without obviating the accident. But, in the circumstances, opinion on the matter is necessarily speculative. How speculative may be realised when it is remembered that this engine had safely passed over this bridge on the morning of the accident; that, immediately before the collapse, the bridge had successfully carried the whole weight of the engine, and that at the moment (2 or 3 seconds later) when the bridge fell, it was carrying much less than the engine's full weight. All I can say is, that the evidence does not satisfy me that the absence of planks caused the accident, or that the breach of the statutory duty to lay down planks was its immediate cause. In making these observations, I am bearing in mind the fact that the evidence indicated that the surface of the bridge was somewhat rough and uneven, and that the use of planks would have minimised the jolting of the traction engine, but there is no evidence of any particular impact or jolt giving rise to the fall of the bridge.

To make the failure to comply with the requirements of the statute a defence, it must be shewn that there was a direct causal relation between such failure and the accident which followed: *Walker* v. *Village of Ontario* (1901), 86 N.W. Repr. 566; *Sutton* v. *Town of Wauwatosa* (1871), 29 Wis. 21; *Welch* v. *Town of Geneva* (1901), 85 N.W. Repr. 970.

In my view, this finding of fact differentiates the present action from the principle of the *Goodison* case as determined in the Supreme Court of Canada, because the Judges in that case all base their judgments upon the finding of Mr. Justice Anglin, which I have already cited. At p. 192, Mr. Justice Davies says: "The two findings must be read together. That which holds the stringers of the bridge to have been inadequate to bear the weight of the engine when carried over the bridge without compliance with the statutory conditions is neutralised by the holding that compliance with the conditions would have ensured safety." Mr. Justice Idington, at p. 193, says: "The finding of fact that if the bridge in question had had the planks laid upon it by appellant as required by the statute, it would have been of suffi-

cient strength to have ensured safety, seems to me to be an impassable barrier to the appellant herein." And Mr. Justice Duff, at p. 194, says: "I think the action should be dismissed because I think the findings of the learned trial Judge shew that *mishap* was caused by the failure of the plaintiffs' servants to perform the conditions under which alone they were entitled to take the engine upon the bridge."

The result therefore is, that there was a breach by the defendants of their statutory obligation to keep the bridge in repair, which was the primary cause of the accident. There was reciprocal statutory obligation imposed on the driver of the engine to lay down planks before running the engine over the bridge. If the evidence disclosed that the breach of this latter obligation was the immediate cause of the accident, the *Goodison* case would govern, unless the statute has been effectively altered; but, as my finding is otherwise, I think that the present action is not governed by the *Goodison* case; and, consequently, that both defences of the defendants fail, and that the plaintiff is entitled to judgment.

This conclusion renders it unnecessary for me to consider or discuss the question raised at the trial as to whether Walter Linstead is within the words of the Traction Engine Act, that is, whether he was "a person proposing to run any traction engine" over the bridge, he being a volunteer or passenger travelling over the highway on the engine which was in charge of Pipher.

I assess the damages at $1,400. Costs will follow the event. Judgment accordingly. *Judgment for plaintiff.*

[April 3, 1916. An appeal was heard by Meredith, C.J.O., Garrow, Maclaren, Magee and Hodgins, JJ.A. Appeal dismissed.]

HUNT v. BECK.

Ontario Supreme Court, Boyd, C. November 15, 1915.

WATERS (§ II C—87)—*Meaning of "Freshet"—Dams—Interference with logging operations—Preferential rights of statutory licensees—Improvements—Rivers and Streams Act.*]—Appeal by the defendants from the report of a Local Judge, to whom the action was referred for trial, and who found in favour of the plaintiffs upon their claim to recover from the defendants damages for wrongfully depriving the plaintiffs of water sufficient to float their logs down the Thessalon river; and motion by the defendants for judgment on their counterclaim.

ONT.
S. C.

George H. Watson, K.C., and *T. E. Williams*, K.C., for defendants.

T. P. Galt, K.C., and *U. McFadden*, for plaintiffs.

BOYD, C.:—The right to float timber down streams is part of the early legislation of Canada; and after the Privy Council in *Caldwell* v. *McLaren* (1884), 9 App. Cas. 392, 406, declared that such a right was given free of charge as to improvements made upon such streams to render them floatable, there was further legislation pertinent to this case. An Act was passed, 47 Vict. ch. 17 (1884), for "protecting the Public interest in Rivers, Streams and Creeks," with important recitals, of which these may be selected: "Whereas licenses have for many years been granted . . . to cut timber on lands belonging to the Crown through or along which such rivers and streams run. . . . And whereas the said transactions have taken place on the faith that the licensees . . . had, and should continue to have, the right of floating saw-logs and other timber . . . down the streams on which their limits or lands are situate. And whereas . . . the licensees . . . have in many cases expended large sums of money on the lands so granted and placed under license." Then it was, among other things, enacted that, in case it may be necessary to remove any obstruction from the water-course or to construct any apron, dam, slide, gate-lock, boom or other work therein or thereon, necessary to facilitate the floating and transmitting saw-logs, timber, etc., down the stream, it shall be, and is declared to be, lawful to remove the obstruction and to construct the said works of improvement. The Act further went on to provide means whereby toll would be exacted from persons using such improvements, to be paid to the persons who had constructed and maintained them.

That was the state of the law under which both parties were conducting operations in the spring of 1914, and these provisions are now to be found in the Rivers and Streams Act, R.S.O. 1914, ch. 130, sec. 3.

The plaintiffs have no particular status on the Thessalon river, but during the season in question were driving logs down the river from Wood's creek, a tributary of the Thessalon river, joining that stream below the confluence of its two branches, and about 15 miles south of the defendants' operations on the western branch of the river. The defendants had acquired timber rights

ONT.
S. C.

from the Government by the purchase of berth No. 195 on the north shore of Lake Huron, in the district of Algoma, an unsurveyed and primitive territory, in which are the western sources of the Thessalon.

The defendants began operations, for the first time after acquiring the limit, in 1913, and proceeded to construct a series of dams, of which three were storage dams, and seven or eight others used for flooding purposes in getting the logs over rocks, rapids, and shallows, and other impediments. These improvements were essential for taking away the timber, and there is no complaint and no reason to suspect that they were not properly placed and properly used in order to facilitate the transport of the logs to and down the river—that is, so far as the defendants are concerned. The plaintiffs *do* plead that the dams were illegally used to obstruct the water, but otherwise it is to be taken that they were well and skilfully placed so as best to enable the defendants to utilise their timber limits. One other general observation is, that the whole region on and along the Thessalon is owned by the Crown, and that the rights of both parties are to be measured by the statute law and common law, if that be required.

The more important of the dams in connection with this controversy are the main storage dam at Stone Lake, having capacity to hold 9 feet of water and being the largest reservoir, and the most southerly dam at Carpenter Lake, of 3 or 4 feet holding capacity, and used as needed either as a storage dam or a flooding dam.

The plaintiffs relied on the spring freshets to get the logs down from Wood's creek. Work was begun in breaking the dumps and clearing the way to water the logs on the 20th April. There was a notable rain-storm for two nights and a day continuously on the 27th and 28th April; and, apart from this, very little rain the whole season. The plaintiffs' logs were through the creek and at the river on the 6th May; they drove on the river for two or three days till the night of Saturday the 9th May. No work on Sunday, and on Monday morning the logs were high and dry on sand-bars two or three miles from the river, which had scarcely any water in it. The water is said to have dropped 6 or 8 inches on the 9th; but on the 11th it had dropped about 2 feet. The plaintiffs attribute this loss of water to the closing of Carpenter creek dam by the defendants. There is a conflict of testimony

ONT.
S. C.

as to the date on which this was done. The Judge has found that it was closed on the 9th May (as the plaintiffs' witnesses say), and not on the 11th May, Monday (as the others say). In my view of the case, it is not important on which day it was closed.

There was also much conflicting evidence as to the duration of the spring freshets. But in truth one of the witnesses for the plaintiffs came nearest to the fact when he said: "You can't tell the length of a freshet within a week or a month; it depends on rain and temperature." The dictionary meaning of the word "freshet" is the same as the statutory and popular meaning, and that is, a flood or inundation by means of rains or [and] melted snow. Much of the evidence as to other freshets and the driving in other places was of small import. Each year and each season is different as to freshets, depending on climatic conditions—the amount of snow, the amount of rain, and the state of the thermometer. And as to drives, the time consumed depends on the character of the logs, the state of the water, the number of hands at work, and the handling of the descending timber. Generally, on the evidence, I should consider that the season of 1914 was exceptionally dry after the great rain of April, and that the water was lower than usual, and that the freshet for that season at its height by reason of the April rain was about spent before the 10th May. The plaintiffs' witness Dunbar says (p. 143) that the freshets that year in that place, Wood's creek, were over about the 9th May; and (p. 144) he does not think that the water continued to rise till the 6th May.

Amid much nebulous and speculative evidence, mixed with the observation of the actual localities spoken of by those who had been over the ground, it seems tolerably clear that of the whole watershed area drained by the Thessalon and its tributaries above Wood's creek, less than one-half would be attributable to the west branch of the river, which drains berth 195. That is, if one takes the water from Wood's creek into account, which is twice as large as Carpenter's creek, there would be at least more than one-third of the water in the natural flow of the river as a whole at the entrance of Wood's creek, coming from sources other than down through the defendants' works and dams. Hence if it be that there was a fall of two feet in the river where the plaintiffs were on the 11th May, and this was from the freshet then continuing, why when it was stopped was there no evidence of any

flow of the freshet from the west branch and from Wood's creek? The volume of the freshet from these two currents would have been greater than from the other branch of the river coming from berth 195. But, on the plaintiffs' proof, the stoppage of the water at Carpenter Lake dam stopped all attempts at floating the logs. This state of affairs is consistent with only one conclusion, viz., that the freshet had spent its force and that the run of all the waters of the river was being reduced to the ordinary, natural flow, never sufficient for timber operations.

But, assuming that two feet of water were cut off by the defendants' action in closing the dam (and this does not rest upon proof, but upon inference only), what was that water? In my opinion, it was neither current freshet water nor the ordinary natural flow of the stream, but water stored for the defendants' own operations, which, if not so impounded, would have passed off down the river before the plaintiffs' men were at the mouth of Wood's creek.

The defendants' *modus operandi* is to be considered. In the fall and winter of 1913 and early spring of 1914, the three storage dams at Stone Lake and Lake Camp 1 and Lake Camp 2 were closed and had accumulations of water in before the great rain came on. That filled to overflowing the two smaller dams, but in the big controlling dam, Stone Lake, it was filled only to less than 8 feet, about 7½ feet. Carpenter Lake dam was left open all the time till stop-logs were put in early in May. After the heavy rain, Lake Camp 1 was opened and the water went down to 4 inches. Lake Camp 2 dam had 2 or 3 stop-logs taken off to ease the pressure during the rain, and remained with about 4 feet of water stored. In Stone Lake dam, next day after the rain, it sprang a leak, and, though partly repaired, it continued to leak till after the 15th May. Through the leak there was a discharge of 4 feet of water, which about equalised any inflow, so that it did not "raise" perceptibly after that. From this big leak and from crevices in the other dams came the water that went down the river in the early part of May. There was some addition also of water let down on the 3rd and 5th May from Stone Lake dam for the purpose of working logs into shape so as to be ready to go down with the drive anticipated. It seems reasonably clear that but for the storage of the earlier water there would have been no supply

ONT.
S. C.

of surplus water going to the plaintiffs at all after they reached the river.

The stop-logs were put in Carpenter Lake dam because there was more water needed at that point to get some of the defendants' logs into better position. It is not without pertinence that, while the plaintiffs failed to make the mouth of the river, the defendants were equally unfortunate in not getting their logs out into floatable water. The supply stored was insufficient for the defendants' wants, and both are in like bad case from the shortage of the water that season.

It may be that, owing to the changed condition of the river in recent years, its broadening and shortening, lumbermen below will find it necessary to erect dams in Wood's creek or above the river near there with a double view of getting over the difficult rapids in Wood's creek, which delayed the plaintiffs for too many days, and also to capture the surplus water which comes during the operations in the upper river when water let down by the defendants for emergencies in the day-time passes off during the night opposite and below Wood's creek, and so is lost. I suspect that, considering the difficulties of the situation and the season, there was an insufficient gang of men handling the plaintiffs' drive. But this is by the way.

Next, what is the legal position of the parties? As to the floatation of logs in Thessalon river, each had equal rights under the statute; but as to the user of the water above where the defendants had made improvements, they had preferential rights. They were the first and the only occupants of these head waters of the Thessalon river, and as to their various works to facilitate the driving of logs to the market they were statutory licensees. The statutory license, implemented by the erection of works, did by necessary implication give them superior rights in regard to the use and control of these improvements, as between them and the plaintiffs operating on the river at Wood's creek. As a matter of natural justice, the timber licensee who had the right to further his operations by the construction of dams, etc., had also the right to put them to the most beneficial and profitable use for his own undertaking primarily, and was not called on, to his own prejudice, to make his reserves of water subservient to the needs of a lower operator. If any detriment arises from the proper and reasonable use of the dams to facilitate the transmission of the

ONT.

S. C.

defendants' logs (and nothing to the contrary of this is proved), then the plaintiffs have to submit to the disadvantage as a necessary consequence of their position. This water so stored was essential to the defendants' use; were they to suffer by its release that the plaintiffs might benefit thereby? Briefly, there has been no diversion or diminution of the water, no interference with the natural, ordinary flow of the stream; and the rightful retention of the water by the defendants cannot be turned into an illegal detention from the plaintiffs.

After carefully reading and considering the voluminous evidence, I am compelled to the conclusion that in all aspects of the case, whether of fact or of law, the plaintiffs have not established a claim for damages. The judgment given in the primary court is to be reversed, and the action stands dismissed with costs.

The amount agreed upon as to the defendants' counterclaim should be paid by the plaintiffs—but without costs.

Action dismissed.

[March 21, 1916. An appeal was heard by Meredith, C.J.O., and Garrow, Maclaren and Hodgins, JJ.A. *Appeal dismissed.*]

SASK.

S. C.

CURRIE v. R. M. OF WREFORD.

Saskatchewan Supreme Court, Elwood, J. March 14, 1916.

PARTIES (§ II B—115)—*Joinder of defendants—Principal and agent—Leave.*]—Appeal from a Master in Chambers refusing to dismiss an action for misjoinder of parties.

Sample, for plaintiff.

B. D. Hogarth, for defendant Lasher.

ELWOOD, J.:—By the statement of claim in this action the plaintiff alleges in the first place that his claim is for work done under a written agreement made by the defendant Lasher for and on behalf of the defendant municipality with the plaintiff. In the alternative he alleges that the defendant, assuming to be the agent of the municipality, induced the plaintiff to enter into a contract, and that the defendant was not authorized by the defendant municipality to make the contract and that the plaintiff has suffered damages in consequence and claims his damages. In the further alternative, the plaintiff says that the contract in question was made between the plaintiff and defendant Lasher.

The defendant Lasher made an application to the Master in Chambers to dismiss the plaintiff's action as against him, on the

SASK.
S. C.

ground that he had been improperly added as a defendant; in the alternative to have certain paragraphs struck out as embarrassing. The Master refused the application and from this order the appeal is taken to me.

It was contended on the part of the plaintiff that these parties and these various causes of action could be joined under our r. 54, notwithstanding our r. 37. It was admitted that no leave had been obtained to join these defendants, and I am of the opinion that before so joining these defendants, leave should have been obtained. It will be noticed that O. 16, r. 7 of the English Practice is somewhat different from ours, in that it does not state that before joining the parties, leave must be obtained. But under that rule in the 1916 Annual Practice, at p. 230, I find the following:

> The typical case for the application of the rule, which is of most frequent occurrence in practice, is where a person assuming to act as agent for a disclosed principal makes a contract with the plaintiff the breach of which gives rise to the action.

Bennetts v. *McIlwraith*, [1896] 2 Q.B. 464; *Sanderson* v. *Blyth*, [1903], 2 K.B. 533, are clearly in point.

It is quite true that in Odgers on Pleadings, 7th ed., p. 30, it is stated:

> A plaintiff may join in one action a claim against a principal in a contract made by his alleged agent, and an alternative claim against the alleged agent for contracting without authority.

and three of the above cases are cited as authority; but it is not contended that this can be done other than under the above quoted r. 7. See also *Edinger* v. *MacDougall*, 2 A.L.R. 345.

The order will be that the plaintiff do within 14 days after service of the order elect against which of the defendants he will proceed; or he may, within that time, amend his statement of claim by alleging a joint cause of action against both defendants. On default of his either so electing or amending, the action will be dismissed against the defendant Lasher with costs.

This order is not to interfere with the plaintiff's right to make an application to a Judge under r. 37, provided that such application be made before the expiration of the fourteen days. The plaintiff will pay this defendant's costs of the application and of this appeal in any event. *Judgment accordingly.*

SWANSTON v. MERRETT. SASK.

S. C.

Saskatchewan Supreme Court., Lamont, J. February 10, 1916.

SALE (§ I A—1)—*Validity—Non-compliance with Steam Boilers Act (R.S.S. 1909, ch. 22, sec. 15)—Inspection certificate.*]—Action upon lien note for threshing engine.

L. B. Ring, for plaintiff.

H. Y. MacDonald, K.C., for defendants.

LAMONT, J.:—The plaintiff's claim against the defendants is for the amount due under a lien note or agreement in writing dated at Regina November 12, 1912, whereby the defendants jointly and severally covenanted and agreed in consideration of one North-West engine and one Filshie separator 36 by 56 sold and delivered by the plaintiff to the defendants to pay to the plaintiff at Regina on or before November 10, 1913, the sum of $1,350, together with interest at the rate of 8% per annum as well after maturity as before.

The defence is that the sale was illegal and void by virtue of sec. 15 of the Steam Boilers Act.

The evidence shews that the plaintiff operated the engine referred to in his statement of claim during the seasons 1908, 1909 and 1910. That in September, 1911, he sold the engine and separator to the defendant Merrett and one Edgley. That in 1912 Edgley left the country for parts unknown, and that in November of that year both the above-named defendants went to the plaintiff and offered him the note in question herein for the outfit. The plaintiff agreed, and gave Merrett back the note signed by himself and Edgley, and took the note now sued on. The last inspection under the Steam Boilers Act, so far as the evidence discloses, was made on August 12, 1910.

Section 15 of the Steam Boilers Act reads as follows:

> No boiler which has been in use for two or more seasons shall be sold or exchanged for subsequent use as a boiler unless it is accompanied by an inspection certificate issued within one year next preceding the date of such sale or exchange.

The plaintiff knew the boiler was being purchased for threshing operations.

Where a statute forbids the sale of a boiler unless accompanied by an inspection certificate issued within one year next preceding the date of the sale, any sale made without such certificate is illegal and void. *Ramage* v. *Deyoe*, 14 D.L.R. 243.

The sale which forms the consideration for the note sued on

SASK.
S. C.

in this action, whether considered as a sale made in September, 1911, or in November, 1912, was void under the Act because it was not accompanied by the inspection certificate required by the above section. The plaintiff, therefore, cannot recover.

Judgment for defendants with costs.

JOHNSON v. CHOMYSZYN.

Saskatchewan Supreme Court, Lamont, Elwood and McKay, JJ. March 25, 1916.

SALE (I B—9)—*Sufficiency of delivery—Fraud—Remitting case for re-trial.*]—Appeal from a judgment dismissing an action for goods sold and delivered.

W. B. Scott, for appellant.

D. A. Finn, for respondent.

The judgment of the Court was delivered by

MCKAY, J.:—This action was brought under a certain order for the sale of goods, dated at Cedoux, July 28, 1913, whereby the appellant agreed to sell to the respondent 1,000 ft. of pure soft copper lightning cable at 15 cents per foot, and 24 tops complete at $2.15 each, 6 arrow vanes at 75 cents each, and three horse vanes at $2, which goods were to be delivered at the depot of the C.P.R. in Cartwright, Man., billed to the said respondent at Cedoux, Sask., and according to the terms of the said order the purchase price of $212 was to be paid in cash on June 1, 1914, or by a note due November 1, 1914, the total claim amounting to $227.10.

The respondent practically denies all the allegations of the appellant's claim, but the defences relied on are, (1) that the order was obtained by fraud, particulars of which are given in the statement of defence; (2) that the goods were not delivered or shipped to him.

The learned trial Judge held that there was no delivery, and dismissed the appellant's action, and, in consequence thereof, did not consider the question of fraud raised by the defence.

With very great deference, I have come to the conclusion that there was delivery.

From the evidence of respondent it is clear that some of the goods in question did arrive at Cedoux, and apparently consigned to the respondent, because he says that after the sending of the first letter to the appellant "he found that there was some package at the depot for him," and in consequence whereof he wrote a second

letter to the appellant asking why they sent that stuff out that he had cancelled.

True it is that the appellant does not swear to having seen each article at Cedoux that was ordered, and he says he did not open the boxes. But he swears he saw the goods at Cedoux referred to in the order (ex. "A"), and, further, he swears that the respondent told him personally they were there at Cedoux. And the respondent does not deny this, although he gave his evidence after the appellant. Furthermore, at no place in his evidence does the respondent say only part of the goods arrived at Cedoux. Nor did he object to accept the goods for want of delivery of any of them.

I do not think the case of *McGowan Cigar Co.* v. *O'Flynn*, 19 W.L.R. 877, is applicable to the case at bar. In that case the cigars had not arrived at their destination, and the plaintiffs contended that there was a statutory delivery, having delivered them to the C.N.R., a common carrier. But, as the order called for shipment by freight and the goods were sent by express, it was held it was not delivery on the terms of the contract, and the plaintiffs could not succeed. But in the case at bar, in my opinion, there is evidence of actual delivery at Cedoux to the respondent, and it is not necessary for the appellant to rely on statutory delivery by shewing he shipped according to the contract. Furthermore, the shipment from Riceton did not entail any additional expense or prejudice respondent in any way, but, on the contrary, it was admitted by respondent's counsel at the argument of the appeal that the freight from Riceton would be much less than from Cartwright; in other words, that the goods would cost the respondent less than under the original terms of shipment.

With regard to the question of fraud, I think this is a matter that should be referred back to the trial Judge for his finding thereon, as, in my opinion, it is important that we should have his finding on this question, he having seen and heard the witnesses. This appeal will, therefore, stand until the next sitting of this Court.

The result will be that this case will be referred back to the trial Judge for the purpose of giving his judgment on the question of fraud, and, after he has done so, this appeal can again be argued at the next sittings of this Court on that question, if either of the parties so desire, that party desiring to question the appeal from

SASK.
S. C.

such finding giving notice to the other party stating his grounds; and the question of the costs of appeal will stand until then, or, if neither party desires to again argue the question of fraud before us, the question of costs only may be argued. *Case remitted.*

McGREGOR v. PETERSON AND WILLIAMS.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Newlands, Elwood and McKay, JJ. March 18, 1916.

MORTGAGE (§ VII C—156)—*Discretion as to extending time of redemption—Terms—Review on appeal*]—Appeal from an order extending time of the redemption of a mortgage.

P. H. Gordon, for plaintiff, appellant.

A. Casey, for defendant, appellant.

P. M. Anderson, for defendant, respondent.

The judgment of the Court was delivered by

NEWLANDS, J. —This is an application on the part of a mortgagor to extend the time for redemption. The Master in Chambers extended the time for 9 months, the mortgagor to pay the costs of the application. This order was confirmed by a Judge in Chambers, from whose decision appeal was taken to this Court.

In *Forrest* v. *Shore*, 32 W.R. 356, Bacon, V.C., upon a similar application said:—

> The Court has, in many instances, enlarged the time fixed for payment, and a practice has grown up to give a longer time for redemption, but it is a matter for judicial discretion.

When the question decided is in the discretion of the Judge, the general rule is that the Court of Appeal will not interfere unless the discretion has been exercised on a wrong principle.

The general terms upon which an extension of time is granted is upon payment of interest and costs. These terms are, however, departed from when the circumstances of the case require it. In the case above cited, Bacon, V.C., only required the mortgagor to pay half the interest and no costs.

That this Court might have imposed other terms if we had heard the application in the first instance is not a question we can consider.

In *Re Wray*, 36 Ch.D. 138, Cotton, L.J., said:

> I give no opinion what order I should have made if I had been hearing the application in the first instance, but I cannot concur in interfering with the discretion of the Judge below.

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

Appeal dismissed.

WEYBURN SECURITY BANK v. KNUDSON et al.

SASK.

S. C.

Saskatchewan Supreme Court, Newlands, Lamont, Brown and Elwood, JJ. March 18, 1916.

MORTGAGE (§ VI E—90)—*Foreclosure—Final vesting order—Executions—Priorities.*]—Appeal from a final vesting order in an action for foreclosure.

M. A. Miller, for appellant.

No one contra.

The judgment of the Court was delivered by

ELWOOD, J.:—This was an action brought by the plaintiff for foreclosure of its mortgage upon certain lands. The final order for foreclosure vests the property in the plaintiff free of all encumbrances, but subject, among other things, to an execution in favor of the Rat Portage Lumber Co., Ltd.

This execution of the Rat Portage Lumber Co. was allowed to lapse prior to the commencement of this action. At the time of obtaining the order *nisi* for foreclosure the abstract produced from the Registrar of Land Titles for the Moose Jaw Land Registration District shewed an execution of the Rat Portage Lumber Co. against the defendant Knudson dated January 20, 1912, and registered in the Moose Jaw Land Registration District on January 25, 1912, as number E. 5501; and it was in consequence of this execution that the order *nisi* and final order were made subject to that execution. It now appears that at the time of the order *nisi* and final order this execution had not been renewed and, therefore, there was no execution in the Moose Jaw Land Registration District affecting the lands in question.

I am of opinion, therefore, that the final order for foreclosure should be amended by striking therefrom the following words:—

> Subject to an execution for $567.41 in favour of the Rat Portage Lumber Co., Ltd., dated January 20th, 1912, and registered January 25th, 1912 as number E. 5501.

But under the circumstances I would substitute for the words so struck out the following:—

> Subject to any execution registered prior to this order in the Land Titles Office for the Moose Jaw Land Registration District in force and affecting the above lands.

As the error was apparently through no fault of the plaintiff, I would make the costs of the application and of the appeal costs in the cause. *Judgment varied.*

SASK.

S. C.

SACKVILLE v. CANADA PERMANENT MORTGAGE CO.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Lamont, Elwood and McKay, JJ. March 18, 1916.

INJUNCTION (§ II—134)—*Application to continue—Wrongful exercise of power of sale—Notice.*]—Appeal from an order of Newlands, J., on an application for injunction.

W. Lindal, for appellant.

D. J. Thom, for respondent.

The judgment of the Court was delivered by

ELWOOD, J.:—The material shews that some arrangement was made between the plaintiff and one Collins, acting on behalf of the defendant, whereby the plaintiff should make monthly payments on account of his indebtedness to the defendant company. The effect of the arrangement is amply borne out by the letters written by Mr. Mason, the defendant's manager, Regina. I do not think on this application we are called upon to definitely decide what that arrangement was. The plaintiff swears definitely that the agreement was that he was to pay two payments of $10 each every month, and that no further steps were to be taken by the defendant under the notice of exercising power of sale. If that was the arrangement, then it would seem to me that the proceedings, so far as the notice of exercising power of sale is concerned, would be at an end, and that the defendant company could only proceed again by serving a further notice of exercising power of sale. What the exact arrangement was is a matter that will be determined at the trial.

I am of opinion that the plaintiff is entitled to an order continuing the injunction made herein, dated January 19, 1916. The costs of the application made before Newlands, J., on January 27, 1916, should be costs in the cause to both parties. The defendant should pay the plaintiff the costs of this appeal in any event of the action. *Injunction continued.*

Re GOODNOUGH ESTATE.

Saskatchewan Supreme Court, Elwood, J. March 15, 1916.

WILLS (§ III G 2—127)—*Life estate to widow in realty and personalty—Use and enjoyment—Implied power to encroach upon corpus—Maintenance.*]—Action for construction of will.

Schull, for executors.

McCausland, for children.

Dickenson, for the widow.

SASK.

S. C.

ELWOOD, J.:—The deceased Goodnough by his last will directed his just debts, funeral and testamentary expenses to be paid by his executors, and then provided as follows:—

> I give, devise and bequeath all my real and personal estate of which I may die possessed: to my wife Angie J. Goodnough, the whole of my real and personal estate for her use and benefit during her lifetime and at her decease anything remaining to be divided share and share alike among my children, and I nominate and appoint my friend, John Hodges, and my son Arthur R. Goodnough to be executors of this my last will and testament.

The executors being uncertain as to the interpretation of the will have submitted to me the following question, namely, whether or not under said clause, the said Angie J. Goodnough is entitled to a bequest of all the real and personal property of the estate to be enjoyed by her during her life, with liberty to expend or dispose of the same as she sees fit, or whether or not the said Angie J. Goodnough is only to receive the interest on the personal property and the rents and profits on the real estate during her life-time, and as incidental to the foregoing questions, whether or not the executors would be entitled to a discharge upon transferring to the said Angie J. Goodnough (after payment of all just debts of the deceased) all the real and personal property of the deceased.

In *Re Johnson*, 8 D.L.R. 746, a great many cases were reviewed, and the case was distinguished from *Re Holden*, 57 L.J. Ch. 648, the Chancellor pointing out that the widow was not the executrix and that, therefore, the reason in the Holden case did not apply.

In the case at bar, it will be noticed that the widow is not the executrix, and it seems to me that the proper construction of the will in the case at bar is; that the widow shall be entitled to a life interest in the real and personal property, but that there is an implied power to encroach on the capital for the purposes of maintenance. I am also of the opinion that the executors should not transfer to the widow the real estate, but that she is entitled to occupy the real estate or receive the rents and profits thereof as she may elect, and that she is entitled to the use of the furniture and other personal property, that she is entitled to receive the income from money on hand or from any investments, and that, in the event of the income not being sufficient for her maintenance, the executors have the power to encroach upon capital for the

SASK.
S. C.

purpose of such maintenance. See also *Re McDonald*, 35 N.S.R. 500. *Re Thomson's Estate*, 14 Ch. D. 263.

The costs of all parties will be paid out of the estate.

Judgment accordingly.

BORYS v. CHRISTOWSKY.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Newlands and McKay, JJ. March 18, 1916.

AUTOMOBILES (§ III B—200)—*Negligence of operator—Taking hands off steering wheel while running at high speed—Liability.*]—Appeal from a judgment in favour of plaintiff in an action for negligent driving of an automobile.

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

W. M. Rose, for respondent.

The judgment of the Court was delivered by

NEWLANDS, J.:—The trial Judge in this case found the defendant guilty of negligence (in taking his hands off the steering wheel of his automobile while driving at a high rate of speed with the plaintiff and three other women), and that this negligence on his part was the cause of the accident. The evidence was contradictory, but the weight of evidence was in favour of the plaintiff. We should not, therefore, interfere with this finding. As to what the defendant is found to have done—take his hands off the steering wheel when the automobile was moving at a high rate of speed—it was, in my opinion, gross negligence, and renders the defendant liable to plaintiffs for the injuries they received while driving with him by his consent. *Appeal dismissed.*

INDEX

CASES—*continued.*

CASES—*continued.*

CASES—*continued.*

CERTIORARI—

CHARITIES—

CHATTEL MORTGAGE—

COMPENSATION—

CONDITIONAL SALES—

CONFLICT OF LAWS—

CONSPIRACY—

CONTRACTS—

WORDS AND PHRASES—