

**CANADIAN
COMMERCIAL CASES**

HF 1279
C64
C35
v.1
pt.1

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No. 12417



NOVEMBER, 1901

CANADIAN
COMMERCIAL CASES
ANNOTATED

EDITED BY

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AND

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VOL. I., PART 1.

SUBSCRIPTION PER VOLUME, \$6.00

1901

THE SNOW LAW PUBLISHING CO.

Temple Building, Montreal

CANADA

HF1279

C64

C35

v.1

pt.1

Entered according to Act of Parliament in the year One
Thousand Nine Hundred and One, by THE SNOW LAW PUB-
LISHING Co., in the office of the Minister of Agriculture and
Statistics at Ottawa.

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[IN THE SUPREME COURT OF CANADA.]

BEFORE SIR HENRY STRONG, C. J., AND TASCHEREAU,
GWYNNE, SEDGEWICK AND KING, JJ.

HUGH P. KEEFER and the QUEBEC BANK (Plaintiffs) Appellants

AND

THE PHOENIX INSURANCE COMPANY OF HARTFORD
(Defendant) Respondent.

(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.)

Insurance against fire—Insurable interest—Unpaid vendor.

1. An unpaid vendor, who by agreement with his vendee has insured the property sold, may recover its full value in case of loss, though his interest may be limited, if when he effected the insurance he intended to protect the interest of the vendee as well as his own.
2. The fact that the vendor is not the sole owner need not be stated in the policy, nor disclosed to the insurer.
3. Judgment of the Court of Appeal (26 Ont. App. R. 277) reversed, and that of the trial judge (29 O. R. 394) restored.

ARGUMENT : 20th April, 1900.

JUDGMENT : 19th February, 1901.

Appeal from a decision of the Court of Appeal for Ontario (26 Ont. App. R. 277) reversing the judgment at the trial (29 O. R. 394) in favour of the plaintiffs.

The plaintiff Keefer sold a piece of land to one Cloy for \$2,000, payable by instalments, agreeing to keep it insured for the amount of the purchase money, which he did. A fire having occurred causing a loss of \$1,740, when Keefer had been paid \$800 by Cloy, the insurance company refused to pay more than the amount of Keefer's interest, and the latter brought an action to recover the full amount of the loss, the Quebec Bank, as assignee of Cloy's interest in the policy, joining him as plaintiff.

At the trial before Mr. Justice Ferguson, the plaintiff recovered the full sum claimed, but this judgment was reversed by the Court of Appeal. The plaintiffs then appealed to this court.

THE CHIEF JUSTICE.—

I concur in the judgment of Mr. Justice Sedgewick.

TASCHEREAU, J.—

I am of opinion that the appeal should be dismissed.

GWYNNE.—

I entirely concur in the judgment of the Court of Appeal for Ontario in this case. The policy of insurance sued upon is printed and is in the statutory form prescribed by ch. 167, R. S. O. 1887, and is one only of indemnity, expressed, I think, in very plain terms, whereby the defendant agreed,

"to indemnify and make good unto the said insured, his heirs or assigns, all such direct loss or damage (not exceeding in amount \$2,000, nor the interests of the insured in the property herein described)."

At the trial the interest of the assured at the time of the policy being made, although then represented by him to be his own property, was in fact that of a vendor with a lien thereon for unpaid purchase money, amounting then to the sum of \$1,200. Now that this policy so entered into operated solely as an insurance against loss of the insured's direct beneficial interest as such unpaid vendor cannot, I think, admit of a doubt.

The suggestion that the words "heirs or assigns" and "interests" (in the plural) as used in the above contract, which is in printed form, show that the assured intended to insure the interest of his vendee as well as his own, has been fully answered by the judgment of the Court of Appeal for Ontario, and nothing can in my opinion be usefully added thereto. As to the assured having had the intention suggested (assuming him to have entertained it), all that need be said is that such intention is not expressed in the contract, and it cannot be argued that a secret intention of the assured can be appealed to for the purpose of changing the terms of the contract, contrary to the intention of both parties to the contract as expressed therein. But this point also is fully dealt with by the judgment appealed against. The appeal, therefore, must in my opinion be dismissed with costs.

SEDGEWICK, J.—

The appellant Keefe, on the 25th July, 1893, being the owner of certain lands and premises in the town of Thorold, upon which the buildings covered by the policy in question were erected, entered into an agreement with one George C. Cloy to sell the property to him for \$2,000, payable as follows: \$300 in cash; \$500 in four months, and the balance, \$1,200 in twelve months. At the same time Keefe verbally agreed with Cloy to keep the buildings insured to

the extent of \$2,000 until the purchase money should be fully paid. There was, at the date of the agreement, a policy in force covering the property for that amount, and this policy was allowed to remain until the 23rd of February, 1894, when the policy sued on was substituted for it, and issued to the appellant Keefer. Cloy at this time had paid Keefer \$800 on account of the purchase money, and subsequently paid him \$500. The policy was renewed from time to time, and on the 11th December, 1896, the frame building mentioned in the policy was destroyed by fire, and another building damaged to the extent of \$40, making a loss of \$1,740, the amount claimed in this action. At this date the purchase money payable to Keefer had been reduced by payments made by Cloy to \$700. The interest which Cloy had, or claimed to have, under the policy was assigned to the Quebec Bank, and this action was brought by Keefer and the Quebec Bank to recover the total amount of loss, the bank claiming the interest of Cloy under its assignment, as well as that of Keefer.

The case was tried before Mr. Justice Ferguson, and judgment given in favor of the appellant. This judgment was reversed by the Court of Appeal, Mr. Justice MacLennan dissenting.

At the time of the fire, the appellant was the owner in fee of the whole property, but having only a beneficial interest to the extent of \$1,200, and Cloy having a beneficial interest to the extent of \$800, and the question in dispute here is whether an unpaid vendor can recover not only his beneficial interest but the beneficial interest of his vendee as well, as under the circumstances of the present case.

I am clearly of the opinion that he can. The learned Chief Justice of this court in *Caldwell v. Stadacona Fire and Life Ins. Co.* (11 S. C. R. 242) thus clearly lays down what I understand to be the law :

"Whatever doubt may be raised by text writers, it is clear, from the language of judges used in delivering judgments in cases of authority, that provided the assured had an interest at the time of the execution of the policy, and at the date of the loss, he is entitled to recover upon a fire policy the full value of the property destroyed, provided the whole interest in the property was insured, although his interest may have been a limited one merely."

He cites, among other cases, *Simpson v. Scottish Union Ins. Co.* (1 H. and M. 618), where Vice-Chancellor Wood says :

"I agree that a tenant from year to year, having insured, would have a right to say that the premises should be rebuilt for him to occupy, and that his insurable interest is not limited to the value of his tenancy from year to year."

And *Waters v. Monarch Assur. Co.* (5 E. and B. 870), where Lord Campbell says :

"The last point that arises is : To what extent does the policy protect those goods? The defendants say that it was only the plaintiffs' personal interest. But the policies are in terms contracts to make good "all such damage and loss as may happen by fire to the property hereinbefore mentioned." That is a valid contract, and as the property is wholly destroyed, the value of the whole must be made good, not merely the particular interest of the plaintiffs. They will be entitled to apply so much to cover their own interest and will be trustees for the owners as to the rest. The authorities are clear that an assurance made without orders may be ratified by the owners of the property, and then the assurers become trustees for them."

My brother Gwynne at page 260, in the same case, expressed similar views.

Castellain v. Preston. (11 Q. B. D. 380), (a case very largely relied on by the majority of the court below), strongly supports the view just stated. Lord Bowen says :

"It is well known in marine and in fire insurance that a person who has a limited interest may insure nevertheless on the total value of the subject matter of the insurance, and he may recover the whole value, subject to these two provisions ; first of all, the form of his policy must be such as to enable him to recover the total value, because the assured may so limit himself by the way in which he insures as not really to insure the whole value of the subject-matter ; and secondly, he must intend to insure the whole value at the time. When the insurance is effected he cannot recover the entire value unless he has intended to insure the entire value. A person with a limited interest may insure either for himself and to cover his own interest only, or he may insure so as to cover not merely his own limited interest, but the interest of all others who are interested in

the property. It is a question of fact what is his intention when he obtains the policy. But he can only hold for so much as he has intended to insure. Then to take a case which perhaps illustrates more exactly the argument, let us turn to the case of a mortgagee. If he has the legal ownership, he is entitled to insure for the whole value, but even supposing he is not entitled to the legal ownership, he is entitled to insure *prima facie* for all. If he intends to cover only his mortgage and is only insuring his own interest, he can only in the event of a loss hold the amount to which he has been damnified. If he has intended to cover other persons beside himself, he can hold the surplus for those whom he has intended to cover."

A case which I cite, not as authority, but as clearly stating what I conceive to be the law, is that of *Insurance Company v. Updegraff*. (21 Penn. 520.)

"Although the vendor," (the court says), "is not bound to insure, or even to continue an insurance already made, he may, like any other trustee having the legal title, insure if he thinks proper to the full value of the property. It is true that in the case of a mortgagee of a ship he can only recover to the extent of his mortgage debt, unless it appears that in effecting the insurance he intended to cover, not his own interest only, but that of the mortgagor also. If he intended to cover the whole interest, both legal and equitable, he may recover the whole amount of the insurance, under a trust, as to the surplus, to hold it for the mortgagor. The same rule applies to the case of an insurance by a vendor. There is this difference, however, that as the whole estate is at law in the vendor, and the vendee has only a title to go into equity, the insurance company cannot assert the rights of the latter, or go into equity in respect to them, except upon principles of equity and good conscience. An insurance upon a house, effected by the vendor, is *prima facie* an insurance upon the whole legal and equitable estate, and not upon the balance of the purchase money. Where the form of the policy shows it to be upon the house, and not upon the debt secured by it, the burthen of showing that the insurance was upon the latter, and not upon the former, rests upon the underwriters. There is no hardship in this. The premium paid, as compared with that usually charged where the insurance is upon houses, and not upon debts secured by them, is generally

decisive of the question, and the rates of insurance are peculiarly within the knowledge of the insurance company. If the insurance was upon the whole estate the premium would be according to the usual rates for houses of that description and location; if it was only upon the debt due to the vendor, there would be a large reduction on account of the responsibility of the vendee, and the value of the lot of ground included in the sale, because both of these would, in that case, stand as indemnities to the underwriters. They would be entitled to a cession of the vendor's claims, from which an ample indemnity might be recovered."

There cannot, I think, be any question but that in the present case the appellant intended to insure the whole property, and not merely his beneficial interest therein. The agreement between him and Cloy is clear evidence of this as well as the terms of the policy itself. Nor in my view is there any doubt but that the company thought that it was insuring the whole property. The premium is for an insurance not upon a partial but upon an absolute interest. The terms of the policy show that the building itself was insured. The company agreed to make good all such direct loss or damage not exceeding in amount the interests of the assured in the property described, and that word "interests," I think clearly includes interests of all kinds, if insurable; legal interests, equitable interests, and all other interests arising from any relationship between the assured and any one claiming under the assurance.

Some of the learned judges below seem to have thought the fact that Cloy's interest was not disclosed at the time of the insurance vitiated the policy. The authorities are conclusively the other way. Bowen L. J., in *Castellain v. Preston* (11 Q. B. D. 380) says two conditions only are necessary in order to entitle the assured to recover, "first, the form of his policy must be such as to enable him to recover the total value; and secondly, he must intend to insure the whole value at the time."

It is nowhere a condition of his recovering the whole amount that he must disclose all the parties interested. The law, I think, is well laid down in *Wood on Fire Insurance*, sec. 151:

"Unless the policy requires that the interest of the insured shall be disclosed, a failure to disclose the nature of

his interest or of the existence of a lien or encumbrance thereon, is not a fraudulent concealment, and the policy is operative if the assured in fact has an insurable interest therein."

Lord Tenterden, in *Crowley v. Cohen* (3 B. & Ad. 478), says:

"Although the subject matter of the insurance must be properly described, the nature of the interest may in general be left at large."

And see *Arnold on Marine Ins.*, 6th ed. p. 51.

In arriving at the conclusion which I have done, I have been much influenced by the statement of the law in *Castellain v. Preston* (11 Q. B. D. 380). There is nothing inconsistent with our present judgment in that case. There it was practically admitted that the vendor insured only in his own interest, and the case proceeding upon that assumption merely held that the vendor having received the full amount of the purchase money the insurance company became subrogated to his rights against the vendee, and could recover from him, the vendor, any excess which he received beyond a proper indemnity. On the whole, I think, this appeal must be allowed, and the judgment of the trial judge restored.

KING, J.—

I agree with Osler J. that the case mainly turns upon the question:

"What is the proper construction of the policy of insurance? Is it limited by its terms to the plaintiff's interest which, though not disclosed to the company, was that of an unpaid vendor, or is it an insurance not only for himself but for others interested, as for example, the vendee, to the extent of the value insured?"

And again:

"The question is whether the policy is apt for the purpose?"

The learned judge came to the conclusion that the words are not apt for such latter purpose, and that therefore the plaintiff's interest as unpaid vendor to the extent of the \$700 remaining due at the time of the loss was alone at risk at that time.

The policy declares in the first place that the company "in consideration of the stipulations herein named and of \$40 premium does insure H. F. Keefer for the term of one year from the 23rd day of February, 1894, at noon, to the 23rd day of February, 1895, at noon, against all direct loss or damage by fire except as hereinafter provided to an amount not exceeding \$2,000, to the following described property, while located and contained as described herein and not elsewhere, to wit: \$1,700 on the frame building (describing it) and \$300 on his frame storehouse (describing it)."

It subsequently goes on as follows:

"And the said Phoenix Insurance Company hereby agrees to indemnify and make good unto the assured, his heirs and assigns, all such direct loss or damage (not exceeding in amount the sum or sums insured as above specified, nor the interests of the assured in the property herein described), the amount of loss or damage to be estimated according to the actual cash value of the property with proper deduction for depreciation however caused."

I must admit to having been for some time of the opinion that by the terms of the indemnity clause the insurer's liability was limited to an amount (within the sum assured) not exceeding the assured's own interest at risk and liable to be prejudiced by a loss. Such seemed to me the fair meaning and scope of the indemnity clause; and it appeared to be quite unnecessary to guard therein against non-insurable claims or interests, as these would be excluded by the implied terms of an insurance contract. On fuller consideration, however, I think that the policy has a different meaning. By its opening clause, already recited, the plaintiff is insured generally in respect of the property mentioned to the amount specified, that is to say, he is insured generally in respect to his insurable interests in the property, whatsoever they may be. Then in the indemnifying clause, the company undertakes in terms to indemnify and make good unto the assured all such direct loss or damage; but that this may not appear to be a covenant to pay \$2,000 in any event in case of loss, the words are added: "not exceeding in amount the sum or sums insured as above specified;" and further, that it may not appear to be a covenant to pay the amount irrespective of the existence or continuance of the insurable interest of the assured, the further

words are added: "nor the interests (i.e., the insurable interests) of the assured in the property herein described," and then the clause goes on to provide for the mode in which the amount of loss or damage shall be estimated. Strictly, the saving clauses, both as to the sums specified as insured and to the insured's interests in the property, were not necessary; nor were they more necessary in the one case than in the other, and in both cases appear to have been inserted by way of greater caution. The object of the clause of indemnity, so called, was not to limit or define the subject of insurance in any way. That had been sufficiently designated or described in the opening clause of the policy. As to the use of apt words to cover beneficial interests intended to be insured, it seems to me that these need not be specially descriptive of such other interests in the subject of the insurance. All that is meant is that the words shall be large enough to cover all that was in fact intended. If they are so, the insurer's concurrence in what the assured intended to be embraced in them is implied, and so the difficulty involved in his supposed non-concurrence is removed.

The next question is whether it is competent for an unpaid vendor retaining the legal title and having the right so to retain it, to insure and recover for the whole value of the property which he has bargained to sell, there being no question of his intention so to insure and no question of the use of apt words therefor in the policy.

It is not easy to see how such a case can be put lower than that of a mortgagee, as instanced by Bowen L. J. at p. 398 of *Castellain v. Preston* (11 Q. B. D. 380) where he says:

"If he has the legal ownership he is entitled to insure for the whole value. If he intends to cover only his mortgage, and is only insuring his own interest, he can only, in the event of a loss, hold the amount to which he has been damnified. If he has intended to cover other persons besides himself he can hold the surplus for those whom he has intended to cover. But one thing he cannot do, that is, having intended only to cover himself, and being a person whose interest is only limited, he cannot hold anything beyond the amount of the loss caused to his own particular interest."

I cannot concur with Mr. Justice Maclellan in regarding

what was said by Bowen, L. J., as "an authoritative statement of the law by the Court of Appeal in England." The other members of that court had preceded him in the delivery of separate opinions in which the several matters arising in the case were fully considered, and we are not to suppose that they adopted all the views and statements of law expressed by Bowen, L. J., in his somewhat wide incursion into the field of insurance law. To me it appears that, in respect of what is said by him as bearing on this appeal, his views mark a departure to some extent from prior authority; still we have in them the considered opinion of a very high authority which, so far as I am able to discover, appears also to have been adopted and established as part of the law and practice of insurance, and which, as limited by him, appears to be consistent with good-sense.

The remaining and alternative part of the case relates to the effect of the alleged agreement with the vendee for the keeping alive of insurance on the premises. If that agreement were a valid one, I think that there could be no doubt that under this policy the plaintiff could recover in respect of the whole value of the property to the extent of the insurance, for in such case the plaintiff, in addition to the amount of his interest as unpaid vendor, would, in case of loss, be prejudiced to the further amount to which he had bound himself to keep up in the insurance.

The result is that I concur in allowing the appeal.

Appeal allowed with costs.

Solicitors for the Appellants: *Collier and Yale*.

Solicitors for the Respondent: *Smith, Rae and Greer*.

Notes:—

The case of *Castellain v. Preston* (1883) 11 Q. B. D. 380, referred to in the above judgment, was one in which a vendor, who had previously insured his house against loss by fire, contracted for the sale thereof, no reference being made to the policy of insurance. After the contract was made, but before its completion, the house was damaged by fire, and the vendor obtained the insurance money from the company (the plaintiff). In an action subsequently brought by the latter against the vendor it was held that they were entitled to recover back the insurance money, either for their own benefit, or as trustees for the purchaser. The principle

of subrogation laid down in this case was that, on payment of money due under a fire insurance policy, the insurers can enforce all the remedies of the insured, either in contract or in tort, as against third parties, in order to make good the loss.

And in *Aldridge v. G. W. Ry. Co.* (1841) 3 Man. & G. 515, it was decided that a contract of insurance was a contract of indemnity only, and that the insurer was put in the place of the insured as regards all his rights of action in respect of the cause of the loss; the insurer thus having a right of action against the owner of property adjoining that of the insured, when the damage to the latter was caused by the negligence of the former in allowing the fire to spread.

If at some period subsequent to the fire the assured receives other compensation for his loss, the insurer can recover from him the amount which he has thus in all received in excess of his actual loss.

Darrell v. Tibbits, (1879) 5 Q. B. D. 560.

And see, *North British v. London, Liverpool & Globe*, (1877) 5 C. D. 569.

In *Rayner v. Preston* (1881) 18 C. D. 1, it was held that where a house was burned between the date of a contract for its sale and the date fixed for the completion of the contract, and the vendor had received the insurance money, the purchaser, as against the vendor, could not recover the insurance moneys either as an abatement of his purchase-money or for the repair of the premises.

As regards the effect of non-disclosure to the insurance company of the insured's exact interest in the property, contrary to a clause in the policy, the recent decision of the Supreme Court of Canada in the case of *Temple v. Western Assurance Co.* is in point. T. had insured his property against loss by fire, the policy containing a clause which stated that "if the insured is not the sole and unconditional owner of the property, or if any building intended to be assured stands on ground not owned in fee simple by the assured, or if the interest of the assured in the property, whether as owner, trustee, assignee, factor, agent, mortgagee, lessee, or otherwise, is not truly stated in this policy . . . this policy shall become void, unless consent in writing by

the company be endorsed thereon." At the date of the policy there was a small mortgage on the property then insured, but T., who insured as owner, did not communicate this fact to the company. It was held by the Supreme Court of Canada (judgment rendered June 5, 1901) that this mortgage did not, under the condition above quoted, avoid the policy.

[COURT OF KING'S BENCH, QUEBEC.]

(APPEAL SIDE.)

BEFORE SIR ALEXANDRE LACOSTE, C. J. AND BOSSÉ,
BLANCHET, HALL AND OUMET, J. J.

CAME (Defendant) Appellant.

V.

THE CONSOLIDATED CAR HEATING CO.

(Plaintiffs) Respondents.

Patent for a combination—Rules of construction—No infringement unless all the elements are used.

1. A patent is a contract between the government granting the same, or the public, and the patentee, and must be construed like all other contracts; but when there is any doubt as to the true meaning of the patent, which expresses the intentions of the parties to the contract, it must be interpreted against the patentee, as the latter is the stipulator.
2. Where a patentee, in one of his claims, describes the working of a locking and unlocking device, without any specific mention of a hinge joint (referred to in the other claims) which, in the opinion of the Court, is one of the elements co-operating in that process, and contributing to the firmness of the locking, such hinge joint will be held to form part of the locking device, and to be included in the claim of the same.
3. The true rule, both in Canada and in England, regarding the infringement of a patent for a combination is the same as that which has been firmly established in the United States, namely, that the patent is not infringed unless all the elements which go to make up the combination are used. In such cases it is impracticable to declare that there has been an infringement by the taking of the "pith and marrow," or "the substance and essence" of the patent, as it is generally impossible to arrive at the exact meaning of these terms with reference to a particular patent.

MONTREAL, May 29, 1901.

SIR ALEXANDRE LACOSTE, C. J. (*Translation.*)—

The action is for infringement of a patent and for an injunction.

The respondent is the assignee of Sewall, who obtained, on the 4th of May, 1887, a patent for what is known as the "Sewall Coupler."

The appellant is the agent of the Gold Car Heating Company, which manufactures a coupler known as the "Gold Coupler," claimed by the respondent as being an infringement of his patent.

The first judgment went against the appellant, granting an injunction, but as that was the real object of the suit, he was condemned only in the nominal sum of \$25 as damages.

Sewall's invention consists in "certain new and useful improvements in hose couplings." Its object is "to construct a two part hose coupling, each half of which is alike, which may be used to couple together hose for the passage of steam, air, water, gas, etc."

The coupling hangs by gravity, and is provided with locking devices which keep the two halves locked together in all positions except when turned upwards at the centre. At the lower end of the meeting faces is what is called a hinge-joint, upon which the two halves of the coupler are turned to disengage them from each other.

Their combination is described as follows: "Each half of the coupling" is composed "of a body portion having an upwardly turned neck or extension, both of which are bored centrally to form with the hose to be coupled a continuous passage. The body portion is provided at one side with a broad flat extension projecting forward to overlap one side of the body portion of the companion half, and said extension has at one edge an overturned lip or flange. At that side of each half of the coupling opposite the broad extension a groove or passage is cut of suitable shape to receive the flange, and a shoulder is also provided which serves as a bearing. The meeting face of the body portion is provided at its lower end with a rib extending about one-half of the width of the coupling, and said face is cut away

at the side of the rib to present a deep groove or recess, for the remaining distance, this recess or groove receiving the rib of the companion portion."

Then the inventor shows how his combination will operate: "The two halves of the coupling being placed opposite to each other it will be seen that the extension of one half overlaps the opposite side of the other half, the flange entering the groove and the rib entering a recess formed in the opposite half."

A disclaimer is inserted which is in the following terms: "I am aware that two parts hose couplings have been made, each part of which has a passage through it, but a valve has been employed at the junction of the two passages to close the passage when the two parts of the coupling are disengaged, and such a coupling having indirect obstructed passages I do not herein claim."

And the claims read as follows: "1. A two-part hose coupling, composed of like halves or portions, each half consisting of a body portion, having a suitable passage therethrough, a broad extension, locking flange shaped as described and located at one side of the body portion, a groove or passage shaped as described upon the other side of the body portion and a joint connection at the lower side of the meeting face of the body portion upon which the two halves may be turned to disengage them one from the other substantially as described. 2. A two part hose coupling composed of two like halves or portions adapted to be locked together against lateral or downward pressure but to be disengaged by the upward movement only, each half of which consists of a body portion having a suitable passage through it, a broad extension located at one side of the body portion and having a locking flange upon the upper side of the broad extension and extending in a diagonal line, a groove or passage upon the other side of the body portion also extending in a diagonal line and having at the lower side of the meeting faces of the body portions a co-operative part of a separable connection, all substantially as and for the purpose set forth. 3. In a two part hose coupling composed of like halves or portions each of which has a free and unobstructed passage through it directly from end to end, which passages co-operate together to form a longitudinal unobstructed passage directly through

the hose coupling, combined with locking devices, as described, upon each side to lock the said halves or portions together, as set forth."

The Gold coupler is composed of two like halves consisting of a body portion having a free and unobstructed passage through it directly from end to end, which passages co-operate together to form a longitudinal unobstructed passage directly through the hose coupling combined with locking devices similar, practically, to those described in the Sewall patent, with the exception, nevertheless, of the hinge-joint, which is cut off in Gold's. There is in addition a rocking gasket at the end of each passage at the meeting faces, which ensures a steam tight joint.

The respondent urges that the Gold coupler is a piracy of his third claim, which does not include the hinge joint, and that the rocking gasket is an improvement upon his own combination, and cannot be used with his invention without a license.

He further says that even admitting that the hinge joint be included in every one of his claims it is not an essential part of his invention and that appellant in using the Gold coupler has taken the substance of his combination and has thus infringed his patent.

The question I now take up is not whether the hinge joint is an essential part of the patent but whether it is included in the third claim.

This patent, which is a contract between the government, or the public, and the patentee, must be interpreted like all other contracts. The intention of the parties must be found in the contract itself and the interpretation of its several clauses is a question of law which is left to the court. The rules of interpretation are those applied to other contracts.

The maxim, *ut res magis valeat quam pereat*, has really no application in this case, because, whatever interpretation we lay on the third claim, it will have an effect. But in case of doubt the contract is interpreted against him who has stipulated, that is to say, the patentee. It is in the light of these principles that we will examine the third claim of the patent.

The respondent contends that the third claim is a mere combination of the main portion of the two halves with the locking devices upon each side to lock said halves; that the hinge joint is not part of the locking devices; that its function, as stated in the patent, is not to help in the locking; that at all events, it is not part of the locking devices which are on the sides of the coupler.

In deciding these propositions, reference must be made to the specifications where the invention is described and to the two first claims, being invited to do so by the words "as described," and "as set forth," contained in the third claim.

Does the hinge joint form part of the locking devices?

Nowhere in the patent does Sewall say, in so many words, what he means by "locking devices;" but no operation, whether of locking or unlocking, is described in which the hinge joint is not used.

After having described the several elements that compose his combination, that is to say, the body portion, the broad extension with its flange, the corresponding groove, and the hinge joint, he proceeds to show how the locking will be affected: "The two halves of the coupling being placed opposite to each other, it will be seen that the extension of one-half overlaps the opposite side of the other half, the flange entering the groove and the rib entering the recess formed in the opposite half."

So the rib and recess, that is to say, the hinge joint, is shown to be one of the elements co-operating in the locking of the couplers. And the inventor immediately adds: "It will thus be seen that the two halves are firmly locked together," giving to understand that all the elements above named contribute to the firmness of the locking.

As to the unlocking, he says that the halves are "capable of being disengaged only by moving them upward on the ribs turning in the grooves which serve as a hinge joint or connection." The important function of the hinge joint in the disengagement or unlocking of the coupler is thus clearly demonstrated.

In a lock every element used in unlocking forms part of the locking devices. I might add that in the first

claim the hinge joint is described as a "joint connection upon which the two halves are turned to disengage," and in the second, "a co-operative part of a separable connection."

Our conclusion must, therefore, be that the hinge joint forms part of the locking devices.

But, says the respondent, the locking devices mentioned in the third claim, are limited to those "upon each side," and the hinge joint is not on the side, but at the lower end of the meeting face, as stated in the specifications.

This is true in one sense, but in the two first claims the hinge joint is mentioned as being at the lower side, while the flange and the corresponding groove are at the upper side. There are four sides in the mind of the inventor. To which side does he allude in the third claim? It may be to the flange or groove only, but not necessarily so. The third claim seems to have been put in to particularize a special passage through the main portion of the coupler which Sewall intended to cover by his patent. A free and unobstructed passage—"direct from end to end"—"a longitudinal unobstructed passage directly through the hose coupling," and this seems to have been done as a precautionary measure in case his two first claims which apply to a suitable passage would be anticipated.

If the third claim had been the only one made, could it have been said that it did not cover the hinge joint? Evidently not. And why should we give a different interpretation because there are two other claims when the specifications disclose the evident intention of the inventor to include the hinge joint in every operation, and to make it the basis of the disengagement process.

If Sewall meant to include the flange and the corresponding groove only, why did he not say it clearly, as he did a few days previous to the filing of his claim in the Canadian Patent Office, when he filed his amended claim in the United States Patent Office?

No doubt, in interpreting a patent which is a contract between the patentee and the public, we must decide the question without any bias, but the public has a right to know what it is prohibited from doing. It is upon the patentee, who is the stipulator, to prove the special restric-

tion imposed upon the public by his third claim and in case of doubt the verdict of a court has to be "not proven." As Lord Cairns said in *Harrison v. Anderston Foundry Company*, 1, App., Cases, H. L., 574: "In case a patentee claimed a subordinate or subsidiary part of the combination, it is necessary to see that the patentee has carefully distinguished those subordinate or subsidiary parts and has not left *in dubio* what claim to parts, in addition to the claim for combination, he meant to assert."

Again the question is not as to the validity of the patent, nor as to the validity of that one claim, but as to its extent.

We, therefore, come to the conclusion that the third claim is too vague and too ambiguous to enable us to say that the inventor contemplated a combination different from the one described in the two first claims, and that we must consider it as being the same combination which includes all the elements of the two others, and in particular the hinge joint.

Assuming now that the hinge joint is included in every one of the claims, is the Gold coupler an infringement of the Sewall patent? The Gold coupler has all the elements of the Sewall patent with the exception of the hinge joint, but it has another element, the rocking gasket, placed at the end of each of the passages that run through the coupler, and which, by its oscillating or rocking capacity, facilitates the adaptation of the two passages or tubes, so as to make a steam-tight joint, even in case the two faces would not meet squarely.

The respondent admitted that the Gold coupler would not be an infringement of its patent in the United States, where, according to the jurisprudence, in a patent for a combination, the patent is not infringed unless all its elements are used; but it is claimed that the substance of Sewall's combination has been taken by the appellant, and that, according to the English and Canadian courts this constitutes an infringement.

I do not think that there is such a deep gulf between the English or Canadian jurisprudence and the American jurisprudence as respondent contends. To say with the American courts that in a patent for a combination of old elements the subject matter of the patent is the combination

itself taken as a whole, which cannot be infringed unless the whole combination is taken, is clearer to my mind than the rule expressed by some of the English and Canadian courts that there is an infringement when the "pith and marrow," "substance and essence," of the combination have been taken. It is easy to find out the pith in a plant, the marrow in a bone, but it is often a heavy task to discover the pith and marrow of a combination.

I have looked at the precedents quoted by both parties, and nowhere could I find a definition of the words pith, marrow, or substance and essence, as applied to a combination, that would satisfy my mind and be a sure guide in the application of the law of this country.

It is understood by all that a patent is a contract between the patentee and the public by which certain privileges asked for by the patentee are granted to him.

The least the public can ask is that these privileges should be clearly defined, so that people acting in good faith may know without a metaphysical exertion of the mind what is left to them, and what they can use without incurring a penalty; it is for that reason that the law of patents has provided for an exact and complete description to be given by the inventor, and also for specific claims.

If the inventor claims a combination, that combination alone is covered, and the other inventors thus know upon what they can work. We find that rule laid down in many of the English cases. Take *Clark v. Adie*, 46 L. J., Ch. 185, which is a leading case. It was decided in that case that when a patent is taken out for a combination it will "protect the several subordinate parts, and all subordinate combinations of such parts, provided the subordinate parts or combinations be themselves properly subjects for a patent, and also provided that it is clearly and previously defined by the specifications what are the subordinate parts or combinations of parts in respect of which, as well as the entire combination, protection is claimed."

The Lord Chancellor said: "It must have been made plain that the inventor had it in his mind, and intended to claim protection for these subordinate integers."

Lord Hatherly said: "If you claim for a portion of the machine you must make it plain."

In *Harrison v. Anderston Foundry Co.*, 1, App. Cases, 574-578, Lord Cairns said: "If it is clear that the claim is for a combination, and nothing but a combination, there is no infringement unless the whole combination is used."

Lord Chelmsford: "If a patent is solely for a combination, nothing can be an infringement but the use of an entire combination."

Again, Lord Cairns, in *Dudgeon v. Thompson*, 3 App. Cases, 44: "There is no such thing as the infringement of the equity of the patent, but that which is protected is that which is specified, and the infringement must be of what is specified."

That dictum of Lord Cairns was approved in the *Ticket Punch Register Company v. Colley's Patents*. In this case Smith, L. J. said: "Their (plaintiffs') complaint must be that the defendants have infringed the combination, for it is the combination, and nothing else which is protected."

These quotations show that the present rule in England is similar to that in the United States.

It is true that in some of the cases cited by the respondent, and by the learned judge who decided the case in the first court, and even in some of the cases above cited, the English judges put to themselves the question: "Has the combination in substance been taken?"

Perhaps it is not easy to reconcile the dictum of some of the judges with the rule. Yet I think that we may safely say that the English courts never intended to go beyond the claims in the patent, and that if the claim is for a combination, the combination alone is protected; also that the patent being a contract has to be interpreted like all other contracts.

Sewall claimed a combination of what is admitted by him to be all old elements to procure a coupling of hose having a steam tight joint, and disengaging automatically. According to his specification this coupling is done by the combination of the following elements: the body portion with its passage, the extension with its flange, and its corresponding groove, and the hinge joint. Every element has its special function or functions. The hinge joint forms

part of the locking, and it helps in keeping the two halves firmly locked together; it is a guide in coupling, and ensures the bringing of the two faces squarely together; and it is the basis of the operation in the disengagement of the coupler.

Can it be said that the hinge joint is not a material part of the combination? True, the coupler can be coupled and uncoupled without it, but the combination is destroyed, and the process is not as perfect, nor as safe, nor as practicable. This view is supported by the evidence which establishes that Sewall's coupler has never been put on the market without the hinge joint, and that the Safety and Martin Coupler, which have the elements of the Sewall without the hinge joint, could not compete with the Sewall.

It is true that the Gold has all the elements of the Sewall without the hinge joint, and it is a strong competitor of the Sewall on the market, but this is due to the addition of a new element, the rocking gasket, which obviates the inconveniences resulting from the absence of the hinge joint. The Gold does not couple so surely if the person who couples it is not in the practice of coupling hose, and the disengagement is not as perfect; on the other hand, the rocking gasket secures in one way more safely a steam tight joint. The Gold does not take from the Sewall Patent the advantage of always bringing squarely together the two faces, nor the firmness of the locking, nor so safe a disengagement so as to prevent a catching.

Under these circumstances can one say that the substance of Sewall's combination has been taken? The substance of Sewall's is a special mode of coupling, by which he uses the flange already known, the groove already known, the gravity, also known, and the hinge joint, which is a new element. If the patentee does not claim in his patent a subordinate combination of the body portion with the broad extension, with the flange and the groove, how can he reproach Gold for using this last combination with a new element, the rocking gasket? Patentees who are original inventors of devices are entitled to a broad construction, but a mere improver is confined to his particular device.

We must take into consideration the state of the art at the time the patent was taken. Car hose couplers and modes of couplings of many kinds had been invented and

were then in use, all more or less perfect. Locking devices quite similar to the flange and groove in Sewall's, whether applied to side port or port end couplers were in use. The art was gradually advancing towards the thing desired, the field of invention was limited, Sewall discovered a particular device. Are we not to limit him to that particular device?

To take the substance of a combination does not mean merely taking some of the essential elements of the combination without which the combination could not subsist. If it was so, the body portion of the coupler could not be used without infringing.

To take the substance of a combination is to take the combination itself, the whole combination without omitting any material element which the inventor himself considered as material.

As I said, true it is that the coupling and uncoupling could be made without the hinge joint, but not so perfectly. Supposing that a medicine composed of five ingredients already known, should be patented for the cure of croup. Would the patent be infringed by another mixture, including three or four of these ingredients; and, more so, if it is established that this last remedy is less efficacious than the one patented?

Much stress has been laid on the wedging or folding action of Sewall's locking. I cannot see any other action than that of gravity. Gravity is the only acting agent that brings closer the two halves; the flange and the groove are passive, their function is to secure and maintain what gravity has done, and prevent the loosening of the tie.

I quite understand that equivalents or slight changes of no importance will not permit the infringer to escape. But I do not find in Gold's coupler the device as patented in Sewall's, and I am, therefore, to reverse, and this is the unanimous opinion of the Court.

The appeal is allowed.

Solicitors for the Appellant, *Robertson, Fleet & Falconer*.

Solicitors for the Respondents, *McGibbon, Casgrain, Ryan & Mitchell*.

[HIGH COURT OF JUSTICE FOR ONTARIO]

BEFORE MEREDITH, C. J.

Re ABBOTT—MITCHELL IRON AND STEEL CO.

Company—Petition for winding-up order—Service of demand for payment.

1. The demand for payment of a debt due, the neglect to comply with which is proof of insolvency, under R.S.C., cap. 129 (The Winding-up Act) sec. 6, is a formal demand in writing, duly served on the company. The service of a specially endorsed writ of summons does not meet these requirements, not being a "demand" but only a notice that certain proceedings will be taken if the amount thereby claimed is not paid within eight days.
2. It is a condition essential to the making of a winding-up order that the company shall have had the four days' notice of the application given by R.S.C., cap. 129, sec. 8.

TORONTO, July 18, 1901:

I held on the first argument that the case of the petitioners was not made out, but gave them leave to amend by setting up the demand in writing of payment, and the neglect for sixty days to comply with the demand, and the petition having been amended accordingly came on again to be heard on the 23rd of May last, when counsel for the petitioners contended that the service which had been effected on the respondent company of a specially endorsed writ in an action against it to recover the amount of the petitioners' claim was a sufficient demand in writing within the meaning of the Winding-up Act, R. S. C. 1886, cap. 129, sec. 6. Mr. Thompson, for the respondents, contended that it was not; and further argued that the case was not one in which a winding-up order should be made, because, as he contended, there remains practically nothing to be wound up. Contrary to the impression I had on the argument, I have come to the conclusion that the service of the writ was not a sufficient demand in writing requiring the respondent company to pay the amount due to the petitioners within the meaning of sec. 6. The writ is issued from the High Court in the name of the Sovereign, and requires the person summoned to enter an appearance within ten days, and informs him that in default of appearance the judgment may be signed. The endorsement gives the particulars of the claim, and contains a notification of the amount of the plaintiff's claim for debt and costs, and that if the amount be paid within eight days proceedings will be stayed. What

the statute requires to be served is a demand in writing requiring the company to pay the sum due, that is, as I understand the language of sec. 6, to pay it at once. Now there is nothing of this nature in the writ or the endorsement upon it. There is in terms no such demand in writing, but only a notice of the effect of payment within eight days, and the claim is, having regard to the nature of the proceedings, not, I think, in the nature of a demand in writing requiring payment to be made. It is but reasonable where what is practically the bankruptcy of the Company is to follow the failure to comply with the demand served, or may do so, that the demand should be reasonably certain in terms, and at all events not calculated to mislead; and I think that to treat the service of a specially endorsed writ as a sufficient demand in writing would be to sanction what would be calculated to mislead. There is a further objection to giving effect to this, as a ground for making the winding-up order. By sec. 8 of the Act, the petitioning creditor must give four days' notice of his application to the Company before applying by petition for the order, and it would, I think, be against the spirit as well as the letter of the Act if effect were given to a ground of which the Company had not that notice, and which was not put forward in the petition, notice of which was served upon it. Upon the whole, therefore, I conclude that the application should be refused, and I, therefore, dismiss the petition without costs.

Solicitor for the Petitioners, *L. M. Lyon*.

Solicitors for the Company, *Clute, Macdonald & McIntosh*.

Notes:—

It appears from this decision that in order to bring a company within the provisions of R. S. C., c. 129 (The Winding-up Act) sec. 6, (which defines when "a company is deemed to be unable to pay its debts as they become due,"—that being such insolvency as, according to sec. 5, s.s. (a), will justify the making of a winding-up order) it is necessary that a formal written demand for payment shall, for that purpose, have been duly served on the company on behalf of a creditor to the extent of \$200 at least, and the company or bank (as the case may be) has failed to pay the debt within sixty or ninety days, respectively, after service of such demand.

And the service must, whenever possible, conform to any local statutes in force regarding the mode of serving process on corporations. *Re Qu'Appelle Valley Farming Co.*, (1888) 5 Man. L. R., 160. *Re Rapid City Farmers' Elevator Co.*, 9 Man. L. R., (1894) 574.

In a Quebec case it was held that when a company is insolvent, and the insolvency is alleged in the petition, the creditor applying for the order is not obliged to allege and prove that he made the statutory demand. *Mackay v. L'Association Coloniale de Construction*, etc. (1884) 13 R. L., 383.

But this decision has not been adopted by the courts of other provinces. See *re Rapid City Farmers' Elevator Co.* (1894) 9 Man. L. R., 574.

But once the company has allowed the stated interval to elapse without complying with the statutory demand for payment, the court has no discretion, but must regard such "neglect" as conclusive evidence of insolvency under the Act. *In re Imperial Hydropathic Hotel Co.*, (1882) 49 L.T. 160.

The attitude of the company, however, must be that of "neglect." There may possibly be some reasonable cause for omitting to pay. *In re London & Paris Banking Corporation*. (1874) L.R. 19, Eq. 444.

The order may be obtained before the expiration of the sixty or ninety days after the service of the demand, if the company or bank is in fact insolvent; but the burden of proving the insolvency then rests upon the petitioning creditor. *Eddy Mfg. Co. v. Henderson Lumber Co.* (1890) M.L.R. 6, S.C. 137.

The fact that the creditor is secured in respect of the debt upon which he bases his petition does not effect his right to obtain a winding-up order. *In re Chapel House Colliery*. (1883) L.R. 24 C.D. 259. *Olathe Silver Mining Co.* (1884) L.R. 27 C.D. 278.

Section 8 uses the words "a creditor for the sum of at least two hundred dollars," omitting to state that the debt

must be one which is then due. It has been held, however, that this omission is immaterial, and that it is only a creditor whose debt was actually due at the time of the service of the notice who is entitled to a winding-up order. *Re Atlas Canning Co.* (1897) 5 B. C. R. 661. *In re British Joint Stock Bank* (1890) L. R. 44 C. D. 703.

According to the decisions under the English Winding-Up Act it appears that while a shareholder is only entitled to an order upon proof that there will be some assets (see *re Rica Gold Washing Co.* (1879) L. R. 11 C. D. 36) or that there is a reasonable probability that there will be some (see *re Diamond Fuel Co.* (1879) L. R. 13, C. D. 400), a creditor is, upon proof of insolvency, entitled to one *ex debito justitiæ*,—whether or not there will be any assets for the creditors to divide. *In re Isle of Wight Ferry Co.*, 2 Hem. & R. 597.

And see also, *in re Professional, etc., Building Society*, (1871) L. R. 6, Ch. 856.

[COURT OF KING'S BENCH, MANITOBA.]

BEFORE KILLAM, C. J.

THE IMPERIAL BANK v. THE FARMERS TRADING CO.

*Company — Managing director conducting all business —
Liability of company for notes made by him.*

When the directors of an incorporated company leave the conduct of the general business in the hands of a managing director or secretary, who accepts or makes or endorses such bills or notes as he sees fit, recording such transactions in the books of the company which are examined by its auditors, it will be inferred, (even when there is a by-law to the effect that promissory notes shall be signed by the president and the secretary or managing director) that such secretary or managing director was duly authorized to make promissory notes on behalf of the company; and any such notes so made and used by him in the ordinary course of business will bind the company.

WINNIPEG, July 1901.

The plaintiff sued as endorsee of three promissory notes, alleging them to have been made by the defendant company in favor of A. J. Creighton and endorsed by the bank.

The Company was incorporated under the Manitoba Joint Stock Company's Act, R.S., M. c. 25, for the purpose of carrying on a trading business. It deals chiefly in agricultural instruments, vehicles, binder-twine and tea. Its place of business is in the town of Portage La Prairie. There are four directors, three of whom are farmers residing at some distance from the town. The fourth is Mr. G. A. J. A. Marshall, who personally conducted and managed the business. In July, 1897, Mr. Marshall was appointed secretary of the company, and in January, 1898, the directors passed a resolution "that Mr. Marshall's position be defined as Managing Director of the Company."

A by-law provided for the secretary keeping minutes of the meetings and having the custody of the corporate seal, books, and papers of the Company. There was no by-law, resolution or other act expressly defining the powers or duties of the managing director.

A by-law provided that cheques were to be signed by the president or vice-president and countersigned by the managing director or secretary.

Another by-law authorized the directors to borrow money from a bank, and empowered the president and the managing director or secretary to sign promissory notes therefor on behalf of the Company.

There was no by-law or other act authorizing the making, acceptance, or endorsement of notes, bills, or cheques, except as just mentioned.

On the 2nd January, 1900, an agreement was made between one Arthur J. Creighton and Marshall, acting for the Company, by which the Company ordered of Creighton certain specified quantities of tea of different kinds at specified prices for future delivery, and Creighton agreed to accept the Company's promissory notes, for the aggregate amount of the order, less ten per cent. thereof, payable in three months from the 2nd January, 1900. The notes were given signed "For the Farmer's Trading Company, Ltd.,

G. A. J. A. Marshall, managing director." The notes sued on are part renewals of these, and are signed in the same way. No tea was ever delivered under the order, and the Company never received any consideration for the notes except Creighton's acceptance of the order of the tea.

On account of the distance at which the three directors resided it was impossible for them to oversee or be consulted about the details of the business, and the specific transactions Marshall managed, both buying and selling. He states that he never told them of the course of business, and that they left it all to him.

From the year 1895 the Company was in the habit of buying tea from Creighton, and from the time of Marshall's appointment as managing director he was accustomed to give Creighton promissory notes, similarly signed, for tea, and also to make notes and accept bills in the same form on behalf of the Company for goods purchased. Many of these were retired by the Company's cheques.

The words "For the Farmer's Trading Company, Ltd.," and "managing director" were impressed on such notes and bills by one rubber stamp, kept in the office of the Company, which was used also for the purpose of endorsement. Different stamps were used for signing cheques.

The cheques were usually signed by the president in blank and left for Marshall to fill up and sign. Counterfoils showed what they were given for.

Notes made and bills accepted were usually entered in a book kept in the Company's office for the purpose of showing bills payable by the Company.

According to Marshall's evidence auditors were from time to time appointed by the directors, and these or any other person examining the books would see that Marshall was in the habit of giving notes for the Company.

There was no direct evidence of knowledge on the part of the shareholders or directors, other than Marshall, of his course in these matters. Marshall professed himself unable to say whether they had such knowledge or not.

The question is whether under these circumstances the Company can be held liable upon these notes.

By section 62 of the Manitoba Joint Stock Companies Act, R. S. M., c. 25, a promissory note made by an agent or officer of a company "in general accordance with his powers as such officer under the by-law of the Company or otherwise" is binding upon the Company.

It is clear then that the power may be conferred without by-law.

The powers and duties of the managing director were not expressly defined in any way, but it is evident that he was to exercise large and important functions, otherwise the business of the Company could not go on. His powers, whatever they were, can be gathered only by inference from the nature and course of the business.

It is unnecessary to cite authority to show that the powers of officers or agents of corporations can be inferred. The books are full of cases in which the courts have drawn inferences as to the extent of their powers for the purpose of rendering corporations liable in contract or on tort.

In Lord Justice Lindley's work on Partnership, 6th ed., p. 135, referring to the case of *Hawtayne v. Bourne*, 7 M. & W. 595, it is said: "It will be observed that what is necessary to carry on the partnership business in the ordinary way, is made the test of authority where an actual authority or ratification can be proved. . . . What is necessary for carrying on the business of the firm under ordinary circumstances and in the usual way is the test . . . The question whether a given act can or cannot be said to be necessary to the transaction of a business in the way in which it is usually carried on must evidently be determined by the nature of the business and by the practice of persons engaged in it. Evidence on both of these points is therefore necessarily admissible, and as may readily be conceived, an act which is necessary for the prosecution of one kind of business may be wholly unnecessary for carrying on another in the ordinary way."

Of course there are many powers which a partner has to bind his firm that are not presumed in an agent or manager of an incorporated firm. But in *re Cunningham & Co., Limited*, 36 C. D. 532, North, J., adopted the principles there laid down as applicable for determining the authority

of a manager of a branch of the business of a Joint Stock Company. And in considering the authority of the manager in that case to make a promissory note for the Company, he referred to the fact that it was not in the ordinary course of the business of that Company because it was a newly formed Company and had not yet any ordinary course of business.

In the present case there is no evidence of the ordinary practice of persons engaged in the particular kinds of business in which the defendant Company engaged. It is, however, well known that it is very common for dealers buying from larger dealers or from manufacturers to give promissory notes or accept bills of exchange for the goods purchased, and I think that very slight evidence should be required to prove such a practice as would involve the inference that this course was necessary for carrying on the business of this Company under ordinary circumstances and in the usual way.

Here the manager made notes and accepted bills for goods purchased, and he did so in the most open way. The transactions appeared in the books of the Company, its cheques were used—and this, too, appeared on the books—to retire such bills and notes, and the Company's books were audited and the transactions passed. This course extended over a period of more than two years. I think that it may properly be inferred from this that the manager was intended to have this among his other powers.

If he had the power to give the Company's notes at all, it is unnecessary to inquire into his authority to enter into the particular transaction out of which the notes in question arose. Creighton was a dealer in tea from whom the Company was accustomed to buy, and there does not appear to have been anything to indicate to the Bank that the transaction was anything out of the ordinary course. See *Bryant, Powis and Bryant, Limited, v. Quebec Bank*, (1893) A. C. 179.

There will be judgment for the plaintiff for the full amount of the notes, interest and charges, with costs.

Solicitors for the Plaintiffs, *Anderson and Ormond*.

Solicitors for the Defendants, *Cooper and Taylor*.

Notes:—

In the case of *Bryant, Powis and Bryant, Limited, v. Quebec Bank*, (1893) A. C. 179, referred to in the foregoing judgment, the Judicial Committee of the Privy Council held that the appellant company was liable to the bank on two bills of exchange indorsed in the name of the company, "per pro C. G. Davies," and discounted by the bank in the ordinary course of business. In giving judgment their Lordships said that the law on the subject appeared to be "very well stated" in the following extract from the decision rendered by the Court of Appeal for the State of New York in *President, etc., of the Westfield Bank v. Corman*, (1867) 37 N. Y. R., 320 at p. 322.

(The passage is an excerpt from a quotation in the judgment in *North River Bank v. Aymar* (1842) 3 Hill, 262 at p. 270, and was only cited as such in the New York case above mentioned):—

"Whenever the very act of the agent is authorized by the terms of the power, that is, whenever by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent, as to all persons dealing in good faith with the agent; such persons are not bound to inquire into facts aliunde. The apparent authority is the real authority." See also *Bryant, Powis and Bryant, Limited, v. Le Banque du Peuple*, (1893) A. C. 170.

[IN THE HIGH COURT OF JUSTICE FOR ONTARIO]

BEFORE FERGUSON, J.

THE DONNELLY SALVAGE AND WRECKING CO.
v. TURNER*Towing Contract—Vis major—quantum meruit.*

When a tug contracts to tow a stranded vessel, but is prevented from actually doing so by stress of weather and by ice, nothing will be allowed for the work done in attempting to reach the vessel, when the evidence shows that by the exercise of due diligence the master of the tug might have informed himself that it would be impossible to effect a passage by the route attempted.

TORONTO, June 25, 1901.

The Donnelly Salvage and Wrecking Company are the plaintiffs, and they carry on business in the city of Kingston. The defendant was the owner of the schooner "Wave Crest," and on the 7th day of December, 1899, this vessel being loaded with stock, went ashore off Point Breeze, in the state of New York, on the south side of Lake Ontario, and thereby became and was in a position of danger and peril. It was necessary to have the vessel relieved immediately if that were possible. The defendant, having his vessel in this position, communicated by telegraph with the plaintiffs, and several telegrams passed between the parties. The first of these dated 8th December from defendant asked the plaintiffs what they would take to pull the vessel off. The answer was: "Don't wish to contract. Will send Donnelly, one hundred and fifty dollars per day. Will you want steam pump also?" The reply to this was: "Accept terms. Vessel close to harbor. Weather fine. Send tug and pump immediately. Want schooner towed Toronto. Wire reply." It was contended that adding to this acceptance "Want schooner towed to Toronto" prevented if from being such an acceptance as completed a contract. This question, I think it not necessary to determine, because I am of the opinion that the response, "Will leave with steamer Donnelly as soon as we get outfit on board," and the fact that the plaintiffs did so leave, show a complete contract. I think there was then a consensus and that the parties were *ad idem*. Each of the first two of these telegrams was dated on the 8th of December, and each of the last two on the 9th of December.

The plaintiffs say that the defendant on or about the 9th day of December, 1899, engaged the steamer and pump at the sum of \$150 per day for the steamer, and a reasonable sum, which would be \$45 per day, for the steam pump, together with the services of their wrecker, engineer, and diver, whose services were worth \$14 per day, and that they continued in the employment of the defendants for the ensuing six and a half days, whereby the defendant became indebted to the plaintiffs in the sum of \$1358.50, which sum is wholly due and unpaid.

The defendant denies that he is indebted to the plaintiffs, and denies that the plaintiffs rendered any service whatever to the defendant in respect to which the plaintiffs are entitled to any compensation from the defendant, and submits that the plaintiffs' action should be dismissed with costs. The plaintiffs' tug "Donnelly" did start on the trip or voyage to the place where the defendant's vessel was in difficulty. It started about eleven on the night of Saturday the 9th of December. It appears that there are two routes from Kingston to the place where the defendant's vessel lay. One of these was through what is called the "Gap," and then in a somewhat oblique direction across the lake, which was, or may be called, the outside route. The other route was through the Bay of Quinte and through the Murray Canal, and then almost directly across the lake. This was, or may be called, the inside route. The plaintiffs' tug proceeded on the Saturday night through the Gap and some 15 miles out into the lake, when, in the opinion of her seamen, as they said, they found the weather so stormy and the sea so rough that they could not safely go any further, when they turned back and took shelter. After this they proceeded westward into the bay, taking the inside route, in which they found ice to such an extent that they turned back to the eastward again. It then occurred to them that a wind that they observed might have removed the ice that had stopped them in the Bay, when they communicated by telegraph and were informed that the ice had gone. They then turned and went westward again in the Bay, and upon their arrival at Murray Canal found the gate locked and the keeper absent, which caused further delay. Having found the keeper of the canal and got the tug through, the mariners on board were advised by telegram that the defendant's vessel had "gone to pieces." Upon receiving this advice the tug went home to Kingston. The six and one-

half days for which the plaintiffs charge wages were spent chiefly if not almost altogether, in the Bay of Quinte going one way and another, taking on coal, etc. The plaintiffs do not profess to have performed any service actually useful to the defendant, but say and contend that they did the best that they could, or that could be done in the circumstances, and that they were prevented from serving the defendant in the manner anticipated and contracted for by reason of the inclemency of the weather and the consequent roughness of the water, the act of God, *vis major*, and they, the plaintiffs, claim the reward the same as if they had actually performed the services for the defendant as intended by the contract.

It is, I think, not needful that I should here state with particularity what the plaintiffs' tug and men were doing during the time spent in the Bay of Quinte, during nearly if not quite the whole of the six and one-half days. There is in the evidence a sort of written history of this and a chart showing where the tug went and where she was during the period. The evidence shows, however, that during parts of the time neither the plaintiffs nor the defendant knew where she was or what the tug was doing.

The plaintiffs, claiming wages for the time spent to no purpose, should at least show reasonable diligence on their part, and that they were prevented from doing what was intended by the contract by the act of God, the superior power. In the view that I have taken of the case I need not say that these would entitle the plaintiffs to recover the wages, but I think that before the plaintiffs can be permitted to recover they must at least show these things.

When on the night of the 9th December the plaintiffs' tug went through what was called the Gap, and some fifteen miles out became discouraged by reason of the weather, the sea, etc., turned back to shelter, and the men concluded to take the inside route, it seems plain to me that they should have ascertained whether this inside route was clear for them to go through, and that if they had made the effort they would have discovered that it was not, that ice was there to block their way. That this discovery could have been made appears by the ease with which they afterwards discovered that the same ice had been taken away by the wind.

Then, if the plaintiffs' men had made this discovery, it

seems plain that they would not have attempted to go by the inside route at that time, but, on the contrary, would either have remained in their place of shelter or gone back to Kingston to await better weather to enable them to go by the outside route. I cannot see that the plaintiffs' men were at all right or prudent or diligent in the position in which they were, and knowing the urgency of their mission, in blindly locking themselves and the tug up in the bay for the space of about or nearly a week, when they might have ascertained the condition of the passage before going in. If the plaintiffs' men had been diligent and ascertained that they could not go by the inside route, their plain duty was to go by the outside route as soon as possible. In such circumstances, and upon the contention of the plaintiffs (the pleadings are not full), the burden rested upon them, the plaintiffs, of showing that they were always ready and willing and that during this period the time for which they claim the wages, there was owing to stress of weather, &c., no reasonable opportunity of their getting with their tug out into and crossing the lake. The evidence is that the weather on the American side was during the period generally good.

Much evidence of various kinds was given respecting the weather on this side at or about the place through which the tug would have to go from the Gap. This evidence I do not write out here in detail. My opinion and finding upon it is that it does not show that during the period the weather was always such that there was no reasonable opportunity for the plaintiffs' tug to go through the Gap and across the lake to or towards the relief of the defendant's vessel. I am of the opinion that the plaintiffs have failed to satisfy the onus that thus rested upon them.

It was not contended that, as the hiring was by the day, the plaintiffs are entitled to pay for the time that elapsed before their negligence in going blindly into the Bay in their effort to take the inside route. I think I need not consider this or whether or not their negligence would disentitle the plaintiffs to such pay. The amount would be small in any view of this, only for a few hours, the fractional part of a day.

I do not think, on the whole case made, that the plaintiffs are entitled to recover, and the action should, I think, be dismissed with costs.

Then, as to the counter claim, I am of the opinion that in the way above stated there was a breach by the plaintiffs of their contract with the defendant. But, as I freely stated to counsel at the argument, I am not given any means of measuring the damages, if any, arising from that breach. The vessel was in fact lost. There is some evidence that the value of her before she went upon the rocks was \$3,000 or \$4,000. But from all that appeared I would be disposed to discount such opinion evidence largely. The evidence contained in the examination of the defendant's husband and agent, read to him at the trial when in the witness box, was that the value of the vessel when upon the rocks was about \$500, and he said he had an offer for the vessel lying upon the rocks of \$500. This, I understood, was to include the sails and gear, which were sold for \$237.50. I am not given any skilled evidence as to the possibility of saving the vessel, or the probability of her being saved, and if so in what condition, by the most expert craftsmen. All is left in uncertainty and gloom, and still, and after calling attention to this, I am asked to measure damages. All I can in the circumstances say is that the defendant has not proved any damages in the way that a suitor should prove damages for the payment of which he expects an order against his opponent.

Then, assuming that the defendant does not prove any damages, there arises no mischief from a dismissal of the counter claim, which dismissal should I think be without costs.

The action will be dismissed with costs and the counter claim will be dismissed without costs.

Judgment accordingly.

Notes :—

TOWAGE :—In a recent English case it was held that a contract to tow a vessel from one port to another, for a certain fixed sum, was indivisible; and that, therefore, if the complete performance of the contract was prevented by circumstances beyond the control of either party, the tug cannot recover on a quantum meruit for so much work as was actually done with a view to fulfilling the contract.

In that particular case a fog coming up, the towed vessel became stranded on a rock, (no one being in fault), thus rendering impossible the completion of the towage contract. *The Madras* (1898) Probate, 90.

See also, *Appleby v. Myers* (1867) L. R., 2 C. P. 651.

A contract which is originally one for towage may become a matter of salvage. In such a case, however, the burden is upon the owners or navigators of the tug to prove clearly that such unforeseen dangers arose that their obligations under the contract of towage were extinguished by *vis major*, and that, so far as that contract was concerned, they might have abandoned the tug. *The I. C. Potter* (1870) L. R., 3 Ad. & Ec. 272.

But in a later case it was laid down that the danger need not be such as would put an end to the towage contract,—but that it is sufficient if these unforeseen perils are of such a nature that they cannot be inferred to have been within the contemplation of the parties at the time the contract was made. *Five Steel Barges* (1890) L. R. 15 P. D. 142.

In *The Westburn* (1896), 74 L. T. 130, the facts were that a tug had contracted to take a ship into a certain harbour. At the entrance, however, a fog came on, and before the tug could anchor the ship went ashore, and was then rescued by the tug from what was a dangerous situation. It was held that the tug was entitled to salvage.

But if the tug, through negligence, gets its tow into a dangerous position, it is not entitled to salvage for subsequently rescuing her therefrom. *The Robert Dixon* (1879) L. R. 5 P. D. 54.

If those making the contract on behalf of the vessel which is to be towed conceal facts regarding the danger of the proposed service which are of such a nature that it may reasonably be inferred that, had they been disclosed, the tug would never have undertaken the work upon ordinary towage terms, the contract is inoperative, and the work done will be considered a salvage service. *The Kingalock* (1854) 1 Sp. Eccl. and Adm. 264.

Every contract of towage contains the implied undertaking that the tug is suitable and is properly equipped for the kind of service required by the terms of the contract. *The Undaunted* (1886) L. R. 11 P. D. 46.

Moreover, those in charge of the tug are bound to use all proper skill and diligence, and the owners are not released from their liability under this obligation by a provision in the contract to the effect that the captain and crew of the tug shall, during the continuance of the contract, be considered to be the employees of the owner of the vessel which is being towed. *The Ratata* (1897) Probate 117.

As evidence of the vital distinction which the law makes between salvage and towage services, it may be noted that there is no maritime lien on a ship for towage services as there is for salvage. See *Westrup v. Great Yarmouth Steam Carrying Co.* (1889) L. R. 43 C. D. 241.

[IN THE SUPERIOR COURT, QUEBEC.]

BEFORE DAVIDSON, J.

THE PABST BREWING CO.

v.

H. A. EKKERS and THE CANADIAN BREWERIES, Limited

Trade name—Place of manufacture—Common law right.

1. A manufacturer, whose goods are generally known to the public by a certain name, has a common law right, apart from the Trade Mark Act, for protection against a competitor who uses the same or some similar name in such a manner that the ordinary purchaser is liable to think that his goods are made by the manufacturer to whose goods the word or words composing the name originally applied.
2. This right extends to the use of the name of the place where the goods are made when the same has always been used in connection with them. The beer manufactured by the plaintiff company was always known as "Milwaukee" beer, and an injunction was therefore granted restraining the defendants from advertising their beer (which was made elsewhere) as "Milwaukee" beer.

MONTREAL, June 13, 1901.

The plaintiffs pray that the defendants may be severally condemned in the sum of \$5,000 by way of damages, and further, that they be "enjoined from using the word 'Milwaukee' in connection with the brewing, bottling, sale, purchase and advertising of beer not brewed in the city of Milwaukee in the state of Wisconsin. . . ."

In support of the suit plaintiffs allege that they are an incorporated company, and that for fifty years past they and their predecessors have been engaged in the business of brewing lager beer and malt extract at Milwaukee; that the beer brewed by them and by other brewers in Milwaukee has become well known in the United States and Canada as the product of Milwaukee, and has acquired a reputation which is of great value to the plaintiffs; that plaintiffs have for upwards of eleven years marketed its products in Montreal and in this province, and have had an office and bottling establishment in this city. The complaint made against defendant Ekers is in the following words:—

"5. On the 1st of March, 1898, and at divers times thereafter, known to the defendant Ekers, but unknown to the plaintiff, the said defendant Ekers, in bad faith and with the unlawful and fraudulent intent of appropriating the reputation of the breweries of the said city of Milwaukee, and of causing his goods to be sold as the product of the said breweries in Milwaukee, to the detriment of the plaintiff, has continuously made use of the words "Milwaukee Lager," and has used the word "Milwaukee" to designate lager beer which is not the product of the said city of Milwaukee, but which as the plaintiff believes, was, in fact, brewed in the city of Montreal."

The other defendants, the Canadian Breweries Company, are complained of in identical terms. It is further alleged that:

"7. The said illegal and unauthorized use of the name of the said city of Milwaukee has had the effect of deceiving buyers and the public generally, and has caused damage to the plaintiff in a sum which the plaintiff fixes at five thousand dollars in the case of the defendant Ekers, and at a like amount in the case of the other defendant. . . ."

And lastly that : " The plaintiff has protested against the said illegal use of the word ' Milwaukee ' by the defendants, and has requested the defendants to discontinue the use thereof ; but the defendants have refused and neglected so to do, and have continued and are now continuing such illegal use of the said word."

The defendants plead that plaintiffs have no exclusive right to use the word " Milwaukee ;" that Milwaukee is merely the name of the place at which plaintiffs carry on their business, and is without special significance, and any person is entitled to use it, provided he does so in good faith, as defendants have done ; that with respect to the sale by them of " Milwaukee lager beer," defendants marked the same as made by them at Montreal, and never pretended that it was made at Milwaukee, and still less that it was made by plaintiffs ; that the word Milwaukee has never been registered by plaintiffs in accordance with the laws in force in Canada, and is not their exclusive property, and is not a trade mark or trade name."

The writ issued in February, 1900. Defendant Ekers sold out his business to the other defendants in June, 1899, and has never since manufactured, advertised or sold the lager beer complained of. While in business he was never protested nor sued, nor have any damages been liquidated in regard to his use of the word. The action in so far as directed against him is dismissed with costs.

Since their assumption of the business the Canadian Breweries have made use by labels and advertisements of several different descriptions of their labels. Thus:—" The Canadian Breweries, Limited, Ekers' Milwaukee Lager, Montreal ;" " Ekers' Milwaukee Lager, Montreal Special Brew," " Ekers' Milwaukee Lager ;" " Ekers' Brewery, Milwaukee Lager, 409 St. Lawrence Main street."

Defendant Ekers began to use the word Milwaukee in 1885, and adopted it (p. 11). " I suppose Milwaukee was a lager beer place."

Milwaukee has for a great many years been famous for the lager beer brewed there by plaintiffs and others, whose efforts have given it, in this respect, a reputation unsurpassed on the continent. The product is commonly identified and sold as " Milwaukee beer." Plaintiffs have for a

long time past spent large sums of money in advertising their beer throughout Canada. It was always identified with the name of Milwaukee. Four years ago they established an agency in Montreal. That, of course, did not mark their earliest sales.

A common law right exists to prevent a manufacturer or trader from making and selling goods by names, words or marks which may mislead or confuse the public by creating the belief that they are those of a competitor.

This right exists independently of the possession of a registered trade mark. The object of the Trade Mark Act is to relieve traders from the necessity of proving their course of business for a number of years in order to show their exclusive right to sell goods by a particular description. The probability of misleading not experts or persons who know, but ordinary or unwary customers is the mischief to be guarded against. Although the first purchaser is not deceived, nevertheless, if the article is so delivered to him as to be calculated to deceive a purchaser from him that is illegal.

It is not only names or marks in which particular individuals have acquired a personal property that the law protects. An exclusive right is not essential to the maintenance of the action. It is sufficient if the right asserted is exclusive as against the defendant. If by long continued industry, skill and generous use of capital or by the possession of some local advantage in the way of springs, peculiar quality of water, material or otherwise, a place has achieved a reputation for great excellence in some particular article, its name cannot be usurped by competitors in other localities. Right of redress is common to all whose interests are invaded by an unlawful appropriation of the name of a locality.

The many authorities cited by plaintiff, which include a number of well known cases, support these principles :

In *Southorn v. Reynolds*, (1865), 12 *Law Times*, N.S., 75, plaintiff made pipes at Broseley, in Shropshire, and they were known as "Southorn Broseley Pipes." His brother carried on another establishment there and also sold pipes under that name. The defendant had no establishment there, but sold pipes called "Reynolds' Purified Clay Pipes, made by Southorn from Broseley," the Southorn being a

workman who had once been employed at Brosley. Injunction granted to restrain the use of "Southorn" and "Brosley."

In *Braham v. Beachim* (1878), L.R., 7 Ch. D., 848, "Radstock Coal" case.—The principal plaintiff, Countess Waldegrave, was the owner or lessee of all the collieries in the parish of Radstock except one small piece, and had sold the coal under the names "The Radstock Coal Company," and "The Countess Waldegrave's Radstock Collieries." The defendants, also in the coal business, adopted the style first, of "The Radstock Colliery Proprietors," and, later, of "The Radstock Coal Company, Colliery Proprietors," although they were never entitled to raise coal in the parish of Radstock, nor until after the commencement of the action, within any part of the district through which the seams of Radstock coal extended. The Court granted an injunction on the ground that the defendants' conduct was calculated to deceive; and that they were not entitled to continue to use either of the names adopted by them. I cite these two cases as examples of English jurisprudence. Sebastian and other text books discuss many others.

In the Scotch case of *Dunnachie v. Young*, 10 Scot. Sess. Cas., (4th series), 874 ("Glenboig Bricks"), the plaintiffs at Glenboig made bricks (which became known by the name of the place), from a seam of clay, which extended to Heathfield, where the defendants were in the same business and used clay from the same seam. The defendants called their bricks "Young's Glenboig." An injunction was granted against the use of the word "Glenboig."

Decisions in the United States are emphatic on the point.

In the *City of Carlsbad v. Kulnow*, 68 Fed. Rep. 794, the use of the word "Carlsbad" was restrained at the suit of the plaintiff, the German City, which had for years evaporated the salts of Carlsbad springs and sold them under the name of "Carlsbad Sprudel Salz." The defendants, a firm of New York druggists, put up similar salts and called them: "Improved Effervescent Carlsbad Powder." Although the genuine Carlsbad salts are not effervescent, and the word "improved" was relied upon as implying that the salts were different from those sold under the name of "Carlsbad" alone, the defendants were enjoined from

using the word "Carlsbad" in any form. This decision was confirmed by the Circuit Court of Appeals, 71 Fed. Rep. 167.

In *Pillsbury-Washburn Flour Mills Company v. Eagle*, 86 Fed. Rep. 608 (1898), an injunction was granted at the suit of companies engaged in the milling business at Minneapolis, restraining a firm of flour dealers in Chicago from using the words "Minneapolis" and "Minnesota" to designate flour not milled in Minneapolis, but purchased from millers in Milwaukee, Wis.

Plaintiff cites the unreported cases of *Pabst Brewing Company v. Hanley Brewing Company* (Mass., April, 1899), and *Schiltz Brewing Company and Pabst Brewing Company v. Fred Hollander Company* (N.Y., September, 1900), in which Boston and New York brewing companies were prohibited from using the word Milwaukee.

The French authorities are of the same tenor. "La loi protège non seulement les noms de fabricants, mais encore les noms de lieux. Cela est juste." Pouillet, "Traité de Marques de Fabrique," Nos. 394, 395.

"Le nom d'une ville appartient exclusivement aux industriels qui y possèdent des fabriques; eux seuls peuvent, à l'exclusion des étrangers, en revêtir leurs produits et profiter ainsi de la réputation acquise par une fabrication spéciale." Fuzier-Herman, Rep., "Concurrence déloyale," No. 245.

I grant the injunction asked for. As to damages, they were not seriously pressed for and, under the circumstances of the case, would not in any event have been granted. Costs to plaintiff as in an action of the first class.

McGibbon, Casgrain, Ryan & Mitchell, solicitors for the Plaintiffs.

Hall, Cross, Brown & Sharpe, solicitors for the Defendants.

Notes 1—

A trade name and a trade mark are essentially different. The latter is something invented by the user for the purpose of distinguishing his goods in a particular manner. *Turton v. Turton* (1888) 42 C. D. 128.

But a trade name is something which, though perhaps only the name of the first maker of the article in question, or the name of the place where it is made, may in time become a mere designation of the article itself. *Hall v. Barrows* (1864) 33 L. J. Ch. 204.

And when a name has, by usage, become such a designation, the original user will be granted an injunction restraining others from using the name, and thus leading the public to suppose that their goods are those of the first user. *Wotherspoon v. Currie* (1872) 42 L. J. Ch. 130. *Boulnois v. Peake* (1868) 13 C. D. 513n.

And it has been held that a manufacturer has not the right to call his goods by a name which would be a fair and accurate description of them when the goods of another manufacturer are already so well known by that name that the public would be misled. *Reddaway v. Banham* (1896) A. C. 199. But see, *Burgess v. Burgess* (1858) 22 L. J., Ch. 675.

In *Tussaud v. Tussaud* (1890) 44 C. D. 678, Madame Tussaud & Sons, Limited, which had been so registered, and which had for many years carried on business under that name, obtained an injunction restraining a company promoted by Louis J. Tussaud and others from carrying on a similar business under the name of "Louis Tussaud, Limited."

But a company cannot acquire any title to the exclusive use of a name which merely describes the nature of its business. *Colonial Life Insurance Co. v. Home & Colonial Insurance Co.*, (1864) 33 L. J., Ch. 741.

The Sun Life Assurance Co. of Canada opened an office in London, after it had for many years carried on business elsewhere under that name. The Sun Life Assurance Co., which had done business since 1810, having its head office in London, applied for an injunction to restrain the former company from doing business under that name anywhere in Great Britain. It was held that as the use of the full name "The Sun Life Assurance Co. of Canada" was neither a misstatement of fact, or in any respect fraudulent, the defendant company had a right to use it in England, but that it would not be entitled to denominate itself "The Sun," or "The Sun Life" simply, without the addition of the words "of Canada." *Saunders v. Sun Life Assurance Co. of Canada* (1894), 1, Ch. 537.

In the very recent case of *La Soci   Anonyme des Anciens Etablissements Pauliard et Lavessor v. The Pauliard-Lavassor Motor Co. (Limited)*, (1901) 17 T. L. R. 680, it was held that the plaintiff company, which was a foreign one, having an English market for its output, was entitled to an injunction restraining not only the defendant company, but also its individual incorporators, from further infringing their trade name in that country.

In *Rose v. McLean Publishing Co.* (1896) 24 Ont. A. R. 240, it was held that the use of a geographical name in a secondary sense, as part of the title identifying a mercantile journal, and not as merely descriptive of the place where the journal is published, will be protected. The company publishing "The Canada Bookseller and Stationer" were therefore restrained from using that title, on the ground that it conflicted with "The Canadian Bookseller and Library."

See also *Robinson v. Bogle* (1889), 18 O. R. 387.

Wilson v. Lyman (1898), 25 Ont. A. R. 303.

[IN THE COURT OF QUEEN'S BENCH, QUEBEC.]

(APPEAL SIDE.)

GOLDBERG v. THE DOMINION WOOLLEN CO.

BEFORE SIR ALEXANDRE LACOSTE, C.J. AND BOSS  ,
BLANCHET, WURTELE AND OUMET, J.J.

Commercial contract—Sale of goods—Implied cancellation of first agreement—Mise en demeure.

1. Where a contract for the sale of goods stipulated that on one part the delivery thereof, and on the other the payment therefor, should be made at certain specified dates, and it appeared that the vendor had not been ready to deliver at the time agreed upon, that the vendee had then taken no action but had subsequently demanded and received delivery of smaller orders, and that the vendor had treated this, in his books, as a cancellation of the original contract, it was held on the evidence (there being no allegation that the vendee had tendered, or even that he had been able to pay the amount due on the first contract at the time named) that the contract had been rescinded by the conduct and acts of the parties.

2. The fact that a contract is of a commercial nature only avoids the necessity for a *mise en demeure* (i.e., the making of a demand for the fulfillment of the obligation) when the date for the doing of the act in question is stated in the contract. Moreover, since, where a *mise en demeure* is necessary, damages only run from the time that the same is given, the mere bringing of an action for damages for the non-delivery of goods some time previous thereto is not such a *mise en demeure* as will entitle the vendee to damages, as, in such a case, whatever loss there may have been has been suffered before the date of the *mise en demeure*.

Appeal from a judgment of the Superior Court. The facts of the case are set forth in the present judgment.

M. Goldberg and S. W. Jacob, for Appellant.

S. Beaudin, K.C., and J. G. Martin, for Respondent.

MONTREAL, December 27, 1900.

The judgment of the Court was delivered by

BLANCHET, J.—(*Translation.*)

The Appellant, a wholesale clothier of ready-made goods, claims from Respondents, who are manufacturers, the sum of \$10,000, for failure to deliver goods sold.

The facts which have given rise to this action, are as follows :

During the months of January and February, 1898, Vineberg, who was manager of his wife's (the Appellant's) business establishment, placed two orders with the Respondents for the manufacture of 42,100 yds of cloth of a special color and weight, known as *frieze*, and various other brands to be used in Appellant's business. The conditions of said orders were that the goods were to be paid for on the 1st of June following, and that they should be paid for in "spot cash." It was also agreed that samples of these goods would be delivered on the 15th and on the 30th (sic) February.

From the outset, the conditions agreed upon by the parties were not followed ; the samples were not delivered upon the dates fixed, only a part being delivered during the month of March ; and they were not paid for "spot cash," but by notes.

During the month of April there was no delivery made, nor on the 1st of June, the date fixed for the complete delivery ; but on the 25th of May, six days before, Vineberg had placed an order with the Respondents for the

manufacture of a certain number of yards of the same cloth, of which he requested the delivery at the earliest possible date, and at the same time a delay of 60 days was given him for payment.

On the 2nd of June, the day after that fixed for the delivery of the goods, the directors of the Company Respondents, met and decided that Vineberg was to pay according to the conditions agreed upon, that is "spot cash," and that no delay was to be given him. The question then arose as to giving sureties. The Company was disposed to accept a party by the name of Westgate, but Vineberg stated that that would cost him too much, and he offered other sureties, who were refused.

The matter remained thus until the 22nd of June. On that day 325 yards of cloth were delivered. During July and August nothing was delivered. On the 10th of September Appellant had a letter sent by her husband to the Company, complaining that no goods had been delivered. The next day the Company answered that they were sending a certain quantity of cloth, and that they expected to ship the same by boat. This was followed by three unimportant deliveries of goods, (a few hundred yards), which were also paid for by notes, of which one was kept over at the bank for some days on account of want of funds, while the other was only paid subsequently as it was not collected by the Company.

On the 9th of October, Appellant wrote a letter to the Company complaining that she had not received the goods mentioned in the orders, and stating that she would hold the Company responsible for all damage resulting from the delay in filling such orders.

The Company having failed to comply with said request, the Appellant instituted an action for damages to the extent of \$4,000; and subsequently, on discovering that \$4,000 did not cover all the damage suffered, she desisted from this action and took out a second one, (the present suit), claiming \$10,000 as damages.

This action has been met by a plea in which Defendants state:—The order given by you (the Appellant) on May 25th constitutes a revocation or abandonment of your original contract. At that date you found out that you

did not need such a large quantity of goods ; you found out that you could not pay us, at the time fixed, the price due on said contract, i.e., \$25,500 ; and you therefore gave another order, which we accepted, for a certain and much smaller quantity of cloth, and it is in fulfillment of this latter order that subsequent deliveries were made.

Vineberg, on the contrary, contends in his plea, that the Company, seeing that they were not in a position to deliver the goods ordered at the date fixed, the 2nd June, solicited additional delay from him, saying :—Give us a statement of what you need at once for your business, and we will do our best to deliver that quantity, and, to return one kindness by another, instead of paying us cash, we will give you delay to pay.

One of these two versions is supported by the testimony of Robert, who is the Company's manager. Robert swears positively that it was perfectly well understood and agreed between the parties that the two first orders were cancelled, and that the order of May 25th was substituted in their stead ; that Vineberg had admitted he was unable to find the money wherewith to pay for the first order, and that the subsequent deliveries of goods were made by virtue of the second order.

This evidence is very plausible, and is supported by the testimony of the other employees of the Company's business establishment. Thus, it is proved in a satisfactory manner that immediately after the demand of credit contained in the order of May 25th was refused, the two first orders were erased from the books and were replaced by the second order. It is proved that, at that date, there was a certain quantity of goods ready for delivery, and even addressed to Appellant, and that at once these goods were unpacked, put back on the shelves, and sold at a loss, because, as I have said, this cloth was of a special weight and brand which probably would have been of no use to other commercial firms ; the Company was therefore forced to sell it at a loss.

This would prove at least the good faith of Robert and of the other employees, and that they really believed that the order of May 25th was a revocation of the first two orders.

Vineberg's version has also something to commend it. It is evident that the Company was not ready to deliver the 42,000 yards of cloth on the 2nd of June, and it is therefore manifest that it needed delay. His assertion that the Company demanded from him additional delay is very plausible. On the other hand it is inconceivable that Vineberg, knowing that in five days he could have exacted the complete delivery of the goods ordered, and knowing also that in default of such delivery he could have claimed the damages he now seeks to recover, should have abandoned such an advantageous position for the purpose of substituting another order, an order of two thousand seven hundred yards, and should have asked delay to pay for the latter. This does not appear to be very probable.

But another fact confirms me in this opinion. It is that during the three or four months that followed, nothing in the record shows that any reference was ever made to these two orders, but all Vineberg asked for was "the goods." Verbal demands were made, which were followed by deliveries of small quantities of goods, but nothing in the record shows in any way that a special demand was ever made for those particular goods.

Nevertheless, whatever may be our opinion on this point, we do not think that the case should be decided on this question. The Respondent has raised two other contentions which are mentioned in the judgment, and which are sufficient to do justice to the parties in this case.

It is evident, taking Vineberg's pretension that it was agreed the goods should not be delivered on June 2nd, that it was understood and agreed between the parties that the goods were to be delivered later on.

The Appellant says: This is a commercial contract, and in contracts of this kind there is no necessity for a *mise en demeure*, because the contract itself is a *mise en demeure*.

That is true, but on one condition, and this condition is very important: the date of the delivery must be stated in the contract. Here the date is mentioned in the two first orders, but the negotiations that took place between the parties show in the clearest possible manner that this date was changed, that an additional delay was granted, and no limit to this delay fixed. Therefore a new *mise en demeure*

was necessary, and it was necessary at an opportune time. Not only was this necessary, but, further, the Appellant should have shown or indicated that she was ready to pay the price for the goods.

There is no proof on this point; there is not even any allegation that the Plaintiff was ever able to pay the \$25,000. There are many affirmations on the part of Vineberg, who says: I could easily have found the money; I could have secured it from certain banks on ordinary paper, the paper of my clients. But this is no proof that he had the control of \$25,000, that he could tender that amount, and that he could pay it cash; and it is evident that under these circumstances the Appellant's demand is not well founded.

We may say that the record contains a letter of the 9th October demanding the delivery. That letter is not clear. As I said a moment ago, in the first line of it reference is made to "orders," and in the last line there is a claim of damages for failure to deliver the goods mentioned "in the order." It is doubtful to which order this refers, and under such circumstances this letter cannot be considered a regular *mise en demeure*.

The *mise en demeure* has therefore been made only by the institution of the action. When the action was instituted all the damages had been suffered; and the law on this point is clear and positive. If a *mise en demeure* is necessary, damages begin to run solely from the date of the *mise en demeure*.

In this instance damages can certainly not be awarded; and, as I have stated, the Appellant has not even alleged that she could have fulfilled her contract in due time.

When two parties are bound under a contract, it is not sufficient that the purchaser should say to the seller: You have not made the delivery in due time. He must show that he was ready and able to pay. It would be absurd to award damages to a person who could not have paid the price of the things bought.

For these reasons we believe that the two grounds mentioned in the judgment of the Superior Court are sufficient to confirm the same.

Judgment confirmed and appeal dismissed with costs.

Solicitor for the Appellant: *S. W. Jacobs*.

Solicitors for the Respondents: *Foster & Martin*.

[IN THE HIGH COURT OF JUSTICE FOR
ONTARIO.]

BEFORE MEREDITH, C.J.

BENNETT v. WORTMAN.

Infringement of Patent—Assignee selling article after reassignment to Patentee—R.S.C. cap. 61, secs. 28 and 31.

1. The words "puts in practice any invention" as used in R.S.C. cap. 61, sec. 28, (which defines the acts which give a right of action for the infringement of a patent) should be construed so as to include the act of selling "the subject matter of the patent," authority to restrain which by injunction is conferred by sec. 31; and, in any event, the Court has always power under such latter section to restrain the sale of a patented article by one who has no legal right to sell it.
2. B, having obtained a patent for a certain invention, assigned the same to W for the term of four months, with the option of purchasing the same at the end of that period. At the expiration of the time so fixed, W elected not to buy the patent, and reassigned the same to B; but he continued to sell the patented articles which he had manufactured during the four months in which he had been the assignee of the patent. B having brought action to restrain such sales, it was held that, while the making of the articles in question during the four months was a lawful act on the part of W, yet the latter, on and by the reassignment of the patent to B, had divested himself as to the future of all rights (including the right to sell the patented articles then manufactured) which he had acquired under the previous assignment, and that these rights were thereby again exclusively vested in B.

The facts of the case are fully set forth in the head note.

JULY 20, 1901 :—

MEREDITH, C. J.:—

This action was tried before me without a jury at London, on the 12th April, last and at the close of the argument I decided all the questions in dispute except the one as to the right of the Defendant to sell the sad irons which were manufactured by him in the four months during which he was assignee of the patent granted to the Plaintiff in accordance with which they were made, after the expiration of the four months, and after he had in pursuance of his agreement with Plaintiff having elected not to purchase the patent re-assigned it to the Plaintiff—as to which I reserved judgment.

It was argued on behalf of the Defendant that a patentee has no remedy against one who sells the patented article or thing without the authority of the patentee, and in support of this argument section 28 of the Patent Act, R.S.C. cap. 61, which gives right of action for an infringement was appealed to.

It is true that the section does not use the word sell in defining the acts which are to give the right of action, the language of it being "Every person who... makes, constructs or puts in practice any invention..., or who procures such invention from any person not authorized... to make or use it and who uses it shall be liable..." but section 31 authorizes the Court or a Judge in an action for the infringement of a patent to make an order on the application of the Plaintiff or Defendant for an injunction restraining the opposite party from further use, manufacture or sale of the subject matter of the patent, and reading the two sections together, the proper conclusion is, I think, that the legislature intended that the words "puts in practice" in section 28 should include selling the "subject matter of the patent," authority to restrain which is given by section 31; but, however that may be, there is, I think, no doubt whatever that the Court has jurisdiction under section 31 to restrain the sale of the patented article by one who has no legal right to sell it, and that is the remedy which the Plaintiff in this action seeks.

Would, then, a sale by the Defendant of the sad irons which he manufactured under the authority of the assignment to him of the patent, after he had reassigned it to the Plaintiff, be an infringement of the patentee's rights and an act that at the instance of the patentee should be enforced? The answer to this question must, I think, be in the affirmative. The assignment of the patent to the Defendant no doubt conferred on him the exclusive right, privilege and liberty of making, constructing and using and vending to others to be used the patented invention. The making by him of the irons which are in question was, therefore, a lawful act, but when he re-assigned to the Plaintiff the patent, he divested himself as to the future of all the rights which he had acquired under the previous assignment and thereafter the exclusive right which I have mentioned became revested in the Plaintiff. It is, of course, clear that, after the reassignment to the Plaintiff, the Defendant had

no longer any right to make or construct the patented article or thing and in my opinion he had not thereafter the right of vending it to others to be used. The exclusive right of vending it to others was, as I have said, vested in the Plaintiff and the right being an exclusive one, it follows that it could not exist in any one else. This observation does not, of course, apply to articles lawfully sold to a purchaser, for by the sale they are withdrawn indefinitely from the operation of the franchise secured by the patent.

The language of Chief Justice Taney in delivering the judgment of the Supreme Court of the United States in *Bloomer v. The Onevan* (1852) 14 Howard at p. 549, is apposite. In pointing out the distinction between the grant of the right to make and vend a patented machine and the grant of the right to use it, referring to the right of a grantee of the latter nature, he says: "When the machine passes to the hands of the purchaser it is no longer within the limits of the monopoly, but in the case of a grant by the patentee of the right to make and vend, (he is speaking of a sale of the exclusive privilege of making and vending it for use in a particular place) the interest acquired necessarily terminates at the time limited for its continuance by the law which created it." Applying this to the facts of the case I am dealing with, it leads to the conclusion that every right granted by the Plaintiff to the Defendant terminated at the time limited by the contract for the continuance of the right: see also *Bloomer v. Millinger* (1863) 1 Wallace 340; *Brooks v. Bicknell* (1845) 4 McLean at p. 67.

If I am right in this view I have expressed, this is an *a fortiori* case, for the application of the principle of these decisions, for the sale of the patent to the Defendant was a conditional one, and whether it was to be absolutely depended upon the election which he should make at the expiration of the four months, and if the Defendant's contention as to the extent of his right were well founded it follows that it was open to him during the four months to make enough of the patented articles to answer the requirements of the market for them for the whole term of the patent and to deal with them as free from the monopoly of the patent after the four months, and so in effect to appropriate to himself the whole value of the patent, for which if he elected to purchase according to his agreement he was to pay in addition to what he had paid \$920, without paying

anything. It is, in my opinion, impossible to interpret the instrument on which the rights of the parties depend so as to produce such a result.

I come, therefore, to the conclusion that the Plaintiff is entitled to an injunction restraining the Defendant from vending to others the sad irons in his possession at the time of the re-assignment of the patent to the Plaintiff and there will be judgment accordingly.

The Defendant must pay the costs of the action except as to the matters as to which he has succeeded and the costs of these the Plaintiff must pay.

Solicitor for the Plaintiff : *U. A. Buchner.*

Solicitor for the Defendant : *T. H. Luscombe.*

[IN THE HIGH COURT OF JUSTICE FOR
ONTARIO.]

BEFORE A DIVISIONAL COURT :—ARMOUR, C.J.O., AND
FALCONBRIDGE, C.J., K.B.

HARDING et al

v.

THE METROPOLITAN LIFE INSURANCE CO.

Life insurance policy—Action to recover premiums paid—Insurable interest of the insurer in the life of the insured—14 Geo. III, cap. 48.

When an insurance is effected on the life of C by his wife (who is named as the beneficiary), the mere fact that the premiums are subsequently paid by H (a person not having an insurable interest in the life of C) will not of itself render the policy void as being in contravention of 14 Geo. III, cap. 48, unless it is also proved that the real transaction was the insurance by H of the life of C for her own (H's) benefit.

Appeal by the Plaintiffs from the judgment of a Judge of the County Court for the County of York, dismissing an action brought to recover the amount of premiums alleged to have been paid by the Plaintiff, Laura Harding, in respect of an insurance claimed to have been effected by her

on the life of her father, Robert Clark. The Plaintiff, Jane Clark, wife of Robert Clark, died during the continuance of the action.

The judgment appealed from held that there was no evidence to shew that the Plaintiff Harding had effected the insurance; but that, on the contrary, it appeared that it had been effected by the deceased Jane Clark, and that Laura Harding had merely promised to pay the premiums if her mother did not do so.

JUNE 24, 1901.

The judgment of the learned Judge of the County Court is right and must be affirmed.

No cause of any action was established by either of the Plaintiffs at the trial.

The contention made before us was that the policy in respect of which the Plaintiff Harding had paid the premiums which she sought to recover back was a void policy as made in contravention of the Act 14 Geo. III, c. 48.

But the evidence in my opinion wholly failed to establish this.

The policy was produced and as far as it showed was a policy upon the life of the Plaintiff Clark payable to his executor, administrator, wife, relative by blood or lawful beneficiary.

The application was not produced although expressly made by the policy a part of it and the Plaintiff's counsel refused to consent to its being put in evidence, and evidence therefore of its contents was inadmissible, and I think that proof of this application was a necessary part of the Plaintiff's case in order to establish the illegality of the insurance.

The insurance appeared to have been effected by the wife of the Plaintiff Clark upon the life of her husband, and as far as one can conjecture from the evidence the wife was named as the beneficiary in the application and so far the insurance was a valid one, the wife having an insurable interest in the life of the husband.

The mere fact that the Plaintiff Harding paid the premiums would not of itself show that the transaction was in

contravention of the statute unless it were also shown that the real transaction was the insurance by the Plaintiff Harding of the life of the Plaintiff Clark for her own benefit, but this the evidence, in my opinion, failed to establish.

The evidence failed also to establish any knowledge in the Defendants that the transaction was other than it appeared to be by the application.

The appeal must be dismissed with costs.

Solicitor for the Plaintiffs: *T. Hislop.*

Solicitor for the Defendants: *F. S. Mearns.*

Note :—

See also the recent decision of the Court of Appeal for Ontario in *North American, etc. v. Brophy*, (a case dealing with the application of 14 Geo. III., cap. 48), and not yet officially reported.

[IN THE HIGH COURT OF JUSTICE FOR
ONTARIO.]

BEFORE FERGUSON, J.

SAUNDERS v. THE ONTARIO BANK.

Contract—Sale of goods by sample—Warranty—Warehouse receipts—Agency.

1. A bank advanced money upon the promissory notes of a cold storage firm, endorsed by M, one of the members of the firm, warehouse receipts for goods deposited by M with his firm being taken as security for his endorsements. The cold storage company bought eggs with the monies so obtained, and warehoused them in the name of M, receipts being issued to him. The firm becoming financially embarrassed, the manager of the bank checked over the goods then in the warehouse, and instructed O'R, the other partner, to sell them and to pay the proceeds of such sales into the bank, which was duly done. One of the purchasers having brought an action for damages caused by breach of warranty regarding the condition of the eggs, the bank contended that it had not been the vendor. Held, that since the bank had, in fact, had the control

over the goods, their title not being disputed, it was immaterial whether or not the warehouse receipts upon which the title was based were such as would have proved good against all comers.

Held, further, that the arrangement between the local manager of the bank and O'R virtually constituted the latter the agent of the bank for the sale of the goods, no ratification by the head office being necessary; and that, therefore, the bank was liable for the breach of the implied warranty which, it appeared, was given by O'R, so acting as its agent.

The facts of this case are fully set forth in the head note and in the judgment.

FERGUSON, J.:—

AUGUST 2nd, 1901.

The Plaintiffs in the statement of claim allege that on or about the 9th day of February, 1901, the Defendants sold to them: 4500 dozens of eggs f.o.b. cars at the city of Ottawa, at the price of thirteen cents per dozen, and say that at the time of such sale the Defendants warranted such eggs to be in good condition and of good quality, and equal in quality and condition to a certain sample box or case of eggs produced by the Defendants for examination by the Plaintiffs about the time of such sale and upon the faith of which the sale was made and that they, the Plaintiffs, paid the Defendants the sum of \$585.00, the amount of the purchase price; that the Defendants delivered to the Plaintiffs the said quantity of eggs, but that a large portion thereof was damaged by frost, and therefore not in a good condition for sale or use, and that on account of the eggs being so frozen and not in a good condition they, the Plaintiffs, were forced to sell the eggs without delay, at and for the sum of \$270.00, being six cents per dozen, that being the best price that could be obtained for them, and that they, the Plaintiffs, sustained loss or damage amounting to the sum of \$315.00 by reason of the eggs being so frozen and not in good condition.

The Defendants deny that they sold these eggs or any other goods to the Plaintiffs, and also say that they did not nor did anyone on their behalf expressly or impliedly give to the Plaintiffs, or to any person on their behalf, the warranty referred to by the Plaintiffs, and that if any person or persons purported to make or give any warranty to the Plaintiffs, the same was not made or given by or on behalf

of the Defendants, and such person or persons had no authority from the Defendants to make or give any warranty, and that no such warranty is binding upon them, the Defendants.

The Defendants further say that the eggs referred to were bought by the Plaintiffs from one Geo. A. O'Reilly, and were of good quality and in good condition, and equal to the sample in quality and condition and were so accepted by the Plaintiffs, and that if the eggs were in any way injured by freezing and otherwise such injury occurred after delivery to and acceptance by the Plaintiffs.

The Defendants also say that the sum of \$270.00 was not the best price obtainable for the eggs, and that by the exercise of reasonable diligence a larger price could have been obtained.

The Plaintiffs claim as well for the loss of profits on a re-sale of the eggs, and to this the Defendants say that no such loss was suffered by the Plaintiffs.

A company known as "The Ottawa Cold Storage and Freezing Company" was carrying on business in Ottawa, which business seems to have been an extensive one. The Company was composed of Geo. A. O'Reilly and James McCullough.

This company obtained large credit of the Defendant Bank. It appears that their method of doing business so far as this has concern here, was that goods were purchased in the name of McCullough as owner and for him warehoused by the Company, they, the Company, giving him, McCullough, warehouse receipts in respect of the goods, which McCullough endorsed to the Defendants as security for the advances.

The Bank, the Defendants, appear to have advanced the money upon the notes of the Company endorsed by McCullough. The local manager of the Defendants Bank in one part of his evidence says that he thought the warehouse receipts were taken from McCullough to secure his endorsements of the notes, that the understanding was that McCullough had the eggs warehoused with the Company. But he says that the eggs were bought and paid for with the proceeds of the notes of the Company on which

McCullough was endorser (that is money advanced by the Defendants). He says the Company was a wholesale purchaser of agricultural products and he might have taken the other kind of warehouse receipts, but he thought the way he did was the better way. He says the Company were also doing a warehousing business.

About the 1st of August, 1900, this Company were in financial difficulty. The Defendants' local manager, having learned this, went as he says and checked over the goods.

McCullough had gone away but O'Reilly was still there. The local manager says that if O'Reilly had gone as McCullough did, he would have appointed some other person to sell the goods. He says, however, that he left the goods in the hands of O'Reilly to dispose of them to the best advantage, that is to sell them as well as possible, and to pay the proceeds of the sale into the Bank, and that O'Reilly came to him from day to day and deposited the moneys received by him on such sales and finally reported to him that all the goods were sold. The sale to the Plaintiff took place as before stated on the 9th of July, 1901. It is, I think, most clearly proved that the identical moneys received by O'Reilly on that sale were paid by him into the Defendants Bank.

The Cold Storage and Freezing Company were also largely indebted to The Merchants Bank of Halifax, and about or shortly after the 17th of November, 1900, that Bank having sued, placed a writ of execution in the hands of the Sheriff against the goods and land of the Company, directing the levy of over \$10,000. The Defendants having learned of this gave notice of their claim, the claim being founded on the warehouse receipts.

The Sheriff instituted interpleader proceedings and an order was made, but before the trial of any issue these Defendants satisfied the claim of the Merchants Bank. The Sheriff withdrew from possession of the goods under the seizure. The moneys paid by Defendants to the Merchants Bank were, according to the evidence, virtually charged against this Company, the Cold Storage and Freezing Company.

After the 1st of August, 1900, there was, as the local manager says, a change in the account of the Company in

the Defendant Bank. The manager took supervision of it, and as I gather from the evidence the Company had no longer an account over which they had control.

Having considered the evidence as best I have been able with the view of ascertaining the real meaning of it, I have arrived at the conclusion that the sale of these goods (the eggs) to the Plaintiffs was a sale by the Defendants through their agent O'Reilly.

It does not seem to me material whether or not the warehouse receipts through which the Defendants claimed title to the goods were such as would technically prove a good title against all oncomers, or whether or not all the requirements of the 2nd sub-sec. of sec. 72 of the Act were strictly complied with. The Defendants really had control of the goods, no one after the settlement with the other Bank, so far as shewn, disputing their title, and no one complaining of any want of compliance with any of the requirements of the sub-sec. above referred to, and in any case these were not, as I think, things or matters to be looked after by the purchasers as between them and their vendors.

Although it was contended that there could be no good appointment of O'Reilly as agent for the sale of the goods, except by direction from the head office of the Defendants, I am of the opinion that the appointment shewn was sufficient for the purposes.

Then I think the sale made by the Defendants' agent, O'Reilly, to the Plaintiffs was a "Sale by Sample": It is said in Benjamin on Sales, 7th Am. ed., p. 685, that to constitute a "Sale by Sample" in the legal sense of that term, it must appear that the parties contracted solely in reference to the sample or article exhibited, and that both mutually understood they were dealing with the sample with the understanding that the bulk was like it. Or, as sometimes stated, to raise the implied warranty of conformity between sample and bulk it must appear that the alleged sale by sample was really such, that the portion shewn was intended and understood to be a standard of the quality, and not merely that it was in fact taken from the bulk.

It is shewn by the evidence that it is customary to buy and sell eggs by sample, and on the evidence of the witnesses Mills and Casselman, not in any way contradicted by O'Reilly or any other witness, I am of the opinion that this sale was really a sale by sample, and that the implied warranty as to conformity between sample and bulk was raised, or arose.

The evidence is that the eggs in the box, the sample, were good eggs and not frozen at all. On the evidence of Latorney, Champagne and Casselman, which seems to be uncontradicted, I find that at the time the sample was exhibited a large proportion of the bulk was frozen eggs. This, one would say, ought to have been known to Mr. O'Reilly, but he says he was not aware of it.

The evidence of the carters and railway men seems reasonably to show that the eggs were not frozen in transit, and the evidence of witnesses professing to be skilled or to have had large experience in the egg business goes, to shew that the freezing or some of it had taken place many days previous to the making of this contract, they, giving their reasons for knowing this, and the evidence of Latorney seems direct on this subject.

Then, if my view is right, there seems an implied warranty given by O'Reilly to the Plaintiffs when this sale by sample was made. There was a breach of this, or rather the warranty was untrue. By reason of this the Plaintiffs have suffered and lost and the Defendants have gained and profited. O'Reilly was acting, as I have already said, as the agent of the Defendants when he made this contract and when the warranty arose or was given.

The general rule is that the principal is answerable for every such wrong of the agent as is committed in the course of the agency or service and for the benefit of the principal, though no express command or priority of the principal is proved, and in this respect no sensible distinction can be drawn between the case of fraud and the case of any other wrong. *McKay v. Com. Bank of New Brunswick* L.R., 5 P.C. 411-412 and many other cases.

In was, however, contended that O'Reilly in doing what he did was acting in his own interest, and not in the interest and for the benefit of the Defendants. I have given attention to this argument and the assigned reasons on which it is bottomed, and my opinion is against it. I think he was acting in the interest and for the benefit of the Defendants, and I am of the opinion that Defendants are liable to the Plaintiffs for the loss that they sustained by reason of the eggs having been frozen, which on the evidence is \$315.00.

The evidence as to this amount is all one way. As these damages were unascertained and unliquidated there will be no interest.

The Plaintiffs claim damages for loss of profits on a re-sale of the goods. The rule on this subject is laid down with clearness in the 6th ed. of Mayne on Damages at p. 55, and I think that in this case such damages must be considered too remote.

The Plaintiffs have not, as I think, proved enough to entitle them to succeed upon this claim.

There will be judgment for the Plaintiffs for the sum of \$315.00 with costs of the action, which costs, if necessary to say so, will be on the High Court scale.

Order accordingly.

[IN THE HIGH COURT OF JUSTICE FOR
ONTARIO.]

BEFORE MEREDITH, C.J.

PROVIDENT CHEMICAL WORKS

v.

CANADA CHEMICAL MANUFACTURING CO.

Trade-mark—Descriptive letters—Registration—Secondary meaning—Proof of acquisition—Fraud—Deception.

The letters C.A.P., standing for the words "cream acid phosphates," being descriptive merely, are not the proper subject of a trade-mark, and registration of them as a trade-mark, under the Trade-Mark and Design Act, will not give a right to the conclusive use of them.

Purto v. Todd (1888), 17 S.C.R. 196, followed.

Words or letters which are primarily merely descriptive may come to have in the trade a secondary meaning signifying to persons dealing in the articles described that when branded with such words or letters the articles are of the manufacture of a particular person.

But where the Plaintiffs used the letters C.A.P., standing for "cream acid phosphates," in connection with acid phosphates manufactured by them, and the Defendants used the same letters, signifying "calcium acid phosphates," in connection with acid phosphates manufactured by them and prominently stated thereon to be manufactured by them, and the evidence did not shew that there was on the part of the Defendants any fraud, or any intention of appropriating any part of the Plaintiffs' trade, or that any purchaser or person invited to purchase was deceived or misled, or that the letters had come to mean in the trade, acid phosphates of the Plaintiffs' manufacture :—

Held, that the Plaintiffs could not complain of the use of the letters by the Defendants.

Reddaway v. Banham, (1896) A.C. 199, applied.

An action for an injunction and damages and other relief in respect of the alleged infringement by the Defendants of a trade-mark registered by the Plaintiffs. The facts and arguments are fully stated in the judgment.

July 24. (1901.)

MEREDITH, C.J. :—

The Plaintiffs are a manufacturing company having their head office and manufactory at St. Louis, in the State of Missouri, one of the United States of America.

Acid phosphates is one of the articles which the Plaintiffs manufacture, and it is manufactured in large quantities and a market for it is found both in the United States and in Canada, as well as elsewhere.

The Plaintiffs have for many years manufactured acid phosphates which they designate "cream acid phosphates," and upon the packages in which it is put up for sale and sold are stamped the letters C.A.P., which are said to have been used as the initial letters of the words "cream acid phosphates."

These letters the Plaintiffs have registered as their trade-mark, in the United States on the 21st September, 1886, and in Canada on the 24th July, 1900. Their name and place of business also formed part of the trade-mark so registered.

The Defendants are a manufacturing company, and have for many years carried on business at London, in this Province; about nine years ago they commenced the manufacture of acid phosphates as a branch of their business for the purpose of utilizing one of the bi-products in the manufacture of sulphuric acid, the manufacture of which forms their principal business.

Calcium is, as I understand, one of the ingredients of the acid phosphates manufactured by the Plaintiffs and by the Defendants.

The Defendants for several years have used in connection with the acid phosphates manufactured by them the letters C.A.P., branding them upon the packages in which it is put up for sale, and advertising it under those letters; the letters being intended to signify calcium acid phosphates.

Calcium acid phosphates is a proper as well as a scientifically correct designation for the acid phosphates manufactured by the Defendants, though the word "calcium" is used perhaps more frequently after than before the other two words—acid phosphates of calcium.

It was not contended that the Defendants in adopting and applying to the product of their manufacture the letters C. A. P. had in fact any intention to put off their goods as the goods manufactured and sold by the Plaintiffs under

that brand; had it been so contended, the contention would not have been supported by the evidence, for the contrary is satisfactorily shown.

The Plaintiffs' case is, however, that the letters C.A.P., though primarily, perhaps, descriptive of the article to which they were applied, have acquired a secondary meaning, and have come to be known and recognized in the trade as indicating the specific article manufactured by them and sold under that brand—cream acid phosphates—and that the Defendants have no right to apply those letters to the acid phosphates which they manufacture, because, as they contend, the result of their so doing is, that those dealing in the article are likely to be misled into thinking that the goods of the Defendants so branded are the specific article manufactured by the Plaintiffs and sold under the same brand; and they also claim that they are proprietors of the registered trade-mark to which I have referred, and therefore entitled to the exclusive use of the letters C.A.P. as applied to the article of acid phosphates.

The relief claimed by the Plaintiffs based on these alleged rights is an injunction restraining the Defendants from using the letters C.A.P. in connection with any baking powder material not manufactured by the Plaintiffs, and from using them so as to induce the belief that the material manufactured or sold by the Defendants is the same as that manufactured and sold by the Plaintiffs, and from in any way infringing the Plaintiffs' alleged trade-mark; they also claim damages and an order for the obliteration of the letters C.A.P. wherever they are used by the Defendants in connection with their acid phosphates, and for the destruction of any dies or other instruments for stamping or marking those letters, in the possession of the Defendants.

I purpose dealing first with the claim as far as it is based on the Plaintiffs' right as owners of the trade-mark and therefore to the exclusive use of the letters C.A.P. when applied to any material for making baking powder.

It is clear, I think, that primarily the letters C.A.P., standing as they do for the words "cream acid phosphates" or "calcium acid phosphates," are descriptive merely, and are not therefore the proper subject of a trade-mark.

As Mr. Justice Burton pointed out in *Partlo v. Todd*, 14 A.R. 444, at p. 452, a word or name which is merely descriptive of an article, or which is indicative merely of its quality or composition, cannot properly be the subject of a trade-mark. That, I take it, is a correct statement of the law, and it is conclusive against the Plaintiffs' on this branch of the case, unless by the registration of the letters under the Trade-Mark and Design Act as a trade-mark they have acquired a right to the use of them which the Defendants are not entitled to question in this action. If the decision of the Supreme Court in *Partlo v. Todd*, 17 S. C.R. 196, is still the law, the registration does not help the Plaintiffs. That was conceded by Mr. Cassels, but he contended that the decision proceeded upon the ground that there was no machinery provided by the Act for expunging from the register a trade-mark improperly admitted to registration, and no longer governed because, by subsequent legislation, jurisdiction is given to the Exchequer Court, at the suit of anyone aggrieved by an entry in the register of trade-marks without sufficient cause, to make an order expunging or varying the entry as the Court thinks fit.

This contention is not, I think, well founded, for, as I read the report of the case, the judgment of the Court did not proceed upon the ground upon which Mr. Cassels argued that it was rested, but upon broader grounds. The head-note to the report lends colour to the argument, but it is not warranted by anything which is found in the judgment, and I must, therefore, follow *Partlo v. Todd*, and, following it, hold that it is open to the Defendants in this action to raise and rely on the objection to the Plaintiffs' claim which is, in my opinion, fatal to it, that at the time of the registration the Plaintiffs were not proprietors of the trade-mark because the letters C.A.P. were not, for the reasons I have already mentioned, the subject of a trade-mark.

I come now to the other branch of the case.

In *Reddaway v. Banham* [1896] A.C. 199, the House of Lords, after a full review of the authorities, laid down the law which is to be applied in determining as to the right of one who is not the owner of a trade-mark in respect of them

to restrain another from using names, marks, letters, or other indicia which the former has applied to articles put upon the market by him.

As put by the Lord Chancellor (p. 204) the principle of law to be applied is, that nobody has any right to represent his goods as the goods of somebody else, and, as said by Lord Herschell (p. 209)), it is that stated by Lord Kingsdown in these words: "The fundamental rule is, that one man has no right to put off his goods for sale as the goods of a rival trader, and he cannot therefore (in the language of Lord Langdale in *Perry v. Truefitt* (1842), 6 Beav. 66) be allowed to use names, marks, letters, or other indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person."

It seems to have been conceded on all hands that that principle has no application where the names, marks, letters or other indicia are descriptive of the material of which the article is composed or of its quality or nature—as if in that case the words "camel hair" conveyed to persons dealing in belting the idea that it was made of camel hair—but that it was to be applied where the names, marks, letters or other indicia, though primarily they conveyed that meaning, had come to have a secondary meaning and to be understood in the trade to mean, when applied to an article, that it was one manufactured by the person who was known to have applied them to such an article of his manufacture.

To apply, then, the principle of that case to the facts of this. There can, I think, be no question, as I have said already, that the letters C.A.P. as used by the Plaintiffs were merely descriptive of the article phosphates, and unless, therefore, they had come to have in the trade a secondary meaning and to be no longer merely descriptive, but to signify to persons dealing in acid phosphates that acid phosphates so branded were of the Plaintiffs' manufacture, there was nothing to prevent the Defendants from applying to acid phosphates manufactured by them the name of "calcium acid phosphates" or the letters C.A.P. as being the initial letters of those three words and standing in place of them.

As I have said, there is no case made on the evidence of fraud on the Defendants' part, and no ground for thinking that in using the letters C.A.P. they did not do so

simply because they stood for the words "calcium acid phosphates," and without any idea or intention of appropriating to themselves any part of the Plaintiffs' trade. Nor is there any pretence for saying that any one who has purchased their goods bearing the brand C.A.P., or any one who was invited by advertisement or otherwise to do so, was deceived or led by the use of the letters to believe that what he was purchasing or invited to purchase was the article which the Plaintiffs manufactured and sold under that brand.

The evidence does not satisfy me that the letters C.A.P. used by the Plaintiffs in connection with acid phosphates manufactured by them have acquired a secondary meaning, or have come to mean in the trade acid phosphates of the Plaintiffs' manufacture, or that those words were understood in the trade otherwise than as descriptive of the article simply.

Acid phosphates are not sold either by the Plaintiffs or the Defendants by retail, but only, as I understand the evidence, to manufacturers of baking powder, who in ordering it are in the habit of doing so calling the article "acid phosphates," and not by the name either of "cream acid phosphates" or of "calcium acid phosphates." Mr. Fullerton, one of the witnesses examined on behalf of the Plaintiffs, who had purchased both from them and from the Defendants, testified that he called the article indifferently by the two names "C.A.P." and "phosphates" simply. The evidence also shews that it was customary in the trade to designate other articles used in the manufacture of baking powder by the initial letters of the words descriptive of them, as B.C.T. to signify baker's cream of tartar, and C.T.S., cream of tartar substitute, and the like. This is important, I think, as indicating that persons in the trade would understand the letters C.A.P. to mean cream acid phosphates or calcium acid phosphates according as they purchased from the Plaintiffs or from the Defendants; in other words, they would know, if they were buying acid phosphates from the Plaintiffs, that it was of the grade called by them cream acid phosphates, and if from the Defendants, that called by them calcium acid phosphates.

But, even if the letters C.A.P have acquired the secondary meaning I have spoken of, something more is required

to be shown by the Plaintiffs to entitle them to the relief they seek. It is only—even in that case—if the use which the Defendants make of the letters is calculated to deceive persons in the trade into the belief that the article purchased from the Defendants under that brand is the article manufactured and sold by the Plaintiffs under the same brand, that the acts of the Defendants are a violation of the rights of the Plaintiffs.

I quote from the speech of Lord Morris in the *Reddaway* case. After expressing his concurrence with the judgment of the House, he proceeds—referring to the finding of the jury that camel hair belting had become so identified with the name of the Plaintiff that camel hair belting had in the market obtained the meaning of Reddaway's (the Plaintiff's) belting—as follows: "That finding establishes as a fact that the use of the words 'camel hair belting' *simpliciter* deceives purchasers, and it becomes necessary for the Respondents to remove that false impression so made on the public. That, to my mind, is obviously done when the Respondents put prominently and in a conspicuous place on the article the statement that it was camel hair belting manufactured by themselves. Having done so, they would, as it appears to me, fully apprise purchasers that it was not Reddaway's make, by stating that it was their own. A representation deceiving the public is and must be the foundation of the Appellants' right to recover; they are not entitled to any monopoly of the name 'camel hair belting' irrespective of its deceiving the public, and everyone has a right to describe truly his article by that name, provided he distinguishes it from the Appellants' make. In this case the Respondents did not so distinguish it because they omitted to state that it was their own make:" [1896] A.C. pp. 221-2.

That statement of Lord Morris, if I may venture to say so, appears to me to crystallize into a few words the whole case, and to properly state the rule to be applied and the limits of its application.

If, then, it was open to the Respondents in that case—what they had done having been fraudulently designed with intent to deceive, and having had that effect—to set themselves right by adopting the course pointed out by Lord Morris, it is an *a fortiori* case that these Respondents, who

have not acted fraudulently—have not intended to deceive, and have not in fact deceived any one into the belief that in buying goods of their manufacture he was buying the Plaintiffs' goods—and have taken care to put prominently on the articles of their manufacture the statement that they were manufactured by them—have not represented their goods as the goods of the Plaintiffs, nor by the use of the letters C.A.P. put off their goods for sale as the goods of the Plaintiffs—have committed no wrong for which the Plaintiffs are entitled to call them to account.

Had I been of a different opinion, it would have been necessary to consider the effect of the laches and delay of the Plaintiffs in taking proceedings to assert their rights against the Defendants, but, as it is, I need not consider that question.

I have not referred to any of the cases cited upon the argument but the two I have dealt with, because the general question with which I have had to deal is so fully dealt with in the *Reddaway* case, and because the American cases cited by Mr. Shepley are not altogether in accord with the view taken by the English Courts as to the application of the rule laid down in *Re Reddaway* to cases where the names, words, letters, or other indicia used are descriptive merely of the article or indicative merely of its quality or composition.

The result is that, in my opinion, the Plaintiffs' case fails, and their action must be dismissed with costs.

Solicitor for the Plaintiffs : *H. Cronyn*.

Solicitor for the Defendants : *E. W. M. Flock*.

Note:—

See in connection with this case the notes upon the decision in *Pubst, etc. v. Ekers et al.*, reported *ante* p. 38.

[IN THE SUPREME COURT OF CANADA.]

BEFORE TASCHEREAU, GWYNNE, SEDGWICK, KING AND
GIROUARD, JJ.

MAGANN (Defendant), Appellant

v.

AUGER et al (Plaintiffs), Respondents.

(31 S.C.R. 186.)

(On appeal from the Court of Queen's Bench, of the Province of Quebec, Appeal Side.)

Contract by correspondence—Mailing letter of acceptance—Place where contract made—Indication of place of payment—Jurisdiction—Declinatory exception—Waiver—Procedure.

C.P.Q. Articles 85, 94, 129, 1164, 1173, 1175, 1176.—C.C. P.Q. Articles 85-86.

An offer was made by the plaintiff by letter dated and posted at Quebec, and was accepted by defendant by a letter dated and posted at Toronto. An action having been brought upon the contract in the Superior Court for the District of Quebec, the defendant, who had been served substitutionally, petitioned in revocation of a judgment which had been entered by default, first taking exception to the jurisdiction of the Court, and then constituting himself incidental plaintiff, and, as such, making a cross-demand for damages to be set off against the plaintiff's claim.

Held, that in the Province of Quebec, as in the rest of Canada, in negotiations carried on by correspondence, it is not necessary for the completion of the contract that the letter accepting an offer should have actually reached the party making it, but the mailing in the general post-office of such letter completes the contract. (*Underwood v. Maguire*, R.J.Q., 6 Q.B., 237, overruled.)

Article 85 of the Civil Code, as amended by 52 Vict., ch. 48, (P.Q.) providing that the indication of a place of payment in any note or writing should be equivalent to election of domicile at the place so indicated, requires that such place should be actually designated in the contract.

In forming an opposition or petition in revocation of judgment the defendant, in order to comply with Art. 1164 C.P., P.Q., is obliged to include therein any cross-demand he may have by way of set-off or in compensation of the plaintiff's claim and, unless he does so, he cannot afterwards file it as of right.

A cross-demand so filed with a petition for revocation of judgment is not a waiver of a declinatory exception previously pleaded, nor an acceptance of the jurisdiction of the court.

In order to take advantage of waiver of a preliminary exception to the competence of the tribunal over the cause of action on account of subsequent incompatible pleadings, the plaintiff must invoke the alleged waiver of the objection in his answers.

The judgment appealed from, affirming the decision of the Superior Court, District of Quebec (Q.R., 16 S.C. 22), was reversed.

Appeal from a judgment of the Court of Queen's Bench (Province of Quebec), Appeal Side, affirming the judgment of the Superior Court for the District of Quebec, dismissing the defendant's declinatory exception, and; on the merits, maintaining the plaintiff's action with costs.

The facts of the case are set forth in the head note and in the judgment.

The judgment of the Court was delivered by :

TASCHEREAU, J.

The judgment of the Superior Court, confirmed by the Court of Appeal for the same reasons, as appears by the printed case, dismissed the appellant's exception to the jurisdiction on the sole ground that by constituting himself incidental plaintiff he had submitted to the jurisdiction of the Court, and waived his said exception. We think that judgment untenable. The appellant's incidental demand, though not so in express terms as it was for instance in *Peale v. Phipps*, (14 How. 368) was of its nature merely alternative, in the event of his exception to the jurisdiction not prevailing. If any part of the appellant's petition was illegal it was the incidental demand, not the declinatory plea. It is that demand that should have been objected to by the respondents, as incompatible with the exception to the jurisdiction. The respondents replied to the petition and declinatory plea and proceeded to trial and judgment upon the declinatory plea as a separate issue, and it was the court *ex proprio motu* which suggested the question of waiver. Now, it is a well settled rule that waiver must be pleaded or invoked by the party who relies upon it. In this case, if there had been a waiver at all, it was on the part of the respondents who asked the Court for a judgment on the merits of the appellant's declinatory exception without invoking waiver of it by the appellant. Then, were it necessary to determine the point, it would seem that appellant is right in his contention that under articles 1164, 1173, 1175, 1176 C.C.P., (new), his incidental or

cross-demand was rightly filed with his petition. Arts. 217, 218, 219, C.C.P., *Turcotte v. Dansereau* (27 Can. S.C.R. 583), *Brunet v. Colfer* (11 Q.L.R. 208), 5 Boncenne-Bourbeau, 100 et seq. Though not a plea, in the ordinary sense of the word, the cross-demand was in the nature of a set-off, or compensation against the respondent's claim. Had he not filed it with his petition, he could not later have been allowed to file it, as of right.

Having come to the conclusion that the appellant had not waived his declinatory exception, we have to pass upon its merits, and determine whether or not the whole cause of respondent's action has arisen in the District of Quebec. If not, it is conceded, the Court had no jurisdiction. This brings up the controverted question raised in *Underwood v. Maguire* (R.J.Q., 6 Q.B. 237), and noticed in Sirey, Code Civil annoté, under art. 1101, no. 32, under art. 1583, no. 40; Code de Procéd., under art. 420, no. 78, and in Pandectes Françaises vo. "Obligations" no. 7054. In negotiations carried on by correspondence is the contract entered into only when the letter containing the acceptance has reached the party who has made the offer? Or, as put in Sirey, loc. cit. "Est-il nécessaire pour la perfection du contrat que l'acceptation soit parvenue à la connaissance de celui qui a fait l'offre?" The jurisprudence and commentators' opinions in France on the question are fully cited and collected in Sirey and the Pandectes, loc. cit.

If counted merely, the respondent's contention that the question should be answered in the affirmative would seem to have a majority in its favour. But if the reasoning is weighed, the question should, we think, be answered in the negative, and we adopt the view taken by Pothier, Vente, no. 32; 24 Demol. Ier, des Contr. No. 72; by Marcade, vol. 4, under art. 1108, no. 395; by Lyon-Caen, Dr. Commercial, vol. 3, nos. 25 et seq.; by the annotator to the arret of the 21st Jan., 1891, in Pand. Franç. 92, 2, 163; by the annotator to the same arret in Dalloz, 92, 2, 249; by Guilouard, Vente, vol. Ier, no. 15; by Vigié, Dr. Civ. Fr., vol. 2, no. 1112; and by Hudelot, Obligations, no. 37. It would appear useless to repeat here the argumentation upon which these commentators have reached their conclusions upon the question. A simple reference to them is sufficient. They completely refute the reasoning upon which the contrary doctrine is based.

If it were required for the *aggregatio mentium* necessary to create mutuality of obligations in a contract made by correspondence that the party who has made the offer has received the acceptance of his offer, it would follow that the party accepting should himself not be bound till he is informed that his acceptance has reached the party offering. It is obviously of the greatest importance to the commercial community that such a doctrine should not prevail.

By the conclusion we have reached upon the question, we declare the law to be in the Province of Quebec upon the same footing as it stands in England, and in the rest of this Dominion, a fact rightly alluded to by Mr. Justice Bossé in *Underwood v. Maguire* (R.J.Q., 6 Q. B. 237), as of great importance specially in commercial matters.

It had previously in France been said by a learned writer that this view of the question "est celle qui présenterait le plus de chances de succès devant la juridiction commerciale." Boncenne-Bourbeau, vol. 6, p. 163.

It has been argued for the respondents that as under arts. 1152 and 1533 of the Civil Code the payment by the appellants under this contract had by law to be made to them in the District of Quebec, where delivery of the ties sold to them had to take place, they had the right to bring the action there under the provisions of art. 85. In France, no doubt, the action is rightly brought where the payment has to be made. But that is so only in virtue of art. 420 of their Code of procedure, which is treated by the commentators and the jurisprudence as an exception in the *tribunaux de commerce* to the ordinary rules in the matter. Dalloz, 63, 1, 176; Pand. Fr., 99, 1, 22. At common law, the indication of a place of payment does not confer jurisdiction upon the tribunals of that place. I refer to Demol. vol. Ier, no. 374; Sirey Cod. Civ. Ann., under art. 111, no. 52; 12 Duranton, no. 99; 27 Demolombe, vol. 4, des contrats, no. 274; 6 Boncenne-Bourbeau, 210 et seq.; *Wurtele v. Lingham*, (1 Q.L.R., 61); *Tourigny v. Wheeler*, (9 Q.L.R., 198); *Cloutier v. Lapierre*, (4 Q.L.R., 321); *Clark v. Ritchey*, (9 L. C. Jur. 234). By the act 52 Vict., ch. 48, amending article 85 of the Civil Code, the indication of a special place of payment in any note or writing, wherever it is dated, now confers jurisdiction over any action relating to such note or writing upon the tribunals of the place so

indicated. But here, in the written agreement sued upon there is no such indication of a place of payment and the declaration does not allege any. *Bent v. Lauze*, (3 L.A. An. 88); *Vidal v. Thompson*, (11 Mart. La. 23); *Morris v. Eves*, (11 Mart. La. 730.) The place of payment designated by the law alone is not the indication required by art. 85 of the Code as it now reads. It is a stipulated domicile, one expressly contracted for by the parties not the place indicated by the law that this article provides for.

When article 94 of the Code of Procedure read with art. 86 of the Civil Code says that a defendant may be summoned in the case of an election of domicile for the execution of an act, before the Court of the domicile so elected, it means clearly a conventional domicile, not a legal domicile, not the place that the law alone designates as the place of payment.

It would seem, moreover, that article 85 C.P.Q. requires that the election of domicile and the indication of a place of payment equivalent thereto under its provisions, be made at such a designated place in a locality that the notifications, demands and suits relating thereto may be made and served thereat: art. 129 C.P.Q. For instance, if a note says "payable at Quebec," that is not an election of domicile under this article.

We hold therefore that the contract between the parties in this case having been made in Toronto where the appellant accepted the respondent's offer and mailed his letter of acceptance, the whole cause of action did not arise at Quebec, and the indication of a place of payment as required to give jurisdiction over the matter to the Superior Court at Quebec not having been alleged nor proved, the action: not having been personally served upon the appellant must be dismissed.

Appeal allowed with costs, declinatory plea maintained and action dismissed with cost.

Solicitors for the Appellant: *Dandurand, Brodeur & Boyer.*

Solicitors for the Respondents: *Taschereau, Pacaud & Smith.*

Notes 1.—

The rule of private international law, that the law governing the obligations arising out of a contract is that of the country where the contract is made, (*lex loci contractus*), is equally applicable in Ontario and in Quebec; and, in each of these provinces, the qualifications to which it is subject are similarly recognized. These modifications were briefly summed up by Mr. Justice Willes in the case of *Lloyd v. Guibert* (1865) 35 L.J., N.S. 74, in the following words: "It is generally agreed that the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought, therefore, to prevail in the absence of circumstances indicating a different intention, as, for instance, that the contract is to be entirely performed elsewhere, or that the subject-matter is immoveable property, situate in another country, and so forth."

As an example of one of the various kinds of exceptions to the general rule alluded to in the above statement of the law, reference may be made to the case of *The Queen v. Doutré*, (1884), L. R., 9 Ap. Ca. 745, where it was held that a contract made with a member of the Bar of the Province of Quebec for his professional services, was governed by the laws of that province (as being the professional domicile of the advocate) irrespective of where the contract was made.

And see, also, *Chamberlain v. Napier*, (1880), L.R. 15 C.D. 614.

In the Province of Quebec the law on this point is contained in article 8, of the Civil Code, which reads as follows: "Deeds are construed according to the laws of the country where they are passed, unless there is some law to the contrary, or the parties have agreed otherwise, or by the nature of the deed or from other circumstances, it appears that the intention of the parties was to be governed by the law of another place; in any of which cases, effect is given to such law, or such intention express, or presumed."

And see, *Moore v. Harris*, (1876), L. R., 1 Ap. Ca. 318.

Vennor v. Life Association of Scotland, (1886), 30 L. C. J. 303.

Rogers v. Mississippi & Dominion S.S. Co., (1888), 14 Q. L. R. 99.

In the case of contracts by correspondence, however, the question when and where the contract is actually made is one which has given rise to much controversy, especially amongst continental jurists. Several works have been published upon the debated point,—whether at the place and moment when, in the ordinary course of despatch, the acceptance pass out of the possession and control of the offeree, the contract is so completed as to debar the offeror from thereafter withdrawing his proposal,—or whether it is only concluded when and where such communication is actually received by the offeror.

As regards contracts made by letter, the English rule is that which was laid down in the well known case of *Bryne v. Van Tienhoven*, (1880), L. R., 5 C. P. D. 344, namely that the contract is completed at the time and place when and where the offeree posts the letter accepting the proposition of the other party. A letter revoking the offer will not avail against such an acceptance unless it has been received before the latter is mailed; the fact that it was written and posted before the letter of the offeree was sent is immaterial.

In other cases it has been held that an acceptance by letter completes the contract from the date of the posting of the same, even though its delivery in due course is accidentally delayed.

See, *Adams v. Lindsell*, (1818), 1 Barn. & Ald. 681; *Dunlop v. Higgins*, (1848), 1 H. L. 381; or even when it is not delivered at all.

See, *Household Fire Insurance Co. v. Grant*, (1879), L. R., 4 Ex. D. 216.

And a letter withdrawing the offer, which is only received by the offeree after he has posted his letter of acceptance, is inoperative, as the contract is completed from the date of the mailing of such latter letter.

In re Imperial Land Co., Harris's Case, (1872) L. R. 7, Ch. 587.

In re Scottish Petroleum Co., MacLagan's Case, 51 L. J., Ch., 841.

And see, also, *Henthorn v. Fraser* (1892) Ch. 27.

It is submitted, therefore, that the headnote of *Magann v. Auger*, (as reported in 31 S.C.R. at p. 186.) which states "that in the Province of Quebec, *as in the rest of Canada*, . . . the mailing in the general post-office of such letter (of acceptance) completes the contract, *subject, however, to revocation of the offer by the party making it before receipt by him of such letter of acceptance*" is incorrect.

There is, apparently, nothing in the judgment of Mr. Justice Taschereau to indicate that that was the conclusion arrived at by His Lordship. On the other hand, Mr. Justice Taschereau says (at p. 193): "By the conclusion we have reached upon the question, *we declare the law to be in the Province of Quebec upon the same footing as it stands in England, and in the rest of the Dominion?*"—a result which would not be arrived at if the proviso contained in the headnote was included in his judicial ruling on the point.

Amongst French jurists there has always existed a difference of opinion as to whether or not it is necessary to the completion of a contract that the acceptance should have actually been made known to the person who made the offer. The majority of the authors who have dealt with the question, (as is mentioned in the judgment of Mr. Justice Taschereau, at p. 193), have maintained that it is; and that view of the question was adopted by the majority of the Court of Queen's Bench in *Underwood v. Maguire*, (1895), R. J. Q., 6 Q. B. 237, which was the ruling authority on the point in the Province of Quebec, until it was put aside by the Supreme Court in *Magann v. Auger*.

As shewing the present tendency of the French Jurists upon this point, however, it may be said that Mr. Mignault (*Le Droit Civil Canadien*, vol. 5, p. 198, note b), draws attention to the fact that whereas Beaudry-Lacantinerie in his *Précis* (No. 797 *bis*) expressed the opinion that the contract was only completed when the offeror was actually made aware of the acceptance of his offer, he has since come to the conclusion (vide his work *Des obligations*, Nos. 37 *et seq.*) that the contract is a perfect one from the very moment that the offeree has expressed his acceptance in the proper way, it being unnecessary for that purpose that such acceptance should, at the time, be within the knowledge of the offeror.

[IN THE COURT OF APPEAL FOR ONTARIO.]

BEFORE ARMOUR, C. J. O., AND OSLER AND LISTER, J. J. A.

BROPHY (Defendant), Appellant.

v.

THE NORTH AMERICAN LIFE INSURANCE CO.

(Plaintiffs) Respondents,

Policy of life insurance—Lack of insurable interest—14 Geo. III., Cap. 48—Form of decree.

A policy of insurance was issued by an insurance company upon the life of C., the premiums being paid by B, who, at the same time, bought from the same company an annuity, the entire proceeds of which were to be and were devoted to that purpose, and the whole transaction being made with the intention of benefiting B, to whom the policy was subsequently assigned by C. The latter, having died, the company brought an action for the cancellation and delivery of the policy.

1. Held, that the policy was void as being in contravention of 14 Geo. III., cap. 48, the Defendant B not having had any insurable interest in the life of C.
2. Held, further, that, the trial judge having determined that the company had no knowledge of the true nature of the transactions, the latter was entitled to ask for the cancellation of the policy, but that in so seeking the intervention of the Court the company itself was bound to do equity, and should therefore return the Defendant B the balance of the total amount of all premiums paid on the policy, with interest, after having set off against this sum the costs of the action.

Appeal from a judgment of STREET, J.

The facts of the case are fully set forth in the head note, and in the judgments.

TORONTO, SEPTEMBER 21st, 1901.

ARMOUR, C. J. O. :—

The evidence in respect of the impeached policy of insurance is very plain and simple.

One Richard Alexander Cromar, a broker and insurance expert, as he called himself, on the 27th October, 1885, wrote to the defendant Brophy as follows : " *Re* the pleasant

intercourse we have had in business matters lately.—On the condition of your making me, A. C., your referee, adviser and broker in any transaction relating to insurance, real estate or monetary investments, I agree and hereby promise to allow you the following rebate or commission on all premiums or amounts paid to any company or institution transacting business in Canada as follows, viz. :—Annuity bonds, one-half of one per cent. ; endowment policies, single premiums, one per cent. ; endowment policies, annual premiums, ten per cent. On all other transactions the half of commission given me as a general broker. Advice in any matter I will be pleased to give you to the best of my knowledge and ability gratis."

This proposed arrangement was apparently agreed to by the defendant Brophy, and continued in force until after the impeached policy was effected.

The defendant Brophy deposed as follows :—"I wanted to know from him the different kinds of insurance, and we had a talk about it two or three times, and he was telling me the different plans, and they did not suit me altogether, and I was thinking over that thing one night and I wanted to have as little trouble with the business as possible myself, and I was thinking over it one night after we had talked the second or third day, and the next morning I told him what I had been thinking of during the night, that there seemed to be a convenient and easy way for me, and that would be to buy the annuities and let the annuities go for insurance on my life, and he struck the table and said that is the best idea I ever heard. I have been a long time doing insurance business and that never came into my mind before; so he went out of the room where we were and told the manager then what he proposed and that he approved of so much, and that is the first insurance he did for me." The insurance here referred to was an endowment policy in the New York Life upon the life of the defendant Brophy effected in 1885. Shortly before the effecting of the impeached policy the defendant Brophy had an interview with Cromar, and this is the account he gave of it :—"I said I had some more money to put into insurance, and he said, wouldn't it be much better for you to have a young life. How would it be if I put it on my life, and he drew out the figures and showed me the difference in the insurance

that I would get on his life and on my life, and showed me the advantage of putting it on his life, and that is the way he came to put the insurance on his life."

The defendant Brophy thereupon, through Cromar, applied to the plaintiffs for an annuity bond for \$300, and Cromar applied for an insurance on his life for an amount, the annual premium for which would be met by the annuity bond, which amount was ascertained to be the sum of \$6,025.

The annuity bond was issued by the plaintiffs for the annual sum of \$300, payable to the Defendant Brophy on the fifth day of March, in each year, and the policy of insurance on the life of Cromar for \$6,025, in consideration of the annual premium of \$300, was issued by the plaintiffs, payable to Cromar on the fifth day of March, 1917, if living; if not, his executors, administrators or assigns. This policy was originally written with premiums payable annually, 20th February, but was altered, making the premiums payable on the 5th day of March in each year, the same day on which the annuity of \$300 was payable.

The amount charged for the annuity was. . . . \$2,546.70
and for the premium of insurance. . . . 300.00

\$2,846.70

and from this was deducted one-half of one
per cent. on the sum paid for the an-
nuity bond \$12.73

and ten per cent. on the premium of insur-
ance 30.00

42.73

\$2,803.97

these deductions being made in pursuance of the arrange-
ment contained in the letter of Cromar of the 27th October,
1885. And for this balance of \$2,803.97 the defendant
Brophy sent his cheque to the plaintiffs.

Thereafter, until the death of Cromar, who died on the
24th April, 1900, the money payable by the annuity bond
was applied in payment of the premiums payable by the
policy of insurance.

On the 13th of March, 1897, Cromar, by assignment under his hand and seal, assigned, transferred and set over unto the defendant Brophy, and for his sole use and benefit, all his right, title and interest in and to the said policy of insurance, subject to all its terms and conditions, expressly reserving to the insured, however, sole right and power to make choice of any investment, option or options granted under the conditions of said policy, and personally to receive the full benefit thereof without the consent of any person or persons named therein as assignee or assignees, and that in the event of the death of the said assignee or assignees before the policy became due, then and in that case the proceeds thereof should be payable when due to the insured, his executors, administrators or assigns.

The defendant Brophy said that this assignment was not according to his agreement with Cromar; that by it he was entitled to an absolute assignment, but that he submitted to taking it rather than have any trouble.

The defendant Brophy had no insurable interest in the life of Cromar, and the policy of insurance, effected as it is shown by the above evidence it was, was clearly a wagering policy within the Statute, 14 Geo. III., ch. 48, and I do not think that the provisions of the assignment made it any less so, for the insurance was an entire contract, and being void in part, was void altogether. I have no doubt that, so far as the defendant Brophy was concerned, he acted in ignorance of the law, and with no intention to do anything unlawful.

If the plaintiffs were aware, at the time of this transaction, of its nature, and there is a good deal in the evidence tending to this conclusion, they would have no right to come to a Court seeking relief, for they would be in *pari delicto* with the defendant Brophy. The learned trial judge, however, found that they were not aware of it, and I am not prepared to dissent from his finding. I at first thought that to entitle the plaintiffs to come to the Court, seeking the relief they here seek, they ought to have tendered or offered to return the premiums they had received, with interest; but I find several cases in which such relief has been given without any such tender or offer.

The proper form of decree to be made herein will be that the policy be delivered up to be cancelled; that the premiums

of insurance received by the plaintiffs be paid to the defendant Brophy with interest thereon from the date of their receipt; that the plaintiffs do have their costs of this action; that the counterclaim be dismissed with costs, and that this appeal be dismissed with costs, and that all the costs when taxed be set off against the premiums and interest payable by the plaintiffs to the defendant Brophy.

I refer to the following authorities in support of this decree.

Whittingham v. Thornborough, (*Finch Case* 31, 2 Equity Abridg. 635, 2 Vernon 206.) *De Costa v. Scandrett*, 2 Equity Abridg. 636, 2 P. Wms. 170. *Desborough v. Curlewis*, 3 Equity Ex. 175. *India & London Life Assce. Co. v. Dalby*, 4 De G. & S. 462; *Prince of Wales, &c., Assn. v. Palmer*, 25 Beav. 605; *The British Equitable Insce. Co. v. G. W. Railway Co.*, 38 L. J. Chy. 132. And the decree made by V. C. Strong in the *National Life Insurance Co. v. Egan*, reported on motion for injunction, 20 Grant 469.

OSLER, J. A.:—

The policy in question, though valid upon its face as being a policy in favor of Cromar upon his own life for a sum payable to him on the 20th February, 1917, should he then be living, or to his executors in case of his death before that time, was an illegal, void and invalid instrument under section 1 of 14 Geo. III., chap. 48, because Cromar was not at its inception the person really interested therein. The insurance was effected by and for the benefit of the defendant, who was to pay the first and subsequent premiums thereon under an agreement between Cromar and himself, by which Cromar was to make the application and obtain the policy and then to assign it to the defendant. The defendant's own evidence appears to me to establish this beyond any question, and the case is thus distinguished from that of these plaintiffs v. *Craigien* reported in 13 S. C. R. 278, where the facts showed that the application was really made by the person whose life was insured, though for the benefit of persons named in the application and

policy, and to whom on the death of the insured the policy was to be payable. There the premiums were payable and were paid by the insured. The insurance was in its inception one really obtained by the applicant himself on his own life, though by the terms of the policy the money was directed to be paid to persons whom he intended to benefit. As is pointed out in the judgment of the present Chief Justice of the Supreme Court, no rule of law or statute prevents insurance of that kind: "It is not one which the statute, 14 Geo. III., was intended to prevent. . . . Of course, if it is made to appear by the evidence that the undertaking of the person whose life is assured to pay the premiums is colourable and the premiums are in reality to be paid by a third person who has no insurable interest in the life and who is to have the benefit of the insurance, the policy will be a wager policy and so within the statute and void."

The evidence so plainly establishes all this in the present case that I think it unnecessary to say more than that I agree with the findings of the learned trial Judge thereon. The case of *Vezina v. The New York Life*, 6 S. C. R. 30, was much relied upon by the defendants. But that case turns altogether upon the facts which were held by the majority of the Court to prove that the insurance was valid in its inception as a bona-fide insurance for his own benefit by the person whose life was insured without collusion between himself and the person who had paid the premiums and to whom he afterwards assigned the policy. I refer also to the case of *Evans v. Reynolds*, L. R. 4 Q. B. 622.

An important question, however, bearing upon the proper disposition of the plaintiff's action remains to be considered. It is clear that where a policy is not void upon its face and of which the illegality is made to appear only by evidence dehors the instrument itself, the insurers are not bound to wait until an action has been brought against them by the insured, but may, just as in the case of a policy which has been obtained by fraud, (*National Life Ins. Co. v. Evans*, 20 Gr. 469) themselves actively seek the intervention of the Court to relieve them from liability by cancelling the policy upon proper terms. *North America Life Assurance Co. v. Craigen*, 13 S. C. R. 273, 293; *Desborough v. Curlew*, 3 Y. & C. 175. The action, therefore, may

well lie in the present case as the policy is not on its face open to the objection relied on. The plaintiffs, however, do not appear to have tendered repayment of the premiums received by them thereon before action, nor do they by their pleadings, as they did in the Craigen case, submit to such order being made in respect thereof as the Court may think proper. In the present state of the practice I am not prepared to hold that a tender of the premiums before action was necessary. It is true that the defendant could not maintain an action to recover them, cognizant as he must be held to have been of the illegal nature of his agreement with Cromar and of the illegality of the policy obtained in pursuance thereof. When the policy is avoided for actual fraud on the part of the insured he cannot recover back the premiums: *Feise v. Parker*, 4 Taunt 640; *Ander-son v. Thornton*, 6 Exch. 425; *Howard v. Refuge Friendly Society*, 54 L. T. N. S. 644; and, except where the insured renounces the contract before the termination of the risk, the rule is the same when it is avoided for illegality, as for want of interest or otherwise where the facts were known to him: *Lowry v. Bourdieu*, Dougl. 468; *Park on Insurance*, vol. 1, p. 456; *Campbell v. Allen*, (1808) 12 Fac. Dec. 853; *Patterson v. Powell* (1832) 2 L. J. N. S. C. P. 13; *Dawker v. The Canada Life Assurance Co.*, 24 U.C.R. 591. Fraud, or illegality, is an answer to an action by the insured "not from any merit in the defendants which justifies them in retaining money which *ex aequo et bono* is not theirs, but from the demerit of the plaintiff which excludes him from the aid of a Court to draw it out of the defendants' hands." But where the insurers are unwilling to await the result of an action upon the policy and themselves seek the intervention of the Court to relieve them by cancelling it, a different principle applies. The money they receive for premiums is not theirs, as the risk never attached, and therefore in seeking equitable relief they must themselves do equity by returning the premiums or submitting to any order the Court may think proper to make. The distinction is well stated in *Schwartz v. The United States Insurance Co.*, 3 Wash. C. C. Rep. (1812) 170, 175. That was an action by the insured for a return of the premiums on a policy avoided for fraud. WASHINGTON, J., said: "The cases of *Willingham v. Thornborough*, 2 Vern. 206; *DaCosta v. Scandrett*, 2 P. Wms. 170, and *Wilson v. Duckett*, 3 Burr. 1361, in which the premium was

decreed to be refunded notwithstanding the fraud of the insured in obtaining the insurance, fall short of establishing the point for which the plaintiffs' counsel contends. In the two former the insurers were plaintiffs in Equity seeking to set aside the policy on the ground of fraud, and since the insurers could not in conscience retain these premiums, no matter how great the demerit of the insured might be, a Court of Equity, governed by its own principles, could not relieve the insurers on other terms than compelling them to discharge that to which they had no equitable right, and placing the parties in the situation they were in when the contract was entered into. The other case, though tried at law, was made under a decree of the Court of Chancery in which the insurers were complainants, and offered in the bill to repay the premiums."

The same rule prevails in more modern cases.

In *The Prince of Wales Assurance Co. v. Palmer* (1858), 25 Beav. 605, the policy was avoided in Equity at the instance of the Company for the fraud of the person who had procured it. The premium was ordered to be applied so far as would be necessary in payment of the costs, and the residue to be paid into Court, with liberty to apply.

In *London Assurance Co. v. Mansell*, 11 Ch. D. 363, the Company procured the contract for insurance to be rescinded on the ground of the fraudulent misrepresentations of the applicant. They had tendered back the premium, and it was ordered to be repaid by them. "Where equity relieves in ordering the insurance to be cancelled, the general rule is that the party in whose favour the decree is made shall do equity by returning the consideration." *Bunyon on Life Assurance* (1891), pp. 120, 121; *Barker v. Walters* (1844), 8 Beav. 96; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484.

The only hesitation I have had as to the jurisdiction of the Court to deal with the premiums in this case arises from the fact that the plaintiffs have not in their pleadings or at the trial expressly submitted themselves thereto. It was certainly usual under the former practice to make such a submission in the pleadings, either expressly or by the general prayer for "such further and other relief as the case might require or the Court might think fit." And if it is really essential, the only consequence would be that

the plaintiff's action must be dismissed with costs. Dealing with this point, in *Barker v. Walters* (1844), 8 Beav. 92, the Master of the Rolls said:—"If it were necessary to make the offer, this, I own (*i. e.*, the prayer for general relief), seems to me to be sufficient." The report does not indicate that any such offer was made in *The Prince of Wales Assurance Co. v. Palmer*, *supra*. And an examination of the pleadings in the *Egan* case, *supra*, discloses that there was neither tender nor offer to return the premium, nor anything beyond the prayer for general relief. That case was tried before STRONG, J., and the decree ordered the policy to be cancelled and the premiums to be set off as far as might be necessary in payment of the plaintiffs' costs, the balance to be repaid to the defendant.

The plaintiffs, no doubt, have strenuously opposed any order to repay the premiums, but I think that when they bring their action to trial, move for the judgment of the Court and having obtained it insist upon retaining it, they have made a sufficient submission of all their equitable obligations as to the premiums to enable the Court to make the proper order in respect thereof. They are not now in a position to ask for a dismissal of their action and, therefore, the judgment at the trial must be amended by directing a reference, if necessary, to ascertain the amount which has been paid to the plaintiffs on account of premiums, and the payment of that amount to the defendant or so much thereof as may remain after deducting the plaintiffs' costs of suit. There should be no costs in respect of the appeal as to the judgment in the action, success being divided. The appeal as to the counterclaim should be dismissed with costs.

LISTER, J. A.:—

The plaintiffs ask to have a policy of life insurance issued by them on the life of one Alexander Cromar, now deceased, for the sum of \$6025.00 delivered up to be cancelled upon the ground that it is a wager policy within the meaning of 14 Geo. III., and, therefore, void, under section 1 of that Act.

The defendant resists upon the ground that the policy was issued to Cromar upon his own application and for his own benefit, and that it was by him duly assigned to the defendant by an assignment executed on the 13th of March,

1897; and by way of counterclaim he seeks to recover from the claimants the amount of the assurance with interest and posts, and he also asks for such further and other relief as may be deemed necessary and proper.

The facts, as they are succinctly stated in the opinion of my brother Street, were these: "The defendant Brophy was an elderly man and a priest; Cromar was an insurance agent canvassing for one Company, and perhaps for more, and in 1885 he began to do some insurance business for Brophy. At that time Brophy was in the habit of buying annuities from insurance companies, insuring his own life and allowing the annuity payments to go in payment of the premiums on the policies on his life. Cromar did all his business in insuring his life; and an arrangement was made between them by which Brophy in effect received the benefit of part of the commissions which Cromar got from the insurance companies to whom he took Brophy's application for insurance. Then in the year 1896 or the beginning of 1897, a new system was adopted upon Cromar's suggestion, and Brophy took out eleven policies of insurance in different companies which are mentioned in the schedule which has been put in, amounting in all to upwards of seventy thousand dollars. That system was this: Brophy purchased an annuity upon his own life in the company in which he was insured; in the case of the North American Life, which is typical of this, he purchased an annuity upon his own life for three hundred dollars. Then, instead of insuring his own life, he insured Cromar's, that being part of the arrangement between him and Cromar—for an amount the premiums upon which would be equal to the amount of the annuity which Brophy had purchased. Then there was a further agreement, as Brophy, who is the defendant in this action, tells us, under which the policies were at once assigned to him, Brophy. The advantage which Cromar was to get from this was the commissions on the premiums payable to the insurance company and on the original insurance. This arrangement was carried out with regard to policies in eleven companies; and in ten companies Cromar carried out the arrangement to the letter. That is to say, contemporaneously with and as a part of the insurance and of the annuity transaction, Cromar made an absolute assignment to Brophy of the policies; but he began to think apparently before he had completed the assignment of the North American policy that he was not getting enough out of it, that he was allowing Brophy to insure his

(Cromar's) life, and that Brophy was going to make a good deal of money out of it, while he (Cromar) was making nothing but his own commissions out of the company; and when he came to assign the North American policy, instead of assigning the policy absolutely, as he assigned the other ten policies, he assigned it in such a way that if he should survive Brophy, then he (Cromar) should get the benefit of the insurance. Brophy said that at the time he got the assignment he did not like it, that it was contrary to the agreement under which this insurance had been effected, but that he was afraid that Cromar might make trouble in the transaction between them. He did not want it too public, and so he said nothing about it. In other words, the defendant himself, through his fear of publicity being given to this large business that he had been carrying on—an illegal business, I may say, in insurance—and believing himself to be under Cromar's thumb, rather than make matters unpleasant, submitted to the breach of his agreement which Cromar had committed by assigning this policy not absolutely, but in the way in which I have stated it."

The learned trial judge found that the arrangement between the defendant and Cromar was one by which the defendant having no interest in Cromar's life should be permitted to insure it for his (Brophy's) benefit, and that the plaintiffs had no knowledge of such arrangement, and he held that the plaintiffs were entitled to the relief asked for, and that the defendant was not entitled to recover back the premiums paid, and he accordingly gave judgment for the plaintiffs with costs and dismissed the defendant's counterclaim with costs.

The plaintiffs have not, by their statement of claim or otherwise, offered to return to the defendant the premiums which they received from him on the policy in question. Upon these facts I concur in the conclusion arrived at by the learned trial judge that the policy in question is, as being contrary to or in evasion of the provisions of 14 Geo. III., cap. 48, sec. 1, void. That section is in these words: "Whereas it has been found by experience that the making insurance on lives and other events wherein the assured shall have no interest hath introduced a mischievous kind of gambling, that from and after the passing of this Act, no insurance shall be made by any person or persons, bodies politic, or corporate on the life or lives of any person or

persons; or on any other event whatsoever, wherein the person or persons for whose use benefits or on whose account such policies shall be made shall have no interest or by way of gaming or wagering, and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever."

It has no application to an assurance bona-fide effected by a person on his own life, and who, without consideration, valuable or otherwise, by will or assignment, directs payment of the sum assured to be made at his death to a third person:—*Ashley v. Ashley*, 3 Sim. 149; *North Am. Life Ass. Co. v. Craigen*, 13 S. C. R. 278. But an assurance effected by one on his own life, not for his own use and benefit, but really for the use and benefit of another, who has no insurable interest in his life, and who pays the premiums and takes an assignment of the policy, is void. The law looks upon such a transaction as a mere evasion of the provisions of the Statute.—*Shilling v. Accidental*, 27 L. J. Ex. 12; 2 H. & N. 43; *Vezina v. The New York Life*, 6 S. C. R. 30. In this case the evidence of the defendant himself makes it plain that he had no insurable interest in the life of Cromar; that the assurance was effected by Cromar under an arrangement with the defendant, by the terms of which it was to be effected, not for Cromar's use or benefit, but for the use and benefit of the defendant, who, under the arrangement, was to pay and did pay the premiums, and to whom the policy was to be assigned. Clearly, under these circumstances, the transaction, from its inception to its completion, by the assignment of the policy to the defendant, was illegal and void, as contravening the provisions of section 1 of the Statute; in other words, it is a wager policy within the Statute, and therefore void; and so far as this action is concerned, it is, I think, immaterial that Cromar did not fully carry out his arrangement with the defendant by an absolute assignment of the policy.

As to the premiums the question arises, are the plaintiffs in consequence of not having offered by their statement of claim either to repay the premiums paid, or to submit to such terms as the Court might think fit to impose entitled in this action to the relief which they seek? I think they are. Mr. Porter, in the third edition of his work on the Law of Insurance, at p. 95, states both the rule and the reason for the rule in these words: "Equity, however, will

only decree the delivery up of a fraudulent and, therefore, void policy, when the insurer seeking relief offers either to repay the premiums paid or to submit to any terms which the Court may think proper to impose in granting such relief, which will include the re-payment of premiums. To hold otherwise would be to let the insurer affirm and deny the contract in one breath."

While the earlier cases seem to support the rule, as Mr. Porter states it, it has not been applied in the more modern cases. In *Prince of Wales Co. v. Palmer*, 25 Beav. 605, where the plaintiffs sought a cancellation of a life assurance policy on the ground of fraud, no such offer was made, and yet the Court decreed its cancellation and ordered that the premiums received by the plaintiffs should be applied in payment of the costs of the parties; and in the case in our Courts of *The National Insurance Co. v. Egan*—unreported as regards the hearing and final judgment—which was also an action for the cancellation of a policy for fraud in which no offer was made by the bill to repay the premiums or to submit to such terms as the Court might think fit to impose, in granting the relief there sought, the present Chief Justice of the Supreme Court, then Vice-Chancellor, decreed the relief prayed for, with costs to be paid out of the premiums, and the surplus, if any, to be paid to the defendant. It would seem to follow from these cases that whatever the rule may have been, it is not now necessary that an insurer before he can successfully invoke the aid of the Court to relieve him from a policy which he alleges to be illegal, must, by his statement of claim, offer to repay the premiums paid or to submit to such terms as the Court may think fit to impose in granting relief. In such cases the Court will assume that the person seeking relief is willing to submit to any terms which it thinks fit to impose.

I think the judgment appealed from should be varied by ordering that the premiums paid by the defendant with interest thereon be applied in payment of the plaintiffs' costs, and the residue, if any, paid to the defendant, (see *The British Equitable Insurance Co. vs. G. W. R.*, 38 L.J. Ch. 132), and that the judgment as varied should be affirmed with costs.

Judgment affirmed as varied.

Solicitor for the Appellant: *D. O'Connell*.

Solicitors for the Respondents: *Kerr, Davidson, Patter-
son & Grant*.