Dominion Law Reports

CITED "D.L.R."

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

ANNOTATED

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

VOL. 52

EDITED BY

C. E. T. FITZGERALD

C. B. LABATT *and*

RUSSEL S. SMART

ASSOCIATE EDITOR OF PATENT AND TRADE MARK CASES.

CONSULTING EDITOR

E. DOUGLAS ARMOUR, K.C.

TORONTO:

CANADA LAW BOOK CO. LIMITED

84 BAY STREET

1920

CASES REPORTED

IN THIS VOLUME.

TABLE OF ANNOTATIONS

(Alphabetically Arranged)

APPEARING IN VOLS. 1 TO 52 INCLUSIVE.

LAW OF OBLIGATION OF TENANTS TO REPAIR

by

C. B. LABATT

and

H. H. DONALD.

Annotation.

I. *Obligation of the parties in the absence of an express agreement.*

1. Landlord not bound to repair in the absence of an express agreement to do so.
2. Consequences of this principle.
3. Agreement of landlord to repair, whether tenant entirely relieved from responsibility by.
4. Obligation to repair in the absence of express stipulations.
5. Liability of tenants for voluntary waste.
   (*a*) *Tenants for years.*
   (*b*) *Tenants from year to year or at will.*
6. Liability of tenants for permissive waste.
   (*a*) *Tenants for years.*
   (*b*) *Tenants from year to year and at will.*

6a. Comparison between the obligations created by the duty to refrain from waste and by an express agreement to repair.
   (*a*) *Where voluntary waste has been committed.*
   (*b*) *Where the waste is merely permissive.*

6b. Obligation to repair, arising from an implied contract.

II. *Construction and effect of the various covenants relating to repairs. Generally.*

7. Enumeration of covenants respecting repairs.
   (*A*) *Covenants to repair and keep in repair.*
   (*B*) *Covenants to repair within a certain period after notice from the landlord.*
   (*C*) *Covenants to deliver up in good repair.*
   (*D*) *Covenants to put into repair.*
   (*E*) *Covenants to paint.*
   (*F*) *Covenants of indemnity.*
8. Obligations created by these covenants are independent.
9. Contemporaneous agreements by lessor and lessee as to repairs.
10. Covenants to repair considered in relation to the validity of leases given in pursuance of powers.
11. During what period agreements to repair are obligatory.
12. Obligation of covenants as to repair, how far continuous,—
   (*a*) *General covenant to keep in repair.*
   (*b*) *Covenant to put in repair.*
13. What covenants respecting repairs are classed among the "usual" covenants of leases.
14. Short Forms Acts.

III. *What property is covered by agreements to repair.*

15. Property existing at the time the tenancy begins.
16. Additions to and alterations in the premises after the tenancy begins. Generally.
17. Covenants to repair considered with reference to the tenant's right to remove fixtures.

IV. *What constitutes a sufficient performance of the covenant to repair.*

18. Covenant not broken by dilapidations due to reasonable use.
19. Obligation of tenant to make good damage done by casualties beyond his control.

19a. Non-erection of buildings stipulated to be built.

20. Structural alterations, deemed to be a breach of the covenant.

Annotation.

VI

Annotation.

Annotation.

58. Doctrine that the measure of damages is the depreciation in the selling value of the reversion caused by the breach.

XI. *Measure of damages in actions brought after the expiration of the term by a superior landlord against his immediate lessee.*

59. Damages usually assessed at the amount required to put the premises in order.
60. Application of this rule is independent of the question whether lessor actually loses by the want of repair.

XII. *Measure of damages in actions brought by lessees against their sublessees and assignees.*

61. Amount recoverable while the superior lease is still unforfeited.
    (a) *Generally.*
    (b) *Where there is a contract of indemnity (see also below, sec. 62).*
    (c) *Possible arrangements after expiration of superior lease, not an element to be considered.*
62. Amount recoverable where the superior lessee has been ejected by the superior landlord.
63. Lessee's right to be indemnified by his sublessee or assignee for the costs of defending an action brought by his lessor.
    (a) *Where there is no connection between the covenants in the original lease and the under lease.*
    (b) *Contract of indemnity implied from the substantial identity of the covenants in the two leases.*
    (c) *Rule where the underlessee enters into an express contract of indemnity.*
    (d) *Liability of an assignee for costs.*

XIII. *Pleading and practice.*

64. Action upon agreement to repair is transitory.
65. Service of the writ out of the jurisdiction.
66. Bringing in new parties.
67. Declaration.
    (a) *Sufficiency.*
    (b) *Variance.*
68. Plea.
69. Evidence.
    (a) *Competency and relevancy.*
    (b) *Burden of proof.*

XIV. *Liability of tenant to third persons.*

70. Generally.
71. Tenant presumptively liable for injuries caused by defects in the premises.
72. Rights of stranger, how far affected by the absence of an obligation on the tenant's part to repair.
73. Under what circumstances the liability is transferred to the landlord.
74. Landlord's knowledge or ignorance of the dangerous conditions, how far material.
75. Tenant's covenant to repair, how far landlord's liability affected by.

In the following monograph it is proposed to deal only with the obligation to repair which is incurred by a tenant who occupies premises by virtue of an agreement made directly with their owner, either by the tenant himself or by some third person for his use. The responsibility of a tenant for life in this regard will not be discussed, except in so far as the principles by which its nature and extent are determined, may be identical with, or throw

Annotation.

light upon, those which are more particularly applicable to the juridical relation which constitutes the proper subject of the article.

I. Obligation of the parties in the absence of an express agreement.

1. Landlord not bound to repair in the absence of an express agreement to do so.—It is a fundamental principle that the landlord is not bound to keep premises in repair unless he has expressly agreed to do so (*a*), or unless the parties have contracted with reference to some special custom. This second exception, however, is of scarcely any practical importance, and has left very faint traces upon this branch of the law of contracts (*b*).

Ordinarily in the letting of a house, there is no implied warranty as to its condition, and, in the absence of a promise by the lessor to put the premises into a state of good repair, the lessee takes them as they stand (*c*). Even where the landlord contracts to put the demised premises into "good tenantable repair," he is not bound to put them in such a state of repair as will fit them to any particular or specified purpose. Hence the tenant, if he takes possession without complaining of the insufficiency of the repairs actually executed, and without expressing a desire that more should be done, cannot recover from the landlord the money which he has been obliged to spend to adapt the premises to the requirements of his business (*d*).

Ancient Quebec decision.—The lessor is obliged to make necessary repairs on the premises leased according to their use, even though the lease recites that the lessee has knowledge of the state of the premises.

The lessee may sue the lessor to have the repairs made, or may make them at the lessor's expense.

This principle is not applicable where it is a question of the duty to repair a common staircase in a building divided into apartments, offices, etc., which are leased to different tenants. Under such circumstances there is not a demise of the staircase, but merely a grant of an easement in the use thereof, and, as the

(*a*) As regards third persons, see Sub-title XIV., post. Other cases assuming the correctness of the rule are cited in the following notes. See also *Gott* v. *Gandy* (1853) 2 El. & Bl. 845, 23 L.J.Q.B. 1 [tenant from year to year]; *Brown* v. *Trustees* (1893) 23 O.R. 599 [monthly tenant]. In the case of a weekly tenancy it has been held by Day, J., that, even if there is no express agreement to repair, the tenant, having regard to the usual practice of that class, has a right to expect reasonable repairs to be done. See, however, *Sandford* v. *Clarke* (1888) 21 Q.B. 398, and the comments thereon by Mr. Beven, 1 Negl. 487. *Miller* v. *Kinsley* (1864) 14 U.C.C.P. 188.

(*b*) *Whitfield* v. *Weedon* (1772) 2 Chit. R. 685.
Burrell v. *Harrison* (1691) 2 Vern. 231.

(*c*) *Chappell* v. *Gregory* (1863) 34 Beav. 250.

(*d*) *McClure* v. *Little* (1868) 19 L.T. 287.

Annotation.

control of the subject-matter of the easement remains with the landlord, the case is deemed to be one within the operation of the rule that, although, generally speaking, the person in enjoyment of an easement is bound to do the necessary repairs himself, an undertaking on the grantor's part to do those repairs may be inferred as a matter of necessary implication from the facts in evidence. The implication here is held to be that it was the intention of the parties that the landlord should keep the staircase reasonably safe for the use of the tenants and their families (*e*) and also of any strangers who will necessarily go up and down it in the ordinary course of business with the tenants (*f*). In this class of cases, however, a distinction is made between an easement and a mere licence. The mere fact that the landlord of an apartment house allows the tenants the privilege of using the roof as a drying ground for their clothes imposes no duty on him to keep the fence round it in repair (*g*).

A New Brunswick case.—Where a lease of a building is made to several tenants, and the landlord retains control over the sewer pipes, he was held to be liable for the damage caused by break of the same (*h*).

A recent case.—The landlord is liable for damage to tenant's property caused by leakage of water, when the premises are leased to various tenants, and the landlord retains control of the premises (*i*).

Any arrangements that may be made by the landlord for the collection of the rainwater (*j*) or for the supply of water (*k*) to the upper floors of a building which is leased to several tenants are presumed to be assented to by a tenant of any of the floors below, and, if there is leakage, he cannot hold the landlord liable unless negligence is proved. The implied assent of the tenant is deemed to be a sufficient reason for qualifying the stringent rule established by *Rylands* v. *Fletcher* (*l*).

When a water tank kept, on the roof of premises leased, falls through the roof and damages the tenant's property, the landlord

---

(*e*) *McMartin* v. *Hannay* (1872) 10 Cot. Sess. Cas. (3rd Ser.) 411 [here the defendant had admitted his retention of control by keeping a man to look after the staircase].

(*f*) *Miller* v. *Hancock* [1893] 2 Q.B. 177, 69 L.T. 214.

(*g*) *Ivay* v. *Hedges* (1882) 9 Q.B.D. 80 [nonsuit held proper].

(*h*) *Brown* v. *Garson* 42 N.B.R. 354.

(*i*) *Alberta Loan and Investment Co.* v. *Bercuson*, 21 D.L.R. 385.

(*j*) *Carstairs* v. *Taylor* (1871) L.R. 6 Ex. 217 [held that there was no liability where the hole, which allowed waste to escape from a box into which the gutters emptied themselves, was made by a rat].

(*k*) *Blake* v. *Woolf* [1898] 2 Q.B. 426, 79 L.T. 188 [damages not recoverable where the leak was the result of the bad workmanship of an independent contractor].

(*l*) L.R. 3 H.L. 330.

Annotation.

is liable, even though it be kept there for the benefit of the tenant(*m*).

Where the landlord has promised to do repairs, there is no implied agreement that the tenant may quit if the promise is not performed (*n*). But a default of the landlord in this respect is a ground for refusing specific performance of an executory contract. Thus it has been held that, in an agreement for a lease with repairing covenants of a new house, there is implied an undertaking on the landlord's part to finish and deliver the house in a proper state of repair, the performance of which is a condition precedent to the tenant's liability to accept a lease (*o*).

Quebec case.—Where the landlord has covenanted to make certain repairs, it is not necessary for the tenant to give him notice to do so, and the tenant may recover damages against the landlord for an accident due to non-repair (*p*).

The lessee may sue the lessor for breach of verbal warranty made by the latter that the drains were in good order when the lease was made. The warranty as made was collateral to the lease and an action is maintainable (*q*).

A covenant by the lessor that, in case the premises are burnt down, he will "rebuild and replace the same in the same state as they were before the fire" does not bind him to re-erect the additions which the lessee may have made to the premises as originally demised (*r*).

2. Subsidiary consequences of this principle.

(A) Though, in the absence of an express contract, a tenant from year to year is not bound to do substantial repairs, yet in the absence of an express contract he has no right to compel his landlord to do them (*a*). Nor is he entitled to treat the disrepair as an eviction and quit the premises (*b*).

(B) Though a tenant is, by force of the statute of 6 Anne, ch. 31, relieved from liability for the destruction of premises if caused by an accidental fire, the landlord is not bound to rebuild the premises (*c*).

(*m*) *Wolff* v. *Mackay*, 12 D.L.R. 750.

(*n*) *Surplice* v. *Farnsworth* (1844) 7 M. & G. 576, 8 Scott N.R. 307.

(*o*) *Tildesley* v. *Clarkson* (1882) 31 L.J. Ch. 362, 30 Beav. 419.

(*p*) *Troude* v. *Meldrum* 21 Que. S.C. 75.

(*q*) *De Lassalle* v. *Guildford* [1901] 2 K.B. 215.

(*r*) *Loader* v. *Kemp* (1826) 2 C. & P. 375.

(*a*) *Gott* v. *Gandy* (1853) 2 El. & Bl. 845, 23 L.J.Q.B. 1, per Lord Campbell [declaration alleging duty of landlord to repair held to be demurrable]. The judges viewed the action as one which was in form for a wrong, but in substance for a breach of a duty arising from a contract. See especially the opinion of Erle, J.

(*b*) *Edwards* v. *Etherington* (1825) Ry. & M. 268, is to the contrary effect, but was overruled by *Hart* v. *Windsor*, 12 M. & W. 68; *Sutton* v. *Temple*, 12 M. & W. 52.

(*c*) *Bayne* v. *Walker* (1815) 15 R.R. 53, 3 Dow 233, 247; *Pindar* v. *Ainsley*, cited by Buller, J., in *Belfour* v. *Weston* (1786) T.R. 312; *Brown* v. *Preston*

Annotation.

(C) No implied responsibility for repairs is cast upon the landlord by the fact that the repairs which were not done came within an exception of fair wear and tear in the lessee's covenant, even though the result of the repairs not being done is that the premises become uninhabitable. Under such circumstances the tenant is not entitled to quit (*d*).

(D) It would also seem that, where a covenant to repair is subject to an exception of casualties by fire and tempest, the landlord cannot be called on to do repairs rendered necessary by such casualties. In view of later decisions this doctrine, if sound, must rest entirely upon the fact that the lease embraced the exception as to fire, for it is now settled, as to cases in which the tenant's covenant to repair is not subject to this exception, that the landlord cannot be compelled to apply the proceeds of an insurance policy to the reconstruction of the premises after they have been destroyed by fire (*e*).

3. Agreement of landlord to repair, whether tenant entirely relieved from responsibility by.—Even where the landlord has expressly agreed to do repairs, the tenant is possibly not wholly absolved from responsibility. The doctrine of an Ontario case is that, if a need for slight repairs arises, and he fails to make them, he is probably precluded from recovering damages for the personal injury, for the reason that such damages are not deemed to have been within the contemplation of the parties; but that, at all events, if he knew of the dangers caused by the want of such repairs, and failed to have the repairs done himself, his action is barred on the ground that he voluntarily took the risk of using the premises in that condition. Under such circumstances, it was said, the proper course of the tenant is to notify the landlord that the repairs are needed. If the landlord then failed to perform his obligation within a reasonable time, the tenant would be justified in doing the repairs himself and charging it against the landlord or taking it out of the rent (*a*).

It must be admitted, however, that the authorities relied upon for the doctrine in this case scarcely warrant the decision in its

(1825) Newfoundl. Sup. Ct. Dec. 491. According to Lord Eldon, in the first of these cases, the meaning of the maxim, *Res perit domino*, is "that where there is no fault anywhere, the thing perishes to all concerned; that all who are interested constitute the *dominus* for this purpose; and if there is no fault anywhere, then the loss must fall upon all."

(*d*) *Arden* v. *Pullen* (1842) 10 M. & W. 321, 11 L.J. Ex. 359. Defendant's counsel cited a nisi prius case, *Collins* v. *Barrow*, 2 Moo. & Rob. 112; but Alderson, B., said that it could not be supported unless it was put on the ground that the premises were made uninhabitable by the wrongful act or default of the landlord himself. He was of opinion that this was really the theory of the decision, and that the statement of facts in the report was imperfect.

(*e*) *Leeds* v. *Cheatham* (1827) 1 Sim. 146; *Lofft* v. *Dennis* (1859) 1 E. & E. 474, 28 L.J.Q.B. 168.

(*a*) *Brown* v. *Toronto General Hospital* (1893) 23 O.R. 599.

Annotation.

full extent. The one upon which most stress is laid merely decides that a monthly tenant may make such repairs as are necessary and deduct the amount expended from the rent (*b*). The doctrine that a tenant, if he makes repairs which the landlord is bound to make, is entitled to be recouped for his expenditure, cannot be said logically to involve the doctrine that the tenant is guilty of a *culpable* non-feasance if he fails to make these repairs. In another of the cases cited (*c*), the point was simply that a lessor who covenants to repair cannot be sued unless he has previously been notified that repairs are necessary, the reason assigned being that it is a trespass for him to enter the premises without leave. It is difficult to see how such a ruling can be regarded as affording any support to the doctrine of the Ontario Court.

Additional doubt is cast upon the correctness of this decision by an English case which, although not directly in point, may at least be said to suggest a different doctrine. The case turned upon the construction of sec. 12 of the Housing of the Working Classes' Act of 1885, providing that "in any contract for letting . . . a house or part of a house, there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation." It was argued that the word "condition" was to be construed in its strict common law sense, and that the only remedy of the tenant, if the premises were not habitable, was to repudiate the contract and quit. This contention did not prevail, and the landlord was held liable for injuries which a tenant received through the fall of plaster from the ceiling (*d*). In this case the evidence shewed that the tenant knew the ceiling to be in a dangerous state, as the plaster had fallen several times before the injury was inflicted. Yet it was not suggested either by the court or by counsel that this circumstance precluded him from recovery. It may be said that a distinction between this and the Ontario case is predicable on the ground that in the former the duty violated was statutory, and, in the latter, merely conventional; but this argument can scarcely prevail in view of the series of judgments which have settled that the maxim, *Volenti non fit injuria*, is an available defence, under appropriate circumstances, to actions for a breach of the duties imposed by the Employers' Liability Act (*e*). Indeed another objection to the case under discussion is also suggested by the decision of the House of Lords cited below. That decision has finally settled that the consent of a plaintiff to take a risk must be found by the jury as a fact, and cannot be inferred merely from

(*b*) *Beale* v. *Taylor's Case* (1691) 1 Lev. 237.
(*c*) *Huggall* v. *McKean* (C.A. 1885) 33 W.R. 588, aff'g 1 C. & E. 394.
(*d*) *Walker* v. *Hobbs* (1889) Q.B.D. 458.
(*e*) The last of these is *Smith* v. *Baker* [1891] A.C. 325.

Annotation.

his knowledge of the conditions to which he continued to expose himself. This doctrine the Ontario court has plainly disregarded in holding, as matter of law, that the tenant took the risk.

4. Obligation of tenant to repair in the absence of express stipulations.—Owing to the fact that the responsibilities of tenants are almost invariably defined by written instruments, which contain specific provisions with respect to the repairing of the premises, the cases bearing upon the extent of the obligation to repair in the absence of express stipulations on the subject are by no means numerous; and even the few which the books contain are far from being harmonious.

The tenants' responsibility has been ordinarily referred to one of two theories:

(1) That his failure to repair produced certain physical conditions which amounted to waste.

(2) That he was under an implied agreement to do the repairs which were neglected.

The law also imposes an obligation on the lessee to "treat the premises demised in such manner that no injury be done to the inheritance, but that the estate may revert to the lessor undeteriorated by the wilful or negligent conduct of the lessee." At first sight this might seem to be an explicit authority for declaring upon the wilful or negligent quality of the tenant's acts, wherever the facts would justify it, and certainly there is nothing in the law of real property which would prevent a landlord from thus relying directly upon the general duty of everyone to use due care (*a*). But on referring to the treatise we find that the only authorities cited are those relating to waste. As the right to maintain an action on this ground is dependent merely upon the physicial conditions induced by the tenant's acts, and not in any degree upon the moral quality of those acts (*b*), the doctrine enunciated by the learned author does not, it is submitted, correctly state the effect of the decisions on which it is based. The doctrine is, at most, sustainable as a fairly accurate presentment of the practical result of the principles which determine the liability of tenants from year to year, the class to which the defendant, in the case cited, belonged. In fact, that case really proceeds upon the theory of a contract, as, after quoting the passage in question,

(*a*) That a tenant must rebuild premises destroyed by a fire which was due to his own carelessness was settled at a very early period: Coke on Litt. 53, *a.*; see also *Klock* v. *Lindsay* (1898) 28 Can. S.C.R. 453 following *Murphy* v. *Labbé* (1896) 27 Can. S.C.R. 126.

(*b*) The essential words in a covenant of a declaration in an action for permissive waste, as given in 2 Ch. Plead., p. 530, are "wrongfully permitted waste to the said house, by suffering the same to become and be ruinous . . . . for the want of needful and necessary reparations." Waste is defined by Blackstone as "any act which occasions a lasting damage to the inheritance." 2 Comm. Ch. 18.

Annotation.

the Court goes on to observe that there is an agreement implied in every lease "so to use the property as not unnecessarily to injure it. . . It is not a covenant to repair generally, but so to use the property as to avoid the necessity for repairs."

Under the older forms of procedure it was held that, where a tenant holds over the landlord may waive the trespass and sue him for waste (*c*).

5. Liability of tenants for voluntary waste.—(*a*) *Tenants for years.*—So far as the writer's researches extend, no question has ever been raised as to the liability of a tenant for years for voluntary waste. Nor, apparently, has it ever been suggested that this liability is dependent on the existence of a specific agreement to repair. That the commission of such waste is actionable was recognized by Parke, B., in a considered judgment (*a*).

(*b*) *Tenants from year to year or at will.*—These tenants, not being within the Statute of Gloucester (*c*), are not subject to the statutory action of waste, quite irrespective of the question whether the waste be voluntary or permissive. But under the old forms of pleading, it was held that there was "no doubt that an action on the case might be maintained for wilful waste" against a tenant at will (*d*). The theory was that voluntary waste was a trespass amounting to a "determination of the will" (*e*). But his accountability for acts amounting to such waste is unquestionable under the modern rules of practice.

6. Liability of tenants for permissive waste.—(*a*) *Tenants for years.*—From the very first, the Statute of Gloucester has been "understood as well of passive as active waste, for he that suffereth a house to decay which he ought to repair, doth the waste" (*a*). But whether the liability of a tenant for years for "passive," or, as it more commonly termed, "permissive," waste, can be predicated in cases where he has not entered into any express

(*c*) *Burchell* v. *Hornsby* (1808) 1 Camp. 360.

(*a*) *Yellowley* v. *Gower* (1855) 11 Exch. 294, citing Coke 1 Inst. 53. See also *Harnett* v. *Maitland*, 16 M. & W. 257. A lessee is liable for waste by whomsoever it is done, for it is presumed in law that the lessee may withstand it. *Greene* v. *Cole*, 2 Wm. Saund. 259, *b* (n); *Crawford* v. *Bugg* (1886) 12 O.R. 8 at 15; *Gray* v. *McLennan* (1885) 3 Man. L.R. 337.

(*c*) It seems, however, that the statutes are applicable to a demise for one year or half a year. See Coke Litt. 54, *b*.

(*d*) *Gibson* v. *Wells* (1805) 1 Bos. & P., N.R. 290, per Mansfield, C.J.; *Moore* v. *Townshend* (1869) 33 N.J.L. 284. Compare *United States* v. *Bostwick* (1876) 94 U.S. 53 (see s. 4, ante). See also *Martin* v. *Gilham* (1837) 2 N. & P. 568, 7 A. & E. 540, where the point actually decided was that evidence of permissive waste only would not support a declaration which charged voluntary waste. The allegations were that the defendant cut down trees, "and otherwise used the premises in so untenantlike and improper a manner that they became dilapidated."

(*e*) Coke Litt. 57, *a*; *Countess of Shrewsbury's Case*, 5 Coke 13, *a*.

(*a*) 2 Co. Inst. 145; 3 Dyer 281, *b*.

Annotation.

obligation to repair, is a question which, even at this late day, cannot be said to be finally settled.

(A) The authorities which make more or less strongly in favour of the view that the existence or absence of a specific provision is not a differentiating factor will first be reviewed.

The reports of the older cases bearing on the liability of a tenant for years for permissive waste are too meagre to enable us to say with certainty whether or not that liability was discussed in any of them with reference to a covenant in the lease. But at all events the point was never directly taken, that the action would not lie unless there was such a covenant; and this circumstance, although merely negative and therefore not to be pressed too strongly, may not unreasonably be deemed to indicate that the view commonly held by the profession was that the landlord's right of recovery on this ground was not limited to cases on which the tenant had expressly undertaken to do repairs. In the language of the Courts, so far as it has come down to us, there is absolutely no intimation that the existence or absence of a covenant was regarded as a differentiating factor (*b*). A similar conclusion is suggested by the only reported expression of judicial opinion on the point in the eighteenth century (*c*). An additional body of authority on the same side is also obtainable from the dicta of eminent judges during the last hundred years (*d*).

(*b*) In Coke Litt. 53, *a*, it is laid down in perfectly general terms that the burning of a house by negligence or mischance is permissive waste, and that the tenant must rebuild. (See comment on *Rook* v. *Worth* in the next note.)

In *Darcy* v. *Askwith* (1618) Hob. 234,.

In *Weymouth* v. *Gilbert*, 2 Roll. Abr. p. 816, l. 40.

In 3 Dyer 281, E., a case is cited in which the lease provided that the lessor might re-enter if the lessee *did* any waste on the premises, and it was held that the lessor might re-enter for the permissive waste of the lessee in *suffering* the house to fall for want of repairs.

In *Griffith's Case* (1564) Moore 69.

Moore (1564) 62, Case 173; Ibid (1564) 73, Case 200; S.C. Owen 206.

See also 22 Vin. Abr. Waste "c" and "d" p. 436-440, 443; 5 Com. Dig. Waste d 2, d 4.

(*c*) In *Rook* v. *Worth* (1750) 1 Ves. Sr. 460, Lord Hardwicke said, arguendo; "As between landlord and tenant for years, though there is no covenant to repair and rebuild, he is subject to waste in general, and if the house be burnt by fire, he must rebuild." This remark must be taken subject to the limitation, that, if the fire was accidental, the tenant would be saved from liability by the Statute of 6 Anne ch. 31; but, for our present purposes, this circumstance is immaterial.

(*d*) In *Harnett* v. *Maitland* (1847) 16 M. & W. 257, reference was made (with apparent approval, though no positive opinion was expressed) to the notes to *Greene* v. *Cole*, 2 Saund. 252, where it is stated that by the Statute of Gloucester, 6 Edw. 1, ch. 5, an action for permissive waste (which did not lie at common law against them) was given against a lessee for life or years or their assignee. That the insertion or omission of a covenant was material was not suggested.

In *Yellowley* v. *Gower* (1855) 11 Exch. 274, a considered judgment, there was said by Parke, B. (p. 294), to be no doubt of this liability, as tenants for terms of years are clearly put on the same footing as tenants for life, both

Annotation.

(B) Of the cases which have been cited as authorities for the opposite doctrine, the earliest is *Gibson* v. *Wells* (*e*); but this precedent is not really in point, as we shall presently see. A more distinct expression of opinion is found in *Herne* v. *Benbow* (*f*). Only a short per curiam judgment is reported, and, as Parke, B., justly remarked, the report is a bad one (*g*). In fact it is difficult to believe that we have a correct statement of the true purport of the decision. The court is represented as laying it down, that an action on the case for permissive waste cannot be maintained against a tenant for years in the absence of a covenant to repair, but the single authority cited relates to a tenancy at will (*h*). Under these circumstances it would seem that the dilemma of assuming an error either on the part of the Court or of the reporter can only be escaped by resorting to the hypothesis that tenants for years were regarded as standing upon precisely the same footing as tenants at will. This hypothesis would be an extremely violent one, for, in view of the fact that tenants at will are not within the scope of the Statute of Gloucester (see secs. 5, 6, ante), it is scarcely conceivable that the court, if it had really intended to take such a position, would have done so without explaining

---

as to voluntary and permissive waste, by Lord Coke, 1 Co. Inst. 53. There seems to be no warrant for saying that this very eminent judge regarded a covenant as being of any special importance. The actual point decided was merely that a lease which followed in *Morris* v. *Cairncross* (1906) 14 O.L.R. 544 impliedly permitted the lessee to leave certain repairs undone—such implied permission being deduced from the insertion of a covenant by the lessor to do the repairs—allows permissive waste, and is therefore not a good execution of a power which prohibits the making of a lease exempting the lessee from punishment for waste. [Compare *Davies* v. *Davies* (1888) 38 Ch. D. 499.]

In *Woodhouse* v. *Walker* (1880) 5 Q.B.D. 404, there was a specific provision as to repairs in the instrument creating the tenancy (here one for life). The court, therefore, was not called upon to pronounce an explicit opinion respecting the question whether, in the absence of such a provision, a tenant for life or years could be made liable as for permissive waste. But, in a judgment concurred in by Lush and Field, JJ., the opinion was strongly intimated that there was such a liability, and a significant comment was passed upon the strange conflict between the "modern authorities—or rather the dicta"—on this question and the more ancient reading of the statutes as to waste.

In *Davies* v. *Davies* (1885) 38 Ch. D. 499, Kekewich, J., placed the same construction as we have done upon the language used in these last two cases, and expressed a decided opinion that, quite apart from a covenant to repair, a tenant for years was responsible for permissive waste. Cited in *Morris* v. *Cairncross*, *supra*.

Several of the above cases are cited by Mr. Foa, and considered by him to have determined that the liability exists, whether there is a covenant to repair or not (Landl. & T. p. 122).

On the same side may be cited *Moore* v. *Townshend*, 4 Vroom. (33 N.J.) 284, where a distinguished American judge reviewed the authorities at great length.

(*e*) 1 Bos. & P. (N.R.) (1805) 290.
(*f*) 4 Taunt. 764.
(*g*) See *Yellowley* v. *Gower* (1855) 11 Exch. 274 (p. 293).
(*h*) *Countess of Shewsbury's Case*, 5 Coke 13, *a*; Croke. El. 777.

Annotation.

more distinctly the rationale of its decision. Upon the whole, it seems probable that the report is incorrect, for the court is certainly entitled to the benefit of the doubt which may well be felt as to its having actually rendered a decision so singularly pointless as one which would restrict the remedy of an action of waste to cases in which, as the tenant could always be sued on his covenant, the right to bring such an action would not be of any advantage.

In spite of the objections to which this case is open, the doctrine which it is supposed to embody has received sufficient recognition in subsequent judgments to render the intervention of a court of error necessary to determine whether it is or is not good law. So far no court of this grade has gone further than to refuse to interfere where an equitable tenant for life is guilty of permissive waste (*h*). In the case cited the legal liability was considered doubtful. After the Judicature Act came into force a Divisional Court, on the authority of *Powys* v. *Blagrave* held an equitable tenant for life liable for damages (*i*). Lopes and Stephen, JJ., inclined to the view that there was no legal liability, but held that, at all events, a case was presented for the application of the general provision of the Judicature Act, that, assuming the rules of equity and common law to be in conflict, effect must be given to the former (*j*). This latter point does not seem to have suggested itself to the judges who decided *Woodhouse* v. *Walker* and *Davies* v. *Davies* (see above), and the propriety of this application of the statute would seem to be open to dispute. Can it correctly be said that there is a conflict, in the sense adverted to, between the doctrine that a court of equity will not restrain a tenant from permissive waste and the doctrine that a tenant is liable in damages for such waste? The proposed theory of construction virtually requires us to adopt the general principle that, as a result of the provision in question, injured persons are henceforth disabled from maintaining an action for damages in every case in which a court of equity would formerly have declined to give any positive assistance towards the enforcement of their rights. Such a principle involves such far-reaching consequences that we may well pause before taking its correctness for granted, even upon the authority of the two very eminent judges by whom it has been thus applied. Another possible objection to their view may also be suggested. For the purposes of their argument, they assume that the right of action existed before the Judicature Act was passed. It seems to follow, therefore, that, as this right was created by the legislature,

(*h*) *Powys* v. *Blagrave* (1854) 4 DeG. M. & G. 448, a decision by the Lords Justices.

(*i*) *Barnes* v. *Dowling* (1881) 45 J.P. 635, 44 L.T. 809.

(*j*) In *Patterson* v. *Central &c. L. Co.* (1898) 29 O.R. 134, Chancellor Boyd took the same view as to the effect of the Judicature Act of Ontario.

Annotation.

their decision resolves itself ultimately into the proposition that the earlier statutes have been abrogated *pro tanto* by the general provision regarding the conflict between the rules of law and equity. Supposing this to be a correct statement of the logical situation, it is difficult to admit that the learned judges have not carried the doctrine of repeal by implication further than the analogies of statutory construction will warrant.

In two still more recent cases, also, the position is taken that the existence or absence of an express covenant to repair is a controlling factor (*k*).

In the earlier editions of his treatise on Torts, Sir Frederick Pollock regarded the liability of a termor for permissive waste, in a case where there is no covenant, as being a doubtful point; but in the later editions it is laid down in unqualified language that there is no such liability except where there is an express covenant to repair. This distinguished writer, therefore, considers that the question is virtually settled in this sense; and such also seems to be the prevailing view in Ontario (*l*). In the second of the two cases cited below, Chancellor Boyd deemed it unnecessary to "delve into the ancient law" of the subject with a view to impeaching the opinion of Kay, J. in *Avis* v. *Newman* (*m*). But, with all deference, it is submitted that the opinion of a single English judge on a point so much in dispute as this is not so absolutely conclusive as to absolve a colonial court from the duty of investigating the authorities on its own account. Apart from this consideration, it is perhaps permissible to express a doubt whether, in view of the fact that the conflict of views now under discussion is, so far as the reports shew, less than a century old, the precedents which the learned Chancellor declined to examine can fairly be regarded as fit subjects to commit to the limbo of "ancient law." In the present instance it is particularly unfortunate that he has not exercised an independent judgment on the question; for, if he had looked at the authorities relied upon by Kay, J., he would have seen good reasons for doubting the finality of the decision. The very doubtful value of one of those authorities, *Herne* v. *Benbow*, has already been noticed. Another is *Gibson* v. *Wells* (*n*), in which,

(*k*) *Freke* v. *Calmady* (C.A. 1886) 32 Ch.D. 408; *Avis* v. *Newman* (1889) 41 Ch.D. 532, per Kay, J. For some remarks on this case see infra.

As tending somewhat in the same direction, though not actually in point, we may also refer to *Leigh* v. *Dickeson* (1884) 15 Q.B.D., (C.A.) 60 affirming 12 Q.B.D. 194, holding that, in the absence of an express contract, one tenant in common of a house who expends money in ordinary repairs, not being such as are necessary to prevent the house from going to ruin, has no right of action against his co-tenant for contribution. Such a payment is treated as voluntary.

(*l*) *Wolfe* v. *Macguire* (1896) 28 O.R. 45 [a case of a yearly tenant, but the language of the court is quite general]. *Patterson* v. *Central &c. L. Co.* (1898) 29 O.R. 134.

(*m*) (1889) 41 Ch.D. 532.

(*n*) 1 Bos. & P. (N.R.) 290.

Annotation.

according to Kay, J., Sir James Mansfield was clearly of opinion that an action for permissive waste would not be against even a tenant for years. This is certainly too strong a statement, as the case is merely to the effect that an action for permissive waste does not lie against a tenant from year to year, and the general words used are to be construed with reference to the fact. The allusion to the consequences which would follow in the case of a tenant at will, if the action were sustained, shews this very plainly. In another case, *Jones* v. *Hill* (*o*), the court expressly declined to express an opinion either one way or the other as to the question whether an action for permissive waste would lie. The fourth authority cited is *Barnes* v. *Dowling* (*p*), which is undoubtedly in point, but seems to be itself a rather questionable application of *Powys* v. *Blagrave* (see above). Mr. Justice Kay was also much influenced by his theory (announced during the argument of counsel), that Lord Coke's words, in 2 Inst. 145, "he that suffereth a house to decay, which he ought to repair, doth the waste," include only permissive waste when there is an obligation to repair. It is respectfully submitted, however, that the passage thus commented upon cannot fairly be made to bear this construction. The case put of a tenant occupying upon condition that the lessor may enter, if the tenant suffers the house to be wasted, seems to be merely illustrative, and not intended to restrict liability to such cases of express stipulations. The learned judge does not refer to the passage in 1 Coke, 53, *a*, the relevancy of which is much more indisputable. There, as already remarked, it is laid down, in the most general terms, that an action for waste lies against a tenant for years, and in the explanations and illustrations which follow, there is not the smallest intimation that permissive waste would raise no right of action in the absence of an express agreement to repair.

The above summary may, we think, fairly be said to shew that, except in so far as the question may be concluded by the very dubious special ground relied upon in *Barnes* v. *Dowling*—a ground which is of no force in jurisdictions where there is no provision like that of the English Judicature Act—the balance of authority is rather in favour of the doctrine that a tenant for years is liable for permissive waste, even where he has not expressly agreed to repair. Such a doctrine is certainly more in conformity than the opposite one with the rationale of the action of waste, the essential purpose of which is the indemnification of the landlord for certain acts of commission or omission by the tenant, regardless of the question whether the tenant may have promised or not to do or abstain from them.

(*o*) 7 Taunt. 392.
(*p*) 44 L.T.N.S. (1881), 809.

Annotation.

(*b*) *Tenants from year to year and at will.*—That neither tenants from year to year (*p*) nor tenants at will (*q*) are liable for permissive waste is well settled.

6a. Comparison between the extent of the obligations created by the duty to refrain from waste and by an express agreement to refrain.—The implied liability of a tenant for a misuse of the premises being almost invariably, as the foregoing summary indicates, referred to the question whether his acts of commission or omission amounted to waste, it is a matter of considerable practical importance to ascertain how far his obligation to repair, as measured by the standard, differs from that which arises out of an express agreement.

(*a*) *Obligations compared where voluntary waste has been committed.*—Where the defaults amount to voluntary waste, the position of a tenant who is bound by a stipulation to repair, is, so far as appears, the same, for all practical purposes, as that of one who is not so bound. Such, at all events, would seem to be a legitimate deduction from two of the cases already cited, in which the acts amounted to waste of this description, and the court, while it referred the tenant's liability to his breach of the covenant to repair contained in the lease, recognized fully that the same evidence would have supported an action of waste (*a*).

(*b*) *Obligations compared where the waste is merely permissive.*—Whether a tenant, when sued for permissive waste, should be judged by the same standards of responsibility as he would be, if the action was brought on a specific general agreement of the character ordinarily found in leases, cannot be affirmed with certainty; but, at all events, the authorities contain nothing which is necessarily inconsistent with the view that the tests applied in

(*p*) *Leach* v. *Thomas* (1835) 7 C. & P. 327; *Torriano* v. *Young* (1883) 6 C. & P.8. In the latter case Taunton, J., instructed the jury, in a case where permissive waste was proved, to find for or against the defendant, according as they should conclude from the evidence that he was a tenant from year to year, or an assignee of a lease for a term of years containing a covenant to repair.

(*q*) *Panton* v. *Isham* (1693) 3 Lev. 359; *Gibson* v. *Mills* (1805) 1 Bos. & P. (N.R.) 290; *Harnett* v. *Maitland* (1847) 16 M. & W. 257 [declaration held demurrable in not shewing that the defendant was more than a tenant at will]; see also *Herne* v. *Benbow* (1813) 4 Taunt. 764.

(*a*) *Marker* v. *Kenrick* (1853) 13 C.B. 188 [removal of a barrier between two mines]; *Kinlyside* v. *Thornton* (1776) 2 W. Bl. 111 [demolition of fixtures].

Compare *Doe* v. *Jones* (1832) 4 B. & Ad. 126, 1 N. & M. 6, where the acts of tenant in turning lower windows into shop windows, and stopping up and opening doorways, were viewed as waste, which would have been actionable but for the fact that these alterations were contemplated by the lessor. See also *Holderness* v. *Lang* (1885) 11 Ont. R. 1, where the judgment proceeds on the theory that any act amounting to voluntary waste at common law would be a breach of a covenant to repair. The erection of new buildings is not waste where the parties, by inserting in the lease a covenant to keep all future buildings in repair, shew that they contemplated that erection. *Jones* v. *Chappell* (1875) L.R. 20 Eq. 539.

Annotation.

each case are, for practical purposes, identical. That the physical conditions which constitute permissive waste are, on the whole, the same as those which amount to a breach of the usual covenants to keep and leave in repair seems to be indubitable (*b*). Nor, when we examine the more particular expressions of opinion as to the circumstances of disrepair which constitute such waste, do we find anything to suggest that the tenant's liability would have been in any essential respect different, if these covenants had been sued on.

If the tenant build a new house, it is waste, and if he suffer it to be wasted, it is a new waste (*c*).

If a house be uncovered by tempest, a tenant for years must repair it, even though there be no timber growing upon the ground, for the tenant must at his peril keep the house from wasting (*d*).

It is waste to suffer a house to be uncovered, so that the timbers decay (*e*).

If a lessee permit the walls to decay for default of daubing or plastering, that is waste (*f*).

It is waste to suffer a park paling to decay, so that the deer are dispersed (*g*).

To suffer a sea-wall to be in decay, so as by flowing and reflowing of the sea the meadow or marsh be surrounded, whereby it becomes unprofitable, is waste (*h*).

It is waste if the tenant do not repair the bank or walls against rivers or other waters, whereby the meadows or marshes are surrounded and become rushy and unprofitable (*i*).

"If any part of the premises are suffered to be dilapidated, it amounts to permissive waste" (*j*).

(*b*) Lord Coke speaks of "permissive waste which is waste by reason of omission or not doing, as for want of reparation." 2 Inst. 145. According to Blackstone (2 Comm. Ch. 18), "suffering a house to fall into decay for want of necessary reparations" is permissive waste. See also *Gibson* v. *Wells* (1805) 1 Bos. & P. N.R. 290; *Herne* v. *Benbow* (1813) 4 Taunt. 764; *Doe* v. *Jones* (1832) 4 B. & Ad. 126, per Parke, B.; *Torriano* v. *Young* (1833) 6 C. & P. 8; *Harnett* v. *Maitland* (1847) 16 M. & W. 257; *Powys* v. *Blagrave* (1854) 4 DeG. M. & G. 448; *Woodhouse* v. *Walker* (1880) L.R. 5 Q.B.D. 404; *Avis* v. *Newman* (1889) 41 Ch.D. 532 [the phrase used here was "suffering dilapidations"]. Kekewich, J., recently defined permissive waste as that "which has not come about by the tenant's own acts, but comes about by a revolution, or by wear and tear, or by the action of the elements, or in any other way not being his own act." *Davies* v. *Davies* (1888) 38 Ch.D. 499.

(*c*) 1 Co. Inst. 53, *a*; S.P. *Darcy* v. *Askwith* (1618) Hob. 12.

(*d*) Coke Litt. 53, *a*; Bue. Abr. tit. Waste (*c*, 5).

(*e*) 1 Co. Inst. 53, *a*.

(*f*) *Weymouth* v. *Gilbert*, 2 Roll. Abr. 816. pl. 36, 37.

(*g*) Coke Litt. 53, *b*.

(*h*) Coke Litt. 53, *b*.

(*i*) Coke Litt. 53, *b*.

(*j*) *Gibson* v. *Wells* (1805) 1 Bos. & P. (N.R.) 290, per Mansfield, C.J.

Annotation.

"Tenantable repair" extends to permissive as well as commissive waste (*k*).

The scope of these statements will be made still clearer by contrasting them with those which deal with circumstances which are deemed to negative waste.

"A wall uncovered when the tenant cometh in is no waste if it be suffered to decay" (*l*).

The destruction of premises caused by its reasonable use is not waste (*m*).

"A tenant not obliged by covenant to do repairs, is not bound to rebuild or replace" (*n*).

On the whole, therefore, it would seem that little, if any, real difference between the obligations arising under and apart from an express agreement to repair can be predicated except in those rare cases in which the wording of the agreement is such that it cannot be regarded merely as one to keep in good repair (*o*). Thus it has been held that an assignee of a lease cannot be held liable, on the ground of waste, for yielding up the premises in a state of dilapidation which amounts to a breach of a covenant "sufficiently to repair the premises with all necessary reparation, and to yield up the same . . . in as good condition as the same should be in when finished under the direction of J.M." (*p*).

(*k*) *Proudfoot* v. *Hart* (C.A. 1890) 25 Q.B.D. 42, 63 L.T. 171 [a case where there was a covenant].

(*l*) 1 Co. Inst, 53, *a*.

(*m*) *Manchester &c. Co.* v. *Carr* (1880) 5 C.P.D 507 [here there was a covenant, but it was not a material factor in this part of the judgment], following *Saner* v. *Bilton* (1876) 7 Ch.D. 815, and holding that any use of the property is reasonable, provided it is for a purpose for which the property was intended to be used, and provided the mode and extent of the user was apparently proper, having regard to the nature of the property, and to what the tenant knew of it, and to what, as an ordinary business man, he ought to have known of it. See also *Crawford* v. *Newton* (1887) 36 W.R. 54, per Cave, J., arguendo.

(*n*) *Wise* v. *Metcalf* (1829) 10 B. & C. 299, per Bayley, J. This remark was made in a case where the obligations of an incumbent of an ecclesiastical benefice were under discussion; but, as tenants for years are on the same footing as life tenants under the statutes as to waste, this principle is presumably so far general as to be applicable to the former.

(*o*) "Where a lease is silent on the subject . . . . . the law implies an obligation on the part of the lessee to use the property in a proper and tenant-like manner without exposing the buildings to ruin or waste by acts of omission or commission." Riddell, J.

McCuaig v. *Lalonde* (1911) 23 O.L.R. 312.

"If there be a lease of a dwelling house as a dwelling house it shall not be perverted to a perfectly different purpose." Lord Westbury.

Keith v. *Reid* L.R. 2 H.L. sec. 39.

(*p*) *Jones* v. *Hill* (1817) 7 Taunt. 392. "It is impossible," said Gibbs, C.J., "that it should be waste to omit to put the premises into such repair as A. B. had put them into. . . . Waste can only be for that which would be waste if there were no stipulation respecting it; but if there were no stipulation it could not be waste to leave the premises in a worse condition than A. B. had put them into." The case is cited with approval in *Crawford* v. *Bugg* (1886) 12 O.R. 8 (p. 15).

Annotation.

This ruling has apparently not been questioned in any later case, but it is certainly *strictissimi juris* to say the very least. Surely a more reasonable construction of the covenant would have been to have regarded the word "necessary" as equivalent to "good," and to have held that, when the contemplated standard had thus been fixed by an epithet which must unquestionably be attained by the tenant if he is to escape liability for waste, it became quite immaterial that this standard should have been made more definite by a reference to what a third party was to do in order to bring the premises up to that standard. Essentially the covenant seems to be nothing more than a recital that J.M. was to put the premises in good repair, and a stipulation that the tenant was to keep and leave them in that condition.

The foregoing remarks are applicable only to tenants for a term of years. The obligations of a tenant from year to year, or of a tenant at will, are very different, according as he has or has not agreed to repair; but this results simply from the fact that such tenants are not liable at all for permissive waste. See sec. 5 (*b*). It is laid down, therefore, that they are merely bound to use the premises in a "tenant-like" (*q*), or, as another case puts it, "husband-like," manner (*r*). The meaning of these rather vague epithets, as we learn from other cases, is that the law merely requires him to keep the premises sound and water-tight (*s*), or to make such fair repairs as may be necessary to prevent actual decay of the premises (*t*). This doctrine necessarily implies that, as judges have also said, he is not bound to do "substantial" repairs (*u*), or "substantial or lasting repairs" (*v*). As is shewn by the cases cited, the question whether the tenant has, in any particular instance, fulfilled his duty, as thus defined, is primarily and essentially one for the jury to determine under proper instructions embodying the above principles. Compare the following section.

(*q*) *White* v. *Nicholson* (1842) 4 M. & G. 95.

(*r*) *Horsefall* v. *Mather* (1815) Holt N.P. 7, 17 R.R. 589, where Gibbs, C.J., nonsuited the landlord, holding that a declaration which was framed on the theory that there was an implied obligation to repair generally, was expressed in terms too broad. "A tenant from year to year," said the learned judge, "is bound to use the premises in a husband-like manner; the law implies this duty and no more. I am sure it has always been holden that a tenant from year to year is not liable to general repairs."

(*s*) *Leach* v. *Thomas* (1835) 7 C. & P. 327.

(*t*) *Ferguson* v. ———— (1798) 2 Esp. 590, where Lord Kenyon, in his charge, remarked that the tenant was bound to put in windows or doors that have been broken by him, but ruled that he was not bound to recoup the landlord for the sum spent in putting a new roof on an old worn-out house.

(*u*) *Leach* v. *Thomas* (1798) 7 C. & P. 327; *Gott* v. *Gandy* (1853) 2 El. & Bl. 845, 23 L.J.Q.B. 1.

(*v*) *Ferguson* v.————(1798) 2 Esp. 590.

6b. Obligation to repair, treated as one arising ex contractu.— Annotation.
In a case already cited Coleridge, J., remarked, arguendo, that "the duties between landlord and tenant arise from contract" (*a*). This dictum seems difficult to reconcile with the authorities reviewed in the preceding section, unless waste, which is an act of a distinctly tortious character, is brought within the domain of contract by assuming that an implied agreement to abstain from it may be predicated from the relation of the parties. This conception must, indeed, have been actually present to the mind of the pleader in one of the few reported decisions in which the declaration was distinctly framed on the basis of an assumed contract (*b*). In all the rest the notion of an undertaking to perform positive acts is directly relied upon (*c*).

That it makes no appreciable difference, so far as the extent of the tenant's obligation is concerned, whether the gravamen of the action is contract or tort, is apparent from the points settled by the cases just cited. Thus the conclusion that a declaration is too broad which alleges that a tenant at will undertook to keep the premises in good and tenantable repair, and deliver them up in the same condition in which he had received them (*d*), would at once follow from the rule that such a tenant is not liable for merely permissive waste. Sec. 5, ante. So, although the non-liability of a tenant from year to year for a failure to renew worn-out stairs, sashes, doors, etc. (*e*), or to do "substantial repairs" (*f*), has been affirmed in actions where the court was viewing his obligations under their contractual aspects, it is evident that the omissions alleged would not have constituted actionable waste in such a tenant.

A similar deduction may be drawn from a comparison of the expressions used in sec. 5 (b) to denote the kind of repairs which

---

(*a*) *Gott* v. *Gandy* (1853) 2 El. & Bl. 845. A specific agreement not to commit waste is not uncommon. See, for example, *Doe* v. *Bond* (1826) 5 B. & C. 855.

(*b*) *Leach* v. *Thomas* (1835) 7 C. & P. 327 [allegation of an agreement including inter alia a stipulation not to commit waste]. It is remarked by Sir Frederick Pollock (Torts p. 330) that, "since the Judicature Acts, it is impossible to say whether an action alleging misuse of a tenament by a lessee is brought on the contract or as for a tort;" and that "doubtless it would be treated as an action of contract if it became necessary for any purpose to assign it to one or the other class."

(*c*) *Auworth* v. *Johnson* (1832) 5 C. & P. 239 [allegation of an agreement in consideration of allowing occupation]; *Horsefall* v. *Mather* (1815) Holt. N.P. 7, 17 R.R. 589 [action of assumpsit—allegation of an undertaking in consideration of becoming tenant]; *White* v. *Nicholson* (1842) 4 M. & G. 95 [assumpsit —allegation of a promise to use in a tenant-like manner].

(*d*) *Horsefall* v. *Mather*, supra. Here the walls and ceiling had been somewhat damaged by the removal of fixtures.

(*e*) *Auworth* v. *Johnson* (1832) 5 C. & P. 239.

(*f*) *Gott* v. *Gandy* (1853) 2 El. & Bl. 845.

Annotation.

the tenant must make to escape liability for waste with those used in cases where an implied contract is relied upon. Thus it is laid down that the tenant must use the premises in a "husband-like" manner (*g*), or a "tenant-like" manner (*h*). Similarly it is held that as there is an implied duty on the part of a tenant for years, to make fair and tenantable repairs, the allegation of a proviso to that effect in a bill for specific performance of an agreement to take a lease is sustained by proof of an agreement which did not embrace such a proviso. Such an allegation being merely the expression of what the law would imply, the agreement stated is not substantially different from that proved (*i*).

Still more unquestionable, of course, is the identity between the results to be obtained through the two forms of action, where the theory of an agreement not to commit waste is relied upon. Thus if a tenant from year to year is charged with a breach of this agreement in removing fixtures, his liability is determined simply by inquiring whether the fixtures belonged to the removable class (*j*).

"Articles not otherwise attached to the land than by their own weight are not to be considered as part of the land . . . the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels" (*k*).

In the trial of a case in which a breach of an implied contract to keep the premises in a certain condition is relied upon, the judge should explain to the jury in general terms the limit of the obligations of a tenant of the class of the defendant, and tell them, with regard to any acts of which the quality is doubtful, that he is entitled to a verdict, if they think that he did all that a tenant of his class ought to do, considering the state of the premises, when he took them (*l*).

(*g*) *Whitfield* v. *Weedon* (1772) 2 Ch. R. 685 [tenant bound to repair fences]. The mere relation of landlord and tenant is a sufficient consideration for the tenant's promise to manage a farm in a husband-like manner. *Powley* v. *Walker* (1793) 5 T.R. 373.

(*h*) *White* v. *Nicholson* (1842) 4 M. & G. 95 [here it was held that the obligations arose, even though the written agreement for the letting contained several express stipulations].

(*i*) *Gregory* v. *Mighell* (1811) 18 Ves. 328 (p. 331).

(*j*) *Leach* v. *Thomas* (1835) 7 C. & P. 327 [defendant held entitled to remove an ornamental chimney-piece, but not brick pillars built *on* a dairy floor to hold milk-pans]. In *Glover* v. *Piper* (1587) Owen 92, it was held that if the condition of a bond given by the lessee of a copyhold estate is that he shall not commit any kind of waste that will involve the forfeiture of the copyhold, the condition is broken if he suffers the house to fall down during the term for want of reparation, even though it was ruinous when the lease was made.

(*k*) *Holland* v. *Hodgson* L.R. 7 C.P. 328, followed in *Bing Kee* v. *Yick Long* (1910) 43 Can. S.C.R. 334.

(*l*) *Auworth* v. *Johnson* (1832) 5 C. & P. 239, per Lord Tenterden.

Annotation.

No implied contract to use the premises in a tenant-like manner arises where the tenant holds under an express contract which provides for such repairs (*m*). But the mere fact that a house was let from year to year by a written agreement which contains several express stipulations as to other matters, will not prevent the implication of an implied contract to use the premises in a tenant-like manner (*n*).

II. Construction and effect of the various covenants relating to repairs generally.

7. Enumeration of Covenants Respecting Repairs.—The covenants in leases which are applicable to repairs generally, and do not provide for any particular kind of work, are as follows:

(A) Covenants to repair and keep in repair during the term.

The various principles which determine the extent of the tenant's obligation under these covenants will be discussed at length in the later subtitles.

The obligation of this covenant is not enlarged by the fact that the tenant remained in occupation of the premises for a period considerably longer than the term originally stipulated for. Whatever the covenant meant during the term, it continues to mean during the whole time that the tenant holds over (*a*).

A proviso may be construed as a covenant to repair if it is clearly intended to operate as such (*b*).

(B) Covenants to repair within a certain period after notice from the landlord.

In order to entitle the ground landlord to take advantage of a covenant of this description, the notice provided for must be given to the lessee. A sublessee holding under a lease containing a covenant to repair after two months' notice, is not bound by a notice left on the premises by the superior landlord whose rights are defined by the terms of a lease containing a covenant to repair after three months' notice, and the time within which the repairs must be completed only begins to run when the intermediate landlord serves a notice in accordance with the terms of the sublease (*c*).

(*m*) *Standen* v. *Chrismas* (1847) 10 Q.B. 135.

(*n*) *White* v. *Nicholson* (1842) 4 M. & G. 95.

(*a*) *Crawford* v. *Newton* (1887) 36 W.R. 54, per Cave, J.

(*b*) As where these words were introduced after the usual covenants to repair: "Provided always that nothing herein shall be deemed, etc., in any way to compel the lessee, his executors, etc., to give up the buildings . . . in as good and sound a state as they now are; but such buildings are not to be wilfully or negligently destroyed; necessary repairs, however, for the preservation of the buildings to be done by the lessee at his own cost." *Perry* v. *Bank of Upper Canada* (1866) 16 U.C.C.P. 404.

(*c*) *Williams* v. *Williams* L.R. 9 C.P. 659, 43 L.J. (C.P.) 382.

Annotation.

So far as the rights of the landlord are concerned, a provision for re-entry if at any time the premises should not be repaired within three months after notice, has apparently the same force and effect as a specific covenant to repair after three months' notice (*d*).

This covenant is deemed to be subject to any exceptions which may qualify the effect to the general covenant to repair (*e*).

As to the notice required by the Conveyancing Act of 1881, see sec. 43, post.

(C) Covenants to deliver up in good repair.

The principles determining the extent of the lessee's obligation under this covenant are ordinarily the same as those applicable in regard to (A), and will be discussed in later sections.

The liability created by a clause binding the lessee to deliver up at the end of the term, in good and sufficient repair, the houses to be built in pursuance of another clause, is such a flaw in the title of the owner of the leasehold that a purchaser of the term will not be compelled to accept a conveyance, even though the landlord did not take advantage of the lessee's failure to build the whole number of houses within the stipulated period, and continued to accept rent for many years subsequently (*f*).

(D) Covenants to put into repair. (See also sec. 25, post.)

The distinction between the extent of the obligations imposed by this covenant and (A) is not very clear. That the two covenants are by some judges not regarded as identical in effect is apparent from the remark of Erle, C.J., that "to 'repair' is not the same as to 'put in repair,' which may require the building of something new" (*g*). The obligation created by the general covenant to keep in repair is at all events less onerous than that which results, where the tenant agrees to put the premises into "habitable" repair. The implication then is that he is to put them into a better state than he found them, and that, regard being had to the state in which it was at the time of the agreement, and also to the situation and the class of persons who are likely to inhabit it, he is to put it into a condition fit for a tenant to inhabit it (*h*). On the other hand, we have the authority of

(*d*) *Doe* v. *Brindley* (1832) 4 B. & Ad. 84, followed in *Holman* v. *Knox* (1912) 3 D.L.R. 207, 25 O.L.R. 588.

(*e*) *Thistle* v. *Union &c. R. Co.* (1878) 29 U.C.C.P. 76.

(*f*) *Nouaille* v. *Flight* (1844) 7 Beav. 521, 13 L.J. (Ch.) 414. Lord Langdale was of opinion that, although the purchaser might have possession of the property during the entire term, he could not be said to "enjoy" it in any reasonable sense of the word, if his possession was constantly attended by a liability enforceable at the end of the term, and not admitting either of indemnity or compensation.

(*g*) *Martyn* v. *Clue* (1852), 18 Q.B. 661, per Erle, J.

(*h*) *Belcher* v. *McIntosh* (1839), 8 C. & P. 720, per Alderson, B. Compare sec. 24, post.

Sir George Jessel for the doctrine that a covenant to "do necessary repairs" includes putting the property into repair. Indeed the learned judge held that the same result followed, even if the word "necessary" is omitted (*i*).

A covenant of this sort is sometimes made by a prospective tenant prior to the actual execution of the lease. Its effect upon the rights and liabilities of the parties will then depend upon the construction of the preliminary agreement as a whole (*j*).

(E) Covenants to paint.

The extent of the duty of the tenant under the general covenant to paint the demised premises has given rise to some embarrassing questions See 26 (*e*) post. These are in some degree obviated by adding to the above stipulations another (commonly inserted in English leases), binding the tenant to paint the outside and inside wood and ironwork in a certain manner at stated times (*k*).

(F) Covenants of indemnity.

In cases of sublease or assignment of the terms, the sublessee or assignee sometimes covenants to indemnify his immediate lessor or assignor against the damages which may be recovered by the superior landlord in an action for a breach of the covenants as to repairing (*l*). The costs of that action, as well as the other expenses to which the intermediate lessee or assignor may have been subjected, owing to the default of the sublessee or assignee, are not uncommonly provided for also. The effect of the omission or insertion of such a provision, in connection with the measure of damages, is discussed in secs. 60 (*b*) and 62.

Where there is no express provision on this subject, and the right to demand indemnity from transferees of the leasehold interest is left to be determined by general principles, the accepted doctrine is that the liability of the lessee is that of a surety for the performance of the covenants by each successive assignee, and that there is an implied promise on the part of each assignee to indemnify him against liability for breaches of covenant committed while such assignee occupied the premises, and this promise is implied, although the assignee may have covenanted to indemnify his immediate assignor against those breaches (*m*).

(*i*) *Truscott* v. *Diamond &c. Co.* (1882), 20 Ch.D. 251 (p. 256).

(*j*) In *Pym* v. *Blackburn* (1796) 3 Ves. 34, a lessee had promised to repair the leased building, and after the completion of the repairs, to accept a lease for a specified term, but the day at which the term was to begin was left blank. The court refused to hold that the tenant was bound by the agreement to surrender the existing term and accept a new lease immediately after the repairs were completed.

(*k*) *Woodf. L. & T. p.* 626, see also *Kirklington* v. *Wood* (1917) 61 L. J. 147 [covenant to paint at stated times, liable in damages for non-performance].

(*l*) The question of a covenant of indemnity is discussed in *Clare* v. *Dobson* (1911) 80 L.J.K.B. 158.

(*m*) *Moule* v. *Garrett* (1870) L.R. 5 Exch. 132 (dess. Cleasby, B.), adopting a dictum of Lord Denman in the written judgment of the Exchequer Chamber

Annotation.

The English Court of Appeal has held that the liability of an assignee of the term under a covenant to indemnify is a future and contingent liability capable of proof under sec. 31 of the Bankruptcy Act of 1869, and that he is therefore released from this liability by a discharge in bankruptcy, obtained prior to the expiration of the term (*n*).

8. Obligations created by these covenants are independent.—(See also sec. 54, post.) In several cases it has been held that covenants (A), (B), and (C) create distinct and independent obligations. Hence, where there is a general covenant to repair and a covenant to repair after notice, the absence of a notice is no excuse for a default as regards repairs (*a*). The landlord, therefore, may bring such an action for the disrepair without serving any notice at all (*b*). So if the lease contains covenants that the tenant shall keep and leave in repair, and to repair after notice, the first covenant is not so qualified by the last as to prevent the landlord from maintaining an action for leaving the premises out of repair at the end of the term without shewing that notice to repair was given (*c*).

No rulings with respect to the other covenants seem to be reported; but, in general principles, it is sufficiently obvious that similar doctrines must be applicable.

9. Contemporaneous agreements by lessor and lessee as to repairs, effect of.—The cases in which both the landlord and the tenant bind themselves by stipulations respecting the preservation of the premises fall into two classes.

In one class of cases the effect of the stipulations is simply to cast upon the landlord the responsibility for certain repairs which would otherwise have to be done by the tenant. Here, if the language of the stipulation clearly shews that the landlord did undertake to do the repairs in question, no difficulty can arise,

---

in *Wolveridge* v. *Steward*, 1 C. & M. 644 (p. 659); see also *Close* v. *Wilberforce* (1838), 1 Beav. 112.

(*n*) *Morgan* v. *Hardy* (1887) 35 W.R. 588, per Bowen and Fry, L.JJ. Lord Esher dissented, adopting the opinion of Denman, J., in the lower court (17 Q.B.D. 771).

(*a*) *Gregory* v. *Wilson* (1852) 9 Hare 483.

(*b*) *Baylis* v. *Le Gros* (1858) 4 C.B.N.S. 537. "It would be monstrous," said Cockburn, C.J., "if after giving credit to his tenant that he will duly perform his engagement, the landlord abstains from harassing him with continual inspection, and then should find himself debarred of his remedy for a breach of a positive covenant."

(*c*) *Wood* v. *Day* (1817) 7 Taunt. 646, 1 Moo. 389; *Harflet* v. *Butcher* (1623) Cro. Jac. 644, see also *Telfer* v. *Fisher* 15 W.L.R. 400, [when tenant's covenant to repair contains no provision as to notice, the landlord is under no obligation to give notice before repairing premises and proceeding to collect the cost].

Annotation.

except in so far as some ulterior consequence of the resulting exemption of the tenant may be in dispute (*a*).

When the landlord contracts to supply heat absolutely, he is brought under an obligation to see that the demised premises were in a fit state for the tenant to carry on her business; and on that obligation being broken he is liable to the tenant in damages (*b*).

In the other class the question to be determined is whether the landlord's performance of an agreement to put the premises in repair, or to do some act calculated to facilitate the execution of the repairs by the tenant, is a condition precedent to the existence of any liability on the tenant's part, in such a sense that no action can be maintained against him for a default as regards repairs, unless the agreement has been fulfilled, or whether such performance is to be regarded as merely the breach of an independent covenant giving a right to a cross action. The answer to this question is entirely a matter of construction, depending upon the words used by the parties to express their respective obligations. The cases on the subject are collected in the subjoined note (*c*).

(*a*) See *Yellowley* v. *Gower* (1855) 11 Exch. 274 (referred to in the next section), where one of the steps in the argument which led up to the conclusion that the lease was not a valid exercise of the power, was the determination of the point that the agreement of the landlord to do certain repairs relieved the tenant *pro tanto* from liability.

(*b*) *McNichol* v. *Malcolm & Standard* (1907) 39 Can. S.C.R. 265.

(*c*) *Performance a condition precedent.*

A covenant to keep a house in repair from and after the lessor hath repaired it is conditional; and it cannot be assigned as a breach that it was in good repair at the time of the demise, and that the lessee suffered it to decay, for "although it were in good reparation at the beginning, if it afterwards happen to decay, the plaintiff is first to repair it before the defendant is bound thereto." *Slater* v. *Stone* (1623) Cro. Jac. 645.

In an action on a covenant to repair, which includes the words, "the lessor allowing and assigning timber for the repairs," it is necessary to aver that the lessor did so allow, etc., the timber. *Thomas* v. *Cadwallader* (1744) Willes 496.

Where the tenant's covenant is to keep the premises in repair, the landlord having first put them into complete repair and condition, no liability to repair is cast upon the tenant until the lessor has fulfilled his covenant to put in repair. *Coward* v. *Gregory* (1866) L.R. 2 C.P. 153, approving *Neale* v. *Ratcliffe* (1850) 15 Q.B. 916, 20 L.J. (Q.B.) 130, where it was held that the landlord's obligation is not divisible so as to enable him to recover for the non-repair of a part of the premises which he has put into repair. Wightman, J., in his opinion delivered for the whole court, said: "Nor will this raise any inconvenience different in kind from that which follows from holding the condition divisible. If it be divisible, still the whole of the part as to which the action is brought must be shown to have been put in repair; non-repair of a single room would shew the condition not performed as to the house, if that part of the covenant were sued on. Inconvenience of this sort must attend every case of condition precedent. On the other hand, the intentions of parties may be defeated, and great injustice done, by allowing an action to be maintained for non-repair of some part, the previous condition of which might have cast little burden on the landlord to put in repair, while he has neglected to do more expensive repairs to another part, the complete repair of which may have been the tenant's principal motive for taking the premises at all."

Annotation.

Where the covenant is to expend a certain sum in improvements and repairs, under the direction of a surveyor to be named by the landlord, the appointment of the surveyor is a condition precedent to the tenant's liability to expend the money, and a declaration alleging a breach of the covenant is bad, unless it avers such appointment. *Coombe* v. *Greene* (1843) 11 M. & W. 480, 2 Dowl. N.S. 1023.

Where the tenant covenants to repair, "being allowed rough timber upon the demised premises," an averment that the landlord was ready and willing to find the timber shews a sufficient performance of the condition precedent relating thereto. *Martyn* v. *Clue* (1852) 18 Q.B. 661.

Where one person, in consideration of another becoming his tenant, agrees to pay the latter a sum of money to repair the house to be let, and the latter subsequently becomes a tenant under a lease in which this agreement is not stated, and does the repairs, after which the lessor promises to remit a portion of the rent in payment for them, this promise may be enforced on the account stated, as an agreement independent of the lease. *Seago* v. *Deane* (1828) 4 Bing. 459, 1 Mo. & Pa. 227, 235.

Where a person agrees to take a house in consideration of certain *conditions* being fulfilled, and among these conditions is one by which the landlord engages to "complete the whole work necessary" by a specified date, the completion of the work is a condition precedent to the landlord's right to sue the intending lessee for not becoming a tenant. *Tidey* v. *Mollett* (1864) 16 C.B.N.S. 298.

In *Bragg* v. *Nightingale*, Styl. 140, the court was divided on the question whether a condition precedent or reciprocal covenants resulted where the lessor covenanted to repair the house demised by a given day, and the lessee covenanted that from that time until the end of the term he would repair and leave in repair.

Where the tenant accepted the lease on condition that the drains were put in good order and covenanted to pay all outgoings and keep premises, with the exception of drains, in repair, and the landlord failing to repair drains, the local authorities ordered the repairs to the drains made; the tenant is not liable for the repairs.

Henman v. *Berliner* [1918] 2 K.B. 236, 87 L.J. (K.B.) 984.

Performance not a condition precedent.

Where a lessee covenants to put a house in repair before a specified date, "5000 slates being found, allowed and delivered by the lessor towards the repair," and afterwards keep it in repair during the term, the provision as to the slates is rather a covenant than a condition precedent. "Having been," would, it was said, have been more proper than "being" to convey the latter meaning. It was laid down that the lessee should plead specially that he did not put the premises in repair by reason that the plaintiff did not find the slates, and that therefore he was not bound to put them in repair. But at the same time it was intimated, arguendo, that, even supposing that the provision was a condition precedent, the lessee and his representatives would be bound to keep in repair, if the house had been put in repair without the lessor having furnished the materials. *Mucklestone* v. *Thomas* (1739) Willes 146.

Where a covenant to repair in a farming lease was followed by the clause, "the said farmhouse and buildings being previously put in repair and kept in repair" by the landlord, it was held that this clause amounted to an absolute and independent covenant on the landlord's part, and not merely to a condition precedent. *Cannock* v. *Jones* (1849) 3 Exch. 233, affirmed 3 H.L.C. 700, 5 Exch. 713. This particular question, however, was discussed only in the court below; where the actual point decided was that a declaration relying on the landlord's failure to repair, as a breach of contract, was good.

Where a lease contains a provision that "the lessor is to find timber, bricks, and tiles for repairs within five miles of the premises, the lessee to do the drawing and labour, he, the lessee, to give the lessor three months' notice in writing of his requirements," the obligation to repair is not conditional upon the landlord finding materials. Hence, if the lessee sends a notice to supply materials for repairing a barn, and, no attention being paid to the

Annotation.

In any event a special stipulation is necessary to create an obligation of such a nature that the fact of the landlord's having failed to perform it is an answer to an action against the tenant for not repairing. No such obligation can be implied (*d*).

The stipulation relied upon as constituting a condition precedent may be applicable only as to a part of the term to which the alleged obligation to repair relates. In this case, even if the lessee is not liable for a breach of that obligation in respect to one part of the term, the lessor may still recover damages for a breach in respect to the other part (*e*).

---

notice by the landlord, the repairs are not made, and the contents of the barn suffer damage, such damage is deemed to be proximately caused not by the landlord's default but by the tenant's non-performance of his own part of the contract. The duty of the tenant under such circumstances is to do the repairs himself, after which he will have a claim against the landlord for all such materials as should have been supplied. *Tucker* v. *Linger* (1883) 21 Ch.D. 18, 8 App. Cas. 508, 52 L.J. (Ch.) 941.

Where the tenant covenanted generally to repair, "having or taking in and upon the said demised premises competent and sufficient housebote, etc., without committing any waste or spoil," the covenant was held to be absolute, and the provision as to housebote, etc., was construed as amounting not to a condition precedent, but to a mere license. This construction was founded partially, though not entirely, on the meaning of the last clause, which was thought to be intended to relieve the tenant from liability for waste in cutting timber. *Bristol* v. *Jones* (1859) 1 E. & E. 484.

In an Ontario case the lessee of a farm covenanted "to repair and to keep up fences," and there was also a stipulation by the lessor to "build the line-fence between the premises hereby demised and the farm of D. M., should the same be required during the currency of this lease." One of the line-fences was, as a matter of fact, about twenty-four yards off the true boundary line. All the justices of the Court of Appeal held that the lessor was not liable on his covenant to build until something was done to disturb the state of things existing at the time of the demise, as if the adjoining proprietor should refuse to allow entry to be made on his lands for the repair of the fence, or require the line-fence to be built on the true line. *Houston* v. *McLaren* (1887) 14 Ont. App. 107.

Upon the trial of an action for breach of a contract in leaving premises in bad repair, it is proper to tell the jury that they are not to take into consideration evidence, which had been received without objection on the plaintiff's part, of a promise made by him before the demise to do some repairs. *Haldane* v. *Newcombe* (1863) 9 L.T. 420, 12 W.R. 135.

Another case involving such contemporaneous agreements is *Snell* v. *Snell* (1825) 7 D. & R. 249, 4 B. & C. 741, where the court considered itself to be precluded by the course which the pleading had taken from discussing the general question of law.

(*d*) *Colebeck* v. *Girdless Co.* (1876) 1 Q.B.D. 234, 45 L.J.Q.B. 225, see also *Henman* v. *Berliner* [1918] 2 K.B. 236, 87 L.J. (K.B.) 984.

(*e*) In an action by the assignee of the reversion against the assignees of the term for not repairing and yielding up repaired, the defendants pleaded that they demised the premises to the plaintiff for a term less by a few days than their own, that he covenanted to repair and yield up in repair, the defendants finding certain iron and lumber work, and that the want of repair complained of was caused by plaintiff's default, and was a breach of his covenant. Held, that the plea was not good at common law for avoiding circuity of action, because there was a period of time to which the defendant's covenant extended and the plaintiff's did not, viz., the thirty days by which their term exceeded his, and was also bad as an equitable plea, because, the

Annotation.

10. Covenant to repair considered in relation to the validity of leases given in pursuance of powers.—It has been held that a lease containing a covenant to expend a specified sum for the purpose of "effectually repairing" the premises to the lessor's satisfaction, and to keep them in repair thereafter during the term, is not a good execution of power to grant leases for the purpose of "new building or effectually repairing" any messuage, etc. (*a*). But a doubt as to the correctness of this decision was recently intimated by the English Court of Appeal in a case where the trustees of a settlement of a house property, acting under a power to demise any of the messuages "to any person who shall improve or repair the same, or covenant to improve or repair the same," agreed to let a house on the terms of a letter by which the tenant undertook "to do necessary repairs." This undertaking, as it covered repairs generally, that is, all such repairs as would be necessary to enable the landlord to hand over the property to a new tenant in substantial and tenantable repair, was deemed to be one which satisfied the terms of the power (*b*).

A power given by a testator to lease the land devised, reserving the "usual covenants," does not justify granting a lease entertaining a covenant that "in case the premises are burnt or blown down the lessor should rebuild, otherwise the rent should cease" (*c*).

If the doctrine that a tenant for years is answerable for permissive waste be adopted (see sec. 6 (*b*), ante), the consequence will be that a lease exempting the lessee from making certain repairs which are to be done by the lessor is void where the power forbids the making the lessee "dispunishable for waste" (*d*). So also a lease by a tenant for life under the Settled Estates Act, of 1877, which allows such tenants to make leases for twenty-one years, provided the demise is not made without impeachment for waste, is void where there is an exemption from liability for "fair wear and tear damage by tempest" (*e*).

defendants being bound to find timber and iron work, the plaintiff's covenant was less onerous and the statement that the damages were identical was not true. *Marshall* v. *Oakes* (1858) 2 H. & N. 793.

(*a*) *Doe* v. *Withers* (1831) 2 B. & Ad. 896. Lord Tenterden considered that the words of the power might be understood to signify repairing those parts which merely needed repair, so that they might stand the remainder of the term, and rebuilding those which were not otherwise reparable, while the words of the lease might imply merely putting the whole into the best state which its then condition allowed of.

(*b*) *Truscott* v. *Diamond R. Co.* (1881) 20 Ch.D. 251, 51 L.J. (Ch.) 259.

(*c*) *Doe* v. *Sandham* (1787) 1 Term. Rep. 705. In *Medwin* v. *Sandham* (1789) 3 Swanst, 685, it was held that equity would not, as against the reversioner, reform this lease when neither the lessor nor any person capable of exercising the power was any longer alive.

(*d*) *Yellowley* v. *Gower* (1855) 11 Exch. 274.

(*e*) *Davies* v. *Davies* (1885) 38 Ch.D. 499, see also *Morris* v. *Cairncross* (1906) 14 O.L.R. 544.

Annotation.

A remainderman cannot take exception to the execution of a power authorizing a life tenant to grant a "repairing lease," where the lease in question contained a covenant that the lessee would, during the term, do repairs when and as often as necessity should require, leave in good repair, and repair three months after notice by the lessor (*f*).

11. During what period agreements to repair are obligatory. As a general rule, no question can arise as to date at which the obligation of the covenant attaches, for the lessee or assignee, as the case may be, must ordinarily have become subject to the burdens of the term at precisely the same moment as he became entitled to its benefits (*a*). But it has been held that a party may be bound by an express covenant to repair before his lease begins in point of interest, as where a lessee first underlet the premises for a portion of the term and afterwards assigned the whole term. Here, although the underlessee refused to attorn, the covenantor was required to repair during the period covered by the underlease (*b*). On the other hand it may be apparent from some other stipulation in the lease that the obligation does not attach at the beginning of the term (*c*).

(*f*) *Easton* v. *Pratt* (1864) 33 L.J. (Ex.) 233, 12 W.R. 805, reversing 33 L.J. (Ex.) 30. It was considered that, under such a covenant, whatever the state of the premises at the time of the demise, the tenant is bound to put the premises into repair, and keep them in a state of good and sufficient repair. In the Court of Exchequer, Bramwell, B., stated his exception of the meaning of a repairing lease as follows: "I should say, as a matter of reasoning, independently of any of the authorities, that the expression 'repairing lease' requires a lease with more than the common covenant, which does not call upon the lessee to make good the defects which time brings about in the substantial fabric of the building." But in the Exchequer Chamber, Erle, C.J., did not think that the term had "any defined meaning as a name of art with the Court of Chancery or among conveyancers."

(*a*) The general rule being that the habendum of a lease can only be considered as marking the duration of his interest, and that its operation in the grant is merely prospective, a lessee cannot, in an action for a breach of a covenant to repair, be made liable for acts done before the time of the execution of the lease, although the habendum states the premises to be held from a date prior to performance of the acts in question. *Shaw* v. *Kay* (1847) 1 Exch. 412. In *Hawkins* v. *Sherman* (1828) 3 C. & P. 459, an action was brought by a lessee against a party to whom he, the residue of the term, subject to the performance of all the covenants in the lease, which from that date, "on the part of the tenants, lessees, or assignees were, or ought, to be performed." Counsel for plaintiff offered to prove that the assignee had bought at a lower price because the premises were in bad repair, and was therefore bound to indemnify his assignor for the entire sum which he had been compelled to pay to the ground landlord for dilapidations. But t trial judge declared the evidence to be inadmissable, applying the principle that an assignor ca assignment.

(*b*) *Lewyn* v. *Forth* (1673) 1 Vent. 185, 3 Salk. 108.

(*c*) Premises were leased for eight years, the lessee covenanting that he would at his own charge place the land and premises in good order; that he would build a new stable, and repair and keep in good repair the fences

Annotation.

As long as a legal term exists the termor is bound by any covenants to repair which he may have entered into, however many assignments of the term may have been executed (*d*); but an assignee who assigns is liable only for his own defaults. See 37 (*a*), *post*.

The bringing of an action of ejectment for a breach of the covenants in a lease containing a stipulation that for any breach it shall "determine and be utterly void," puts an end to the term, and the lessee is not liable for any breaches of covenant (*e*) committed after the service of the declaration. But the tenant is not discharged from the obligation of a covenant to repair by the mere fact that he has been evicted from a part of the premises. Such a case is controlled by the principle that a tenant cannot at the same time exercise the right of a tenant, and yet contend that he was not a tenant (*f*). The results of a compulsory transfer of the term by virtue of proceedings taken in accordance with statutory provisions are the same as those which follow from a forfeiture by the landlord himself. But in such a case the tenant's liability for repairs continues up to the date of the actual transfer and does not cease when the proceedings are begun (*g*).

12. Obligations of covenants as to repair, how far continuous.—(*a*) *General covenant to keep in repair.*—(See also sec. 54, post). It is now well established that a covenant to keep in repair creates a continuing obligation (*a*). From this principle two important consequences follow:

First, the right of re-entry, if it is reserved in the lease, can be exercised at any moment of the period during which the tenant

---

and gates, then erected or to be erected, and on account of these improvements it was agreed that no rent should be paid for the first nine months of the term. Held, that the lessee was not bound by the covenant to repair during the period for which he was relieved of rent. *Castle* v. *Roban* (1852) 9 U.C.Q.B. 400.

(*d*) *Staines* v. *Morris* (1812) 1 Ves. & B. 8, 13. See also *Barnard* v. *Godscall*, Cro. Jac. 309; *Thursby* v. *Plant*, 1 Wm. Saund. 240, for the general doctrine as to the result of an assignment.

(*e*) *Jones* v. *Carter* (1846) 15 M. & W. 718.

(*f*) *Newton* v. *Allen* (1841) 1 Q. B. 519. See *Holman* v. *Knox* (1912) 3 D.L.R. 207, 25 O.L.R. 588.

(*g*) *Mills* v. *Guardians &c.* (1872) L.R. 8 C.P. 79, where the court declined to accept the tenant's contention that the receipt of a notice from a railway company to treat for his interest under the Land Clauses Consolidation Act of 1845 put an end to his liability.

(*a*) The remark of Manwood, J., in Anon. 3 Leon. 51, that by the recovery of damages the lessee should be excused for ever after for making of reparations, so as if he suffer the houses for want of reparations to decay, that no action shall thereupon after be brought for the same, "is," according to Willes, J., "contrary to the modern authorities." *Coward* v. *Gregory* (1866) L.R. 2 C.P. 153. *Holman* v. *Knox* (1912) 3 D.L.R. 207, 25 O.L.R. 588.

Annotation.

remains in default (*b*), subject of course to such exceptions as may, under special circumstances, arise from the operation of the doctrines of waiver or estoppel. See secs. 54, 55, post. Secondly, subject to the same exception, damages may be recovered *toties quoties* for a breach of the obligation until the proper repairs have been executed (*c*), although it is recognized that there must always be considerable difficulty in apportioning the damages where successive actions are brought (*d*). To such an action the Statute of Limitations can clearly be no bar as long as the term is still running (*e*).

(*b*) *Covenant to put in repair.*—That there can be only one breach of a covenant to put in repair is manifest on principle, and it has been so held in an action against the lessor (*f*).

13. What covenants respecting repairs are classed among the usual covenants of leases.—The covenant to keep the demised premises in repair is considered to be a normal part of leases in such a sense that, if an intending lessee has entered under an agreement which provides that the lease to be executed shall contain the usual covenants, particularly the covenants to pay rent and to repair, he is liable to be ejected if he fails to keep the premises in repair (*a*). But in suits for specific performance a covenant to

(*b*) *Doe* v. *Durnford* (1832) 2 C. & J. 667; *Chauntler* v. *Robinson* (1849) 4 Exch. 163 [covenant to repair "when and so often as need or occasion should require during all the term"].

(*c*) *Doe* v. *Jackson* (1817) 2 Stark. 293; *Thistle* v. *Union F. & R. Co.* (1878) 29 U.C.C.P. 76; *Perry* v. *Bank &c.* (1866) 16 U.C.C.P. 404, and the case cited in the following note. Using the rooms of a house in a manner prohibited by the lease is a continuing breach. *Ambler* v. *Woodbridge* (1829) 9 B. & C. 376. Compare *Coward* v. *Gregory* (1866) L.R. 2 C.P. 153, in which it was held, in an action against a lessor for breach of a covenant to keep in repair, that the breach being a continuing one, a former recovery of damages was not a bar to another action, but merely went in mitigation of damages. In an action of waste, also, the wrong of not repairing is regarded as a continuing wrong, the cause of action arising de die in diem up to the death of the tenant. *Woodhouse* v. *Walker* (1880) 5 Q.B.D. 404. *Holman* v. *Knox*, supra.

(*d*) See the remarks of Le Blanc, J., in *Kingdom* v. *Nottle* (1813) 1 M. & S. 355.

(*e*) *Maddock* v. *Mallett* (1860) Ir. C.L. 173, case in which the buildings to which it was intended that the lessee's obligation should be applicable during the term, were pulled down by him and replaced by others of an essentially different character. The fact that these unauthorized alterations had been made more than twenty years before the action was brought on the covenant to repair the original buildings, was held not to prevent the recovery of damages. *Nixon* v. *Denham*, 1 Jebb. & S 416, 1 Ir. L.R. 100, was said by Fitzgerald, B., to be a strong case, and the reports to be unsatisfactory.

Another case in which similar facts were involved and the same conclusion was arrived at as in *Maddock* v. *Mallett*, is *Morrogh* v. *Alleyne* (1873) Ir. Rep. 7 Eq. 487.

(*f*) *Coward* v. *Gregory* (1866) L.R. 2 C.P. 153, 36 L.J.C.P. 1.

(*a*) *Swain* v. *Ayres* (1888), 21 Q.B.D. 289.

Annotation.

repair is treated as unusual if it contains an exceptive proviso, relieving the tenant from liability in case of damage resulting from fire or tempest (*b*).

The covenant as to indemnity is also considered to be, so far, a usual and proper provision in cases where the original lessee transfers his interest that, in a suit for specific performance of an agreement to purchase leasehold premises, the purchaser, whether his assignee is the original lessee or a subsequent assignee, may be compelled to insert a covenant of indemnity against the performance of the covenant to repair and other covenants (*c*).

14. Short Forms Acts.—The parties to lease are, by various statutes, granted the option of embodying their agreements in certain concise forms declared by the legislature to be the legal equivalents of the inordinately verbose provisions which usually encumber such instruments.

The English Leases Act of 1845, 8 & 9 Vict., ch. 124, is considered to have prescribed a form which is somewhat inaccurate. (Woodfall's Landl. & T. p. 138. For the full text see p. 902.) For this reason, possibly, the Act has not been of much practical utility. Indeed, it has been so rarely taken advantage of, that, so far as the writer has noticed in the preparation of the present article, no reported case construed or even referred to it.

The Canadian statutes, modeled on the English enactment, have been more fortunate in this respect. The earliest is found in ch. 92 of the Consol. Stat. of Upper Canada. The short forms, with which we are concerned in this article, are, in substance, the following:—

Covenant 3.—To repair. Covenant 4.—To keep up fences. Covenant 6.—That lessor may enter and view the premises, and that lessee, if notified, will repair within three months. Covenant 8.—To leave in good repair. Covenant 9.—That lessor may re-enter for breaches of covenant.

This statute has been re-enacted without any very material changes in Ontario, (Rev. Stat., 1877, ch. 103; 1887, ch. 106; 1897, ch. 125; R.S.O. 1914, ch. 116) and similar provisions are in force in

(*b*) A person who agrees to take an assignment of the interest of another in a lease to contain all "usual covenants," cannot resist specific performance on the ground that it ought to contain an exception of his non-liability to make good damage by fire. *Kendall* v. *Hill* (1860) 6 Jur. N.S. 968. A contract for a lease of a mill to contain "all the usual and necessary covenants," and in particular a covenant to keep in good tenantable repair, does not entitle the lessee to have the covenant to repair qualified by the introduction of the words "damages by fire or tempest only excepted." *Sharp* v. *Milligan* (1857) 23 Beav. 419; same case, sub nom., *Thorpe* v. *Milligan*, 5 W.R. 336. See *Murphy* v. *Labbé* (1897) 27 Can. S.C.R. 126 and *Klock* v. *Lindsay* (1898) 28 Can. S.C.R. 453.

(*c*) *Staines* v. *Morris* (1812) 1 Ves. & B. 13.

Annotation.

Manitoba, (R.S.M. 1913, ch. 181); and in British Columbia, (R.S.B.C. 1911, ch. 135).

Longer provisions corresponding to those above stated are set out in these Acts, and it is declared that the use of the shorter forms shall have the same effect as if the extended forms were employed. In the first place, the implied addition of the words "executors, administrators and assigns," does not apply to any but the covenants expressly provided for in the Act (*a*). In the second place, the effect of the covenant to repair which is contained in the second column of schedule of forms probably cannot be read into a lease in which the words contained in the first column is not found.

A lease which purported to be made in accordance with the Short Forms of Leases Act contained a covenant by lessees "to leave the premises in good repair, ordinary wear and tear only excepted." This was not the statutory form, and it must be construed as it stood. The lessees are liable to rebuild premises when damaged by fire. (*b*).

This latter doctrine cannot be laid down in positive terms as it was stated, arguendo, in the dissenting opinion of the case last cited; but it is not in conflict with anything said by the other justices.

III. What property is covered by agreement to repair.

15. Property existing at the time the tenancy begins.—The subjoined rulings indicate the construction which the courts have placed upon various agreements as to a subject-matter in existence when the lease took effect. It is difficult to see what general principle can be extracted from them, except that an over-refinement of interpretation is discountenanced by the courts.

A covenant, in an agreement for the letting of a farm and mill, that the tenant "should keep and leave the messuages and buildings in good repair," renders him liable in damages, where the mill-wheel is not repaired (*a*).

A covenant to repair and keep in repair the *buildings with paling and fencing*, is broken if a pavement is not repaired (*b*).

In an action against a lessor it has been held that a covenant to repair the "external parts of the premises" obliged him to keep in repair any wall which formed part of the enclosure of the house even though it might have become actually exposed to the atmos-

(*a*) *Emett* v. *Quinn* (1882) 7 A.R. (Ont.) 306 (Patteson, J.A., dissented as to the particular instrument under review).

(*b*) *Delamatter* v. *Brown* 9 O.L.R. 351.

(*a*) *Openshaw* v. *Evans* (1884) 50 L.T. 156.

(*b*) *Pigot* v. *St. John* (1614) Cro. Jac. 329.

Annotation.

phere through the pulling down of an adjoining house (*c*). Doubtless a similar ruling would have been made if the covenantor had been a lessee.

Where, at the time of executing a lease of a house, the lessee signed an indorsement on the lease, that he would lease the adjoining house at the same rent, he getting possession as soon as the premises were vacated by the tenants then in occupation, the implication was considered to be that, except as to the time of getting possession, the lessee was to occupy the second house on the same terms as he occupied the house mentioned in the lease itself. The obligation of a covenant to repair contained in the lease was therefore held to extend to the second house also (*d*).

Where the word "erections" follows the word "houses" in the enumeration of the various kinds of property subject to a covenant to repair, it is probably to be construed on the principle of *ejusdem generis*, and, if so, will not cover fences. At all events the covenant can be applicable only to permanent fences (*e*).

16. Additions to and alterations in the premises after the tenancy begins, generally.—The principle which Channell, B., considered to be established by the authorities for the construction of covenants which do not in terms cover subsequent additions was stated by him as follows in *Cornish* v. *Cleife* (*a*).

(*c*) *Green* v. *Eales* (1841) Q.B., 225.

(*d*) *Mehr* v. *McNab* (1894) 24 O.R. 653.

(*e*) *Gange* v. *Lockwood* (1860) 1 F. & F. 11. The words "farming buildings" in a deed creating a trust to keep a mansion-house, etc., in good repair have been held to include farmhouses: *Cooke* v. *Cholmondeley* (1858) 4 Drew. 326.

(*a*) (1864) 3 H. & C. 446. In this case it was held that a covenant in a lease of three dwelling-houses and a field to repair "the said dwelling-houses" does not extend to independent houses subsequently erected in the field, although the covenant goes on: "as well in houses, buildings, walls," etc. The only object of these words is to explain what precedes, that is, that the tenant is to repair not only the houses but also the buildings, etc.

Brown v. *Blunden* (1684) Skinner 121.

Douse v. *Earl* (1689) 3 Lev. 264, 2 Ventr. 126, cited in *Bacon Abr.*, Covenant (F).

Darcy v. *Askwith* (1618) Hob. 234.

Green v. *Southcott* (1877-1884), Newfoundl. Rep. 176.

Upon the authority of *Cornish* v. *Cleife*, *supra*, it has been held that any buildings erected on the demised land during the tenancy become part of the demised property, and are therefore subject to the covenant to yield up a good and tenantable repair, under the implied covenant in that regard, contained in sec. 20 of the Conveyancing Ordinance of New Zealand, Session 2, No. 10, *Stephens* v. *Money* (1893) 11 New Zea. L.R. 775.

Buscombe v. *Stark* (1916) 30 D.L.R. 736 following *Joyner* v. *Weeks* [1891] 2 Q.B. 31.

[Lessee who covenants to restore premises to their original condition after changes have been made, and does not do so, is liable for the estimated costs of restoration.]

Annotation.

"Where there is a general covenant to repair, and keep and leave in repair, the inference is that the lessee undertakes to repair newly erected buildings. On the other hand, where the covenant is to repair, and keep and leave in repair the demised buildings, no such liability arises."

Bramwell, B., laid down the law more guardedly as follows:

"There is no general rule by which it can be determined whether a covenant to repair extends to houses erected on the land after the term has begun running. Each case depends on the particular terms of the covenant into which the parties have entered."

Whenever, as is customary in all well-drawn leases, there are clauses dealing with the contingency of subsequent erections, it is clear that the obligation of repairing must be applicable to any additions to the property which satisfy the descriptive words of the provisions so inserted, unless it can be gathered from the rest of the instrument that the obligation is not to attach, unless some specified event occurs (*b*). The obligation of such a covenant attaches to the houses for the erection of which provision is made, even if they are never fully completed (*c*). Moreover, it is clear

(*b*) The lessee covenanted to lay out £200 within fifteen years in "erecting and rebuilding messuages or some other buildings, upon the ground and premises, and from time to time to repair all the said messuages, etc., so to be erected," with all such other houses, edifices, etc., as should at any time "thereafter be erected;" and "the said demised premises, with all such other houses, etc., so well repaired," to deliver up at the end of the term. It was held that, as the premises then standing were to be pulled down, under another provision in the lease, it could not have been intended that any of the £200 should be expended on them, and that the covenant to repair was applicable only to the buildings which might be erected with that money or otherwise. *Lant* v. *Morris* (1757) 1 Burr. 287.

The assignee of the term in possession at the end of the term is liable for the non-repair of all the buildings upon the demised land, where the covenant is that the lessee shall from time to time, during the term, well and sufficiently repair, etc., the said messuage or tenement, erections and buildings erected and built, or to be erected and built, upon the said ground hereby demised or any part thereof. *Hudson* v. *Williams* (1879) 39 L.T. (N.S.) 632, distinguishing *Cornish* v. *Cleife*, *supra*, on the ground that the lease there contained no such words as "built or to be built," and that there was nothing in the case to indicate that the parties contemplated the building of other houses. In a suit to enforce the purchase of a leasehold, the lessee had covenanted to build a certain number of houses within the first five years of the term, to repair the houses then upon the ground, or thereafter to be erected, and to deliver up at the end of the term all the premises thereby demised. A portion of the additional houses were not built within the period stipulated, but the lessor did not take advantage of the default and continued to receive the rent for forty-six years. Lord Langdale declined to enforce the contract, as, although the breach of the covenant to build had been waived, the covenant to deliver up in repair extended to the additional houses which were to be built, as well as to the ones already complete at the date of the demise, and could not be confined to such houses only as should actually be found upon the land at the end of the term. *Nouaille* v. *Flight* (1884) 7 Beav. 521.

(*c*) *Bennett* v. *Herring* (1857) 3 C.B.N.S. 370 [lease of a piece of land with two houses thereon in course of erection, with a covenant by the lessee to complete the houses within two months, and also to keep the houses in

Annotation.

that a covenant of this scope cannot be fulfilled by the repair of any other kind of structures except those which answer to the description in the lease.

Even so broad a covenant as one that the lessee and his assigns shall at all times keep in repair all buildings which shall be erected is not considered to be performed, if the substantial effect of the lease is that the lessor foregoes half his rent on condition that the lessee erects two dwelling-houses, and an assignee of the lessee pulls down the dwelling-houses which had been erected, and puts up and keeps in repair a foundry. The court declined to admit that there was any the less a breach of the covenant, because the foundry was much more valuable than the houses destroyed, the position taken being that any other rule would have the effect of allowing a tenant by his own misfeasance to render the covenant nugatory (*d*).

But in cases where the tenant would derive an unfair advantage from the strict operation of this principle, the landlord may obtain relief in equity (*e*).

17. Covenants to repair considered with reference to the tenant's right to remove fixtures.—In some instances the effect of a covenant as to repairing is simply to exclude from the case the question whether the tenant is entitled to the benefit of the distinction between trade and other fixtures, the result being that his proprietary rights are made to depend upon whether the thing of which the quality is disputed is literally a fixture in the narrowest sense of the word (*a*).

On the ground that a covenant to repair, etc., all erections and buildings then erected or afterwards to be erected, and to leave the premises in good repair, is general and not subject to any exception, it has been held to prevent the tenant from removing buildings erected for the purposes of trade. But the court refused

---

repair during the term, and proviso for forfeiture in case of the breach of any of the covenants. See also *Jacob* v. *Down* [1900] 2 Ch. 156. [Covenant to erect buildings and keep them in repair, lessee's obligation is a continuing one, and he is liable even though buildings be never completed.]

(*d*) *Maddock* v. *Mallett* (1860) Ir. C.L. 173.

(*e*) Where a lessee of a farm covenants to keep in repair the buildings etc., to be erected on the same premises or any part thereof, and subsequently with the permission of the landlord, builds upon the waste adjoining the farm a house which he continues to hold down to the termination of the lease, the act of the tenant will be treated as an engagement on his part that the house shall be regarded as part of the premises originally demised, and subject to the same conditions, in such a sense that he will be bound to keep it in good repair. *White* v. *Wakley* (1858) 26 Beav. 17, 28 L.J. (Ch.) 77 [it was conceded that no action at law would lie].

(*a*) *Bing Kee* v. *Yick Chong* (1910) 43 Can. S.C.R. 334; the onus rests on the party alleging fixtures to be part of the freehold. To shew that they were intended to be so.

Annotation.

to extend the covenant to erections, not let into the soil, but merely supported on blocks of wood (*b*).

Commenting on this decision in a later case, Lord Tenterden said: "This is highly reasonable, because the expectation of buildings to be erected during the term, and left at its expiration, is often one of the inducements to the granting of a lease, and forms a considerable ingredient in the estimate of the rent to be reserved" (*c*).

A lessee covenanted to keep in repair the premises, with all the walls, *glass-windows*, etc., and yield up the same with all wainscots, *windows*, etc., and other things which then were, or at any time thereafter should be, thereunto affixed, *and together also with all sheds and other erections, buildings, and improvements, which should be erected, built, or made upon the said demised premises*, in good repair and condition. It was held that, if a new plate-glass window which had been put in by the tenant in place of an old one was not a "shop" window within the covenant, it was at all events an improvement, and that it could not be removed, although it had been erected for the purposes of trade (*d*).

In line with the above decisions is a later one in which it is laid down, in general words, that a covenant to keep in good repair runs with the land, so far as it relates to fixtures, and binds the assignee of the term, although the tenant himself may have the right of removing them at the end of the term (*e*).

In other instances the distinction between trade and other fixtures may, by the express words of the covenant, be made the controlling element in the case.

The tenant, a blacksmith and wheelwright, having covenanted to keep and yield up the premises with all additions and improvements thereto, (trade fixtures *bonâ fide* made by the lessee only excepted), in good and tenantable repair, erected an addition to the demised building, and made the new and old buildings practi-

(*b*) *Naylor* v. *Collinge* (1807) 1 Taunt. 19.

(*c*) *Thresher* v. *East London & Co.* (1824) 2 B. & C. 608. There it was questioned whether any matter capable of having the effect of taking such buildings out of the operation of the covenant can exist debars the deed. The substance of the decision was this: Even if an under-lessee who occupied the premises during the pendency of the previous lease of which the one in question is a continuance had, as between himself and his own immediate lessor, a right to remove buildings erected for the purpose of trade, it is very doubtful whether the superior landlord may not rely on the theory that he had nothing to do with any contract between other parties, and treat the removal of the buildings as a breach of the covenant to repair. Certainly he may do so, where the under-lease binds the tenant not only to repair the premises, but to leave, at the end of the term, those premises so repaired, together with all such erections, etc., as then were, or should at any time thereafter, be built upon the premises.

(*d*) *Haslett* v. *Burt* (1856) 18 C.B. 162, 893.

(*e*) *Williams* v. *Earle* (1868) 9 B. & S. 740, L.R. 3 Q.B. 739.

Annotation.

cally one by pulling down the greater part of the wall between them. It was held that the building so erected was not a trade fixture, and that the lessees' removal of it, after the term was ended, was a breach of the covenant to repair, although he put up again the wall which he had taken down, and left it in good repair (*f*).

But, with respect to many of the cases, it seems difficult to affirm with any certainty that the conclusion arrived at would have been different if the covenant to repair had not been a factor in the discussion. The rulings in favour of it and against the tenant are collected below.

(*a*) *Cases in which the right of removal was conceded.*

A covenant to leave the buildings which then were, or should be erected on the premises during the term, in repair, etc., is not broken by carrying away two sheds which were erected for the benefit of the tenant's trade (*g*).

A covenant to repair does not run with the land, so far as it relates to mere movable chattels, such as the tools and utensils used in a rolling-mill (*h*).

One covenant in a lease of coal and iron works bound the lessees to agree to keep in good repair the "furnaces and other works, houses and other buildings," then standing or thereafter to be erected and built upon the demised lands. Another bound them at the expiration of the term to deliver up the property, inclusive of "ways and roads" upon the land in such good repair that the works may be continued and carried on by the lessor. It was held (1) that the word "works" was not intended to refer to merely temporary works, such as train-plates and sleepers not affixed to the freehold, and laid down by the lessee only for the purpose of more conveniently transporting the iron ore from the mine to the smelting house, but implied permanent and substantial works, similar in the nature to the furnaces, etc., mentioned in connection with them; and (2) that such property was not included under the words "ways and roads." The court accordingly dissolved an injunction restraining the defendant, a judgment-creditor of the lessee, from removing the plates and sleepers (*i*).

(*f*) *Weller* v. *Everett* (1900) 25 Vict. L.R. 683. As the court professed to arrive at this result by rejecting the authority of *Penton* v. *Robart* (1801) 2 East. 88, a case which seems to be still good law in England, it is doubtful whether the decision can be treated as sound outside the jurisdiction in which it was rendered.

(*g*) *Dean* v. *Allaley* (1802) 3 Esp. 11, per Lord Kenyon who distinguished the case where a tenant builds a substantial addition to the house, see *Bing Kee* v. *Yick Chong* (1910) 43 Can. S.C.R. 334.

(*h*) *Williams* v. *Earle* (1868) 9 B. & S. 740, L.R. 3 Q.B. 739.

(*i*) *Beaufort* v. *Bates* (1862) 3 De.G. F. & J. 381, 6 L.T. 82.

Annotation.

A tenant held under an instrument binding him to maintain "the demised premises, a mill, and all buildings and improvements then erected and thereafter to be made and erected thereon, in good and sufficient tenantable condition," and also to "keep the mills and the works and machinery in working order, repair, and condition; and at the determination of the demise, to yield up the premises, and all buildings and improvements thereon in the like good and sufficient tenantable condition." It was held that the tenant would only be enjoined from removing such machinery as was originally demised or contracted for as essentially and integrally belonging to the demised mill or was substituted during the term for what was originally bound. The injunction was expressly stated not to restrain the tenant from removing any machinery in the nature of trade fixtures which had since the conversion of the mill to the purposes for which it was then used, been erected in place of any mere trade utensils, or in order to perform any manufacturing process theretofore performed by hand (*j*).

(*b*) *Cases in which the right of removal was denied.*

Carrying away a shelf, though not stated to be a fixture, is a breach of covenant to leave the premises in the same order (*k*).

A tenant who covenants to keep and yield up in repair the premises and all erections, buildings, and improvements which may be erected thereon during the term, cannot remove a veranda erected during the term, the lower part of which was attached to posts fastened to the ground (*l*).

A lessee covenanted to keep and yield up in repair a mill and a steam-engine, with the boilers and attached gearing in the mill. During the term he increased the size of the mill both laterally and upwards, and substituted for the existing engine another of greater power. Shadwell, V.C., being of opinion that both the new building and substituted engine were subject to the covenant, enjoined the assignees of the lessee, who had become bankrupt, from removing either the building or the engine. The assignees were offered the privilege of bringing an action to ascertain their legal right, but, as they declined to do so, the injunction was made perpetual (*m*).

A new pair of mill-stones substituted by the lessee for an old pair, has been held to be included in the "*improvements*" which a tenant is to keep and leave in repair (*n*).

(*j*) *Cosby* v. *Shaw* (C.A. 1888) 23 L.R. Ir. 181, *Foley* v. *Addenbrooke* (1844) 13 M. & W. 174.
(*k*) *Pigot* v. *St. John* (1614) Cro. Jac. 329.
(*l*) *Penry* v. *Brown* (1818) 2 Stark. 403.
(*m*) *Sunderland* v. *Newton* (1830) 3 Sim. 450.
(*n*) *Martyr* v. *Bradley* (1832) 9 Bing. 24, 2 Moo. & S. 24.

Annotation.

A covenant to yield up in repair all "buildings, quays, works, edifices and engines" prevents a lessee of salt-works from removing salt-pans resting by their own weight on a frame of bricks (*o*).

A general covenant to yield up in repair prevents a lessee from removing a greenhouse, the framework of which was attached by screws to a piece of timber embedded in mortar on the top of dwarf walls (*p*).

A covenant by which "all things" which at the time of the execution of the lease were, or at any time during the term should be "fixed or fastened or set up on the premises, are to be yielded up at the expiration of the term, together with all fixtures thereto belonging, in as good condition as the same were at the execution of the lease," reasonable use excepted, has been held to extend to a building resting upon blocks of wood, not let into the ground; also to a building resting on stumps; also to a building placed on scantling and old posts just let into the ground, all erected during the term. It was held allowable to qualify the literal meaning of the words "at the execution of the lease" by reference to the other expressions in the covenant (*q*).

The Ontario Act respecting Short Forms in Leases (R.S.O. 1914, ch. 116, sec. 9) is not intended to effect any change in the respective rights of landlords and tenants with respect to fixtures. Hence, where a tenant enters into possession of premises under a lease framed in accordance with the provisions of this Act, and "affixes things to the freehold for the purposes of trade, or of domestic convenience, or ornament, or for their temporary or more convenient use," he is not obliged to keep such fixtures in repair and surrender them to the landlord at the end of the term (*r*).

Both at common law and under the Short Forms Act a lessee

(*o*) *Earl of Mansfield* v. *Blackburne* (1840) 6 Bing. U.C. 426, 8 Scott 720.

(*p*) *West* v. *Blakeway* (1841) 2 Man. & G. 729.

(*q*) *Allardice* v. *Disten* (1861) 12 U.C.C.P. 278.

(*r*) *Argles* v. *M'Math* (1894) 26 O.R. 224, affirmed 23 A.R. (Ont.) 44. Maclennan, J.A., stated that the meaning of the covenant in the extended form is that the "buildings, erections, and fixtures thereon" are only such as were thereon at the time of the demise, and which were the property of the landlord. In the court below it was laid down that the term "fixtures," as used in the covenants to repair and to leave the premises in good repair, does not include trade fixtures, but only fixtures of the irremovable class, viz., those things, the property in which passes to the landlord immediately upon being affixed to the freehold.

Annotation.

may remove trade fixtures even after the lessor has elected to forfeit the term for a breach of the covenants (*s*).

IV. What constitutes a sufficient performance of the covenant to repair.

18. Covenants not broken by dilapidations due to a reasonable use of the property.—In a former section some cases were cited to the point that the deterioration of premises which is due to their reasonable use in the manner contemplated by the parties is not waste (*a*). On general principles it may also be presumed that such a result would not be regarded as a breach of a covenant to keep in repair.

That damage done by ordinary wear, whether it be due to the use of the premises by the lessee himself or by his family or by his servants, need not be remedied is assumed in all the cases. But it is usual to insert in leases a specific provision that the tenant shall not be liable for the effects of "reasonable wear and tear," or the like.

In computing the damages for a breach of the covenant to repair an allowance should be made to the landlord for ordinary wear and tear; and where the undertaking is "to give up the house in the same conditions and repairs," no exception can be read into it as the form is absolute (*b*).

Such an exception does not cover total destruction by a catastrophe which was never contemplated by either party such as the fall of a building caused by the overloading of a floor by a subtenant (*c*).

Nor is a covenant to deliver up the premises in good repair, "and all the trees now standing in the orchard of the said premises, whole and undefaced, *reasonable use and wear only excepted*," broken by removing trees which are past bearing from parts of the orchard which are too crowded (*d*).

Whether the tenant, allowance being made for the effect of this exception, has sufficiently performed his covenant is a question of fact to be decided in view of all the circumstances (*e*).

(*s*) *Argles* v. *M'Math* (1894) 26 O.R. 224, 23 A.R. (Ont.) 44.

See also *Mowat* v. *Hudson* (1911) 105 L.T. 400 [the right to the removal of trade fixtures is not taken away by the covenant to deliver up premises in good repair].

(*a*) *Manchester &c. Co.* v. *Carr* (1880) 5 C.P.D. 507; *Sauer* v. *Bilton* (1878) 7 Ch. 815.

(*b*) *Bornstein* v. *Weinberg* (1912) 8 D.L.R. 752, 27 O.L.R. 536 following *Lurcott* v. *Wakely* [1911] 1 K.B. 905; see remarks of Cozens-Hardy M. R. at pp. 912-914.

(*c*) *Manchester &c Co.* v. *Carr* (1880) 5 C.P.D. 507; 43 L.T. 476.

(*d*) *Doe* v. *Crouch* (1810) 2 Camp. 449, per Lord Ellenborough.

(*e*) *Polleykett* v. *Georgeson* (1878) 4 Vict. L.R. (Eq.) 207.

Annotation.

19. Obligation of tenant to make good damage done by casualties beyond his control.—(See also sec. 23, post). It was recently remarked by Cave, J., arguendo, that a tenant is obliged to make good the damage which is done by such causes as a casual storm, that takes off a slate from the roof, or a stone thrown from outside which breaks a window, and that, if he neglects to do these things, he must also make good any further damage that may be caused to the structure by his non-performance of his covenant (*a*).

When roof of premises is damaged during a storm the landlord is under no obligation to repair the same which would make him liable in damages (*b*).

On the other hand, a covenant to keep and yield up in repair does not mean, in the case of a very old building at all events, that "the consequences of the elements should be averted. . . . What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss which, so far as it results from time and nature, falls upon the landlord" (*c*).

Damage done by violent catastrophes such as fire and tempest is not infrequently the subject of a specific exception (*d*). Whether the particular catastrophe which is alleged by the tenant to absolve him from the obligation of repairing comes within the excepted cases must be determined as a matter of construction.

(*a*) *Proudfoot* v. *Hart* (1890) 25 Q.B.D. 42.

(*b*) *Betcher* v. *Hagell* 38 N.S.R. 517.

(*c*) *Gutteridge* v. *Munyard* (1834) 7 C. & P. 129, per Tindal, J. This statement was recently approved by Lord Esher in *Lister* v. *Lane* [1893] 2 Q.B. 212; but the difficulties of its practical application have been thus commented upon by Alderson, B.: "The criterion of Tindal ,C.J., as to results from time and nature is difficult for a jury. Suppose a house built forty years to have old windows, what is the rule as to repairing them? Or suppose a new house demised for ninety-nine years, if the test be the state in which it was when the tenant first entered, it would be unfair to be compelled to keep it in the same state forever." *Payne* v. *Haine* (1847) 16 M. & W. 541.

Miller v. *Burt* (1918) 63 S.J. 117 [tenant's obligations as regards old buildings demised to him].

(*d*) Although the point does not seem to have been expressly decided by any court, it seems to be conceded that the statute of 6 Anne, ch. 31, declaring that no suit should be brought against any *person* in whose house or chamber any fire should *accidentally* begin, nor any recompense be made by such person for any damage occasioned thereby, relieves tenants from the consequences of accidental fire. See Hargrave's note, 377, to Co. Litt. lib. 1; IV. Kent's Comm. p. 83. Such at all events is the effect of the similar provision in 14 Geo. 3 ch. 78, sec. 86. See *Filliter* v. *Phippard* (1847) 11 Q.B. 355, where it is laid down that, by accidental fire is meant one not traceable to any cause, and does not include wilful fires or those caused by negligence. This provision, it should be observed, although it occurs in a statute which mostly relates to London only, is of general application. *Ex parte Goreley*, 34 L.J. (Bkt.) 1, 10 Jur. N.S. 355. See also *Murphy* v. *Labbé* (1897), 27 Can. S.C.R. 126; also *Morris* v. *Cairncross* (1907) 14 O.L.R. 544.

Annotation.

In a covenant to repair subject to an exception in case of damages by "fire, storm, tempest, or other inevitable accident," the last words mean some accident *ejusdem generis*, and do not cover such a use of the property by the tenant as an overloading of a floor which causes the fall of the whole building (*e*).

Damage done by the drifting of ice against a wharf in a strong wind does not come within an exception of accident by tempest (*f*).

19a. Non-erection of buildings stipulated to be built.—The non-erection of buildings which the tenant has covenanted to erect within a given time is a continuing breach of a covenant to keep in repair (*g*).

20. Structural alterations, usually deemed to be a breach of the covenant. Pulling down the premises, wholly or partly, is a breach of a covenant to keep and surrender in good repair (*a*). Under ordinary circumstances, therefore, even the covenant is violated by the breaking of a door through a wall, whether it be merely one which divides two adjoining rooms of the same house (*b*), or two court yards belonging to the same house (*c*), or two adjoining houses (*d*). Even a power in a lease to "make alterations and improvements, and, for that purpose, to pull down any walls . . . such alterations and improvements, when so effected to form part of the demised premises," does not authorize a tenant to break a doorway through the exterior wall separating the house demised from a house not the property of the lessor (*e*). Even a person to whom premises are leased to be used as a shop, although, as will be seen below, he is considered to have an unusual amount of liberty in adapting his premises to the requirements of his business, has no right to carry out such serious structural

(*e*) *Manchester &c. Co.* v. *Carr* (1880) 5 C.P.D. 507.

(*f*) *Thistle* v. *Union &c. R. Co.* (1878) 29 U.C.C.P. 76.

(*g*) *Jacob* v. *Down* [1900] 2 Ch. 156, 69 L.J. (Ch.) 493.

(*a*) *Gange* v. *Lockwood* (1860) 2 F. & F. 115, per Willes, J. See also *Kinlyside* v. *Thornton* (1776) 2 Wm. Bl. 1111 [demolition of fixtures by tenant covenanting to yield up in good repair]; [removal of a barrier between two adjoining mines where the lessee had covenanted to work them in a fair and husbandlike manner], following.

(*b*) *Holderness* v. *Lang* (1885) 11 O.R. 1.

(*c*) *Doe* v. *Bird* (1883) 6 C. & P. 195, per Denman, C.J. Here, however, the liability was rendered more manifest by the express terms of the covenant which was to "repair, uphold, etc.," the "brick-walls," etc., pertaining to the tenement.

(*d*) *Doe* v. *Jackson* (1817) 2 Stark. 293. In one case however Byles, J., seems to have thought it an open question, whether the opening of a door in a garden wall is a breach of a covenant to "repair, uphold, and maintain the demised houses, and the buildings or erections to be erected or being on the land demised, etc." *Borgnis* v. *Edwards* (1860) 1 F. & F. 111.

(*e*) *Barton* v. *Reilly* (1879) 1 New So. Wales S.C. N.S. (C.L.) 125. Also *Holman* v. *Knox* (1912) 3 D.L.R. 207, 25 O.L.R. 588.

Annotation.

alterations as would result from cutting away a brick or stone front support and to put iron pillars as a support, and putting in large glass windows; or from removing the plate glass windows and iron pillars, and building up the front with brick or stone (*f*).

The consent of the landlord to the tenant changing the external front of a building by making a one-store entrance with one door, does not authorize the tenant to make a two-store entrance with two doors, and although the value of the buildings may be increased, the landlord is entitled to damages for the unauthorized change (*g*).

Three Ontario cases with regard to the removal of fences seem very difficult to reconcile without the aid of some very subtle distinctions. In two the court adopted a doctrine which seems to be in full conformity with general principles as well as with the decisions above cited, viz., that the removal of a fence and the use of the materials to repair other fences renders a tenant guilty of a breach of a covenant to repair unless the removal is made by the command or at the instance of the lessor himself (*h*). Yet at a later date we find the position taken that it cannot be held, as a matter of law, that the removal of a fence is a breach of a covenant in a lease of a farm to keep in repair the fences erected or to be erected on the premises, but that the question is one of fact to be decided with reference to the circumstances of each case (*i*).

Except in so far as this case may be regarded as resting on the acquiescence of the landlord in the removal, this being one of the grounds on which the judgment was based,—(see sec. 55, post),—its correctness seems to be quite disputable. Leaving the element of acquiescence out of account, the simple question presented was whether the transfer of property of a fixed character to a new position, not originally contemplated by the parties, was or was not a wrongful act. Under the authorities already referred to there can be no doubt that such an act was essentially tortious unless there is some special reason for applying a different standard to the situation under discussion. So far as any such reason is suggested by the court, it seems to be that, under the circumstances

---

(*f*) *Holderness* v. *Lang* (1885) 11 O.R. 1, per Wilson, C.J. See also *Buscombe* v. *Stark* (1916) 30 D.L.R. 736.

(*g*) *Straus Land Corporation Ltd.* v. *International Hotel Windsor Ltd.* (1919) 48 D.L.R. 519, 45 O.L.R. 145.

(*h*) *Pickard* v. *Wixon* (1866) 24 U.C.Q.B. 416 [action by tenant for trespass on his land by landlord's cattle]. In *Wixon* v. *Pickard* (1866) 25 U.C.Q.B. 307, the same landlord sued the same tenant for trespass in taking his cattle. It was held that, if the landlord, in the exercise of the powers reserved in the lease, directed the removal of the fence with the view of repairing other fences, he laid himself under the duty of so using his right of way over it as not to inflict injury upon the tenant. If the landlord's cattle strayed, therefore, the tenant had a right to impound them damage feasant.

(*i*) *Leighton* v. *Medley* (1882) 1 O.R. 207.

Annotation.

attending the occupation of farming property in Canada, a tenant may be conceived to have a greater liberty than he ordinarily has in respect to moving fences from one place to another. This agreement, it is submitted, is wholly inadequate to justify trenching upon a definite rule of law. Any tenant who desires to make alterations of this sort can readily obtain the necessary permission from his landlord, if the alterations are proper, and he is not subjected to any hardship by a rule which would compel him to ask that permission.

In the absence of a negative covenant, a tenant, who is permitted by his lease to put up as many buildings as he thinks fit upon the land demised, the instrument also containing a proviso that he shall repair and maintain present and future erections, is entitled to pull down existing structures and re-erect them (*j*). But the effect of an Irish decision (*k*), referred to in sec. 12, ante, and the rationale of the legal situation created by the covenant, seems, at all events, to require that the lessee who pulls down buildings should replace them by others of essentially the same description, and not of inferior quality.

A more simple case is that of a shop, in respect to which it is held that, as the proprietor gains by having the place made as attractive and convenient as possible, some latitude must be allowed to him under the covenant (*l*). In the case cited, the court refused to hold that a breach had been committed, either by the removal of part of a large shop window-front and the insertion of a door in its place, or by the removal of a partition of a temporary quality, constructed partly of wood and partly of glass, from one position in a shop to another, especially where the object of the alterations was to adapt the premises to the requirements of a statute regulating the business for which the premises were leased. Similar freedom as to structural alterations is allowed where words are used in a covenant which indicate that such alterations were contemplated by the parties, as where the lessee undertook to keep the premises, and all such "improvements" as should be made by the lessee during the term. This stipulation

(*j*) *McIntosh* v. *Pontypridd &c. Co.* (1892) 71 L.J. (Q.B.) 164, where an underlessee was required by a local improvement company to treat with them for a strip of land on which the existing buildings stood. The authority followed with regard to the effect of the non-insertion of a negative covenant was *Doherty* v. *Allman* 3 App. Cas. 70.

(*k*) *Maddocks* v. *Mallett* (1860) Ir. C. L. 173.

(*l*) *Holderness* v. *Lang* (1885) 11 O.R. 1, a case decided under the Ontario Short Forms Act. Wilson, C.J., said: "Converting a flat window into a bow window, or to put a glass into a panel of the door, or a door where there is a window, or to make a door to open at the right hand in place of the left hand, or to divide a door into two parts, in place of being all in one, or to shift a staircase from one part to another, or the like, would not be wrongful acts under a lease, if these were acts of improvement and beneficial to the estate."

Annotation.

was construed as putting the parties in the same position as if they had entered into an express contract for the liberty of making improvements, which, at common law, would have been waste. Such a covenant is not broken, therefore, by turning the lower windows into shop windows and stopping up a doorway, and opening a new one (*m*). But a covenant of similar tenor entered into with regard to a dwelling-house, which was to be kept, with "all improvements made thereon, in good and sufficient tenantable order, repair and condition," was deemed to be broken by the conversion of the house into a store, though the value of the premises was increased. Such alterations, it was said, differ from those which are consistent with the character of a dwelling-house (*n*).

21. Substantial performance of the covenant deemed to be sufficient.—The general result of the cases is that, as was declared by Tindal, C.J., in a *nisi prius* ruling which has frequently been cited, with approval, a substantial performance of the covenant is sufficient (*a*).

This principle, in most of the instances in which it has been applied, has enured to the benefit of the tenant, but under some circumstances it becomes a decisive factor in the landlord's favour (*b*). Its acceptance involves the corollary that the questions arising in an action for the breach of a covenant to repair are questions of fact for the jury, or the judge sitting as a jury, "to

---

(*m*) *Doe* v. *Jones* (1832) 4 B. & Ad. 126, 1 N. & M. 6.

(*n*) *Elliott* v. *Watkins* (1835) 1 Jones 308, distinguishing *Doe* v. *Jones* supra, on the grounds that the lease in that case shewed that the parties contemplated the probability of future alterations being made, and that the alterations made were consistent with the terms of the agreement. See also *Keith* v. *Reid* L.R. 2 H.L. 39.

(*a*) *Gutteridge* v. *Munyard* (1834) 7 C. & P. 129, per Tindal, C.J.; *Stanley* v. *Towgood* (1836) 3 Bing. U.C. 4, and the cases cited below. Covenants to repair must not be strained, but reasonably construed, on the principle of "give and take." Willes, J., in *Scales* v. *Lawrence* (1860) 2 F. & F. 289.

(*b*) Thus it has been held that, to make dilapidations "wilful" within the scope of a proviso for avoiding the term if the tenant should "wilfully fail to perform" any of the covenants, it is not necessary that he should have received notice to repair, but that the tenant is in default so as to make the proviso applicable, where he knows the premises to be out of repair, and suffers them to remain in that condition. *Doe* v. *Morris* (1842) 11 L.J. (Ex.) 313.

Annotation.

be decided on what are the substantial merits of the case, rather than on strict rights or extreme law" (*c*).

22. Repairs subject to the approval of the landlord, or his agent.—In the absence of words clearly shewing that this was the intention of the parties, the insertion in a lease of words reserving to the landlord a right of surpervising certain specific repairs to be executed by the tenant, will not be taken to imply that his approval of their quality is a condition precedent to the tenant's being entitled to claim the benefit of what he has actually done towards the performance of his part of the contract (*a*).

(*c*) *Scales* v. *Lawrence* (1860) 2 F. & F. 289, per Willes, J. In a recent nisi prius case, Cave, J., refused to hold that, because a person put nails into the wall of a house, he must take them out and fill up the holes or be guilty of a breach of covenant, or that a house is not out of repair, because a dozen or so of cracks, which do not affect the stability of the structure, appear in the plastering. *Perry* v. *Chozzner* (1893) 9 T.L.R. 488. Leaving the glass in a window cracked was, however, held to be a breach in *Pigot* v. *St. John* (1614) Cro. Jac. 329. Where the covenant is to repair "by all manner of needful and necessary reparations," and to yield up the premises "in good and substantial repair," the last clause will be regarded as giving a clue to the meaning of the general words, and it will be proper to instruct the jury that they are to find whether the particulars of non-repair enumerated by the landlord's witnesses were dilapidations amounting to a substantial breach of the covenant. *Harris* v. *Jones* (1832) 1 Moo. & R. 173. Where a lessee covenants to put the premises into complete repair "forthwith," it is for the jury to say upon a reasonable construction of the covenant, whether he has really done what he reasonably ought in the performance of it. *Doe* v. *Sutton* (1840) 9 Car. & P. 706.

It is held, however, that, where a person under an agreement to take a lease of a house states to an intending assignee of the agreement, who is cognizant of its terms, that he will not be liable for substantial repairs such a statement is regarded as a misrepresentation of a matter of law and not of a fact, and is therefore not a ground for refusing specific performance of the agreement. *Kendall* v. *Hill* (1860) 6 Jur. N.S. 968. In this case Romilly, M.R., considered that the obligation to do "substantial repairs" was one to which no precise significance could be attached for the purposes of the case, remarking: "It is impossible to say what are 'substantial repairs.' There are no repairs which may not become substantial by neglect. The slightest possible defect, if not attended to at the proper time, may require substantial repair; and is it to be thrown upon the landlord, because it has been neglected by his tenant in the first instance?"

In the Province of Quebec it has been held that a tenant is one of several occupants of a building, neglect on his part to do "tenant's repairs" (according to Art. 1635 C.C. Que.) renders him liable for damage to the other occupants. *Paquet* v. *Nor-Mount Realty Co.* (1916) 28 D.L.R. 458.

(*a*) A lease provided that the tenant should lay out £200 in "certain erections and alterations, or repairs to be inspected and approved of by the lessor, and to be done in a substantial manner," and that the lessee should be "allowed the sum of £200 towards *such* erections and alterations, and should be at liberty to retain the same out of the first year's rent." The court refused to accept the contention that the word "such" had relation both to the quality of the repairs and to the right of the lessor to decide on their sufficiency. The approval of the lessor, therefore, was held not to be a condition precedent to the tenant's reimbursement, in such a sense that, unless it was given, he would not be entitled to make any deduction from the rent. Such an agreement was said to be in effect a contract that the repairs should be substantially done, and that the lessor shall have the means of ascertaining that fact. *Dallman* v. *King* (1837) 4 Bing. (N.C.) 105, distinguishing *Morgan* v. *Birnie*, 9 Bing. 672, a case of an architect's certificate.

Annotation. Even where a lessee is to incur a forfeiture if he does not do certain repairs "to the satisfaction of the surveyor" of the lessor, there will be no forfeiture incurred if the jury are of the opinion that the surveyor ought to have been satisfied, whether he was or was not, as a matter of fact, satisfied (*b*).

23. Extent of the obligation to repair to be estimated with reference to the condition of the premises at the beginning of the term.—A principle which the courts have often had occasion to apply is that, in construing a covenant to repair, even when it is expressed in the largest terms, regard must be had to the general character and condition of the demised property when the tenant entered (*a*). The scope of this principle under its various aspects is clearly indicated by the following utterances of the judges in a leading decision by the Court of Exchequer (*b*):

"A lessee who has contracted to keep demised premises in good repair is entitled to prove what the general state of repair was at the time of the demise, so as to measure the amount of damages for want of repairs by reference to that state." (Per Alderson, B.)

"The cases all shew that the age and class of the premises let, with their general condition as to repair, may be estimated in order to measure the extent of the repairs to be done. Thus a house in Spitalfields may be repaired with materials inferior to those requisite for repairing a mansion in Grosvenor Square." (Per Parke, B.)

"The term 'good repair' is to be construed with reference to the subject-matter, and must differ, as that may be a palace or a cottage; but to 'keep in good repair' presupposes the putting it into, and means that during the whole term the premises shall be in good repair." (Per Rolfe, B.)

The principle was also extensively discussed by the Court of Appeal in a recent case (*c*), where Lord Esher conceived the result of the earlier decisions to be this:

"The question whether the house was, or was not, in tenantable repair when the tenancy began is immaterial; but the age of the house is very material with respect to the obligation both to keep and to leave it in tenantable repair. It is obvious that the obligation is very different when the house is fifty years older than it

(*b*) *Doe* v. *Jones* (1848) 2 C. & K. 743, per Pollock, C.B.

(*a*) *Lister* v. *Lane* [1893] 2 Q.B. 212, citing with approval Smiths' Landl. & T. (3rd Ed.) p. 302; followed in *Wright* v. *Lawson* (1903) W.N. 108.

(*b*) *Payne* v. *Haine* (1847) 16 M. & W. 541. See also the charges of Willes, J., in *Scales* v. *Lawrence* (1860) 2 F. & F. 289, and *Woolcock* v. *Dew* (1858) 1 F. & F. 337. A similar rule holds in the case of a sub-lessee under a covenant to repair. He is only bound to put the premises in the same condition as he found them at the time of the lease to him. *Walker* v. *Hatton*, 10 M. & W. 249, per Parke, B., arguendo. *Miller* v. *Burt* (1918) 63 L.J. 117.

(*c*) *Proudfoot* v. *Hart* [1890] 25 Q.B.D. 42.

Annotation.

was when the tenancy began. The age of the house must be taken into account because nobody could reasonably expect that a house two hundred years old should be in the same condition of repair as a house lately built; the character of the house must be taken into account, because the same class of repairs as would be necessary to a palace would be wholly unnecessary to a cottage; and the locality of the house must be taken into account, because the state of repair necessary for a house in Grosvenor Square would be wholly different from the state of repair necessary for a house in Spitalfields. The house need not be put into the same condition as when the tenant took it; it need not be put into perfect repair; it need only be put into such a state of repair as renders it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it."

The above principle, it is manifest, not only defines the extreme upward level of the tenant's duty, but also fixes the standard which he must attain in order to satisfy the obligation of the covenant. Thus, in a case where the covenant was to keep and leave in good repair, we find Parke, B., stating the nature of the resulting obligation of the tenant as follows:

"He cannot say he will do no repairs, or leave the premises in bad repair, because they were old and out of repair when he took them. He was to keep them in good repair, and in that state with reference to the age and class, he was to deliver them up at the end of the term" (*d*).

From this standpoint the obligation of the tenant, under a covenant to keep and yield up in repair, may also be stated as that of keeping a building, however old, "as nearly as may be in the state in which it was at the time of the demise by the timely expenditure of money and care" (*e*).

Any instruction to a jury which withdraws from their consideration the question whether the demised premises were new or

(*d*) *Payne* v. *Haine* (1847) 16 M. & W. 541.

(*e*) *Gutteridge* v. *Munyard* (1834) 7 C. & P. 129, per Tindal, C.J. A motion was made to set aside the verdict, but no objection was made to the charge of the Chief Justice. In *Woolcock* v. *Dew* (1858) 1 F. & F. 337, Willes, J., ruled that evidence that the premises were ruinous is no answer to a covenant to keep them in repair, for, even if they fall down, such a covenant compels the tenant to rebuild them as nearly as may be in the same state, (provided it was a tenantable state), in which they were demised. Where a hired barge is to be delivered up in "good working order," the words do not mean that it is to be delivered up absolutely in that condition, but in good working order with reference to the purposes for which a barge of such an age and condition was capable of being used—the same sort of order it was in when the hiring took place, fair wear and tear excepted. *Schroder* v. *Ward* (1863) 3 C.B.N.S. 410. See also *Miller* v. *Burt* (1918) 63 S.J. 117.

Lurcott v. *Wakely* (1911) 80 L.J. (K.B.) 713 [on covenant to repair and yield up in repair at the end of term. Tenant must rebuild wall of old house which had naturally fallen into decay.

Annotation.

old at the time when the tenant entered is, of course, erroneous (*f*). But after the witnesses have been examined generally as to the condition of the premises when the lease was executed, the trial judge is justified in refusing to allow the tenant to go into minute particulars, even though they may bear upon that condition (*g*). Though the age of a house at the time of its demise must be considered in estimating the amount of repair on which the lessor can insist, yet an inquiry into its state of repair at the time of entry would be misplaced (*h*).

In an action for leaving in bad repair, it is proper to instruct the jury to consider only the state of repairs when the defendant entered, in so far as it went to shew the age, character and class of the premises, and the extent to which the defendant had performed his contract (*i*).

24. "Good," "tenantable," and "habitable" repair, meaning of.—(*See also under s. 26 (e), post*)—Such epithets as "tenantable," "habitable," "good," or the like, are often prefixed to the word "repair" in covenants of the kind here under review. For practical purposes these expressions seem to be synonymous, so far as the tenant's obligations are concerned (*a*). They all "import such a state as to repair that the premises might be used and dwelt in not only with safety, but with reasonable comfort, by the class of

---

(*f*) *Stanley* v. *Towgood* (1836) 3 Bing. N.C. 4. An application for a new trial was refused, for the reason that the counsel could not agree as to the expressions actually used by the trial judge, and he had reported that no such instruction as that to which exception was taken had in fact been given.

(*g*) *Young* v. *Mantz* (1838) 6 Scott 277, S.C. sub nom; *Mantz* v. *Goring* (1838) 4 Bing. (N.C.) 451 [here the question excluded was: "Did not some of the defects complained of exist prior to a specified date?"]; *Woolcock* v *Dew* (1858) 1 F. & F. 337 [evidence of removal of a paling round a mill excluded].

(*h*) *Payne* v. *Haine* (1847) 16 M. & W. 541, per Alderson, B., who regarded this as the effect of *Stanley* v. *Towgood* (1836) 3 Bing. (N.C.) 4.

(*i*) *Haldane* v. *Newcomb* (1863) 12 W.R. 135 [action for leaving in bad repair].

(*a*) Alderson, B., in charging a jury, thought it "difficult to suggest any material difference between the term "habitable repair," and the more common expression "tenantable repair." *Belcher* v. *Mackintosh* (1839) 2 Moo. & R. 186, 8 C. & P. 720. In *Proudfoot* v. *Hart*, infra, Lord Esher spoke of "good repair" as being much the same thing as "tenantable" repair. In another case the Court of Appeal declined to say what was the meaning of the words "tenantable repair." *Crawford* v. *Newton* (1887) 36 W.R. 54.

Annotation.

persons by whom, and for the sort of purposes for which, they were to be occupied" (*b*).

The cases shew clearly enough that a tenant incurs a more onerous obligation where he undertakes to keep the premises in the state of repair designated by these epithets than where he simply agrees to keep them in repair. In the latter case he will merely be bound to prevent them from becoming more dilapidated than they were when he took possession (*c*). In the former he subjects himself to the additional burden of bringing them up to a certain standard of habitability. In a recent case it was laid down by Lord Esher that, under a contract to keep and leave the premises in "good" or "tenantable" repair, "the obligation of the tenant, if the premises are not in tenantable repair, when the tenancy begins, is to put them into, keep them in, and deliver them up in tenantable repair" (*d*). But this principle must be construed

(*b*) Alderson, B., in *Belcher* v. *Mackintosh* (1839) 8 C. & P. 720; 2 Moo. & P. 186. In one part of his judgment in *Proudfoot* v. *Hart* (1890) 25 Q.B.D. 42, Lord Esher remarked that this definition was a good one, so far as it goes; and in another place, he expressed his approval of a definition of the term "tenantable repair" drawn up by Lopes, L.J., viz.: "'Good tenantable repair,' is such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it." In another case Alderson, B., remarked: "It is no doubt, in practice, difficult to say what is a putting premises, so old as to be ready to perish, into good repair, or keeping them in it; but a contract to "put" premises in good repair cannot mean to furnish new ones where those demised were old, but to put and keep them in good tenantable repair, with reference to the purpose for which they are to be used." *Payne* v. *Haine* (1847) 16 M. & W. 541. See also *Mantz* v. *Goring* (1838) 4 Bing. (N.C.) 451, where it was laid down that a lessee must fulfil a covenant to keep in tenantable repair according to the nature of the premises.

(*c*) See the charge of Tindal, C.J., in *Gutteridge* v. *Munyard* (1834) 7 C. & P. 129.

(*d*) Lord Esher in *Proudfoot* v. *Hart* (1890) 25 Q.B.D. 42, p. 50, following *Payne* v. *Haine* (1847) 16 M. & W. 541, where the ruling was that a contract by which a tenant agrees to "keep" a farm and outbuildings, and at the expiration of the tenancy deliver up the same "in good repair, order, and condition," implies that, even if the premises were old and in bad repair at the time of the demise, the tenant was bound to put them in good repair, as old premises. Rolfe, B., observed that "to 'keep in good repair' presupposes the putting it into, and means that, during the whole term, the premises shall be in good repair. Similarly it was declared by Parke, B., that the mere fact that the premises were old will not justify the keeping them in bad repair, because they happened to be in that state when the lessee took them." See also *Lurcotte* v. *Wakely* (1911) 80 L.J. (K.B.) 713.

See also *Belcher* v. *Mackintosh* (1839) 2 Moo. & R. 186, 8 C. & P. 720. Alderson, B., in charging the jury as to a covenant to keep premises in "habitable repair," said: "They were old premises and dilapidated; the agreement was not that the tenant should give the landlord new buildings at the end of his tenancy, but that he should take the premises out of their former dilapidated condition, and deliver them up fit to be occupied for the purposes they were used for."

It has been held that a testamentary trust "out of the rents and profits to keep the mansion-house, and all the buildings, in *good repair*, rebuilding, if necessary, any *farming buildings* that may from time to time require it,"

Annotation.

with due reference to the more general one that a substantial performance of the covenant is all that is required.

Where the covenant is to keep in "good and tenantable repair," the question is "whether the premises have been kept in substantial repair, as opposed to claims for fancied injuries, such as a mere crack in a pane of glass, or the like" (*e*).

The effect of this principle, it will be observed, is to create an exception to the general rule illustrated in the next section by throwing upon the tenant, in some cases, the obligation to renew worn-out parts of the premises. In the decision of the Court of Appeal just cited (*f*), Lord Esher said with regard to the floor of the house:

"It may have been rotten when the tenancy began. If it was in such a state when the tenancy began that no reasonable man would take the house with a floor in that state, then the tenant's obligation is to put the floor into tenantable repair. The question is, what is the state of the floor when the tenant is called upon to fulfil his covenant? If it has become perfectly rotten he must put down a new floor, but if he can make it good in the sense in which I have spoken of all the other things—the paper, the paint, the whitewashing—he is not bound to put down a new floor. He may satisfy his obligation under the covenant by repairing it" (*g*).

But even a covenant of this tenor will not render the tenant liable to rebuild the entire house after it has fallen down, from causes which do not indicate any culpability on his part (*h*).

25. How far the covenants bind a tenant to restore, renew and improve the premises.—Occasionally leases contain, in addition to the covenant to keep in repair, one which binds the tenant to

---

does not merely require the trustees to keep the premises in that state of repair in which they were at the testator's death, but to put them in such a state of repair, as will satisfy a respectable tenant using them fairly: *Cooke* v. *Cholmondely* (1858) 4 Drew, 326.

(*e*) *Stanley* v. *Towgood* (1836) 3 Bing. U.C. 4, *per* Tindal, C.J., *arguendo*.

(*f*) It is singular that the Court has not attempted to furnish any explanation of the apparent discrepancy between its opinions in this case and an earlier one in which a covenant to keep in "tenantable" repair was involved, and a judgment of Cave, J., was upheld in which he had declared without any qualification that re-papering was not obligatory. See s. 26 (f), post.

(*g*) *Proudfoot* v. *Hart* (1890) 25 Q.B.D. 42, per Lord Esher. This statement qualifies pro tanto the remarks of Cave, J., who in the lower court had laid down without qualification that a lessee under a covenant to keep and leave in "tenantable repair" is bound to patch up parts of the structure, whenever it may be necessary, but not to substitute a new structure in place of a part which has become absolutely worn out and necessary to be replaced.

(*h*) *Manchester, etc. Co.* v. *Carr* (1880) L.R. 5 C.P.D. 507 [covenant was to keep in "good" repair]. See also *Telfer* v. *Fisher* (1910) 15 W.L.R. 400 (Alta.) 3 Alta. L.R. 423.

Annotation.

rebuild in the event of its being necessary (*a*). But it is settled beyond all dispute, by several cases, that a covenant merely to keep and leave in repair cannot, under any circumstances, be given such a construction as to render a tenant liable for damages accruing from a radical defect, the consequences of which can be obviated only by renewing the whole structure or one of its important parts (*b*).

In the first case cited below the facts shewn in an action to recover from the lessee the cost of rebuilding the demised house, which had exhibited signs of weakness during the term, and after the end of the term the house was condemned by the district surveyor as a dangerous structure and pulled down were as follows: The foundation of the house was a timber platform, which rested on boggy soil, below which, at a depth of seventeen feet, was a layer of solid gravel. The house was fully one hundred years old, and the bulging of the walls, which had led to its demolition, was

---

(*a*) A lessee covenanted, within the first two years of the term to put the premises in good repair and at all times during the term to repair as often as need should require, and also within the first fifty years of the term to take down the four demised messuages, as occasion might require, and in the place thereof erect four other good and substantial brick messuages. In an action for a breach in not having taken down the old messuages and erected four others within the fifty years, the defendants pleaded that the occasion did not require that the messuages should be taken down. Upon demurrer, Gibbs, C.J., intimated his opinion that the covenant would be satisfied without taking down the old houses, if within the fifty years the houses should be so repaired as to make them completely and substantially as good as new houses, and stated that, if the plaintiff took issue upon the question whether occasion did arise for the re-construction, he would direct the jury to find for the plaintiff unless the repaired house was as completely and substantially to every purpose as good as a new house. The demurrer was then withdrawn, and the issue pleaded to. *Evelyn* v. *Raddish* (1817) 7 Taunt. 412.

(*b*) *Lister* v. *Lane* [1893] 2 Q.B. 212. The principle enunciated in the text is suggested more especially by the language of Kay, L.J., at p. 218.

The following expressions of judicial opinion may also be cited in its support besides those referred to in the arguments of the Lord Justices.

"If a house falls down by mere old age, the tenant is not bound to put up a new one. If it falls down by the fault of the tenant it is otherwise." *Belcher* v. *Mackintosh* (1839) 8 C. & P. 720, per Alderson, B.

If a tenant "takes an old house, he must not let it tumble down; he must keep it up; but only as an old house. No tenant is bound to leave, for his landlord, a new house; but the house which he took, in a state of fit repair, as such house." *Scales* v. *Lawrence* (1860) 2 F. & F. 289, per Willes, J.

"When a very old building is demised, a covenant to keep and yield up in repair does not mean that it should be restored in an improved state." *Gutteridge* v. *Munyard* (1834) 7 C. & P. 129, per Tindal, C.J.

"When the house can be kept in repair by repairing a piece of a door or anything of that sort, the tenant is bound to do it; but when the whole flooring is rotten, he is not bound to put in a new flooring." *Crauford* v. *Newton* (1887) 36 W.R. 54, per Cave, J.

Wright v. *Lawson* [1903] W.N. 108.

Lurcott v. *Wakely* (1911) 80 L.J. (K.B.) 713.

Miller v. *Burt* (1918) 63 L.J. 117.

Annotation.

caused by the rotting of the timber platform. The house might have been repaired during the term by means of underpinning. Lord Esher quoted as a correct statement of the law the rule formulated in Smith's Landl. & T. (3rd Ed.) p. 302, that "a tenant who enters upon an old house is not bound to leave it in the same state as if it were a new one," and remarked that this rule was derived partly from the summing up of Chief Justice Tindal in a case already referred to (*c*). After quoting from this charge, he proceeded thus: "You have then to look at the condition of the house at the time of the demise, and, amongst other things, the nature of the house—what kind of a house it is. If it is a timber house, the lessee is not bound to repair it by making a brick or stone house. If it is a house built upon wooden piles in soft ground, the lessee is not bound to take them out and to put in concrete piles" (*d*). . . . "If a tenant takes a house which is of such a kind that by its own inherent nature it will in course of time fall into a particular condition, the effects of that result are not within the tenant's covenant to repair. However large the words of the covenant may be, a covenant to repair a house is not a covenant to give a different thing from that which the tenant took when he entered into the covenant. He has to repair that thing which he took; he is not obliged to make a new and different thing, and, moreover, the result of the nature and condition of the house itself, the result of time upon that state of things, is not a breach of the covenant to repair. So here the builder placed a platform of timber on this muddy soil, and built the house upon it. That is the nature of this house. Whatever happens by natural causes to such a house in course of time—the effects of natural causes upon such a house in the course of time are 'results from time and nature which fall upon the landlord,' and they are not a breach of the covenant to repair. They are matters which must be taken into account in considering whether the covenant to repair has been broken, and, when they are the results of time and nature operating on such a house, they are not a breach of the covenant, and the tenant is not bound to do anything with regard to them. That, as it seems to me, is the state of things in this case, and therefore the decision of

(*c*) *Gutteridge* v. *Munyard* (1834) 7 C. & P. 129. See sec. 23, ante.

(*d*) The case cited in support of this principle by the learned judge was *Soward* v. *Leggatt* (1837) 7 C. & P. 613, in which Lord Abinger, C.B., said at (p. 617): "The surveyor who has been called on the part of the plaintiff has given you an estimate; but it is also proved that, when the repairs came to be done, they amounted to considerably more than the estimate, and that is generally the case, because, when the work is actually done, improvements are made for which the tenant is not liable, of which the improved mode of laying the joists in the kitchen is an example, and if the joists have been now laid in a manner which will make them more durable and last longer before new ones are again wanted, that is a thing for which the tenant is not liable on the covenant to repair.

Annotation.

Grantham, J., was quite right. The tenant from time to time did the proper repairs, and now the plaintiffs want him to do something for which he is not liable, and which would be of no avail unless he built a house of an entirely different kind."

Kay, L.J., commenting on the alleged obligation of the tenant to "underpin" the house said: "Here the house was built upon a timber structure laid upon mud, the solid gravel being seventeen feet below the timber structure, and the only way in which the effect of time upon the house could be obviated is, according to the surveyor's evidence, by "underpinning" the house. That was the only way to repair it during the tenancy. "Underpinning," as I understand, means digging down through the mud until you reach the solid gravel, and then building up from that to the brickwork of the house. Would that be repairing, or upholding, or maintaining the house. To my mind, it would not; it would be making an entirely new and different house. It might be just as costly to underpin as to pull the house down and rebuild it. No one says, as I judge from the evidence, that you could repair the house by putting in a new timber foundation. The only way, as the surveyor says, to repair it is by this underpinning. That would not be either repairing, or upholding, or maintaining such a house as this was when the lessee took it, and he is not liable under his covenant for damage which occurred from such a radical defect in the original structure."

Cases in which the tenant binds himself by a covenant to keep in that state of repair described as "tenantable," etc., stand upon a different footing. See last section.

26. Specific rulings as to various kinds of repairs.—In order to exhibit more clearly the effect of the general principles discussed above, when applied to specific groups of facts, the decisions relating to the duty of tenants with respect to the repair of the different parts of the premises, are here classified under convenient headings.

(*a*) *Foundations of houses.*

See the case of *Lister* v. *Lane* cited in the preceding section.

(*b*) *Roofs.*

A sub-lessee of the assignee of a lease of a theatre covenanted that he would perform the covenant in the original lease, and keep his immediate lessor harmless and indemnified from the same covenant, and would well and sufficiently repair, mend, and keep the premises in good and substantial repair. During the term the roof exhibited signs of weakness, and the Government officials declined to renew the license until the roof was put in proper condition. This could only be done by inserting other beams. The sub-lessee having refused to make the necessary alterations, the administratrix of the assignee of the lease made them at the

Annotation.

expense of the estate. The money thus laid out was held not to be recoverable from the sub-lessee, as the covenant did not apply to any alteration or re-construction of the building either in whole or in part (*a*).

When the lessor has covenanted to keep the roof in good condition, and through an obstruction in the downfall pipe, water overflows and damages the lessee's property, the lessor is liable, even though he has had no notice of the obstruction, as the rule as to notice of defects does not apply when the lessor retains control of the premises to which his covenant relates. (*b*)

(*c*) *External repairs.*

A covenant by the lessor to keep in repair the external parts of a house embraces all those which form the enclosure of the premises and beyond which no part of them extends, and is broken by allowing the partition wall between the house and an adjoining one to sink and become ruinous after the latter house had been pulled down (*c*). So a covenant to do external repairs includes the mending of broken windows as "being part of the skin of the house" (*d*).

The tenant who has work done on an outside drain involving reconstruction and improvement cannot recoup himself for his expenses by setting up the landlord's covenant to keep the exterior of the house and buildings in repair (*e*).

(*d*) *Windows.*

Presumably an agreement to keep windows in repair would be construed as embracing skylights (*f*).

(*e*) *Woodwork inside houses.*

For a tenant to allow the boards to decay, or to get broken, or the mantel pieces to get broken, is a breach of the agreement to keep in tenantable repair (*g*).

"If the tenant leaves the floor out of repair when the tenancy ends, and the landlord comes in, the landlord may do the repairs himself and charge the costs as damages against the tenant; but he is only entitled to charge him with the necessary cost of a floor which would satisfy a reasonable man taking the premises. If the landlord puts down a new floor of a different kind, he cannot charge the tenant with the cost of it. He is entitled to charge the cost of

---

(*a*) *Lazar* v. *Williamson* (1886) 7 New So. Wales L.R. 98.

(*b*) *Melles & Co.* v. *Holme* [1918] 2 K.B. 100.

(*c*) *Green* v. *Eales* (1841) 2 Q.B. 225.

(*d*) *Ball* v. *Plummer* (1879) 23 Sol. J. 666, following *Green* v. *Eales*, supra.

(*e*) *Howe* v. *Botwood* (1913) 82 L.J. (K.B.) 569.

(*f*) See *Harris* v. *Kinloch* [1895] W.N. 60, a suit to restrain the obstruction of ancient lights.

(*g*) *Crawford* v. *Newton* (1887) 36 W.R. 54, per Cave, J., in a judgment approved by the Court of Appeal.

Annotation.

doing what the tenant had to do under his covenant; but he is not entitled to charge according to what he has himself in fact done" (*h*).

(*f*) *Plastering.*

For a tenant to allow the plaster on the walls to come off is a breach of an agreement to keep in tenantable repair (*i*).

(*g*) *Painting and whitewashing.*

The nature of the tenant's obligation in regard to painting is determined by the fact that it is partly for decoration and partly for the protection of the woodwork. So far as it merely subserves the purposes of decoration the tenant is not, it would seem, bound to repaint unless there is some express agreement to that effect (*j*). Such an agreement ought always to be inserted, if a landlord wishes to avoid controversy on this point (*k*).

On the other hand, if a tenant, who is under a covenant to keep the inside of the house in tenantable repair, "does not paint as an ordinary tenant would do, and under these circumstances the woodwork becomes destroyed, or the painting which was on was left in such a condition as to require more than ordinary repair and expense in renewing it," that is a defect, and is a want of tenantable repair (*l*). But this principle, that it is a breach of such a covenant to neglect to paint where the result is the decay of the structure underneath, is not deemed to involve the converse

---

(*h*) *Proudfoot* v. *Hart* (1890) 25 Q.B.D. 42, per Lord Esher.

(*i*) *Crawford* v. *Newton* (1887) 36 W.R. 54, per Cave, J., in a judgment approved by the Court of Appeal.

(*j*) See *Crawford* v. *Newton*, and *Proudfoot* v. *Hart*, cited infra. It is not amiss to notice in this connection that the incumbent of an ecclesiastical benefice is bound to maintain the parsonage, and also the chancel, and to keep them in good and substantial repair, restoring and rebuilding when necessary, according to the original form, without addition or modern improvement; but he is not bound to supply anything in the nature of ornament, such as painting (except where necessary to preserve exposed timber from decay), and white-washing and papering. *Wise* v. *Metcalfe* (1829) 10 B. & C. 299, containing an elaborate discussion of the law by Court and counsel.

(*k*) A tenant who covenants to paint a house every seven years cannot be called upon to distemper a wall within the septennial period. *Perry* v. *Chotzner* (1893) 9 T.L.R. 488, per Cave, J.

Under a covenant, "so often as need should require, well and sufficiently to repair, etc., paint, etc., cleanse, etc., and leave in such repair, reasonable wear and tear excepted," if the tenant has painted and papered the premises within the usual period, the extent of his obligation before quitting is merely, in addition to the repair of actual dilapidations, to clean the old paint, etc., and not to repaint, etc. *Scales* v. *Lawrence* (1860) 2 F. & F. 289, per Willes, J.

(*l*) In a 21 year lease there was a covenant to paint in 1909 and 1916; and in March 1916, the lease came to an end on six months' notice, but the covenant must be kept, and if it is not performed, damages follow. *Kirklington* v. *Wood* (1917) 61 S.J. 147.

Crawford v. *Newton* (1887) 36 W.R. 54, per Cave, J., in a judgment approved by the Court of Appeal.

Annotation.

proposition that any painting which prevents decay is a sufficient performance of the covenant under all circumstances. "If," said Lord Esher in a recent case, "the paint is in such a state that the woodwork will decay unless it is repainted, it is obvious that the tenant must repaint. But I think that his obligation goes further than that. A house in Spitalfields is never painted in the same way as one in Grosvenor Square. If the tenant leaves a house in Grosvenor Square with painting only good enough for a house in Spitalfields, he has not discharged his obligation. He must paint it in such a way as would satisfy a reasonable tenant taking a house in Grosvenor Square. As to whitewashing, one knows it is impossible to keep ceilings in the same condition as when they have just been whitewashed. But, if though the ceilings have become blacker, they are still in such a condition that a reasonable man would not say, 'I will not take this house because of the state of the ceilings,' then I think that the tenant is not bound, under his covenant to leave the house in tenantable repair, to whitewash them" (*m*).

Under a covenant that the tenant will "substantially repair, uphold and maintain" the house demised, he is bound to keep up the painting of inner doors, inside shutters, etc. (*n*).

(*h*) *Papering.*

The principle which exempts a tenant from the obligation of renewing parts of the demised premises (sec. 25, ante) involves the consequence that, as a general rule, repapering, if not expressly mentioned a covenant, is not comprised within its terms (*o*).

The following resumé of a tenant's duty by Cave, J., had reference to a covenant in a lease for five years which merely bound the tenant to keep the inside of the house in tenantable repair and contained no express stipulation as to papering. It will not be inferred that such a stipulation gave landlord a right to have the house re-papered. The landlord's rights, it was declared, in this respect are not enlarged by the fact that the tenancy actually continued for seventeen years for the covenant as to repairing cannot be extended, but must mean the same as during the original term. Paper is decorative repair. If a man takes a house which is papered new for him for three years, he must return the house with the paper, not stripped off, or torn off, or anything of that kind, but subject only to the fair wear and

---

(*m*) *Proudfoot* v. *Hart* (1890) 25 Q.B.D. 42, qualifying the broad doctrine laid down by Cave, J., in the Court below, that it is not necessary to renew the paint or the whitewash, unless this is required for the preservation of the fabrics themselves.

(*n*) *Monk* v. *Noyes* (1824) 1 Car. & P. 265, per Abbott, C.J.

(*o*) *Scales* v. *Lawrence* (1860) 2 F. & F. 289, per Willes, J. [the phrase used in this covenant was "with all needful reparations and cleansings"].

Annotation.

tear of the paper. But where he takes a house for a term of years, and there is nothing to do but to keep the inside in tenantable repair, and he remains there so long that the paper, in the natural course of things, becomes useless for a future tenant he is not bound to put on a new paper, although he may do it, if he likes, to please himself. In the absence of a covenant that the tenant shall paper and paint, he may, if he thinks fit, strip the paper off the walls, provided his term is not so short that it amounts to an absolute destruction of the paper (*p*). This judgment was approved by the Court of Appeal, where, however, the sole point directly decided was that the tenant was not bound to do the decorative painting and papering which were only required for the purpose of ornamentation, and that he was merely required to paint and paper to such an extent as might be necessary to prevent the house from going to decay.

Moreover, a few years later, the Court of Appeal seems to have modified the views which it presumably held in approving, as a whole, of the judgment of Cave, J. In a case which has already been frequently referred to, that judge again laid it down in unqualified language that a covenant to keep and leave in "tenantable repair" does not bind the lessee to repaper walls, unless it is necessary to do this for the preservation of the walls themselves (*q*). Commenting on this ruling, Lord Esher said: "I agree that he is not bound to repaper simply because the old paper has become worn out, but I do not agree with the view that under a covenant to keep a house in tenantable repair the tenant can never be required to put up new paper. Take a house in Grosvenor Square. If, when the tenancy ends, the paper on the walls is merely in a worse condition than when the tenant went in, I think the mere fact of its being in a worse condition does not impose upon the tenant any obligation to repaper under the covenant, if it is in such a condition that a reasonably-minded tenant of the class who take houses in Grosvenor Square would not think the house unfit for his occupation. But suppose that the damp has caused the paper to peel off the walls, and it is lying upon the floor, so that such a tenant would think it a disgrace, I should say then that the tenant was bound under his covenant to leave the premises in tenantable repair, to put up new paper. He need not put up paper of a similar kind—which I take to mean of equal value—to the paper which was on the walls when his tenancy began. He need not put up a paper of a richer character than would satisfy a reasonable man within the definition."

(*p*) *Crawford* v. *Newton* (1887) 36 W. R. 54.

(*q*) *Proudfoot* v. *Hart* (1890) 25 Q.B.D. 42.

Annotation.

(*i*) *Drains.*

A covenant to repair and keep in repair all drains, etc., does not create an obligation to make a new drain (*r*).

(*j*) *Ornamental lakes, etc.*

The obligation to keep ornamental bodies of water in proper condition has never, it would seem, been considered by the courts in connection with the liability of tenants of the class with which this article deals, but its nature is to some extent indicated by two cases in the books.

In one it was held that, under an agreement to keep the premises in repair the landlord is not bound to cleanse an ornamental water, so as to prevent its becoming a nuisance (*s*). The obligation of the covenantor was said to be merely to keep the water from bursting its banks, or to keep the sluices in working order. In another case Chitty, J., was asked to say that a direction in a will that a tenant for life should keep the "mansion-house, outbuildings, parks, grounds . . . and appurtenances" in good and substantial repair, bound a life tenant to scour and cleanse an ornamental lake in the park (*t*). The learned judge refused to put this construction upon the words, his conclusion being, it would seem, based not upon any general principle which would exclude the existence of the duty contended for, but upon the evidence in the case, which shewed that the water had been in its natural, unimproved condition when the testator died, and had been converted into an ornamental lake by the life tenant. The doctrine thus applied is analogous to that laid down in *Cornish* v. *Cleife* (*u*), (see sec. 16, ante), with regard to buildings afterwards erected on the demised land, and is also sustained by the cases which turn upon the principle that the extent of a tenant's obligation is to be estimated with reference to the condition of the premises at the beginning of the term; see sec. 23, ante.

(*k*) *Fences.*

Under a covenant to keep and maintain an orchard in fair and reasonable condition, a tenant is not necessarily bound to fence it,

---

(*r*) *Lyon* v. *Greenhow* (1892) 8 T.L.R. 457, per Smith, J., who held that the landlord was not entitled to recover from the tenant the money expended in making a new drain in compliance with the requirements of the local Sanitary Authority.
Howe v. *Bolwood* (1913) 82 L.J. (K.B.) 569.
Henman v. *Berliner* (1918) 87 L.J. (K.B.) 984.

(*s*) *Bird* v. *Elwes* (1868) L.R. 3 Exch. 225 [here the tenant had done the cleansing and sought indemnification from the landlord].

(*t*) *Dashwood* v. *Magniac* (1891) 64 L.T. 99.

(*u*) (1864) 3 H. & C. 446.

Annotation.

if it was not fenced at the time of the demise. But his contract is not fulfilled unless, either by fencing or some other expedient, he protects it from the intrusion of animals who would injure the trees (*v*).

For cases as to the removal of fences, see sec. 20, ante.

V. Remedies of the landlord for the enforcement of covenants to repair.

27. Right to enter and make repairs neglected by the lessee.—Where a tenant covenants to repair during the term, and the action is brought during the term, the lessor, if he has reserved to himself a sufficient power of entry and has done the repairs, may of course recover the cost (*a*). But unless there is an express stipulation to that effect, the landlord has no right to enter for the purpose of making repairs, unless he is authorized to do so by the tenant (*b*). The reservation of a right of re-entry for breach of the covenants will not prevent an unauthorized entry to make repairs from being a trespass. Under such circumstances he will be enjoined from proceeding with the work, even though he has obtained leave from the sub-lessees to enter, and he himself holds the premises from a superior landlord, who is entitled to forfeit the term for non-repair of the premises (*c*).

The cases as to the rights of a mesne landlord who, without being actually restrained by his immediate lessee, has gone on and made the repairs necessary to save a forfeiture by the superior landlord, are conflicting. According to a somewhat recent decision the sublessee cannot be held liable for the expenses thus incurred, the proper course of the mesne landlord being to avail himself of his right of forfeiture for a breach of the covenants (*d*). But about fifty years earlier the Court of King's Bench allowed the mesne landlord to recover under similar circumstances (*e*). Both Holroyd, J.,

---

(*v*) *Parker* v. *Sell* (1890) 16 Vict. L.R. 271.

(*a*) Wills, J., in *Joyner* v. *Weeks* [1891] 2 Q.B. 31, p. 35.

Telfer v. *Fisher* 3 Alta. L.R. 423 [where there is no provision in the lease as to notice to be given to the tenant to repair the landlord is not bound to give the tenant notice before doing the repairs himself and suing to recover the cost].

(*b*) *Barker* v. *Barker* (1828) 3 C. & P. 557; *Bracebridge* v. *Buckley* (1816) 2 Price Exch. 200 (p. 218); *Neale* v. *Wyllie* (1824) 3 B. & C. 533, 5 D. & R. 442; *Worcester School Trustees* v. *Rowlands* (1841) 9 C. & P. 739; *Colley* v. *Streeton* (1823) 2 B. & C. 273, per Abbott, C.J.

(*c*) *Stocker* v. *Planet Building Soc.* (1879) 27 W.R. 877, affirmed S.C. p. 793.

(*d*) *Williams* v. *Williams* (1874) L.R. 9 C.P. 659.

(*e*) *Colley* v. *Streeton* (1823) 2 B. & C. 273. Holroyd, J., laid down the broad rule that a lessee who holds under a lease which gives a right of re-entry if the premises are not kept in tenantable repair, and subleases on the same terms, has a right to enter for the purpose of making repairs when, in consequence of the refusal of the sublessee to repair, there is a danger that the lease superior may be forfeited by the landlord. *Telfer* v. *Fisher* 3 Alta. L.R. 423.

Holman v. *Knox* (1912) 3 D.L.R. 207.

Hebert v. *Clouatre* (1912) 6 D.L.R. 411.

Annotation.

and Abbott, C.J., declared that it was in any case immaterial as regards the right of the lessee to recover the amount spent in saving the term, whether the entry was a trespass or not. If the entry was wrongful, he merely rendered himself liable to an action.

28. Right to re-enter for breach of the covenant.—The landlord is, of course, restricted to an action for damages, where the covenants as to repair are broken by a tenant who holds under a lease in which there is no express proviso for re-entry upon such breach. But formal leases are rarely, if ever, drawn without such a proviso, and, where it is inserted, the landlord may, (at common law), re-enter or maintain ejectment without giving the tenant notice to repair (*a*). In England this rule is now changed by statute. See sec. 43, post.

The forfeiture of the term may be effected not merely by a notification conveyed to the tenant, but by any act which shews unmistakably that the landlord intends to resume control of the premises. There is a sufficient entry to put an end to the lease when the landlord, finding the premises in a dilapidated state, enters into an agreement with an underlessee in possession to become his tenant (*b*).

A re-entry by the superior landlord for the lessee's breach of the covenants to repair and pay rent is not a breach of the lessee's covenant with an underlessee that the latter shall "peaceably enjoy the demised premises without any *interruption from or by him*, his executors, etc., or *any person claiming by, through, or under him*" (*c*).

29. Action for damages.—(*a*) *On general covenants to repair.*—In *Main's Case* (*a*) it was laid down that an action on the covenant to keep in repair could not be brought before the end of the term, unless the dilapidations were of such a nature that it was a physical impossibility to remedy them during the residue of the term—as where trees have been cut down. But this doctrine was never universally held, and has long been abandoned (*b*). In all the modern cases it has been taken for granted that the landlord may

---

(*a*) *Baylis* v. *Le Gros* (1858) 4 C.B.N.S. 537. The same principle of course applies where the tenant entered under an agreement for a lease which, when executed, is to contain such a proviso. See sec. 36 (b) post.

(*b*) *Baylis* v. *Le Gros* (1858) 4 C.B.N.S. 537.

(*c*) *Kelly* v. *Rogers* [1892] 1 Q.B. 910, following *Stanley* v. *Hayes*, 3 Q.B. 105, and explaining the remarks of Bowen, L.J., in *Harrison* v. *Muncaster* [1891] 2 Q.B. 680. See *Clare* v. *Dobson* (1911) 80 L.J. (K.B.) 158.

(*a*) 5 Coke 21, *a*, 1st resolution; *Sheph. Touch.*, 173.

(*b*) See *Luxmore* v. *Robson* (1818) 1 B. & Ald. 584 [covenant here was to "keep in proper repair the buildings, etc., during the continuance of the term"] disapproving of a passage to the contrary in F.N.B. 145 R. and 12 (13) E. 3, tit. Covenant, 2, which had also been denied by Doderidge, J., to be law. See 2 Roll. Rep. 347.

Annotation.

assert his rights while the term is still running (*c*). It should be observed, however, that something more than the mere fact of the premises having fallen into disrepair is necessary to render the tenant liable as for a breach of the covenant. There is deemed to be an actionable breach only when they are left in that condition for an unreasonable time (*d*). Especially is this principle applicable where the occurrence which creates the abnormal conditions which the lessee is bound to remedy is one which is due to causes entirely beyond his control.

A covenant to repair houses or to sustain houses on sea banks "is not broken simply because the houses are burnt, or thrown down by tempest, or the banks be overthrown by a sudden flood, or the like accident; but if the covenantor doth not repair and make up these things again in time convenient, the covenant will be broken" (*e*).

When the period which the tenant is allowed for making the necessary repairs has once begun to run, the landlord's acceptance of rent does not operate so as to extend that period for repairing, and so prevent the landlord from exercising his right of re-entry until a reasonable time has elapsed after the receipt of the rent (*f*).

If the covenant is to make repairs on or before a certain day, the fact that the landlord has made no requisition for the performance of the covenant is immaterial, the general rule being that no demand is necessary where there is a covenant to do an act within a certain time, and a neglect of performance is tantamount to a refusal in law (*g*).

(*c*) This rule is so axiomatic that very few late decisions can be found in which the court has formally stated it. See, however, *Perry* v. *Bank*, etc. (1866) 16 U.C.C.P. 404; *Green* v. *Southcott*, Newfoundland Rep. 1874-1884, p. 176.

In the case of *Telfer* v. *Fisher* (1910) 15 W.L.R. 400, 3 Alta. L.R. 423, following *Manchester Bonded Warehouse Co.* v. *Carr* (1880) 5 C.P.D. 510, it was held that where the tenant's covenant to repair contains no provision as to notice, the landlord is under no obligation to give notice before repairing premises, and proceeding to collect the cost.

(*d*) *Job* v. *Banister* (1857) 26 L.J. Ch. 125; *Chauntler* v. *Robinson* (1849) 4 Exch. 163 [covenant binding the tenant to repair "when and so often as need or occasion shall require during all the term"]. In *Baylis* v. *Le Gros* (1858) 4 C.B. N.S. 537, it seems to have been conceded by the court, during the argument of counsel, (p. 552) that the want of repair must have lasted a reasonable time before the right of action is complete for the breach of a general covenant to repair. It was remarked by Cockburn, C.J., that, at all events, an allegation that the premises were in a state of dilapidation justified the inference that they had been out of repair a considerable time.

These authorities indicate that the court used too strong an expression in *Perry* v. *Bank* (1886) 17 U.C.C.P. 404, when it said that *the moment the necessity for repairs* exists, and the tenant fails to make them, the covenant is broken.

(*e*) *Sheph. Touch.* 173.

(*f*) *Chauntler* v. *Robinson* (1849) 4 Exch. 163.

(*g*) *Bracebridge* v. *Buckley* (1816) 2 Price 200.

Annotation.

(*b*) *On covenants to repair after notice.*—So far as regards proceedings upon these covenants themselves, they manifestly imply that the landlord is precluded from taking steps to enforce his rights until the period provided for has elapsed. No damages, therefore, are recoverable where the action for a breach is brought before the specified period has expired (*h*). The time when that period begins is fixed by the service of what the law regards as a sufficient notice on the party whom it is intended to hold responsible for the repairs. See sec. 7 (B), ante. In cases where the running of the period has been suspended, the circumstances attending the suspension will determine when the lessor has a right to begin proceedings.

On the one hand, if a lessee upon whom notice to repair has been served makes a proposition for the purchase of the term, and negotiations are thereupon commenced which lead the lessee to suppose that the strict legal rights of the lessor will not be enforced, and thus induce him to postpone making the repairs, the running of the period of notice is suspended until the negotiations have been definitely broken off, unless the lessor expressly stipulates that they are to be without prejudice to the notice. After the negotiations are closed, and the notice again becomes operative, the lessee still has the whole of the period specified in the notice within which to complete the repairs, that being in the eye of a court of equity a reasonable period according to the understanding of the parties themselves, whether it is more or less than actually required for the purpose (*i*).

On the other hand, where notice to repair within a specified period has been served, and an action of ejectment brought before that period has elapsed, is discontinued by consent of the landlord upon the tenants undertaking to put the premises in repair on or before a specified day subsequent to the expiration of the period allowed by the notice, the order of court which embodies this arrangement does not supersede the notice, but merely enlarges and suspends the right of re-entry, and a new action may be instituted after the date fixed by the order without the service of any fresh notice (*j*).

(*c*) *Statute of Limitations as a bar to the action.*—The rule that an action for damages for a breach of the covenant to keep in repair is not barred by the Statute of Limitations as long as the term is still running, has been noticed in a former section (12).

(*d*) *Measure of damages.*—See x., xi., xii. post.

(*h*) *Williams* v. *Williams* (1874) L.R. 9 C.P. 659. See *Clare* v. *Dobson* (1911) 80 L.J. (K.B.) 158.

(*i*) *Hughes* v. *Metropolitan R. Co.*, (1877) 2 App. Cas. 439, 36 L.T. 932.

(*j*) *Doe* v. *Brindley* (1832) 4 B. & Ad. 84.

Annotation.

30. To what extent equity will aid the enforcement of the landlord's rights.—In one of his judgments, Lord Hardwicke remarked, arguendo, that specific performance of a covenant to repair would not be decreed, such a case being different from one where there was a covenant to rebuild (*a*). This doctrine is applied or assumed to be correct in several later cases (*b*). But even at the period to which those cases belong, the courts did not hesitate to issue injunctions which were avowedly intended to compel defendants to perform contracts as to repairs (*c*). And possibly the inference from more recent decisions is that the original doctrine is virtually abrogated by the present practice of issuing mandatory injunctions, wherever a restraining order would be merely a circuitous expedient for attaining the same result (*d*).

It is to be observed, moreover, that the jurisdiction of a court of equity to enjoin waste will sometimes be exercised under such circumstances, that the result is pro tanto an enforcement of the covenant. Thus a covenant to repair, and at the end of the term surrender buildings in good condition, does not preclude the granting of an injunction against pulling them down and carrying away the materials, just before the end of the term (*e*).

(*a*) *City of London* v. *Nash* (1747) 3 Atk. 512.

(*b*) *Rayner* v. *Stone* (1761) 2 Eden 128; *Lucas* v. *Comerford* (1790) 3 Br. C.C. 166, 1 Ves. 235; *Pym* v. *Blackburn* (1796) 3 Ves. 34; *Hill* v. *Barclay* (1809) 16 Ves. 402; *Doherty* v. *Allman* (1876) Ir. Rep. 10 Eq. 460.

(*c*) Lord Eldon, in a case frequently referred to, refused to direct a lessor to repair the stop-gates, etc., of a canal, the water of which the lessee was entitled to use, but issued an injunction which would "create the necessity" of doing the repairs required, the order pronounced being, substantially, that the lessor should be restrained from impeding the lessee's employment of the demised premises by keeping the said stop-gates out of good repair; *Lane* v. *Newdigate* (1804) 10 Ves. 192.

(*d*) A landlord has been ordered to restore a staircase to the use of which the lessee was entitled; *Allport* v. *Securities Co.* (1895) 72 L.T. 533, 64 L.J. Ch. 491. In a case where an injunction was asked for by the owner of one plot of land to restrain the lessee of an adjoining plot, occupied under the Inclosure Act of 41 Geo. 3, ch. 109, from permitting to remain broken down or removed a boundary fence which such lessee was, by the award the Commissioners who had allotted the two adjoining plots, bound to keep in repair, North, J., on the ground that the defendant was a woman in a humble position in life, thought it best to avoid the danger of misapprehension on her part, and made a positive order that she should do the repairs, instead of issuing the injunction in the negative form applied for; *Bidwell* v. *Holden* (1890) 63 L.T. 104. Compare the cases in which defendants have been specifically ordered to pull down buildings which they had no right to erect; *Rankin* v. *Huskisson*, 4 Sim. 13; *Morris* v. *Grant*, 24 W.R. 55; *Jackson* v. *Normandy Brick Co.* (1899) 80 L.T. 482.

(*e*) *Mayor &c.* v. *Hedger* (1810) 18 Ves. 355. In *Sunderland* v. *Newton* (1830) 3 Sim. 450, the court enjoined the tenant from removing certain fixtures until his right to do had been determined in an action at law. On the other hand, in *Doherty* v. *Allen* (1876) Ir. Rep. 10 Eq. 460, the lease was one of a store for nine hundred and ninety-nine years, and contained the ordinary covenants as to repair. The court refused to enjoin the lessee from converting the store into dwelling houses and left the lessor to his legal remedies. It was held that the circumstances were not such as to justify granting relief on the ground of waste.

Annotation.

VI. What persons may sue on the covenants.

31. Reversioner himself.—The right of the reversioner himself to sue on the covenants calls for no particular comment, except in so far as the situation may have been complicated by contracts which the various parties interested in the premises have entered into after the lease was executed (*a*). One such case arises where there is a partial merger of a lease resulting from one of several co-lessors having assigned his reversion to one of the lessees. This circumstance, it has been held, does not deprive the other co-lessors of their remedy for a breach, but merely affects the amount of damages recoverable by them (*b*). Another special case is presented where an underlessee of part of the demised premises purchases the reversionary interest of the superior landlord. Here, if the mesne landlord fails to keep in repair the part of the premises not embraced by the underlease, the underlessee may maintain ejectment as to that part, and is not obliged to bring the action as to the whole of the premises (*c*).

Whether one of several joint lessors can or cannot sue on a covenant with all to repair, it is at all events certain that they may all join in a suit (*d*).

Where tenants in common give a joint lease to a tenant who covenants with their respective heirs and assigns to repair, all the tenants of the reversion at the time of the breach of this covenant must join as the plaintiffs in an action upon it (*e*). Tenants in common may maintain an action for breach of the covenant to repair against a lessee of a part of their property who, subsequently to the demise, but before the alleged breach, became a co-tenant of the plaintiffs in the same piece of property (*f*).

32. Assignee of the reversion.—At common law the covenant to repair did not run with the reversion; but this rule was changed by the statute, 32 Hen. VIII., ch. 34 (*a*), the provisions of which,

---

(*a*) It may be noted in passing that damages recovered by the trustees of a life tenant, during his lifetime, for breach of a covenant to repair contained in a lease granted by the creator of the trust, belong to the life tenant and fall into his personal estate after his decease. *Noble* v. *Cass* (1828) 2 Sim. 343. Presumably the same doctrine would be applied in the case of tenancy under a lease.

(*b*) *Baddeley* v. *Vigurs* (1854) 4 E. & E. 71.

(*c*) *Doe* v. *Morris* (1842) 11 L.J. (Ex.) 313.

(*d*) *Wakefield* v. *Brown* (1846) 9 Q.B. 209.

(*e*) *Thompson* v. *Hakewell* (1865) 19 C.B.N.S. 713, 13 L.T. 989.

(*f*) *Gates* v. *Cole* (1821) 2 Brod. & B. 660, 23 R.R. 524.

(*a*) Bacon's Abr. Cov. (E. 5) citing Cro. Eliz. 617; *Brett* v. *Cumberland* (1619) Cro. Jac. 521; *Bennett* v. *Herring* (1857) 3 C.B.N.S. 370; *Martyn* v. *Williams* (1857) 1 H. & N. 817, citing 1 Saund. 240, a, note (a); 1 Sm. L.C. 42, and holding that the interest created by a license for a term of years to dig, work, and search for china clay upon the licensor's estate, and dispose of the same to the licensee's own use is an incorporeal hereditament; that a conveyance of the land during the existence of the term in such here-

Annotation.

so far as they are material in the present connection, are that the grantees of any reversion "shall have the same remedies, by action only, for not performing of . . . covenants contained . . . in their leases, demises, or grants, against the lessees, as the lessors or grantors themselves might have had at any time."

From the fact that the statute was made applicable only to demises by deed, an assignee's rights of action under it are in some respects limited. In the first place, wherever the older forms of procedure are still in use, the assignee is unable to sue in assumpsit on the unsealed contract of a tenant to repair entered into with the assignor (*b*). In the second place, where the demise is not by deed, the right to sue for a breach of an agreement to repair is not transferred to the assignee of the reversion, by force of the statute, and the lessor is, therefore, not disabled from suing for a breach of an agreement to repair after he has parted with his interest in the reversion (*c*).

The mere fact that the premises were in a ruinous condition, and that the assignor had therefore a complete cause of action before the reversion was assigned, is obviously not sufficient to preclude the assignee from suing for the tenant's failure to repair after a notice duly given by the assignee, in accordance with the ordinary stipulation in that regard (sec. 7, B. ante), after the reversion was transferred to him. Here the action is not founded upon the time when the premises became ruinous, but upon the failure to repair at the time appointed (*d*). And probably the assignee has a right of action on the general covenant also upon the principle that the omission to repair constitutes a continuing breach, and that the cause of action still exists after as before the reversion (*e*). It is true that in an old case it was laid down that the grantee of the reversion should not recover damages but from the time of the grant, and not for any time before (*f*). But there the covenant to repair was apparently not treated as one which creates a continuous obligation. If this was the standpoint of the

---

ditament is an assignment of the reversion within the statute; that a covenant in the indenture to deliver up the works in repair would run with the interest of the owner of the fee expectant upon the determination of the license; and that an alienee of the land who owns it at that time may sue for a breach.

(*b*) *Standen* v. *Chrismas* (1847) 10 Q.B. 135.

(*c*) *Bickford* v. *Parson* (1848) 5 C.B. 92, 17 L.J. (C.P.) 192, holding that a plea that, before the breach alleged, the plaintiff had assigned his reversion is no answer to a declaration, stating that the defendant had promised during his tenancy to keep the premises in repair, and had failed to do so. [Quære, does the same principle apply to the case of an heir?]

(*d*) Bacon's Abr. Cov. (E. 5); *Maschall's Case* (1587) 1 Leon. 61, S.C. Moore 242.

(*e*) *Thistle* v. *Union* F. & R. Co. (1878) 29 U C.C.P. 76.

(*f*) Anon (1573) 3 Lem. 51.

Annotation.

Court, the ruling was based on a hypothesis which is inconsistent with the current of modern authority. See sec. 12, ante.

A different principle prevails where the tenant is in default at the end of the term as to the performance of a covenant to keep and leave in repair. Here, if he holds over without a fresh lease and the reversion is afterwards sold, the alienee cannot sue for the breach of the covenant. Since the lessee remains liable to the original lessor on the breach of covenant, it is regarded as unjust not to confine the remedy to that lessor. The presumption is that he has either sold the premises for a lower price on account of the breach of the covenant, or has received the full price on the supposition that the damage is to be made good. In the former case he may sue on his own account; in the latter as trustee for his vendee (*g*).

The right of an assignee of the reversion to sue for a breach of the general covenant to repair which occurred during the period of his ownership, still survives after his estate is determined when the action is brought (*h*).

The assignee of a part only of the reversion of demised premises may maintain an action for a breach of a covenant to repair contained in the original lease, provided the breach relates to that part of the premises of which the reversion has been assigned to the plaintiff (*i*), and the breach occurred after the reversion was granted (*j*).

In all cases where the assignee of the reversion may maintain ejectment for breach of a covenant to repair, he may institute proceedings without giving the tenant notice of the assignment (*k*).

The English Judicature Act of 1873, sec. 25, sub-sec. 5, has not changed the rule that the mortgagee, and not the mortgagor in possession, is the party entitled to take advantage of a breach of the covenants in a lease of the property (*l*).

33. Heir of the reversioner.—That the lessor's heir may sue for a breach of the covenants committed after his ancestor's death to

---

(*g*) *Johnson* v. *St. Peter* (1836) 4 A. & E. 520.

Where the tenant covenanted to repair and held over after the expiry of the lease by means of a parol agreement; the assignee of the reversion could not recover for breaches of the covenant as the lease in question was not in writing. *Blane* v. *Francis* (1917) 86 L.J. (K.B.) 364.

(*h*) Bacon's Abr. Cov. (D), (E. 5), citing Roll. Rep. 80, Owen 152, 1 Bulst. 281, Cro. Eliz. 617.

(*i*) *Twynam* v. *Pickard* (1818) 2 B. & Ald. 105, distinguishing between the application of the statute to covenants and to conditions which are in their nature entire, and therefore necessarily confined to the assignees of the reversion of the whole of the premises.

(*j*) Sheph. Touch. p. 176.

(*k*) *Scatlock* v. *Harston* (1875) 1 C.P.D. 106, distinguishing the cases where it is sought to forfeit the term for non-payment of rent.

(*l*) *Matthews* v. *Usher* [1900] 2 Q.B. 535.

Annotation.

repair follows directly from the doctrine that the benefit of these covenants runs with the land under the statute referred in the preceding section (*a*).

This doctrine prevails, although the lessee has covenanted only with the lessor, his executors and administrators. In such a case the inference from the naming of the executors is considered to be that the covenant was intended to continue after the lessor's death (*b*). Nor does the heir lose his right of action because the premises were already out of repair in the lifetime of the ancestor. "If the lessee suffers them to continue out of repair in the time of the heir, that is a damage to the heir, and he shall have an action" (*c*).

34. Personal representative of lessor.—That an executor of the lessor is the proper party to sue for a breach of the covenants to repair, committed during the lifetime of the lessor, follows from the nature of his office (*d*). Such an action may be maintained by him without an averment of special damages to the estate (*e*).

35. Husband of a woman for whom the demised premises are held in trust.—A husband who has joined his wife in executing a lease of premises, devised to trustees for her separate use, cannot maintain an action for a breach of the covenant to repair after her death. But in such an action the lessee cannot plead in bar that the lessor had only an equitable estate in the premises, for that is tantamount to a plea that no estate or interest passed by the indenture of lease (*f*).

VII. Who are bound by the covenants.

36. Lessees and persons treated as lessees.—(*a*) *Generally*—Far the larger number of the cases with which this article deals have to do with the liability incurred by persons who obtain possession of and continue to occupy certain premises by virtue of a formal lease which defines his rights and fixes the duration of his tenancy. The responsibility for a breach of any stipulation as to repairs which is contained in the lease is a necessary result of its execution, and the legal consequences of the breach, if established, can be escaped only on one of the grounds stated in ix., post. The situation created by an agreement of this sort, therefore, requires no special comment in the present connection.

(*a*) See Com. Dig. tit. Covenant (B. 3); Woodf. Landl. & T. 303.

(*b*) Bacon's Abr. Cov. (E. 2), citing *Lougher* v. *Williams* (1674) 2 Lev. 92.

(*c*) *Vivian* v. *Champion* (1705) 2 Ld. Raym. 1125, per Lord Holt.

(*d*) *Wyatt* v. *Cole* (1877) 36 L.T. 613; *Brett* v. *Cumberland* (1619) Cro. Jac. 521.

(*e*) *Ricketts* v. *Weaver* (1844) 12 M. & W. 718, 13 L.J. Ex. 195, holding that the heir is not the proper party plaintiff.

(*f*) *Blake* v. *Foster* (1800) 5 R.R. 419, 8 T.R. 487.

Annotation.

But there are also cases in which, although the occupation of the premises is not directly referable to a subsisting lease, the lease may nevertheless be treated as the criterion of the liability which the occupant incurs in respect to repairs. Such cases relate o persons who belong to one or other of the following classes:

(*b*) *Persons entering into possession under an agreement for a lease.*—At law a person who occupies premises under a valid agreement for a lease, is regarded as having taken possession subject to an implied contract to perform the covenants respecting repairs which the contemplated lease is to contain (*a*). These covenants are also binding upon one who occupies premises after signing a written agreement which is not valid as a lease, for the reason that some formal requirement was not duly complied with. But in this instance his liability seems to be referred not so much to the theory of an implied contract as that of his voluntary renunciation of a right and acceptance of certain benefits which carry with them corresponding burdens. Thus the language used by the court in one case involving the effect of a failure to satisfy the formalities prescribed by the Statute of Frauds and the Stamp Acts, was that if the intending lessee chooses, after signing the informal agreement, to waive a lease, and rely on being let into possession, he is bound by a stipulation in the agreement providing that he is to keep the premises in repair during the whole time they shall be in his occupation (*b*).

According to the last cited case, the situation which resulted from the signing of the informal agreement by the defendant, and his entry upon and occupation of the premises, was held to be this that he did not legally agree for a term of three years, but that in point of law he was tenant at will for the first year, subject to the terms of the agreement, and afterwards tenant from year to year, still subject to that agreement which bound him to keep the premises in good repair as long as he should occupy (see opinion of Patteson, J., p. 56). The change in the character of the tenancy

---

(*a*) *Thomson* v. *Aarey* (1840) 12 A. & E. 475; *Pistor* v. *Cator* (1842) 9 M. & W. 315 [here the decision is limited to the case of a person occupying during the whole of the term specified in the agreement, but the other decisions bearing on the subject indicate that this circumstance could not have been referred to as being indicative of the limits of the rule]; *Ponsford* v. *Abbott* (1884) 1 Cab. & E. 225, per Lopes, J.

(*b*) *Richardson* v. *Gifford* (1834) 1 A. & E. 52. There the court refused to hold that there was error in admitting evidence of a document by which the defendant engaged to take the premises for a term of three years, and to keep them in good repair during the whole of the time they were in his occupation. The contention of the defendant's counsel was that the document was inadmissible as a lease, because not properly stamped, and that it could not operate as an agreement for a term of more than three years (the period for which the premises had actually been occupied), because it was not signed by both parties, as required by 29 Car. 2, ch. 3, secs. 1, 2.

Annotation.

after the first year, under the circumstances mentioned, seems to be a consequence deduced from the entire invalidity of the agreement. In cases where this element has not been present, the tenancy is, in common law courts, regarded during its entire course as being one from year to year (*b*). The tenant, under such circumstances, is presumed to hold subject to the terms of a lease embracing the stipulations contemplated by the agreement therefor, so far as those terms may be applicable to a tenancy from year to year (*c*). In one case, however, turning largely on the words of the agreement for the lease, the theory of a tenancy from year to year was wholly repudiated (*d*).

(*b*) See *Walsh* v. *Lonsdale* (1882) 21 Ch.D. 9; *Swain* v. *Ayres* (1888) 21 Q.B.D. 289.

(*c*) *Bennett* v. *Ireland* (1858) E.B. & E. 326, and the cases cited in the last note. In an Irish nisi prius case it was ruled by Brady, C.B., that a person entering under a *verbal* agreement for a lease of a term of more than three years becomes a tenant from year to year only, but is bound by the covenant to repair, as that term is understood in relation to that species of covenant. *Fisher* v. *Maguire* (1840) Arm. Mac. & Og. 51. Such a doctrine, if literally construed, is tantamount to denying to the covenants any binding force, and seems to be inconsistent with the decisions already noted as to the position of a tenant under analogous circumstances. But the precise meaning of the learned judge in the case cited is not entirely clear. Possibly he merely intends to lay down that the incidents of the tenancy are, as a whole, those of one from year to year, but that the covenants which the parties had in mind are the measure of his obligation as to repairs. This is, at all events, what the writer conceives to be, both on principle and authority, the true doctrine on the subject.

(*d*) *Hayne* v. *Cummings* (1864) 16 C.B.N.S. 421. There a landowner entered into an agreement, not under seal, to lease premises to another party the agreement being expressed to be made "in consideration of the rents and covenants to be reserved and contained in the lease agreed to be granted, and the lease to be granted upon the second party's completing certain repairs, and to contain all the usual and proper covenants, and especially a proviso for the re-entry for the non-payment of rent or non-performance of the covenants. It was further agreed that, until the lease should be granted, the landowner, his executors, etc., should have the same powers and remedies for enforcing performance of the covenants as fully as if the lease had actually been granted." Then followed a proviso that, if the default should be made by the second party in the observance of "the *covenants and conditions* on his part *herein* contained," it should be lawful for the landlord to enter. The second party was let into the premises, but the repairs were not done by the time agreed on. In an action of agreement it was contended in his behalf that the clause of re-entry applied only to a breach of any of the covenants to be contained in the contemplated lease, and that the tenant, having entered and paid rent, became a tenant from year to year upon the terms of the agreement, so far as they were applicable to that description of tenancy and consequently was entitled to six months' notice to quit. This contention did not prevail, the judges being of opinion that the intention of the parties would be effectually carried out by construing the words "covenants and conditions" as referring to the stipulations in the agreement itself, though it was not under seal. Otherwise as the covenants to be contained for in the lease had been provided for in another part of the agreement, to affirm that the words could not apply to those stipulations would be tantamount to affirming that they could not have any sense at all.

Annotation.

Wherever the executory agreement for the lease is enforceable, a court of equity arrives at the same result as a court of law, so far as the tenant's liability on the covenants is concerned, by applying the familiar principle that, in equity, such an agreement is to be treated as one already executed. Under the English Judicature Act, and those modeled upon it, this is the rationale of the tenant's position in every court, and he is regarded for all purposes as holding on the terms of the agreement and not merely from year to year (*e*). If the agreement is not one which is immediately enforceable, as where the lease is to be executed after certain conditions have been complied with, the situation is not affected by that Act, and legal principles being still controlling, the intending lessee, if he goes into possession before the stipulated conditions have been performed, is regarded as a tenant from year to year on the terms of a lease embracing the covenants as to repair which were to be inserted in the lease (*f*).

(*c*) *Persons continuing in possession under a lease which the lessor had no authority to grant.*—A tenant who holds premises and continues to pay rent under a lease which is void, as not having been made pursuant to a power in a will, is deemed to hold upon the terms of the lease, and therefore to be bound by any covenant to repair which may be contained therein, in the same way as a tenant who holds over upon the expiration of a valid lease (*g*). See below. A similar principle is controlling where a tenant for lives executes a lease for a term longer than those lives can possibly last. Here, whether the lessee after taking possession of the premises, is to be deemed an equitable assignee, (as the Court preferred to hold), or a tenant from year to year, he is bound by any covenant to repair the original lease contains (*h*).

(*d*) *Cestui que trust continuing an occupation begun under a lease taken by his trustee.*—Although neither the mere occupation by a female cestui que trust of premises leased for her by her trust nor even such occupation coupled with the payment of rent, will render her liable in equity on a covenant to repair contained in the lease, (see sec. 41, post), she may possibly be held liable in law, if, after the death of her trustee, she made several payments of rent, and those payments were made and accepted under circumstances justifying the inference that she herself had become tenant-at-law on the terms of the lease, or, if she paid the rent or dealt with or occupied under the lease in such a way as to justify the inference that she became executrix de son tort (*i*).

(*e*) *Walsh* v. *Lonsdale* (1882) 21 Ch.D. 9.
(*f*) *Swain* v. *Ayres* (1888) 21 Q.B.D. 289.
(*g*) *Beale* v. *Sanders* (1837) 3 Bing. (N.C.) 850.
(*h*) *Macnamara* v. *Vincent* (1852) 2 Ir. Ch. R. 481.
(*i*) *Ramage* v. *Womack* [1900] 1 Q.B. 116, per Wright, J.

Annotation.

(*e*) *Lessees for years holding over.*—It is well settled that a lessee who holds over after the expiration of his lease is still bound by the covenants as to repair in that lease (*j*). That is to say, there is an implied contract on the part of the tenant to hold the premises under a tenancy from year to year, subject to those covenants (*k*). The mere fact that a verbal agreement for an additional rent is made after the expiration of the term will not prevent the operation of this rule (*l*). Nor can the tenant escape liability on the ground that the lease under which he was in possession was void, as not being pursuant to a power in the instrument of gift (*m*); nor on the ground that the title of the person from whom he held the premises was merely equitable (*n*).

(*f*) *Person entering as undertenant of one to whom a lease is subsequently granted.*—Where one person has gone into occupation of premises as undertenant of another before the latter has obtained a lease, and a lease is subsequently granted to the mesne landlord, it is for the jury to say whether the undertenant thenceforth holds under the lease, and so liable for the performance of the covenants as to repairs which it contains (*o*).

(*j*) *Crawford* v. *Newton* (1887) 36 W.R. 54, per Cave, J.; *Beavan* v. *Delahay* (1788) 1 H. Bl. 8; *Hett* v. *Janzen* (1892) 22 O.R. 414, and cases cited below. Compare also as to the general rule—though the covenants involved had no relation to repairs. *Doe* v. *Bell* (1797) 5 T.R. 471. Evidence that the tenant held over, after the assignment of the reversion, that he paid the same rent at the same periods, and that he gave the notice provided for in the agreement with regard to the determination of the tenancy, is evidence from which it may be inferred that he held over upon the terms of that agreement, and was therefore bound by a covenant to repair contained therein. *Wyatt* v. *Cole* (1877) 36 L.T. (N.S.) 613. The liability of a tenant in this position is sometimes put beyond question by the insertion of some express stipulation in the lease—as, for example, a proviso that, if notice should not be given to determine the lease at the end of that period, it should be considered a lease upon the same covenants from year to year until notice to determine it. *Brown* v. *Trumper* (1858) 26 Beav. 11.

Blane v. *Francis* (1917) 86 L.J. (K.B.) 364, [1917] 1 K.B. 252.

(*k*) *Morrogh* v. *Alleyne* (1873) Ir. Rep. 7 Eq. 487 [there the lease expired by reason of the death of the lessor, who had merely a life estate, and the termor's wife continued to occupy the premises and pay rent]. *Digby* v. *Atkinson* (1815) 4 Camp. 275; *Torriano* v. *Young* (1833) 6 C. & P. 8. The general principle applicable under such circumstances is that a tenant holding over after the end of a term of years is deemed to do so on such terms as may be incident to a tenancy for years, and not merely on such terms as are necessarily incident to such a tenancy. *Hyatt* v. *Griffiths* (1851) 17 Q.B. 505 [not a covenant to repair in this case]. That the tenant's obligation is referable to the covenant and not an implied contract arising out of a new tenancy from year to year is clearly indicated by the rule which prevailed under the old forms of procedure, that a tenant who held over after allowing the premises to fall into disrepair could not be sued in assumpsit. *Johnson* v. *St. Peters* (1836) 4 A. & E. 520, 4 N. & M. 186.

(*l*) *Digby* v. *Atkinson* (1815) 4 Camp. 275, 16 R.R. 792.

(*m*) *Beale* v. *Sanders* (1837) 3 Bing. (N.C.) 850.

(*n*) *Morrogh* v. *Alleyne* (1873) Ir. R. 7 Eq. 487.

(*o*) *Torriano* v. *Young* (1833) 6 C. & P. 8.

Annotation.

37. Transferees of the interest of the lessee in the leasehold estate.—(*a*) *Assignees of terms for years.*—Where the lessee covenants for himself and his assigns to repair, and an assignee fails to repair, the lessor may, of course, sue either his lessee or the lessee's assignee (*a*). So, also, if the lessee covenants to discharge the lessor *de omnibus oneribus ordinariis et extraordinariis* and to repair the houses, an action lies against the assignee (*b*). But this right of action is not confined to cases in which there is an express stipulation casting the burden of repairing upon the assignee. It is well-settled that, as respects property in esse at the time of the demise, the effect of the Stat. 32 Hen. 8, ch. 34, (*c*), is that the covenants as to repairing run with the land in such a sense that the assignee of the term is liable for a breach of the covenant committed after the assignment, even though assigns are not named in the instrument of demise (*d*), and though in the part of the deed relating to the repairs, the lessee covenants only for himself and his executors and administrators (*e*). A rational foundation for this doctrine is found in the principle embodied in the maxim: *Qui sentit commodum, sentire debet et onus* (*f*). The covenant being one of this nature, the objection that there is no privity of estate between the assignee of an underlessee and the original lessor cannot be made in an action brought by him against

---

(*a*) Bacon Abr. Covenant (E. 4).

(*b*) *Dean of Windsor's Case*, 5 Coke, 24, *a*.

(*c*) See s. 32, ante.

(*d*) Bacon's Abr. Cov. (E. 3); Sheph. Touchst. p. 179, citing *Spencer's Case*, where the rule is laid down as follows: "If the lessee for years covenants to repair the houses during the term, it shall bind all others as a thing which is appurtenant, and goeth with the land into whose hands solve the term shall come, as well those who come to it by act of law, as by the act of the party, for all is one having regard to the lessor." See also *Dean of Windsor's Case*, 5 Coke, 24, *a*; *Brett* v. *Cumberland* (1619) Cro. Jac. 521; *Torriano* v. *Young* (1833) 6 C. & P. 8; *Wakefield* v. *Brown* (1846) 9 Q.B. 209; *Perry* v. *Bank &c.* (1866) 16 U.C.C.P. 404; *Crawford* v. *Bugg* (1886) 12 O.R. 8 [Short Forms Act]. The rule is the same in the case of feu-contracts in Scotch law. See *Clarke* v. *Glasgow Ass. Co.* (1854) 1 Macq. H. L. C. 668. A prima facie case of privity sufficient to render a defendant in possession liable, as assignee of a lease, for forfeiture on account of a breach of a covenant to repair is established, where the defendant was in possession of the premises, and was in the habit of paying the rent reserved in the original lease, of which he is proved to have been cognizant. *Doe* v. *Durnford* (1832) 2 C. & J. 667. The burden of a covenant to repair a road dedicated to the use of the public does not run with the land. *Austerbery* v. *Oldham* (C.A. 1885) 29 Ch.D. 750, 53 L.T. 543.

(*e*) *Martyn* v. *Clue* (1852) 18 Q.B. 661.

(*f*) *Smith* v. *Arnold* (1704) 3 Salk. 4. "In respect the lessee hath taken upon him to bear the charges of the reparations, the yearly rent was the loss, which goes to the benefit of the assignee, etc." *Dean of Windsor's Case*, 5 Coke, 24, *a*. "Reason requires that they who shall take benefit of such covenant when the lessor makes it with the lessee should, on the other side, be bound by the like covenants when the lessee makes it with the lessor." *Spencer's Case*, 5 Coke, 17, *b*.

Annotation.

the underlessee, especially where the immediate lessor of the defendant is a party plaintiff (*g*). The lessor's right of action against the lessee still continues, but only one satisfaction can be obtained for the breach (*h*).

The general rule has been held not to be changed by the fact that the lessor has paid a sum of money to the lessee to put the premises in repair. Such a payment is, on the contrary, deemed to be notice to him to require the application of the money by the assignee unless he intends to be himself responsible to the lessor (*i*).

An assignee of the term cannot, by assigning over, get rid of his liability for breaches of covenant committed during the period of his own occupation (*j*); but he is responsible for these alone (*k*), even though the landlord has not been notified of, nor given his assent to, the re-assignment (*l*).

The re-assignment—in the case cited the term was equitable—is not rendered fraudulent by the fact that the new assignee is a mere beggar. The motives of the first and second assignees in parting with and receiving the term are not enough to make it fraudulent, if the act done be a real act, intended really to operate as it appears to do. Fraud may be inferred, however, where the assignment is nominal only, and the assignor retains the beneficial possession, because he assumes to do one thing and really does another. But if he assigns, really getting rid of the burthen and giving up really the benefit also, if any, to his assignee, the act is not fraudulent (*m*).

In an action against an assignee by a party entitled to take advantage of a breach of the covenant to repair, the plaintiff, if there has been a re-assignment, has the onus of proving that the breach alleged was committed while the defendant was in possession (*n*).

(*g*) *Wakefield* v. *Brown* (1846) 9 Q.B. 209.

(*h*) *Brett* v. *Cumberland* (1619) Cro. Jac. 521.

(*i*) *Martyn* v. *Clue* (1852) 18 Q.B. 661.

(*j*) *Hickling* v. *Boyer* (1851) 3 Mac. & G. 635, (p. 645) per Lord Truro approving 2 Platt on Leases, p. 417; *Smith* v. *Peat* (1853) 9 Exch. 161. In the case of an equitable term also, relief will be granted as to breaches of the covenant committed before the assignment. *Fagg* v. *Dobie* (1839) 3 Y. & C. Exch. 96. As to effect of a re-assignment, generally, see Woodf. Landl. & T., p. 273; Foa Landl. & T., p. 327; Redman Landl. & T. pp. 522, 523.

(*k*) *Macnamara* v. *Vincent* (1852) 2 Ir. Ch. R. 481; *Perry* v. *Bank* &c. (1866) 16 C.P. 404; *Beardman* v. *Wilson* (1864) L. R. 4 C.P. 57.

(*l*) *Crawford* v. *Bugg* (1886) 12 O. R. 8.

(*m*) *Fagg* v. *Dobie* (1839) 3 Y. & C. Exch. 96. See generally the text books cited in note (j), *supra*.

(*n*) *Crawford* v. *Bugg* (1886) 12 Ont. R. 8. From this principle it follows that it is not error to instruct a jury that, where the demised premises had been in the possession of several persons after the defendant, one of the assignees in the series of those, occupied them, and it is on the evidence a reasonable inference that the dilapidations complained of took place during the time he held the lease, the landlord is entitled to substantial damages.

Annotation.

If the distinction recognized in *Spencer's Case* (*o*) as to the effect of covenants regarding things in esse and not in esse at the time of the demise is to be upheld in all its strictness, the assignee, unless he was named, would not be bound by the covenant in respect to additions to the demised premises made during the term. But in an English case it has been held that, for the purpose of affecting him with liability, things which have a potential existence, contemplated by the parties to the lease at the time it was executed, stand in the same category as things actually in existence (*p*).

A covenant to repair is considered to be devisible, and an action for its breach is therefore maintainable against the assignee of a part of the demised premises, wherever it would be maintainable against the assignee of the lessee's entire interest (*q*).

(*b*) *Assignees of tenants from year to year.*—Where a new party comes into possession as assignee of a lessee holding under a demise which is to continue from year to year, and the landlord gives the assignee no notice to quit, the implication is that the assignee becomes a tenant on the same terms as the original lessee, and is therefore liable for the performance of any covenants to repair which such lessee may have entered into. In such a case it is not necessary to prove that the assignee expressly agreed to hold the

---

Smith v. *Kent* (1853) 9 Exch. 161. Here it was held justifiable to find the defendant responsible for the want of repairs, where it was proved that the demised premises were out of repair when they were held by the party to whom the immediate assignee of the defendant had assigned them, and that party had testified that he put them in no better condition than when he received them, and there was no rebutting testimony.

(*o*) 5 Coke, 17, *b*.

(*p*) *Minshull* v. *Oakes* (1859) 2 H. & N. 793, 27 L. J. (Ex.) 194, where the covenant was that the lessee, "his executors, or administrators, would repair the messuage, etc., and all other erections and buildings which should or might be thereafter erected, etc., and the same being so repaired, the lessee, his executors, administrators, and assigns, at the end of the term would yield up." It was contended that the assignee of the lessee, not being named in the covenant to repair, was not liable for the non-repair of certain buildings erected during the term. This argument did not prevail. "In the present case," said Pollock, C.B., "we think it sufficient to say, that, as the covenant is not a covenant absolutely to do a new thing, but to do something conditionally, viz., if there are new buildings, to repair them; as when built they will be part of the thing demised, and subsequently the covenant extends to its support, and as the covenant clearly binds the assignee to repair things in esse at the time of the lease, so does it also those in posse, and consequently the assignee is bound. There is only one covenant to repair; if the assignee is included as to part, why not as to all?" In *Emmett* v. *Quinn* (1882) 7 A.R. (Ont.) 306, Burton, J.A., expressed a doubt as to the correctness of this decision, and quoted (p. 320) with approval a passage from an article in the *London Law Times*, vol. 67, p. 76, in which it was strongly criticised. But it has not, so far as the writer is aware, been judicially discredited in England itself.

(*q*) *Congham* v. *Taylor* (1645) Cro. Car. 22, declaring the rule to be the same both at common law and under the Statute of 32 Hen. 8 ch. 37. This case was cited as good law by Lord Ellenborough in *Stevenson* v. *Lambard* (1802) 2 East. 575. See also Bacon's Abr. Cov. (E. 3).

Annotation.

premises on the terms of the lease. He may be charged as tenant by virtue of an agreement implied from the situation of the parties (*r*).

(*d*) *Equitable assignees.*—A person who takes possession of leasehold premises after signing an agreement for an assignment is, in equity, deemed to be in possession, subject to the obligation to perform a covenant to repair contained in the lease (*s*). The mere fact that, in the particulars which were prepared with a view to the sale and referred in the executory agreement, it was expressly stipulated that the purchaser should not be entitled to an assignment, does not render the agreement one merely for the right of occupation, so as to put the party contracting to purchase in the position of a tenant holding from year to year, and, therefore, only bound to do the repairs which are obligatory on such tenants (*t*). Nor will a party to an agreement of this sort be relieved of the obligation of the covenants because the lessee was not a party to it (*u*). The same principle is, of course, applied where the term transferred is itself merely equitable—as where the assignor was not to have a lease until a certain condition is fulfilled (*v*), or where he originally took possession under a demise for a longer period than his lessor had a right to grant (*w*).

The equitable assignee of an underlessee is charged with the obligation to perform the covenants in that underlease, though he is himself the original lessor (*x*).

(*e*) *Persons succeeding lessees in possession without an assignment.*—A party who has succeeded the lessee in possession of the premises, without an assignment from the latter, cannot be made liable on the covenants to repair contained in the lease, unless he has estopped himself from denying that he was assignee of the term. In the case cited, Bowen, L.J., remarked that "if a man pays rent to the landlord on the footing of accepting a term and the liabilities under it, and the landlord accepts the rent on those conditions, then such a person may be estopped from denying that he has become tenant to the landlord on those conditions" (*y*). See further as to this case under sec. 38 (b), post.

(*r*) *Buckworth* v. *Simpson* (1835) 1 C. M. & R. 834, 7 Tyr. 344 [rule here applied to executors].

(*s*) *Wilson* v. *Leonard* (1840) 3 Beav. 373.

(*t*) *Close* v. *Wilberforce* (1839) 1 Beav. 112.

(*u*) *Close* v. *Wilberforce*, supra.

(*v*) *Fagg* v. *Dobie* (1838) 3 Y. & C. 96.

(*w*) *Macnamara* v. *Vincent* (1852) 2 Ir. Ch. 481.

(*x*) *Jenkins* v. *Portman* (1836) 1 Keen. 435.

(*y*) *Tichborne* v. *Weir* (C.A. 1892) 67 L.T.N.S. 735.

Annotation.

(*f*) *Underlessees.*—The sub-lessee of a person who has covenanted to repair is not liable in law on the covenant, nor is he liable in equity, unless the original lessee is insolvent (*z*).

The lessee is not entitled to recover cost of repairs from under lessee in the absence of a covenant of indemnity (*z1*).

38. Mortgagees of the term.—(*a*) *Legal mortgagees.*—Like all other assignees, a legal mortgagee of a term is liable on the covenants in the lease, whether he takes possession or not (*a*). If he wishes to avoid this liability, his proper course is to take a derivative lease of all but a small portion of the term (*b*). The liability in law is the same irrespective of whether he has or has not actually gone into possession, and equity will grant him no relief (*c*). But, on the other hand, where he has never been in possession, a court of chancery will not assist the landlord by a decree of specific performance, and he will be left to his legal remedies—at all events, where he has never been in possession (*d*).

(*b*) *Equitable mortgagees.*—The question whether a mere depositary of a lease by way of mortgage may be compelled to take an actual assignment, and thus rendered liable for the performance of the covenants, is one with respect to which the authorities are in conflict (*e*).

On principle it would certainly seem to be the better opinion that this form of equitable mortgage does not subject the depositary to the responsibility of an assignee. The deposit simply confers on the depositary an inchoate right to demand that, if the debt thus secured is not paid, the estate or interest which was granted by the instrument shall be sold to satisfy his claim. Whether he will ever invoke the aid of a court of chancery to perfect this inchoate right rests entirely with himself. The theory that a purely optional right, which by its very nature is to be exercised at some indefinite time in the future, to be fixed by the holder himself, may be converted, against his will, and in the absence of any special equity, into an obligation which shall take effect immediately, seems to be contrary to analogy and extremely unjust.

(*z*) *Goddard* v. *Keate* (1682) 1 Vern. 87 [distinguishing a derivative lease from an assignment of the term]. *Sparks* v. *Smith* (1692) 2 Vern. 275.

(*z1*) *Clare* v. *Dobson* (1911) 80 L.J. (K.B.) 158.

(*a*) *Pilkington* v. *Shaller* (1700) 2 Vern. 374.

(*b*) *Sparks* v. *Smith* (1692) 2 Vern. 275.

(*c*) *Pilkington* v. *Shaller*, ubi supra.

(*d*) *Sparks* v. *Smith* (1692), ubi supra. What the effect of his having gone into possession would have been, the court did not determine.

(*e*) In *Flight* v. *Bentley* (1835) 7 Sim. 149, it was held that such a depositary was liable on the covenant to pay rent. But a few years afterwards Shadwell, V. C., refused to follow this decision, expressing, in terms as strong as judicial courtesy permits, his surprise at its ever being rendered. *Moores* v. *Choat* (1839) 8 Sim. 508. See also the case cited in the next note.

Annotation.

That a mortgagee of this description is not, in the absence of some special consideration, liable for the performance of the covenants in the lease with him seems to be taken for granted in a recent case by the English Court of Appeal, where the depositary of the lease had, without any acknowledgement to the lessee who had departed from and remained out of the country, entered into and retained possession of the demised premises for forty years, paying the amount of rent reserved in the lease. Neither in the arguments of counsel nor in the opinions of the Lord Justices was any reference to the conflict of opinions in the earlier decisions in regard to the general question whether a person who takes a deposit of a lease by way of mortgage can be compelled to assume a liability for the covenants therein. But it may, perhaps, be assumed that the landlord's counsel did not present his client's case under this aspect for the reason that he believed it impossible to hold the defendant under the doctrine of *Flight* v. *Bentley*. One special point made was that the statute, 3 & 4 Will. 4, ch. 27, secs. 1, 34, operated in such a manner that the lessee's estate had been transferred to the occupant of the premises, as a result of the forty years adverse possession by himself and his successors in interest. It was also argued that the fact of the mortgagees having, while he remained in possession, paid the rent specified in the original lease, estopped him from denying that he accepted the term with all the liabilities incidental thereto. Neither of these contentions prevailed, the court holding that there was merely an extinguishment of the lessee's right after the expiration of the statutory period, and that neither an equitable mortgagee nor an assignee of his interest in the residue of the term is, under such circumstances bound by a covenant to repair on the original lease (*x*). It is somewhat strange that no attempt was made in this case to hold the mortgagee liable on the broad principle that a party who accepts the benefits of a disposition of property is deemed to accept its burdens also. This principle is one of much broader scope than that of estoppel, and its application would, it seems, have been abundantly justified by the reliance placed upon it in the analogous cases of persons holding even after the expiration of their terms, and entering into possession under agreements for leases.

39. Personal representatives of tenants.—(*a*) *Generally.*—At one time it seems to have been the prevailing opinion that an action on the covenant to repair could be maintained against executors and administrators only when they were expressly mentioned as being bound, or when the covenant was to repair "during the

(*x*) *Tichborne* v. *Weir* (1892) 4 R. 26, 67 L.T. 735 (C.A.)

Annotation.

term" (*a*). But the rule has been otherwise for at least a century (*b*).

The executors of a testator who has subleased the property demised to him, being liable, as between themselves and the lessor, are entitled to retain a sufficient portion of the trust fund to indemnify themselves against liability for dilapidations which accrued before the death of the testator, although there is a possibility that the under-lessees may remove that liability by doing the repairs and so fulfilling the covenants, as soon as a demand is made upon them by the lessor (*c*).

(*b*) *Liability for dilapidations prior to the death of the lessee.*—Where leased premises are out of repair at the death of the lessee, it is the executor's duty to apply his general assets to put them in repair, as well as to pay any rent then due (*d*). Those assets are liable in his hands to make good all the breaches of the covenants to repair that have occurred, or may occur, during the term (*e*), and, as custodian of the assets, he may be sued by the lessor, or his successor in interest (see VI., ante), and compelled to apply to funds which he holds in satisfaction of the plaintiff's claims (*f*). So far as regards his obligation to indemnify the reversioner out of the trust fund, it is of course immaterial whether the dilapidations accrued during the lifetime of the deceased, or while the property was being administered (*g*).

The rule stated above in sec. 36 (e), ante, that a tenant who holds over after the expiration of a term of years is presumed to be still subject to the obligation of any covenants as to repairs which the lease may contain, involves the corollary that the assets of the tenant so holding over are liable in the hands of his personal representative for the due performance of those covenants (*h*).

The executors of one of two joint tenants who dies during the term are not liable for breaches of the covenant to repair committed after his death (*i*).

(*a*) See *Sheph. Touchst.* p. 178.

(*b*) See *Wentworth Off. Ex.* p. 250, 14th ed. See *Kirklington* v. *Wood* (1917) 61 S.J. 147.

(*c*) *Hickling* v. *Boyer* (1851) 3 Macn. & G. 635.

(*d*) *Read* v. *Tenterden* (1833) 4 Tyr. 111.

(*e*) *Macnamara* v. *Vincent* (1852) 2 Ir. Ch. R. 481.

(*f*) Bacon's Abr. (D.4); Sheph. Touchst., p. 172; *Brett* v. *Cumberland* (1619) Cro. Jac. 521; *Hickling* v. *Boyer* (1851) 3 Macn. & G 635. As to the statutory liability of personal representatives of life tenants for *permissive waste* committed before the tenant's death, see *Woodhouse* v. *Walker* (1880) 5 Q.B.D. 404; *Crawfurd* v. *Bugg* (1886) 12 O. R. 8.

(*g*) Anon (1573) 3 Leon. 51, pt. 72.

(*h*) *Morrogh* v. *Alleyne* (1873) Ir. Rep. 7 Eq. 487, a case in which the assets were applied to the rebuilding of the premises after a fire, there being no exception of fire in the lease.

(*i*) *Whyte* v. *Tyndall* (H.L.E. 1888) 13 App. Cas. 263, 58 L.T. 741, rev'g 20 L. R. Ir. (C.A.) 517, and restoring the decision in 18 L. R. Ir. 263.

Annotation.

(c) *Liability for dilapidations accruing during the administration of the estate.*—(See also 36 (d), supra). The liability which an executor incurs as to breaches of the covenant committed while he is in control of the demised premises is of a much more extensive nature than that explained in the last subdivision.

"The law, as it applies to personal representatives with respect to non-payment of rent and taxes, does not stand on the same footing as the law which binds them to repairs" (*j*).

During the period of his administration he is treated as assignee of the leasehold interest, and his liability in the covenants is assimilated to his liability in actions for waste committed during his own time, and after he has gone into possession. He is therefore personally liable for his failure to repair according to the covenants in the lease (*k*). He cannot resist an action for damages caused by his breach of those covenants, either on the ground that he has derived no profit from the premises (*l*), or on the ground that he had offered to surrender the term (*m*)—except, possibly, as regards breaches committed after the offer (*n*). Moreover, although it is recognized that the executor or administrator of a lessee who has fully administered, and is chargeable with no default or laches, may discharge himself from liability for rent to a greater extent than the real value of the demised premises, yet, for the purposes of this rule, the real value, as against the reversioner, or one claiming under him, must be taken to be that which the premises would have been worth, but for his own act. He cannot take advantage of his own wrong by availing himself of a reduction of value occasioned solely by his failure to keep the premises in repair during the period of his possession (*o*).

Applying the principle that a declaration in the habendum of a lease that two lessees are to hold as tenants in common, and not as joint tenants, creates an interest which is just as consistent with a joint as with a several liability to pay one undivided rent, and to execute all necessary repairs, the House of Lords here held that the covenants were joint, in a case where premises were demised to G. & A., "their executors, administrators, and assignees, habendum to" the said G. & A., their executors, etc., as tenants in common, and not as joint tenants, at a single yearly rent, and G. & A. covenanted "for themselves, etc., that they, the said G. & A., or some or one of their executors, etc.," would pay the yearly rent and keep the premises in repair.

(*j*) *Tremeere* v. *Morrison* (1834) 1 Bing (N.C.) 89.

(*k*) *Tremeere* v. *Morrison* (1834) 1 Bing. (N.C.) 89; *Buckley* v. *Peck* (1711) 1 Salk. 316; *Hornidge* v. *Wilson* (1839) 11 A. & E. 645; *Tilney* v. *Norris* (1701) Ld. Raym. 553, 1 Salk. 309; *Buckworth* v. *Simpson* (1835) 1 C.M. & R.834.

(*l*) *Tremeere* v. *Morrison* (1834) 1 Bing. (N.S.) 89, 4 M. & Sc. 607.

(*m*) *Sleaf* v. *Newman* (1862) 12 C.B.N.S. 116, following the last cited case.

(*n*) *Read* v. *Tenterden* (1833) 4 Tyr. 111.

(*o*) *Hornidge* v. *Wilson* (1840) 11 A. & E. 643, 3 P. & D. 641, following *Tremeere* v. *Morrison*, supra.

Annotation.

An executor who has assented unconditionally to a specific bequest out of the testator's personal estate is not entitled to an indemnity out of the testator's general estate in respect of covenants contained in the lease (*p*); otherwise if no such assent is given (*q*).

Being responsible for the condition of the premises the executor is entitled to enter on the property, and see that the repairs are executed (*r*).

If the executors plead plene administravit, the remedy is against the legatees to recover for a breach of the covenant (*s*).

(*d*) *Liability of executor of assignee of term.*—An assignee of a leasehold being equally liable with the original lessee on the covenant to repair (see 37 ante), the executor of such assignee is accountable under the same circumstances and to the same extent as the executor of the lessee (*t*), even though there is no express mention of assigns in the lease (*u*). If the executor re-assigns the term, the personal estate of the first assignee is liable for breaches of the covenant to repair, which occurred between the date of the first and second assignments (*v*).

40. Legatees of the term.—(*a*) *Legatees taking the term as an absolute gift.*—It is sufficiently obvious, and there is an express ruling to the effect, that a legatee of leasehold property under a will which states that the bequest is "subject to the payment of the rent and the performance of the covenants contained in the lease," takes them subject to the burden of putting them in repair (*a*). But the question whether, in the absence of a provision of this sort the legatee must pay for the repairs, is one upon which there has been some conflict of opinion. In the case just cited, Lord Truro thought that this burden went with the legacy, independently of the directions in the will. In the following year Kindersley, V.-C., expressed his disapproval of this doctrine, though he considered that he would have been bound by it if the will under review had been of the same tenor. He felt himself at liberty, however, to decide in favour of the legatee, distinguishing the case before him on the ground that the question was not, as in *Hickling* v. *Boyer*, one between the specific legatee of a separate leasehold and the residuary legatee of general personal estate, but between the tenant for life and the remainderman or the reversioner of an aggregate mass of property, all constituting the

(*p*) *Shadbolt* v. *Woodfall* (1845) 2 Coll. 30.
(*q*) *Hickling* v. *Boyer* (1851) 2 Coll. 30.
(*r*) Kekewich, J., in *Tomlinson* v. *Andrew* [1898] 1 Ch. 232.
(*s*) Kekewich, J., arguendo, in *Tomlinson* v. *Andrew* [1899] 1 Ch. 232.
(*t*) Bacon's Abr. Cov. (E. 3).
(*u*) *Keeling* v. *Morrice* (1701) 12 Mod. 371.
(*v*) *Macnamara* v. *Vincent* (1852) 2 Ir. Ch. R. 481.
(*a*) *Hickling* v. *Boyer* (1851) 3 Macn. & G. 635.

Annotation.

residuary real and personal estate, of which the leaseholds in question formed only a component part (*b*). But this distinction can scarcely be sustained in face of the broad statement of Jessel, M.R., in a still later case that a specific legatee takes leasehold property cum onere, and that the rule is the same where the legatee receives such property as part of the residuary estate (*c*).

(*b*) *Legatees taking the term as tenants for life.*—In this sub-division it is proposed merely to review the obligations of life tenants of leaseholds. The question how far life tenants are liable for the repairs of freehold estates does not fall within the scope of the present monograph.

No difficulty is presented by the cases in which the life tenant is held liable, for the simple reason that, in neglecting to repair, he has defaulted in a duty imposed by an express provision in the will under which he takes (*d*). Nor is it disputed that, where the obligation of a covenant is not a factor, and the extent of the tenant's responsibility is considered with reference to his duty to prevent waste, a tenant for life under a will is not subject to an implied trust to keep the property in repair (*e*). But even at this late date the precise extent of the tenant's responsibility as regards the performance of the covenants, in the absence of some express provision embodying the testator's wishes, can scarcely be said to have been finally determined.

That the general assets of a testator, and not the specific legatee of a leasehold forming part of the estate, is chargeable with the expenses of the repairs necessary at the death of the testator, is not disputed.

In a case already referred to in the preceding sub-division of this section, it was laid down that where there is a tenant for life and a remainderman or reversioner under the same will of a large mass of property, consisting partly of leasehold property, and the testator at the time of his death was liable to the landlord

---

(*b*) *Harris* v. *Boyer* (1852) 1 Drew. 174.

(*c*) *Hawkins* v. *Hawkins* (1880) 13 Ch. D. 470. There it was held that the damages which a testator's estate is liable to pay for dilapidations in a leasehold property are not "debts" within the meaning of a clause in a will which specifically bequeathed to one person certain personal estate upon trusts, after payment therefrom of his "debts and funeral expenses," and gave the residuary estate to another person who was also appointed executor. The residuary legatee, therefore, was declared not to be entitled to have the sums which he paid to the landlord for dilapidations, subsequent to the testator's death, paid out of the specifically bequeathed property.

(*d*) See, for example, *Dingle* v. *Copper* [1899] 1 Ch. 726 [a case of an equitable tenant for life].

(*e*) *Powys* v. *Blagrave* (1854) Kay 495, affirmed 4 D. M. & G. 418: *In re Cartwright* (1889) 41 Ch. D. 532.

Annotation.

for a breach of the covenants to repair contained in the lease, the residue of the estate is to be applied to discharge the sum necessary to make good the dilapidations (*f*).

The same theory is adopted in a recent Irish decision, while it was denied that, as between the tenant for life of a leasehold, specifically bequeathed, and the general assets of the testator, there is any equity in favour of the general assets, to throw upon the former the obligation of putting the leaseholds which were dilapidated at the time of his death in the state of repair demanded by the covenant in the lease (*g*).

That the same principle prevails where the party seeking to fix the obligation for such repairs is the remainderman is also settled by a much discussed case in the Court of Appeal (*h*), where it was held that the life-tenant was not bound to put the leasehold property into a better state of repair than that in which it was when the testator died, although the dilapidations which had then accrued constituted a breach of the covenant in the lease. If considered with reference to the particular facts involved, the scope of this decision is, it will be observed, merely that the life-tenant is not compellable to remedy any breaches of the covenant to

---

(*f*) *Harris* v. *Boyer* (1852) 1 Dr. 174. Here the tenant for life and the remainderman had already arranged that the demands of the landlord should be satisfied out of the estate, and the decree of Kindersley, V.C., was in accordance with the principle stated in the text.

(*g*) *Brereton* v. *Day* (1895) 1 Ir. Rep. 519. Porter, M. R., said: "In cases where it is sought to apply the maxim, "*Qui sentit commodum, idem sentire debt et onus*," there is always a preliminary question—what is the *commodum* . . . In this case the *commodum* was meant to be the house in that state in which the testator was, as between himself and the landlord, legally bound to leave it. If so, the legatee does not receive the commodum until the repairs are effected, and the onus which attaches to it is that which is expressed— namely, the payment of the rent and other outgoings, including, no doubt, the maintenance of the place in tenantable repair."

(*h*) *Coles* v. *Courtier* (C.A. 1886) 34 Ch.D. 136. Counsel for the remainderman relied upon a decision by Fry, J., which seemingly looked in the opposite direction. *Fowler* v. *Odell* (1881) 16 Ch.D. 723, holding that, in the interests of the remaindermen the trustees of leasehold property are bound to keep it free from the risk of forfeiture by seeing that the covenant to repair is duly performed. It was declared that the trustees are not bound to be content with the setting apart of a sum of money in the joint names of themselves and of the tenant for life as an indemnity against the consequences of a breach, but are entitled to require the covenants to be specifically performed. A receiver of rents was accordingly appointed. But the learned judge who had in the meantime been elevated to the Court of Appeal, explained in *Coles* v. *Courtier* that he had proceeded upon the ground that, under the provisions of the will, it was the duty of the trustees to have the property forthcoming at the death of the tenant for life, and that, as they had nothing but rents and profits in their hands, and their trust could only be performed by applying these rents to the repairs, they were bound to do so. He expressly disclaimed intention of deciding any general principle as to the rights of tenants for life and remaindermen. Both Cotton and Bowen, L.JJ., expressed the opinion that, if Mr. Justice Fry's decision had been one between tenant for life and remaindermen, there would have been some difficulty in following it.

Annotation.

repair which were already complete when his estate first vested in possession. But some of the language used by the Lords Justices is so general and unqualified that it is at least possible to suppose them to have intended to enunciate the much wider doctrine that, irrespective of the time when the dilapidations accrue, a tenant for life of an estate consisting of leasehold interests is—at all events, as between himself and the remainderman,—not bound to keep the leased premises in such a state of repair as to prevent forfeiture for a breach of the covenant in that regard. In two cases Kekewich, J., considered that this was really the effect of their remarks, and, although with much reluctance, he held that the expenses of making such repairs as will satisfy the covenants should be charged upon the residuary estate, whether the tenancy for life is equitable (*i*), or legal (*j*), and whether the premises fell into disrepair before or after the death of the testator. In the second of these cases, the learned judge was invited, but refused to follow the judgment of Stirling, J., in *Thompson* v. *Redding* (*k*). But when the question next came before him, this judgment had, as we shall presently see, been reinforced by the opinions of North, J., and the Irish Master of the Rolls. To this array of adverse authority he felt bound to defer, and decided that, as against a remainderman, a tenant for life of leaseholds specifically bequeathed is bound, during the continuance of his interest, to perform the covenants contained in the leases (*l*).

The cases which it was thus deemed proper to follow proceed upon the ground that the general principle applicable to specific legacies is that the legatee takes them *cum onere*, and that the Court of Appeal ought not, in the absence of a categorical statement to that effect, to be credited with the intention of enunciating a doctrine which would relieve the tenant of a burden so closely connected with the legacy as a duty the omission of which may, and in most instances actually does, render the subject matter liable to forfeiture. Accordingly it has been held by the judges mentioned in the subjoined note that the life-tenant of a leasehold estate is responsible for the due performance of any covenants to repair which the lease may contain (*m*), whether the

(*i*) *Jeune* v. *Baring* [1893] 1 Ch. 61 [originating summons taken out by trustees of will to obtain a construction].

(*j*) *Tomlinson* v. *Andrews* [1898] 1 Ch. 232 [remainderman was adverse party here].

(*k*) [1897] 1 Ch. 876. See note (*m*) infra.

(*l*) *Cooper* v. *Gjers* [1899] 2 Ch. 54 [the covenant here was as to insurance].

(*m*) Stirling, J., in *Thompson* v. *Redding* [1897] 1 Ch. 876 [remainderman was here interested, and the particular point decided was that the income derived from certain leaseholds which trustees were directed to pay to testator's widow for her life should be construed as meaning net income, and that the expenses for current repairs were to be borne by her]; North, J.,

Annotation.

adverse interests are those of the general estate or those of the remainderman.

But another element of uncertainty has quite recently been introduced into the controversy by a decision of North, J., which proceeds upon the theory that a different doctrine is to be applied according as the parties seeking to fasten responsibility upon the tenant for life are the persons who represent the residuary estate or the remaindermen. The latter, he held, cannot make the estate of the tenant liable for repairs which he has been obliged to make owing to the fact that during the life-tenant's possession, the covenants as to repair were not performed (*n*). So far as is apparent from the cases cited in this section, the distinction thus taken does not seem to have suggested itself to any other judge, and further discussion is necessary before its validity can be conceded. If it is once granted that the obligation to perform the covenants rests on the life-tenant, it is difficult to understand why the very person who, if the covenants are not performed, will receive a depreciated estate, or, it may be, no estate at all, should not be entitled to recover the money which he has expended in doing the repairs which the life-tenant has wrongfully neglected. The only authority cited by the learned judge is one in which the question was merely whether the life-tenant was liable for permissive waste (*o*) and is an application of the much disputed doctrine that there is no such liability unless the tenant is under an express obligation to repair. (See sec. 6, ante.) Clearly a case decided on this ground makes against rather than for the conclusion adopted.

41. Beneficiaries of a leasehold held in trust.—In a recent case Wright, J., laid it down as a general rule that "the covenants of a trustee or assignor ordinarily bind the beneficiary or equitable assignee, so as to render him liable in an action on the covenants only when there is a privity of contract between him and the original lessor," and decided that, where the cestui que trust of a trustee who takes a lease with a covenant to repair occupies the demised premises, as it is intended that she should do, and pays the rent, no equitable liability to repair could be predicated from the fact that she holds the beneficial interest in the lease, nor from that fact coupled with her occupation of the premises (*p*).

42. Guarantor of the performance of the covenant.—If it is apparent, upon an examination of the whole deed, that the lease

---

in *In re Betty* [1899] 1 Ch. 821 [tenant for life bound to indemnify the testator's estate for dilapidations accruing after the testator's death, and for those alone]; Irish Master of the Rolls in *Kingham* v. *Kingham* [1897] 1 Ir. Rep. 170 [remainderman adverse party here].

(*n*) *In re Parry* [1900] 1 Ch. 160.
(*o*) *In re Cartwright* (1889) 41 Ch D. 532.
(*p*) *Ramage* v. *Womack* [1900] 1 Q.B. 116.

Annotation.

was intended to make a third person jointly liable with the lessee for the performance of the covenant to repair, as well as the other covenants, he will be charged as guarantor, even though a strict grammatical construction would point to a different result (*q*).

VIII. Judicial relief from the consequences of non-performance of the covenants.

43. In the course of an action on the covenants.—(*a*) *At common law.*—Under the old procedure it was held that, in an action of ejectment after breach of the covenant to repair, the court has no power to stay proceedings upon terms, unless the landlord consents (*a*).

(*b*) *Under statutes.*—The general Judicature Acts, it would seem, only effect the operation of the above rule indirectly by enabling the tenant to raise in such an action one of the equitable defences of which he could not previously have availed himself without the assistance of the Court of Chancery (*b*). But the legal rights of the tenant have been considerably altered by sec. 14, sub-sec. 1 of the Conveyancing Act, which runs as follows:—

"A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach and, in any case, requiring the lessee to make compensation in money for the breach, and the

---

(*q*) *Copland* v. *Laporte* (1835) 3 Ad. & E. 517. Liability predicted, where the words of the indenture were, in effect, that L & R covenanted to C that L would pay the rent, and *further*, that L, his executors, etc., would keep the premises in repair.

(*a*) *Doe* v. *Ashby* (1839) 10 Ad. & E. 71. For an instance in which proceedings were stayed by consent, see *Doe* v. *Brindley* (1832) 4 B. & Ad. 84.

(*b*) In their annotation of sec. 57 (3) of the Ontario Judicature Act R.S.O. (1897) ch. 51 Messrs. Holmested and Langton state that it has not yet been settled whether the general power here conferred upon the High Court to relieve against all forfeitures should be construed as authorizing relief against a forfeiture in a case where no relief would formerly have been granted by a court of equity. If a conjecture based upon a merely negative inference may be hazarded, the present writer ventures to suggest that the similar power bestowed by the English statute could scarcely have been regarded as being of wider scope than that which had previously been exercised by courts of equity. Otherwise the provision noticed below would not have been inserted in the Conveyancing Act passed several years after the general statute. This circumstance affords some slight ground at all events for the view that the Ontario Judicature Act should be construed as being merely declaratory, and not as investing the courts with more extensive powers.

See Ontario Judicature Act R.S.O. (1914) Ch. 56 sec. 16 and notes thereon Holmested, 4th ed. (1915) p. 40.

See *Holman* v. *Knox* (1912) 3 D.L.R. 207 [where relief against forfeiture by virtue of s.s. 2 of sec. 13 of the Landlord and Tenant Act, R.S.O. (1897) Ch. 170, is referred to in the judgment of Clute, J., at p. 235].

Annotation.

lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor, for the breach" (*c*).

This provision was intended to place the tenant in a better position than he was before the Act was passed (*d*). The principle which it is assumed to embody is that the power of enforcing a forfeiture should be treated as a mere security for the performance of the covenants—a theory which has very recently been carried to its logical conclusion in the decision that even if the order relieving against forfeiture directs that the necessary repairs shall be made within a specified period, and also, in general terms, permits the plaintiff to proceed on his judgment and recover possession if the defendant makes default in any of the conditions mentioned, it is still within the discretion of the court to enlarge the time given for making the repairs (*e*). The relief provided for may be granted though it is not claimed in the plaintiff's pleadings (*f*). But the words of the Act are construed strictly in this respect, they do not enable an underlessee to obtain relief against a forfeiture for breach of the covenant to repair (*g*).

The decisions respecting the sufficiency of the notice are already quite numerous. Their effect, so far as they bear upon the subject of the present article, is stated below (*h*).

The notice must be such as to give the tenant precise information of what is alleged against him and what is demanded of him (*i*).

"The notice ought to be so distinct as to direct the attention of the tenant to the particular things of which the landlord com-

---

(*c*) See remarks of Earl Loreburn, L.C., as regards the discretion given by this section in *Hyman* v. *Rose* [1912] A.C. 630.

(*d*) A notice under sec. 14 of the Conveyancing and Law of Property Act should be such as to enable the tenant to understand with reasonable certainty what he is required to do, so that he may have an opportunity of remedying before an action for forfeiture is brought.

Fox v. *Jolly* (1916) 84 L.J.K.B. 1927.

See also *Sullivan* v. *Doré* (1913) 13 D.L.R. 910; *Straus* v. *International Hotel Windsor* (1919) 48 D.L.R. 519.

Fletcher v. *Nokes* [1897] 1 Ch. 271. See Landlord and Tenant Act, R.S.O. (1914) ch. 155, sec. 20.

(*e*) *Gaze* v. *London etc., Stores* (1900) 44 Sol. Jour. 722, 109 L.T. Journ. 443.

(*f*) *Mitchison* v. *Thompson* (1883) 1 Cab. & E. 72.

(*g*) *Burt* v. *Gray* [1891] 2 Q.B. 98. But see *Hurd* v. *Whaley* (1918) 88 L.J. (K.B.) 260.

(*h*) "The notice required under sec. 14 of the Conveyancing Act corresponds in this respect to sec. 13 of the Landlord and Tenant Act," R.S.O. (1897) ch. 170.

Judgment of Clute, J., in *Holman* v. *Knox* (1912) 3 D.L.R. 207. See also Landlord and Tenant Act, R.S.O. (1914) ch. 155, sec. 20.

(*i*) *Horsey Estate* v. *Steyn* [1899] 2 Q.B. 79.

Annotation.

plains, so that the tenant may have an opportunity of remedying them" (*j*).

Hence, where there has been a breach both of a covenant to build and of a covenant to keep in good repair, a notice is not sufficient which does not mention the latter breach (*k*).

Nor is the notice good if it is insufficient as to one of the breaches complained of, even though it sufficiently specifies other breaches (*l*).

On the other hand, the notice is not invalidated, as a whole, by the fact that one out of several breaches of the covenant to repair which are specified had never really been committed (*m*). So, where the physical condition of the demised premises is the same at the time when the action was commenced as it was at the time when the notice was given, the tenant is held to have had sufficient notice when more than three months prior to the bringing of the action due notice had been served on him, although by demanding rent up to a later date, and so treating the lessee as tenant, the landlord is obliged to rely upon the right of action created by the state of the premises between that date and the date of the bringing of the action (*n*). Nor need the landlord go through every room in a house and point out every defect (*o*).

A month is a reasonable time to allow for remedying the breach, although there is a covenant in the lease that the tenant will repair three months after notice (*p*). But two days' notice is not a reasonable notice where the tenant is required to make extensive repairs (*q*).

A good notice to repair may be given under the general covenant of the lease, although the landlord has previously served notice to repair within three months, in accordance with the terms of the special covenant, and the three months have not yet expired (*r*).

The clause in this section of the statute as to the requisition for compensation merely means that the landlord, if he wants compensation, shall inform the lessee that it is wanted, and not that the notice is bad unless the compensation is asked for (*s*).

(*j*) *Fletcher* v. *Nokes* [1897] 1 Ch. 274, holding that a notice to the lessee that "you have broken the covenant for repairing the inside and outside of the house" (describing them), contained in a specified lease, was sufficient to satisfy the statute.

(*k*) *Jacob* v. *Down* [1900] 2 Ch. 156.

(*l*) *Gregory* v. *Serle* [1898] 1 Ch. 652.

(*m*) *Pannell* v. *City of London, etc., Co.* [1900] 1 Ch. 496.

See also *New River Co.* v. *Crumpton* (1917) 86 L.J. (K.B.) 614.

(*n*) *Penton* v. *Barnett* (1897) 67 L.J.Q.B. 11, referred to in *Holman* v. *Knox* (1912) 3 D.L.R. 207.

(*o*) *Fletcher* v. *Nokes* [1897] 1 Ch. 271.

(*p*) *Gregory* v. *Serle* (1898) 46 W.R. 440; [1898] 1 Ch. 652.

(*q*) *Horsey Estate* v. *Steyn* [1899] 2 Q.B. 79.

(*r*) *Cove* v. *Smith* (1886) 2 T.L.R. 778.

(*s*) *Lock* v. *Pearce* [1893] 2 Ch. 271.

Annotation.

A notice signed by one of the trustee-lessors and adopted by all is sufficient (*t*).

Where a statement of claim seeks relief on the ground of forfeiture, and nothing else, and the notice is thus found to be insufficient, the court will dismiss the action, and not proceed to try the case for the purpose of determining the amount of damages which should be awarded for the dilapidations (*u*).

In a recent case the English Court of Appeal refused to apply this provision for the benefit of a person who was seeking relief against forfeiture, after having entered into possession under an agreement for a lease.

Lord Esher considered that the provision was applicable not only in cases where there is an actual tangible lease in existence, but also where there is an agreement for a lease of which specific performance would be decreed, and the case before the court was not one in which the agreement could be enforced, inasmuch as the covenant to repair had been already broken when proceedings for forfeiture were taken. Lindley, J., declined to express any definite opinion upon the general question whether the statute was applicable whenever there was a right to specific performance. But it was unanimously held that this ground of relief, not having been relied upon at the trial nor put forward by the pleadings, was no longer open to the defendant (*v*). Compare sec. 44, note (d), post.

44. By the intervention of a court of equity.—(*a*) *The general rule* is that equity will not relieve against a breach of any covenant as to repairing, a distinction being taken between such covenants and that for the payment of rent (*a*) As regards the application of this rule it makes no difference whether the action was brought for a breach of the general covenant to repair or the special covenant to repair within a certain period after notice (*b*), or to lay

(*t*) *Holman* v. *Knox* (1912) 3 D.L.R. 207.

(*u*) *Fletcher* v. *Nokes* [1897] 1 Ch. 271.

(*v*) *Swain* v. *Ayres* (1888) 21 Q.B.D. 289, affirming 20 Q.B.D. 585.

(*a*) *Hill* v. *Barclay* (1811) 18 Ves. 56; *Wadman* v. *Calcraft* (1804) 10 Ves. 67; *White* v. *Wamer* (1817) 2 Mer. 459. See *Hyman* v. *Rose* [1912] A.C. 623.

Where a lessee for years under covenants to pay rent and repair, made a hundred underleases, and the original lease was avoided for non-payment of rent, it was held, in a suit brought by six of the underlessees to be relieved against the forfeiture, that equity would not apportion the rent, and would only grant relief on condition that the petitioners paid the whole rent in arrear, and made such repairs as would satisfy the covenant in that regard. Having done this they might compel the rest of the undertenants to contribute. *Webber* v. *Smith* (1690) 2 Vern. 103. Richards, C.B., in *Bracebridge* v. *Buckley* (1816) 2 Price Exch. 200, said he did not understand the case.

See *Hurd* v. *Whaley* (1918) 88 L.J. (K.B.) 260 as to relief of underlessee notwithstanding breach of a covenant to repair.

(*b*) See cases just mentioned. In *Hill* v. *Barclay*, ubi cit., Lord Eldon said that, in the case of a notice to repair, a Court will not speculate as to whether the repairs will be equally or more beneficial, if postponed to a time later than the period appointed.

Annotation.

out a sum of money in repairs within a given time (*c*). Nor will a Court interfere for the enforcement of rights, the existence of which is dependent upon the performance of that covenant (*d*).

The special circumstances relied upon, as creating exceptions to this rule, will now be noticed separately.

(*b*) *Accident, surprise, mistake, etc.*—These ordinary reasons for equitable relief are, of course, no less applicable to covenants to repair than in other cases (*e*).

(*c*) *Notice to quit given by the landlord before his assertion of his rights under the covenant.*—In a suit for specific performance of an agreement to give a lease, upon which possession has been taken, Vice-Chancellor Turner held that the liability of a lessee extends to default occurring after, as well as before, a notice to quit which he does not comply with, and that such a notice, so far from being a dispensation by the landlord of the obligations incumbent on the lessee, is rather to be regarded as a notice to the tenant to be more vigilant in the performance of his duties (*f*).

(*d*) *Negligence of persons employed to do the repairs.*—A lessee is responsible for the acts or omissions of the persons he employs to do the work required by a covenant to repair. That those persons may have neglected their duty, furnishes no equitable ground for relieving the lessee against the legal consequences of the breach of covenant (*g*).

(*c*) *Bracebridge* v. *Buckley* (1816) 2 Price 200, (diss. Wood, B.). The ground assigned for this decision was that the Court had no effectual means of ascertaining the amount of compensation, nor of seeing that it was applied to the performance of the covenant. In an old case, in which a lessee for a long term covenanted to lay out £200 upon the premises within ten years, and after thirty years the lessor brought an action of covenant and recovered £150, the covenantor being only able to prove that £30 had been laid out, the Lord Keeper, though admitting the case to be a hard one, would neither give relief on the ground of excessive damages, nor decree that the money received should be laid out on the premises. *Barker* v. *Holden* (1685) 1 Vern. 316.

(*d*) In *Job* v. *Banister* (1857) 26 L.J. (Ch.) 125, Lord Cranworth held that specific performance of a covenant to renew a lease at the expiration of term would not be decreed, where the premises were out of repair, and the covenant for renewal was subject to a proviso that all the covenants should have been performed. The condition as to the performance of the covenants was here regarded as still binding the lessee and his assigns, although the original lease had been once renewed, and in the instrument granting the renewal the provision as to such performance had not been inserted. In *Gregory* v. *Wilson* (1851) 9 Hare 683, Sir George Turner applied the principle that a court of equity will not enforce specifically an agreement for a lease under which possession has been taken and rent paid, where the evidence clearly shews that there has been such a breach of the covenant to repair, which was to have been inserted in the lease, that, if the lease had been executed, the landlord would have had a right to enter and avoid it. Compare *Swain* v. *Ayers*, referred to in the last section (note v).

(*e*) See *Hill* v. *Barclay* (1811) 18 Ves. 56; *Reynolds* v. *Pitt* (1812) 19 Ves. 134.

(*f*) *Gregory* v. *Wilson* (1852) 9 Hare 683.

(*g*) *Nokes* v. *Gibbon* (1856) 3 Drew. 681, 26 L.J. (Ch.) 433.

Annotation.

(e) *No person properly qualified to perform the covenant.*—The fact of there having been no personal representative of the lessee to perform the covenant to repair is not an equitable ground of relief against the consequences of a breach (*h*).

(f) *Lunacy of landlord.*—In one case Lord Eldon enjoined an action of ejectment brought by the committee of a lunatic's estate against a tenant who had rendered the term liable to forfeiture by his failure to repair within three months after notice. The principle adopted was that a court of equity would give relief wherever it seemed reasonable to suppose that a judicious landlord, acting for himself, would not have taken advantage of the forfeiture, and it was remarked that care must be taken not to get rid of a good tenant by being too strict (*i*).

(g) *Breach not wilful.*—In one case Vice-Chancellor Turner declined to accept the contention of counsel that a court of equity would relieve tenants against the consequences of a breach of the covenant to repair, unless such breaches were wilful and obstinate (*j*). Some remarks of Lord Eldon (*k*) in which reliance was placed were explained as being meant to distinguish between such cases and cases of neglect arising from mistake or accident. The learned judge was of opinion that, at all events, where a man who knows that he is charged with a legal obligation, neglects to perform it, his neglect to do so must be deemed to be wilful, and, if he persists in it, to be obstinate.

(h) *Assurances leading the tenant to suppose that the repairs need not be proceeded with* will be treated by a Court as a ground for relieving him against the consequences of a failure to complete the repairs within the period fixed by a notice from the landlord. To raise an equity which will justify interference on this ground, the assurances must be given by the landlord himself or his authorized agent. Remarks made by the agent of a party with whom the lessor is negotiating for a sale of the premises, which, if it is carried out, will result in the demolition of the buildings, cannot be relied on for this purpose (*l*).

(i) *Possibility of compensating the landlord for the breach.*—In a much discussed case Lord Erskine enjoined a landlord from forfeiting the term for non-performance of a covenant to expend

---

(*h*) *Gregory* v. *Wilson* (1852) 9 Hare 683.

(*i*) *Ex parte Vaughan* (1823) Turn. & R. 434. Here the proceedings were stayed upon the completion of the repairs, and the tenant's payment of the expenses of the legal proceedings, survey of the premises, etc., which the committee incurred by reason of the tenant's default.

(*j*) *Gregory* v. *Wilson* (1852) 9 Hare 683.

(*k*) *Hill* v. *Barclay* (1811) 18 Ves. 56, referred to in *Holman* v. *Knox* (1912) 3 D.L.R. 207; *Reynolds* v. *Pitt* (1812) 19 Ves. 134.

(*l*) *Hannam* v. *South London Waterworks* (1816) 2 Mer. 65, per Lord Eldon, p. 67.

Annotation.

£200 in five years upon the demised premises (*m*). The money to be thus laid out was considered to be in effect a substitute for a certain amount of rent, and the case was really decided upon the analogy of those which permit relief against forfeiture for non-payment of rent (*n*), and upon the principle that relief is in the discretion of the Court, and that, where there is a covenant specifying a liquidated sum to be laid out in repairs to be a given time, the landlord could not be injured by the expenditure of that sum (*o*). Special emphasis was laid upon the fact that the suit was not in relation to a mere covenant to repair, and an ejectment brought under the clause of re-entry. The ruling, therefore, was not intended to break in upon the general rule stated at the beginning of this section. But, making every allowance for the circumstances which differentiate it from other decisions of this type, it seems impossible to regard it as good law, especially as it has been treated with very scant respect in later cases (*p*).

(*j*) *Pendency of negotiations with a third party, looking to the total destruction of the subject-matter.*—In one case Lord Eldon said that he was strongly of the opinion that a Court of Equity should interfere where the lessor is insisting that the lessee should repair the demised premises, pending a treaty with a third party, result of which, if it is completed, is that the premises will be immediately afterwards pulled down. But no direct ruling upon the point was made (*q*).

As the rule that such negotiations cannot be considered in assessing the amount of damages recoverable by the lessor has

---

(*m*) *Sanders* v. *Pope* (1806) 12 Ves. 282. The only other case in which a similar decree was rendered seems to be *Hack* v. *Leonard* (1723) 9 Mod. 91, where, upon the broad ground that compensation could be made, the tenant was, upon payment of damages, relieved against a breach of a general covenant to repair. This case was referred to with disapproval by Lord Eldon in *Hill* v. *Barclay* (1811) 18 Ves. 56 (p. 61), and regarded as having been decided on the ground that, if the repairs of the premises are done at the close of the term, the landlord would have his premises in excellent condition from them not having been done sooner. The report was described as a "loose note." In *Bracebridge* v. *Buckley* (1816) 2 Price 200, Richards, C.B., declared himself unable to understand the precise ground of the decision in *Hack* v. *Leonard*.

The judgment of Earl Loreburn L.C. in *Hyman* v. *Rose* [1912] A.C. 630-632 indicates that relief should be granted from any forfeiture upon deposit of a sufficient sum to secure the restoration of the buildings to their former condition at the end of the lease. Followed in *Sullivan* v. *Doré* (1913) 13 D.L.R. 910, and *Straus Land Corp.* v. *International Hotel Windsor* (1919) 48 D.L.R. 519, 45 O.L.R. 145.

(*n*) See ante, note (*a*).

(*o*) See the remarks of Lord Eldon in *Hill* v. *Barclay*; see *Holman* v. *Knox* (1912) 3 D.L.R. 207.

(*p*) See *Bracebridge* v. *Buckley* (1816) 2 Price 200; *Hill* v. *Barclay* (1811) 18 Ves. 56. The latter case, however, did not categorically overrule the decision.

(*q*) *Hannam* v. *South London etc., Co.*, 2 Mer. 65 (p. 67).

Annotation.

been recently applied under the Judicature Act of 1873, which declares that equitable shall prevail over legal principles where there is a conflict between the two (*r*), it is, perhaps, permissible to infer that this doctrine of the learned Chancellor would not now meet with approval if it became necessary to decide as to its soundness.

(*k*) *Judgment in action obtained by default.*—Where a default judgment has been obtained by the lessor in an action of ejectment under such circumstances that it cannot be considered either as a confession by the lessee of the breach of the covenant to repair or an adjudication upon evidence that there has been a breach, a Court of Equity will not refuse relief against the judgment, unless it is clearly proved that there has been a breach (*s*).

IX. Defences to actions for a breach of the covenant.

(As to the Statute of Limitations as a bar to the action, see sec. 12, ante.)

45. Recovery of damages in a previous action.—In an action by a *lessee* against a *lessor* it has been held that, as a covenant to keep in repair is one of such a nature that there is a continuing breach as long as it remains unperformed, the former recovery of damages is not a complete defence, but only goes in mitigation of damages, and that the position of the defendant in this respect is not strengthened by the fact that the lessor has not expended upon repairs the sum awarded him as damages in the former action (*a*) A similar rule doubtless prevails in cases where the lessee is defendant. (See sec. 12, ante). It is, in fact, logically involved in the principle by which the right of the lessor, as covenantee, to substantial damages is qualified to the extent that any damages which may previously have been recovered must be taken into account in any subsequent action. (See sec. 56, post).

46. Repairs executed after the commencement of the action.—Repairs made while the suit is pending are not a ground for abating it, but, at most, a ground for qualifying the damages (*b*)

(*r*) *Conquest* v. *Ebbetts* [1896] A.C. 490. See sec. 60, post.

(*s*) *Banford* v. *Creasy* (1862) 3 Giff. 675. In this case the lessee was restored to possession, having accepted the offer of the lessor to waive all objection to the relief asked, if all his costs of suit, both at law and equity, rent, and expenses for repairs, were paid. Kindersley, V.C., distinguished the cases of *Hill* v. *Barclay*, 18 Ves. 56; *Reynolds* v. *Pitt*, 19 Ves. 134; *Gregory* v. *Wilson*, 9 Hare 683, on the ground that these were cases in which the plaintiff in equity came seeking an injunction to restrain proceedings at law, confessing a breach of covenant, and asking for relief to restrain his landlord from trying the question upon his strict legal right. It was pointed out that Lord Eldon in the first of these cases had by no means enunciated the broad principle that the Court would not under any circumstances grant relief for a breach.

(*a*) *Coward* v. *Gregory* (1866) L.R. 2 C.P. 153, 36 L.J.C.P. 1.
Telfer v. *Fisher* (1910) 3 Alta. L.R. 423; 15 W.L.R. 400.

(*b*) Anon. (1573) 3 Leon. 51.

Annotation.

Accordingly, upon proof being given that the lessee has expended money in repairs after the commencement of the action, the lessor is, at all events, entitled to nominal damages (*c*).

47. Dilapidations due to lessor's unlawful act.—A lessee covenanted to repair, and that, if he should fail to do it, the lessor might execute the repairs and sue for the sum expended. In an action for non-payment of money thus spent, the lessee pleaded that the dilapidations so repaired were caused by the wilful trespass of the lessor. On demurrer this was held not to be a defence, but only the subject of a cross action (*a*).

47a. Transfer of defendant's interest prior to the commencement of the action.—In an action by a lessee against a sublessee to recover the sum spent by the former in doing repairs to prevent the forfeiture of the term by the supreme landlord, it is no defence that the defendant had, before the commencement of the action, transferred his interest in the premises to another person who had rebuilt them entirely (*b*). Compare the rule that an assignee of the term cannot, by assigning over, get rid of his liability. Sec. 37 (*a*), ante.

48. Impossiblity of performance without the commission of a trespass.—On general principles it is clear that the landlord cannot obtain any satisfaction for the non-performance of a covenant as to repairs in any case where the circumstances are such that the repairs cannot be lawfully made unless the permission of the landlord is first obtained, and that permission is withheld. But a plea that the plaintiff prevented the defendant from entering so as to do the repairs covenanted for is bad, where the facts, as stated, shew that, prior to the commencement of the action, the defendant's reversionary estate, succeeding on the determination of an underlease which was relied upon as preventing the entry, had already vested in possession, and that there was accordingly nothing to prevent his entering for the residue of the term and making the repairs in question (*a*).

The position of a tenant who cannot repair without committing a trespass against some third party depends upon the terms of his covenant. In a case in the Ontario Court of Appeal, Hagarty, C.J.O., considered that, under a general covenant by the tenant to keep fences in repair, it was no defence to an action for a breach, that the line fence, for the non-repair of which the action was

(*c*) *Morony* v. *Ferguson* (1874) Ir. R.C.L. 8 551 [new trial directed for the reason that the jury gave the lessee the benefit of the payment, not for the purpose of reducing damages, but of rendering a verdict in his favour].

(*a*) *Kelly* v. *Moulds* (1863) 22 U.C.R. 467.

(*b*) *Colley* v. *Streeton* (1823) 3 D. & R. 522, 2 B. & C. 275.

(*a*) *Baddeley* v. *Vigars* (1854) 4 El. & Bl. 71.

Annotation.

brought, was on the land of the adjoining proprietor—at all events, so long as that proprietor raised no objection to its position. Patteson, J.A., declined to express a decided opinion on this point; Osler, J.A., did not notice it at all (*b*).

The question is certainly one which needs further discussion before the opinion of the learned Chief Justice can be accepted as sound. Clearly the repairs could not be done under such circumstances without committing a trespass on the adjoining proprietor's land, and it is far from being self evident that this is one of the cases in which a person is obliged to elect between the consequences of a breach of contract, or of the trespass without which it is physically impossible to avoid that breach. Only a covenant couched in unqualified terms and clearly covering the fence in question can place the tenant in such a dilemma. It is difficult to admit that this effect can be justifiably attributed to a covenant like the one under discussion. Primâ facie, at all events, such a stipulation is applicable only to the fences which were, as a matter of fact, on the demised premises. It is a rather startling proposition that a tenant may be regarded as bringing himself within the purview of the rigorous doctrine as to unconditional stipulations, where, so far as the words of the covenant are concerned, he cannot be charged with any agreement at all in respect to the subject matter of the alleged breach. The result of predicating liability under such circumstances would be, it is submitted, to carry that doctrine to a length which is not warranted either by principle or authority.

49. Impossibility of performance resulting from the rebuilding of the premises by the tenant.—In a case where the tenant's performance of the covenant has been rendered impossible by his own act in taking down, without the landlord's permission, the buildings demised, and re-erecting others not satisfying the description contained in the lease, his inability to escape the consequences of the non-performance results immediately from the general principle that no one can reap any advantage from his own misfeasance (*a*). According to an old decision the tenant must

---

(*b*) *Houston* v. *McLaren* (1887) 14 A.R. (Ont.) 107.

(*a*) *Maddock* v. *Mallett* (Exch. Ch. 1860) Ir. C.L. 173, see sec. 12, ante for the facts. In *Sinclair* v. *Gordon* (1821) 3 Bligh. 21, the tenant was bound to keep the demised houses in tenantable condition, and leave them so at his removal, but there was no provision in the lease authorizing him to pull down the old buildings without rebuilding the same, or substituting other buildings instead thereof, but he was authorized to build a certain addition. The tenant pulled down the old buildings and erected new ones with an addition thereto. *Held*, that he was entitled only to the value of so much of the new buildings as ought to be considered an addition under the terms of the lease, and not a substitute for the old buildings.

Audet v. *Jolicoeur* (1912) 5 D.L.R. 68 [as to the right to put up new buildings].

Annotation.

be held liable, even where his reason for rebuilding the premises was that they were so dilapidated that they could not be kept in repair.

"Where he hath by his own act tied himself to an inconvenience, he ought at his peril to provide for it" (*b*).

Such a doctrine, however, is hard to reconcile from a logical standpoint, with that which declares the covenant to be adequately performed if the demised buildings are re-erected by the tenant after their destruction by some cause for which the tenant is not responsible. (Sec. 19, ante, and secs. 51, 52, post). Supposing the impossibility of keeping the old premises in repair to be established by the evidence, and the new ones to be substantially the same as those which they replace, the common sense view of the situation rather seems to be that the action must fail at the outset from want of proof of any legal injury.

50. Impossibility of performance arising from the act of the legislature.—This is, of course, a valid defence. Hence a railway company, to which the legislature has compelled a person to sell his land, is not an assignee for whose breach of a covenant binding himself and his assigns he must answer (*a*).

51. Vis major as an excuse for non-performance.—According to Sheph. Touchst. (p. 174), a covenant to repair a house before a certain day is excused where the plague is in the house before and until the day; but the obligation must be performed within a convenient time after the plague ceases. Considerable doubt, however, is thrown upon the correctness of this doctrine by later decisions in which a more stringent effect is ascribed to express covenants of a similar tenor (*a*). But a stipulation to repair before a certain day is quite unusual. The form in which the question, whether this or a similar kind of practical impossibility is a defence most commonly arises is merely this: how far is the tenant entitled to rely on vis major as an excuse for a temporary default in respect to performance? In cases turning upon this question the law is presumably still what was indicated by one of the older authorities in which a lessee who had covenanted on pain of forfeiting a certain sum of money, to sustain and repair the banks

---

(*b*) *Wood* v. *Avery* (1600) 2 Leon. 189, distinguishing cases in which the action is one for waste [plea that the premises were so rebuilt and afterwards kept in repair, held not to be an answer to an action on a bond conditioned to be void, if the lessee should maintain and repair the demised premises].

(*a*) *Baily* v. *DeCrespigny* (1869) L.R. 4 Q.B. 180.

(*a*) See *Shubrick* v. *Salmond* (1765) 3 Burr. 1637 [bad weather no excuse for breach of absolute agreement to freight a ship at a certain place by a certain day]; *Baker* v. *Hodgson* (1814) 3 M. & S. 267 [prohibition of intercourse by authorities on account of the prevalence of infectious disorder, not a sufficient excuse for failure to send a cargo on board a ship].

Annotation.

of a river, so as to prevent it from overflowing a meadow, was held to be excused from the penalty if the banks were destroyed by a great, outrageous and sudden flood, but to be still bound to repair the banks within a convenient time (*b*). The following passage is the locus classicus on the subject and is still frequently quoted:

"Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him; as in the case of waste, if a house be destroyed by tempest, or by enemies, the lessee is excused. But when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract" (*c*).

See also the following section.

52. Destruction of the subject-matter of the covenant by fire.—It has been settled by a large number of decisions extending over a period of three hundred years that, unless the covenant is expressly made subject to an exception in case of fire or other inevitable accident, the tenant still remains bound by his agreement to repair, even when the house, or other thing to be repaired, has ceased to exist in specie, owing to some event for which he is not responsible, whether such destruction be due to an accidental fire (*a*), or lightning (*b*), or the operation of the waves of the sea (*c*),

---

(*b*) Dyer, 33, *a*, 10. That an overflow of land by a tempestuous sea is not waste, see (1) *Griffith's Case* (1564) Moore 69, 187; (2) Ibid (1564) 73, 200; S.C. Keilway, 206. See *Butcher* v. *Hagell* 38 N.S.R. 517.

(*c*) *Paradine* v. *Jane* (1647) Aleyne 26, p. 27, Dy. 33.

(*a*) *Poole* v. *Archer* (1685) 2 Show. 401, Skinn. 210, and cases cited note (f), infra. Whether the general words of the statute of 6 Anne, ch. 31, relieving occupiers of premises from all responsibility for accidental fires should be regarded as having the effect of abrogating this rule of the common law is a question which does not appear to have been considered. On general principles, it seems not unreasonable to contend that the parties may be assumed to have contracted with reference to the special rule of liability declared by the legislature to be thenceforth applicable to all persons of a class which includes tenants.

As to the exception of "fire" in the covenant to repair *Delamatter* v. *Brown* (1905) 9 O.L.R. 351; as to liability of tenant as regards destruction of the premises by fire *Murphy* v. *Labbé* (1897) 27 Can. S.C.R. 126, *Klock* v. *Lindsay* (1898) 28 Can. S.C.R. 453.

(*b*) *Paradine* v. *Jane* (1647) Aleyne 26.

(*c*) *Meath* v. *Cuthbert* (1876) Ir. Rep. 10 C.L. 395. In this case the Court was not obliged to go further than to hold that a lessee is not exonerated from a covenant to repair, as long as the subject-matter of the demise continues to exist, though some of the land has been swept away by the sea, and the residue rendered quite valueless. But the other cases cited in this section shew that the tenant could not have escaped liability, even if the whole of the land demised had been swept away. Compare also *Brecknock* v. *Pritchard* (1796) 6 T.R. 750, where it was held that, under an unqualified covenant to build a bridge and keep it in repair, the covenantor is bound to rebuild, even though the bridge is carried away by an extraordinary flood.

Annotation.

or to the act of a public enemy (*d*). The rule is the same both in law and equity (*e*). Performance of the covenant under such circumstances can, it is clear, only be attained by replacing its subject-matter, a conception which finds a more distinct expression in the form in which the rule is not uncommonly stated, viz., that the tenant must rebuild after the destruction of the leased premises by fire (*f*).

The effect of this principle is also to render a tenant still liable on his covenant to pay rent, even though the premises are destroyed by any of the causes above mentioned (*g*); and the obligation of this covenant, being distinct from, and independent of, that which is created by the covenant to repair, remains unaffected by any qualification which may be introduced, for the benefit of the tenant, into the covenant to repair. Hence even where the covenant to repair is expressly made subject to an exception of casualties by fire, the tenant remains liable for the

---

(*d*) *Paradine* v. *Jane* (1647) Dy. 33, Aleyne 26.

(*e*) *Meath* v. *Cuthbert* (1876) Ir. Rep. 10 C.L. 395.

(*f*) *Walton* v. *Waterhouse* (1773) 2 Saund. 420, 3 Keb. 40; *Bullock* v. *Dommitt* (1796) 6 T.R. 650; *Digby* v. *Atkinson* (1815) 4 Camp. 275; *Torriano* v. *Young* (1833) 6 C. & P. 8; *Pym* v. *Blackburn* (1796) 3 Ves. 34; *Morrogh* v. *Alleyne* (1873) Ir. Rep. 7 Eq. 487; *Hoy* v. *Holt* (1879) 91 Pa. 88; *McIntosh* v. *Lown* (1867) 49 Barb. 550. "When the lessee covenants that he will repair and keep in good and sufficient reparation, without any exception, this imparts that he should in all events repair it; and in case it be burnt or fall down, he must rebuild it, otherwise he doth not keep it in good and sufficient reparation." *Chesterfield* v. *Bolton* (1739) 2 Com. 627. A similar principle is controlling in cases of what are known in Scotch law as feu-contracts. *Clarke* v. *Glasgow Ass. Co.* (1854) 1 Macq. H.L.C. 668, citing English decisions as to lessees. Here the feuar's liability was declared not to be so limited that he was merely compellable to apply to the re-erection of the destroyed building, the sum for which he had bound himself to insure the premises. The House of Lords approved the doctrine of Lord Ellenborough in *Digby* v. *Atkinson*, supra, 278, that such a stipulation as to insurance is introduced merely that the tenant may have the means of performing this covenant.

In *Davis* v. *Underwood* (1857) 2 H. & N. 570, the case was suggested of a man being under a covenant to repair a house, but not to rebuild it if it should be burnt down. Bramwell, B., thought that no action could be maintained by the lessor on the covenant to repair, because he would have sustained no damage. The equitable principle that a person taking the benefit of a bequest must perform the conditions upon which it is made, sometimes creates a responsibility similar in character and extent to that which a tenant incurs by his express contract. Thus, if a testator directs his trustees to allow a designated person to occupy a mill, etc., so long as he shall think proper to do so, "he nevertheless keeping the premises in good and tenantable condition," and pay a certain rent, that person, if he accepts the gift, must reinstate the premises if they are destroyed by an accidental fire, and pay the rent in the meantime, cannot escape the liability by declining any longer to retain them. *Gregg* v. *Coates* (1856) 23 Beav. 33, relying on *In re Spingley*, 3 Mac. & G. 221, a case of a devisee for life with a condition for keeping the premises in repair.

(*g*) *Paradine* v. *Jane* (1647) Aleyne 26; Dy. 33; *Monk* v. *Cooper* (1740) 2 Str. 763, 2 Ld. Raym. 147; *Baker* v. *Holtpzaffell* (1811) 4 Taunt. 45; *Izon* v. *Gorton* (1839) 5 Bing. (N.C.) 501.

Annotation.

stipulated rent, even though the premises have been burnt down, and not rebuilt by the lessor (*h*). Under such circumstances a court of equity will not enjoin an action for the rent (*i*).

As to the rule that the covenant to repair ceases to be "usual," in the sense in which that word is used in suits for specific performance of agreements for leases, if there is a proviso as to non-liability in case of the destruction of the premises by fire or tempest, see sec. 13, ante.

53. Agreement subsequently modified by the consent of the landlord.—If the tenant seeks to bar the action on the theory of a subsequent accord based upon mutual promises on his part to repair and on the landlord's part to forbear to sue, he cannot succeed if the contract set out in his plea is merely executory, and no good consideration is shewn for the promises (*a*).

If the agreement to repair is, as is customary, under seal, it cannot be discharged by a parol license (*b*).

54. Waiver of the right of action by the landlord.—(*a*) *Acceptance of rent after breach.*—The receipt of rent up to a date subsequent to that at which the premises have been put into good repair is a waiver of the right of forfeiture for such dilapidations as may have previously existed (*a*). But the doctrine that the tenant's failure to repair constitutes a continuing breach of a covenant to keep in repair (sec. 12, ante), obviously involves the corollary that, if the dilapidations which existed before the rent was paid remain unremedied after the payment, the right of action, whether for damages or in ejectment, still remains intact. In other words, the right of action under such circumstances is not waived by the

---

(*h*) *Belfour* v. *Weston* (1786) 1 T.R. 310; *Brown* v. *Preston* (1825) Sup. Ct. Dec. Newfoundland 491. But see *Central Agency Ltd.* v. *Hotel Dieu of Montreal*, 27 Que. S.C. 281.

(*i*) *Holtpzaffell* v. *Baker* (1811) 18 Ves. 115; *Hare* v. *Groves* (1796) 3 Anstr. 696, per Macdonald, C.B.

(*a*) *Bayley* v. *Homan* (1837) 3 Bing. (N.C.) 915, 5 Scott 94, holding an action not to be barred by a plea stating that, after covenant broken, an agreement was entered into between the plaintiff and the defendant to the effect that, in consideration that the defendant at the request of the plaintiff had become tenant of the premises from year to year at a certain rent, and had at request of plaintiff, promised to repair the premises before a specified date, plaintiff would give time till such date for the reparation without bringing an action, and that, in case the premises should be repaired by that date would relinquish all claim in respect to the breach.

(*b*) *Rawlinson* v. *Clarke* (1845) 14 M. & W. 187.

(*a*) *Pellatt* v. *Boosey* (1862) 31 L.J.C.P. 281 [Byles, J., while agreeing with the rest of the court as to this general principle, pointed out that another special ground for refusing to allow the action to be maintained was afforded by the fact that the plaintiff by describing in his declaration the breach as one which occurred "during the existence of the term" had acknowledged that the term had existed down to the end of the period during which the premises had been in a state of disrepair]. See Fawcett Landlord and Tenant 3rd Ed. p. 499; also *Moore* v. *Allcoats Mining Co.* [1908] 1 Ch. 575 and *Balagno* v. *Leroy* (1913) 10 D.L.R. 601 and annotation.

Annotation

landlord's acceptance of rent, such acceptance being construed merely as an admission by him that the tenancy subsisted up to the end of the period for which the rent was paid (*b*). Still less is the lessor's right of action for a breach by the lessee lost by his acceptance of rent from the lessee's assignee (*c*)

The rule is different where the covenant broken is of such a nature that the breach is not a continuing one. For example, where the tenant has broken a covenant against underletting, the landlord, if he accepts rent or brings an action for it, even after he has instituted proceedings in ejectment, is deemed to have waived his right of re-entry (*d*). This distinction constitutes one of the grounds upon which two Ontario decisions are based. In one of these it was held that the removal of a fence cannot be set up as a ground of forfeiture if the landlord, with knowledge of the facts, accepts rent from the tenant (*e*). The position was distinctly

---

(*b*) *Chauntler* v. *Robinson* (1849) 4 Exch. 163 [covenant here was to repair "when and so often as need or occasion should require during all the term"]; *Ainley* v. *Balsden* (1857) 14 U.C.Q.B. 535; *Thompson* v. *Baskerville* (1877) 40 U.C.Q.B. 614.

Where the premises continue in the same state of disrepair between the date up to which rent is claimed and the date at which an action of ejectment for breach of covenant is brought, the demand for rent is not inconsistent with the right to maintain the action. *Penton* v. *Barnett* (1897) L.J. (Q.B.) 11.

Where an action is brought for non-repair after notice, and an order of court is made by the consent of the parties, enlarging the time for the completion of the repairs, the landlord's subsequent acceptance of the rent for the current quarter is merely an admission that the lessee was tenant up to the end of the quarter and does not operate as a waiver of the right of forfeiture if the repairs are not completed at the date fixed. *Doe* v. *Brindley* (1832) 4 B. & Ad. 84; *Doe* v. *Jones* (1850) 5 Exch. 498. The breach of a contract to repair within a reasonable time being a continuing breach is not waived by the landlord's acceptance of rent in such a sense that the reasonable time which the tenant has for the repairs shall be deemed to run from the date of the acceptance and not from the date when the premises fell into disrepair. *Doe* v. *Baker* (1850) 5 Exch. 498. Where the landlord has given the tenant notice to repair, an acceptance of rent after the expiration of the period within which the tenant is required to make the repairs is not a waiver of the forfeiture which the tenant incurs by failing to complete the repairs before the period is expired. *Cronin* v. *Rogers* (1884) 1 Cab. & E. 348, per Denman, J. *Fryett* v. *Jeffreys* (1795) 1 Esp. 393 [apparently the action is here conceived of as being brought on the general covenant though the report is not clear upon this point]. *Holman* v. *Knox* (1912) 3 D.L.R. 207.

Where a notice pursuant to sec. 14 s.s. 1 of the Conveyancing Act is given by a lessor to a lessee requiring specific breaches of a covenant to repair to be remedied, and such notice is only partially complied with; the acceptance afterwards of rent by the lessor, although a waiver of the forfeiture of the lease at the time such rent is due does not deprive the lessor of his rights of re-entry, if the breaches are continuing.

New River Co. v. *Crumpton* 86 L.J.K.B. 614; [1917] 1 K.B. 762.

(*c*) *Bacon's Abr.* (D. 4).

(*d*) *Dendy* v. *Nicholl* (1858) 4 C.B.N.S. 376.

Straus Corp. v. *International Hotel Windsor* (1919) 48 D.L.R. 519.

(*e*) *Leighton* v. *Medley* (1882) 1 O.R. 20.

Annotation.

taken that the removal of the fence, even if it was a breach of a covenant to repair fences, was not a continuing breach. In the other case a precisely similar conclusion, and on the same ground, was arrived at with regard to the breaking of a doorway into an adjoining room (*f*).

Except in so far as these rulings may be sustained on the essentially equitable ground of acquiescence (see next section), the writer ventures to think that they are contrary both to principle and authority. From a logical standpoint, the quality of the act of removing a fence is plainly quite immaterial in an action the gravamen of which is that the fence was suffered to remain out of repair. The only question to be decided is whether the tenant had or had not put it in the condition contemplated by the covenant. The fact that he had removed the fence necessarily implies that he had not put it in that condition, and that it was still out of repair. Such being the situation, there was obviously a breach of the covenant, and a breach which had continued up to the time when the action was brought. The authorities above cited are, therefore, decisive of the landlord's retention of his right to forfeit the term in spite of his acceptance of the rent. To hold otherwise would, under the supposed circumstances, involve the preposterous result that a tenant can, by annihilating the subject-matter of the covenant, place the landlord in the dilemma of losing his rights of action if he continues to recognize the lease as an existing obligation at any time after he has ascertained that the restoration of the subject-matter must be effected before it is physically possible to restore the covenant. The bare statement of such a doctrine is sufficient to expose its unsoundness.

(*b*) *Effect of notice to repair given prior to action on general covenant.*—The principle that the general covenant to repair and the covenant to repair after notice are independent obligations, (sec. 8, ante), clearly involves the corollary that the landlord does not, by giving notice to repair, waive his right to bring an action for damages on the general covenant (*g*).

His position, after giving such notice, with respect to his right to forfeit the term, depends upon the actual terms in which the notice is couched. Even though the lease contains both a general covenant to repair and a covenant to repair after three months' notice, the service of the notice will not preclude him from subsequently maintaining ejectment on the general covenant before the expiration of the three months, if the phraseology of the notice is such as to render it applicable to the general rather than

(*f*) *Holderness* v. *Lang* (1886) 11 O.R. 1.

(*g*) *Doe* v. *Meux* (1825) 4 B. & C. 606. *Holman* v. *Knox* (1912) 3 D.L.R. 207; see also *Straus Corp.* v. *International Hotel Windsor* (1919) 48 D.L.R. 519.

Annotation.

to the special covenant—as where the tenant was required *forthwith* to put the premises in repair, agreeably to the covenant in that regard (*h*); or applicable to both covenants—as where he was notified to repair in accordance with the *covenants* of the lease (*i*). On the other hand, by serving an unequivocal notice to repair within the period provided for by the special covenant, the landlord is deemed to have waived his right to forfeit the term under the general covenant until the expiration of the conventional period. The notice, it is said, amounts to a declaration that the landlord will be satisfied if the premises are repaired within three months, or as Holroyd, J., preferred to put it, operates as an admission that the tenancy would continue for three months. If this were not the rule, the landlord might be able to bring ejectment after the tenant had put the premises into complete repair pursuant to the notice (*j*).

(*c*) *Eviction.*—(See also sec. 11, ad finem). Any act of the landlord amounting to an eviction, although it may not deprive him of his right to recover damages for a breach of the covenant to repair, is regarded as a waiver by the landlord of his right to take advantage of the condition of re-entry (*k*).

55. Landlord's acquiescence in the non-performance of the covenants.—Under appropriate circumstances, the equitable plea that the landlord acquiesced in the non-performance of the covenant to repair, will constitute an effective defence (*a*). Such a plea is not made good unless the tenant establishes not merely the

---

(*h*) *Roe* v. *Paine* (1810) 2 Camp. 520.

(*i*) *Few* v. *Perkins* (1867) L. R. 2 Exch. 92.

(*j*) *Doe* v. *Meux* (1825) 4 B. & C. 606, 7 D. & R. 98, 1 C. & P. 346. In another case it was held that the principle which prevents the pursuit of inconsistent remedies operates so that a lessor who gives the lessee notice to repair within two months, under a clause in one of the covenants providing that, if the repairs should not be executed within the period specified, the landlord might execute them himself and distrain upon the tenant for the expenses, is thereby deemed to have waived his right to proceed under the general power of re-entry, as for condition broken. According to Patteson, J., the situation, after the notice had been given, was this: "The landlord says, I shall take advantage of the proviso enabling me to compel you to repair, or, if you do not repair within the two months, to perform the repairs myself, and, on so doing, to distrain, not to re-enter. The tenant thus had the option given him, and exercised it by not repairing." Lord Denman considered that a notice given after the expiration of the original period of notice that, if the lessee did not agree to certain terms in three days, he would be held to his covenant was not a reasonable notice such as would revive the right of action in the general covenant. *Doe* v. *Lewis* (1836) 5 A. & E. 277.

(*k*) *Pellatt* v. *Boosey* (1862) 31 L.J.C.P. 281.

(*a*) *Hill* v. *Barclay* (1811) 18 Ves. 56. Evidence that a tenant neglected to repair in a reasonable time, merely because he is uncertain whether a new lease will be granted him, negatives any inference of acquiescence on the landlord's part in the property remaining out of repair. *Job* v. *Banister* (1857) 26 L.J. (Ch.) 125.

Annotation.

landlord's previous knowledge of, but his assent to the changed conditions (*b*). Whether this assent shall be implied must be determined from the evidence introduced. In an Ontario case referred to in the last section, the landlord was held to be precluded from taking advantage of a breach of the covenant where he had at first raised objections to the alteration of the premises, but, after a single conversation on the subject, had made no further complaint (*c*). There the whole consideration for the term had been paid in advance, so that the case was not complicated by questions arising out of the acceptance of rent. The mere fact that the tenant has been allowed to remain in possession for three years after the breach of the covenant is not a sufficient ground for the interference of a court of equity to restrain the landlord from forfeiting the term where no rent has been received during that period, nor the subsistence of the tenancy otherwise recognized (*d*.) Still less can the principle of acquiescence be applied with the result of creating an implied promise on the landlord's part to pay for the alterations on the premises where a tenant, instead of repairing, as his covenant requires him to do, rebuilds (*e*).

X. Measure of damages in actions brought prior to the expiration of the term by the ground landlord against his immediate lessee.

56. Substantial damages may always be recovered.—In a nisi prius case, it was ruled by Rolfe, B., that where a tenant for years agrees to repair, and the premises are destroyed by fire without his fault, the landlord cannot, in an action brought before the expiration of the term, recover more than nominal damages for a breach of this agreement (*a*).

"Otherwise he might put the sum awarded in his pocket and then bring another action against the defendant for non-repair, in which action he would, on the principle contended for, be entitled again to recover substantial damages."

But this case is quite contrary to the general current of authority. The objection adduced by the learned judge, as being conclusive against the allowance of more than nominal damages, manifestly does not carry the decisive weight ascribed to it, for although the lessor would not be debarred from commencing a second action the next day after he had received the damages awarded in the first, he could not recover substantial damages

(*b*) *Gange* v. *Lockwood* (1860) 2 F. & F. 115. *Straus Corp.* v. *International Hotel Windsor* (1919) 48 D.L.R. 519 [the landlord consented in this instance to only part of the changes made].

(*c*) *Holderness* v. *Lang* (1886) 11 Ont. Rep. 1.

(*d*) *Bracebridge* v. *Buckley* (1816) 2 Price 200.

(*e*) *Sinclair* v. *Gordon* (1821) 3 Bligh. 21.

(*a*) *Marriott* v. *Cotton* (1848) 2 C. & K. 553; as to liability of tenant see *Murphy* v. *Labbé* (1897) 27 Can. S.C.R. 126; *Klock* v. *Lindsay* (1898) 28 Can. S.C.R. 453; and Art. 1629 Civil Code (Que.).

Annotation.

unless he could prove that some substantial injury had been received since that for which he had been recompensed in the first action (*b*). The case has, accordingly, been often questioned, and may be regarded as having been virtually, if not actually, overruled (*c*). If it is to be upheld at all, it must be regarded as only sustainable on its own peculiar circumstances—the injury being accidental, and no actual damage received owing to the fact that the premises were insured (*d*). Even this slender support can only be claimed for the decision, in so far as it is an individual expression of opinion by an able judge, for during the discussion of an Irish case in which it was cited as an authority (*e*), Serjeant, afterwards Justice, O'Brien, ascertained from an examination of official copies of the orders made in *Marriott* v. *Cotton*, that the verdict for nominal damages had at the trial was set aside by the court above and substantial damages awarded (*f*).

The accepted doctrine, therefore, is that in an action brought on the covenant to repair during the currency of the term, substantial damages may be recovered (*g*). The amount recoverable is not limited to nominal damages, even when the length of the term unexpired is so great that no real damage can be proved, as the accumulated proceeds of investment of a nominal sum would at the end of the term provide more than a sufficient fund (*h*).

A court will usually refuse to interfere with a verdict awarding

---

(*b*) See the remarks of Lefroy, C.J., in *Bell* v. *Hayden* (1859) 9 Ir. C.L. 301. "A jury, where successive actions are brought, may think the former action an important element for their consideration; but it cannot be said that damages recovered at one period for one thing affords an answer to an action at another period for another thing." Monahan, C.J., in *Maddock* v. *Mallett* (1860) 12 Ir. C.L. 173 (p. 211).

(*c*) *Joyner* v. *Weeks* [1891] 2 Q.B. 31 (Wills, J.); *Macnamara* v. *Vincent* (1852) 2 Ir. Ch. 481 (Lord Chancellor Brady).

(*d*) See the argument of counsel in *Coward* v. *Gregory* (1866) L.R. 2 C.P. 153; also Mayne on Dam., p. 250, whose criticism is adopted by Richards, C.J., in *Perry* v. *Bank, etc.* (1866) 16 U.C.C.P. 404; see *Murphy* v. *Labbé* (1897) 27 Can. S.C.R. 126.

(*e*) *Macnamara* v. *Vincent* (1852) 2 Ir. Ch. R. 481.

(*f*) See the remarks of the learned judge himself in *Bell* v. *Hayden*, 9 Ir. C.L. 301 (p. 303).

(*g*) *Doe* v. *Rowlands* (1841) 9 C. & P. 734; *Turner* v. *Lamb* (1845) 14 M. & W. 412; *Smith* v. *Peat* (1853) 9 Ex. 161; *Mills* v. *East London Union* (1872) L.R. 8 C.P. 79; *Beatty* v. *Quirey* (1876) Ir. Rep., 10 C.S. 516; *Metge* v. *Kavanagh* (1877) Ir. Rep. 11 C.L. 431; *Joyner* v. *Weeks* [1891] 2 Q.B. 31; *Macnamara* v. *Vincent* (1852) 2 Ir. Ch. 481; *Perry* v. *Bank, etc.* (1866) 16 C.P. 404. A judge is, of course, justified in refusing to direct a jury to find only nominal damages. *Bell* v. *Hayden* (1859) 9 Ir. C.L. 301. See *Holman* v. *Knox* (1912) 3 D.L.R. 207; *Hyman* v. *Rose* [1912] A.C. 623; *Sullivan* v. *Doré* (1913) 13 D.L.R. 910; *Straus Corp.* v. *International Hotel Windsor* (1919) 48 D.L.R. 619.

(*h*) Wills, J., in *Joyner* v. *Weeks* [1891] 2 Q.B. 31; *Atkinson* v. *Beard* (1861) 11 U.C.C.P. 245.

Annotation.

substantial damages where some want of repair is shewn (*i*). On the other hand, where the jury have given merely nominal damages for a breach of a covenant to deliver up in "good and tenantable repair," a new trial will be granted where there has been a substantial breach of the covenant, and the evidence of the lessee's own witnesses shews that the damages awarded are insufficient to put the premises in a state of proper repair (*j*).

The cases in which the sublessee is sued by a mesne landlord stand, to some extent, upon different footing from those in which the head landlord is suing, and the plaintiff is sometimes restricted to nominal damages as a result of the fact that the head landlord is the party to whom the obligation to repair is ultimately owed by all the parties concerned (*k*). (See xii. post.)

57. Doctrine that the measure of damages is the amount necessary to put the premises in good repair.—The rule which prevailed two centuries ago in the English courts is expressed in the following passage of Lord Holt's judgment in an oft-cited case:

"We always enquire in these cases what it will cost to put the premises in repair, and give so much damages" (*a*).

This rule was largely superseded about the middle of the nineteenth century by the alternative rule stated in the next section. Indeed, some expressions of judicial opinion at and since that time can scarcely be construed otherwise than as indicating an adoption of the view that the damages ought never to be computed with reference to the standard indicated by Lord Holt's doctrine (*b*). But the propriety of employing either method of assessment,

---

(*i*) *Payne* v. *Haine* (1847), 16 M. & W. 541. Where the defendant's own witnesses admit that there was some want of repair, a verdict for so small an amount as £14 10s. will not be set aside on the ground that the damages are excessive. *Stanley* v. *Towgood* (1836), 3 Bing. (N.C.) 4. Unless the award of an arbitrator is impeached, it is conclusive as to the amount of damages, not merely in an action on the award, but in an action for a breach of the covenant to repair, *Whitehead* v. *Tattersall* (1834), 1 Ad. & E. 491. Where a plaintiff declares as the survivor of two co-heiresses, and lays the breach after the death of the other co-heiress, the consideration of the jury, in their estimate of damages for non-repair, is not limited to the period subsequent to the death of that co-heiress. *Nixon* v. *Denham* (1839) 1 J. & S. (Ir.) 416.

(*j*) *Macandrew* v. *Napier* (1883) 2 New Zeal. L.R. 24. But it should be remembered that the amount necessary to put the premises in repair is not the invariable measure of damages. See the following sections.

(*k*) See *Clare* v. *Dobson* (1911) 80 L.J. (K.B.) 158 [as to rights of lessee against underlessee in respect to the covenant to repair.]

(*a*) *Vivian* v. *Champion* (1705) 2 Ld. Raym. 1125.

(*b*) "The damage by non-repair may surely be very different, if the reversion comes to the landlord in six months or in nine hundred years. Lord Holt's doctrine would startle any man to whom the proposition was stated." *Turner* v. *Lamb* (1845) 14 M. & W. 412, per Alderson, B. So late as 1893 Wills, J., declared it to be clear law that the true measure of damages is not the sum required to put the premises into repair, but the loss to the landlord measured by the depreciation in the saleable value of the reversion. *Henderson* v. *Thorn* [1893] 2 Q.B. 164, 62 L.J. (Q.B.) 586.

Annotation.

according as one or other seems most convenient or best adapted to do justice under circumstances, still continued to receive occasional recognition (*c*). This trend of opinion, it is true, is chiefly apparent in Ireland, but any doubts which the practice of the English judges and the language used by some of them, may have raised in regard to the question whether Lord Holt's doctrine had not been entirely repudiated have been banished by a recent case

---

(*c*) In 1839 it was held that, in an action on a covenant to keep premises in repair, contained in a lease for three lives with a covenant for perpetual renewal on the part of the landlord, two of these lives having fallen when the action is brought, the measure of damages is the sum necessary to put the premists into repair, and not merely the sum representing the diminution of the landlord's security for rent. *Nizon* v. *Denham* 1 J. & S. (Ir.) 416. About twenty years after Baron Alderson's strong expression of disapproval, already quoted, we find reported the following remarks of a judge of the same court: "The damages recovered are usually such as are sufficient to put the premises in repair. As a matter of fact, it is never proved in evidence to what extent the reversion is damaged." . . . "The great object of a covenant of this sort is not to put money in the pockets of a lessor, but to enforce the performance of the acts stipulated for." *Davies* v. *Underwood* (1857) 2 H. & N. 570, per Watson, B. In 1877 the law was laid down in an Irish case by Palles, C.B., "Where the action is brought pending the lease, the damages may be, but need not necessarily be, the present value of a sum equal to the cost of repair, that sum being payable at the end of the term. . . . The damages may, but need not necessarily be, the injury caused by the want of repair to the saleable value of the reversion." The learned judge, in upholding an instruction, allowing the jury to estimate the damages in either way, as they thought proper, said: "Who is to decide in any particular case the most appropriate mode [of arriving at the damages]? I think that, save probably in very extreme cases, such, for instance, as where, on the one side the lessor has actually sold his interest, or on the other where the breach complained of has subjected him to a liability to a head landlord, or other third party, to a fixed amount, this is the province of the jury. They can best appreciate the circumstances of each case, best consider the reasonable uses to which the premises can be applied, and determine whether their application to such cases will involve a reconstruction of that which was permitted to fall into disrepair or a total destruction of the subject matter of the covenant. *Metge* v. *Kavanagh* (1877) 11 Ir. Rep. C.L. 431. In this case it was considered "the most accurate way of making an allowance to the lessee, for the expenditure necessary to make repairs is by deducting the value of the interest, during the lease, of the sum representing the value of the necessary repairs; or, in other words, by reducing the actual cost of the repairs to the present value of that sum payable at the end of the lease."

In the case of a fee-farm grant, where there is no reversion, and the only right the grantor has is to preserve the security for his fee-rent, and to have the premises kept in such repair as shall not impair this security, or so endanger the recovery of the premises in fair tenantable condition, if there is an eviction for non-payment of rent, the principle of ascertaining the sum required to restore the premises to good tenantable repair, and reducing this sum to its present value as a reversionary interest which will come into possession at the termination of the grant, is not deemed to be properly applicable. In such a case it was directed that the damages should be assessed at the sum by which the interest of the grantor in the premises comprised in the fee-farm grant had been depreciated by the alleged breaches and that regard should be had to any diminution in the security of the fee-farm rent, or in the selling value of the grantor's interest in the premises in their existing condition, as compared with their condition if duly kept in repair. *Lombard* v. *Kennedy* (1868) 23 L.R. (Ir.) 1.

Annotation.

in the House of Lords, which determines that there are really two alternative rules for estimating the amount recoverable by the lessor. In an opinion concurred in by Lord Morris and Lord Macnaghten, Lord Herschel said:

"I do not think any hard and fast rule can be laid down as to the damages which may be recovered by the covenantee during the currency of a lease in respect of a breach of a covenant to keep the demised premises in repair. All the circumstances of the case must be taken into consideration, and the damages must be assessed at such a sum as reasonably represents the damage which the covenantee has sustained by the breach of covenant. . . . I quite agree with the criticism to which Lord Holt's view has been subjected, if that learned judge intended to lay down that, whatever the circumstances, and however long the term had to run, the damages must necessarily be what it would cost to put the premises into repair. On the other hand, I think it would be equally wrong to hold that this could never be the measure of damages, whatever the circumstances, and however nearly the term had expired" (*d*).

In the case cited it was shewn that, under the circumstances, the application of either test yielded the same results.

58. Doctrine that the measure of damages is the depreciation in the selling value of the reversion caused by the breach.—The doctrine which, for at least fifty years, was applied by the English courts nearly, if not quite to the exclusion of that noticed in the last section, is that the amount of damages recoverable for a breach of the covenant to repair is measured by the extent to which the reversion has been injured by the failure to repair. In other words, "the criterion of damage is the loss which the landlord would sustain by the non-repair, if he went into the market to sell the reversion" (*a*). In a recent case in the Court of Appeal Rigby, L.J., said:—

(*d*) *Conquest* v. *Ebbetts* [1896] A.C. 490. See further, as to this case, sec. 61, post. This expression of opinion seems to throw considerable doubt upon, if it does not actually overrule the decision in *Henderson* v. *Thorn* [1893] 2 Q.B. 164, which proceeds upon the theory that the doctrine which declares the depreciation in the selling value of the reversion to be the measure of damages is so far rigid and invariable, that a sum paid by the lessee as damages for a breach of the covenant to repair in an action brought during the currency of the term will be presumed to have been paid by him with a knowledge that his liability was computed on this basis. See sec. 58, post.

See judgment of Earl Loreburn, L.C., in *Hyman* v. *Rose* [1912] A.C. 623, at 630.

(*a*) *Smith* v. *Peat* (1853) 9 Exch. 161, per Martin, B. See also *Conquest* v. *Ebbetts* [1896] A.C. 490; *Henderson* v. *Thorn* [1893] 2 Q.B. 164; *Doe* v. *Rowlands* (1841) 9 C. & P. 734, per Coleridge, J.; *Lombard* v. *Kennedy* (1888) 23 L.R. Ir. 1; *Perry* v. *Bank, etc.* (1886) 16 U.C.C.P. 404. The same rule is applied where the action is brought for waste. *Whetham* v. *Kershaw* (1885) 16 Q.B.D. 613, 34 W.R. 340, per Bowen, L.J. Where a lessee covenants to

Annotation.

"The rule is that on a covenant to keep in repair you are to take the effect upon the value of the reversion, treating it as though it were carried into the market for sale under such circumstances that the purchaser might do whatever he liked with the property, and then turn it to the best advantage" (*b*).

The remarks of Lopes, L.J., in the same case are to the same effect:

"The measure of damages for the breach of a covenant to keep in repair during the currency of the term is the loss which is occasioned by the lessor's reversion—a loss which will be greater or less, according as the term of the tenant at the time of the breach has a less or greater time to run." He said that he would have left the case to the jury in these words: "What you have to consider is what is the loss occasioned to the plaintiff's reversion. In order to arrive at that you must in your own mind determine what is the value of this reversion with this covenant observed, and what is the value of this reversion with the covenant not observed; and the difference between the two sums will be the loss which the plaintiffs have sustained in respect to their reversion."

For the purpose of the above doctrine it is of course immaterial whether the action is brought against the original lessor or an assignee of the term (*c*).

The special reason which is supposed to render this the only fair rule for estimating the damages in cases where the lease has a long time to run, is supposed to be that, "when the damages are awarded to the landlord, he is not bound to expend them in repairs, neither can he do so without the tenant's permission to enter on

---

maintain the premises in as good a condition as they would be when repaired by him according to an agreement, and the premises are destroyed by fire, the measure of damages for which he is liable is the cost of rebuilding less the sum by which they will be increased in value as a result of the rebuilding. *Yates* v. *Dunster* (1855) 11 Exch. 15. Supposing the injury to the reversion to be taken as the measure of the damages in a case where a tenant has received notice from a public body to treat for the sale of his interest under the compulsory provisions of a statute like the English Lands Clauses Consolidation Act of 1845, the lessor, in an action brought for breach of the covenant before the actual assignment under the statute, is entitled to have the damages assessed with reference to the determination in the value of the reversion up to the date of the assignment, and not merely up to the date when the notice to treat was received. *Mills* v. *Guardians, etc.* (1872) L.R. 8 C.P. 79.

(*b*) *Ebbetts* v. *Conquest* [1895] 2 Ch. 277. So far as the opinions of the Lords Justices embody the view that the method of the assessment here explained is the only correct one, they have been overruled by the House of Lords. See last section. But their remarks stand as an authoratative exposition of the particular doctrine applied.

Hyman v. *Rose* [1912] A.C. 623; *Straus Corp.* v. *International Hotel Windsor* (1919) 48 D.L.R. 619.

(*c*) *Smith* v. *Peat* (1853) 9 Exch. 161.

Annotation.

the premises" (*d*). But this consideration does not seem very conclusive, since, whatever the footing on which the damages are computed, the amount recovered will be credited to the tenant in any subsequent litigation, whether it was actually expended by the landlord or not. See sec. 56, ante.

XI. Measure of damages in actions brought after the expiration of the term by a ground landlord against his immediate lessee.

59. Damages usually assessed at the amount required to put the premises in repair.—The rule ordinarily applied in the assessment of damages was thus stated by Lopes, L.J., in a recent case:

"Where the term has come to an end, and the action is on the covenant to leave in repair, the measure of damages is the sum it will take to put the premises into the state of repair in which the tenant ought to leave them according to his covenant" (*a*).

There has been some controversy as to whether the method of computation specified in this passage is not the only correct one. Discussing this question lately in the English Court of Appeal (*b*) Lord Esher said:

"A great many cases have been cited, of which only one was directly in point, though another was as nearly as possible in point; and a series of dicta of learned judges have been referred to, which seem to me to shew that for a very long time there has been a constant practice as to the measure of damages in such cases. Such an inveterate practice amounts, in my opinion, to a rule of law. That rule is that, when there is a lease with a covenant to leave the premises in repair at the end of the term, and such covenant is broken, the lessee must pay what the lessor proves to be a reasonable and proper amount for putting the premises into the state of repair in which they ought to have been left. It is not necessary in this case to say that that is an absolute rule applicable under all circumstances; but I confess that I strongly

---

(*d*) Coleridge, J., in *Doe* v. *Rowland* (1841) 9 C. & P. 734. In this case the learned judge also pointed out that, if a lease for 100 years has 99 years to run, it cannot make much difference in the value of the reversion whether the premises are now in repair or not.

(*a*) *Ebbetts* v. *Conquest* [1895] 2 Ch. 377. See also *Joyner* v. *Weeks* [1891] 2 Q.B. 31; *Henderson* v. *Thorn* [1893] 2 Q.B. 164; *Inderwick* v. *Leech* (1884) C. & E. 412, 1 T.L.R. 95, affirmed T.L.R. 484; Mayne on Dam. (4th Ed.) p. 253, quoted with approval by Denman, J., in *Morgan* v. *Hardy* (1886) 17 Q.B.D. 770 (p. 779). Where a tenant remains in possession under a void lease until the term specified therein has expired, the damages should, of course, be assessed with reference to the state of premises at the end of the term. *Beale* v. *Sanders* (1837) 3 Bing. (N.C.) 850.

As to the desirability of the appointment of a surveyor to estimate on behalf of both parties the amount due for dilapidations when the expiration of the term is approaching, see Woodfall L. & T. (15th Ed.) 683.

(*b*) *Joyner* v. *Weeks* [1891] 2 Q.B. 31 followed by *Buscombe* v. *Stark* (1916) 30 D.L.R. 736.

Annotation.

incline to think that it is so. It is a highly convenient rule. It avoids all the subtle refinements with which we have been indulged to-day, and the extensive and costly inquiries which they would involve. It appears to me to be a simple and businesslike rule; and if I were obliged to decide that point, I am very much inclined to think that I should come to the conclusion that it is an absolute rule. But it is not necessary to determine that point in the present case. The rule that the measure of damages in such cases is the cost of repair, is, I think, at all events, the ordinary rule, which must apply, unless there is something which affects the condition of the property in such a manner as to affect the relation between the lessor and the lessee in respect to it."

Under a covenant to deliver up premises in thorough repair and good condition the lessee is bound to renew or rebuild any subsidiary part of the premises and is liable for damages if he does not do so (*c*).

The language of Fry, L.J., is somewhat less decided:

"I cannot help observing that the rule so laid down is one of great practical convenience. It is more simple than the inquiry to what extent the reversion is damaged, which appears to me to involve many matters in respect to which the lessor has nothing to say to the lessee. It is much more simple than the rule suggested by the judgment of the Court below, viz., that the measure of damages is the amount of the diminution in value of the reversion not exceeding the cost of the repairs. That involves the ascertainment of two amounts in order to take the smaller of the two. However exact such a measure of damages may be, there is, as it seems to me, a complexity about it which unfits it for determining affairs as between man and man in a court of law."

These utterances shew, at all events, that the Court of Appeal regarded the method of computation which they applied as being pre-eminently "the workable one" (*d*). But the practical importance of the question is greatly diminished by the fact that, as Denman, J., recently remarked, in most instances the amount required to place the premises in the state in which they ought to have been left is the same amount as that by which the selling value of the premises falls short of what it would have been if the tenant had done his duty (*e*).

(*c*) *Lurcott* v. *Wakely* [1911] 1 K.B. 905, followed by Middleton, J., who delivered judgment of a Divisional Court in *Bornstein* v. *Weinberg* (1912) 27 O.L.R. 536, 8 D.L.R. 752, also *Jones* v. *Joseph* (1918) 87 L.J. (K.B.) 510; *Commercial Properties* v. *La Compagnie Leduc* 54 Que. S.C. 392.

(*d*) See opinion of Wills, J., in *Henderson* v. *Thorn* [1893] 2 Q.B. 164.

(*e*) Denman, J., in *Morgan* v. *Hardy* (1886) 17 Q.B.D. 770, 779.

Annotation.

In cases where the premises are delivered up in such bad repair that they cannot be occupied at once by another tenant, the landlord is entitled to recover not only the amount necessary to put the premises in repair, but an additional sum for the time during which the premises will be useless owing to the repairs not having been done (*f*).

If we adopt the view that the damages awarded in an action brought on the covenant during the currency of the term shall be conclusively presumed to have been assessed with reference to the selling value of the reversion, (see sec. 57, ante), the consequence obviously follows that, when the landlord brings an action at the end of the term, the lessee is not entitled to have the damages computed on the theory that the sum paid in the first action represented the sum necessary to put the premises in repair (*g*). But whether any such rigid presumption can be indulged, independently of direct evidence, is, to say the least, extremely doubtful since the decision of the House of Lords in *Conquest* v. *Ebbetts*. See sec. 56, ante.

60. Application of this rule independent of the question whether lessor actually loses by the want of repair.—The rule stated in the last section has been described by Rigby, L.J., as an "arbitrary" one, "laid down upon grounds of convenience" (*h*). "Arbitrary" it may well be called, for it is held to govern the amount of damages recoverable, whether or not the lessor in fact loses by the want of repair. It frequently happens that, at the expiration of a lease, it is more to the interest of the landlord to have the demised buildings altered or even destroyed than to have them put in repair. But in the assessment of the damages, this circumstance does not enure to the benefit of the tenant (*i*). The principal

(*f*) *Birch* v. *Clifford* (1891) 8 T.L.R. 103. See also *Woods* v. *Pope* (1835) 1 Scott 536, 1 Bing. (N.C.) 467 [no covenant, however, mentioned on the report], where the court refused to disturb a verdict giving damages for the inability of the landlord to let the premises for six weeks after the tenant had quitted them.

(*g*) *Henderson* v. *Thorn* [1893] 2 Q.B. 164, per Wills, J., who said: "It is impossible for us in this case to treat the first set of damages as the equivalent of putting the premises in repair; we can only say that, when the end of the term comes and the landlord is entitled to put the premises in repair at the expense of the tenant who has broken his contract, he shall not have the money twice over, but shall, subject to an allowance for such depreciation as would have accrued, had the covenant been performed on the first occasion, between that date and the end of the term, subtract what was paid to him before from the amount that he now recovers." It was held that the official referee had correctly assessed the damages by determining the sum required at the end of the lease to put the premises in repair and deducting therefrom the amount paid into court in the first action together with sum for depreciation.

(*h*) *Ebbetts* v. *Conquest* [1895] 2 Ch. 377. See *Hyman* v. *Rose* [1912] A.C. 623. *Sullivan* v. *Doré* (1913) 13 D.L.R. 910.

(*i*) *Inderwick* v. *Leech* (1884) C. & E. 412, 1 T. L. R. 95, aff'd 1 Times L. R. 484; *Joyner* v. *Weeks* [1891] 2 Q. B. 31 (see infra). "It is true," said Wills, J., in a recent case, "that the sum paid by the tenant is often a sum prepo-

Annotation.

reason why evidence of this sort is excluded to assessing the damages is that it brings in a consideration which "depends upon the arrangements which the lessor has made with other persons, with which the lessee has nothing to do, as to which in general he will have no information, and as to which at the time he enters into the bargain he can have none" (*j*). In cases of this type there is commonly in evidence some definite arrangement, made before the expiration of the lease, for re-demise of the premises to some third person, who is to pull down or change the buildings, and, it may be, pay an increased rental. Both these elements were present in *Joyner* v. *Weeks* (*k*), where it was argued, on behalf of the lessor, that the breach of the covenant to leave in repair did him no harm, inasmuch as the plaintiff had re-demised the premises on terms that were not affected by the want of repair; and that, at any rate, with regard to the part of the premises that was pulled down, the want of repair did no harm. This contention did not prevail in the Court of Appeal.

"The circumstances relied upon by the defendant," said Lord Esher, "did not affect the property as regards the relation between the lessor and the lessee in respect to it. They arose from a relation, the result of a contract between the plaintiff and a third person, to which the defendant was no party, and with which he had nothing to do. It was said that this contract passed an estate in the premises to such third person. If it had done so, I think it would have made no difference; but it did not; it only

---

terous in relation to the real damage to the landlord; as, where he is going to pull down the premises and is, therefore, not the loser by a penny because they are returned on his hands out of repair. In such a case, the rule of law may amount to putting into the landlord's pocket money far beyond the damage which he has actually suffered; but it must be remembered that there are difficulties on the other side, and that, but for this rule of law, a tenant who has broken his contract might come off better than if he had kept it; a result not to be lightly encouraged." *Henderson* v. *Thorn* [1893] 2 Q.B. 164.

(*j*) Rigby, L.J., in *Conquest* v. *Ebbetts* [1895] 2 Ch. 277. See also *Joyner* v. *Weeks*, infra.

(*k*) [1891] 2 Q.B. 31. An earlier case to the same effect is *Rawlings* v. *Morgan* (1865) 18 C.B.N.S. 776. There, before the end of the lessee's term, his lessor had verbally agreed to give a building lease to a new tenant, who in fact entered on the expiration of the first term and pulled down the premises, and afterwards (but apparently before the action) obtained a building lease in conformity with the verbal agreement. The dilapidations were £221; but the terms of the building lease were not affected by the existence of the dilapidations. The lessor sued the first lessee for the £221, and was allowed to recover the full amount. The argument was the same as in *Joyner* v. *Weeks*, that the plaintiff had in fact sustained no loss. Erle, C.J., and Keating, J., declined to say what their opinion would have been if during the defendant's term the plaintiff had made a binding agreement with the tenant; Byles, J., relied exclusively on the fact that before any binding agreement had been made with a new tenant, a cause of action for the £221 had accrued. Montague Smith, J., doubted whether such a binding agreement would have in any way affected the plaintiff's right as against the defendant. See *Buscombe* v. *Stark* (1916) 30 D.L.R. 736. *Straus* v. *International* (1919) 48 D.L.R. 619.

Annotation.

gave an interesse termini during the continuance of the defendant's term, and could not take effect to give an estate as between the plaintiff and the third person until the relation between the plaintiff and the defendant was at an end. At the moment of the determination of the lease between the plaintiff and the defendant, the premises were out of repair. And, if we cannot look at the contract between the plaintiff and the third person, or anything that took place under it, there was nothing but the ordinary case of the breach of a covenant to leave the premises in repair. In my opinion the contract between the plaintiff and the third person cannot be taken into account; it is something to which the defendant is a stranger. So, also, anything that may happen between the plaintiff and the third person under that contract after the breach of covenant is equally matter with which the defendant has nothing to do, and which cannot be taken into account. These are matters which might or might not have happened, and, so far as the defendant is concerned, are mere accidents. The result is that there is nothing to prevent the application of the ordinary rule as to the measure of damages in such a case. . . . If anything could prevent the application of the ordinary rule that the measure of damages is the cost of such repairs as were contemplated by the covenant, it could only be something in the condition of the premises which affected the relation between the lessor and lessee in respect of them, and that contracts made between the lessor and a third person must be disregarded. The rule I have mentioned is a good working rule, and I believe it to be the legal rule."

"In what way," said Fry, L.J., "can that lease affect the question between the plaintiff and the defendant? It may be regarded in three points of view. The first involves the question whether any estate passed by it. It was contended for the defendant that, the lessor having parted with his reversionary estate for a term of twenty-one years, his right was confined to the right to such damages as the owner of a reversion expectant upon the determination of that second lease would have sustained by reason of a breach of the covenant in the first lease. I see no ground for that contention. The second lease passed no estate until possession was taken under it. It only gave an interesse termini which would, on possession being taken, become an estate. The lessor had a right of entry on the determination of the first lease. Directly that happened, a right of action for damages accrued in respect of the breach of the covenant to yield up in repair. Therefore the lessor's right of action for these damages vested before any estate vested in the grantee of the subsequent lease. Consequently that lease cannot affect the case so far as the passing of any estate under it is concerned. Then, secondly, with regard to the coven-

Annotation.

ants as to alterations, etc., contained in that lease, how can such covenants, which are unperformed at the date of the vesting of a plaintiff's right of action, take away or modify the right of action which so vested? I will assume that there is a covenant in the second lease to put the premises into the same state of repair as was required by the first lease. But, even so, how can it affect the case any more than an agreement with a builder to do the repairs? It appears to me that it is res inter alios acta, with which the lessee has nothing to do and which he is not entitled to set up. Then, thirdly, how can subsequent performance by the second lessee of the covenants which he has entered into abridge or take away the cause of action that vested in the lessor before the second lease took effect? I can see no ground for thinking that I can do so. As a general rule, I conceive that, where a cause of action exists, the damages must be estimated with regard to the time when the cause of action comes into existence. I can find nothing in the existence of this reversionary lease, whether I regard its operation before or after the vesting of the plaintiff's cause of action, to interfere with the application of the general rule as to the measure of damages in such cases."

Upon an analogous principle the lessee is not allowed to claim any deduction from the damages on the ground that the premises have so altered in value by reason of the deterioration of the neighbourhood, that they might be equally valuable for letting purposes, if some of the repairs were omitted, or done more cheaply, than if everything requiring to be replaced or repaired were replaced or repaired according to the ordinary rules applicable to covenants to repair (*l*).

XII. Measure of damages in actions brought by lessees against their sublessees and assignees.

61. Amount recoverable while the superior lease is still unforfeited.—(*a*) *Generally.*—The question of the proper measure of damages in actions brought by mesne landlords against undertenants was recently discussed very fully in a case which was finally carried up to the House of Lords. It was determined that, although the general principle that the damages are measured by the depreciation in the value of the reversion is no less applicable in such a case than in one where a reversioner in fee is suing his immediate lessee, the mesne landlord's liability over to the superior landlord, and the undertenant's knowledge of that liability, introduce special elements which it is necessary to take into account in applying the general principle under these particular circumstances.

(*l*) *Morgan* v. *Hardy* (1886) 17 Q.B.D. 770, affirmed by the Court of Appeal (1887) 35 W.R. 558, and approved in *Joyner* v. *Weeks*, supra; *Sullivan* v. *Doré* (1913) 13 D.L.R. 910; *Straus Corp.* v. *International Hotel Windsor* (1919) 48 D.L.R. 619.

Annotation.

The lease there under review bound the lessee by the usual covenants to keep and leave the demised premises in repair. Subsequently a party, with notice of the original lease, was granted a sublease at an improved rent, containing similar covenants, for the whole term less ten days. The action was brought by the lessee three and a half years before the expiration of the term against the sublessee for a breach of his covenant to keep in repair. The Court of Appeal proceeded upon the broad ground that this sum must be regarded as the damages which a sublessee who was informed of the obligations under which the mesne landlord lay to the original lessor must be taken to have contemplated as the result of the breach of the covenant (*a*). It was argued that the computation of damages on such a basis would in effect introduce a stipulation for indemnity unto the underlease; but this contention did not prevail. A special point also made by Rigby, L.J., was that a sufficient reason for applying a standard different from that which was appropiate in the case of a reversioner in fee was furnished by the fact that a reversioner of ten days of a term cannot take his reversion into the market and sell it to a purchaser to be dealt with as building ground. "If," said the learned judge, "the supposed general rule of the diminution of the reversion were to apply to a case of this kind, the result would seem to follow that, in a case of ten days reversion, or three days reversion, nothing but nominal damages could be recovered during the term upon the covenant to keep in repair." The damages for which the defendant was accordingly held to be liable was the sum represented by the difference in value between the reversion with the covenant performed as it ought to be, and the value of that reversion with the covenant unperformed.

The House of Lords took the same view as the Court below, though the test of contemplation was not so directly relied upon. "If," said Lord Herschell, "the premises were now in good repair, the reversion of the respondents would secure them the improved rent to the end of the term, without any liability on their part, unless it were to the extent to which repairs subsequently became necessary. As matters stand they can only receive this rent, subject to the liability of restoring the premises in good repair so that they may in that condition deliver them to their lessor. The difference between these positions represents the diminution in the value of their reversion owing to the breach of covenant" (*b*).

As no substantial damages can be recovered for a breach of a general covenant to repair, unless some injury has been done to

(*a*) Citing *Hadley* v. *Baxendale*, 9 Exch. 341.

(*b*) *Conquest* v. *Ebbetts* [1896] A.C. 490, affirming [1895] 2 Ch. 377. See *Clare* v. *Dobson* (1911), 80 L.J. (K.B.) 158.

Annotation.

the reversion, nothing but nominal damages are recoverable by a lessee from a sublessee, where the lessee has himself entered the premises and made all necessary repairs prior to the bringing of the action (*c*).

(*b*) *Where there is a contract of indemnity (see also below, s. 62).*—Where the contract of an assignee of a lease is substantially one of indemnity, the Court will adjust the rights and liabilities of the parties on a corresponding basis, treating the assignee as principal and the original lessee as surety in respect to the liability under the covenant, and will refuse to allow the original lessee to recover more than nominal damages from the assignee, unless an action on the covenant has previously been brought against him by the superior landlord, and he has already paid, or been adjudged liable to pay, damages assessed in that action. Otherwise, the assignee, being still liable to the landlord on his covenant, would be without defence if a second action should be brought on that covenant (*d*).

(*c*) *Possible arrangements after expiration of superior lease, not an element to be considered.*—(See also 44 (*j*), supra).—Where a sublessee is sued for a breach of the covenant to repair, he "has no right to demand that, in the assessment of the damages, a speculative inquiry should be entered upon as to what may possibly happen, and what arrangements may possibly be come to, under the special circumstances of the case, when the superior lease expires by effluxion of time." No weight, therefore, can be legitimately ascribed to the consideration that, owing to the nature of the premises, and the changed circumstances of the neighbourhood it is extremely probable that the ground landlord will make an entirely different use of the site when the term came to an end, the consequence being that he will not desire to have the buildings then on the land put into good repair, and will arrange with the lessee to accept from him a sum less than the cost of making the repairs (*e*).

62. Amount recoverable where the original lessee has been ejected by the superior landlord.—In cases where the original lessee and his sublessee have been both ejected by the superior landlord for the failure of the lessee himself to pay the rent of the premises, the lessee may recover substantial damages from his

---

(*c*) *Williams* v. *Williams* (1874) L.R. 9 C.P. 659.

(*d*) *Beattie* v. *Quirey* (1876) 10 Ir. R.C.L. 516, where one who had taken a lease containing a covenant to repair had assigned it to a person who covenanted to perform the covenants in the original lease and to indemnify his assignor against all actions, suits, expenses and claims, on account of the breach of such covenants, of certain houses on the land demised, and subsequently, upon the destruction by fire of a portion of the premises, the superior landlord has commenced an action against the original lessee for a breach of his covenant.

(*e*) *Conquest* v. *Ebbetts* [1896] A.C. 490. Compare the similar rule applied in actions brought after the end of the term. Sec. 60, ante. See *Clare* v. *Dobson* (1911) 80 L.J. (K. B.) 158.

Annotation.

sublessee for a breach of the covenant committed while the lessee was still owner of the reversion, even though the superior landlord has not yet demanded or recovered damages on his own account (*a*). A fortiori may the amount of the dilapidations existing at the time the ejectment was brought be recovered by a mesne landlord from a sublessee who committed the breach of covenant for which the superior landlord forfeited the term? (*b*). But under such circumstances he cannot recover the value of his reversionary interest. The loss of that interest is deemed to be the result, not of the undertenant's breach of covenant, but of the breach by the plaintiff himself of the covenants entered into by him with his lessor (*c*). An additional and independent reason for refusing to allow the value of the interest to be taken into account exists, if it is shewn that one of the covenants upon which the ejectment was founded was contained in the superior lease, but not in the sublease, and there is nothing to shew that the landlord might not have recovered possession of the property for a breach of that covenant (*d*).

63. Lessee's right to be indemnified by his sublessee or assignee for the costs of defending an action brought by his lessor. —(*a*) *Where there is no connection between the covenants in the original lease and the under lease.*—Where there is no express agreement by a sublessee to indemnify his lessor against a breach of the covenants as to repair, such an agreement will be implied only under the circumstances noticed in sub-sec. (*b*) infra. If the independence of the obligations assumed by the superior lessee and the sublessee is a reasonable inference—as where the sublessee has merely covenanted to keep the premises in repair (*a*), or has entered into covenants which are so materially different from the lessee's that a performance of the one would not necessarily be a performance of the other (*b*)—the liability of such sublessee to

(*a*) *Davis* v. *Underwood* (1857) 2 H. & N. 570.
(*b*) *Clow* v. *Brogden* (1840) 2 M. & G. 39.
(*c*) *Logan* v. *Hall* (1847) 4 C.B. 598.
(*d*) *Clow* v. *Brogden* (1840) 2 M. & G. 39.
(*a*) See *Walker* v. *Hatton* (1842) 10 M. & W. 249.
(*b*) *Penley* v. *Watts* (1841) 7 M. & W. 601. Although the covenants contained in a sublease may be the same in language, with a single important exception, as those in the original lease, yet they must be regarded as differing in substance, when the sublease was granted two years after the lease, for, as the sublessee is only bound to put the premises in the same condition as he found them at the time of the lease to himself, the covenants would necessarily not have the same effect. *Walker* v. *Hatton* (1842) 10 M. & W. 249. A sublease which contains the same covenants as the original lease, but which is eight years later in date, and contains no reference to the original lease, does not give the lessee right to "contribution or indemnity" within the meaning of Order XVI., Rule 48 of the (English) Rules of the Supreme Court. *Pontifex* v. *Ford* (1884) 53 L.J. (Q.B.) 321 [Pollock, B., distinguished, *Hornby* v. *Caldwell* (1881) 8 Q.B.D. 329 (see infra) on the ground that the original lease was referred to in the sublease, and also on the general principle that even where covenants are similarly worded, their actual effect is different as regards old and new houses].

Annotation.

reimburse the lessee for the damages which he has been compelled to pay in an action brought by the superior landlord for a breach of the covenants as to repair, extends only to that portion of the damages which was necessarily incurred by the lessee, viz., the amount required for the purpose of putting the premises in repair. As a general rule, therefore, the costs of defending the superior landlord's action are not recoverable from the sublessee. Such costs are deemed to have been incurred by the lessee in his own wrong, for the reason that he can put an end to the controversy between him and the lessor by paying over or depositing in court the sum required for repairs. They are, therefore, not a necessary consequence of the breach of the covenants (*c*).

(*b*) *Contract of indemnity implied from the substantial identity of the covenants in the two leases.*—"An implied contract of indemnity arises whenever two contracts are made, and the second contract contains a stipulation to do the very thing which was undertaken to be done by the first." On this principle a clause in a sublease that "letting shall be subject in all respects to the terms of the existing lease and the covenants and stipulations therein," renders the sublessee liable for such costs as the lessee reasonably incurs in defending an action brought by the lessor for breach of the covenant to repair (*d*).

(*c*) *Rule where the underlessee enters into an express contract of indemnity.*—In one of the cases already cited (*e*), it was laid down in broad terms by Parke, B., that an underlessee who enters into a contract to indemnify the mesne landlord against a breach of the covenant in the original lease to keep the premises in repair, is responsible for the costs of an action by the superior landlord to

---

(*c*) *Walker* v. *Hatton* (1842) 10 M. & W. 249, following *Penley* v. *Watts* (1841) 7 M. & W. 601. See also *Ebbetts* v. *Conquest* (1895) 2 Ch.D. (C.A.) 377 (per Lindley, L.J.); *Logan* v. *Hall* (1847) 4 C.B. 598; *Smith* v. *Howell* (1851) 6 Exch. 730; *Taylor* v. *Strachan* (1858) 16 U.C.R. 76. These cases outweigh the authority of *Neale* v. *Wyllie* (1824) 3 B. & C. 533, 5 D. & R. 442, holding the sublessee liable for the costs of defending the superior landlord's action, on the ground that the original lessee had no right to enter for the purpose of repairing. This reason is plainly inadequate to support the conclusion based upon it, as the lessee has open to him the two courses mentioned in the text; and also *Clare* v. *Dobson* (1911) 80 L.J. (K.B.) 158.

(*d*) *Hornby* v. *Caldwell* (1881) 8 Q.B.D. 329. The plaintiff's knowledge of the fact that he was at all events liable for some damages, and that the action was, therefore, indefensible to that extent, was not adverted to by the court. The case is, therefore, a negative authority for the doctrine that a lessee who admits the breach is not always bound on pain of losing his right to costs, to suffer a judgment by default. See (*c*, *d*,) infra, note. The facts upon which stress was laid were that the sublessee had declined to pay the amount claimed or to take any responsibility of a defence to the action. Lord Esher said that under such circumstances the lessee was not bound to submit and run the risk of the sublessee saying he had paid too much; see *Clare* v. *Dobson*, ante.

(*e*) *Penley* v. *Watts* (1841) 7 M. & W. 601.

Annotation.

recover damages for such a breach. But apparently this doctrine is to be read as subject to the implied exception that the lessee, if he defends an action by the superior landlord with full knowledge that the proper repairs have not been made, cannot recover the costs from the sublessee. Lord Abinger expressed the opinion that under such circumstances, the rule limiting the recovery of costs to those necessarily incurred, probably prevented recovery (*f*).

(*d*) *Liability of an assignee for costs.*—It is well settled that the implied duty of each successive assignee of a term to indemnify any of his predecessors in interest who may have been compelled to pay damages for a breach of the covenant does not (see sec. 7, ante), extend to the reimbursement of the costs which may have been incurred in resisting a claim which was known to have been well founded. "No person has a right to inflame his own account against another by incurring additional expense in the unrighteous resistance to an action which he cannot defend" (*g*). Especially inexcusable is it for an assignee to "inflame his account" in this manner, where the proper amount of the damages has already been settled by a previous suit. Even an express contract of indemnity couched in the most comprehensive terms will not then enable him to recover the costs of defending a second suit (*i*).

XIII. Pleading and practice.

In the present subtitle it is proposed to bring together some miscellaneous rulings which will be found useful in the conduct of litigation involving the obligations of tenants with respect to repairs. The decisions upon points of technical pleading have been inserted for the reason that they are still living precedents in those jurisdictions where the older system of procedure is still in force, and will be suggestive even to lawyers who practise under statutes framed upon the same lines as the English Judicature Act.

64. Action upon agreement to repair is transitory.—The action of assumpsit on an agreement to repair contained in a lease from

---

(*f*) *Walker* v. *Hatton* (1842) 10 M. & W. 249.

(*g*) Lord Denman in *Short* v. *Kalloway* (1839) 11 Ad. & E. 28.

(*i*) *Smith* v. *Howell* (1851) 6 Exch. 730 [covenant was to "save harmless and indemnify" the assignor against the covenants in the original lease and "all costs, damages, and expenses which may be incurred by reason of any delay, breach, default in payment or performance thereof"]. In this case there had been successive assignments, and the second assignee was seeking to recover from the third assignee the costs of an action brought against him by the first assignee to recover the sum for which judgment had been rendered against such first assignee in an action by the lessee. Alderson, B., expressed the opinion that the best mode of ascertaining the actual amount due for dilapidations in such a case is for the first assignee to suffer a judgment by default, so that the parties may have the matter properly settled by a competent tribunal.

Annotation.

year to year, terminable at six months' notice, is transitory, not local (*j*).

65. Service of the writ out of the jurisdiction.—An action against the assignée of a lease for breach of a covenant to repair contained in the lease is an action for the enforcement of a liability affecting land or hereditaments within the meaning of Order XI., r. 1, (b) of the Supreme Court of Judicature. Service of the writ of summons out of the jurisdiction is therefore allowable in such an action where the land is situated within the jurisdiction (*k*).

66. Bringing in new parties.—Order XVI., rules 48, 52, providing that where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the action, the judge may, on notice being given to such last-mentioned person, make such order as may be proper for having the question determined, does not cover a case where a lessee claims relief against an under-lessee holding by a deed containing a covenant to repair precisely similar to that in the original lease. The covenant in the underlease cannot be construed as a covenant to indemnify the defendant against or to perform the covenant in the original lease, for the reason that the terms of the covenant to repair must in each case be construed with reference to the ages and character of the premises at the time of the demise (*l*). See sec. 23, ante.

Under Rule 11 of the same Order, a person occupying the demised premises under a contract for an assignment from the lessee which contained a stipulation to indemnify such lessee, but which was never executed may be brought in as a third party in an action against the executors of the lessee for breach of the covenant to repair (*m*).

67. Declaration.—(*a*) *Sufficiency.*—It seems that, in an action for not repairing, the declaration ought to state the term for which the premises were demised, at all events where the quantum of damage may depend upon the length of the term (*a*).

Where a lessee covenants to keep in good repair a house, outhouses, and stables, and the breach assigned is that he permitted the racks in the stable to be in decay, a verdict should not be set aside on the ground that the plaintiff did not specifically set forth that the racks were fixed, and so part of the freehold. To give the declaration any other construction would be very remote (*b*).

(*j*) *Buckworth* v. *Simpson* (1835) 5 Tyr. 344, 1 C.M. & R. 834.

(*k*) *Tassell* v. *Hallen* [1892] 1 Q.B. 321.

(*l*) *Pontifex* v. *Foord* (1884) L.R. 12 Q.B.D. 152. This theory of the significance of the verbal identity of the covenants in the lease and underlease seems to be different from that entertained in the case cited in sec. 63 (*b*), ante.

(*m*) *Byrne* v. *Browne* (1889) 22 Q.B.D. 657.

(*a*) *Turner* v. *Lamb* (1845) 14 M. & W. 412 [the declaration was amended upon the recommendation of the court].

(*b*) *Anon.* (1891) 2 Ventr. 214.

Annotation.

A covenant to repair at all times, when, where, and as often as occasion shall require during the term, and at furthest within three months after notice of want of reparation is one covenant, and it cannot be stated as an absolute covenant to repair at all times, when, where, and as often as occasion shall require during the term (*c*).

Where the covenants as to repair are subject to an exception of reasonable use and wear, a declaration which, in assigning a breach, takes no notice of this exception is bad on demurrer, but probably good after verdict (*d*).

A declaration which is so worded that the damages claimed for a breach of the general covenant to repair are not distinguished from those claimed for a breach of the covenant to repair after notice, is bad on special demurrer, but cannot be objected to after verdict (*e*).

(*b*) *Variance.*—Under an allegation that a tenant who had covenanted to keep and leave the premises in repair "suffered and permitted the premises to be and continue ruinous," the landlord cannot recover for voluntary waste, as by removing windows, etc. (*f*). On the other hand a verdict for the landlord will be set aside where he alleges voluntary waste and only permissive waste is proved (*g*).

A contract to insure and rebuild in case of fire will not support a declaration alleging an agreement to let and take a farm, with mutual promises to repair (*h*).

A declaration stating that the defendant promised to use the messuage let to him in a tenant-like manner, and take due care of the furniture, etc., during the tenancy, and at the expiration thereof, to leave the said furniture, etc., *cleaned*, is sufficiently supported by proof that the house and furniture were in a clean state, and that defendant verbally agreed to leave them as he found them (*i*).

An allegation of a promise to deliver up the premises in the same state as they were at the commencement of the tenancy is supported by the following memorandum appended to an agreement of letting: "A. agrees to take the fixtures again at the expiration of the tenancy, provided they are in as good condition then as they *now* are; and B. agrees to leave the premises in the same state as they *now* are" (*j*).

(*c*) *Horsfall* v. *Testar* (1817) 1 Moore 89, 7 Taunt. 385.

(*d*) *Wright* v. *Goddard* (1838) 8 Ad. & E. 144. Compare cases cited in notes (*l*) and (*m*), infra.

(*e*) *Wright* v. *Goddard* (1838) 8 Ad. & E. 144.

(*f*) *Edge* v. *Pemberton* (1843) 12 M. & W. 187.

(*g*) *Martin* v. *Gilham* (1837) 2 N. & P. 568, 7 A. & E. 540.

(*h*) *Beech* v. *White* (1840) 12 A. & E. 668, 7 P. & D. 399.

(*i*) *Stanley* v. *Agnew* (1844) 12 M. & W. 827.

(*j*) *White* v. *Nicholson* (1842) 4 M. & G. 95.

Annotation.

Where one of the breaches assigned is that the tenant did not, according to his agreement, leave the premises in as good condition as he found them, and on the trial it is proved that the agreement was that he should leave the premises in as good condition as he found them, and that he found them in tenantable repair, a verdict for the plaintiff will not be set aside, since the agreement, as laid, is substantially proved (*k*).

In an action on a covenant for not repairing, which contains an exception of "casualties by fire," to state it in the declaration as a general covenant to repair, omitting the exception, is a fatal variance of which advantage may be taken on "non est factum" (*l*).

Where the declaration alleges that the plaintiff demised certain premises (*except as therein* is excepted), to hold (*except* as therein is excepted) for the term of twelve years (except the last day thereof), and the lease in point of fact contains no exception applying to the premises, the exceptions in that regard will either be rejected as surplusage, or merely regarded as an exception of nothing. There is therefore no variance (*m*).

68. Plea.—A plea of "not guilty of breaking the covenant" to repair is bad in demurrer, since two negatives do not make an issue (*a*).

A plea that the house was rebuilt and repaired before the action is bad, unless it shews by whom it was built and repaired (*b*).

The doctrine that the payment of money into court admits everything which the plaintiff would be obliged to prove in order to recover, that money involves the consequence that, where two breaches are assigned in one count of a declaration, viz. (1) the failure to repair, and (2) the non-payment of rent, and the defendant pays money into court on the second breach, the whole contract set out in that count is deemed to be admitted (*c*). Similarly it has been held that, after verdict, some damage upon every part of the breach of covenant in the declaration must be taken as admitted where the defendant pleads that he has paid a certain sum into court, and that the plaintiff had not sustained damages greater than the said sum in respect of the causes mentioned in the declaration (*d*).

69. Evidence.—(*a*) *Competency and relevancy.*—Evidence that the premises were in reasonably good repair when the lease was assigned, and were in disrepair afterwards, is evidence to go to the jury as to the breach by the assignee (*a*).

(*k*) *Winn* v. *White* (1773) 2 Wm. Bl. 840.
(*l*) *Brown* v. *Knill* (1821) 5 Moore 164; *Tempany* v. *Burnand* (1814) 4 Camp. 20. Compare note (*d*), supra.
(*m*) *Williams* v. *Hayes* (1821) 9 Price 642.
(*a*) *Taylor* v. *Needham* (1810) 2 Taunt. 278.
(*b*) *Walton* v. *Waterhouse* (1675) 2 Wm. Saund. 420.
(*c*) *Dyer* v. *Ashton*, 2 D. & R. 19, 1 B. & C. 3.
(*d*) *Wright* v. *Goddard* (1838) 8 Ad. & E. 144.
(*a*) *Perry* v. *Bank, etc.*, (1866) 16 U.C.C.P. 404.

Annotation.

Where, in an action on a promise to keep the premises in repair, the defendant pleads that he has paid a certain sum into court, and that no greater damages have been sustained, evidence as to the state of the premises at the time of the demise is "material both to the event of the suit and to the amount of the damages," and therefore should not be excluded (*b*).

(*b*) *Burden of proof.*—The plaintiff begins where the plea is that the defendant lessee did repair and did not suffer the premises to become ruinous, as alleged (*c*); or where to a declaration for not repairing premises in a reasonable time, the defendant pleads that he did repair within a reasonable time (*d*).

Evidence that the premises were out of repair a few days before the demise to the defendant, who came in as assignee of the original lessee, casts on the defendant the burden of proving that the premises had been put into repair after that time. The plaintiff need not prove that the premises were out of repair on the very day of the demise (*e*). Express evidence of the actual state of the premises at the time the lease was first made need not be produced in an action against an assignee of the lease. If it be shewn that they were in good repair up to the time they came into the defendant's possession, and he omitted to make necessary repairs, that constitutes a prima facie case for the landlord (*f*).

The fact that the landlord did not prove any contract at the trial is no ground for setting aside a verdict for the damages awarded for the non-repair (*g*).

In assessing the damages for a breach of a covenant to repair, a judge sitting as a jury is warranted in adopting the opinion of the only expert witness who has inspected the premises with reference to the covenant, that a certain amount is required to put them in tenantable repair (*h*).

Art. 1629 of the Quebec Civil Code operates so as to create a presumption that a loss by fire on the demised premises was caused by the lessee or the persons for whom he is responsible. The effect of introducing into a covenant to deliver up the premises in good repair an exception of "accidents by fire" is to deprive the lessor of the benefit of this presumption, and by throwing the

---

(*b*) *Burdett* v. *Withers* (1837) 7 Ad. & E. 136.

(*c*) *Saward* v. *Leggatt* (1836) 7 C. & P. 613. As to the proof of the particulars of the dilapidations for which recovery is sought in an English County Court from a tenant from year to year, see *Smith* v. *Douglas* (1855) 16 C.B. 31.

(*d*) *Belcher* v. *McIntosh* (1839) 8 C. & P. 720, per Alderson, B.

(*e*) *Doe* v. *Durnford* (1832) 2 C. & J. 667.

(*f*) *Perry* v. *Bank, &c.* (1866) 16 U.C.C.P. 404.

(*g*) *Dyer* v. *Ashton* (1822) 1 B. & C. 3, 2 D. & R. 19.

(*h*) *Moxon* v. *Townshend* (1886) 2 T.L.R. 717, affirmed (1887) 3 T. L.R. 392.

Annotation.

parties upon their rights and liabilities under Art. 1053, which gives a general remedy for damages caused by negligence, to bring into operation the ordinary principles of evidence as to the onus of proof (*i*). To rebut the presumption created by this article, it is not necessary for the lessee to prove the exact or probable origin of the fire, or that it was due to unavoidable accident or irresistible force. It is sufficient for him to prove that he has used the leased premises as a prudent administrator (*en bon père de famille*), and that the fire occurred without any fault that could be attributed to him or to persons for whose acts he should be held responsible (*j*).

XIV. *Liability of tenant to third persons.*

70. Generally.—A review of the cases dealing with the responsibility of a tenant to strangers for injuries caused by the dilapidated condition of the premises will form an appropriate conclusion to our article.

Members of a tenant's household are not, it should be observed, strangers within the scope of the principles to be discussed below. The rights of such persons are co-extensive with those of the tenant himself, and therefore more restricted than those of members of the general public (*k*). See sec. 3, ante.

71. Tenant presumptively liable for injuries caused by defects in the premises.—Starting from the fundamental conception that, in cases where it becomes necessary to determine whether the landlord or the tenant is the proper party to sue for injuries caused by defects in the demised premises, the essential question is simply whether the dangerous conditions were produced by the wrongful act of the landlord or of the tenant (*a*), we observe that, in the

---

(*i*) *Evans* v. *Skelton* (1889) 16 Can. S.C. 637, diss. Ritchie, C.J., and Taschereau, J.

(*j*) *Murphy* v. *Labbé* (1896) 27 Can. S.C. 126 (diss. Strong, C.J.). In *Klock* v. *Lindsay* (1898) 28 Can. S.C. 453, the law as laid down in this case was followed, but the presumption was held not to have been overcome by the evidence introduced.

In an action against the lessor for injuries caused by defective premises, it was held that the plaintiff being a stranger to the covenant between lessor and lessee as regards repairs could not recover. Judgment of Meredith C.J.C.P. *Marcille* v. *Donnelly*, 1 O.W.N. 195, following *Cavalier* v. *Pope* [1905] 2 K.B. 757; [1906] A.C. 428 and *Cameron* v. *Young* [1908] A.C. 176. *Jackson* v. *Vanier*, 18 Que. S.C.R. 244, the landlord was held liable for injuries to a stranger caused by snow falling off the roof of his premises, in spite of the fact that the building was occupied by tenants whose duty was to clean the same off.

(*k*) *Mehr* v. *McNab* (1894) 24 O.R. 653, where it was held that the daughter of a lessee who has covenanted to repair, cannot maintain an action against the lessor for personal injuries caused by defective repairs.

(*a*) *Pretty* v. *Bickmore* (1873) L.R. 8 C.P. 401, per Bovill, C.J. The enquiry as between the landlord and the tenant is, who is blameworthy in regard to the want of repair. *Hett* v. *Janzen* (1892) 22 O.R. 414.

Annotation.

absence of positive evidence, the landlord's freedom from liability follows, as a matter of legal inference, from the general principle which attaches responsibility to the exercise of control (*b*). Hence the well-settled rule that it is the tenant and not the landlord who is prima facie liable to strangers for injuries caused by the defective condition of the demised premises (*c*). We also find the responsibility of the tenant affirmed in a direct, doctrinal form (*d*). But this mode of expression is to be taken with due reference to the circumstances, and is not really inconsistent with the rest of the cases, which indicate that the true conception of the juridical situation is to view it as involving a rebuttable presumption of fact which, in the first instance, throws the liability upon the tenant. This presumption is of course replaced by a peremptory conclusion of law where it is proved that the defective conditions complained of were due to the non-feasance or misfeasance of the tenant (*e*), especially where the tenant has expressly stipulated to do the repairs, the omission of which produced the defects which caused the damage (*f*). See, however, secs. 74, 75, post.

(*b*) The hardship of holding him liable for conditions which he has neither the right nor the power to prevent is sometimes adverted to explicitly by judges. "It certainly seems hard that, if a man lets his premises, and so divests himself of all power of control over them, he should be made liable for the default of the tenant. The owner ought not to be made liable for subsequent nuisances which did not originate with himself; for these, so long as the tenant is in possession, the owner is irresponsible." Crompton, J., in *Gandy* v. *Jubber* (1864) 5 B. & S. 78 (p. 87). "Deplorable, indeed, would be the situation of landlords if they were liable to be harassed with actions for the culpable neglect of their tenants." Ld. Kenyon in *Cheetham* v. *Hampson* (1791) 4 T.R. 318, 2 R.R. 397.

(*c*) *Payne* v. *Rogers* (1794) 2 H. Bl. 349 [plaintiff fell through a grating in a footpath]; *Pretty* v. *Bickmore* (1873) L.R. 8 C.P. 401. In *Russell* v. *Shenton* (1842) 3 Q.B. 449, a demurrer was sustained to a declaration on the ground that it sought to impose liability for the non-repair of drains upon a landlord, merely as "owner and proprietor," and did not shew how the prima facie liability of the tenant was transferred to the landlord. In *Cheetham* v. *Hampson* (1791) 4 Term. Rep. 318, it was held that no action could be maintained against the landlord of a tenant from year to year for injuries caused by the non-repair of fences.

(*d*) "A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumble-down house; and the tenant's remedy, if any, is on his contract. In this case there was none, not that that circumstance makes any difference in my opinion." *Robbins* v. *Jones* (1863) 15 C.B.N.S. 221 (p. 240). *Cavalier* v. *Pope* [1906] A.C. 428.

(*e*) "If a man demises with no nuisance upon the land, and the tenant commits a new nuisance, the landlord is not liable." Littledale, J., *Rex* v. *Pedley* (1834) 1 Ad. & E. 822, 3 N. & M. 627; *Gandy* v. *Jubber* (1864) 5 B. & S. 78, 87, per Crompton, J., arg. [defective grating]. See note (*b*), supra. See *Paquet* v. *Nor-Mount Realty Co.* (1916) 28 D.L.R. 458.

(*f*) *Pretty* v. *Bickmore* (1873) L.R. 8 C.P. 401 [coal-shoot in footpath became defective while the tenant was in possession]; *Nelson* v. *Liverpool, &c., Co.* (1877) 2 C.P.D. 311 [defective grating]; *Gwinnell* v. *Eamer* (1875) L.R. 10 C.P. 658 [defective grating]; *Bishop* v. *Trustees &c.* (1859) 1 E.

Annotation.

It should be observed that the combined effect of the above rule and of the principle established by *Fletcher* v. *Rylands* (*g*) will sometimes be to render a tenant liable for want of repairs even when he has not been guilty of any negligence. Thus it has been held that the tenant of a house is absolutely bound, as between himself and the occupier of an adjoining house, to keep a drain passing through his premises in such a state of repair that the sewage will not escape and cause injury to the neighbors (*h*).

72. Rights of stranger, how far affected by the absence of an obligation on the tenant's part to repair.—In the only case in which the point has been directly raised, the fact that the tenant could not be compelled by the landlord to repair was denied to be a valid defence (*a*). This conclusion, it is true, was arrived at in a criminal action, but, in view of the general principle that, so far as respects the liability of occupiers, the law puts public and private nuisances on the same footing (*b*), it seems difficult to contend that this circumstance should be treated as a differentiating factor if the same question were presented in a civil suit. The decision already cited, that the landlord of a tenant from year to year cannot be sued for injuries caused by the non-repair of fences on the demised property, may also be regarded as looking in the same direction (*c*). Such a tenant would not have been accountable to the landlord (see sec. 6*b*, ante), and the court, by its exoneration of the landlord, clearly holds by implication that the tenant was the proper party to sue.

& E. 697; 28 L.J. (Q.B.) 215 [verdict set aside on the ground that the lease was still in force]. *Tarry* v. *Ashton* (1876) 1 Q.B.D. 314 [tenant liable for injuries caused to a foot-passenger by the fall of a lamp which he knew to be in a defective condition, and failed to repair]. In *Firth* v. *Bowling I. Co.* (1878) 3 C.P.D. 254, the successor in interest of a lessee who had agreed to fence the land occupied by him for the benefit of the lessor and his other tenants, was held answerable where the wire rope used for the fencing fell into decay, and the cattle of an adjoining tenant died from swallowing the fragments which dropped into the grass upon a field leased by their owner.

(*g*) 3 H. & C. 774, L.R. 1 Ex. 265; L.R. 3 H.L. 330. See *Alberta Loan* v. *Bercuson* (1915) 21 D.L.R. 385.

(*h*) *Humphries* v. *Cousins* (1877) 2 C.P.D. 239 [negligence negatived by jury].

(*a*) *Reg.* v. *Watson* (1697) 2 Ld. Raym. 856, 1 Salk. 357, also cited sub. nom. *Reg.* v. *Watts*, where a house was maintained in a ruinous condition so that passers-by were endangered, it was argued that, as the defendant was a tenant at will, and therefore not responsible to the landlord for failing to remedy the defects in question, he could not be indicted for the nuisance created by these defects. This contention did not prevail, the court saying that "as the danger is the matter that concerns the public, the public are to look to the occupier, not to the estate, which is not material in such case to the public." This case was cited with approval by Blackburn and Crompton, JJ., in *Gandy* v. *Jubber* (1864) 5 B. & S. 78.

(*b*) See the opinion in *Chauntler* v. *Robinson* (1849) 4 Exch. 163.

(*c*) *Cheetham* v. *Hampson* (1791) 4 Term Rep. 318.

Annotation.

A different theory, however, seems to have been entertained by Honeyman, J., when he intimated, arguendo, that the landlord is liable to a stranger, in any case where the tenant is under no obligation to repair (*d*). Such a situation is precisely that which was presented in the case last cited, and the learned judge appears to be of opinion that the proper method of escaping from the dilemma of an injuria sine remedio is to hold the landlord responsible. A similar doctrine seems to be involved in the decision in *Gandy* v. *Jubber* (*e*), where even the landlord's ignorance of the existence of a defect in the premises held under a yearly tenancy did not protect him. See sec. 74, post.

Upon the whole, therefore, it may be regarded as a question still open to discussion, whether the absence of an obligation on the tenant's part to repair shall, ex necessitate rei, and to prevent the plaintiff from being left remediless, be regarded as casting the responsibility upon the landlord, or whether the position shall be taken that the tenant is liable on the broad ground that he is the person in occupation of the premises, and that the contractual arrangements between him and the landlord are a matter with which a stranger has no concern. One consideration which makes strongly in favour of the latter of these alternatives is that it is more in consonance with the doctrine noticed in sec. 2, ante, that the landlord of the tenant from year to year cannot, in the absence of an express stipulation, be compelled by the tenant to do repairs which the latter is not bound to execute. The manifest effect of this doctrine is that, as between themselves, neither the landlord nor the tenant is subject to any obligation respecting repairs in a case where the tenant is not bound to do them and the landlord has not entered into any agreement with regard to them. (Compare the doctrine laid down at the beginning of the next section.) To declare the reciprocal rights of the parties to the demise to be the criterion and gauge of the rights of a stranger would, therefore, result in leaving him altogether without a remedy. Thus the simple question which finally emerges is whether in order to avoid this unreasonable result, the landlord or the tenant shall be held liable, and the only principle available for determining this question seems to be that which declares that in the absence of some countervailing consideration, responsibility is an inseparable incident of the power of control. (*f*)

73. Under what circumstances the liability is transferred to the landlord.—According to a recent case (a), there are only two ways

(*d*) *Pretty* v. *Bickmore* (1873) L.R. 8 C.P. 401.

(*e*) (1854) 5 B. & S. 78.

(*f*) The rights of a licensee are discussed in *Marshall* v. *The Industrial Exhibition* (1900) 1 O.L.R. 319.

(*a*) *Nelson* v. *Liverpool, etc., Co.* (1877) 2 C.P.D. 311.

Annotation.

in which the landlord can be made liable, first, by shewing that he has made such a contract to do repairs as will enable the tenant to sue him for not repairing (*b*), and secondly, that he has been guilty of a mis-feasance, as, for instance, where he lets the premises in a ruinous condition (*c*). But to be strictly correct the second branch of the statement should, it seems, be extended so as to cover non-feasance as well as mis-feasance (*d*).

(*b*) This exception to the general rule is recognized by Buller, J., in *Payne* v. *Rogers* (1794) 2 H. Bl. 349, where the court refused to set aside a verdict against the landlord, the record shewing that evidence had been given on the trial that repairs had actually been done by the landlord. It was pointed out that to hold the tenant liable in such a case would give rise to a circuity of action, as the tenant would have his remedy over against the landlord. "The meaning of the case is that the party injured may either have his remedy against the tenant for not repairing, or the landlord, if he has undertaken to repair:" Parke, B., in *Chauntler* v. *Robinson* (1849) 4 Exch. 163 (p. 167). See also, to the same effect, *Pretty* v. *Bickmore* (1873) L.R. 8 C.P. 401. A landlord who agrees to execute repairs and superintends them while the tenant has temporarily vacated it to allow the work to be done is of course liable for the negligence of the persons making the repairs. *Leslie* v. *Pounds* (1812) 4 Taunt. 649 [cellar-flap left open]. See *Troude* v. *Meldrum*, 21 Que. S.C. 75.

(*c*) This statement finds support in the following cases: *Gandy* v. *Jubber* (1856) 5 B. & S. 15 (reversed but not on this point, 9 B. & S. 15); *Todd* v. *Flight* (1860) 9 C.B.N.S. 377; *Heaven* v. *Anderson* [1894] 1 Q.B. 164; *Sandford* v. *Clarke* (1888) 21 Q.B.D. 398; *Rosewell* v. *Prior* (1702) 1 Ld. Raym. 713, 2 Salk. 460, 12 Mod. 635; *Rich* v. *Basterfield* (1847) 16 L.J.C.P. 273, 4 C.B. 783; *Mehr* v. *McNab* (1894) 24 O.R. 653. In *Rosewell* v. *Prior*, supra, the court took the position that the erector of the nuisance, before the assignment, was liable for all consequential damages; that it was not in his power to discharge himself by the assignment; that he continues the nuisance by granting it over in this manner and reserving rent; and that putting it out of one's power to abate a nuisance is as great a tort as not to abate it when one has the power to do it. In *Gandy* v. *Jubber*, supra, Crompton, J., said: "It is a sound principle of law that the owner of property receiving rent shall be liable for a nuisance existing on the premises at the date of the demise" (p. 88). This remark was approved by the Exchequer Chamber (see 9 B. & S. p. 16), where Erle, C.J., remarked: "If the landlord lets the premises with a nuisance on them, all parties agree that he is responsible." See 5 B. & S. 485. The Court of Error also expressed its approval of another statement by Crompton, J., that, "to bring liability home to the owner, the nuisance must be one which is in its very essence and nature a nuisance at the time of letting, and not merely something which is capable of being thereafter rendered a nuisance by the tenant." In *Todd* v. *Flight*, supra, an additional reason was suggested by Erle, J., for the conclusion arrived at, viz., that the chimneys had apparently fallen by the operation of the laws of nature, and from no fault on the tenant's part. But the element thus introduced seems to be purely suppositious. It is not adverted to in the declaration, nor treated in the judgment as an essential factor. Moreover it is difficult to reconcile the statement that the tenant was without fault with other parts of the opinion which seem to recognize the existence of a concurrent liability on the tenant's part. See sec. 75, post. *Telfer* v. *Fisher* (1910) 3 Alta. R. 423, 15 W.L.R. 400.

(*d*) *Todd* v. *Flight* (1860) 9 C.B.N.S. 377, 30 L.J. (C.P.) 21, Erle, C.J., after stating the effect of three earlier cases, said: "These are authorities for saying that if the wrong causing the damage arises from the non-feasance or the mis-feasance of the lessor, the party suffering damage from the wrong may sue him." The learned judge considered that this was the principle which reconciled the various decisions. *McIntosh* v. *Wilson* (1913) 14 D.L.R. 671.

Annotation.

The liability which arises from the letting of premises on which there is a dangerous nuisance is also incurred by a person who, while such a nuisance exists, purchases the reversion (*e*), or re-lets the property (*f*). But there is not a re-letting which will render the landlord liable, where a yearly tenant continues his occupation after the end of a year. Such a tenancy is regarded as subsisting until it is determined by notice (*g*). For a similar reason a weekly tenant's continuance of his occupation on the expiration of each week does not render the defendant liable for defects then existing (*h*). Nor, it would seem, is there any re-letting within the purview of the rule, where the tenant who entered under a lease holds over at the end of the term (*i*).

A point of view which, logically speaking, is somewhat different from that noticed at the beginning of the section, but which involves precisely the same conclusions, is evidenced by the statement that "in all the cases where the landlord has been held responsible, it will be found that he has done some act authorizing the continuance of the dangerous state of the premises" (*j*). In the first of the cases cited below it was held that the necessary authorization may be inferred from the fact that he has retained the obligation to repair the premises.

The question whether the defect was structural or one of management is for the jury whenever that point is left in doubt by the evidence (*k*).

(*e*) "If a man devises land with a nuisance upon it, and during the continuance of the term, and whilst the landlord was unable to remove the nuisance, another chooses to buy the reversion of the land with the nuisance upon it, he is answerable." Littledale, J., in *Rex* v. *Pedley* (1834) 1 Ad. & E. 822, 3 N. & M. 627.

(*f*) The cases cited in the following notes all recognize the correctness of this doctrine.

(*g*) *Gandy* v. *Jubber* (Exch. Ch. 1865) 9 B. & S. 15, reversing on this ground, 5 B. & S. 78. This ruling qualifies the statement of Littledale, J., that "if there is a tenancy from year to year, and the tenant commits a nuisance, the landlord is liable. He has no business to do so; and by doing so, he continues the nuisance." *Rex* v. *Pedley* (1834) 1 Ad. & E. 822, 3 N. & M. 627.

(*h*) *Bowen* v. *Anderson* [1894] 1 Q.B. 164, disapproving *Sandford* v. *Clarke*, 21 Q.B.D. 398, so far as it depended on the theory that it assumed (contrary to the ruling in *Jones* v. *Mills*, 10 C.B.N.S. 788), that a weekly tenancy comes to an end at the end of each week.

(*i*) See *Hett* v. *Janzen* (1892) 22 O.R. 414.

(*j*) *Pretty* v. *Bickmore* (1873) L.R. 8 C.P. 401, per Bovill, C.J., If it is a natural consequence of the use of a portion of the premises by the tenants in the manner contemplated that they may become a nuisance to the neighbors, it is the duty of the landlord either to exact from his tenants an engagement to prevent the conditions which would cause the nuisance, or to reserve to himself a right to enter for that purpose. *Rex* v. *Pedley* (1834) 1 Ad. and E. 822, 3 N. & M. 627.

(*k*) *Bowen* v. *Anderson* [1894] 1 Q.B. 164, holding it to be error to take the case from the jury where the evidence was conflicting as to whether the fall of the plaintiff through a coal-plate was owing to the neglect of the tenant

Annotation.

Under some circumstances, an additional reason for holding the landlord liable may be furnished by the fact that it would be waste for the tenant to abate the nuisance in question as where it could not be abated without structural alterations (*l*).

The theory that the landlord must necessarily be liable to a stranger whenever the tenant is under no obligation to repair, has already been discussed. See sec. 72, ante.

74. Landlord's knowledge or ignorance of the dangerous conditions, how far material.—That the landlord cannot be held liable to a stranger for injuries caused by defects in the demised premises unless he knew of these defects, is a doctrine which seems to be reasonably deducible from, though not categorically enunciated in, a case already cited (*a*). But, as the decision proceeded upon the broad ground that such a declaration shewed the landlord to have been guilty of the non-repair which eventuated in disaster and the landlord's cognizance of the conditions was not adverted to as a distinctive element, all that can be affirmed with certainty is that, on general principles, the conclusion of the court must apparently have been in favour of the landlord if the action had gone before a jury and his want of knowledge established (*b*).

Not long afterwards the landlord of a tenant from year to year was held liable by the same court, although it was proved that he had no notice that the nuisance which caused the injury existed at the time of the re-letting (*c*). It was explicitly declared by Crompton, J., that under such circumstances, the landlord is liable

---

to secure it properly, or to the defective state of the flagstone, or to the presence of clay which prevented the plate from fitting.

Evidence that the same tenant had been in possession for about two years before the accident, and that the coal-plate which caused the accident was out of repair about a fortnight after the tenant had entered is sufficient to take to the jury the question whether there was a structural defect existing when the tenancy began. *Sandford* v. *Clarke* (1888) 21 Q.B. 398, as explained in *Bowen* v. *Anderson*, supra.

Under the General Health Act of 38 & 39 Vict. ch. 55, secs. 94, 104, where premises are or become subject to a structural defect which may give rise to a nuisance, or become dangerous or injurious to health, the tenant may, in the absence of any agreement imposing the payment for its repair upon him, throw the liability for its repair upon the landlord. See *Gebhardt* v. *Saunders* [1892] 2 Q.B. 452.

(*l*) See *Rosewell* v. *Prior* (1702) 12 Mod. 635 (p. 640).

(*a*) *Todd* v. *Flight* (1860) 9 C.B.N.S. 377, 30 L.J. (C.P.) 21, where a declaration was held not to be demurrable which alleged that the defendant let the house in question when the chimneys were known by him to be ruinous and in danger of falling, and that he maintained them in that state.

(*b*) As to the evidential significance of knowledge of the conditions in actions for negligence, see a note by the present writer in 41 L.R.A., pp. 33-153, especially pp. 35-38.

(*c*) *Gandy* v. *Jubber* (1865) 5 B. & S. 78, 485 [grating over area was improperly constructed]. The reversal of this decision by the Exchequer Chamber (9 B. & S. 15) does not affect the judgment of the lower court so far as this point is concerned.

Annotation.

whether he has notice of the conditions or not; and it is clear that the other judges, although they do not advert to this element, must have been of the same opinion, or they would not have allowed the plaintiff to recover.

Yet, a few years later, the same court refused to allow a stranger to recover against the landlord in a case where the defect was one of the same character as that in the case last cited, and based their decision upon the fact that he did not know of the defect, and was not negligent in being ignorant of it (*d*).

Precisely upon what ground these two cases are to be reconciled is not very apparent. The only available differentiating factor seems to consist in the fact that in the earlier one the tenant was under no obligation to repair, while in the later one the tenant was bound by an express stipulation in that regard (*e*). This conception, supposing it to be that which underlies the later decision, is certainly not free from difficulties. It involves the acceptance of the doctrine that a landlord is, as respects strangers, a warrantor of the safety of the premises in cases where the tenant is not bound to repair, but that in cases where the tenant is bound to repair, the landlord cannot be held liable unless he is proved to have been negligent. Such a doctrine seems to require for its support the assumption that the imputation to the landlord of a duty to insure safety under the supposed circumstances is necessary to prevent the injured person from being left remediless, and it is clear that, as long as the authorities cited in sec. 72 remain unimpeached, this assumption cannot be justifiably made. Moreover, if evidence of an agreement by the tenant to repair renders it necessary for the plaintiff, if he would succeed, to establish negligence on the landlord's part, the action manifestly fails at the outset where the landlord is excusably ignorant of the conditions. Under such circumstances the case never reaches the stage at which it becomes material to consider whether the tenant's agreement does or does not absolve the landlord (*f*). The result is a somewhat singular logical situation, for the existence or absence of the agreement is first treated as a test to determine whether the standard of the responsibility imputed to the landlord shall be a warranty or

---

(*d*) *Gwinnell* v. *Eamer* (1875) L.R. 10 C.P. 658 [defective grating in footpath].

(*e*) The actual scope of *Gwinnell* v. *Eamer* is indicated by the following question which, during the argument, was asked by Brett, J., and conceded by plaintiff's counsel to require a negative answer: "Assuming that the grating was unsafe at the time of the letting, but without the knowledge of the landlord, and without blame to him for not knowing it, and the tenant is under the covenant to repair—is the landlord liable?"

(*f*) In *Gwinnell* v. *Eamer* the plaintiff had been nonsuited at the trial simply on the ground that the landlord had no knowledge of the unsafe state of the grating at the time of the demise.

Annotation.

merely the conduct of a prudent man, and then ceases altogether to be an operative element in the investigation (*g*).

75. Tenant's covenant to repair, how far landlord's liability affected by.—It has been decided in several cases that a tenant who fails to remedy a continuing nuisance which existed at the time when he took a lease of the premises, must respond in damages to anyone who may be injured by it (*a*). In none of the cases cited was the point directly raised that the effect of an express agreement by the tenant to repair was to absolve the landlord entirely from accountability for accidents occurring subsequently to the demise; but one of the most distinguished of modern judges was strongly inclined to think that this was the result of such a contract (*b*). This expression of opinion, however, was merely obiter, fault on the landlord's part being negatived by the evidence, and was not sustained by the citation of any authorities. A remark made by Keating, J., during the argument in a still earlier case also seems to look in the same direction (*c*). But to attach a definite doctrinal significance to words which, as the subjoined note shews, were nothing more in effect than an intimation that a point made by counsel was not open to discussion, as the pleadings stood, would scarcely be justifiable. It is to be observed, moreover, that in the opinion delivered by Erle, C.J., for the whole court, it seems to be assumed that, under the circumstances set out in the declaration, had the option of suing either the lessor or the lessee. (See pp. 388, 389 of the report.) It is submitted that this is the true doctrine, for there is no apparent reason why a contract, with which the injured person had nothing to do, should prevent the

---

(*g*) In *Hett* v. *Janzen* (1892) 22 O.R. 414, where a landlord was held not liable for an injury caused by a defective grating on the ground of ignorance, Boyd, Ch., and Robertson, J., thought that the weight of authority shewed that the landlord must know of the ruinous or dangerous condition of his premises so as to be guilty of the wrongful non-repair which led to the damage. This seems also to be tacitly assumed in *Bishop* v. *Trustees, &c.* (1859), 1 E. & E. 697.

(*a*) *Coupland* v. *Hardingham* (1813) 3 Camp. 398 [area not fenced]; *Reg.* v. *Watts* (1697) 1 Salk. 357, 2 Ld. Raym. 856 [ruinous house], cited with approval in *Chauntler* v. *Robinson* (1849) 4 Exch. 163. For illustrations of the application of the same rule to cases of nuisances other than those due to defective repair, see *Broden* v. *Saillard* (1876) 2 Ch.D. 692; *Ball* v. *Ray* (1873) 8 Ch. 467; *Brent* v. *Haddon* (1620) Cro. Jac. 555.

(*b*) In *Gwinnell* v. *Eamer* (1875) L.R. 10 C.P. 658, Brett, J., while not definitely rejecting the doctrine that if the landlord at the time of the demise knows of the defect and does nothing to cause it to be remedied, he, as well as a tenant who has covenanted to repair, may be liable, very much doubted whether, if the burthen of repair is cast upon the tenant, the duty of the landlord does not altogether cease.

(*c*) In *Todd* v. *Flight* (1860) 9 C.B.N.S. 377, 30 L.J.C.P. 21, counsel for defendant said: "The present defendant has done no act to identify himself with the nuisance complained of. He let premises subject to an obligation on the part of the lessee to repair them." The learned judge interposed with the question: "If the obligation on the lessee to repair is to exonerate the lessor, should not the latter have pleaded it?"

Annotation. operation of the general principle that joint tort-feasors are severally liable for the consequences of their breaches of duty.

In view of the doubtful state of the authorities on this point, the practical inference is clearly that, in any case where there is a covenant to repair, both the landlord and tenant should be made parties to the action, if such a joinder is permitted in the jurisdiction where the action is brought.

IMP. P. C.

QUEBEC RAILWAY, LIGHT, HEAT AND POWER Co. v. VANDRY.

Judicial Committee of the Privy Council, Viscount Cave, Lord Shaw, Lord Sumner and Lord Parmoor. February 17, 1920.

EVIDENCE (§ II B—108)—ESCAPE OF CURRENT CAUSING FIRES—DEFECTIVE TRANSFORMER—INTERPRETATION OF ART. 1054, CIVIL CODE, QUEBEC—LIABILITY ESTABLISHED—NOT A REBUTTABLE PRESUMPTION OF FAUTE.

Under Art. 1054, Code Quebec, proof that damage has been caused by things under the defendant's care does not raise a mere presumption of *faute*, which may be rebutted by the defendant. It establishes a liability, unless the defendant brings himself within its terms; in cases where the exculpatory paragraph applies, there is a clear difference in law, between a rebuttable presumption of *faute* and a liability defeasible by proof of inability to prevent the damage.

[*Shawinigan* v. *Doucet* (1909), 42 Can. S.C.R. 281; *C.P.R.* v. *Roy*, [1902] A.C. 220; *Dumphy* v. *Montreal Light, etc., Co.*, [1907] A.C. 454, referred to.]

Statement. APPEAL from the Supreme Court of Canada (1916), 29 D.L.R. 530, 53 Can. S.C.R. 72, in an action for damage caused by the escape of electricity in consequence of an unsafe system of transmission. Affirmed.

The judgment of the Board was delivered by

Lord Sumner. LORD SUMNER:—The principal object of this appeal is to settle the true construction of art. 1054 of the Civil Code of Lower Canada. Special leave to appeal was given on the terms that the five actions brought in the Courts below should be consolidated and that the appellants should raise only questions of law.

The appellant company generates and distributes electricity in the City of Quebec and its neighbourhood and along the St. Foye Road, in which the respondents' houses are situated, the company had erected poles carrying two overhead cables, a primary cable charged with electricity at 2,200 volts and a secondary cable from which electricity was supplied to the houses at 108 volts. There were many trees along the roadside and in the adjacent enclosures and at the time in question a violent wind had torn a branch, coated with frozen rain, from a poplar growing some distance within one of the enclosures and had

IMP.
P. C.
QUEBEC RAILWAY LIGHT, HEAT & POWER CO. v. VANDRY.
Lord Sumner.

driven it against these cables, though many feet away. They broke down in consequence, and thus the high tension electricity found its way along the secondary cable into the customers' houses and set them on fire. For the loss thus caused the actions now consolidated were brought against the appellant company.

Though no article of the Code is referred to by number in the declaration, it is plain that both articles 1053 and 1054 were relied on, and so the cases were treated both at the trial by Dorion, J., and in the Court of King's Bench on appeal (1915), 24 Que. K.B. 214, and in the Supreme Court of Canada (1916), 29 D.L.R. 530, 52 Can. S.C.R. 72. There was much difference of opinion among the Judges, but the Supreme Court, by a majority of one, restored the judgment of Dorion, J., in favour of the plaintiffs.

Two questions of law arise upon the Code—(1) whether the plaintiffs can succeed without proving negligence or *faute* against the company; (2) whether even so the defendants would succeed, if they proved that they could not have prevented the fire. In the Courts below it was argued for the defendants that they could not have foreseen the combination of bad weather overloading the branches with *verglas* and of wind breaking off the branch and driving it, laterally on to the cables, and that they were accordingly the victims of *force majeure*. As to this the findings of fact are against them. It was also argued for the plaintiffs, that if the defendants had installed suitable apparatus they would have received automatic warning at the central station of the breakdown of the cable in St. Foye Road in time to have cut off the current before any mischief was done, but, as nothing was made of this below, it need not be pursued now.

The question whether and under what circumstances a defendant can be made liable in a case of quasi-delict, unless actual *faute* is proved against him, has been much discussed in Quebec in recent years. The case of *Doucet* (1909), 42 Can. S.C.R. 281, brought the controversy to a head in 1909, and the Supreme Court was then divided in opinion. The present case renewed both the controversy and the division. In *Doucet's* case, which arose between employer and employee, no definite cause could be discovered for the explosion by which Doucet was injured. In the present case the cause of the occurrence is known. The issue, moreover, arises in the present case between contractor and

IMP.

P. C.

QUEBEC RAILWAY LIGHT, HEAT & POWER CO. v. VANDRY.

Lord Sumner.

customer. Accordingly *Doucet's* case might be no authority in the present case, but for the fact that in Quebec both cases depend on the language of the Code. Unfortunately this seems to have been imperfectly appreciated in the Canadian Courts, and the question "What do the words of articles 1053 and 1054 mean as a matter of construction?" was not in either case always kept in the forefront.

The opposing views may be summarised thus, without always referring them to the particular judgments in which they are stated. *Faute*, it is said, is the basis of all liability for quasi-delict. To hold a man liable for either delict or quasi-delict, when he is not to blame, is unjust. This must be so in principle and it rests also on authority. The whole jurisprudence of Quebec before *Doucet's* case so holds. Since the Code was enacted, it has been so interpreted, and the decisions before the Code were to the same effect. Furthermore, the framers of the Code were directed to codify existing law and, if they suggested alterations, to indicate which of their proposed articles differed from the existing law, and they did not so indicate arts. 1053 and 1054. As a matter of language these articles can be made to give effect to these principles, (1) by holding that art. 1054 does but amplify and carry on art. 1053, and impliedly therefore rests on *faute*, as art. 1053 does expressly, or (2) by holding that paragraph 6 of art. 1054, the "exculpatory" paragraph, applies to the first paragraph of the article as well as to the others, and implies that *faute* must be proved by the plaintiff before the defendant can be called upon for an excuse, or (3) by holding that par. 1 of art. 1054 really specifies circumstances from which *faute* may be presumed, leaving the defendant to rebut it by any evidence that may be available.

The contention on the other hand is that the Civil Code of Lower Canada was founded on the Code Napoléon, from which it differed only in language, and that the reasoning of recent decisions of the French Courts on the corresponding art. 1384, ought to be applied, the prior decisions of the Canadian Courts notwithstanding. The result is to apply a principle thus formulated by Fitzpatrick, C.J., in *Doucet's* case:—"Celui qui perçoit les émoluments procurés par une machine susceptible de nuire au tiers, doit s'attendre à réparer la préjudice que cette machine

cause—*ubi emolumentum ibi onus.*" Article 1054 must be held to raise a presumption of *faute* against the defendant company as the basis of responsibility "non seulement du dommage qu'elle cause par sa propre faute, mais encore de celui causé . . . par les choses qu'elle a sous sa garde." In other words, the fact of the accident supplies all the proof of negligence, which it is necessary for the plaintiff to give.

It seems plain that both these trains of reasoning start rather from the text of the Code Napoléon as interpreted by French Courts and the general jurisprudence of Quebec than from the very words of arts. 1053 and 1054 themselves. Natural as this may be, the statutory character of the Civil Code of Lower Canada must always be borne in mind.

> The connection between Canadian law and French law dates from a time earlier than the compilation of the Code Napoléon, and neither its text nor the legal decisions thereon can bind Canadian Courts or even affect directly the duty of Canadian tribunals in interpreting their own law. (*Maclaren* v. *Attorney-General for Quebec*, 15 D.L.R. 855, at 868, [1914] A.C. 258 at 279.)

Thus, however stimulating and suggestive the reasoning of French Courts or French jurists upon kindred subjects and not dissimilar texts undoubtedly is, "recent French decisions, though entitled to the highest respect . . . are not of binding authority in Quebec," *McArthur* v. *Dominion Cartridge Co.*, [1905] A.C. 72, at 77, still less can they prevail to alter or control what is and always must be remembered to be the language of a Legislature established within the British Empire. In the present case, as in *Doucet's* case, the Judges of the Supreme Court of Canada sedulously, and as they conceived successfully, conformed to this rule and decided, though in different ways, a question of construction of the Quebec Code in accordance with reasoning, which seemed none the less convincing, because it was suggested by French authors or followed a view long laid down by the Courts in Quebec. Nor can the history of the Quebec Code be altogether banished from the recollection of those who administer its provisions, and it is true that under certain conditions it is legitimate to refer to the prior cases which it was intended to codify, *Vagliano* v. *Bank of England*, [1891] A.C. 144, page 145. A construction of articles, which have long been before the Courts, differing from that hitherto accepted, will always, even in a tribunal not bound by prior decisions, be adopted with caution.

IMP.

P. C.

QUEBEC RAILWAY LIGHT, HEAT & POWER CO. v. VANDRY.

Lord Sumner.

Still, the first step, the indispensable starting point, is to take the Code itself and to examine its words, and to ask whether their meaning is plain. Only if the enactment is not plain can light be usefully sought from exterior sources. Of course it must not be forgotten what the enactment is, namely, a Code of systematised principles and rules, not a body of administrative directions or an institutional exposition. Of course also the Code, or at least the cognate articles, should be read as a whole, forming a connected scheme; they are not a series of detached enactments. Of course, again, there is a point at which mere linguistic clearness only masks the obscurity of actual provisions or leads to such irrational or unjust results that, however clear the actual expression may be, the conclusion is still clearer that no such meaning could have been intended by the Legislature. Whether particular words are plain or not is rarely susceptible of much argument. They must be read and passed upon. The conclusion must largely depend on the impression formed by the mind that has to decide. In the present case their Lordships have arrived at the conclusion that the language of the articles is plain, in the sense that their meaning must be found in their words, though they are far from denying that the true construction is a matter of nicety and even of difficulty. It follows that the decision of this question is not legitimately assisted even by reference to the prior decisions in Quebec, which, in fact, are much less definite than they have been supposed to be, and that no useful suggestion can be derived from articles in the Code Napoléon differently expressed, or from the expositions of them, however brilliant, by French jurists. In no event can the intention of the Legislature in passing the articles under discussion be gathered from the category in which they were placed by the commission which drafted the Code.

Articles 1053 and 1054 are the first two of a group of articles headed "Offences and quasi-offences." The first deals with damage caused by *faute* on the part of a person, who can tell right from wrong. The second deals further with the liability of such a person not only for damage caused by his own fault, but also for damage caused by persons whom he controls or things which he has under his care. It is not necessary now to define the meaning of "controls" or "under his care." There is obviously much to be

IMP.

P. C.

QUEBEC RAILWAY LIGHT, HEAT & POWER CO. v. VANDRY.

Lord Sumner.

said in a proper case about both. The article proceeds to speak specifically of the liability of parents for the acts of infant children, of guardians for those of wards, of curators for those of lunatics, and of teachers and artisans for those of scholars and apprentices. Then follows provision for what has been called "exculpation," a term, which, however, begs the question that *culpa* is implied in the "*responsabilité ci-dessus.*" To this succeeds a rule as to the responsibility of masters and employers for their servants and workmen. Subsequent passages deal with responsibility for damage done by animals, or by buildings originally ill-constructed or afterwards allowed to get out of repair.

The language of the exculpatory clause is as follows: "The responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage."

From this it is argued that the exculpatory clause does not refer at any rate to that part of the first paragraph which contains the words "and by things which he has under his care," firstly because "the act which has caused the damage" cannot be applicable to a case of "damage caused by things which he has under his care," for the act of a thing would be a meaningless expression; and secondly, because "the above cases" means only the "cases" properly so called of parent and child and so forth, which figure as particular cases, and even though taken together are far from exhausting the first paragraph. In the French text, however, the exculpatory clause is as follows: "La responsabilité ci-dessus a lieu seulement lorsque la personne qui y est assujettie ne peut prouver qu'elle n'a pu empêcher le fait qui a causé le dommage."

On these words it is pretty plain that the above comment, founded only on the English text, fails. "La responsabilité ci-dessus" refers to the whole preceding part of the article, every paragraph of which contains expressly or by implication the word "responsible," and "le fait qui a causé le dommage" is an expression not inapt to cover damage caused by inanimate things as well as by animate persons.

Behind this linguistic criticism lies the structure of the article. Article 1053 deals with damage caused by the defendant's own *faute*. Article 1054 takes up another and a wider responsibility, namely, for damage otherwise caused, whether by persons or by

IMP.

P. C.

QUEBEC RAILWAY LIGHT, HEAT & POWER CO. v. VANDRY.

Lord Sumner.

things. It deals with what may be conveniently called vicarious responsibility and this under three categories: (*a*) persons who know right from wrong, and would therefore be themselves liable also for their own *faute* under article 1053; for these the defendant answers on the principle of *respondeat superior;* (*b*) persons, knowing right from wrong, and therefore personally liable, who though not strictly falling under that principle, impose a vicarious liability on the defendant because they are under his control in one capacity or another; and (*c*) persons who do not know right from wrong, and things, animate or inanimate, for whom the defendant answers on the ground of his control or charge, his being the only responsibility which the law recognises. Paragraphs 2, 3, 4, and 5 are not mere instances of par. 1: they include persons incapable of knowing right from wrong, who are therefore outside of the words "the fault of persons under his control." They make a defendant liable, when the actor himself is incapable of *faute* and is therefore guiltless of it and another person is made liable for him vicariously, regardless of any *faute* of his own. This position as applied to persons is the same as that which par. 1 applies to things. Such being the object of the article it would be illogical to refuse to the defendant, who is called on to answer for things in his care, the same exculpation, namely that he could not have prevented the injurious occurrence, which is open to him when called on to answer for minors, lunatics or apprentices under his control.

If, then, it is open to a defendant sued in respect of damage done by things in his care to raise a defence under the "exculpatory paragraph," the next question that arises is whether before the defendant can be called on to excuse himself, the plaintiff must prove that there was *faute* on the defendant's part, or whether proof of the facts (1) that a certain thing was under the defendant's care and (2) that the plaintiff was hurt by it, will in themselves suffice to discharge the whole of the plaintiff's burthen. First of all, art. 1054 expressly goes beyond art. 1053 in that, after saying "non seulement du dommage qu'elle cause par sa faute à autrui," which refers to art. 1053, it takes up another's *faute*, "mais encore de celui causé par la faute de ceux dont elle a la contrôle," that is to say not caused by the defendant's own fault. Indeed, if *faute* must be proved against the defendant before he can be made liable under art. 1054, it is difficult to see what efficacy attaches

IMP.
P. C.
QUEBEC RAILWAY LIGHT, HEAT & POWER CO. v. VANDRY.
Lord Sumner.

to the exculpatory clause at all. If the defendant is proved to have been guilty of *faute*, how can he say that he could not have prevented its consequences? if he is not, he needs no exculpation. Secondly, there is no reason why the usual rule should not apply to this as to other statutes, namely that effect must be given, if possible, to all the words used, for the Legislature is deemed not to waste its words or to say anything in vain. Accordingly, the observation at once applies that, if the defendant must be guilty of *faute* before art. 1054 can apply, art. 1054 is otiose, for he might have been made liable for that *faute* under art. 1053. There can be no answer to this argument, unless it be that the *faute* required under art. 1053 is *faute* causing the damage, and that under art. 1054 *faute* not causing the damage is brought in, and this cannot be the intention of the Code, for then under art. 1054 a person would be answerable for damage done by things under his care, when his conduct has been blameworthy in some immaterial respect, but not when he has been blameless altogether. In other words he would be visited with civil liability to a private person as a penalty for some unconnected error, and an injured person's right to compensation for damage actually sustained would depend on the question whether the defendant was a person not beyond reproach or was a person of invincible impeccability. In the third place, to hold that even under art. 1054 the plaintiff must prove *faute* against the defendant would have the singular result that either masters would not be responsible for the *faute* of their servants, unless they were also guilty of *faute* themselves, or the seventh paragraph of the article would have to be read without the implication of *faute*, which on this construction is to be made in the first. There seems to be no doubt that art. 1054 introduces a new liability, illustrated by a variety of cases and arising out of a variety of circumstances, all of which are independent of that personal element of *faute* which is the foundation of the defendant's liability under art. 1053. Furthermore, proof that damage has been caused by things under the defendant's care does not raise a mere presumption of *faute*, which the defendant may rebut by proving affirmatively that he was guilty of no *faute*. It establishes a liability, unless, in cases where the exculpatory paragraph applies, the defendant brings himself within its terms. There is a difference, slight in fact but clear in law, between a rebuttable presump-

IMP.
P. C.
QUEBEC RAILWAY LIGHT, HEAT & POWER CO. v. VANDRY.
Lord Sumner.

tion of *faute* and a liability defeasible by proof of inability to prevent the damage.

Their Lordships fully appreciate that a considerable number of points can be made against this construction. It is said that absolute liability without *faute* shewn was unknown in Quebec before *Doucet's* case. It would, perhaps, be more correct to say that the occasion for so deciding has only recently arisen with the growth of scientific inventions and their industrial exploitation. It may be said that art. 1054 is not the place for obligations arising from what art. 983 calls "the operation of the law solely," but is confined by the title of this group of articles to "delicts and quasi-delicts;" that absolute liability for damage done for things under a man's care, whether those things be in themselves dangerous or not and whether or not they have been brought into the condition which makes them dangerous for purposes of the defendant's own, is a liability transcending the rule in *Fletcher* v. *Rylands* (1868), L.R. 3 H.L. 330 and *Nichols* v. *Marsland* (1876), 2 Ex. D. 1, and might work great injustice; that art. 1054 does not begin with the words "Toute personne est responsable", but with the words "Elle est responsable," *Elle* referring to the words of art. 1053, viz., "Toute personne capable de discerner le bien du mal," a reference which is pointless if the *faute* of such "personne" is immaterial and if all that is needed is that in fact the thing should be under his care. To all this the plain words of the article, if they are plain as their Lordships conceive them to be, are a sufficient answer. In enacting the Code the Legislature may have foreseen cases of the kind now in question many years before any of them arose. In construing it *Fletcher* v. *Rylands* and *Nichols* v. *Marsland* had better be left out of account. There is no reason why the Code should be made to conform to them. The mere title given to a group of articles is not in itself enough to contradict the prescriptions of one of them. As to the fact that the article begins with "Elle" and not with "Toute personne," it may be that a person incapable of knowing good from evil would be also incapable of having others under his control or of having things under his care, or at any rate would by that very incapacity be entitled to exculpation, on the ground that, if he could not tell right from wrong, neither could he prevent the *fait* which caused the damage. Even if this be not so, the only result would be to

exempt from liability under article 1054 persons incapable of knowing right from wrong, though they may occupy the positions mentioned. As no case of this kind arises here, no decision or opinion need be given about it. The positive words of the article stand and must have effect.

Two other points may be briefly disposed of. The poplar tree grew in the field of one of the plaintiffs and belonged to him and both the houses burnt belonged to customers of the defendant company. Though these points were touched upon, it is not clear what legal consequence was supposed to result from them. The owner of the poplar was not shewn to have been in fault and, even if every tree that grows is "in the charge" of its owner, the tree was not the cause of the damage, but only an antecedent prerequsiite. As to the other point there was no evidence that the owner of the houses consented to take the risk of what happened or even knew of it, and if it is said that the exploitation of the electricity was not solely for the supplier's benefit, but also for the consumer's, which is somewhat far-fetched, the article says nothing about the liability of exploiters. On neither of these points have the facts been found, so as to raise in the appellants' favour any contention requiring decision.

Apart from the articles of the Code the appellants resorted to a separate line of argument. The powers under which they carry on their undertaking are statutory and are contained some in private and some in public statutes. Their Lordships think there is no substance in the objection taken by the respondents that under art. 10 of the Code private statutes must be pleaded, which implies proof, and that evidence was not given of the private statutes in this case. The article does not provide that if such evidence is not forthcoming the same result may not be obtained by admissions and as all the statutes without distinction were the subject of discussion in the Courts below, as if the terms of both kinds of legislation had been duly brought before the Court, and as the printed text was in fact readily available, their Lordships think that this objection is not now open to the respondents.

The powers which these statutes give are of a very familiar type. The undertakers are authorised to carry and distribute high tension electricity over cables, which may be either overhead or underground. Sec. 15 of 58-59 Vict. 1895, ch. 49, expressly

IMP.
P. C.
QUEBEC RAILWAY LIGHT, HEAT & POWER CO. v. VANDRY.
Lord Sumner.

provides that the company may erect, equip and maintain poles in the streets for the purpose of working and maintaining its lines for the conveyance of electric power upon, along, across, over and under the same. It was contended by the respondents that subsec. (*e*) of this section, by the words, "the company shall be responsible for all damage which its agents, servants or workmen cause to individuals or property in carrying out or maintaining any of its said works," made the company absolutely liable for the damage sued for in the present case. Their Lordships think that, as an independent cause of action, this case fails. The damage here is not, in any view of the construction of the subsection, caused in carrying out or maintaining works.

The appellants, however, rely on the authority to carry their wires overhead which the statutes give, as an answer to the claim, and contend that the statutes exclude the operation of arts. 1053 and 1054 of the Code in matters concerning the distribution of high tension electricity by overhead cables, as repugnant to the power which the Legislature has bestowed. The application of enactments of this kind is familiar and well settled. Such powers are not in themselves charters to commit torts and to damage third persons at large, but that which is necessarily incidental to the exercise of the statutory authority is held to have been authorised by implication and therefore it is not the foundation of a cause of action in favour of strangers, since otherwise the application of the general law would defeat the purpose of the enactment. The Legislature, which could have excepted the application of the general law in express terms, must be deemed to have done so by implication in such cases. Nor need a use of the power conferred, which is injurious to others, be excluded from the ambit of that which is necessarily incidental to their enjoyment merely because the progress of discovery or invention reveals some extraordinary means of preventing that injury to others which has previously been unavoidable. This point arose and was settled in connection with sparks falling from locomotive engines many years ago. It therefore becomes necessary to consider how far such an escape of electricity as took place in this case was incidental to the use of overhead cables and how far and by what reasonable precautions injurious consequences were preventible.

IMP.

P. C.

QUEBEC RAILWAY LIGHT, HEAT & POWER CO. v. VANDRY.

Lord Sumner.

The question, whether it was necessary to hang the two sets of cables on the same poles or in such proximity to one another that the fall of the branch upon one would lead to the flow of the high tension current into the other, hardly seems to have been examined at the trial. The main contention is this. It was the result of voluminous evidence called at the trial, and indeed in their Lordships' view the company's case, that, if the wires of the transformers, which are used at intervals along the line of cable, had been grounded, the escaping high-tension electricity would have found its way innocuously to earth instead of entering the houses and setting them on fire. The value of this precaution had been established by the experience of several years, but it was the view of some distributors of electricity, and of the defendant company among them, that there was an offset to this advantage in the fact that, if the wiring of the customers' houses was defective, the grounding of the transformer wires would substitute new difficulties for the old. It was not, however, shewn that the wiring of the plaintiffs' houses was defective to this extent, although it was "démodé," nor did the evidence compare the one disadvantage with the other quantitatively. The company could have inspected the wiring and, if it was not safe, could have declined to supply current. It is plain that the company was quite willing to have carried out the grounding of the transformer wires, if the representatives of the Fire Insurance Companies, who advised this course, had given an instruction instead of a recommendation. The latter naturally pointed out that they had no authority to issue instructions but must confine themselves to advice, and as their Lordships are neither prepared to assume that this request on the appellants' part for instructions was a mere quibble, designed to disguise their own reluctance to do anything, nor even to infer that they saw any objection to the proposal except the expense of it, they conclude that the grounding of the wires of the transformers would, some substantial time before the accident in question, have been a practicable and efficient safeguard against the injury which in fact was inflicted. If so, it is impossible to say that the escape of electricity into customers' houses and the consequent damage in time of storm was a necessary incident of the exercise of the power to distribute high tension

IMP.

P. C.

QUEBEC RAILWAY LIGHT, HEAT & POWER CO. v. VANDRY.

Lord Sumner.

current by overhead cables along roads, such as would by implication relieve the company from liability for the consequences.

Two decisions which were pressed on their Lordships' attention require particular examination, viz., *C.P.R.* v. *Roy*, [1902] A.C. 220, and *Dumphy* v. *Montreal Light etc. Co.*, [1907] A.C. 454. The former is a case of damage by the escape of sparks from a locomotive engine and the decision in terms is in line with the well-known authorities of *Vaughan* v. *The Taff Vale Railway Co.* (1860), 5 H. & N. 679 and *The Hammersmith R. Co.* v. *Brand* (1869), L.R. 4 H.L. 171; it is a case of "plain words authorising the doing of the very thing complained of." *Dumphy's* is a case of high tension electricity released by the act of a third party's workman, whom the jury acquitted of negligence. No specific article of the Code is mentioned, and the presence of a high tension current in the cable was only the *causa sine qua non* and the human action which released it was the *causa causans* of the accident. There was statutory authority to circulate high tension electricity overhead, but on the simple issue, whether the damage caused by the escape of that electricity was caused by the company's negligence, it was held that no negligence had been proved, and indeed but for the act of a stranger, who himself was not careless, the company's electricity would have done no harm to anybody.

Whether in the present cases the evidence established affirmatively a case of negligence against the defendants is a question on which the Supreme Court arrived at no definite conclusion. Had it been necessary, the respondents would have been entitled to claim before their Lordships' Board that this issue should be decided now, since the terms imposed on the appellants under the special leave to appeal bound them to rely on points of law only but did not preclude the respondents from meeting those points upon the facts in any way which the evidence warranted. In the view, however, above taken of the case no decision on this question is needed.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

DUNN v. DOMINION ATLANTIC RAILWAY.

CAN.

S. C.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, and Mignault, JJ. April 6, 1920.

CARRIERS (§ II H—140)—RIOTOUS OR DISORDERLY CONDUCT OF DRUNKEN PASSENGER—EJECTION FROM TRAIN BY CONDUCTOR—DEATH BY BEING RUN OVER BY ANOTHER TRAIN—LIABILITY—PROXIMATE CAUSE.

The conductor of a passenger train does not exercise due care in putting off the train at one a.m. on a dark night and leaving unattended a passenger who is so drunk that he staggers in the car, and when put off staggers and falls in sight of the brakesman and conductor, and if such passenger wanders onto the track and is killed five or six hours later the railway company is liable. If such passenger is annoying other passengers and misconducting himself it is the conductor's duty to detain him in the baggage car or other safe place until he can be safely ejected from the train.

APPEAL from the judgment of the Supreme Court of Nova Scotia (1919), 45 D.L.R. 51, 53 N.S.R. 88, affirming by an equally divided Court a judgment of Drysdale, J., dismissing an action claiming damages for negligence in causing the death of a passenger ejected from one of the company's trains. Reversed. Statement.

J. J. Power, K.C., for appellant; *W. A. Henry*, K.C., for respondent.

DAVIES, C.J. (dissenting):—At the close of the argument at Bar in this appeal I was of the opinion that the judgment appealed from, 45 D.L.R. 51, 53 N.S.R. 88, was right and that this appeal should be dismissed. Davies, C.J.

Finding, however, in conference with my colleagues that this view was not shared in by them, I deemed it my duty to read all the evidence most carefully and to read and weigh the reasons of the different Judges of the Supreme Court of Nova Scotia and the trial Judge, who differed in their conclusions.

The result is that I find myself more strongly confirmed in the impression I had formed on the oral argument that the appellant had not proved any case of negligence against the company causing the death of the deceased son.

The facts are not complicated and it seems to me that the evidence on all the material and vital facts is one way and that the findings of the jury on these facts as regards the conduct of the deceased on the train before he was put off by the conductor, and as to the place he was put off being an "unfit place" to put him off, were directly contrary to the evidence.

The trial Judge's decision is short and to the point and I transcribe it in full:—

CAN.

S. C.

DUNN v. DOMINION ATLANTIC RY.

Davies, C.J.

To recover in an action of this kind it is settled law that the negligence alleged and proved must be the proximate cause of the accident or injury.

Here, according to the proof and findings, Dunn was ejected or put off an up-train or train going west, and was run down hours later by a down train, or train going east, with no evidence as to the cause of the accident, except marks on the track, indicating that a train going east had run over the man. The jury has found the defendant company's negligence to be in putting Dunn off the up train at Hantsport.

This is not connected with the accident, and may have had no connection with it. I am obliged to hold that the negligence found does not establish a case upon which plaintiff can recover. For all that appears such negligence may not have in any manner contributed to the accident, and I direct judgment for the defendant company. The *Wakelin* case (1886), 12 App. Cas. 41, is, I think, a conclusive authority against plaintiff.

The broad simple facts are that the deceased was a passenger on an excursion train leaving Halifax for Kentville between 10 and 11 o'clock at night, the train consisting of an engine and fifteen passenger cars, all cars being filled with passengers. The deceased had been visiting his brother who lived in Woodside on the Dartmouth side of Halifax Harbour, and left about 7 p.m. to take a car to Dartmouth ferry across to Halifax and then some conveyance to the railway station in Halifax. He came aboard the train the worse for liquor but by no means helpless, became very disorderly, made himself generally a nuisance to the other passengers and, in fact, assaulted two old couples quietly sitting on their seats. The conductor remonstrated with him and seems to have treated him with great patience and forbearance, the result being that he was violently attacked by deceased who broke one of the car windows and tried to choke him. Only after much effort was the conductor successful in getting the man comparatively quieted down. After this disorderly conduct had culminated in the violent attack upon the conductor, the latter decided to land the passenger when the train arrived at Hantsport, the next stopping place.

I agree so fully and completely with the conclusions of the trial Judge and of Harris, C.J., of the Supreme Court, 45 D.L.R. 51, 53 N.S.R. 88, on appeal from the judgment of the trial Judge, that I do not feel it necessary to re-state the facts and the conclusions to be drawn from them at any length.

The first question to be determined is whether the conduct of the deceased while on the express train was so disorderly and unruly as justified the conductor in putting him off the train and,

if so, whether the place where he put him off, Hantsport station, was a fit and proper place to do so. As regards the latter point, I may say that the evidence shewed Hantsport station is situated in an incorporated town and is not distant from the main thoroughfare of the town more than about one hundred yards.

The excursion train was a very lengthy one and the steps of the car from which the deceased was ejected when the train stopped at Hantsport opened on an extension of the train platform built up of ashes packed and hardened and protected by side plank. There was no more danger or difficulty in the deceased alighting on this ash extension of the station platform than upon the platform of which it was an extension.

I am of the opinion that this station was a fit and proper place to put off the disorderly passenger, and the only remaining question is whether the deceased's conduct had been so disorderly as to have made him a nuisance and offensive to other passengers in the train. It was proved beyond doubt that he was under the influence of liquor, was using profane language, actually assaulted several persons in the train without the slightest provocation and eventually assaulted the conductor violently, breaking at the time one of the windows of the car. The conductor appears to me to have treated the deceased, unruly and provocative as his conduct was, with a good deal of forbearance and restraint and in a manner deserving commendation and not censure.

The result of my reading of the whole evidence, the vital and material parts being uncontradicted, is that I think the conductor was not only warranted and justified, after the deceased's disorderly conduct and his violent personal assault made upon him by the deceased passenger and his inability to keep him quiet, in deciding to put him off the train on reaching Hantsport, but that if he had failed so to put him off he would have assumed a greater responsibility than he was justified in doing. It was not only the conductor's right to land him where he did but, in my opinion, under the circumstances, his duty. The manner of his being put off was, of course, criticised, but I cannot find there was more force used than was reasonably necessary to carry out his ejection. It is true it was nearly midnight, and the station offices were closed, but the hotel of the town was not many yards away and when last seen by the witnesses who spoke of the man's ejection

CAN.

S. C.

DUNN v. DOMINION ATLANTIC RY.

Davies, C.J.

as the train moved away from the station he was walking away from the track towards the town.

If I am right in my conclusion with uncontradicted evidence that the conductor was justified in putting the deceased off at the Hantsport station, the appeal must fail.

If, however, I am wrong in so holding, I am of the opinion that the fact of the deceased's body having been found with life extinct on the following morning on the car track, where he had eventually been killed by a passing train, would not of itself have been sufficient to uphold the verdict. There is not a scintilla of evidence as to what became of the man after having been put off at the station. Whether he had liquor on his person and took more of it or got it otherwise, there is no hint. He evidently, we may surmise, wandered on the track while in a state of inebriety, sat down or lay down on the track, probably fell into a drunken sleep and was struck by one of the company's trains coming from the opposite direction to that of the train from which he had been ejected. No negligence is charged against the train which must have struck him. The expulsion, if wrong, was not the cause of the man's death, nor is there any necessary connection between that expulsion and his death. If, in his half drunken condition, he wandered on to the track and sat or lay down there, and went asleep and was killed, the company is not surely liable, evidence to connect the alleged wrongful landing of the passenger at the station with the accident being entirely wanting.

I think the principle decided in the well-known case of *Wakelin* v. *The London etc. R. Co.* (1886), 12 App. Cas. 41, decided by the House of Lords is applicable in this case. To hold the company liable it must be established by proof that the accident to which the death of the deceased is attributable was caused by its negligence. If in the absence of direct proof, the circumstances which are established are equally consistent with the allegations of the plaintiff as with the denial of the defendants, the plaintiff must fail. The plaintiff was very far from being helplessly drunk when he was put off at the station. He was drunk enough to make himself offensive and a nuisance, but not by any means helplessly drunk. Whether he obtained more liquor after being put off the train or not, there is not a particle of evidence. His condition was his own fault and the company is not liable after his expulsion

for his imprudence or his foolhardiness in running into danger on the track and being killed.

I would dismiss the appeal with costs.

IDINGTON, J.:—The only question raised herein deserving consideration is whether or not the conductor of a passenger train exercised due care in putting off the said train (about 1 a.m. on a dark night, at a station, and leaving unattended) a passenger who was so drunk that he staggered in the car, and when put off staggered and fell in sight of both the said conductor and a brakesman of the train who had been deputed by the former to see that such passenger did not get on again.

The passenger so put off was found on the respondent's railway track, 5 or 6 hours later, 11 or 12 hundred ft. distant from the said station, evidently mangled to death as the result of being run over by another engine or train.

There was no light or accommodation in the station and none shewn to exist in a near-by hotel, or elsewhere in the vicinity.

Assuming the respondent's by-law enabling its conductor to put off a passenger, possessed of a ticket entitling him to proceed further, when misconducting himself, is the doing so justifiable under such circumstances, so obviously likely to lead to such results, as in question herein, without taking the slightest precaution to guard against same?

The jury answered that in the negative, by finding respondent by reason of such want of care, to have caused the death of said passenger, as well as in answering many other questions submitted to them affirming the conditions I have outlined.

The subsequent finding of the dead body where it was, not only justifies that finding as the cause of death, but illuminates the whole story and demonstrates, if circumstances ever can demonstrate anything, the hopelessly drunken condition of the man and the need there was for due care in regard to him in such a condition and in such a dangerous situation.

In broad daylight when there would perhaps be in such a situation many there, engaged at their daily avocations, likely to supply the needed care, such an incident might be justifiable.

The question of law raised herein upon the findings of the jury is of an entirely different character.

I am of the opinion that in this peculiar case herein presented, there was ample evidence to submit to the jury relative to the

CAN.

S. C.

DUNN v. DOMINION ATLANTIC RY.

Idington, J.

question of the duty of due care, under the circumstances and that their finding of fact which was wholly within their province to decide, should not be set aside.

And I am the more inclined to such holding by the evident loss of temper on the part of the conductor leading to and resulting from the scuffle between him and the drunken passenger.

I can see no other excuse for the entire abandonment of a human being in such a condition, to such obvious possible consequences as ensued.

And that excuse for the entire want of care on the part of the respondent's conductor, under such circumstances does not, in my opinion, justify the course pursued.

I agree with Russell, J., and Mellish, J., in the result they reached in the Court below, and so much am I in accord with the elaborate review of the facts presented by the latter, that I do not feel it necessary to repeat same here.

Nor do I deem it necessary to demonstrate that the *Wakelin* case, *supra*, is quite irrelevant unless we are prepared to hold that a drunken man has in law so lost his rights that he may lawfully be pitched overboard regardless of the consequences.

I think the appeal should be allowed and judgment be entered for the amount of damages found by the jury with costs throughout.

Anglin, J.

ANGLIN, J.:—After some hesitation due chiefly to the difficulty and delicacy of the position of a railway conductor called upon to deal with a disorderly, drunken passenger and the danger of unduly curtailing or circumscribing his powers and restricting his discretion, I have reached the conclusion that there was evidence on which a jury might, without laying itself open to a charge of perversity, find that, having regard to the state of inebriety of the late Stanley Dunn and to the conditions at Hantsport Station at the time, it was not a proper place at which to remove him from the defendant's train. The right of removal of a disorderly passenger which is conferred on the conductor is not absolute. It must be exercised reasonably. He cannot under it justify putting a passenger off the train under such circumstances that, as a direct consequence, he is exposed to danger of losing his life or of serious personal injury.

If, upon evidence warranting that belief, the jury was of the opinion that leaving Dunn alone on the platform of the closed

and unlighted Hantsport Station at 1.30 a.m. seriously imperilled his life, they were quite right in concluding that the conductor was "negligent" in doing so. It was eminently for them to determine whether Dunn was or was not in such an advanced state of intoxication that leaving him where he was placed involved endangering his life because he was unable to take care of himself. If so the conductor should have found some other means of discharging his duty to prevent Dunn being a source of danger or annoyance to his fellow passengers as well as a menace to himself until he could be removed from the train without jeopardizing his life. For instance, as Russell, J., suggests, he might have been taken to the baggage car and detained there until a suitable place for removing him from the train should be reached.

The absence of direct proof of causal connection between the leaving of a man on the station platform and his death, in my opinion, does not present any serious difficulty. It was quite open for the jury to infer that he wandered from the platform to and along the track and eventually lay down on the latter in a state of drunken stupor and was killed there about 3 o'clock in the morning by the second engine of the train when returning from Kentville to Halifax. Indeed that seems to be the most probable inference from all the facts in evidence. That he should have wandered on to the track was, I think, a natural and probable result of his being left unattended on the dark station platform in the condition in which he was—such a result as the conductor should have anticipated might ensue.

This case is readily distinguishable from *Delahanty* v. *Michigan Central R. Co.* (1905), 10 O.L.R. 388, where a passenger was put off at an open, lighted station and was not incapable of taking care of himself though slightly intoxicated, and also from the *Wakelin* case, 12 App. Cas. 41, where it was a matter of pure conjecture how the man who was killed got on the line, and there was nothing to justify an inference that he got there by any fault of the company. On this aspect of the case the decision of this Court in *G.T.R.* v. *Griffith* (1911), 45 Can. S.C.R. 380, seems to afford authority for rejecting the attack on the verdict.

There was evidence in my opinion which makes it impossible to say that the jury's answers to the sixth, eighth and ninth questions were not such as could reasonably be found. They,

CAN.

S. C.

DUNN v. DOMINION ATLANTIC RY.

Mignault, J.

therefore, cannot be set aside. Upon them the plaintiff was entitled to judgment.

I would therefore allow the appeal and direct that judgment be entered for the plaintiff for the sum of $2,000, found by the jury to have been the damages sustained, with costs of the action and of the appeals to the Court *en banc* and to this Court.

MIGNAULT, J.:—By the by-laws of the company respondent, admitted to be validly passed by-laws of the respondent, it was provided as follows:—

12. Persons intoxicated, or otherwise unable to take care of themselves, will not be furnished with tickets or allowed to enter the cars or premises of the company, and if found in the cars or upon the premises of the company, they may be removed.

15. Any person in or upon a carriage, station, platform of the company, or elsewhere upon the company's premises, in a state of intoxication, or fighting or guilty of other disorderly conduct, or using foul, obscene or abusive language, or otherwise wilfully interfering with the comfort of other passengers, is guilty of an offence under this by-law. In addition to liability to fine under this section, any such person may be summarily ejected from such station or premises of the company, or in the case of a moving train, such person may be removed or ejected from the train with his baggage at any usual stopping place or near a dwelling house, and the conductor and train servants may use force, doing no unnecessary violence, to restrain passengers and others upon the train from fighting, using foul, obscene, or abusive language, or other disorderly conduct.

The jury found that the deceased was killed by an engine or train of the respondent moving towards the east, that his conduct on the excursion train between Halifax and Hantsport had not been such as to interfere with the comfort or endanger the safety of other passengers on the said train sufficiently to eject him from the train; that he had not used vulgar, offensive, obscene or blasphemous language in the hearing of his fellow passengers; that he had conducted himself in a disorderly manner during his journey from Halifax to Hantsport; that there was negligence on the part of the respondent company in connection with the death of the deceased and that caused such death, and that such negligence consisted in putting a drunken man off the train at a late hour at night in an unfit place; that the deceased was not ejected from the train in question at a usual stopping place for trains of the respondent company; that the deceased at the time he was ejected, was not in a fit state as regards sobriety to take care of himself; that under the circumstances the place where the deceased was ejected from the train, was not a proper place for that purpose. And the

jury assessed the damages at $2,000 equally divided between the deceased's father and mother.

The trial Judge, notwithstanding the findings of the jury, dismissed the action because in his opinion the negligence found against the respondent in putting the deceased off the train at Hantsport was not connected with the accident and may have had no connection with it.

In my opinion, with all deference, the jury could infer from the circumstances of the case, that putting off the deceased at 1.30 a.m., on the ash extension of the station platform, near a closed and unlighted station, in a town without any lights, was the cause of Dunn's death. He was found killed on the tracks some distance to the west and it was a matter for the jury to determine, and there was evidence from which they could draw the inference, whether putting off this drunken and helpless man at such a place and at such an hour was the cause of his having been killed by one of the engines of the excursion train which returned through Hantsport a couple of hours later.

If therefore there be negligence in ejecting Dunn from the train at such an hour and in such a place, the connection between this negligence and Dunn's death is established by the jury's finding which I cannot consider perverse.

But was there negligence, or in other words did the respondent fail in any duty which it owed the deceased? Dunn had a ticket for this train and had a right to travel on it, but he had no right to conduct himself in a disorderly manner, or to interfere with the comfort of the other passengers. The jury found that he had conducted himself in a disorderly manner and this, under the by-laws of the company, authorized the conductor to eject him "at any usual stopping place, or near a dwelling house."

Hantsport was a usual stopping place of the railway, and the finding of the jury that it was not, seems hard to reconcile with the evidence, unless the jury considered the ash extension of the platform not a usual stopping place, but, reading together the answers to questions 7 and 9, it is clear that they did not consider this place, even if it were a usual stopping place, as a proper place to leave a drunken man at such an hour, on a dark night, with the electric lights of the town not burning and the station closed and without any lights.

CAN.

S. C.

DUNN v. DOMINION ATLANTIC RY.

Mignault, J.

The right to eject a drunken man and disorderly passenger from a train, according to the by-law, is not an absolute one. He must be removed at a usual stopping place or near a dwelling house. This clearly shews that he must be ejected at some place where he can be looked after. To leave him in the middle of the night on the extension of a station platform with a closed station and no lights anywhere, would not place him in a better position than if he were ejected in the fields. This does not mean that the company must keep him on the train, but if they choose to eject him in his drunken state, they must eject him at a proper place so as not to leave him in his helpless condition where no one can look after him, and where he is in obvious danger of getting on the railway track and being injured or killed by a passing train. The dictates of humanity as well as the by-law itself seem to me to require this of the railway company.

The respondents, in par. 16 of their plea, somewhat in contradiction of a previous statement of the plea, say that the deceased on the day in question

was intoxicated, or otherwise unable to take care of himself and while in the said condition was found in a car of the defendant company and was removed therefrom by servants or employees of the defendant company.

If he was unable to take care of himself, and the jury so found, I cannot think the verdict of the jury perverse in finding negligence against the respondent.

I would therefore allow the appeal and give judgment to the appellant according to the jury's verdict, with costs throughout.

Appeal allowed.

N. S.

S. C.

MINOR v. THE KING.

Nova Scotia Supreme Court, Harris, C.J., Longley and Drysdale, JJ. and Ritchie, E.J. May 5, 1920.

MUNICIPAL CORPORATIONS (§ II C—50)—BY-LAWS—CONVICTION FOR VIOLATION OF SAME—VALIDITY—STATED CASE—TOWNS INCORPORATION ACT, 8-9 GEO. V. 1918, CH. 4, SEC. 263.

By-laws of a municipal corporation in relation to the licenses necessary for hawkers and peddlers within the municipality are authorized by the Towns Incorporation Act, 8-9 Geo. V., ch. 4, sec. 263, N.S., and a conviction for a violation of such by-laws will be upheld.

Statement.

Cases stated under the provisions of the Nova Scotia Summary Convictions Act, R.S.N.S. 1900, ch. 161, by a Stipendiary Magistrate submitting questions of law for the purpose of determining

the validity of a conviction made by said Stipendiary Magistrate whereby defendant was convicted of a violation of the by-laws and ordinances of the town of Yarmouth with respect to trading without a license.

The by-laws in question and the Acts of the Legislature under which the same were made are set out in full in the judgments delivered.

S. Jenks, K.C., for appellant.

T. R. Robertson, K.C., for the town, respondent.

HARRIS, C.J.:—The defendant was convicted by the stipendiary magistrate of the Town of Yarmouth of a breach of by-law No. 31 of the By-laws and Ordinances of the Town of Yarmouth for—not being a ratepayer of Yarmouth—exercising within said town the calling of a peddler or hawker or trader of goods without a license. Harris C.J.

The stipendiary has reserved for the consideration of this Court the two following questions:

(1) Was I right in deciding that secs. 16 and 18 of by-law No. 31 of the By-laws and Ordinances of said Town of Yarmouth were *intra vires* the town council of said town? (2) If so, was I right in deciding that the defendant herein came within the provisions of said sections of said by-law?

By-law No. 31 of the Town of Yarmouth has two sections on the subject as follows:

Section 16: No person who is not a ratepayer of the Town of Yarmouth shall on his own behalf or as the agent of another, exercise within the town the calling of a peddler or hawker or trader of goods; nor shall any person, who is not a ratepayer of the town, on his own behalf or as the agent of another, peddle, hawk or trade goods, wares or merchandise of any kind or description whatever within the town without first having obtained a license therefor. Provided, etc. (Proviso not applicable to this case.)

Section 18: The language of sub-sec. 16 of this by-law shall be held to include any person who, not being a ratepayer, of the town, without such license, within the town sells, or offered to sell, by cut, drawing, or sample, goods of any kind whatever to any person not a trader in the goods sold, or offers for sale, whether such sale or offer be, or be not, at the time accompanied or afterwards followed by delivery of the goods to the purchaser, and whether such sale or offer to sell include or not the bestowal of labour in the town, on or about, or in connection with, the goods sold or offered for sale.

These by-laws were made pursuant to sec. 263, sub-sec. 67, of the Towns Incorporation Act, 8-9 Geo. V. 1918 (N.S.). ch. 4.

263. The town council in addition to any power to make by-laws and ordinances elsewhere in this Act conferred, shall have power to make by-laws in respect to all matters coming within the following classes of subjects, and

N. S.

S. C.

MINOR v. THE KING.

Harris, C.J.

may from time to time amend or appeal such by-laws, that is to say, for—(67) licensing and regulating auctioneers and junk dealers, with power to discriminate between those who are ratepayers within the town and those who are not ratepayers within the town, as to the amount of the license fee to be charged, and licensing and regulating peddlers and hawkers and traders of goods who are not ratepayers within the town; provided such by-law shall not affect the products of the farm, the forest or the sea.

The relevant facts are as follows: (I quote from the reserved case):

The defendant is the superintendent for the Maritime Provinces for the Dominion Art Co., a corporation whose head office is in Toronto, Ontario. He is not a ratepayer of the Town of Yarmouth. He employed a number of agents (6) all non-ratepayers of the town, who, acting under his orders, went from house to house in said town soliciting orders for the enlargment of photographs which were to be subsequently delivered, with frames, to the purchasers, and paid for by them on delivery. No license was taken out by him, nor by any of his agents, from the town, although he was duly notified by the chief of police that such license was necessary. Each agent carries with him an enlarged photograph as an example of the work done by the company which he shews to the prospective purchaser. It is admitted that some of his agents took orders on February 23, 1920, in said town, from persons who were not traders in said goods. The following is a copy of the contract or agreement which is signed by the purchaser and the agent:

DOMINION ART COMPANY, LTD. (Date.)

Toronto, Canada.

You will please make for the undersigned from the photograph delivered to your agent this day.....finely finished painting and deliver the same to me on or about the.....day of.....19....

The price of the painting is.....$..... It is understood that this order

Advertising allowance.....$..... cannot be countermanded.

Leaving a balance due of.....$..... Verbal agreements not recognized.

Which I agree to pay upon delivery.

The above prices does not include frames or glass.

This order is given upon the further condition that your company will deliver the paintings so ordered in suitable frames which the undersigned is entitled to accept upon payment of a reasonable price, if the frames are satisfactory. In the event the undersigned does not accept the frames and pay for same, they are to be delivered forthwith to your company's delivery-man.

I am to receive one additional painting at no additional cost.

Received by

....

Advertising Salesman. Customer.

Counsel for the defendant did not contend that sec. 16 of by-law No. 31 was *ultra vires*, but he did contend that sec. 18 was beyond the powers of the town council.

No authority was cited on the question and I can see no reason why both 16 and 18 are not authorized by sec. 263 of the

Towns Incorporation Act. It should, perhaps, be pointed out that the conviction is for a violation of by-law No. 31 and even if part 18 was held to be *ultra vires* the conviction could be upheld under part 16.

The main argument in the case turned upon the meaning of the words "trader of goods" in sec. 263 of the Towns Incorporation Act, and in the by-law. The argument is that the word "trader" is to be construed as transient trader and restricted to cases *ejusdem generis* with peddlers and hawkers. I do not agree with this contention and desire to state my reasons for reaching this conclusion.

Many cases in England and Ontario decided under the Hawkers and Peddlers Acts were cited to us in which a restricted meaning was given to the words following hawkers and peddlers.

It should be pointed out that the original Acts in England imposed a license fee on

> Every hawker, peddler, petty chapman, or any other trading person or persons going from town to town or to other men's houses and travelling either on foot or with horse, horses or otherwise—carrying to sell or exposing to sale any goods, wares or merchandize. See 9-10 Will. III., 1697, ch. 27.

Some modifications were made from time to time in this Act, but always there was language which clearly indicated that the traders or trading persons included in the Acts were of the petty class and the decisions usually invoked the *ejusdem generis* rule which clearly applied to the language used.

In Nova Scotia the first legislation dealing with the subject seems to have been in the Acts of 1879, 42 Vict. ch. 1, sec. 84, sub-sec. 39, which authorized the County Council to make regulations for

> the licensing of auctioneers and peddlers and hawkers of goods and traders who are not ratepayers within the Province.

The same language is used in the Acts of 1888. The Towns Incorporation Act of 1888, 51 Vict. ch. 1. In the Towns Incorporation Act of 1895, 58 Vict. ch. 4, the corresponding section, no. 296, sub-sec. 19, was somewhat changed and read as follows:

> (19) The licensing of auctioneers who are ratepayers within the town; and licensing of auctioneers and peddlers and hawkers and traders of goods who are not ratepayers within the town, with power to discriminate as to the amount of the license fee to be charged between those who are ratepayers and those who are not.

N. S.

S. C.

MINOR
v.
THE KING.

Harris, C.J.

In the R.S.N.S., 1900, ch. 71, sec. 263 (67), there was another change and the section reads as follows:

(67) Licensing and regulating auctioneers who are ratepayers within the town, and licensing and regulating auctioneers, junk dealers and peddlers and hawkers and traders of goods who are not ratepayers within the town, with power to discriminate between those who are ratepayers and those who are not as to the amount of the license fee to be charged.

By ch. 41, 1 Ed. VII, 1901, another change was made and we find the section reading thus:

(67) Licensing and regulating auctioneers and junk dealers with power to discriminate between those who are ratepayers within the town and those who are not ratepayers within the town as to the amount of the license fee to be charged, and licensing and regulating peddlers and hawkers and traders of goods who are not ratepayers within the town.

In 1903, 3 Ed. VII, ch. 51, an amendment was made providing that no by-law should affect the products of the farm, the forest or the sea.

I have copied these provisions from the statutes in order that it may clearly appear that our legislation was not as in England merely a Hawkers or Peddlers Act. It is a licensing Act and we find it dealing with auctioneers, junk dealers and traders of goods, as well as peddlers and hawkers. The words at the end of the section quoted from the original English Act and which are apt words only for peddlers and hawkers, and which now in England are incorporated in the definitions of the words "hawkers" and "peddlers" in the two Acts now regulating the matter in the mother country, are not to be found in our Acts.

It is, I think, obvious that the English decisions on statutes, so essentially different from that in Nova Scotia, have no application here and cannot assist in interpreting our Act.

In Ontario the legislation followed the old English statutes, and the English decisions based on those statutes were also followed and therefore the Ontario decisions are of no assistance.

The very fact that the Legislature in this Province completely changed the wording of the English Acts and used the language it did, shews an intention to deal with matters beyond the scope of those dealt with by the English Parliament. I see no reason therefore why we should not give to the words "traders of goods" their ordinary meaning, and so interpreted they apply to this case. The agreement in this case compels the Dominion Art Co. to deliver the paintings in suitable frames which the purchaser

of the painting is entitled to accept at a reasonable price if he wishes. The negotiation of this agreement for the frame constituted in my opinion a trading of goods and made the negotiator a trader of goods within the meaning of the Act.

In 27 Hals., page 509, par. 989, there is this definition of the word "trade."

> "Trade" in its primary meaning is the exchanging of goods for goods or goods for money; and in a secondary meaning it is any business carried on with a view to profit, whether manual or mercantile, as distinguished from the liberal arts or learned professions and from agriculture. The word, however, is one of very general application, and must always be considered with the context with which it is used.

On the argument it was contended that the agreement for the portrait was a trading of goods, but I put to counsel the query as to whether an order taken by a professional portrait painter to paint a portrait would make the artist a trader of goods. Halsbury, in the definition of trade, seems to except such a case, and I find that Baron Martin in *Clay* v. *Yates* (1856), 1 H. & N. 73 at 76, put a somewhat similar question to counsel. It is perhaps unnecessary to decide the question as I prefer to base my decision on the part of the contract regarding the frame.

There was a contention that the taking of the order for the frame was not a trading of goods because it was said that the order did not bind the purchaser. The argument was that if a sale was effected of the frame when the painting came to be delivered, that might constitute a trading, but there was no concluded sale under the agreement.

The case of *State* v. *Montgomery* (1899), 92 Me. 433, was cited in support of this proposition. There the prosecution was for a sale made at the time of the delivery of the picture and the Court did not have to decide the question as to whether or not the taking of the order constituted a trading, but Savage, J., in dealing with the question said of the agreement in that case that "the defendant's employer had not made any previous contract to sell picture frames." The contract here does bind the dealer to deliver a frame and the offering of the frame and entering into the contract in question would in my opinion be a trading of goods within the meaning of the by-law.

I would, therefore, answer both questions in the affirmative.

The defendant must pay the costs of the stated case.

N. S.
S. C.
MINOR
v.
THE KING.
Ritchie, E. J.

RITCHIE, E.J.:—I quote the stated case and the decision of the stipendiary as the facts and the questions to be decided are therein set out:

On the 3rd day of March, A.D. 1920, the defendant, E. N. Minor, was convicted before Charles S. Pelton, Stipendiary Magistrate in and for the Town of Yarmouth, in the County of Yarmouth and Province of Nova Scotia, for unlawfully, not being a ratepayer of said Town of Yarmouth, exercising within said town the calling of a peddler or hawker or trader of goods, without first having obtained a license therefor, contrary to the provisions of by-law No. 31, sec. 16, of the by-laws and ordinances of said town; said offence having been committed on February 23, 1920.

On said 3rd day of March, A.D. 1920, the defendant, in accordance with sec. 73 of R.S.N.S. 1900, ch. 161, the Summary Convictions Act, applied in writing to said stipendiary magistrate for a stated case questioning said conviction on the ground that it was erroneous in point of law, and has duly entered into a recognizance, with sureties, conditioned to prosecute his appeal without delay, and to submit to the judgment of the Court, and pay such costs as are awarded by the same; and to appear before the said stipendiary magistrate, or such other Justice or Justices as is then sitting within ten days after the judgment of the Court has been given, to abide such judgment, unless the judgment appealed against is reversed.

The facts in the case, which are admitted by the defendant are duly set out in a copy of the decision of said stipendiary magistrate hereunto annexed, marked "A.C.S.P."

The questions of law which I have been asked to state are as follows:

(1) Was I right in deciding that secs. 16 and 18 of by-law No. 31 of the By-laws and Ordinances of said Town of Yarmouth were *intra vires* the town council of said town?

(2) If so, was I right in deciding that the defendant herein came within the provisions of said sections of said by-law?

The Decision of the Stipendiary Magistrate is as follows:

This is an information laid against the defendant by the chief of police of the Town of Yarmouth for, not being a ratepayer in said town, trading without a license, contrary to the provisions

of the by-laws and ordinances of said town. The facts in the case, which are admitted by defendant, are as follows:

The defendant is the superintendent for the Maritime Provinces for the Dominion Art. Co., a corporation whose head office is at Toronto, Ontario. He is not a ratepayer of the Town of Yarmouth. He employed a number of agents (six)—all non-ratepayers of the town, who, acting under his orders, went from house to house in said town soliciting orders for the enlargement of photographs which were to be subsequently delivered, with frames, to the purchasers, and paid for by them on delivery. No license was taken out by him, nor by any of his agents, from the town, although he was duly notified by the chief of police that such license was necessary. Each agent carried with him an enlarged photograph as an example of the work done by the company which he shews to the prospective purchaser.

It is admitted that some of his agents took orders on February 23, 1920, in said town, from persons who were not traders in said goods. The following is a copy of the contract or agreement which is signed by the purchaser and the agent: (see judgment of Harris, C.J.).

Under the provisions of sec. 263, clause (67) of the Towns Incorporation Act, 8-9 Geo. V., 1918, ch. 4, the town is authorized to make by-laws in reference to licenses. The clause (after eliminating words which have no bearing on this case) reads as follows:

Sec. 263:

The town council, in addition to any power to make by-laws and ordinances elsewhere in this Act conferred, shall have power to make by-laws in respect to all matters coming within the following classes of subjects, and may from time to time amend or repeal such by-laws, that is to say, for (67) Licensing and regulating auctioneers, etc., . . . and licensing and regulating peddlers, and hawkers and traders of goods who are not ratepayers within the town.

Under this authority the Town of Yarmouth has enacted by-law No. 31, which has been duly approved by the Governor-in-Council. Sec. 16 of by-law No. 31 is as follows:

No person who is not a ratepayer of the Town of Yarmouth shall on his own behalf, or as the agent of another, exercise within the town the calling of a peddler or hawker or trader of goods; nor shall any person, who is not a ratepayer of the town on his own behalf or as the agent of another, peddle, hawk or trade goods, wares or merchandise of any kind or description whatever within the town without first having obtained a license therefor. Provided, etc. (Proviso not applicable to this case.)

N. S.

S. C.

MINOR v. THE KING.

Ritchie, E. J.

Section 18 of said by-law No. 31 is as follows:

The language of sub-sec. 16 of this by-law shall be held to include any person, who, not being a ratepayer of the town, without such license, within the town sells, or offers to sell, by cut, drawing, or sample, goods of any kind whatever to any person not a trader in the goods sold, or offers for sale, whether such sale or offer be, or be not, at the time accompanied or afterwards followed by delivery of the goods to the purchaser, and whether such sale or offer to sell include or not the bestowal of labour in the town, on, or about, or in connection with, the goods sold or offered for sale.

In my opinion, the fact that orders were taken for these enlarged photographs, with frames, which are to be paid for by the purchaser in addition to the cost of the picture, brings this case within the provisions of sec. 16. I have carefully considered the cases cited, but in the absence of anything to shew that the by-laws under which these cases were decided (most of them being Ontario cases) contained any such provision as does sec. 18, I cannot see that any of them have much bearing on this particular case.

Mr. McKay, the counsel for the defence, took the objection that sec. 16 of the town by-law was *ultra vires* the town council. I, at first, had some doubt as to whether or not sec. 18 was *intra vires*, but after careful consideration I have concluded that sec. 263 of the Towns Incorporation Act, 8-9 Geo. V. 1918, ch. 4, which states, "The town council shall have power to make by-laws in respect to all matters coming within (among others) sub-sec. 67—licensing and regulating peddlers and hawkers and traders of goods who are not ratepayers, etc," gives the power, and sec. 264 of the Towns Incorporation Act is as follows:

264 (1). The by-laws and ordinances for the foregoing purposes or any of them, when not inconsistent with any statute in force in the Province, and when approved by the Governor-in-Council, shall have the force of law.

While agreeing with the decision that defendant is not a peddler or hawker, I am of opinion that he comes within the meaning of the term "a trader of goods," particularly in view of the fact that frames are sold to the purchasers or orders taken for same, which are to be paid for in addition to the cost of the enlargement.

I convict the defendant of a breach of said by-law No. 31 on February 23, 1920, and order and adjudge that he forfeit and pay the sum of $70 fine, and $2.80 costs, to be paid and applied accord-

ing to law; to be paid forthwith, and in default of such payment, said defendant, E. H. Minor, to be imprisoned in the common gaol at the Town of Yarmouth in the County of Yarmouth for the term of 60 days unless said sums and the costs of conveying said E. H. Minor to said common gaol are sooner paid.

Consideration of the Towns Incorporation Act and the amendments thereto convinces me that secs. 16 and 18 of the By-laws and Ordinances of the Town of Yarmouth are *intra vires*. I, therefore, answer the first question in the affirmative.

The remaining question as to whether the defendant's case is covered by these by-laws is more difficult. On the face of the statute I think it is clear that the purpose of the statute was to enable the town council to make by-laws which would prevent non-residents who do not contribute by way of assessment to the funds of the town from trading within the town. I cannot think that hawkers and peddlers were alone struck at, and that traders of goods who were not peddlers and hawkers were intended to escape. The object of a statutory enactment is to be considered when endeavouring to ascertain the real meaning of the words used. Having regard to what I conceive to be the object and purpose of the statutory enactment under consideration, I have reached the conclusion that the answer to this question should be in the affirmative, and I so answer it, though I am free to admit that I do not regard the question as free from doubt. There is, of course, a presumption that general words following particular and specific words are to be restricted to the same genus, but it is still a question of construction.

Dealing with this question Maxwell in his book on Statutes, 5th ed., at page 546, says:

> Of course the restricted meaning, which primarily attaches to the general words in such circumstances, is rejected when there are adequate grounds to shew that it was not used in the limited order of ideas to which its predecessors belong. If it can be seen from a wider inspection of the scope of the legislation that the general words, notwithstanding that they follow particular words, are nevertheless to be construed generally, effect must be given to the intention of the Legislature as gathered from the larger survey.

Bowen, L. J., in *Skinner & Co.* v. *Shew & Co.*, [1893] 1 Ch. 413 at 424, 62 L.J. (Ch.) 196, states the view which I am endeavouring to express. He there said:

> There is no doubt of the existence of the rule *ejusdem generis;* and it cannot be denied that general words ought to be construed with reference to the

N. S.
S. C.
MINOR
v.
THE KING.
Ritchie, E.J.

words which are immediately around them. But there is an exception to that rule (if it be a rule and not a maxim of common sense), which is, that although the words immediately around and before the general words are words which are *primâ facie* confined, yet if you can see from a wider inspection of the scope of the legislation that the general words, notwithstanding that they follow particular words, are nevertheless to be construed generally, you must give effect to the intention of the Legislature as gathered from the entire section. Here the question is whether the entire section, when you have regard to the special subject matter to which it is applied does not lead you to the view that the larger meaning must be put upon the words "or otherwise" and that they rather extend the words which precede them than are themselves confined by them.

In this case the particular and specific words are "peddlers" and "hawkers" and the general words are "traders of goods." The words "peddler" and "hawker" were, I think, correctly defined by the late Tuck, C.J., in *Reg.* v. *Phillips* (1898), 35 N.B.R. 393, where he said, at pages 395-396:

> My own idea of a "hawker" has always been that of a man or person who goes through the streets or roads of the city or country calling out his wares for sale. A "peddler," in the olden times, was one who went through the country with a pack on his back, peddling his small wares from door to door, and from farm-house to farm-house.

The peddler is still on the road as in the "olden times."

The words "traders of goods" have on their face a different and much wider meaning. In 3 Bouvier's Law Dictionary, page 3305, a trader is defined to be "one who makes it his business to buy merchandise or goods and chattels and to sell the same for the purpose of making a profit." My construction is that the words "traders of goods" were used for the purpose of catching persons trading generally in addition to peddlers and hawkers. I am of opinion that when the defendant took orders for the frames, notwithstanding that the purchasers were not bound to accept them, he was exercising the calling of a trader of goods. If the frames were not accepted, still the defendant was exercising his calling when he took the orders. The first part of the exercise of the calling of a trader of goods is to get the order, even though the contract is not concluded. It is the initial proceeding of the trading. It was contended that the agents of the defendant who took the orders should have been prosecuted and not the defendant, who is the person carrying on the trading. I am unable to agree with this contention. I have examined with care the cases cited by Mr. Jenks, K.C. I think they are distinguishable and not safe guides in this case, because they are decided upon statutes

couched in very different language from that which I have to consider. In my opinion the questions should be answered as I have indicated and the defendant must pay the costs.

LONGLEY, J., concurred.

DRYSDALE, J., took no part in the judgment owing to illness.

Judgment accordingly.

ADVANCE RUMELY THRESHER CO. v. WHALEY.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, J.A., and Brown, C.J.K.B. May 3, 1920.

SALE (§ II A—25)—BREACH OF WARRANTY—LOSS OF USE—DAMAGES—CLIMATIC CONDITIONS.

When the evidence shews that the buyer had no work for a chattel during a certain season of the year owing to climatic conditions, he cannot succeed in his claim for damages for loss of use, during that period, even though breach of warranty on the part of the seller has already been proved.

[*The "Greta Holme,"* [1897] A.C. 596; *The "Mediana,"* [1900] A.C. 113, distinguished; *British Westinghouse* v. *Underground*, [1912] A.C. 673, referred to.]

Statement.

APPEAL by plaintiff from the trial judgment in an action for damages for breach of warranty of a tractor engine. Varied.

J. F. Frame, K.C., and *R. F. Hogarth*, for appellant.

A. E. Bence, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S., concurs with LAMONT, J. A.

Lamont, J.A.

LAMONT, J.A.:—In the spring of 1918 the plaintiffs sold a second-hand tractor engine to the defendant, and warranted that it had been "rebuilt." By this the parties meant, according to the finding of the trial Judge, that the engine had been taken apart and built up again, "in good and workmanlike manner, which involved replacing with new ones all parts so worn or defective as to impair the efficiency of the engine." The engine had not been rebuilt. On account of the breaking of a defective stud bolt, the several parts of machinery enclosed in the crank-case were smashed to pieces. This delayed the ploughing operations of the defendant for 12 days. After this damage had been repaired the defendant again commenced ploughing, and continued until the first week in September, although the engine was giving trouble. The defendant complained to the plaintiffs. About September 12, the plaintiffs sent an expert, who dismantled the engine, but left without reassembling the parts, owing to some dispute with the defendant. When the engine was dismantled

SASK.

C. A.

ADVANCE RUMELY THRESHER CO. v. WHALEY.

Lamont, J. A.

it was discovered that it had not been rebuilt. The defendant decided to have it rebuilt, and employed one Robinson to rebuild it. Robinson was assisted by the defendant's engineer, Drysdale. They worked at the job intermittently from the last part of September until December 1, when they had it finished. In giving his evidence, Drysdale, in answer to a question as to the length of time they worked to reassemble the engine, said:

> We were there quite a while. We weren't working steady. Mr. Robinson had his farm work and threshing outfit to look after, and he would come in when he had a little spare time, and later on I was laid up with the flu and I was off work for quite a while when Robinson was working away.

As winter had arrived when the rebuilding was completed, the engine was not used until the following spring, when it was found to work satisfactorily. The plaintiffs brought this action on one of the lien notes given for the purchase price of the engine. The defendant claimed damages for breach of warranty. The trial Judge awarded the following damages:

(1) Amount expended in putting the engine in the condition it would have been in had it fulfilled the warranty, $1,251.53. (2) Loss of defendant's own time, $48. (3) Loss of use of the engine, $1,000.

It is from the award of $1,000 for loss of the use of the engine that this appeal is brought.

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

Sale of Goods Act, R.S.S. 1909, ch. 147, sec. 51, sub-sec. (2).

In *Cobb* v. *Great Western R. Co.*, [1893] 1 Q.B. 455, at 464, Bowen, L.J., said:

> The law is that the damages must be the direct and natural consequence of the breach of obligation complained of. The law is the same in this respect with regard both to contracts and to torts, subject to the qualification, that in the case of the former the law does not consider too remote damages which may be reasonably supposed to have been in the contemplation of the parties when the contract was made.

The distinction between tort and contract made in this case was referred to by Lord Halsbury, L.C., in the *"Greta Holme,"* [1897] A.C. 596, at 601.

For the purpose of determining what the parties must be deemed to have contemplated when the contract was made, this Court in *Rivers* v. *Geo. White & Sons* (1919), 46 D.L.R. 145, at 147, 12 S.L.R. 366, at 371, adopted the following rule:

The measure of damages for breach of contract is determined by the knowledge, actual or constructive, which the parties had of the probable consequences of the breach. If they contemplated or ought to have contemplated, the consequences which have proximately followed, they are liable to pay damages accordingly.

In determining what consequences the parties may be reasonably supposed to have contemplated, the knowledge of the circumstances under which the contract was made must be, not merely an important, but the decisive consideration.

Notice of these circumstances enlarges the area of contemplation, and, therefore, the liability of the defendant in an action for breach of contract.

When the contract in question in this action was entered into, the plaintiffs knew that the defendant was a farmer purchasing an engine for use on his own farm. That the defendant wanted it for ploughing was specifically mentioned. The plaintiffs must therefore be held to have contemplated its use for ploughing. Although ploughing may have been the only work specifically mentioned by the defendant for which he was buying the engine, that fact alone is not, in my opinion, sufficient to exclude from the contemplation of the parties other kinds of work at which the engine would be likely to be employed. A purchaser is not obliged to mention specifically the various uses to which he purposes to put an engine before he can recover under the heading of loss of use if those uses are understood. If a vendor sells an engine to a farmer purchaser knowing that the farmer is buying it for use on his own farm, the vendor must be deemed to have contemplated that it would be used for any and every farming operation which farmers having engines usually carry on by means of their engines. If, through the failure of the engine to fulfil the warranty given with it, the farmer is unable to use it for some ordinary farming operation, he is in my opinion entitled to recover damages for loss of such use. See 10 Hals., par. 579.

In determining what damages actually flow from the loss of use, there is another principle to be borne in mind, and that is, that the purchaser must take all reasonable steps to mitigate the loss. This is stated by Haldane, L.C., in *British Westinghouse Electric & Mfg. Co.* v. *Underground R. Co.*, [1912] A.C. 673, at 689, as follows:

Subject to these observations I think that there are certain broad principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be

SASK.

C. A.

ADVANCE RUMELY THRESHER CO. v. WHALEY.

Lamont, J.A.

placed, as far as money can do it, in as good a situation as if the contract had been performed.

The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.

In the case at Bar the defendant claims loss of use for 50 days at $20 per day. As to the *per diem* allowance, he says that if he hired an engine it would have cost him $20 per day, and the correctness of this statement does not appear to be disputed. The fifty days he makes up as follows: 12 days in August when his ploughing was held up by reason of the breaking of the stud bolt. There is no doubt on the evidence that he lost the use of the engine for ploughing during those 12 days, and for such loss he is entitled to recover at $20 per day. The other 30 days he claims to have lost after the engine was dismantled. Upon this point he gives the following evidence: "Q. Then you say you lost 50 days work with it? A. Yes, I would have been working it if I had had the engine going. Q. Well, do I take it from this that you only expected to operate the engine 50 days? A. I expected to operate it as long as I could plough until I got my work done."

There is absolutely no evidence as to what work he had to do on September 12, when the engine was dismantled, nor as to whether the conditions of the season were such that he could have used the engine had it fulfilled the warranty. The evidence does establish that the engine was dismantled on September 12, and the defendant decided to have it rebuilt. He did nothing until the end of September, when he employed Robinson and Drysdale, who worked on and off until December 1. All that the defendant could, in any event, be entitled to would be compensation for the loss of the use of the engine during the time it necessarily took to rebuild it, using due diligence and despatch. By taking no action for nearly three weeks after the engine was dismantled and by employing men who worked at the rebuilding only intermittently, the defendant, in my opinion, did not take reasonable steps to mitigate the loss consequent on the breach. The result is that we are left without any evidence as to what was the actual loss arising from the breach after September 12.

There is, however, another consideration which leads me to the conclusion that the defendant's claim for the 38 days must

fail, and that is, as I have already indicated, that there is no evidence that the plaintiff had 38 days' work for the engine to do after September 12, nor that, if he had, the climatic conditions were such that the engine could have been properly employed for that time. Under the circumstances of this case, evidence of both, I think, was necessary, for the defendant says he only intended to "operate the engine as long as he could plough until his work was done."

For the defendant it was contended on the authority of *The "Greta Holme,"* [1897] A.C. 596, and *The "Mediana,"* [1900] A.C. 113, that it was not necessary to enable the defendant to recover to shew that he would have used the engine. In the former of these cases, Lord Herschell, [1897] A.C. at 604, said:

> I take it to be clear law that in general a person who has been deprived of the use of a chattel through the wrongful act of another is entitled to recover damages in respect thereof, even though he cannot prove what has been called "tangible pecuniary loss," by which I understand is meant that he is a definite sum of money out of pocket owing to the wrong he has sustained.

In *The "Astrakhan,"* [1910] P. 172, at 181, Bargrave Deane, J., said:

> If you deprive the owner of the use of a thing, it is not necessary to shew that he would have used it, but if you put it out of the power of the owner to use it, then, according to Lord Halsbury's reasoning in *The "Mediana," supra,* I think you have to pay damages for that.

This was a case where a Danish warship had been damaged in collision with the *"Astrakhan."* The registrar assessed damages for the loss of use of the warship on the basis that it took 32 days to repair the damage. This was held to be reasonable. But as the evidence disclosed that it would have taken 10 days to put the vessel in a sea-going condition even if there had been no collision, the loss of use for these 10 days was deducted from the amount allowed by the registrar. All these cases relied upon by the defendant were cases of collision at sea, and there was no question that the owner of the injured vessel could, but for the collision, have used his vessel had he wanted to. There were no climatic conditions rendering such use impossible. In his judgment in *The "Astrakhan,"* the Judge said at page 181: "I think in this class of case you should look to see what is the potential use which the Danish Government had for this vessel."

The potential use implies the existence of conditions under

SASK.

C. A.

ADVANCE RUMELY THRESHER CO. v. WHALEY.

Lamont, J. A.

which it could be used, and as for 10 days those conditions did not exist, no damages were allowed for those days.

I am therefore of opinion that as the defendant failed to shew that he had work for his engine for the 38 days claimed and that the conditions were such that the work could have been done but for the breach of warranty, he is not entitled to recover therefor. A claim for the loss of use of an engine for ploughing during the winter season in this country, where the ground is so frozen that ploughing is impossible, would carry with it on its face its own refutation, which, in my opinion, also leads to the conclusion that it was necessary to give evidence of conditions under which it would have been possible to use the engine.

The appeal should, therefore, be allowed as to the 38 days at $20 per day, and the judgment below reduced by $760. The appellants are entitled to their costs.

Brown, C.J.K.B.

BROWN, C.J.K.B.:—I concur in the result of the judgment of my brother Lamont, which I have had the opportunity of perusing. My difficulty is not in finding that 38 days is a reasonable time to allow for taking down and rebuilding the engine under the circumstances: It is entirely limited to the fact that there is no satisfactory evidence that the defendant had 38 days' work for the engine to do and that he could have operated it for 38 days or for any number of days at that season of the year. It should be emphasized that the only work which the defendant suggests that he had for the engine to do was that of breaking wild land. There is nothing to indicate how much land he had to be broken and therefore it cannot be estimated how many days' use the defendant had for the engine. Then, again, it is a matter of common knowledge that breaking is not done in this country after September 1; that, at least, if it is sometimes done, it is not considered good farming to do so. It was incumbent on the defendant to shew that the conditions were so exceptional in the fall of 1918, if such were the case, that breaking could have been successfully done. It would have been a different matter if the defendant had had fall ploughing or threshing to do and intended to use the engine for such operations.

Appeal allowed.

FRAZER v. S.S. "AZTEC."*

CAN.

Ex. C.

Exchequer Court of Canada, Quebec Admiralty District, Maclennan, D.L.J.A. March 16, 1920.

COLLISION (§ I—1)—SHIPPING—RULES OF—CANAL—NEGLIGENCE—BURDEN OF PROOF—CANADA SHIPPING ACT, R.S.C. 1906, CH. 113, SEC. 916.

In a canal accident, the defendant is not responsible, when it is shewn, on the facts, that the accident was not due to any negligence, or non-observance of any rules on his part, but due to the gross negligence of the canal lockmen, who left two valves of the upper gate open.

Under sec. 916 of the Canada Shipping Act a presumption of fault does not arise, unless it is proved that the collision occurred by non-observance of the rules, and as such non-observance does not by itself create a presumption, the burden of proof rests on the plaintiff to prove the contribution of non-observance to the accident, and also to prove that his loss was occasioned by the negligence of the defendant or some one for whose acts the defendant was responsible.

Statement.

ACTION *in rem* for damages caused to the plaintiff's barge and dredge in the Cornwall Canal.

Aubrey H. Elder, for plaintiff; *A. R. Holden*, K.C., for defendant.

Maclennan, Dep. L.J.A.

MACLENNAN, D.L.J.A.:—This is an action *in rem* for damages and arose out of an accident which occurred in the afternoon of August 15, 1919, in Lock No. 17 in the Cornwall Canal.

The plaintiff's case is that his tow barge "Sand King" and his sand dredge "Champion" were lying afloat and moored to the north bank of the Cornwall Canal above Lock No. 17 when the Steamship "Aztec" entered the lock from the west, and after the western gates were closed the steamship backed, carried away the western gates, then moved forward and carried away the eastern gates of the lock, with the result that the water above the lock ran away and the barge and the dredge became stranded and sustained damage. Plaintiff alleges there was no proper outlook kept on the "Aztec;" that those on board improperly neglected to take in due time proper measures for avoiding the carrying away of the lock gates; that she was not properly under control and that the damages and losses consequent thereon were occasioned by the neglect and improper navigation of those on board.

The defendant's case is that, if plaintiff's barge and dredge were injured, it was not due to any fault or negligence of the defendant or those in charge thereof; that while the defendant vessel was being locked through the canal, in the usual and proper manner in so far as the defendant is concerned, the water in the lock was suddenly disturbed and moved in such a manner as to

*Appeal to Exchequer Court of Canada pending.

CAN.
EX. C.
FRAZER
v.
S.S. "AZTEC."
Maclennan, Dep. L.J.A.

cause her to strike the gates in spite of all that could be done by those in charge to prevent it; that the movement and disturbance of the water in the lock were due to the improper condition of the lock gates and equipment, or the improper manipulation and control thereof by the persons in charge or to both these causes, or to other causes of which the defendant is ignorant and for which it is in no way responsible, and that the striking of the lock gates by the defendant vessel and any results thereof were due to forces or causes beyond her control or those in charge thereof.

The steamer "Aztec," having a length of 180 ft., a beam of 33 ft. 3 in., and 13 ft. 9 in. moulded depth, registered tonnage of 834 gross and 653 net, and having on board 1,007 tons of coal with a crew of 16 all told, arrived down at Lock No. 17 in the Cornwall Canal at 3.14 p.m. on August 15, 1919. The lock was in charge of lockman Albert Durocher, assisted by lockman Joseph H. McDonald. Durocher was on the south side of the lock, McDonald on the north, and after the western or upper gates of the lock had been opened the "Aztec" entered the lock, which is 270 ft. long and 45 ft. wide, and made fast to the north wall with two lines, one a five inch manilla rope leading ahead attached to a post on the north wall of the lock the other end being attached to the capstan, and the other a 7-8 inch wire steel cable leading astern attached to a snub or post on the north wall, the other end being in a machine called a compressor which with the capstan were on the upper deck of the ship forward and between the pilot house and the stem. After the steamer had thus been made fast, the lockman closed the western gates by means of the electrically driven machinery provided for that purpose. Near the bottom of each gate there are two pairs of cast iron valves 2½ ft. by 4 ft. which are opened and closed by means of a rod attached to their upper edge and the other end of the rod being connected with a bevel toothed gear on the top of the gate, and this gear is connected with the electric power. To open the valves the rod is forced downward and to close them it is pulled up. This machinery is put in motion by a lever on the top of the gate. Each rod and gear opens and closes one pair of valves. The bottom of the valves are within 12 inches of the bottom of the gates and are 27 or 28 ft. under water.

Durocher and McDonald were the two men in charge of the canal equipment and it is important to examine carefully their

account of what they did from the time the "Aztec" entered the lock until she collided with the gates. Durocher swore that after he closed the north gate and McDonald closed the south gate, he closed one valve in the south gate, he cannot say if it was the heel valve or the miter valve, and that McDonald closed one valve in the north gate, that they then waited until a steamer going down had got clear of Lock No. 15, the next lock below, 800 ft. away, when he, Durocher, started up the other valve by pushing a lever, and McDonald started the remaining valve on his side and Durocher then started walking down to the other end of the lock, and when he got down a piece he says he turned around and saw that the valves were up and that McDonald put up his hand as a signal that they were closed. Durocher thereupon opened all the valves in the gates at the lower end of the lock and the water ran out of the lock into the reach below until it had gone down about 13 ft. of the total drop of 14 ft. to the level of the lower reach, when unexpectedly he saw the bow line of the "Aztec" break and the steamer began to go astern and, although the captain was not in sight, Durocher says he yelled to the captain to go ahead and told Heppell, another lockman standing near him, to go to the other end of the lock. Durocher does not state why he gave this order to Heppell, but the latter says that Durocher's order was: "Va donc voir aux valves en haut, voir si elles sont ouvertes," that is to say, "go to the upper valves and see if they are open." The steamer was then moving astern, it had been tied up 15 ft. from the upper or western gates of the lock and when it had gone astern 15 ft. it collided with the gates letting in a rush of water from the upper reach of the canal, one mile in length, into Lock No. 17, which violently threw the steamer against the eastern gates and carried them away.

I will now refer to McDonald's evidence, as his version of what occurred up to the time of the collision. He was on duty with Durocher and was on the north wall of the canal when the steamer came into the lock and he states that two lines were put out and attached to the snubbing posts on the north side of the lock. His examination then continues as follows by counsel for plaintiff:—

Q. After the two lines which you have mentioned, the compressor line, and the bow line, were attached to the snubbing posts, what were your move-

CAN.

EX. C.

FRAZER v. S.S. AZTEC.

Maclennan, Dep. L.J.A.

n ents? A. Closed the gates. Q. What gates? A. The upper gates. Q. The upper gates of what lock? A. Lock 17. Q. Which gate did you close? A. I closed the south gate. Q. That would be the gate on the opposite side from where you were? A. Yes. Q. What did you do next? A. When the other lock was ready, we let the water out, and put up the valves. Q. You are referring to the valves of what gate now? A. The upper gate. Q. How many valves are there in the upper gates? A. Four chambers. Eight valves. Q. In the upper gates? A. Yes, I believe so. Q. Just think it over, and tell us if that is correct. How many valves are there in each gate? A. There are supposed to be four in each one. Q. Two pairs in each gate? A. Yes. Q. Did you close the valves in the north gate?

Mr. Holden—This is a question of fact, and I submit my learned friend should ask the witness what he did.

By the Court—Q. What did you do? A. I closed the valves. Q. Which valves? A. In the upper gate. Q. There are two gates in the upper end of the lock? A. Yes. Q. In which gate were the valves you closed? A. I generally close them on the north side first. Q. But, on that day? A. We were waiting for the lock at 15. Q. Can you tell us what you did at the upper end of Lock 17? A. We closed one valve on each gate. Q. Just tell us what you did yourself. A. I helped to close them.

By *Mr. Hackett*, continuing: Q. Then, what did you do after helping to close the valves? A. I was walking down to the lower gates. Q. And what happened? Tell us the story. A. The line separated, going down. Q. Which line? A. The bow line, and the boat started to go back. Q. And, then what happened? A. She went into the gates. Q. Into which gates? A. I should judge about the centre of the upper gate.

This is his evidence on examination in-chief as a witness for plaintiff as to what was done at the upper gates up to the time of the collision, and if his evidence in that connection is true only two of the four valves in the upper gates were closed and two of the valves were left open. In cross-examination McDonald swears that after he and Durocher had closed the upper gates they each closed one valve; that Durocher then went to the lower gates and as soon as Durocher started to open the valves in the lower gates, he, McDonald, started to close the remaining two valves in the upper gates; that there were no signals exchanged between him and Durocher after he had closed the valves in the upper gates and that having closed the remaining two valves in the upper gates he locked them and then started to walk down the north bank of the lock in the direction of the lower gates and that when he arrived at a point abreast the midships of the steamer he saw the bow line leading ahead break, he turned around and stared to walk back in the directing of the upper gates, but before he arrived there the steamer collided with the gates, the water came through and carried the steamer forward through the lower gates.

It will be observed that it is only in cross-examination that McDonald states the remaining two valves in the upper gates had been closed, and his evidence in that connection differs in detail from the story told by Durocher. According to Durocher, he started the machinery to close one of the remaining two valves, McDonald at the same time starting the other and that both these valves were closed before Durocher reached the lower gates. McDonald's evidence is that he closed the remaining two valves himself, that Durocher had nothing to do with the closing of them and that they were only closed by him after Durocher had arrived at the lower gates and had started to open the four valves of the lower gates. Durocher swore that McDonald signalled to him that the valves in the upper gates were closed, McDonald is emphatic in saying that no signal was given by him to Durocher.

I will now refer to the evidence of the members of the crew of the "Aztec." Captain John Gooderich, of Ogdensburg, N.Y., who has held a master's certificate for 25 or 26 years, was in command and as he approached and entered the lock was on the upper bridge on the roof of the pilot house. His mate, also the holder of first-class pilot's papers, with three other men, the wheelman, the watchman and a deck hand were on the forecastle deck attending to the lines. Two lines were put out, a five-inch manilla head line leading forward from the capstan, and a seven-eighth inch wire steel cable leading aft; this cable was attached to the compressor near the capstan on the upper deck which was several feet above the top of the lock wall where the lines were attached to the snubbing posts. As the water was let out of the lock and the steamer gradually came down with the water the slack on the bow line leading ahead was taken in by the watchman and the deck hand. When the steamer had been lowered down pretty nearly ready to go out, the master came down from the bridge to the forecastle deck and went to his room there, and very shortly thereafter heavy pressure was noticed on the head line, which was let out about six inches and then held, when it suddenly broke and the steamer went astern and collided with one of the upper gates in about one minute's time. The mate, upon the parting of the head line which broke between the capstan and the ship's rail, attempted to get out another line forward, but was unable to do so before the steamer struck the upper gates.

CAN.
Ex. C.
FRAZER
v.
S.S. AZTEC.
Maclennan, Dep. L.J.A.

The evidence of the master and the mate is that they tied up the steamer to the wall of the lock in the usual way, both as to the number of lines used and the manner in which they were made fast. The master, the first assistant engineer, the mate, the watchman, the wheelman and the deck hand were all examined at the trial. The steamer's witnesses testified that the force which threw the steamer astern with sufficient force to break the bow line could only have been from the engines or from the water in the lock. It was proved that the engines were not moved from the time the steamer tied up till after the collision. None of the witnesses on board the steamer testified that they saw any commotion in the water. They were attending to their lines on the port side of the steamer next the lock and were not in a position to observe the water, but they all attributed the sudden strain on the head line to the effect of the water, and the deck hand Allison swore that he heard the noise of the water which was stirred up and in confusion. He said: "J'ai entendu le bruit de l'eau qui brouillait comme ça" . . . (il cherchait à imiter le bruit de l'eau).

Some light is thrown on the value of the evidence of the lockmen by reference to their actions after the accident. McDonald says that it was the duty of Durocher, the senior man in charge of the lock, to make a written report of the accident to the lockmaster.

Durocher was asked:

Q. As lockman in charge at the time when an accident occurs, to whom do you send a report of the accident? A. To the office. Q. What office? A. The Canal Office, right across from the lock, right between the two locks. Q. Is that Mr. Sargent's office? A. Mr. Sargent's office. Q. Did you report this accident? A. Mr. McDonald did, I was on the other side. I could not get over, I was on an island then.

Durocher swore he made no written report to anyone, that he was not asked or supposed to make any written report and that the only entries he made were in the sheet containing the names of the vessels passing through the lock giving time of arrival and departure, and an entry in a private memorandum book for his own information. The entry on the vessel report shews the time of arrival as 3.14 p.m., time of departure 4.15 p.m., and under the heading "Remarks" he made the following entry:—

Aztec of Buffalo, Steamer Aztec bow line broke and she went back into the west gates and put them out and then she came down with the water and took the east gates out.

The entry in his private note book reads:—

Friday, August 15, 1919, Steamer Aztec carried away 4 gates at Lock 17, 4.15 p.m. Navigation resumed Saturday evening August 16, 1919, 8 p.m.

Durocher says that "Mr. Lally, the superintendent, was right there two minutes after the accident happened. He asked me all about it and I told him." And on the second day of the trial, when asked if he told Mr. Lally anything about the accident, his answer was: "Of course, he told me what had happened, I just told him she had gone through the gates, just as I explained it to the Court." And when again re-called for further cross-examination, he testified as follows:—

Q. Did you see Mr. Lally on August 15th, after the accident happened? A. Yes, he came right down. Q. How long after? A. It could not be more than 10 or 15 minutes, I do not suppose. Q. Did you have any conversation with Mr. Lally. A. Well, he just asked me how it was done, I cannot just exactly remember what was said.

The evidence with reference to the machinery and appliances for opening and closing the valves is very unsatisfactory. It must be remembered that the valves are entirely under water and out of sight and Durocher swore that when the rod was up the valve is supposed to be closed unless something has gone wrong down below which would uncouple or break. He also swore that the worm gear at the top of the rod is about six inches longer than it should be and that they must be careful not to jam it down too far and break the knuckle where the rod connects with the valves. When the gates were taken out of the canal, about three days after the accident, all the valves in the upper gates were missing with the exception of possibly small pieces of some of the lugs hanging to the bottom of the valve rods. Of course no one could say when they broke or whether the breakage was caused by the rod having been jammed down too far or by the impact of the collision.

Another portion of Durocher's evidence is open to the construction that there was something wrong with the upper gates, that they were not mates and were to be changed on the following day. These gates certainly were old, had been in use for a very long time and the appliance for opening and closing the valves required very careful handling.

To enable a plaintiff in a collision action to recover damages, he must prove affirmatively that his loss was caused by the negligence of the defendant or of some person for whose acts he is

CAN.
Ex. C.
FRAZER
v.
S.S. AZTEC.
Maclennan, Dep. L.J.A.

liable. He must make out that the party against whom he complains was in the wrong and that the loss is to be attributed to the negligence of the opposite party. In this case the question is: "Who is responsible for the 'Aztec' colliding with the lock gates?" The plaintiff has endeavoured to establish that the steamer was insufficiently and negligently made fast to the lock wall and improperly and negligently handled after the bow line broke and that the canal equipment—the gates and valves—were properly handled by the lockmen.

This accident happened in Canadian waters and plaintiff very properly cited the Canadian Shipping Act, R.S.C., 1906, ch. 113, and the Rules and Regulations for the guidance and observance of those using and operating the canals of the Dominion of Canada made under said Act.

Canal rule 27 provides:—

> Every vessel of more than 200 tons shall be provided with four good and sufficient lines or hawsers, two leading astern, one leading ahead and one abreast line, which lines when locking, shall be made fast to the snubbing posts on the bank of the canal and lock and each rope shall be attended by one of the boat's crew to check the speed of the vessel while entering the lock to prevent it from striking against the gates or other parts of the lock, and to keep it in proper position while the lock is being filled or emptied.

Canal rule 30 provides:—

> All vessels in the canals, basins and approaches shall be under the control of the superintending engineer or superintendent as regards their position, mooring, fastening, etc.

Section 916 of the Canada Shipping Act reads as follows:—

> If, in any case of collision, it appears to the Court before which the case is tried, that such collision was occasioned by the non-observance of any such regulations, the vessel or raft by which such regulations have been violated shall be deemed to be in fault, unless it can be shewn to the satisfaction of the Court that the circumstances of the case rendered a departure from the said regulations necessary.

The steamer when tied up in the lock did not have four lines as required by rule 27, and the presumption of fault provided by sec. 916 of the Canada Shipping Act would not arise unless the collision was occasioned by the non-observance of the rule. The burden was upon plaintiff to prove that the non-observance of the rule contributed to the accident, as non-observance of the rule by itself created no presumption, and the common law applied, and plaintiff had to prove the cause of the collision.

See *The Ship "Cuba"* v. *McMillan* (1896), 26 Can. S.C.R. 651; *The Steamship "Rosalind"* v. *The Steamship Senlac Co.* (1908),

41 Can. S.C.R. 54, confirmed in Privy Council C.R., [1909] A.C. 441; *Harbour Commissioners of Montreal* v. *The Ship "Albert M. Marshall"* (1908), 12 Can. Ex. 178-183; *Montreal Transportation Co.* v. *"The Norwalk"* (1909), 12 Can. Ex. 434.

In this case the "Aztec" was made fast in the lock by one line leading ahead and one astern, it had no abreast line. A second line leading astern would have been of no use whatever when the bow line leading ahead broke. Plaintiff's counsel submitted that if the ship had had the abreast line out, the accident would have been avoided and the burden of the proof of that was clearly upon plaintiff.

The evidence shews that the "Aztec" was tied up in the usual manner, that two lines, one ahead and one aft was the usual practice. Under Canal rule 30, all vessels in the canal are under the control of the superintendent as regards their moorings and fastening. In this case the superintendent was represented by Durocher, the lockman in charge of the lock. Durocher was satisfied with the manner in which the steamer was made fast; he accepted the two lines before he proceeded to close the upper gates. The function of the abreast line is to hold the vessel close up to the wall of the lock and not to lead forward, as was suggested by the canal superintendent. The pressure which broke the head line would also have carried the abreast line away, as the strain upon it would have been much greater than the strain which broke the head line, as by the time the strain would have come on the abreast line the steamer would have moved astern some distance under way in its backward movement. I have come to the conclusion that the abreast line would not have saved the situation, I am advised by my assessors, that the two lines making the "Aztec" fast to the north wall of the lock were sufficient under ordinary circumstances to hold her in proper position while the lock was being emptied to enable the lower gates to be opened and allow her to pass out of the lock, and that when the "Aztec" was suddenly driven astern, the engines not moving, with sufficient force to break the line leading ahead, the absence of an abreast line did not contribute to the collision. I therefore come to the conclusion that the non-observance of Canal rule 27, regarding the number of lines to be used in making the vessel fast in the lock, did not contribute to the accident in any manner whatsoever.

CAN.

EX. C.

FRAZER
v.
S.S. AZTEC.

Maclennan, Dep. L.J.A.

Before the head line broke the master had left the bridge and when the line gave way the mate attempted unsuccessfully to get another line out. I am advised by my assessors, that it was in accordance with the ordinary practice of seamen for the master to have come down from the bridge on the roof of the pilot house while the water was being let out of the lock and was more than half way down to the level of the reach below, and that as soon as the engines stopped it would have been proper for the master to have left the bridge, and further, that when the head line broke the mate could not by the exercise of reasonable skill and seamanship get out another line forward which would have prevented the collision. The pressure and strain which broke the head line when the steamer was almost ready to go out of the lock came on suddenly, unexpectedly and without any warning to the master and crew who did everything that could have been reasonably expected in the emergency, and I exonerate them from all blame.

The evidence in this case shews that water which should have been held back came in at the upper gates of the lock from one of two causes: either one or more of the valves broke, or they were not closed. The deck hand Allison on the steamer heard the noise of the water in confusion. Durocher admitted that if a valve had been left open the water coming through "would draw a boat;" and McDonald admitted that if anything went wrong with the valves or the upper gate equipment, the pressure of thirteen feet difference in level would make a tremendous commotion in the water. I have asked my assessors the following question:—

If for any reason one or more of the valves in the upper gates of the lock were not closed while the valves in the lower gates were open and the lock was being emptied, would the water coming into the lock through the upper gates have any effect on the ship, and if so, would such effect become more pronounced as the water in the lock approached the level of the reach below?

Their answer is:—

The water coming into the lock would increase in power as the lock was emptied on account of the increasing head above the upper gates and the water in the lock getting nearer the level of the reach below, and would strike against the lower gates, form an eddy and cause heavy pressure backward on the ship.

The commotion occurred and the boat was drawn back. We have the result which the two lockmen say would be produced if one of the valves in the upper gates had been left open, if the lockmen had been alert and vigilant they would have observed

something had gone wrong. They are very much to blame for their carelessness, as they should have seen what was happening and should have averted the accident. I have not come to the conclusion that the valves were broken, although on the evidence there is ground for grave suspicion that something had gone wrong with the canal equipment.

There are many contradictions between Durocher and McDonald. They have not all been referred to. Durocher had been there for nine years and McDonald seven years, and neither of them could inform the Court how many snubbing posts were on the lock bank at Lock No. 17, where they performed their daily duties. Durocher swore that it would not take more than two or three minutes to close a valve; McDonald put it at from five to eight minutes. Neither of these witnesses were satisfactory. McDonald's demeanour in the box was distinctly unfavorable to his credibility; Durocher appeared unwilling to speak of many things with which he should have been conversant, and he admitted that he had been warned by one of his superior officers not to speak about the case or give any information until he was called in Court. When the head line of the steamer broke and she started to go astern, Durocher's first and only order to his fellow lockman Heppell, who was standing near him close to the lower gate, was to go to the upper gates and see if the valves were open. Why give that order if it were true that he, Durocher, had started the machinery to close one of the two remaining valves at the upper gates a few minutes before, and if he had seen McDonald at the same instant set the machinery in motion to close the other valve, and he had received a signal from McDonald that everything had been closed. If he had closed one himself and had seen McDonald close the other, he would have known they had been closed and would not have sent Heppell to see if they were open. When Heppell started for the upper gates the steamer was already going astern, gaining speed and momentum every instant, and considering his age, it is improbable that he arrived before the collision. He was a member of the lock gang, there are contradictions in his evidence, he appeared anxious to support his companions' statements, and I cannot accept his evidence that the valves were closed. McDonald when called as a witness on behalf of plaintiff in his examination-in-chief, clearly stated that

CAN.

Ex. C.

FRAZER v. S.S. AZTEC.

Maclennan, Dep. L.J.A.

after having closed the upper gates he closed one valve, Durocher closed one valve, and he, McDonald, started to walk down towards the other gate and when he had gone about one hundred feet the head line broke and the steamer went right back into the upper gates. If that evidence is true, two of the valves in the upper gates had not been closed, they were left open and it was through them that the water came into the lock which caused the commotion and the back eddy which threw the steamer astern, broke the head line and caused the collision. Taking into account the demeanour of McDonald and Durocher while under examination, the contradictions and inconsistencies in their testimony and their interest in clearing themselves, I have come to the conclusion that the portions of their evidence wherein they swore that the remaining two valves in the upper gates were closed, is an invention to cover up their own negligence. I find that two of the valves in the upper gates were improperly and negligently left open, with the result that the water which came through there caused a commotion in the lock and a back eddy which broke the head line and drove the steamer against the upper gates.

The accident was caused by the gross negligence of the lockmen. The "Aztec" and its crew are not to blame. Plaintiff's action fails, and there will be judgment dismissing it with costs.

Judgment accordingly.

CAN.

S. C.

DAVIDSON v. SHARPE.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. February 3, 1920.

ELECTION OF REMEDIES (§ I—7)—CONTRACT TO PURCHASE LAND—NON-PAYMENT OF INSTALMENTS—ELECTION TO RESCIND CONTRACT—DECREE OF COURT—ACTION ON COVENANT.

Where a party, with full knowledge of all the facts, elects to rescind a contract for the purchase of land in default of payment, and the Court grants his request, he is bound by such election and cannot, by neglecting or refusing to take the necessary steps to enforce the Court's decree, obtain the right to re-elect, and bring a new action on the covenant.

Statement.

APPEAL by plaintiff from the Saskatchewan Court of Appeal (1919), 46 D.L.R. 256, 12 S.L.R. 183, in an action on a judgment obtained in British Columbia or in the alternative on the agreement to sell certain lands on which the British Columbia judgment was obtained. Affirmed.

H. J. Schull, for appellant.

C. E. Gregory, K.C., for respondent.

CAN.
S. C.
DAVIDSON v. SHARPE.
Idington, J.

IDINGTON, J. (dissenting):—The appellant, by an agreement dated February 4, 1913, sold, and respondent agreed to buy, certain lands in British Columbia for the sum of $24,500 of which $5,500 was paid in cash and the balance was to be paid in instalments which the respondent thereby covenanted to pay appellant.

The agreement provided that time was to be of the essence of the contract and that as often as default should happen in making the payments the vendor might give the vendee 30 days' notice in writing demanding payment thereof and that in case such default should continue, the agreement should, at the expiration of such notice, be null and void and the vendor have the right to re-enter upon said lands, and any payments theretofore made might be retained by the vendor as liquidated damages and the vendor be entitled to resell said lands.

It was further provided that this notice should be well and sufficiently given if given the vendee, or mailed at Vancouver post office in British Columbia under registered cover addressed to George B. C. Sharpe, Oak Bay, B.C.

The further payments besides the cash payment fell far short of the requirements of the agreement.

No such notice as this provided for was ever given.

The respondent left British Columbia without actually moving his household effects into the dwelling-house on said lands. The premises were unoccupied by either party thenceforward.

On October 26, 1916, the appellant issued a writ of summons from the Supreme Court of British Columbia to recover from respondent the sums then due. And in the special endorsement set forth her claims as follows:

> The plaintiff's claim is to have an account taken of what is due to the plaintiff for interest, cost, charges and expenses under and by virtue of the covenants contained in certain articles of agreement dated the fourth day of February, one thousand nine hundred and thirteen, whereby the plaintiff agreed to sell to the defendant and the defendant agreed to purchase from the plaintiff that certain parcel or tract of land and premises situate, lying and being in the district of Victoria, in the Province of British Columbia, and known and described as lots 45 and 46 and the South half of lot 41 in "Block" numbered "D" being subdivision of Block D, section 22, in said Victoria District, at the price of $24,500, payable with interest as therein mentioned; and for an order that the defendant do pay to the plaintiff the amount so found due together with the plaintiff's costs to be taxed within such time as this Court may order.
>
> And for an order that in default of payment of the amount so found due within such time that the agreement be declared null and void and cancelled.

CAN.

S. C.

DAVIDSON v. SHARPE.

Idington, J.

And that all monies paid thereunder be forfeited to the plaintiff and that the said defendant do stand absolutely barred and foreclosed of all right, title and interest of in and to the said lands and agreement.

And also in the event of such default, for such damages as the plaintiff may have suffered by reason of the defendant's failure to perform the said agreement.

That writ of summons was duly served by personal service on respondent in Toronto in Ontario.

There was no appearance entered by the respondent.

An exemplification of judgment was got and admitted as evidence herein at the trial hereof which is an action in the Supreme Court of Saskatchewan to recover on said judgment the amount thereof or alternatively to recover on the said agreement the amount due for unpaid instalments. Omitting the formal parts of the exemplification that judgment is expressed in the following terms:

In the Supreme Court of British Columbia.

Between—Josephine Julie Davidson, wife of John L. Davidson, plaintiff; and George B. Sharpe, of the City of Toronto, in the Province of Ontario, defendant.

B.C.L.S.

$1.00.

Dated the 15th day of June, A.D. 1915.

In pursuance of the order of the Honourable the Chief Justice made the 1st day of February, 1915, and in the pursuance of the Registrar's Certificate herein dated the 4th day of March, 1915.

It is ordered and adjudged that the plaintiff do recover against the defendant the sum of $14,185.15, together with costs taxed at the sum of $131.95.

A. B. POTTINGER, District Registrar.

Upon that judgment I respectfully submit that the appellant was entitled to recover in the Supreme Court of Saskatchewan judgment herein.

It is urged by respondent that the Court in British Columbia so entering judgment had no jurisdiction by reason of respondent having left the Province of British Columbia at the time of service of said writ.

Inasmuch as the parties hereto were in British Columbia when the contract was made and was to be performed and hence breach was there and that it was made in respect of land there, I have

no doubt of the jurisdiction or of the right to assert it by service of writ beyond the jurisdiction.

I should have preferred in such a case, however, to have evidence that Order XI. of the Rules of the Supreme Court of British Columbia had been duly complied with by leave of a Judge of that Court having been duly obtained.

However, I think that the presumption exists and must prevail that all that was duly complied with and none the less so, because the objection, as presented here, was not relative to any defect in that regard but upon broader grounds which I hold untenable in this case.

The more serious question raised is that upon which the Courts below, 46 D.L.R. 256, 12 S.L.R. 183, proceeded in dismissing the action.

It is this, that upon an application in course of the proceedings to the Chief Justice of the Supreme Court of British Columbia he made an offer of reference to the Registrar of the Court to take the accounts between the parties and directed that judgment might be entered against the defendant for the amount so certified to be due to the plaintiff—and then proceeded to declare as follows:

> And this Court doth further order that upon the defendant paying to the plaintiff what shall be certified to be due to her as aforesaid within two months after the date of the Registrar's Certificate at such time and place as shall thereby be appointed the plaintiff do convey the lands hereditaments and premises comprised in the said Agreement for sale free and clear of and from all encumbrances done by her or any persons claiming by from or under her and deliver up all deeds, writings in her custody or power relating thereto to the defendant or to whom he shall appoint; but in default of the defendant paying to the plaintiff what shall be certified to be due to her as aforesaid by the time aforesaid that the defendant thenceforth do stand absolutely debarred and foreclosed of and from all right, title, interest and equity of redemption of in and to the said agreement and of in and to the said lands, hereditaments and premises and that the said agreement be thereupon cancelled and ended and all monies paid thereunder forfeited to the plaintiff and that the defendant do deliver to the plaintiff possession of the said lands, hereditaments, and premises which are set out and described in the said agreement.

It is to be observed that the certificate of the registrar fixing the amount due was dated, as appears from the recital in the judgment of which exemplification is adduced in evidence, on March 4, 1915, and that the judgment sued upon is entered June 15, 1915, a month or six weeks after this declaratory order

CAN.
S. C.
DAVIDSON
v.
SHARPE.
Idington, J.

of the Chief Justice, if adhered to and operative, must have put an end to any further right to proceed.

How can we say that this latter judgment sued upon was a nullity as in effect the Courts below have done?

What right have we to impose, without an appeal in due course, our notions of law and fact, upon the appellant and his judgment and declare it was and is a mere nullity?

How do we know that nothing was done in the meantime to rectify the possible mistake of such an illegal election or that the purpose of the appellant was to elect to rescind the agreement?

Had there been evidence adduced of the entry having been according to the practice recognized by the Courts there (or argument adduced herein to shew that as a matter of law it was) a mere error on the part of those concerned, the way might have been open to us to apply our view of the election alleged to have been made, as a final determination of the matter.

That, however, could not enable us to be quite sure of the facts as to whether or not there had been any amendment to the original order of reference enabling the plaintiff to revoke the alleged election. It would have been quite competent for the Court there, for any good reason, to have made such an amendment.

Can there be a doubt that the judgment sued upon stands in full and is exigible in British Columbia?

I respectfully submit that, so long as it is so, it seems to me absurd to hold that upon the production of an exemplification thereof it cannot be recoverable in any other Provinces.

I am unable to understand how we can herein declare that the provision for rescission of purchase stood valid and conclusive despite the later record of the Court quite inconsistent therewith if we have regard to the maxim of *omnia præsumuntur rite et solemniter esse acta*.

Moreover the parties chose by their agreement expressly to provide a mode by which it should become null and the consequence thereof and that mode was not followed or anything like it which we should be able to say was a substantial compliance therewith.

The decision of the Supreme Court of Saskatchewan in the case of *Standard Trust* v. *Little* (1915), 24 D.L.R. 713, 8 S.L.R. 205, relied upon below does not seem in this regard to be in point.

Whether there was in fact incorporated in the agreement of purchase there in question a specific mode as here existed of terminating the vendee's rights, does not appear. For all that appears the Court had to proceed upon the relative rights of the vendor and purchaser, before the Court, when default made, and that the Court adopted the not unusual mode of dealing with a defaulting purchaser according to general principles of law. Moreover the order or judgment was one consistent complete whole not leaving it open to surmise of what the Court had determined. Here the alleged intention has to be gathered from the separate and inconsistent pieces of judicial proceedings of which the latest is a complete judgment which does not put appellant to an election.

Again there is much reason for saying that a lien such as a vendor's lien might be looked upon as a mortgage has been by Courts of Equity, and therefore, a charge of that kind which might be foreclosed and that a decree *nisi* of foreclosure was what was intended.

If that was the conception of the Court in using the word "foreclosed" in the order above quoted, then there was no final order and there remained the option of the plaintiff prosecuting a foreclosure suit to abandon his proceedings therefor and follow his remedy on the personal obligation.

These are only surmises of what may have developed as law in the local Court.

I prefer assuming some such kind of development to that of construing this foreclosure judgment as a final rescission of the agreement and especially so when we find the same Court ignoring what had transpired and pronouncing the complete, self-contained, comprehensive judgment herein sued upon, which was recovered after the lapse of time given by the earlier order, had expired.

The cases cited are beside the question.

I prefer holding that the Court which, after all that it had declared was to take place in two months and which if effective could not permit of a judgment such as sued on being entered

CAN.
S. C.
DAVIDSON
v.
SHARPE.
Idington, J.

over three months later, has in doing so found good reason, either on new facts presented or something otherwise said or done which, within its practice, enabled it, if it saw fit, to proceed to enter judgment, and that its being so was deliberate.

There is nothing in the evidence to warrant anyone in holding otherwise and the presumption is in favour of the judgment being duly entered and meaning what it says.

I therefore conclude that the appeal should be allowed with costs throughout and the judgment be entered accordingly.

Duff, J.

DUFF, J.:—This appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—Practically conceding that the personal judgment of the Supreme Court of British Columbia on default of appearance against the defendant, who appeared on the face of the proceedings in that Court to have been a resident of Ontario and was served there with process, is of no avail outside of British Columbia, counsel for the appellant rested his appeal on the ground that his alternative cause of action—the defendant's personal obligation on his covenant for payment in the agreement for sale—is open to him in Saskatchewan. I agree that merger cannot be pleaded as a defence. *Smith* v. *Nicolls* (1839), 5 Bing. (N.C.) 208, 7 Scott 147; *Bank of Australasia* v. *Harding* (1850), 9 C.B. 661, 19 L.J. (C.P.) 345. But he is met by the order of the Chief Justice of British Columbia, pronounced in the action brought in that Province granting the relief there sought by the plaintiff, viz.: the taking of accounts, a personal judgment for the amount to be certified thereon as due by the defendant, an order for conveyance by the plaintiff on payment thereof within two months, and in default, foreclosure absolute and cancellation of the agreement. It has been held by the Courts of Saskatchewan, 46 D.L.R. 256, 12 S.L.R. 83, that by accepting this order the appellant elected to take the remedy of cancellation in the event of default of payment within the time fixed by the order and that he thereby relinquished all right thereafter to recover any part of the purchase-money. Counsel for the appellant on the other hand contends that the order taken in the Supreme Court of British Columbia was in the nature of an order *nisi*, similar in its effect to the ordinary judgment granted in a suit for foreclosure of a mortgage after trial to be followed by a final order before the equity of redemption is extinguished. This latter view, however, seems

to ignore the essential difference between a judgment for foreclosure in a mortgage action and an order for judgment for cancellation of an agreement for sale due to the difference between a mortgage and such an agreement.

The trial Judge after the conclusion of the trial offered the plaintiff an opportunity to obtain evidence on commission to ascertain the law in British Columbia as to whether the order or judgment cancelled or has the effect of cancelling the agreement therein referred to or does such an order or judgment preclude the plaintiff from enforcing her judgment or suing for the purchase-money under the said agreement, default having been made by the defendant in the payment of the amount found due.

The plaintiff declined to take advantage of the indulgence thus extended. The Judge was therefore justified in assuming that the order of the Chief Justice of British Columbia would have the same effect in that Province as the like order made by an Alberta or Saskatchewan Court would have within its jurisdiction. Nothing has been brought to our attention, nor am I aware of anything, that indicates the difference in this respect between the law which obtains in British Columbia or the practice of its Courts and the law and practice of the English Courts or of Courts of other Provinces of Canada whose juridical systems are based on English law.

The relations of mortgagor and mortgagee in English Courts of Equity are anomalous. *Platt* v. *Ashbridge* (1865), 12 Gr. 105, at 106. "Once a mortgage always a mortgage," is a doctrine so deeply rooted in our system of equity that after the period for redemption fixed by an ordinary judgment for foreclosure had expired the mortgagor's right to redeem *de plano* still subsists until a further and final order of foreclosure has been obtained. Even after such final order has been made our Courts of Equity regard the mortgage as still unextinguished and unsatisfied so long as the mortgagee retains the land. He may at any time enforce the personal obligation of the mortgagor on his covenant, thereby opening the foreclosure and revesting in the mortgagor his right to redemption as it was before the judgment; and the Courts maintain a corresponding jurisdiction to allow the mortgagor, after final order, under exceptional circumstances raising an

CAN.
S. C.
DAVIDSON v. SHARPE.
Anglin, J.

equity in his favour, to redeem on proper terms. When the mortgagee in any way as owner alters his relation to the land he elects to take it and foregoes his debt—but not until then. Sir George Jessel states the doctrine very clearly in *Campbell* v. *Holyland* (1877), 7 Ch.D. 166, 47 L.J. (Ch.) 145. See *Trinity College* v. *Hill* (1884), 10 A.R. (Ont.) 99, at pages 106, 109-10. *Mutual Life Assce. Co.* v. *Douglas* (1918), 44 D.L.R. 115, 57 Can. S.C.R. 243, is a recent instance of the mortgagee's right after foreclosure to enforce the covenant being upheld. The development of the equity jurisdiction in regard to the foreclosure of mortgages is outlined by Griffith, C.J., in *Fink* v. *Robertson* (1907), 4 Comw. L.R. 864.

By taking a foreclosure judgment the mortgagee does not take the property for his debt. The judgment, notwithstanding its absolute form, is construed as merely authorizing him to do so. The foreclosure judgment in the mortgage action is merely a means of enforcing the mortgage contract, which it deals with as subsisting; whereas the judgment for rescission or cancellation of a contract between vendor and purchaser is a judgment not for the enforcement but for the extinguishment of the contract. When the vendor sought and obtained a judgment fixing a period for payment and providing that on default "the agreement shall be cancelled and at an end and all moneys paid thereunder forfeited to the plaintiff," he elected in my opinion, on that event happening, to take the property in satisfaction of so much of the purchase-money as then remained unpaid. If he had intended to reserve his right of election until after default had been made, his proper course would have been to ask, in lieu of the relief granted by the order in that event, for a reservation of liberty to apply for further relief, Seton on Decrees, 7th ed., pages 2171, 2220-1.

Instead of waiting until default had occurred under the judgment ordering the defendant to perform his contract and then applying for its rescission the plaintiff sought and obtained in advance the order usually made after such default—which may be for immediate rescission (*Clark* v. *Wallis* (1866), 35 Beav. 460) or for rescission after the lapse of a further short period and may in the latter event apparently issue at the time of the application

(*Simpson* v. *Terry* (1865), 34 Beav. 423) or only on the expiry of the further time so allowed. *Folingo* v. *Martin* (1853), 16 Beav. 586. The order in the case at bar, although issued in the first instance instead of after default in payment under a judgment of the Court, is similar in form to that pronounced in *Simpson* v. *Terry*, *supra*, and I cannot doubt that in default happening under it, it operated to put an end to the agreement just as the order in *Simpson* v. *Terry*, did.

Lamont, J.A., states the law very clearly and accurately, if I may say so, in delivering the judgment of the Court *en banc* in *Standard Trust* v. *Little*, 24 D.L.R. 713, 8 S.L.R. 205.

The anomalies introduced by Courts of Equity in regard to the relations between mortgagor and mortgagee do not exist in regard to vendor and purchaser. A judgment or order declaring that on the happening of a certain event an agreement for sale shall be cancelled and at an end means precisely what it says and not merely that the plaintiff shall thereupon be entitled to have it cancelled and put an end to. When the purchaser under the order of the Chief Justice of British Columbia made default the agreement ceased to exist and the foundation for any right of personal recovery from the purchaser (except for costs) was gone. The purchaser had no further right to the land and the Court has no jurisdiction to restore him to his former position. The vendor has the land. He cannot have the purchase-money also.

Should the plaintiff attempt to recover under the personal judgment of the Supreme Court of British Columbia which he issued after default in payment under the Chief Justice's order I have little doubt that the defendant could on application have his right to do so restricted to the costs of the action. *Jackson* v. *Scott* (1901), 1 O.L.R. 488. Indeed it would seem to be altogether probable that what was intended by the Chief Justice of British Columbia was that personal judgment against the defendant should issue forthwith upon the amount due being ascertained and certified and should be enforceable as to the debt and interest during the two months allowed for payment by the purchaser, and that if the matter had been brought to his attention he would not have sanctioned the issue of the judgment taken out from

CAN.

S. C.

DAVIDSON. v. SHARPE.

Brodeur, J.

the Registrar's office after the two months allowed for judgment has expired and purporting to be in pursuance of his order.

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

BRODEUR, J.:—An action had been instituted in British Columbia by a vendor against a purchaser for the balance of the purchase-price and for cancellation of the deed of sale in case of default of payment.

A decree was pronounced by the British Columbia Courts declaring that the judgment should be entered against the purchaser for a certain amount which he shall pay within two months and that in default of the defendant paying to the plaintiff what shall be certified to be due to her as aforesaid by the time aforesaid that the defendant thenceforth do stand absolutely debarred and foreclosed of and from all right, title, interest and equity of redemption of, in and to the said agreement and of, in and to the said lands, hereditaments and premises and that the said agreement be thereupon cancelled and ended and all monies paid thereunder forfeited to the plaintiff and that the defendant do deliver to the plaintiff possession of the said lands, hereditaments and premises which are set out and described in the said agreement.

The purchaser has made default to pay.

A new action, which is the present one, has been instituted on the covenant, in Saskatchewan; and it is contested by the purchaser on the ground that, the agreement having been cancelled by the British Columbia judgment, no claim can be made by the plaintiff for the payment of the purchase-price.

On the other hand, it is contended by the vendor that the judgment was not a final order of foreclosure but rather an order *nisi*.

The Saskatchewan Courts, 46 D.L.R. 256, 12 S.L.R. 183, held that the British Columbia judgment amounted to an election on the part of the plaintiff to take cancellation or to a rescission in the event of default of payment.

The decree is absolute in its terms. It provides that the deed is cancelled if within two months the purchaser does not pay the amount due.

The original action might have demanded only the amount due without asking for cancellation and if the plaintiff had been

unable to recover his debt then he could have asked for the cancellation of the agreement. But his action, as instituted before the British Columbia Courts, looks to me as an election on his part to take back the property sold, unless the defendant pays the purchase price.

The authorities say that if a contract providing that on the happening of a certain event it shall be void and that it may be rescinded by the party injured, that the contract is not void for both parties, but simply voidable at the request of the party that suffers. Fry on Specific Performance, 5th ed., sec. 1046.

The stipulation in a contract of sale that the deed would become null and void if the buyer failed to make any payment is exclusively in the interest of the seller, who has a right to choose between the rescission of the contract and its execution.

But when a judgment has been rendered on such a clause pronouncing that the failure to pay within two months would bring about the rescission of the contract; and when such a decree has been by the vendor himself it seems to me that it constitutes on his part an election of his right to cancel. He could not then later on proceed to collect the amount which had been originally promised to him by the covenant, since he has agreed that the agreement was cancelled.

The appeal should be dismissed with costs.

MIGNAULT, J.:—The whole question here is as to the effect of a judgment obtained in British Columbia by the appellant against the respondent.

Mignault, J.

The appellant had made an agreement with the respondent for the sale of certain lands in British Columbia, and on this agreement, in October, 1914, the appellant took action against the respondent, who then lived in Ontario, and made default, an action in British Columbia, in which her claim is stated as follows: (See judgment of Idington, J.)

On this action the following order was made on February 1, 1915, which in every respect agrees with the claim stated by the appellant:

Upon the application of the plaintiff herein upon hearing counsel in support of the application and upon hearing read the affidavit of Mr. M. C. Caple sworn and filed herein:

This Court doth order that the following accounts be taken by the Registrar of this Court, namely:—1. An account of what was due the plaintiff

CAN.

S. C.

DAVIDSON v. SHARPE.

Mignault, J.

under and by virtue of an agreement for sale in the pleadings mentioned, and for her costs in the action, such costs to be taxed by the taxing master. 2. An account of the rents and profits of the hereditaments comprised in the said agreement for sale received by the plaintiff or by any other persons by the order of or for the use of the plaintiff or which without the wilful default of the plaintiff might have been so received. And let what shall appear to be due on taking account No. 2 be deducted from what shall appear to be due to the plaintiff on account of No. 1 and let the balance be certified by the said Registrar, and let judgment be entered against the defendant for the amount so certified to be due to the plaintiff. And this Court doth further order that upon the defendant paying to the plaintiff what shall be certified to be due to her as aforesaid within two months after the date of the Registrar's certificate at such time and place as shall thereby be appointed the plaintiff to convey the lands hereditaments and premises comprised in the said agreement for sale free and clear of and from all encumbrances done by her or any person claiming by from or under her and deliver up all deeds, writings in her custody or power relating thereto to the defendant or to whom he shall appoint:

But in default of the defendant paying to the plaintiff what shall be certified to be due to her as aforesaid by the time aforesaid that the defendant thenceforth do stand absolutely debarred and foreclosed of and from all right, title, interest and equity of redemption of in and to the said agreement and of in and to the said lands and hereditaments and premises and that the said agreement be thereupon cancelled, ended and all monies paid thereunder forfeited to the plaintiff and that the defendant do deliver to the plaintiff possession of the said lands, hereditaments and premises which are set out and described in the said agreement.

An account of moneys due by the respondent to the appellant having been taken, the appellant obtained on June 15, 1915, a judgment against the respondent for $14,185.15 and costs, which judgment was rendered in pursuance of the order of February 1, 1915.

The respondent did not pay this amount to the appellant within the two months mentioned in the order, nor at any time since, and the appellant now sues the respondent in Saskatchewan, where he resides, claiming the amount of the judgment of June 15, 1915, and in the alternative sues on the agreement for sale for the amount due thereunder. The respondent claims that no action lies for the purchase-price, because the agreement is now cancelled by virtue of the order of February 1, 1915, the appellant having elected to have the agreement cancelled in default of payment.

Looking at the matter from every possible angle, I fail to see how the appellant can escape from the effect of the order she obtained and of her election for cancellation of the agreement in default of payment. I do not think that she can answer the

contention of the respondent by referring to the effect which is given to a covenant for cancellation inserted in an agreement for sale when the purchaser fails to pay the purchase price. Such a covenant in an agreement for sale, I take it, gives the vendor the right to elect either to claim cancellation of the agreement or the payment of the purchase price, but until the vendor has elected to have the agreement cancelled, his right to claim the price is not taken away. More, on the contrary, the appellant elected to have the agreement cancelled by her action and by the order she obtained from the British Columbia Court, should the respondent not pay the amount found to be due to the appellant within two months from the date of the registrar's certificate. The rule *una via electa non datur regressus ad alteram*, sometimes expressed as follows: *quod semel placuit in electionibus amplius displicere non potest*, which is the principle contended for by the respondent, precludes the appellant from now obtaining judgment for the purchase price.

The appellant argues that the order she obtained is no more than a rule *nisi*, calling upon the respondent to shew cause why the agreement should not be cancelled should he fail to pay within two months. I do not think this construction can be placed on the order, for by its very wording the agreement is thereupon (that is to say, on the default of the respondent) cancelled and ended.

I may add that in so far as the appellant's action upon the personal condemnation she obtained against the respondent in British Columbia is concerned, she cannot enforce this condemnation against the respondent in Saskatchewan inasmuch as the respondent was not domiciled in, or a resident of, British Columbia when the action was taken there, and did not appear therein or in any way acquiesce in the jurisdiction of the British Columbia Court. See 6 Hals., par. 422.

In my opinion the appeal fails and should be dismissed with costs. *Appeal dismissed.*

Annotation.

ANNOTATION.

Enforceability of a mechanic's lien against the property of a married woman for work performed or materials furnished under a contract made with her husband.

by

MR. C. B. LABATT.

In view of the paucity of Canadian authorities bearing upon the important practical question which is indicated by the above title, it is believed that the following monograph, which contains an exhaustive discussion of all the relevant cases decided with reference to the American Mechanics' Lien Laws, upon which the Canadian statutes have been modeled, will be appreciated by our subscribers. The privilege of producing it here has been courteously accorded by the publishers of the American Law Reports, for which it was compiled by the author, one of the Editors of the Dominion Law Reports.

I. Generally:

II. Enforceability of lien considered with reference to the extent of certain powers conferred on the husband:

III. Evidence from which the husband's agency is or is not inferable:

Annotation.

I. Generally:

§ 1. Principles on which the enforceability of a lien depends.

The general principles upon which the enforceability of a mechanics' lien depends in cases where the claim is founded upon a contract made with the husband of the owner of the property in question are as follows:

(a) The effect of the statutes by which married women have been empowered to hold property in their own right is to abrogate, so far as that property is concerned, their common-law incapacity to bind themselves by contract.

(b) Unless the language of the particular lien law in question requires a different conclusion (*a*), the category of contracts to which the enlarged competency of married women applies is deemed to embrace those which provide for the performance of

(*a*) In *Fetter* v. *Wilson* (1851) 12 B. Mon. (Ky.) 90, where the Kentucky Acts of 1831 and 1834 (3 Stat. Law, 409-411), under which the liens in question were claimed, gave a lien only upon the interest of the "employer" in the premises on which a house was built or repaired, the court took the position that, before the interest of the wife in the land could be brought under the lien, it must be shewn that she was the employer of those who worked on the house or furnished the materials, and that, being a feme-covert, she was incapable of contracting for herself, and consequently could not, in a legal sense, become the "employer" of others to erect a building on her land or to furnish materials for it. This decision was followed in *Pell* v. *Cole* (1859) 2 Met. (Ky.) 252.

But in *Salisbury* v. *Wellman Electrical Co.* (1917) 173 Ky. 462, 191 S.W. 289, it was observed: "Since the enactment of the Kentucky Statutes, § 2128 (Act of 1894), married women have the same power as unmarried women or men to create liens upon their property for its improvement; and where a married woman accepts the material and work placed upon the property, the law implies a promise on her part to pay for them."

Annotation.

work upon a building or other improvement, or for the supply of materials needed for such building or improvement (*b*).

(*c*) Contracts of this description are equally binding upon married women, whether made by them personally, or by their agents (*c*).

(*b*) "There can be no doubt but appellant, . . . although a married woman, had the right to bind herself for labour and materials furnished in the erection of buildings upon her separate property. If she could in person contract, she clearly had the power to authorize her husband to contract in her behalf; or, if her husband contracted for the work and materials to be furnished on her separate property, with her knowledge, consent, and approval, we are aware of no principle that would shield her or her property from the payment of an honest debt, thus incurred." *Greenleaf* v. *Beebe* (1875) 80 Ill. 522.

In *Shannon* v. *Shultz* (1878) 87 Pa. 481, the court, referring to the Pennsylvania Married Women's Property Act of 1848, held that, as a contract for the improvement of, or repairs to, the separate estate of a married woman, was only constructively within its purview, the claim of a lienor must aver specifically the purpose of the contract. *S. P. Kuhns* v. *Turney* (1878) 87 Pa. 497.

In *Farley* v. *Stroch* (1896) 68 Mo. App. 85, the general rule established by *Macfarland* v. *Heim* (1895) 127 Mo. 327, 48 Am. St. Rep. 629, 29 S.W. 1030, that a married woman could not appoint an agent in respect of property not held by her as her separate property, was declared to have been modified pro tanto by the statute relating to mechanics' liens, which provides that "every person, including all cestuis que trust, for whose immediate use, enjoyment, or benefit any building, erection, or improvement shall be made, shall be included by the words 'owner or proprietor' thereof under this article, not excepting such as may be minors over the age of eighteen years, or married women." The contractual power conferred by this provision upon a married woman was held not to be limited to cases where she has a separate estate.

(*c*) "What she could do herself, she could certainly do through her agent. Hence, the suggestion that a wife is incapacitated from appointing an agent to represent her in making a contract for such improvements seems to be without force." *Carthage Marble & White Lime Co.* v. *Bauman* (1891) 44 Mo. App. 386.

In *Greenleaf* v. *Beebe* (1875) 80 Ill. 520, it was held that a complaint was not demurrable which alleged in substance that the husband, acting as agent for the wife, with her full knowledge, consent, and approval, had made with the plaintiff the agreement in pursuance of which the labour and materials in question had been furnished.

In *Vail* v. *Meyer* (1880) 71 Ind. 159, the following remarks were made: "It may be conceded, as a general rule, that a married woman cannot appoint an agent. But a married woman holds and enjoys her real estate as if she were sole; and it becomes essential to its enjoyment that she have the power to make improvements, by building new or repairing old buildings upon it. Contracts for this purpose we have already said she can make, whereby the builder, mechanic, or materialman may acquire a lien under the law. And we think it follows that she may make such contracts in person or by an agent whom she may appoint for that purpose. So far as she is enabled to contract, she may contract in person or by agent."

See also *Farley* v. *Stroch* (Mo.) supra, and cases cited passim in the following sections.

In *Eberle* v. *Drennan* (1912) 40 Okla. 59, 51 L.R.A. (N.S.) 68, 136 Pac. 162, the principle stated in the text was held to be applicable with respect to enactments which specifically require that the labour or material for which a lien is claimed must be furnished under a "contract with the owner" of the property. "A contract made through the agency of one who is authorized to represent the owner, and whose acts are fully ratified by the owner with full knowledge of all the facts, is the contract of the owner of the land within the meaning of the statute." The same rule is taken for granted in many other cases involving statutes of this tenor.

Annotation.

(d) Married women may appoint their husbands to act as their agents in respect of the making of contracts of this description (*d*).

(*d*) *Farley* v. *Stroch* (Mo.) supra, and cases cited passim in the following sections.

"With or without her [the defendant's] knowledge and consent to the doing of the work and furnishing material, her property might be made subject to the lien, if it could be proved that her husband was her agent, clothed by her with the power and authority to make said contracts, and that the contract in question was made by him as agent for her." *Saunders* v. *Tuscumbia Roofing & Plumbing Co.* (1906) 148 Ala. 519, 41 So. 982.

"While the statutory power of a husband to create a mechanics' lien upon his wife's property (Civ. Code, § 649) does not extend to binding her personally for the price of material furnished to him under his own contract, she may constitute him her agent in fact, and in that capacity he may create a personal liability on her part, as well as a lien upon her property." *Sutherih* v. *Chesney* (1911) 85 Kan. 122, 116 Pac. 254 (syllabus of court).

"The entire claim being for the improvement of the defendant's separate estate, and the services rendered being for its direct benefit, the right of enforcing the debt against her separate property is in no way lessened because her husband acted as her agent in procuring the work to be done." *McGraw* v. *Godfrey* (1873) 14 Abb. Pr. N.S. (N.Y.) 402, affirmed in (1874) 56 N.Y. 610.

In *Chicago Lumber Co.* v. *Mahan* (1893) 53 Mo. App. 425, the court observed: "It is usual, of course, for the husband to look after the ordinary business affairs of his wife; and quite common, too, for the husband to appear as if engaged in his own proper person, whereas in truth he is merely engaged as her agent in the matter. The embarrassment in these mechanic lien cases comes from a difficulty of determining whether the husband was engaged on his own account in erecting the improvement, or on account and in behalf of his wife."

"If she can improve her estate she may employ an agent for that purpose, and her husband as well as a stranger." *Lex* v. *Holmes* (1860) 4 Phila. (Pa.) 10.

In two early Tennessee cases it was laid down broadly that a mechanic who expends his money and labor on the wife's property at the instance of the husband alone cannot charge her real estate with a lien. *Knott* v. *Carpenter* (1859) 3 Head (Tenn.) 542, 75 Am. Dec. 779; *Hughes* v. *Peters* (1860) 1 Coldw. (Tenn.) 67. The doctrine thus enounced is clearly inaccurate in respect of its failing to take account of situations in which the husband was acting as the wife's agent.

In *Wadsworth* v. *Hodge* (1889) 88 Ala. 500, 7 So. 194, it was mentioned that, as the husband was no longer the trustee of the wife's statutory separate estate in Alabama, as under the earlier Codes, he could not, as husband or trustee, create a mechanics' lien on the wife's property, without her authority or consent. For a case decided with reference to the abrogated law, see *Ex parte Schmidt* (1878) 62 Ala. 252.

In *Hall* v. *Erkfitz* (1900) 125 Mich. 332, 84 N.W. 310, it was laid down that the real estate of a married woman cannot be subjected to a mechanics' lien for materials furnished to a person who had made with her husband a contract to which she was not a party. This decision simply illustrates the difference between the positions occupied by contractors and by subcontractors in jurisdictions in which the statute contains no express provision for the benefit of the latter. The question of the husband's agency was not raised.

As to the rule that the wife is bound by a notice of intention to claim a lien, where it was given to her husband, while he was acting as her authorized agent in respect of the performance of the work in question, see *Jarden* v. *Pumphrey* (1872) 36 Md. 361; *Copeland* v. *Dixie Lumber Co.* (1911) 4 Ala. App. 230, 57 So. 124, citing *May & T. Hardware Co.* v. *McConnell* (1893) 102 Ala. 579, 14 So. 768.

Annotation.

(e) The right to compensation which is acquired by the performance of contracts of this description, when made by a husband of the owner, acting within the scope of the authority conferred upon him, may be enforced against the property to which they have reference by any statutory remedies in rem which are open in respect of owners other than married women (*e*).

"Neither the fact that the contract was made with the husband, nor the fact that the latter was to pay for the work personally, will justify the inference that the claimant appellant had abandoned the additional right to a lien given him by the statute" (*f*).

(f) These statutory remedies may be pursued by a claimant, irrespective of whether the wife did or did not intend to subject her separate estate to a lien (*g*).

It has been laid down that a general statute declaring that the property of a married woman "shall not be subject to the debts of her husband" is applicable to a debt contracted by him for the improvement of her estate (*h*).

§ 2. Formal prerequisites to the validity of a married woman's contract.

The extent to which, in cases of the type discussed in this monograph, the right to enforce the lien is qualified by the operation of provisions which require that the consent of a married woman to the formation of contracts affecting her separate property shall be expressed in writing, depends upon the phraseology used by the legislature. Some cases bearing upon this phase of the subject are cited in the footnote; but it is obvious that, without further examination of the later statutes in the jurisdictions in question, the practitioner cannot safely treat them as valid precedents (*a*).

(*e*) "If the materials were furnished and used in the improvement of her property, and by her directions, or with her knowledge and consent, and were reasonably necessary, and there was no agreement that her property should not be liable therefor, the law will give a lien thereon for the value of the materials." *Einstein* v. *Jamison* (1880) 95 Pa. 403.

(*f*) *Thompson* v. *Shepard* (1883) 85 Ind. 352.

(*g*) *Jones* v. *Pothast* (1880) 72 Ind. 158, overruling *Dame* v. *Coffman* (1877) 58 Ind. 345, in so far as it was a precedent for a contrary doctrine.

(*h*) *Hoffman* v. *McFadden* (1892) 56 Ark. 217, 35 Am. St. Rep. 101, 19 S. W. 753.

(*a*) In *Wadsworth* v. *Hodge* (1889) 88 Ala. 500, 7 So. 194, the conclusion of the court was, that: "Sec. 2346 of the Code has reference only to the general contracts of married women other than those coming within the influence of the law regulating mechanics' liens and the liens of materialmen; and that the verbal contract of a married woman, through herself or her authorized agent, is sufficient to create a lien for labour done or materials furnished for the improvement of her realty under the provisions of secs. 3018-3048 of the present Code. The plea of coverture, in such cases, can go no further, at most, than to bar a personal judgment against a married woman, to which the plaintiff is entitled, on the common counts, in the event he fails to establish his lien."

Annotation.

The doctrine that a married woman may subject her property to a mechanics' lien by orally ordering work to be done with

---

In *Cutcliff* v. *McAnally* (1889) 88 Ala. 507, 7 So. 331, this decision was said to have been "placed upon the broad basis of the statute itself, which provides for the creation of liens of this nature by an oral contract, and expressly authorized such a contract to be made by a married woman (Code 1886, § 3046)."

See also *Youngblood* v. *McAnally* (1889) 88 Ala. 512, 7 So. 263, where *Ex parte Schmidt* (1878) 62 Ala. 252, and *Schmidt* v. *Joseph* (1880) 65 Ala. 475, were held to be inapplicable as precedents, because they were decided with reference to the language of an earlier statute.

In *Webster* v. *Tattershall* (1896) 18 Ky. L. Rep. 439, 36 S.W. 1126, decided with reference to an enactment providing that a lien may be enforced against the property of a married woman "if the labor was performed under a written contract signed by her" (Ky. Stat. 1894, sec. 2479), the court rejected a claim based upon evidence that she acquiesced in the erection of the building in question, and gave some directions about the work. But in *Jefferson* v. *Hopson Bros.* (1905) 27 Ky. L. Rep. 140, 84 S.W. 540, it was held that sec. 2128 of Ky. Stat. 1903 had operated so as to repeal the enactment thus construed.

In *Johnson* v. *Parker* (1858) 27 N. J. L. 239, where it was unsuccessfully claimed that the land of a married woman should be subjected to a lien on account of her having given oral directions with regard to the work of erecting a building on the land, the decision proceeded partly on the ground that, under the general Act respecting the conveyance of land by married women, such a conveyance must be authenticated by a deed and acknowledgment, and partly on the ground that the following provision of the Mechanics' Lien Law (sec. 4) was applicable to married as well as to single women: If any building be erected by a tenant or other person than the owner of the land, then only the building and the estate of such tenant or other person erecting the building shall be subject to the lien, unless such building be erected by the consent of the owner of such land, in writing.

In *Hauptman* v. *Catlin* (1855) 1 E. D. Smith (N. Y.) 729, it was doubted by two of the Judges of the New York Court of Common Pleas whether a wife could by any contract subject a building owned by her to a lien, "except by a pledge of some sort (by mortgage or otherwise) in writing, duly acknowledged."

In *Berry* v. *Weisse* (1856) 2 E. D. Smith (N. Y.) 662, note, it was laid down that a lien on the real property of a married woman could not be enforced unless the claim was founded on an express written contract executed by both the husband and wife, and duly acknowledged by her. But this decision, although not referred to in *Hauptman* v. *Catlin* (1859) 20 N. Y. 247, was virtually overruled by the declaration of the court of appeals to the effect that the lien attaches on the property of married women by virtue of the general statute which "gives a lien against all owners who shall become parties to certain contracts." (This judgment affirmed the one rendered in (1857) 3 E. D. Smith, 667, on the second review of the case by the Court of Common Pleas. On the first review that court had applied the same doctrine as in *Berry* v. *Weisse* (N. Y.) supra.)

In *Finley's Appeal* (1871) 67 Pa. 453, it was laid down by Sharswood, J., in his concurring opinion, that "a married woman cannot, by her oral consent, authorize her husband to encumber her real estate."

In *Briggs* v. *Titus* (1863) 7 R. I. 441, the court applied a clause of the Mechanics' Lien Act which provided that the husband of the owner might, "with the consent of his wife, in writing," subject her land to a lien. This clause was enacted after the decision was rendered in *Bliss* v. *Patten* (1858) 5 R. I. 376, where an exception based on the ground that the wife's consent was not in writing was rejected on the ground that the statute in force when the proceedings were instituted did not, like the amended one, contain any requirement in this regard. The contention declared to be untenable was that no lien can be created upon the estate of a married

Annotation.

respect to it was expressly laid down in one case (*b*), and was obviously taken for granted in many of the others reviewed in this monograph.

The provision in Rem. & Bal. Code (Wash.) 1133, that, where materials are furnished to a person other than the owner of the land in question, written notice of the furnishing must be given to the owner, has no application to a case in which the materials were purchased by the husband as his wife's agent, and delivered to her (*c*).

§ 3. Husband's agency not inferable from marital relation alone.

It is agreed by all the authorities that, in cases involving the right of a claimant to enforce against the property of a married woman a mechanics' lien for work performed or materials furnished under a contract made with her husband, the fact that he made that contract as her agent cannot be inferred from the marital relationship alone (*a*). This rule is applicable even where the labour or materials furnished belong to the category of necessaries (*b*). In other words, "so far as the liability of the wife's estate to the lien is concerned, her husband, as such, has no more capacity to fix it than any stranger. He can do so as her

---

woman unless by an instrument executed with the formalities required by the Statute of Conveyances.

In *Baker* v. *Stone* (1896)—Tenn.—, 58 S.W. 761, the omission of a contractor to require the wife to bind herself in writing was held to be a bar to the enforcement of a lien against her land.

(*b*) *Murphy* v. *Murphy* (1884) 15 Mo. App. 600.

(*c*) *Spokane Valley Lumber & Box Co.* v. *Dawson* (1917) 94 Wash. 246, 161 Pac. 1191.

(*a*) *Hoffman* v. *McFadden* (1892) 56 Ark. 217, 35 Am. St. Rep. 101, 19 S. W. 753; *Campbell* v. *Jacobson* (1893) 145 Ill. 389, 34 N.E. 39; *Johnson* v. *Tutewiler* (1871) 35 Ind. 353; *Capp* v. *Stewart* (1872) 38 Ind. 479; *Wilson* v. *Shahane* (1911)—Mo. App.—, 138 S.W. 694; *Rust-Owen Lumber Co.* v. *Holt* (1900) 60 Neb. 80, 83 Am. St. Rep. 512, 82 N.W. 112; *Bryan* v. *Orient Lumber & Coal Co.* (1916)—Okla.—, 156 Pac. 897; *Blevins* v. *Camerin* (1882) 2 Posey, Unrep. Cas. (Tex.) 461; (1913) 4 A.L.R. 1022.

In *Carthage Marble & White Lime Co.* v. *Bauman* (1893) 55 Mo. App. 204, where the jury had, at the request of the plaintiff, been instructed that the defendant's property would be subject to a lien if they found from the evidence "that defendant, by and through her husband, acting at her instance or with her consent and approval as her agent and for her benefit, made a contract" with the plaintiff, it was unsuccessfully contended that the court had erred in giving this instruction without explaining to the jury the facts that would justify the finding that the husband made the contract as the agent of his wife. This objection was held to be answered by the remarks in *Holland* v. *McCarty* (1887) 24 Mo. App. 112, where the argument that the meaning of the word "authority" ought to have been defined in an instruction was rejected, on the ground that "words of the English language in ordinary use, when used in no particular technical sense, need not be explained to the jury."

(*b*) "The husband cannot, by any act of his, encumber the wife's property without her consent, even for the purpose of making necessary repairs." *Dearie* v. *Martin* (1875) 78 Pa. 55. The same doctrine was also laid down in *Steinman* v. *Henderson* (1880) 94 Pa. 313.

Annotation.

agent, but not otherwise" (*c*) Accordingly, "some previous appointment, or general holding out to the public as agent, or subsequent adoption or ratification of his acts, is essential in order to hold the wife bound thereby" (*d*). In this point of view it follows that a lien cannot be decreed in favor of a claimant unless he offers some affirmative evidence tending to prove the husband's agency in respect of the contract upon which the claim is based (*e*).

The purport of certain enactments which have abrogated or in some degree modified the operation of the common-law doctrine, as explained above, is stated in § 30, infra.

§ 4. Necessity of alleging the husband's agency.

Where the lien statute involved does not make any specific mention of contracts made with the agents of the owners, the question whether a person whose claim is based upon a contract made with the defendant's husband must expressly aver that he was acting as agent apparently requires an affirmative or negative answer, according as the criterion applied is that of the strict common-law rules of pleading or that of the reformed procedure (*a*). On the other hand, where the statute purports to create a

---

(*c*) *Garnett* v. *Berry* (1876) 3 Mo. App. 197.

(*d*) *Miller* v. *Hollingsworth* (1871) 33 Iowa, 224.

(*e*) *Groth* v. *Stahl* (1892) 3 Colo. App. 8, 30 Pac. 1054; *Kansas City Planing Mill Co.* v. *Brundage* (1887) 25 Mo. App. 268; *Carthage Marble & White Lime Co.* v. *Bauman* (1891) 44 Mo. App. 386; *Womack* v. *Myrick Lumber Co.* (1917)—Ala.—, 76 So. 949; and cases cited passim in subtitles II. and III. infra.

In *Blevins* v. *Camerin* (1882) 2 Posey, Unrep. Cas. (Tex.) 461, the court disapproved a charge by which the jury were instructed that, if the plaintiffs were otherwise entitled to recover for their debts, they would also be entitled to have a lien upon the property described in the petition.

An appellate court cannot declare that the trial court erred in finding in favor of the wife, where, so far as appears from the evidence as set out, the engagement and indebtedness were those of the husband himself, and it is not stated that the husband made the contract as agent for his wife. *Hughes* v. *Anslyn* (1879) 7 Mo. App. 400.

(*a*) In *Wilson* v. *Schuck* (1879) 5 Ill. App. 572, the omission of such an averment was held to require the reversal of a decree, where the petition merely alleged that, at the time of the making of the contract relied upon as the foundation for the lien, the husband was in possession of, and exercising acts of ownership over, the lots in question; that the contract for the materials was made with him; that the petitioner was informed and believed that the wife had some estate or interest in said premises; and that she was personally knowing to the work and labor bestowed and the lumber used in making the improvements thereon. It was held that these allegations did not bring the case within the terms of the Illinois statute then in force, which required the contract to be made with the "owner."

In *Capp* v. *Stewart* (1872) 38 Ind. 479, it was held that allegations to the effect that the contract was made with the husband, and the work done and materials furnished with the full knowledge, consent, and approbation of the wife, did not shew that the contract was made on behalf of the wife. See §§ 14-16, infra.

That the husband's authority must be averred was also laid down in *Steinman* v. *Henderson* (1880) 94 Pa. 313.

Annotation.

lien in favor of persons who perform work or furnish materials under a contract made with the "owner or his agent," it would seem that the husband's agency and the facts importing such agency must be averred, irrespective of whether the sufficiency of the complaint is determined with reference to the requirements of a strict or of a liberal system of pleading (*b*). Similarly it has been held that, in proceedings taken under a statute which purports to subject the property of a married woman to a lien in respect of work performed or materials furnished "with her authority and consent," it is essential to the validity of the lien

---

On the other hand, it was held in *Akers* v. *Kirke* (1893) 91 Ga. 590, 18 S.E. 366, that recovery might be had upon evidence shewing that the wife was the undisclosed principal of her husband, although that fact was not alleged in the pleadings.

(*b*) In *Ex parte Schmidt* (1878) 62 Ala. 252, the complaint averred that the defendant's husband made the contract as her agent, and that the work was done on the house, and the materials furnished for the immediate use, benefit, and enjoyment of the wife, "and that she now is enjoying the same as a residence for herself and family." Held, that this averment brought the case directly within the Alabama statute creating a lien for work performed or materials furnished under any contract made with the "owner or proprietor" or his "agent," and providing that every person, including married women and cestuis que trust, for whose use, benefit, and enjoyment any building or improvement shall be made, is embraced within the words, "owner or proprietor."

In *McGeever* v. *Harris* (1906) 148 Ala. 503, 41 So. 930, an averment that the sum claimed was due "for materials furnished and work and labor done in pursuance of a contract entered into by and between plaintiffs and defendant, through and by her husband," was held to import the affirmation of an authorization on the part of the husband to make the contract for her, the defendant.

In *Greenleaf* v. *Beebe* (1875) 80 Ill. 520, a petition was held not to be demurrable which alleged that W.L.G. was acting as the agent of and for and on behalf of F.E.G., "with her full knowledge, consent, and approval," and that a verbal agreement was made with the said W.L.G., then acting as the agent of and for and on behalf of the said F.E.G., by which the materials were to be furnished and the labour performed, of which acts, proceedings, and agreements the said F.E.G., wife of the said W.L.G., had notice and full knowledge, and to which she gave her consent and approval.

In *Kidd* v. *Wilson* (1867) 23 Iowa, 464, an averment that plaintiffs furnished the materials for the erection of the house in question "at the request of husband, as agent for his wife, for her use and benefit, and with her knowledge and consent," was held to shew that plaintiff furnished the materials for the erection of this house, upon a contract with the wife, through her agent. This ruling was followed in *Burdict* v. *Moon* (1868) 24 Iowa, 418.

In *O'Keef* v. *Seip* (1876) 17 Kan. 131, a petition alleging that the petitioner had entered into a contract with the husband, as agent of his wife, to furnish materials and construct a building on her lot, was held to be sufficient.

Compare also *Burgwald* v. *Weippert* (1871) 49 Mo. 60, where, however, the actual ground of objection to the petition was that it shewed that the contract was made with the husband, and not the wife, to whom the land belonged. The court took the position that the contract must have been made for the wife's use, as the house to which it referred was to be erected on her land, and consequently that it came within the general provision of the Lien Law, by which the words, "owner or proprietor," were declared to embrace every person "for whose immediate use, enjoyment, or benefit any building, erection, or improvement shall be made."

Annotation.

that the facts shewing such "authority and consent" should appear on the face of the claim (*c*).

§ 5. Wife as undisclosed principal.

The general rule that an undisclosed principal may, when discovered, be held personally liable on a contract made by his agent, has been regarded by the courts as involving the corollary, that a person who, in pursuance of a contract made with another person, acting ostensibly for himself, but in reality as the agent of the owner of property, furnishes labor or materials for its improvement, is entitled, when he discovers the fact of the agency, to subject the property to a lien, provided such a remedy would have been available to him if he had dealt directly with the owner. This doctrine has been explicitly recognized in some cases of the type considered in this monograph (*a*).

The effect of the doctrine which defines the limits, *quoad personas*, of the right of action upon a sealed contract, is that a lien which, by the terms of the statute in question, is dependent upon the existence of a contract with the owner, cannot be enforced against the property of a married woman for work performed or materials furnished under a sealed contract which, on its face, purports to have been made by her husband as principal, and not on her behalf (*b*).

(*c*) *Dearie* v. *Martin* (1875) 78 Pa. 55.

(*a*) *Akers* v. *Kirke* (1893) 91 Ga. 590, 18 S.E. 366; *Campbell* v. *Jacobson* (1893) 145 Ill. 389, 34 N.E. 39; *Inter-State Bldg. & L. Asso.* v. *Ayers* (1897) 71 Ill. App. 549, affirmed in (1898) 177 Ill. 9, 52 N.E. 342 (where the opinion of the lower court was adopted *in toto*); *O'Neil Lumber Co.* v *Zirefiet* (1911) 154 Mo. App. 33, 133 S.W. 113; *McGraw* v. *Godfrey* (1873, Com. Pl.) 14 Abb. Pr. N.S. (N.Y.) 397, affirmed in (1874) 56 N.Y. 610; *H. C. Behrens Lumber Co.* v. *Lager* (1910) 26 S.D. 160, 128 N.W. 698, Ann. Cas. 1913A, 1128.

In *Marshall* v. *Hall* (1918)—Mo. App.—, 200 S.W. 770, the court said that in some circumstances a lien for improvements on the wife's land under a contract with the husband may be justified either on the theory that the husband acted in fact for an undisclosed principal, his wife, or that her conduct toward the improvements amounted to a ratification of the contract, or an estoppel. In many others it has been taken for granted.

(*b*) In *Walsh* v. *Murphy* (1897) 167 Ill. 228, 47 N.E. 354, one Rood entered into a sealed contract by which the appellant covenanted to superintend, manage, and carry on the plumbing, gas fitting, and sewering for a building which his wife had begun to construct, to buy all material in his own name and contract for all labor, and Rood covenanted to pay appellant a specified remuneration. The facts of the wife's ownership and her husband's agency did not appear in the instrument. It was also shewn that, apart from the form of the instrument, appellant in fact dealt with Rood as principal and owner of the property, and did not learn that his wife was the owner until after he had ceased working. Held, that the property of the wife could not be subjected to a mechanics' lien for labour and materials furnished by appellant. The court said: "The fact that the contract made by Francis D. Rood would have been valid without a seal, and that therefore the authority to execute it might be by parol, is immaterial. The method of conferring authority or of ratifying the contract does not change the rule. This case does not come

Annotation.

§ 6. Enforcement of lien by subcontractor.

Where a lien in respect of labour performed or materials furnished at the request of the defendant's husband is claimed with reference to a statute which provides that a subcontractor shall be entitled to a lien, the lien is obviously enforceable, irrespective of whether the husband was an agent of the defendant or an independent contractor (*a*). It is equally clear that he cannot enforce the lien thus given unless he takes the steps specified by the statute as prerequisites to the assertion of his remedial rights under the statute (*b*).

If no such provision has been enacted in the jurisdiction in which the suit is brought, it would seem that a subcontractor cannot enforce a lien upon the wife's property, even though the husband was acting as his wife's agent when he employed the principal contractor (*c*). *A fortiori* is he debarred from this remedy where the evidence negatives the existence of such an agency (*d*).

§ 7. Personal liability of husband.

The husband is liable for the work done and the materials furnished under the contract made by him—

(1) Where the evidence shews that the work in question was done by the husband for himself, and that the wife had nothing to do with it. "The fact that the work was done on property of the wife, and no lien was or could be enforced therefor, does not prevent a recovery against him" (*a*).

(2) Where he was, in point of fact, the wife's agent, but contracted as the ostensible owner of her property, and without disclosing his agency to the other party. Under such circum-

---

within any exception to the rule, where the contract creates an implied obligation on the part of the principal. No lien is created except by statute, and there could be none unless the contract was with the owner, and, as we have seen, this contract was not with the owner. She could not have had any right of action upon it against appellant for a failure to perform it, or on account of the manner of its performance, nor could any action be maintained against her under it." The same doctrine was applied in *Murphy* v. *Kohlsaat* (1896) 68 Ill. App. 579.

(*a*) *Thompson* v. *Shepard* (1882) 85 Ind. 352.

(*b*) *Nelson* v. *Cover* (1877) 47 Iowa, 250 (demurrer to petition held to have been properly sustained). As the specified steps had not been taken by the claimant, the question whether, if they had been taken, a court of equity might have supplemented the statute and afforded him the relief asked, was not determined.

(*c*) This was apparently assumed in *Nelson* v. *Cover*, note (*b*) supra.

(*d*) In *McGraw* v. *Storke* (1892) 44 Ill. App. 311, the lien was disallowed on the ground that the effect of the decree of the lower court was that the husband had "entered into the contract with the principal contractor on his own behalf." It was observed that, this statement being true, none of the parties who dealt with the principal contractor had any claim upon the husband or the wife or her property.

(*a*) *Meyer* v. *Broadwell* (1884) 83 Mo. 571.

Annotation.

stances he remains personally liable after the creditor discovers the undisclosed principal, unless the creditor waives the right to proceed against him, and elects to look to the wife alone for his remuneration (*b*).

§ 8. Contractor, when a necessary party to a suit by a subcontractor or materialman.

It has been laid down that, where a materialman or subcontractor seeks to enforce a lien against the property of a married woman, "through the privity which obtains in the contract for the improvement between the owner and the original contractor," the original contractor is an essential party to the suit, for two reasons: (1) "Because the contractor is the debtor and should be called upon to defend;" and (2) "because the property of the owner may not be reached for the debt of the contractor except through the implied authority in the contract between the owner and the original contractor to contract debts on the security of the property" (*a*). But in the case cited, where the proceedings had been dismissed as to the contractor after his death, it was held that this rule was inapplicable for the reason that the husband of the owner, acting as her authorised agent, was a joint party to the contract for the purchase of the materials, and that the credit as regards that contract was extended by the plaintiff to him and the contractor jointly.

§ 9. Acceptance of collateral security by contractor, effect of.

A statutory provision under which the acceptance of collateral security operates so as to defeat the right to a mechanics' lien has been held not to be applicable to a case in which a husband had assumed a personal responsibility for the performance of a building contract, and, while the work was still in progress, executed a note jointly with his wife for a portion of the amount due to the contractor (*a*).

(*b*) *O'Neil Lumber Co.* v. *Greffet* (1910) 154 Mo. App. 33, 133 S.W. 113, where the court affirmed the right of the creditor to sue the husband, and at the same time subject the wife's property to a lien.

(*a*) *O'Neil Lumber Co.* v. *Greffet* (1910) 154 Mo. App. 33, 133 S.W. 113.

(*a*) *Bissell* v. *Lewis* (1881) 56 Iowa, 231, 9 N.W. 177. The contention that, conceding the husband to be the agent of his wife, such agency did not authorize him to enter into a joint contract binding her and himself, and that, as this was done, it amounted to taking collateral security, was thus disposed of: "We think that C. G. Lewis, as agent for his wife, had the power to make such contract as he deemed best for her interest, and that he could well make a joint contract binding on her and himself. In so doing the transaction amounted to this: Two persons contract for the erection of a building on the land of one of them; and because only one owns an interest in the land, it cannot be said collateral security was taken on such contract, and the mechanic thereby deprived of his lien."

Annotation. *II. Enforceability of lien considered with reference to the extent of certain powers conferred on the husband.*

§ 10. Generally.

In nearly all the cases which fall within the scope of this monograph, the sole question considered was whether the evidence warranted the inference that the husband acted on behalf of his wife when he made the contract under review. That is to say, the circumstances involved were of such a nature that, if that question was found to require an affirmative answer, there was no necessity to discuss the further question whether the husband had transcended certain powers previously conferred upon him. But in a few instances this secondary point has constituted the *ratio decidendi*.

§ 11. Powers of husband intrusted with the management of his wife's estate.

It has been laid down that the authority of a husband to make a contract for the improvement of his wife's estate cannot be implied from the mere fact that he occupies or manages and controls her real estate (*a*). But the circumstance that the general management of her property had been placed in his hands has unquestionably a strong tendency to shew that he was invested with such authority (*b*).

§ 12. Powers of husband appointed as his wife's general agent with regard to the erection of the building in question.

The case cited below furnishes some authority for the doctrine that a husband whom his wife appoints as her general agent in respect of the construction of a building on her property is, by virtue of the functions so delegated to him, impliedly invested with the power to enter into such contracts as may be necessary

---

(*a*) *Hoffman* v. *McFadden* (1892) 56 Ark. 217, 35 Am. St. Rep. 101, 19 S.W. 753.

(*b*) In *Wheaton* v. *Trimble* (1887) 145 Mass. 345, 1 Am. St. Rep. 463, 14 N.E. 104, there was evidence tending to shew that the work was done upon the wife's house, and was for her benefit; that she knew that the petitioner was working upon the house, and was present at different times, and personally gave him directions as to parts of the work; that she selected the papers for the upper rooms, and the bills for them were afterwards paid by her husband. The husband and wife both testified that he was not her agent; but, upon cross-examination, she testified that "her husband manages the property just as he used to when it was his; that she allows him to go ahead and do just as he pleases with the whole property; and that ever since it has been in her name he has managed it just as he did before." Held, that it was not an unreasonable inference that, in contracting with the petitioner, the husband was acting as her authorized agent.

See also *Scales* v. *Paine* (1882) 13 Neb. 521, 14 N. W. 522, where the fact that the husband was his wife's general agent is mentioned only in the syllabus of the court.

Reference may also be made to *Arnold* v. *Spurr* (1881) 130 Mass. 347, where, however, no lien was claimed for the work in question.

Annotation.

for the purpose of procuring the performance of the work contemplated by her (*a*). But in another case which bears upon the probative significance of this element, the general agency of the husband was only one of the circumstances from which the right of the claimant to enforce his lien was predicated, and there is nothing in the opinion to shew whether a similar decision would have been rendered if the other evidential element had been absent (*b*).

III. Evidence from which the husband's agency is or is not inferable.

§ 13. Generally.

As in other classes of cases which involve a similar issue, the agency of a husband in respect of procuring improvements to be made upon his wife's property may be proved not only by direct evidence, but also by testimony concerning the acts and conduct of the parties (*a*).

It is obvious that most of the descriptions of testimony which are examined in the present subtitle may be regarded in two different lights; that is to say, either as elements indicative of the existence of an agency already constituted by the wife, or as elements tending to prove a ratification or adoption of acts which previously were not binding upon her. But it is frequently impossible to ascertain from the language of the courts whether they were considering the claimant's remedial rights from the former of these points of view or from the latter; or, indeed, whether their attention was adequately directed to the consideration that the evidence presented was susceptible of being discussed under distinct aspects. Under these circumstances, it has been deemed advisable to collect in the present subtitle all the decisions except those which were explicitly based upon the theory of a ratification. See § 26, infra.

(*a*) *Bissell* v. *Lewis* (1881) 56 Iowa 231, 9 N. W. 177.

(*b*) *Inter-State Bldg. & L. Asso.* v. *Ayers* (1897) 71 Ill. App. 529, affirmed in (1898) 177 Ill. 9, 52 N. E. 342 (adopting opinion of court of appeals). There the general agency of the husband was proved by the testimony of several witnesses as to the footing on which the contracts were made, and as to statements made by his wife to the effect that he was her agent in the construction of the building, and that she left everything to him in regard to the building and the payments.

(*a*) For a specific ruling to this effect, see *Saunders* v. *Tuscumbia Roofing & Plumbing Co.* (1906) 148 Ala. 519, 41 So. 982, where it was held that the answers of a witness to questions as to whether the husband had sold the property in behalf of his wife, as to what he did with the purchase money, as to whether he had sold the property for his wife, and as to who employed the men to erect the building in respect of which the lien was claimed, had been properly admitted.

The same doctrine is, of course, taken for granted in all the cases cited in the present subtitle.

Annotation.

§ 13a. Quality of evidence requisite to prove the husband's agency.

With regard to the quality of the evidence which must be adduced for the purpose of proving the husband's agency, the authorities are conflicting. It has been laid down that "where all the consideration of a debt reaches a wife as an accession to her separate estate, and she retains and enjoys it, only slight evidence of the husband's agency in contracting the debt is required to charge her" (*a*). In the case in which this statement was made, the question whether a different standard is applicable, according as the husband's contract was written or oral, was not adverted to.

It has also been intimated that "less proof will probably suffice to establish the agency of the husband in such matters than where the relationship of husband and wife does not exist" (*b*).

The doctrine embodied in these statements is obviously based upon a consideration of the special conditions which are incidental to the cohabitation of husband and wife upon the ordinary footing. It may be regarded as constituting a partial recognition of the idea which is probably held by the great majority of laymen, that the husband is ostensibly the agent of his wife in regard to such matters as the improvement of her real property. When pressed to its logical conclusion, it is strongly suggestive of the desirability of enacting provisions by which effect would be given to that idea. See Minnesota, Mississippi, Pennsylvania, and Ontario statutes referred to in § 30, infra. That the wife should be fully protected against acts of her husband which may or will impair the value of her separate property is, of course, an indisputable proposition. But it is not apparent that her interests would be exposed to any serious risk of injury if she were subjected to the duty of taking some active steps to relieve herself of liability whenever, as in cases of the type discussed in the present monograph, the acts of the husband are of such a nature that normally they produce results beneficial to her property.

In several cases decided by the Missouri court of appeals the position has been taken that the evidence relied upon for the purpose of establishing the husband's agency in the face of his express written contract "must be so clear, cogent, and persuasive as to leave no reasonable doubt of the agency" (*c*). But since the latest of these cases was decided, it has been laid down by the supreme court that the question of agency is "to be decided like

(*a*) *Akers* v. *Kirke* (1893) 91 Ga. 590, 18 S. E. 366.

(*b*) *Cattell* v. *Ferguson* (1892) 3 Wash. 541, 28 Pac. 750.

(*c*) *Garnett* v. *Berry* (1876) 3 Mo. App. 197; *Barker* v. *Berry* (1880) 8 Mo. App. 446; *Kansas City Planing Mill Co.* v. *Brundage* (1887) 25 Mo. App. 268; *Carthage Marble & White Lime Co.* v. *Bauman* (1891) 44 Mo. App. 386; *Thompson* v. *Kehrmann* (1895) 60 Mo. App. 488; *Farley* v. *Stroeh* (1896) 68 Mo. App. 85 (contrasting cases which involve an oral contract).

all other questions of fact in a civil suit, by a fair preponderance of the evidence" (*d*). Annotation.

§ 14. Wife's knowledge of the husband's acts.

It has been held that the husband's agency cannot be inferred from any of the following circumstances:

(1) That the wife knew that her husband was about to procure the performance of the work in question (*a*).

(2) That the wife knew that the husband was about to enter into the particular contract under which work was performed or materials furnished by the claimant (*b*). Such evidence, of course, possesses a distinct corroborative value when conjoined with other elements (*c*).

(3) That the wife was aware of the fact that the husband had made in his own name a contract with regard to the furnishing

---

(*d*) *Kwenzel* v. *Stevens* (1900) 155 Mo. 280, 56 S.W. 1076, where the judgment in (1898) 73 Mo. App. 14, was reversed. The court said: "When a party has furnished materials towards the building, and the question as to his right to a lien depends on the fact as to whether the husband undertook the work on his own credit or that of his wife, for whose benefit the improvement inures, there is no reason why the question should not be settled by a fair preponderance of the evidence, the burden of proof, of course, being upon him who asserts the agency, and due caution being observed to distinguish between wifely deference and business conduct, when inferences from her acts are to be drawn." The rule, as laid down in the precedent relied upon by the court of appeals (*Eystra* v. *Capelle* (1876) 61 Mo. 578), was held not to be controlling, because it had been propounded with reference to the question whether the husband's agency might be implied, and was consequently not pertinent in respect of cases involving express contracts. For later cases in which the doctrine enunciated by the supreme court was applied by the court of appeals, see *A. M. Becker Lumber Co.* v. *Stevens* (1900) 84 Mo. App. 558; and *Brown* v. *Connecticut F. Ins. Co.* (1917) 197 Mo. App. 317, 195 S. W. 62 (contract of sale).

(*a*) In *Capp* v. *Stewart* (1872) 38 Ind. 479, the court laid it down, in discussing the pleadings, that a wife's property cannot be subjected to a lien on the mere ground that she "has full knowledge that her husband is about building a house upon her ground."

For other cases in which a similar doctrine was applied or recognized, see *Groth* v. *Stahl* (1892) 3 Colo. App. 8, 30 Pac. 1051; *Kansas City Planing Mill Co.* v. *Brundage* (1887) 25 Mo. App. 268; *Duross* v. *Broderick* (1898) 78 Mo. App. 260.

The inference that the husband acted as his wife's agent in purchasing the materials for a house to be erected on her land cannot warrantably be drawn from evidence which shews that, while she was aware of his intention to build the house, if the necessary materials could be procured, she did not know that he intended to purchase those materials on credit, and did not discover that he had done so until after his death. *Miller* v. *Hollingsworth* (1871) 33 Iowa, 224.

(*b*) *Geary* v. *Hennessy* (1887) 9 Ill. App. 17; *Rust-Owen Lumber Co.* v. *Holt* (1900) 60 Neb. 80, 83 Am. St. Rep. 512, 82 N. W. 112.

(*c*) See, for example, *Inter-State Bldg. & L. Asso.* v. *Ayers* (1897) 71 Ill. App. 529, affirmed in (1898) 177 Ill. 9, 52 N. E. 342 (wife was present when husband made some of the contracts in question); *Leisse* v. *Schwartz* (1879) 6 Mo. App. 413 (when contract was made, the wife participated in the conversation and heard all that was said by the husband and the claimant).

Annotation.

of labour or materials for the purposes of a building or other improvement on her land, and that the labour or materials in respect of which a lien is claimed were furnished in pursuance of that contract (*d*). For practical purposes the probative significance of this fact is merely that of an element which must necessarily be involved, even if not specifically mentioned, in every case in which the effect of any of the circumstances adverted to in the following sections is in question.

§ 15. Wife's failure to object to the husband's acts.

Several of the decisions relating to the evidential significance of this fact have proceeded upon the broad ground that it does not of itself warrant the conclusion that the husband was acting as her agent (*a*).

(*d*) *Copeland* v. *Kehoe* (1880) 67 Ala. 594; *Wadsworth* v. *Hodge* (1889) 88 Ala. 500, 7 So. 194; *Wilson* v. *Andalusia Mfg. Co.* (1915) 195 Ala. 477, 70 So. 140; *Groth* v. *Stahl* (1892) 3 Colo. App. 8, 30 Pac. 1051; *Price* v. *Seydel* (1877) 46 Iowa 696 (wife knew lumber was being purchased and used in the erection of a house on her lot, but did not know that it was being purchased on credit); *Barker* v. *Berry* (1880) 8 Mo. App. 446; *Kansas City Planing Mill Co.* v. *Brundage* (1887) 25 Mo. App. 268; *Duross* v. *Broderick* (1898) 78 Mo. App. 260, and the cases cited infra.

"The mere fact that the wife knew that her husband had made a contract in his own name to build a house on her real estate does not, of itself, establish that she directed or engaged him to do so for her." *Hallowell Cement Co.* v. *Elser* (1911) 156 Mo. App. 291, 137 S. W. 626.

"The mere fact that the wife had knowledge of the construction of the building by her husband on her property does not, in our judgment, of itself necessarily establish the agency of her husband, with authority to charge such property with a lien for material used thereon." *Rust-Owen Lumber Co.* v. *Holt* (1900) 60 Neb. 80, 83 Am. St. Rep. 512, 82 N. W. 112.

(*a*) *Burdick* v. *Moulton* (1880) 53 Iowa 761, 6 N. W. 48; *Chicago Lumber Co.* v. *Mahan* (1893) 53 Mo. App. 425; *Rust-Owen Lumber Co.* v. *Holt* (1900) 60 Neb. 80, 83 Am. St. Rep. 512, 82 N. W. 112; *Jones* v. *Walker* (1875) 63 N. Y. 612; *Blevins* v. *Camerin* (1882) 2 Posey Unrep. Cas. (Tex.) 461; *Morrison* v. *Clark* (1899) 20 Utah, 432, 77 Am. St. Rep. 924, 59 Pac. 235.

"Where the credit is given solely to the husband, he alone is bound, although it may appear that the wife knew that the building or improvements were in process of erection on her land, and said nothing." *Wadsworth* v. *Hodge* (1889) 88 Ala. 500, 7 So. 194.

"It would be a harsh rule that would imply from her mere silence in reference to her title, or from her failure to dissent from the contract of her husband, an approval of it, and an intention to bind her estate for the payment of the compensation he had promised. Her estate, under the operation of such a rule, would be restored to the common-law dominion of the husband, from which it is the very purpose of the instrument creating the estate to disembarrass, relieve, and free it." *Copeland* v. *Kehoe* (1880) 67 Ala. 594. It is an open question, to say the least, whether the *argumentum in terrorem* thus advanced is as conclusive as the court assumes. There are other considerations to be taken into account besides the propriety of protecting the wife's interests. See § 13, supra.

In *Flannery* v. *Rohrmayer* (1879) 46 Conn. 558, 33 Am. Rep. 36, the court before proceeding to consider the case with reference to the statute discussed in § 29, infra, remarked: "The fact that [the wife] knew of the work and made no objection to it does not make it her debt, and does not charge her land with its payment. Her husband, having a life estate in the land, might well

Annotation.

In other cases it has been treated as an element which indicates consent and approval on her part (*b*). Under this theory, the

---

contract for an improvement which would make it more valuable to him, and her knowledge and silence without an active participation in the contract, and with no resulting benefit to her or her estate, are insufficient to impose upon her any liability."

In *Rimmey* v. *Getterman* (1885) 63 Md. 424, the court thus commented on the evidence: "The admitted fact that the husband was without means tends strongly to sustain Rimmey in his statement that he was relying wholly on the wife, and considered himself as contracting with her. Her whole conduct, promises, and payments justified him in supposing he was dealing with her and in feeling secure. The letter which he wrote Mrs. Getterman, informing her of the negotiation with the husband, and what he had agreed to have done, and at what price, and proposing to do more for a specified sum, clearly indicates that he regarded her as the responsible person; and he thereby gave her an opportunity to repudiate if she was not disposed to have the work done, which she did not do."

In *Barker* v. *Berry* (1880) 8 Mo. App. 446, the evidence, which was held to have no tendency to shew that the wife was bound by what the husband had done, was thus discussed: "The wife knew of the building, but this fact would not authorize the jury to infer that she ordered the work to be done, or was bound so far as her land was concerned. It was perfectly consistent with the express arrangement of the special contract that the wife should visit the building and know that it was in progress. There was no obligation upon her to dissent from the agreement that the contractor had been willing to make and so far as she adopted, or, to use the inapplicable word of the plaintiff, 'ratified' anything, it was the express written contract which she adopted, and by this she was not bound."

In *Kline* v. *Perry* (1892) 51 Mo. App. 422, the grounds upon which the wife was held not to be bound by the husband's contract were that "the husband had possession, under his marital rights," of the land in question, and that "she might well think he was constructing the building on his own account, and for his own benefit, for the rents he might collect thereon." But it is apparent from the authorities as a whole that the application of the doctrine stated in the text is not confined to cases in which the husband has the beneficial possession of the wife's land.

(*b*) In *McDonald* v. *Mark* (1909) 147 Ill. App. 434, the court thus commented upon the wife's testimony: "She expressly stated that she knew of the contract a few days before the radiators were removed from her premises. With knowledge of the contract with Blaha, and of the delivery of the boiler and radiators to be used, under said contract, in her building, she made no protest, gave no notice of any objection on her part to the improvement contemplated by the contract, and we think that the right to a lien is, under the provisions of sec. 2 of the Lien Act, the same as if the contract had been made with her."

In *Bradford* v. *Peterson* (1890) 30 Neb. 96, 46 N. W. 220, where a judgment holding that the husband was not the wife's agent was reversed, the court said: "In a number of cases this court has held that where a husband constructs a house on the land of his wife, of which fact she had full knowledge, the agency of the husband will be presumed; in other words, the wife, by her silence where she should speak, in effect admits that the work is being done for her benefit. *McCormick* v. *Lawton* (1874) 3 Neb. 449; *Scales* v. *Paine* (1882) 13 Neb. 521, 14 N. W. 522; *Howell* v. *Hathaway* (1890) 28 Neb. 807, 44 N. W. 1136. The wife must be aware while the building is being erected upon her land that it is being erected for her benefit, and that mechanics and materialmen who contribute to the erection of the building are entitled to compensation for such labor and material, and honesty and fair dealing require that, as she knowingly receives the benefit, she shall take the burden with it."

See also *Geary* v. *Hennessy* (1881) 9 Ill. App. 17; *Conway* v. *Crook* (1886) 66 Md. 290, 7 Atl. 402; *Fathman & M. Planing Mill Co.* v. *Christophel* (1894) 60 Mo. App. 106.

Annotation.

claimant's remedial rights, in so far as they depend upon the probative force of the wife's silence, will appropriately be determined on the same footing as if the evidence adduced by him had tended affirmatively to establish such consent and approval—a situation with regard to which the authorities are not harmonious. See next section.

§ 16. Wife's consent to or approval of her husband's acts.

The circumstance that the wife "consented to" or "approved of" the action of her husband in making the contract in question and procuring its performance has in various cases been specified as one of several items of evidence from which the husband's agency was held to be predicable (*a*). That it must, in any point of view, be regarded as possessing a distinct probative value with respect to that issue, is beyond dispute. But the authorities which bear upon the question whether that probative value is sufficient of itself to serve as the foundation of an inference concerning the husband's agency are conflicting (*b*). The conflict

---

(*a*) See, for example, *Taylor* v. *Gilsdorff* (1874) 74 Ill. 354; *McCormick* v. *Lawton* (1872) 3 Neb. 449 (wife was present when the contract was made, and assented to it); *Bodey* v. *Thackara* (1891) 143 Pa. 171, 24 Am. St. Rep. 526, 22 Atl. 754.

In *Frank* v. *Hollands* (1870) 81 Iowa, 164, 46 N. W. 979, the lien was held to be enforceable, where the evidence showed that the wife, when consulted by her husband about the installation of lightning rods, agreed to it and that she was present when they were put up, and made no objection.

(a) Inference of husband's agency not warrantable.

(*b*) *Hoffman* v. *McFadden* (1892) 56 Ark. 217, 35 Am. St. Rep. 101, 19 S. W. 753; *Capp* v. *Stewart* (1872) 38 Ind. 479; *Garnett* v. *Berry* (1876) 3 Mo. App. 197 (condemning an instruction to the effect that the wife's "knowledge and approbation" were sufficient to affect her with the liability of a principal); *Kansas City Planing Mill Co.* v. *Brundage* (1887) 25 Mo. App. 268 (plans for house approved); *Carthage Marble & White Lime Co.* v. *Bauman* (1891) 44 Mo. App. 386; *Farley* v. *Stroch* (1896) 68 Mo. App. 85; *Durass* v. *Broderick* (1898) 78 Mo. App. 260 (wife examined and approved plans for reconstruction of house).

In *Barker* v. *Berry* (1877) 4 Mo. App. 585, the fact that the wife knew that the work was going on, and after its completion joined her husband in a note for it, was held not to prove that she was in any way a party to the contract.

"The issue of fact in such a case is not whether the contract was made with her knowledge, or even with her approbation, but whether it was made by her authority, in her behalf." *Hughes* v. *Anslyn* (1879) 7 Mo. App. 400.

In *Garnett* v. *Berry* (1876) 3 Mo. App. 197, the court observed: "The law is well settled that the owner of the estate must, directly or indirectly, contract for the work which is to charge a lien upon it. If 'knowledge and approbation' are ever found sufficient for the purpose, it is not because of any intrinsic potency in those facts, but because they may be *primâ facie* evidence of authorization by the owner, to the effect of making him a principal party to the contract." This language seems to be essentially inconsistent with that used by the same court in the cases cited supra. The position that the wife's "approbation" may constitute *primâ facie* evidence of the husband's agency necessarily involves by implication the further position that the probative value of this fact is sufficient to warrant the inference of such agency in any case where no rebutting testimony is introduced.

Annotation.

of opinion which is indicated by decisions reviewed in the footnote is apparently due in some measure to the ambiguity of the terms involved. It is manifest that they may conceivably be understood either as signifying merely that the wife permitted the performance of certain acts which, in the nature of the case,

---

In *Ziegler* v. *Galvin* (1887) 45 Hun 44, 9 N. Y. Supp. 459 (decided under a statute applicable only to Buffalo), the agency of the husband was held not to be shewn by the findings of the trial court, which included one to the effect that the contract in question, which was for the building of an additional room in the wife's house, was made by her husband with her full knowledge, consent, and approval, and that "she knew of the contract and improvements being made at the time they were made." The court said: "Her husband, living with her upon the premises, has the right, with her consent, to rebuild and improve the same, at his own expense, for his own comfort and convenience and that of his family; he had the right to so contract and bind himself, without involving his wife." The cases decided with reference to the general Mechanics' Lien Law of New York, under which the owner's property is chargeable for work done with his "consent," were distinguished. See § 29, infra.

In *Lauer* v. *Bandow* (1878) 43 Wis. 556, 28 Am. Rep. 571, a complaint was held insufficient that merely alleged that the legal title to the land upon which the building in question was situated was in the defendant's wife, and that the contract with the plaintiff was entered into, and the house constructed, "with the full knowledge, consent, and approbation of said Anstine Bandow, and said building progressed under her daily view and inspection."

In *Fetter* v. *Wilson* (1851) 12 B. Mon. (Ky.) 90, the court, speaking with reference to an enactment which made the right to a lien dependent upon proof of the fact that the defendant was the "employer" of the claimant, observed: "To say that the wife may be regarded as the employer whenever it shall appear or may be inferred that, although the work done or materials furnished for a building on her land may have been directed by the husband and done or furnished for him, the wife knew of, and assented to, or did not dissent from, his acts in the premises, would in effect be placing the interests of the wife under the control and at the mercy of the husband. This would be to extend the operation of the statute further than is authorized either by its terms or by its object and intent." Clearly this consideration is equally relevant in respect of statutes of the ordinary type, which purport to create a lien for work done under a contract made with the "owner" or with the "owner or his agent."

(B) Inference of husband's agency warrantable.

In *Miller* v. *Hollingsworth* (1872) 36 Iowa 163, the court thus stated its conclusions: "Giving to the averments of the petition, and especially the averment that the lumber was furnished and used in the improvement of the defendant's real property 'with the full knowledge and acquiescence of the defendant,' a liberal construction, we hold that the demurrer should have been overruled. Full knowledge and acquiescence under such an interpretation would imply that the defendant knew the lumber was purchased by the husband without being paid for by him; that while it was so unpaid for, it was being used in the improvement of her real estate, to the enhancement of its value, and that she acquiesced in such use with such full knowledge of those facts. It should also appear that it was not, in fact, sold to the husband in reliance upon his credit alone. In view of such facts and knowledge the defendant, upon the plainest principles of equity, ought to pay. That an adult male or feme-sole would be bound to pay, under such circumstances, is not questioned. A wife being the owner of separate property, under the liberal provisions of our statute, is equally bound by the same principles, provided it appears that she has full knowledge of all the facts, and fully acquiesces in them, and in the appropriation of the property of another to the permanent enhancement of the value of her separate estate."

Annotation.

must affect her property, and which could not lawfully be done without her permission, or as bearing a more definitely technical connotation, importing that she became a party to the husband's contract, either at the time when it was made or subsequently. A "consent" or "approval" in the former sense has, it is clear, no probative relevance whatever in respect of the question whether the contract was adopted; a "consent" or "approval" in the latter sense necessarily implies such adoption. The disagreement between the authorities, therefore, would disappear if we were entitled to assume that the former meaning is to be ascribed to these words in every instance in which the justifiability of inferring the husband's agency has been denied, and the latter sense in

---

In *Burdick* v. *Moulton* (1880) 53 Iowa 761, 6 N. W. 48, the court based its conclusion in favour of the claimant upon the ground that the evidence (not fully stated) shewed that the wife knew of and consented to the improvement. Two elements specified were that she knew of the purchase of the land in question, and superintended the construction work performed by the claimant.

In *Wheeler Lumber, Bridge, & Supply Co.* v. *White* (1914) 164 Iowa 495, 145 N. W. 917, the wife's property was subjected to a lien on the ground that the contract was made with her approval; that she had knowledge of it; and that at all times during the progress of the work she knew of it and of the claims of the various materialmen.

In *Morrison* v. *Clark* (1899) 20 Utah 432, 77 Am. St. Rep. 924, 59 Pac. 235, the court distinguished between the situations which exist when the wife merely does not "prevent the erection" of a building by her husband, and when she "consents" to such erection.

In *Jobe* v. *Hunter* (1894) 165 Pa. 5, 44 Am. St. Rep. 639, 30 Atl. 452, it was shewn, without any contradiction, by competent testimony, that the wife had full knowledge of the contract, that the building was being erected on her land, that she took part in the conversations between her husband and the contractors relative to the work as it progressed, and that she made no objection at any time. The court said: "As none of these facts were disputed, it is a necessary assumption that the work was done, and the building erected on the land of the wife, with her full knowledge and consent." The precedent cited was *Forrester* v. *Preston* (1861) 2 Pittsb. (Pa.) 300, in which it was decided by the district court of Allegheny county, with reference to similar circumstances, that the wife was liable. The following passage from the opinion was quoted: "The building in this case was not erected without the consent of the wife under a contract made with a stranger. It was erected under a contract made with the husband, and, as the facts abundantly shew, under the knowledge, approbation, and concurrence of the wife. It is true that the husband made the contract in his own name, but the building was, with the knowledge and concurrence of the wife, designed and erected for her, and therefore, in making the contract, the husband may be regarded in law as the agent of the wife so much so as if he avowedly acted by her express authority. The husband's agency may be legitimately inferred from the relation and acts of the parties."

See also *Milligan* v. *Alexander* (1913) 4 A.L.R. 1022, and *Lex* v. *Holmes* (1860) 4 Phila. (Pa.) 10.

Compare also *White* v. *Smith* (1882) 44 N. J. L. 105, 43 Am. Rep. 347, where the right of a mechanic to enforce a common-law lien for repairs, executed upon a wagon at the request of the owner's husband, was affirmed on the ground that the owner had placed the wagon in her husband's charge, for use in the business which was carried on for the support of the family. The court thought it clear that the authority of the husband to have the repairs made might properly be implied from the manner in which the wife permitted the wagon to be used.

Annotation.

every instance in which such an inference has been held to be proper. But, in view of the language used in the opinions of the courts, it seems impossible to contend that all the apparently discordant precedents can be harmonized on this footing.

For a discussion of the enactments relating to the effect of the owner's consent, see § 29, infra.

§ 17. Wife's giving of directions with regard to the work.

In a case in which the claimant proved that the wife had given directions to some of the workmen, his right to enforce a lien on her property was denied on the ground that it did not "appear that there was any greater deference [paid] to her wishes in the plan of the house than is commonly shewn by a husband in causing a similar work to be done at his own expense" (*a*). The consideration thus relied upon was possibly the *rationale* of the decision in another case, in which the position was taken that an antecedent appointment of the husband as the wife's agent in respect of the making of a contract for the construction of a house which was to serve as a home for both could not be inferred from the mere fact that she gave directions as to the manner in which parts of the interior should be arranged (*b*); but such a criterion seems to be too vague to be of any practical value. The doctrine which, except in so far as it may be deemed subject to qualification in the sense adverted to in the preceding paragraph, may be regarded as now established, is that the husband's agency may warrantably be predicated from the fact that the wife undertook to give directions concerning the manner in which the work should be done (*c*). Having regard to the peculiar incidents of the matri-

---

(*a*) *Hoffman* v. *McFadden* (1892) 56 Ark. 217, 35 Am. St. Rep. 101, 19 S W. 753. The facts as stated by the court were as follows: "The building erected was located only about 40 feet from a house occupied by the defendant and her husband. She witnessed the progress of the work, and gave some directions to the carpenters as to the manner of executing it. Her husband had expressed a desire to have the building so constructed that she would be pleased with it, and one of the witnesses testified that 'she was present every day and had the work done to suit her.' . . . The contract for the work was made with the husband, and the labor of the carpenters was all paid for by him. All the materials purchased from the plaintiff and others were procured on the husband's order, and, for aught that appears to the contrary, they were sold entirely on his personal credit. The defendant testified that she objected to the erection of the house for reasons which she states, and in this respect her testimony is supported by that of two other witnesses. She also states that her husband was not authorized to act as her agent, and that she was not consulted about the contract for the improvement, and had no knowledge of its terms."

(*b*) *Kansas City Planing Mill Co.* v. *Brundage* (1887) 25 Mo. App. 268 (arrangements of closets and the like). Compare *Barker* v. *Berry* (1880) 8 Mo. App. 446, where similar evidence was held to be insufficient to shew an "adoption" of the contract by the wife.

(*c*) This is one of the points decided in *Milligan* v. *Alexander* (1913) 4 A.L.R. 1022. See also *Watson* v. *Carpenter* (1888) 27 Ill. App. 492 (wife was at home nearly all the time while it was in progress, repeatedly giving

Annotation.

monial relationship, it is obvious that, in the final analysis, the question to be answered in cases where the claimant relies upon evidence of this purport is simply whether the acts of the wife "were by permission of her husband, and attributable to a wifely interest in her husband's affairs, or were from a conscious assertion of her own rights" (*d*).

---

directions about it and at times selecting the material to be used); *Bruck* v. *Bowermaster* (1890) 36 Ill. App. 510 (wife directed entire work as though she owned the house); *Inter-State Bldg. & L. Asso.* v. *Ayers* (1897) 71 Ill. App. 529, affirmed in (1898) 177 Ill. 9, 52 N. E. 342 (wife gave to men delivering the materials numerous orders with regard to the fixtures, trimmings, and moldings, and examined the work and caused some changes to be made); *Rimmey* v. *Getterman* (1885) 63 Md. 424 (before claimant commenced the building of the barn in question, the wife told him to go ahead with the work, was present when the measurements for the structure were made, gave directions about the building, told the plaintiff to do the work as she wanted it done, said she would pay for it, and caused the plan to be changed in such a manner as to thus increase the cost to the amount of $200); *Leisse* v. *Schwartz* (1879) 6 Mo. App. 413 (while the building was going on, the wife was frequently about the work, and on one occasion gave directions, along with her husband, for an enlargement of the house); *Schmitt* v. *Wright* (1879) 6 Mo. App. 601; *Farley* v. *Stroch* (1896) 68 Mo. App. 85; *McCormick* v. *Lawton* (1872) 3 Neb. 449 (wife not only assented to the contract, but encouraged the mechanics to go on with the work, and gave directions as to how it should be done); *Bradford* v. *Peterson* (1890) 30 Neb. 96, 46 N. W. 220.

In *Carthage Marble & White-Lime Co.* v. *Bauman* (1891) 44 Mo. App. 386, it was held that a nonsuit was erroneous, having regard to the testimony of a witness to the effect that the wife "not only visited the building as often as twice a week during its construction, but also that she gave instructions and directions as to the mode and manner of doing the work." But the opinion was expressed that, in view of the fact that the contracts for building the house were in writing and in the name of Mr. Bauman, the alleged acts of the wife concerning the building, if they stood alone, might very well be reconciled with "a wifely interest in her husband's affairs."

For a case in which the giving of directions was treated as evidence tending to shew a ratification of the contract, see *Bodey* v. *Thackara* (1891) 143 Pa. 171, 24 Am. St. Rep. 526, 22 Atl. 754 (§ 26, infra).

(*d*) *Kuenzel* v. *Stevens* (1900) 155 Mo. 280, 56 S. W. 1076. The evidence there presented was thus summarized by the court: Mr. Stevens engaged the architects, and, as between them, nothing was said as to the ownership of the property, but before the drawings were concluded Mrs. Stevens saw the architects, discussed the plans and details, and gave them her views. When the contractors were ready to begin, she requested that the work of excavation should wait until she arrived, as she desired to break the ground with the first shovelful of earth herself, and did so. She visited the plaintiff's planing mill, in company with her husband, to inspect the millwork that was to go into the house, found fault with some of it, and had it changed to suit her. She was at the building almost every day, criticized what she disliked, and had changes made; when her attention was drawn to a china closet and its details explained to her she expressed her disapproval, and said she would instruct the architect to change it, and it was done. Other changes were also made at her direction. Although Mr. Stevens was sometimes at the building with his wife, yet she did most of the talking and gave most of the orders, and she was frequently there without him. In view of this state of facts the court reversed the judgment in *Kuenzel* v. *Nicolson* (1898) 73 Mo. App. 14, on the ground that "whatever difference of opinion there may be as to the side to which this evidence gravitates, there can be no doubt but that the evidence in support of the plaintiff's theory was of character sufficient to be denominated substantial; and, therefore,

Annotation.

Clearly the husband's agency is *a fortiori* an appropriate deduction where evidence that the wife exercised an independent authority over the performance of the contract is found in combination with other elements of a like significance (*e*).

---

applying the principles above stated, the appellate court should not disturb the order of the trial judge [i. e., for a new trial] made in the exercise of a discretion which was within his province alone."

In *McDonnell* v. *Nicholson* (1896) 67 Mo. App. 408, which involved another claim arising out of the same contract, the testimony of a subcontractor to the effect that when he asked Mrs. Stevens for the specifications, to find out whether the plastering was to be finished with the smooth or granular finish, she answered that it must be smoothly finished, was held to constitute independent and substantial evidence of the alleged agency of the husband. In this point of view certain declarations of his were pronounced to be competent proof against his wife.

In *Thompson* v. *Kehrmann* (1895) 60 Mo. App. 488, the evidence with respect to which the opinion was expressed that "all that was said or done by the wife might be well ascribed to wifely interest in the improvements being put upon her land by her husband," was as follows: The husband was general manager for a floral company, and entered into a written contract with the plaintiffs, in his own name, for the erection of two greenhouses on the lot in question, which was owned by his wife. A written contract for the erection of a dwelling house on the same premises had shortly before been signed by the husband and wife, and was in course of performance. After the drafting of the contract for the greenhouses, the husband said he could not sign until he shewed it to his wife. During an interview which they had the next day with one of the plaintiffs, the husband spoke of omitting temporarily the construction of one of the greenhouses provided for in the plans, but the wife remarked that she did not want any building going on after she got into the dwelling house. The following day the contract under review was signed by the husband alone. While the work was progressing, the wife had several conversations with plaintiffs, in the course of which she stated that she and her husband were anxious to go away during the summer, and "she wished they would hurry up the work." On one occasion, when the plaintiffs told the husband they wanted $1,000, his wife said: "Well, we will try to raise it, and go ahead with the work." When the first payment on the contract was due, the husband gave his individual note for $1,500, which was indorsed by the wife, so that it might be discounted; but not being able to discount it, the plaintiffs returned it to the husband, and received thereafter certain payments in cash. Afterwards the floral company made an assignment and there was some talk between plaintiffs and Mrs. Kehrmann about making "some arrangement," as she could not meet the note she had indorsed. She also spoke of selling her house if she could get a chance.

See also *Carthage Marble & White-Lime Co.* v. *Bauman* (1891) 44 Mo. App. 386, note (*c*), supra.

(*e*) Such was the situation in the cases cited infra. Only the evidence relating to the directions is referred to, the rest being stated under the appropriate heads. *Wheaton* v. *Trimble* (1887) 145 Mass. 345, 1 Am. St. Rep. 463, 14 N. E. 104 (wife personally gave the petitioner directions as to parts of the work, and selected papers for upper rooms); *Collins* v. *Megraw* (1871) 47 Mo. 495 (wife to some extent gave personal directions respecting the work, although her husband was the principal manager); *Gillies* v. *Gibson* (1908) 17 Man. L. R. 479 (during the progress of the work the defendant and her husband were frequently in the office of the company which lent the money for the work, giving directions as to the buildings).

In *Chicago Lumber Co.* v. *Mahan* (1893) 53 Mo. App. 425, it was held error to take the case from the jury where the evidence was to the following effect: That the contract for the erection of the house in question was let through an architect for the owners; that the wife had knowledge of the con-

Annotation.

In some cases the giving of directions has been discussed as a circumstance tending to shew, not that the husband was the wife's agent, but that she was actually a party to the contract in question (*f*).

So far as the remedial rights of the claimant are concerned it is obviously a matter of indifference, from which point of view such evidence is regarded.

§ 18. Wife's offer of suggestions concerning the work.

In some cases it has been laid down or assumed that the fact of the husband's agency cannot be inferred from testimony which shews that the wife made "suggestions" with regard to the manner in which the work should be done (*a*). But it is scarcely

---

struction of the house from the beginning; that she had given a mortgage on her land to raise money to pay for the house; that she had paid all the money which had been paid on account of the building; that she had made these payments on the orders of the architect who had let the contract; that she took personal supervision of the construction of the house, and on several occasions, when her husband ordered the contractor to deviate from the specifications and plans, she commanded him to comply with them; that she frequently told the contractor that he must build the house according to the specifications, and not alter them without consent; that it was her money which was paying for the house, and her husband had nothing to do with the matter; that she had finally compelled the contractor to quit the contract because he was not doing the work to suit her; and that, ever since the completion of the house, she had herself been collecting the rents derived from the improvements thus made.

(*f*) In *Rand* v. *Parker* (1887) 93 Iowa 396, 35 N. W. 493, where it was sought to establish the lien upon the wife's realty for lumber furnished by the claimant and used in the construction or repair of a building, and in making other improvements, the evidence shewed that the lumber was purchased by, and charged to, the husband, and that he gave his note for the amount found to be due. The theory of the defendant was that the wife contracted with her husband to make the improvements for a named sum of money, which she paid him, and that the plaintiff was a subcontractor, who, as the statutory notice had not been given, was not entitled to the relief demanded. But the court, relying mainly on the evidence of a carpenter as to various directions given by the wife with regard to the work, both before and after it was begun, held that the evidence clearly shewed that, so far as the claimant was concerned, she was a contractee. It might be that both she and her husband were; but, if so, both were principals, and, whichever theory is adopted, the claimant was entitled to a lien.

See also *Taylor* v. *Gilsdorff* (1874) 74 Ill. 354.

(*a*) *Conway* v. *Crook* (1886) 66 Md. 290, 7 Atl. 402 (suggestions regarding alterations in the cupboards and porch of a house); *Chicago Lumber Co.* v. *Mahan* (1893) 53 Mo. App. 425.

In *Alexander* v. *Perkins* (1897) 71 Mo. App. 286, where the only evidence to connect defendant with the transaction was that, upon one occasion when she was in the house under construction, and near the bathroom, where one of the plaintiff's employees was at work on the basin of the washstand, she told him "to be sure and get the closet working all right," it was held that this was not sufficient to make a case for plaintiff. The court observed that "it would be strange if any single disconnected utterance concerning work contracted for in the name of the husband should be held evidence sufficient to establish an agency." *Chicago Lumber Co.* v. *Mahan* (1893) 53 Mo. App. 425, was cited.

Annotation.

necessary to point out that, in many instances, there must be great difficulty in determining whether the language used by her should be placed in the category of "suggestions" or of "directions." What is in substance and actual purport a peremptory order may be, and frequently is, expressed in words which, on their face, amount merely to an expression of preference. This aspect of the matter should always be explained to the jury in any case where the distinction between these two evidential elements is relied upon by the defendant.

In *Milligan* v. *Alexander* (1913) 4 A. L. R. ante, 1022, it will be observed that, in one of the syllabi prepared by the court, the wife's "consent" was declared to be inferable from evidence that the wife "gave directions or made suggestions" regarding the work. For the purposes of the doctrine thus laid down, the probative values of "directions" and "suggestions" were apparently assumed to be equal. If so, the position taken can scarcely be regarded as correct, in view of the authorities cited in this and preceding sections, which shew that, according to the generally accepted theory, those values are in many instances essentially different.

§ 19. Wife's exhibition of interest in what was done under the contract.

The fact that the wife "took some interest" in the manner in which the building in question was to be erected has been mentioned as one of several items of evidence which were regarded as tending to prove the husband's agency (*a*). But it may reasonably be assumed that no court would hold so colourless an element to be sufficient of itself to justify the allowance of a lien. That it is not sufficient has been expressly held by an intermediate court of appeal (*b*). Other illustrations of the same doctrine are found in the cases in which the enforceability of the claim has been

---

In *Duross* v. *Broderick* (1899) 78 Mo. App. 260, where a judgment in favour of the wife was sustained, a portion of the evidence which was held to be insufficient to establish the claimant's right to a lien consisted of her own testimony to the effect that her husband wanted to please her, and always asked her how she wanted things done; that during a conversation which the contractor and her husband held in her presence about the reconstruction of the house in question, she said that her husband wanted to know whether she "wanted it so and so"; that she replied that she would like it either this way or that way; that she and her husband talked over the plans with the architect; and that nothing was done by her husband about the house without first consulting her about it to see if she liked it.

(*a*) *Tarr* v. *Muir* (1899) 107 Ky. 283, 53 S. W. 663.

(*b*) In *Groth* v. *Stahl* (1892) 3 Colo. App. 8, 30 Pac. 1051, it was observed: "What the case contains to shew her knowledge that her husband was going to build, that the work was being done, and that she took a lively, wifely interest in the progress of the labour, does not amount to that proof of agency which the law requires when the materialman seeks to charge it with a lien for supplies which were furnished under a contract entered into with one who was the owner of the property."

Annotation.

regarded as turning upon the question whether the acts and words of the defendant betokened simply a "wifely interest" in the work performed under the contract made by the husband, or the exercise of that degree of authority which is deemed to shew that she was a principal in the transaction. See § 17, supra.

§ 20. Cost of work or materials defrayed by wife's money.

Evidence that the money of the wife was applied to the payment of the claims of the persons engaged in performing labor, or furnishing materials under the contract entered into by the husband, is regarded as tending strongly to prove that she was the real principal (*a*). The probative significance of this element is

---

(*a*) In *Thompson* v. *Shepard* (1882) 85 Ind. 352, the court thus stated its conclusions: "From these facts, it seems to us, the inference follows that the house was built by the husband of the appellee for her, either as her agent or for the $400 as a contractor. The facts that she was the owner of the land on which the house was built, and that she furnished $400 with which to build it, not only forbid the idea that it was built by the husband voluntarily and without her consent, but compel the conclusion that it was built by him for her, pursuant to an understanding and arrangement with her, by which he was to construct the building for the $400, or, as her agent, take the money and erect the building for her."

In *Rimmey* v. *Getterman* (1884) 63 Md. 424, the material facts and the conclusions drawn therefrom by the court are thus stated: "Mr. Getterman had no money or property. The wife had. She bought the farm for him to work. She so testifies in addition to the admission of the answer. It needed houses and she agreed to furnish the money to pay for building them. She could not, in the start, agree to pay for them without thereby agreeing to build them. They would greatly enhance the value of her farm, and be hers, and she could not have expected her husband, without means, to have them built on his credit, and that she was to escape liability for their cost. By agreeing they should be built, and that she would furnish the money to pay for them, we must hold that she made her husband her agent to have it done. . . . . When Rimmey's credit failed to secure the necessary lumber she came forward and agreed to pay the lumber dealers their money, and forthwith the material came. About this there is no controversy; she admits it. During the progress of the work she made sundry payments on account of it. This she also admits. . . . In addition to all this we have Mr. Ensor's account of what Mrs. Getterman said to him when she came to see him, after he wrote to her that he had the claim to collect, and unless it was paid he would have a lien and proceed against the buildings. He testifies that she was much troubled, and begged that he would not proceed against the buildings, and said 'that she would pay Mr. Rimmey what she owed him.' She did not contend that her husband was liable and she was not. She speaks of what she owed, and not what he owed. She only objected to the amount claimed, and made no other objection to paying the bill. She said all she wanted to know 'was how much she owed Mr. Rimmey;' that she would mortgage her property and pay all the claims for erecting the buildings. In all this interview she recognized the debt as hers, and that she must arrange for its payment. Taking all these circumstances, admissions, and statements into consideration, we think there is no escape from the conclusion that Getterman acted as his wife's agent, and that the contract must be regarded as made for her. If the authority was not express, it was necessarily implied from what was said and done for her."

In *Collins* v. *Megraw* (1871) 47 Mo. 495, one of the circumstances relied upon was, that the wife joined the husband in the execution of a note in settlement of the plaintiff's claim.

Annotation.

doubtless particularly weighty when, as in the cases cited below, she borrowed the money with the view of using it for this purpose (*b*). But such an intention clearly cannot be predicated unless

---

In *Carthage Marble & White-Lime Co.* v. *Bauman* (1893) 55 Mo. App. 204, it appeared from the testimony given by the husband and the wife on cross-examination that, about ten years before the house in question was erected, the wife sold another house for $16,000; that the husband used the money, partly paying for some business property, the title to which was taken in his individual name; that subsequently he purchased the lot on which the house in question was built, paying $5,000, taking the title to his wife; and that he afterwards expended about $18,000 in making the improvements. Held, that the question of the husband's agency had been properly submitted to the jury, as it was a justifiable inference from this testimony that the money derived from the original sale was regarded as belonging to the wife; that the husband invested it for her benefit; and that in purchasing the lot and in building the house he was refunding to her that money and the reasonable profits arising from its investment.

In *Farmilo* v. *Stiles* (1889) 52 Hun 450, 5 N. Y. Supp. 579, a nonsuit was held to be erroneous, where the wife testified that her husband procured the house in question to be built for her and at her request, and that she furnished him from time to time with money to pay for it as the work progressed.

In *H. C. Behrens Lumber Co.* v. *Lager* (1910) 26 S. D. 160, 128 N. W. 698, Ann. Cas. 1913A, 1128, one of the evidential elements adverted to was that the wife personally directed the payment of $250 to the plaintiff on its account while its material was being furnished.

In *Young* v. *Swan* (1896) 100 Iowa 323, 69 N. W. 566, where the husband purchased lumber, and paid for it with money furnished by his wife, it was held that in an action by the vendor to establish and foreclose a mechanics' lien against the property of the wife, he could not insist that this payment should be applied, to the detriment of the wife, upon the general account which the husband had with the vendor at the time when the purchase was made.

(*b*) Such was the situation in *Chicago Lumber Co.* v. *Mahan* (1893) 53 Mo. App. 425. See § 17, note (d), supra.

In *Frohlich* v. *Carroll* (1901) 127 Mich. 561, 86 N. W. 1034, the finding of the trial judge, that the husband entered into the contract on behalf of his wife, was held to be correct "beyond question," the evidence being to the effect that the wife owned the land; that she knew the buildings were to be erected thereon; that she wanted them built; that she used funds of her own, and borrowed more to pay upon the contract, and that she drew her own personal checks to the complainant and other contractors.

In *Fischer* v. *Anslyn* (1888) 30 Mo. App. 316, the court thus stated its conclusions: "If the wife had been before the court on the appeal we think the court, upon the evidence, would have been warranted in finding that she was bound by her husband's contract in building the house, for the record plainly shews that the wife contemplated building, having mortgaged her property to raise money for that express purpose, and covenanted with the mortgagee that she would keep the premises free from all mechanics' liens. Can it be said that after she had permitted her husband to go on and make the contract for these contemplated improvements, and superintend the erection thereof, and expend her money thus raised as she intended it should be expended, and have moved in and occupied the house, that the policy of the law will permit her to claim that not only her interest in the land, but that the house also, is not subject to a mechanics' lien for materials that entered into the construction of the building? . . . . We do not think that she can shield herself behind such a defence. '*Qui facit per alium, facit per se*,' is a maxim entirely applicable here."

In *Boeckeler Lumber Co.* v. *Wahlbrink* (1915) 191 Mo. App. 334, 177 S. W. 741, the liability of the wife was predicated on the ground of estoppel. S § 28, note (b), infra.

Annotation.

some independent testimony going to shew that she knew of the contract is offered (*c*).

There is some authority for the doctrine that the significance of this element is not impaired by the circumstance that the husband furnished a part of the money expended on the work (*d*). But possibly this doctrine needs some qualification with reference to the ratio between the respective amounts paid by the husband and the wife. There is much difficulty in conceding that the same inference is indicated, irrespective of whether a small or a large part of the total cost of the work is defrayed by the wife.

§ 21. Objection by wife to performance of the contract.

It is clear that the wife's property cannot be subjected to a lien where it is proved that she protested against the making of the improvement in question, and that her protest was communicated to the claimant (*a*).

The effect of a specific provision that a married woman who desires to disclaim responsibility in respect of work which is being performed on her land shall file a written notice shewing that she does not consent thereto depends upon the terms of the statute.

(*c*) In *Cattell* v. *Ferguson* (1892) 3 Wash. 541, 28 Pac. 750, the evidence shewed that about a week before the claimants signed a contract with the husband for the erection of a building on the wife's property, the husband and wife obtained from a real estate company, a loan for which they executed a mortgage upon certain lands, including the real estate in question, the mortgage being given to secure the loan, and also the performance of a contract by which the husband and wife bound themselves to make improvements of a certain value on the lands mortgaged. One of the plaintiffs testified that the husband had told him they were borrowing the money for the purpose of putting up the building. The court was of opinion that the plaintiffs should have been nonsuited, for the reason that at the time they rested their case there was no proof upon which the claim of agency could stand. This statement of the husband was not sufficient to support that claim, and no act on the part of the wife, apart from the giving of the mortgage aforesaid, was proved. "It was not shewn that she had any knowledge of the contract, or of the work being done." The case was, however, allowed to proceed, and the testimony given by the husband in his wife's behalf was held to be, when taken in connection with that previously introduced, sufficient to establish *primâ facie* the fact of his agency. The part of his testimony upon which the court laid most stress consisted of his statement that the claimants did not stand in the relation of ordinary contractors, because they had obliged his wife by becoming her bond for the completion of the building. This was declared to be some proof that the wife knew what was going on with reference to the erection of the building, and that she had participated therein; also, that it was her building and was being erected for her. His testimony was only intelligible upon the theory that the instrument he referred to, wherein the plaintiffs became sureties for his wife in the erection of the building in question, was also the contract relating to the improvements mentioned in the mortgage; or, perhaps, a bond given by the appellant as additional security for its performance.

(*d*) *Frohlich* v. *Carroll* (1901) 127 Mich. 561, 86 N.W. 1034 (fact was characterized as "immaterial").

(*a*) *Morrison* v. *Clark* (1899) 20 Utah 432, 77 Am. St. Rep. 924, 59 Pac. 235.

Annotation.

But there is presumably no existing enactment which is susceptible of a construction which will enable a claimant to subject her property to a lien, even though she may not have known that the work was in progress (*b*).

§ 22. Miscellaneous circumstances tending to prove agency of husband.

The following circumstances have been held to have a tendency to shew that, in making the arrangements for building a house on the wife's property, the husband was acting as her agent:—

That he had no interest in the particular piece of land upon which the improvements in question were made (*a*).

That one of the contractors employed by the husband delivered most of the materials directly to the wife (*b*).

That the wife joined her husband in the execution of a lease which provided for the erection of the building (*c*).

§ 23. Miscellaneous circumstances tending to disprove agency of husband.

The circumstances falling under this category are as follows:—

That the claimant did not know that the materials in question were to be used for the purpose of repairing a house owned by the wife (*a*).

(*b*) The New Jersey Mechanics' Lien Law (Revision, page 674, § 9), provides that a married woman on whose land any building is erected shall be taken as consenting thereto, and the building and curtilage shall be subject to the lien created by the Act, unless the owner files in the clerk's office of the county where the land is situated a notice that she does not consent to the construction. But there is also a proviso (added in 1876) that "nothing in this Act contained shall be so construed as to make the lands of any person liable for any building or repairs not authorized by the owner, or built or done without the knowledge of the owner." In *Dodge* v. *Romain* (1889) — N.J. —, 18 Atl. 114, the court construed this proviso as importing that, in order to charge the wife's property with a lien, "she must . . . have authorized the erection, or she must have had knowledge that the building was being erected, and upon such knowledge failed to file the statutory notice of her dissent." There it was conceded that there was no direct proof of the wife's knowledge of the fact that the building in question was being erected on her lands. The inference of such knowledge which it was sought to draw from the fact that she lived quite near to the premises, and must have observed the construction of the building, was held to be effectually overcome by the clear proof that during the period under discussion she was confined by serious illness to a part of her residence from which it was impossible to see her land. The contention that she might be charged with knowledge of the work through the knowledge which her husband possessed was rejected on the ground that his agency was not proved—so far, at all events, as the transaction of business with the claimants was concerned.

(*a*) *Cattell* v. *Ferguson* (1892) 3 Wash. 541, 28 Pac. 750.

(*b*) *Interstate Bldg. & L. Asso.* v. *Ayers* (1897) 71 Ill. App. 529, affirmed in (1898) 177 Ill. 9, 52 N.E. 342.

(*c*) *A. A. Nicol Heating & Plumbing Co.* v. *J. B. Neevel & Sons Constr. Co.* (1915) 187 Mo. App. 584, 174 S.W. 161, distinguishing *Henry Weis Cornice Co.* v. *Neevel* (1915) 187 Mo. App. 496, 174 S.W. 159, as a case in which there was no evidence of the wife's having authorized the construction of the building in question.

(*a*) *Wendt* v. *Martin* (1878) 89 Ill. 139.

Annotation.

That the claimant did not know that the wife owned the land on which the work in question was performed (*b*).

That the wife did not know that the materials in respect of which the lien is claimed were purchased by her husband on credit (*c*).

That the wife took no part in the planning or construction of the building in question (*d*).

That the wife had not "suggested alterations during the progress of the work" (*e*).

That the wife did not contribute any of her own money towards the erection of the building in question (*f*).

That the wife did not give any directions regarding the work in question (*g*).

That the husband executed in his own name the contract for the building of the structures in question, but signed jointly with his wife the contract for the erection of a dwelling house on the same lot (*h*).

That the wife took no part in the purchase of the materials used for the building in question (*i*).

That for all the purposes of occupancy and enjoyment, as well as keeping in repair, the husband treated as his own the house which the claimant repaired (*j*).

§ 24. Miscellaneous circumstances not tending to prove husband's agency.

The mere fact that the wife owned the land on which the house was erected is not sufficient to charge her or her estate with the cost of the house (*a*).

(*b*) *Copeland* v. *Kehoe* (1880) 67 Ala. 594; *Wendt* v. *Martin* 89 Ill. 139; *Kansas City Planing Mill Co.* v. *Brundage* (1887) 25 Mo. App. 268; *Duross* v. *Broderick* (1899) 78 Mo. App. 260 (evidence of claimant's want of knowledge was treated as countervailing the effect of other testimony from which it appeared that the fact of the improvements being made under a contract made with her husband was known to her, and that she was consulted about the details of the improvements and examined and approved the plans).

(*c*) *Price* v. *Seydel* (1877) 46 Iowa 696; *Young* v. *Swan* (1896) 100 Iowa 323, 69 N.W. 566.

(*d*) *Rust-Owen Lumber Co.* v. *Holt* (1900) 60 Neb. 80, 83 Am. St. Rep. 512, 82 N.W. 112.

(*e*) *Thompson* v. *Kehrmann* (1895) 60 Mo. App. 488.

(*f*) *Conway* v. *Crook* (1886) 66 Md. 290, 7 Atl. 402.

(*g*) *Jones* v. *Walker* (1875) 63 N.Y. 612; *Rust-Owen Lumber Co.* v. *Holt* (Neb.) *supra*; *Getty* v. *Tramel* (1885) 67 Iowa 288, 25 N.W. 245 (lumber purchased for barn); *James* v. *Dalbey* (1899) 107 Iowa, 463, 78 N.W. 51 (lightning rods purchased for house and barn). In the former of these Iowa cases the wife's disapproval was apparently not communicated to the claimant; in the latter it was. But this circumstance seems to be immaterial, in the absence of specific evidence that the wife had held out her husband as her agent.

(*h*) *Thompson* v. *Kehrmann* (Mo.) *supra*.

(*i*) *Rust-Owen Lumber Co.* v. *Holt* (1900) 60 Neb. 80, 83 Am. St. Rep. 512, 82 N.W. 112.

(*j*) *Jones* v. *Walker* (1875) 63 N.Y. 612.

(*a*) *Lauer* v. *Bandow* (1878) 43 Wis. 556, 28 Am. Rep. 571. This doctrine is plainly taken for granted in all the cases cited in this subtitle.

Annotation.

The conclusion that the husband acted as his wife's agent in making the contract for the erection of a house on her land was in one case held not to be warranted by the mere fact that the house was to serve as a residence for herself and her children (*b*).

In another case it was held that the right of the plaintiffs to enforce a lien for labour performed in a mine belonging to the wife could not be predicated from evidence that, when conversing with them, she said that her husband wanted it worked, and that she would see they were paid (*c*).

In another case it was held that the fact that the wife signed a joint note for the materials furnished did not shew that they had been furnished at her request (*d*).

In another case it was held that no "request," within the meaning of the statute, was shewn by evidence to the effect that on one occasion, while the petitioners were at work on the house in question, she stated what her husband's wishes were with regard to a certain detail, and added that, "if her husband was suited, all would be suited" (*e*).

§ 25. Credit given to husband alone; probative significance of this fact.

In many of the cases in which the agency of the husband was denied, the circumstance that the labour or materials in respect of which the lien was claimed had been furnished solely on his credit has been adverted to as one of the grounds of the decision (*a*).

(*b*) *Garnett* v. *Berry* (1876) 3 Mo. App. 197. The court relied upon the consideration that "it was no part of [the wife's] duty or care to provide a home for herself and her children. That was incumbent on the husband and father. The occupancy of the premises was his beneficial use, and not hers." Compare *Wadsworth* v. *Hodge* (1889) 88 Ala. 500, 7 So. 194, where the same fact was considered from a different point of view.

(*c*) *Folsom* v. *Cragen* (1887) 11 Colo. 205, 17 Pac. 515.

(*d*) *Johnson* v. *Tutewiler* (1871) 35 Ind. 353.

(*e*) *Bliss* v. *Patten* (1858) 5 R.I. 380. The court said: "She expresses no wish of her own, gives no direction, makes no inquiry, assumes no responsibility; much less does she express any wish or desire that the work should be done for her, or at her expense. To say that if it pleased her husband it would please herself, and all would be pleased, is but saying that she and they desired that his wishes should be gratified."

(*a*) *Copeland* v. *Kehoe* (1880) 67 Ala. 594; *Wadsworth* v. *Hodge* (1889) 88 Ala. 500, 7 So. 194; *Hawkins Lumber Co.* v. *Brown* (1893) 100 Ala. 217, 14 So. 110; *McGeever* v. *Harris* (1906) 148 Ala. 503, 41 So. 930; *Wendt* v. *Martin* (1878) 89 Ill. 139, followed in *Little* v. *Vredenburgh* (1884) 16 Ill. App. 189; *Campbell* v. *Jacobson* (1893) 145 Ill. 389, 34 N.E. 39; *Getty* v. *Tramel* (1885) 67 Iowa 288, 25 N.W. 245; *Willard* v. *Magoon* (1874) 30 Mich. 273; *Durossett* v. *Broderick* (1899) 78 Mo. App. 260; *Bradford* v. *Higgins* (1891) 31 Neb. 192, 47 N.W. 749.

In *Ziegler* v. *Galvin* (1887) 45 Hun 44, 9 N.Y. Supp. 459, a finding of fact that the husband made the contract himself, and intended to carry it out, and pay the consideration named to the contractor, and that the wife did not expect or intend to pay any part thereof, was held to be inconsistent with the conclusion of the trial court that the husband was acting as his wife's agent.

Annotation. Obviously, however, the probative force of such evidence may, in another point of view, be regarded as being that of an element which, whenever its presence is established, demonstrates the nonliability of the wife, irrespective of whether the husband was or was not her agent.

IV. Adoption of the husband's contract by the wife. Estoppel of wife to deny her liability.

§ 26. Ratification, when predicable.

As already stated in § 13, *supra*, the language used in many of the cases cited in subtitle II. is often such as to render it uncertain whether the court regarded the evidence under review as tending to prove or disprove the existence of a contract to which the wife was already a party, or as tending to prove or disprove the fact of her having ratified a contract to which she had not previously been privy. Whenever there is any uncertainty concerning the *rationale* of the decisions, they are dealt with in that subtitle. In the present section only those will be reviewed which have been explicitly referred to the notion of a ratification.

Some of the cases under this head illustrate the application of the general principles of the law of agency, that "a ratification can only be effectual between the parties when the act is done by the agent avowedly for, or on account of, the principal, and not

---

In *Reese* v. *Cornell* (1915) 172 Iowa 734, 154 N.W. 1002, where the inference that the husband was acting for his wife was held not to be warranted by evidence which, although it shewed that he represented her in some matters as to painting, repairing, procuring insurance, and looking after the yard, also disclosed that the erection of the house was an enterprise of his own, and that he entered into the contract on his own account. The court said: "If Cornell contracted in his own behalf for the erection of the house, and the contractor dealt with him with that understanding, Mrs. Cornell, the owner of the realty on which the house was erected, is not thereby rendered liable to the contractor or subcontractors, even though he might have bound her by contract in her behalf had he been so disposed, or even though she may have contributed something thereto, as the old house, toward the enterprise."

In *Hines* v. *Hollingsworth* (1917), 4 A. L. R. 1018, the ground upon which it was held that the claimant could not subject the wife's property to a lien was that the contract for the improvements on her land had been made by the husband on his own credit, and that it was understood that the mechanics were not to look to the lien as a security for his debt.

In *Kansas City Planing Mill Co.* v. *Brundage* (1887) 25 Mo. App. 268, the following remarks were made: "Mrs. Brundage being admitted the owner of the land on which the building was erected, it devolved upon the plaintiff to shew a contract made with her, or her agent for her, for the work and materials. The only contract put in evidence was between W. H. Brundage as the owner, and Moore Brothers, as contractors. It was reduced to writing. Mrs. Brundage was not a party to it. It does not purport on its face to be made in her behalf, or for her use and benefit, nor by W. H. Brundage as her agent. It was his personal undertaking, and shews that the contractors looked to him for pay. It is the accepted rule of law that an action to enforce a lien can only be brought against the debtor."

Annotation.

when it is done for or on account of the agent himself, or of some third person" (*a*); and that a ratification of a contract cannot be inferred unless it appears that the party alleged to have ratified it had knowledge of all the material facts involved (*b*).

In others the question considered was simply whether a ratification could warrantably be inferred from the evidence introduced (*c*). There is explicit authority for a doctrine that a

---

(*a*) Story on Agency, sec. 2512; quoted in *Kansas City Planing Mill Co* v. *Brundage* (1887) 25 Mo. App. 268, where the court laid it down that, the contract "having been made by the husband in his own name, and not as agent, and one which he undertook to perform in his own right, there can be no ratification invoked in the case."

In *Wilson* v. *Andalusia Mfg. Co.*, (1915), 4 A.L.R. 1016, the conclusion of the lower court that the wife bound herself and her property, was disapproved for the reason that "her acts in causing changes of plans for the repairs, and her practically constant presence at the building during its alteration and repair, could not be referred to her ratification of the contract for materials that was not made or attempted to be made in her name or for her. On the contrary, that was made by her husband alone, on his own responsibility."

(*b*) *Young* v. *Swan* (1896) 100 Iowa 323, 69 N.W. 566 (wife, who furnished husband with money to pay for all the materials required for a house, did not know that the lumber supplied by the plaintiff had been purchased on credit).

(*c*) In *Bartlett* v. *Mahlum* (1893) 88 Iowa 329, 55 N.W. 514, where the plaintiff claimed a lien for materials furnished to a person who had contracted with the defendant, William Mahlum, for the erection of a house, it appeared that he conducted the whole business in his own name and for himself, without disclosing any agency. The defendants relied upon the fact that a house and lot belonging to Mrs. Mahlum was conveyed as consideration for building the new house. But the court said: "Concede this to be true, yet Mrs. Mahlum knew that her husband was acting and contracting in his own name, and as owner of lot 5, and she at all times acquiesced therein and consented to what he did. Whatever may be their rights as between themselves, we must hold under the facts that, for all the purposes of this case, William Mahlum is the owner of said lot, and the person for whom the house was erected. The result must be the same, whether he acted as principal or agent, for Mrs. Mahlum fully authorized and ratified all his acts relating to the transaction."

In *Barker* v. *Berry* (1880) 8 Mo. App. 446, the court observed: "The wife, in her domestic capacity, has her own sphere, and may certainly 'give directions how she wants the closets and pantry finished'—which is all she did here—without authorizing an inference that she adopts as her own the contract of another person."

In *Bodey* v. *Thackara* (1891) 143 Pa. 171, 24 Am. St. Rep. 526, 22 Atl. 754, a verdict for the plaintiffs was held to be warranted by evidence which shewed that the wife assented to the contract in question, which was in fact made by her husband on her behalf and for her benefit; that the materials for which the lien was claimed were furnished with her knowledge and consent; that they were reasonably necessary for the improvement of her separate estate, and were used for that purpose; that the wife was frequently upon the premises, during the progress of the work, giving directions as to the materials that were being furnished by the plaintiffs, and also as to the manner of construction; in short, that she understandingly acted as though she herself, and not her husband, was one of the parties to the written contract.

See also *Bumgartner* v. *Hall* (1896) 163 Ill. 136, 45 N. E. 168, affirming (1895) 64 Ill. App. 45, where certain evidence (not stated) as to the wife's conduct during the progress of the work was held to shew ratification.

In *Wright* v. *Hood* (1880) 49 Wis. 235, 5 N. W. 488, it was held that a ratification of a contract for the improvement of a dwelling house could not

Annotation.

ratification by the wife of a contract for the erection of a house cannot be inferred from the mere fact that it was to serve as a residence for herself and her children (*d*).

§ 27. Acceptance of the benefits of the contract.

In the footnotes are collected some cases in which the liability of the wife's property to be subjected to a lien was considered with reference to the general rule that a person who, with knowledge of all the material facts, accepts and retains the benefits of an unauthorized contract made by another person, assuming to act as his agent, may be subjected, on the ground of an implied ratification, to the obligations arising from the contract (*a*).

---

be inferred from evidence which merely shewed that, when the workmen of the plaintiff went to the house to make measurements, the wife was in the kitchen at her work, and said they must not go upstairs yet, but to wait a minute, as one of the young ladies was not out of the bedroom; and that at another time, when a load of these materials arrived at the house, she told the teamster to leave them outside, but when informed that it might rain, she told her children to carry them in. The court said: "There is nothing in these simple and common acts and words of the wife, in respect to the common and ordinary conduct of family and household affairs, at all incompatible with her entire exemption from all liability or responsibility in reference to these materials, so contracted for and furnished by and for the husband, although to improve her house, for the use of her family, including her husband."

(*d*) *Garnett* v. *Berry* (1876) 3 Mo. App. 201.

Another point of view in which this element may be regarded is indicated by the declaration of the same court in *Kansas City Planing Mill Co.* v. *Brundage* (1887) 25 Mo. App. 268, that the existence of the express contract with the husband renders it impossible to charge the wife with "an implied obligation to pay for the improvement of her property, because it was her home."

(*a*) In *Schmidt* v. *Joseph* (1880) 65 Ala. 475, it was held that a charge which was virtually equivalent to the sustaining of a demurrer to the evidence should not have been given, where it appeared that the materials in respect of which the lien was claimed had been selected by the husband for the house in question, that the wife was enjoying the use and benefit of them after they had been put into the house, and that she had not expressed any dissent from such use.

In *Taggart* v. *Kem* (1899) 22 Ind. App. 271, 53 N. E. 651, where the husband and wife owned the land in question as tenants by the entireties, it appeared from the findings of the trial judge that the wife objected to the erection of the building, but they also shewed that she stood by, saw the work being done as it progressed, knew that materials were being furnished therefor, boarded the carpenters, moved into the new house, was still occupying it, and had made two attempts to borrow money with which to pay and discharge the liens. The court said: "She thus accepted the benefits accruing from the labor and materials which went into the building, and is still enjoying such benefits. It seems to us that this is a complete acceptance of the building which was the result of the labour and materials performed and furnished by appellees, and a ratification of the acts of her husband." One of the authorities relied upon was *Wilson* v. *Logue* (1892) 131 Ind. 191, 31 Am. St. Rep. 426, 30 N. E. 1079, in which it was held that where land was owned by husband and wife as tenants by the entireties, and the husband, with the knowledge of his wife and without objection on her part, purchased material to replace a barn on said premises, which had been destroyed by fire, and the wife was present when the material was delivered and used in the construction of the building, and made no objection, the party furnishing the material might acquire and enforce a lien against the property. The court also cited

§ 28. Estoppel of wife to resist enforcement of lien. Annotation.

An examination of the decisions which have turned on the theory of an estoppel against the wife shews that the subject has been discussed under two distinct aspects.

In some of the cases, the wife's conduct has been treated as an element which raised an estoppel against denying the husband's agency in respect of making the contract and procuring its execution (*a*). To the predication of an estoppel of this description it is an obviously essential prerequisite that she should be proved to have had knowledge of all the material circumstances incidental to the creation and performance of the contract (*b*).

Dalton v. *Tindolp* (1882) 87 Ind. 490, in which it was held that, where a husband and wife hold real estate in joint tenancy, a mechanics' lien may be acquired thereon for materials for the construction of a dwelling house, under a written contract signed by the husband, and not by the wife, where it appears that the wife acquiesced in, and consented to, the construction of the building.

In *Chicago Lumber Co.* v. *Mahan* (1893) 53 Mo. App. 425, one of the circumstances relied upon as shewing that the wife had ratified the contract was that she had collected the rents accruing from the building in question. The same evidential element, conjoined with the fact that she and her husband had occupied a part of the building themselves, was the basis of the judgment in *Tarr* v. *Muir* (1899) 107 Ky. 286, 53 S. W. 663.

In *McCarty* v. *Carter* (1868) 49 Ill. 53, 95 Am. Dec. 572, where one of the defendants was the minor daughter of the other, an instruction was held erroneous by which the jury were in effect told that the mere receipt of rents and profits from the building in question by the wife and Lucy J. Davis would involve the creation of a lien, even though they had neither made the contract themselves, nor authorized it to be made for them, and had no knowledge as to the nature of the contract upon which the building was being erected. The court said: "Even admitting them to have both been competent to contract, certainly the mere fact that McCarty made a contract for them, without their authority or knowledge, would neither bind them nor compel them to submit to a lien merely as a consequence of receiving rent. If they had been competent to contract, and knew that the building was being erected under a contract made in their behalf, by a contract made in their behalf by them, and had permitted the contractor to proceed under that belief, a very different question would be presented."

(*a*) "A married woman may, by silently acquiescing in the contract of one who, to her knowledge, assumes to act as her agent, be estopped to deny the agency." *Hoffman* v. *McFadden* (1892) 56 Ark. 217, 35 Am. St. Rep. 101, 19 S. W. 753.

In *Hawkins Lumber Co.* v. *Brown* (1893) 100 Ala. 217, 14 So. 110, it was conceded that the doctrine of estoppel might have been invoked "if the husband had contracted in the name of the wife, representing himself as her authorized agent, and, with a knowledge of this fact, she had acquiesced or had given countenance to the exercise of such authority as her agent."

(*b*) In *Anderson* v. *Armstead* (1873) 69 Ill. 452, where the wife was held to be estopped from denying that her husband was acting as her agent in making the contract for furnishing certain materials and painting her house, the allegation in the wife's answer, denying her knowledge of these facts, was disproved by evidence which shewed that, on two different occasions, when she was at the house while the work was being done, in company with her husband, the claimant spoke to him about the work; that while the work was being done, she and her husband were boarding only about one block from the house and in plain view of it; and that the house was being fitted up for a residence for herself and husband, and was occupied as such soon after the claimant's work was completed.

Annotation.

In other cases the conception relied upon was that the wife had, by failing to disclose her interest in the property to which her husband's contract had reference, estopped herself from setting up that interest against the claimant. The general principles applicable in this point of view have been thus stated by the supreme court of Illinois: "Where the owner of property holds

---

In *Richards* v. *John Spry Lumber Co.* (1897) 169 Ill. 238, 48 N. E. 63, affirming (1896) 64 Ill. App. 347, the evidence shewed that the wife had, by a power of attorney duly executed, authorized her husband to execute leases, collect rents, etc.; that she had entered into a contract in writing with one White to make certain repairs and furnish materials; that this contract was signed for her by her attorney in fact; that she saw and read the contract; that White sought to purchase lumber and other materials from the claimant, but that these were not furnished until the claimant's agent had had an interview with the husband; that he purchased the lumber, to be charged to his wife, and promised to pay for the same before any part of the money was paid to White; and that the wife had knowledge that the husband was assuming to act as her attorney in fact in making this contract and in being present and watching the work as it progressed. Held, that the wife was estopped from denying a liability for the husband's acts.

In *Boeckeler Lumber Co.* v. *Wahlbrink* (1915) 191 Mo. App. 334, 177 S. W. 741, the facts which were held to shew as a matter of law that the wife was estopped from denying the agency of her husband in the erection of the house in question, and that she thereby bound her property for the value of the material which went into the construction of the house, were as follows: That Mr. Eicks, the husband, had first used his own money to defray the cost of building the house, and then borrowed more on the security of a trust deed executed by himself and his wife; that she knew that this money which had been borrowed by her husband was for the purpose of completing the erection of the house on her lot, and made no objection to encumbering her property; that she was frequently on the premises while the building was being erected; that she knew it was being erected as a family residence; that the husband had no interest in the lot; that, so far as it appeared, no objection made by the wife to the location of the building was communicated to anyone except her husband; and that, according to her own testimony, she had nothing to do with any arrangement of detail in respect to the house or its building.

In *McNichols* v. *Kettner* (1887) 22 Ill. App. 493, where the defence was rested upon the ground that the written contract was signed by the husband, and did not purport to bind the wife, the evidence shewed that it was the understanding of all the parties that the money to pay for the building in question was to be derived from the earnings of a son of the defendant; that the claimant supposed that the title to the land on which the building was to be erected was in the husband, and had him sign the contract for that reason; that the defendant must have known the terms of the contract, as she made all the payments that were made upon it from money given to her by her son. The court said: "The money which her son gave her to pay upon the building must, under such circumstances, be regarded as a gift to her, as the lot was, and when she paid it out upon the contract, she paid it, not as her husband's money or her son's money, but as her own money, which she was expending to improve her own property; under all the circumstances we think that appellant is estopped to deny that her husband acted as her agent in making the contract. She permitted him to interfere about an improvement which the evidence shews she wanted made upon her lot. She negotiated with appellee [claimant] about the cost, and the amount of the instalments to be paid for the work; she actually made all the payments that ever were made for the work, and as far as she paid, seems to have done so in accordance with the contract. Her husband does not seem to have had anything further to do about the matter than to participate in the preliminary negotiations, and to

Annotation.

out another or allows him to appear as the owner of or as having full power of disposition over the property, and innocent parties are thus led into dealing with such apparent owner, or person having the apparent power of disposition, they will be protected. Their rights, in such cases, do not depend upon the actual title or authority of the party with whom they have directly dealt, but they are derived from the act of the real owner which precludes him from disputing, as against them, the existence of the title or power he caused or allowed to appear to be vested in the party upon the faith of whose title, or power, they dealt (*c*). It is immaterial . . . whether she in fact authorized the particular contract to be made or not. The question is not what power did her husband actually have over the property, but what power did she, by her acts and omissions, permit him to represent himself to the appellant to have?" (*d*) The doctrine enunciated in the passage above quoted is subject to the qualifica-

---

have signed the written contract. To permit appellant now to defeat appellee from getting his pay would be to allow her to profit by this interference of her husband, which she knew of and acquiesced in, and thus commit a fraud upon appellee, who, in good faith, built the cottage upon her lot in which she and her husband now live."

For a case in which the element of an estoppel was held to be excluded by the consideration that, under the circumstances shewn, the wife might have supposed that the work in question was being done on the personal credit of her husband, see *Coorsen* v. *Ziehl* (1899) 103 Wis. 381, 79 N.W. 562, § 29, note (k) B, infra.

(*c*) To the end of this sentence the language of Bigelow on Estoppel, page 468, is adopted almost verbatim by the court.

(*d*) *Anderson* v. *Armstead* (1873) 69 Ill. 452 (wife had neglected to record her deed in a reasonable time). One of the cases cited was *Schwartz* v. *Saunders* (1867) 46 Ill. 18, where the following language was used: "The contract for the building was made with her full knowledge, approbation, and consent, as we are bound to infer from the testimony, and she did not disclose her interest. She knew very well what was going on and she took no steps to prevent it, and ought now to be estopped from objecting, or of setting up her right to defeat the plaintiff."

"Where the husband contracts for the improvement of his wife's property with one who believes him to be the owner, and the wife, knowing this fact, permits the work to be done without disclosing her right, it has been held that she will be estopped to set up her title in defence of an action to enforce the contractor's lien." *Hoffman* v. *McFadden* (1892) 56 Ark. 217, 35 Am. St. Rep. 101, 19 S.W. 753, citing Bigelow on Estoppel, 602, 603; 2 Jones on Liens, sec. 1264.

In *Hawkins Lumber Co.* v. *Brown* (1893) 100 Ala. 217, 14 So. 110, it was conceded that, "if the husband had represented to the materialmen that the property to be improved belonged to him, and on this false representation the goods were obtained, and the wife, with knowledge of such false representation, had permitted the improvements to be made without objection, probably the equitable rule of estoppel might be invoked."

In *Bruck* v. *Bowermaster* (1889) 36 Ill. App. 510, it was held that good grounds for an estoppel against the wife were shewn by evidence that the whole work was done on her property; that she received the entire benefits of it; that, knowing her husband to be insolvent and unable to pay for the work, she did not disclose the fact that the title to the lots stood in her name; and that she stood by and saw the work and directed its operation.

Annotation.

tion indicated by the following statement: "The mere fact that she stood by and permitted her husband to construct the building on her property, and to enter into contracts for the purpose in his own name without objection on her part, and without informing [the claimant] that she was the owner of the lots, would not, of itself, if she did not know that he represented himself as owner, shew any fraudulent conduct on her part from which an estoppel would arise" (*e*). There is clearly no room for predicating an estoppel on the grounds thus explained, if it appears that the claimant had knowledge, either actual or constructive, that the wife was the owner of the land on which, or in relation to which, the work in question was done (*f*).

It may be remarked that, in the arguments of the courts, the distinction between these two descriptions of estoppel has not always been brought out as clearly as is desirable (*g*).

As the second species of estoppel operates irrespective of whether the husband was or was not the wife's agent, it is of considerable practical importance, as affording claimants a means of enforcing a lien where a case involving a sealed contract is presented in a jurisdiction in which the strict common-law doctrine prevails that parol evidence is not admissible for the purpose of shewing that it was executed by the husband as agent for his wife (*h*).

(*e*) *Bastrup* v. *Prendergast* (1899) 179 Ill. 553, 70 Am. St. Rep. 128, 53 N.E. 995, affirming (1898) 76 Ill. App. 335. See also *Geary* v. *Hennessy* (1881) 9 Ill. App. 17, where it was held that "the mere fact that the improvements were made under her daily inspection, with her knowledge and consent, will not make her land liable where the work is done under a written contract with a third person."

(*f*) *Hoffman* v. *McFadden* (1892) 56 Ark. 217, 35 Am. St. Rep. 101, 19 S. W. 753; *Campbell* v. *Jacobson* (1893) 145 Ill. 389, 34 N.E. 39 (evidence of title had been placed on record long before the date of the contract in question).

(*g*) See, for example, *Anderson* v. *Armstead* (1873) 69 Ill. 452.

In *Barker* v. *Berry* (1881) 8 Mo. App. 446, the court said: "Other cases cited by the plaintiff are to the effect that the legal owner should not stand by and see improvements put upon his land under the order of another, and then attempt to defeat the lien. But the case at bar presents no ground for estoppel. The wife had a right to suppose that the materialmen looked to the written contract as made, and certainly she did not in any way authorize her husband to act for her, nor did he assume to do so. She neither said nor did anything from which any inference could be drawn that she was responsible. Under these circumstances, how the necessary agency is to be established in the face of the express contract, which subcontractors were bound by, it is not easy to discover." The transitions in this passage from one description of estoppel to another afford a very curious example of confused thinking.

The difference was manifestly present to the mind of the court, which observed that "here the owner made no contract, and she cannot be held liable for the contract of another not her agent, unless she had done some act by which she had estopped herself from relying upon her rights." *Geary* v. *Hennessy* (1881) (Ill.) supra.

(*h*) In *Bastrup* v. *Prendergast* (1899) 179 Ill. 553, 70 Am. St. Rep. 128, 53 N.E. 995, affirming (1898) 76 Ill. App. 335, the following evidence was held to be admissible: That the wife observed the progress of the work, frequently

Annotation.

Cases may also arise in which the evidence, although not sufficient to warrant the inference of the husband's agency, may be such as to enable the claimant to enforce his lien on the ground of estoppel. But so far the courts have not devoted much attention to this important phase of the subject (*i*).

In *Milligan* v. *Alexander* (1913), 4 A.L.R. 1022, it was observed, with reference to circumstances similar to those with which the present section is concerned, that "the same result is reached, whether the wife is made liable by estoppel, or on the score of agency, presumed from her knowledge of and acquiescence in the improvement made on her land by her husband." The opinion was also expressed that "inasmuch as the statute gives a married woman the right to contract for the improvement of her property as freely as if she were a feme-sole, we think it is more consonant with reason to hold her liable on the ground of her husband's agency." From what is stated above it is evident that the former of these remarks needs some qualification, inasmuch as there are cases in which parol evidence may not be admissible to prove the husband's agency, while it is always competent to establish an estoppel against the wife. The second remark seems to be, at the very least, wanting in precision. There is much difficulty in conceding that in cases where two legal principles are equally pertinent in respect of a certain state of facts, it is more "consonant to reason" that one of them should be invoked rather than the other. That the effect of modern legislation in enlarging the privilege of married women cannot warrantably be regarded as a decisive factor in this connection is indicated by the consideration that the domain within which the doctrine of

---

inspecting it; that important changes were made and contracts entered into in accordance with her directions; that she fully understood and authorized all that was being done by the claimants in doing the work and furnishing the materials for which the liens are claimed; that she knew her husband was insolvent, so that the building could be paid for in no other way than by moneys secured by liens upon the property; and that the claimants did not know that she, and not her husband, was the owner of the lots. The court said: "Here it was a question of fact pertinent in the case whether or not she [defendant] had knowledge that John McNally held himself out to the appellees as the owner of the property, and permitted him to contract as owner with appellees for her work and materials to be used in constructing the building on her property. Both husband and wife resided upon the premises, and we are of the opinion that the evidence is sufficient to charge her with knowledge that, in making his contracts with the builders, her husband represented himself as owner of the property, and that they relied upon that representation in doing their work and furnishing the materials."

(*i*) In *Spears* v. *Lawrence* (1894) 10 Wash. 368, 45 Am. St. Rep. 789, 38 Pac. 1049, it appeared that during the progress of the work, the wife was about the premises with her husband, and helped to select the colours of the paints for the building. Held, that although the authority of her husband to make the contract in question was not shewn, the wife was estopped to dispute the enforceability of the lien.

Annotation.

estoppel operates is, on the whole, coextensive with that covered by contractual capacity, whether that capacity is or is not defined by statute (*j*). The more simple and logical position seems to be that, as in other classes of cases in which the evidential situation is such that it may be considered under more than one juridical aspect, the results of the wife's acquiescence may, at the option of the court, be defined with reference to the principles either of the law of agency or of the law of estoppel.

If it is sought to bind the wife's property by way of an estoppel, the facts relied upon as creating such an estoppel should be alleged (*k*).

V. Specific statutory provisions operating so as to render the husband the agent of his wife.

§ 29. Enactments relating to the effect of the owner's "consent."

In Minnesota it has been enacted, with respect to labour or materials which may be the subject of a lien, that, whenever these are furnished "by or with the knowledge and consent of a married woman who is the owner of the property benefited thereby, upon the order of her husband, such knowledge and consent shall be sufficient to establish that such husband acted therein as the agent of the wife." Laws 1883, chap. 43; Laws 1885, chap. 46. It has been held that this provision is applicable as a rule of evidence, not merely for the purpose of establishing a lien, but also for the purpose of obtaining a personal judgment against the wife; and that the agency of the husband cannot be predicated from evidence which shews merely the "knowledge" of the wife (*a*).

In Indiana it is provided that "whenever repairs or improvements are made on real property of the wife by order of the husband, with her consent thereto, in writing, delivered to the con-

---

(*j*) Perhaps the only exception to this coincidence is that which is created by the doctrine of those courts which hold that the defendant in an action on the *ultra vires* contract of a corporation may, under certain circumstances, be estopped from pleading its invalidity.

(*k*) *Wilson* v. *Schuck* (1879) 5 Ill. App. 572; *Geary* v. *Hennessy* (1881) 9 Ill. App. 17.

(*a*) *Smith* v. *Gill* (1887) 37 Minn. 455, 35 N.W. 178.

In *McCarthy* v. *Caldwell* (1890) 43 Minn. 442, 45 N.W. 723, where a new trial was ordered on the ground that certain evidence tending directly to shew that, while the work was in progress, the wife had knowledge of it, and made certain inquiries and remarks expressive of approval, had been struck out by the trial judge, the court was of opinion that, apart from this evidence, the conclusion that the labour and material were furnished with the authority, knowledge, and consent of the wife would have been amply justified by testimony to the effect that the wife saw some of the plumbing work in question, after it had been put in, that she assured one of the claimants that he should be paid as soon as the work was finished, and that she joined with her husband in a note and mortgage to be given to them.

Annotation.

tractor or person performing the labour, or furnishing the material, she alone shall be personally liable for the labour performed or the material furnished." 3 Burns's Rev. Stat. 1914, secs. 7860 (6968). It has been held that this provision has no application to real estate which the wife and husband own as tenants by the entireties (*b*).

Obviously the effect of such provisions as the above is to eliminate the possibility of any doubt concerning the probative force of the wife's consent. See § 16, supra.

A similar result has been produced in other jurisdictions by the clauses of general scope which declare that a lien may be acquired not only where the claim is founded upon a contract made with the owner of one of the specified descriptions of property, but also where work was performed or materials furnished "with or by the consent" of such owner. As the "consent" upon which the right to a lien is thus conditioned may, in one point of view, be regarded as operating so as to place the person to whose acts it is applicable in the position of an agent of the consenting party (*c*), the present monograph would not be complete without some allusion to the cases in which the effect of this element has been discussed with reference to the liability of married women (*d*). For further information regarding the subject in its relation to contracts made with vendees and lessees, see notes to *Belnap* v. *Condon*, 23 L.R.A. (N.S.) 601, and *Wilson* v. *Gewurtz*, L.R.A. 1917D, 577.

The phrase used in some of the enactments belonging to this category is "with or by the consent" of the owner. In an action founded upon one of these the only issue involved is whether the wife had given her consent to what was done by the husband in respect of making the contract in question and procuring its performance (*e*).

(*b*) *Haehnel* v. *Seidentopf* (1916) — Ind. App. —, 114 N.E. 422, following *Taggart* v. *Kem* (1899) 22 Ind. App. 271, 53 N.E. 651, which relied on *Wilson* v. *Logue* (1891) 131 Ind. 191, 31 Am. St. Rep. 426, 30 N.E. 1079, and *Dalton* v. *Tindolph* (1882) 87 Ind. 490. See § 27, note (a), supra.

(*c*) It should be observed in this connection that the fact that the husband had not acted as the wife's agent has in some cases been specified as one of several elements which were regarded as negativing the inference of her consent. *Huntley* v. *Holt* (1890) 58 Conn. 445, 9 L.R.A. 11, 20 Atl. 469; *Lippmann* v. *Low* (1902) 69 App. Div. 24, 74 N.Y. Supp. 516; *Coorsen* v. *Zicht* (1889) 103 Wis. 381, 79 N.W. 562.

On the other hand, in *Schmalz* v. *Mead* (1891) 125 N.Y. 188, 26 N.E. 251, the fact that the husband had acted on behalf of his wife when he signed the building contract in question was a portion of the evidence which was held to warrant the inference of her consent.

(*d*) In *Husted* v. *Mathes* (1878) 77 N.Y. 388 (construing an Act of local scope), the applicability of enactments of this tenor to the property of married women was expressly affirmed. The same doctrine is, of course, taken for granted in the cases cited in the following notes.

(*e*) See cases reviewed in note 10, infra.

Annotation.

The operative words of other enactments are "with the knowledge and consent" of the owner. With reference to one of these it has been laid down that "the only thing the lien claimant has to establish on the trial, when he claims a lien upon the real estate upon which a building is erected by some person other than the owner of the realty, is the fact that the owner knew that the building was being constructed on his or her premises, and that he or she consented to such construction" (*f*). It was accordingly held in the case cited that the remedial rights of a person by whom a building had been erected on the land of a married woman, in pursuance of a contract made with her husband, could not be defeated by proof that the husband had expressly promised to defray the entire cost of the improvement. In another case a lien for materials was enforced upon the same general ground, although they had been purchased by the husband on his own credit (*g*).

In one case we find the following statement: "When the statute uses the words, 'by the consent of the owner of the land,' it means that the person rendering the service or furnishing the materials, and the owner of the land on which the building stands, must be of one mind in respect to it. The words, 'consent of the owner,' are used in the statute as something different from an agreement with the owner; and while it may be urged that they do not require such a meeting of the minds of the parties as would be essential to the making of a contract, there must be enough of a meeting of their minds to make it fairly apparent that they intended the same thing in the same sense" (*h*). But unless the learned court was prepared to go to the length of predicating, with respect to cases involving a contract made with an agent of the owner, an exception to the general principle, "*Qui facit per alium facit per se*," it is difficult to see upon what ground the theory that the statutory "consent" imports "something different from an agreement can rest." With all deference it is submitted that the *rationale* of such case is simply that the "consenting" owner becomes, according to the state of facts, a party to the

(*f*) *Heath* v. *Solles* (1889) 73 Wis. 217, 40 N.W. 804.

(*g*) *North* v. *La Flesh* (1889) 73 Wis. 520, 41 N.W. 633.

(h) Import of the term "consent."

(*h*) *Huntley* v. *Holt* (1890) 58 Conn. 445, 9 L.R.A. 11, 20 Atl. 469.

In *Flannery* v. *Rohrmayer* (1879) 46 Conn. 558, 33 Am. St. Rep. 36, it has been previously remarked: "If the statute is to be interpreted as including the real estate of the wife in cases where she is not a party to the contract, and where it does not appear to be for her benefit or for the benefit of her estate, then it works a radical change in the laws relating to the property of married women, and subjects it to the payment of the debts of the husband, thereby and to that extent repealing prior laws on that subject. We cannot believe that such was the intention of the Legislature, and must therefore hold such a construction is inadmissible."

Annotation.

agent's contract either by an antecedent or by a subsequent adoption of its obligations. Indeed, it seems not improbable that the intention of the legislatures which have introduced into the lien laws provisions of the type now under consideration has been to repudiate the doctrine which, as is shewn in § 16, supra, had not infrequently been propounded, viz., that there is a species of "consent" which amounts to nothing more than a mere permission, and consequently does not affect the owner with any contractual liability.

According to some of the cases the statutory "consent" must be established by specific testimony of an affirmative significance; "mere knowledge and silence" on the part of the owner not being regarded, in this point of view, as elements from which it can be predicated (*i*). There is also some authority for the opposite doctrine (*j*). For practical purposes, however, the question

---

(*i*) In *Gilman* v. *Disbrow* (1878) 45 Conn. 563, Mrs. Gilman, one of the plaintiffs in the writ of error, owned the fee of the land on which the defendants had erected two henhouses. Her husband, with whom the defendants had made the building contract, was entitled to the use and improvement of the land during his life. The grounds upon which it was held that the decree complained of was erroneous in that it ran against the wife and her estate were thus stated: "The wife's fee is not to be subjected to this statutory mortgage unless she made an agreement with or requested the defendants to furnish the materials and perform the labour. The fact that she saw them doing it, and by making no objection assented to its being done, does not impose an implied promise upon her. There is nothing in the finding tending to shew either that the structures were erected for the improvement of her reversion, or that they were calculated to have that effect; indeed, their character and their purpose—that of breeding fancy poultry—alike suggest present and temporary rather than future and permanent use—suggest advantage only to the present estate in the husband. In view of this she may well have supposed, in the absence of any express promise or request from herself, that the defendants had made such arrangements with him as to payment, as to induce them to forego any lien upon her fee, and rely solely upon her personal credit, or upon his security of his life estate. . . . And, as we may assume that these structures would add to the profit of the life use, it is to be presumed that the husband was acting solely for himself and for the benefit of his particular estate, until it is made to appear that he was acting in fact as the agent of the wife."

In *Healey Ice Mach. Co.* v. *Green* (1910) 181 Fed. 890, the court, commenting upon the South Carolina enactment (Revisal 1905, sec. 2015), which renders the property of a married woman liable when the improvements on her land are made with her "consent or procurement," observed: "This language indicates something more than mere knowledge that her husband is making the improvement; otherwise the title to her separate real estate, supposed to be protected by carefully devised constitutional and legislative safeguards, would be, as to liens of this character, easily burdened. To consent to or procure improvements on one's real estate requires some act or words much more unequivocal than mere silence with knowledge of the fact."

Compare also *Smith* v. *Gill* (1887) 37 Minn. 455, 35 N. W. 178, note (a), supra.

(*j*) In *Foskett & B. Co.* v. *Swayne* (1897) 70 Conn. 74, 38 Atl. 893, the plaintiff was held to have been erroneously nonsuited, where his evidence shewed that the wife knew that the improvements in question were being made upon the property by the plaintiff, and these improvements would

Annotation.

whether the former or the latter of these theories should be accepted is seldom material in view of the fact that, in the great majority of the cases with which the courts are called upon to deal, testimony of a definite probative value is presented. The effect of some decisions concerning testimony of that description is stated in the footnote (*k*).

largely increase its value. The opinion was expressed that this fact alone might possibly authorize a jury to find that she had given her consent. The court added: "Especially might her consent be inferred when it appeared, as it did, that she had taken part in selecting the materials; that she had given directions concerning the work; that she had in some instances countermanded the orders given by her husband, as though she had the superior authority; that she decided whether certain parts of the work should be done or not done by reason of the cost; and that at times she evinced an expectation to pay for the work and the materials." So far as regards the definite ruling of the court with respect to the effect of the wife's knowledge alone, it seems to be scarcely sustained by *Gannon* v. *Shepard* (1892) 156 Mass. 355, 31 N. E. 296, the precedent cited, which (see infra) involved other elements besides knowledge. It is, moreover, not easily reconciled with the express statement of the court in *Flannery* v. *Rohrmayer* (1879) 46 Conn. 558, 33 Am. Rep. 36, supra, that "mere knowledge and silence do not constitute 'consent.'"

In *McDougall* v. *Nast* (1866; Sup. Gen. T.) 5 N. Y. S. R. 144, a finding that, during the progress of the work, the defendant knew that the building in question was being erected, and did not make any objections, was considered to be in effect a finding that the store was erected with her consent.

A. Decisions rendered with reference to statutes containing only the word "consent"

(*k*) In *Huntley* v. *Holt* (1890) 58 Conn. 445, 9 L.R.A. 111, 20 Atl. 469, a judgment in favour of the wife was affirmed upon evidence of the following purport: At some time prior to the date when the contract in question was made, the defendant's husband proposed to build houses on two of her lots. She objected to his doing so, but he urged that the houses should be built, and informed her that he himself was to pay for them. She then made no further opposition, though she still did not wish the houses to be built. The plaintiff, in making the contract, and in performing the services and in furnishing the materials, gave the sole personal credit to the husband, who did not represent that he was the owner of the land on which the houses were to be placed. In making the contracts he acted in his individual capacity, and did not act as the agent of Mrs. Holt, nor had he, in making same, any authority from or right or authority to act or contract for her. The plaintiff relied as security for the payment for his work and materials upon such lien on the land as by law he might have. Prior to the time he had completed the houses he supposed that Mr. Holt was the owner of the land. Mrs. Holt learned, soon after the work was commenced, that the houses were being built and that the plaintiff was building them. She then, and at all times, supposed that the work was being done upon the personal credit of her husband, and not upon her credit or upon the credit of her interest in the land; and she gave no notice to the plaintiff of her disapproval of the work, or of the fact that she owned the land, or that her husband had no authority to act for her.

This case was followed in *Lyon* v. *Champion* (1892) 62 Conn. 75, 25 Atl. 392, where the plaintiff sought to enforce a lien against the interest of Mrs. Champion in premises which belonged to her, subject to her husband's life estate. It appeared that Mrs. Champion, with some reluctance, consented to the making of certain improvements to the family dwelling. This consent was given to her husband and to her son's wife, Mary, under an express arrangement and agreement that the latter, who had available funds, should furnish the money required, and, after the improvements were completed, received a deed of the premises, giving back a life lease of one tenement. Thereupon the plaintiff was invited by Mr. Champion to visit the premises, to see what was necessary to be done, and did so, the defendant being present. The plaintiff

Annotation.

The effect of the enactments which require that the consent of the wife shall be expressed in writing is stated in § 2, supra.

---

afterwards made a plan and gave it to Mr. Champion, who said it was satisfactory, and arranged for the materials, and for the work to be done by the day. The plaintiff at this time was informed that Mary was to furnish the money to pay for the improvements. During the progress of the work Mr. Champion generally gave necessary directions as to details, but Mary and the defendant occasionally gave such directions, each as to the tenement which they were to occupy respectively. A judgment in favour of the plaintiff was reversed, on the ground that the trial judge had proceeded upon an incorrect theory of what constituted "consent of the owner," within the true meaning of the statute. The court said: "That Mrs. Champion consented that the work should be done fully appears. That she knew the plaintiff proposed to do the work, and afterwards that it was in fact being done by him, and that she, as well as Mary, gave some minor directions, also appears. And this is all. . . . Mrs. Champion supposed that the work was being done at the expense of Mary, to be repaid to Mary in the special way named, which would leave her a life lease of the tenement she desired to occupy. The plaintiff was himself informed that Mary was to furnish the money to pay for the improvements. If he, nevertheless, expected the defendant to be responsible to him, there was clearly no meeting of minds between them so as 'to make it fairly appear that they intended the same thing in the same sense,' For the most that can be said is, that the defendant consented that the plaintiff should do the work, but not that he should do it for her or at her charge. It was the plaintiff's own negligence if he was misled by this, since he never spoke to the defendant upon the subject, and never gave her any notice that he expected to charge her."

In *Gannon* v. *Shepard* (1892) 156 Mass. 355, 31 N. E. 296, it was held that the wife's "consent" might warrantably be inferred, where it appeared that the house in question was built for the wife; that she could and did see the workmen of the petitioners at work upon it from time to time; that on one occasion she was in it with her husband, and saw the petitioners at work there; that she did not give any directions to them while they were at work; that she did not object to their furnishing labour or materials; and that she did not give them the written notice, disclaiming responsibility, which is provided for by Mass. Pub. Stat., 191, sec. 4.

In *Husted* v. *Mathes* (1879) 77 N. Y. 388, a finding in favor of the plaintiff was held to be warranted by evidence that the wife was informed of the intended improvement, that she knew of the work while it was in progress, and that she received the benefit willingly.

In *Schmalz* v. *Mead* (1891) 125 N. Y. 188, 26 N. E. 251, affirming (1889) 15 Daly 223, 4 N. Y. Supp. 614, a finding that the labour was performed and the materials furnished in the erection of the buildings in question "with the consent" of the wife was held to be warranted by evidence of the following purport: The building contract, though made by the husband in his name, was really made by him in his wife's name. She took an assignment of it within a short time after its execution. She herself advanced all the money on it, and stipulated for the execution of certain mortgages to her upon the property when the buildings were completed, to secure the moneys advanced, besides a considerable sum in addition. She knew that the buildings were being erected, and that labour was employed and materials furnished for that purpose. The court said: "The contract itself contemplated and provided for all this, and the uncompleted buildings became a part of the realty. She made a contract which required the erection of buildings on her land. She was to furnish the money for that purpose. The performance of the contract involved the employment of labour and the purchase of materials."

In *Lippmann* v. *Low* (1902) 69 App. Div. 24, 74 N. Y. Supp. 516, the complaint was held to have been properly dismissed, on the ground that the plaintiff had never even seen the defendant, nor had any communication with her upon the subject of work to be done upon her house, and that he relied upon the statement of the husband as to the ownership of the property, and that his contract was made with the husband.

Annotation

§ 30. Other enactments.

In Kansas it has been enacted that a lien may be enforced for work performed or materials furnished, "under contract with the husband or wife of the owner." The effect of this provision has

---

In *Schummer* v. *Clark* (1905) 107 App. Div. 207, 95 N.Y. Supp. 836, it was held that evidence of the following purport should have been submitted to the jury in a case where a lien was claimed for plumbing work: The defendants, at the time plaintiff was performing the work and furnishing the materials, resided close by the dwelling. The wife was frequently at the house when the work was in progress, and actually lived in it when the furnace was placed. The premises belonged to her. The husband was a carpenter and builder, and purchased the furnace and hardware, and they were charged to him. They were obtained, however, for the benefit of his wife, and were necessary to the completion of her house, and presumably enhanced its value, and she personally paid $20 on the account. The court said: "It is not a controlling circumstance that the goods were charged to the husband, when it does not appear that he was acting independently of his wife, or by virtue of any agreement with her whereby he was to pay for the improvement and no liability was to attach to her. When it is disclosed that she, and not the husband, owned the property, she ought to be charged with its improvement under the circumstances of this case. In the present case the only authority which the husband had was derived from the wife, and she had acquiesced in the improvements upon her property, and they inured to her benefit, and she is the only paymaster."

In *Dennis* v. *Walsh* (1891; Brooklyn City Ct.) 41 N.Y.S.R. 103, 16 N.Y. Supp. 237, the consent of the wife was held to be inferable from evidence which shewed that she lived close to the premises in question, and saw the building in course of erection; that she was present when her husband had a conversation with the plaintiff's son about the work; and that she drew her own check to make a payment on account.

In *Brunold* v. *Glasser* (1898; County Ct.) 25 Misc. 285, 53 N.Y. Supp. 1021, the wife's consent was held by one of the county courts of New York to be predicable from evidence which shewed that she was not only present at the making of the contract, but constantly visited the house in question while the work of erection was in progress, and that she mortgaged her property to defray the cost of building it.

B. Decisions rendered with reference to statutes containing the words "knowledge and consent."

In *Coorsen* v. *Ziehl* (1899) 103 Wis. 381, 79 N.W. 562, it was held that the consent of the wife to the erection of the building upon which the lien was claimed could not be inferred, where the husband had testified that the wife did not know of the work until it was started; that she would not dare to tell him to stop anything when he had started; that he had no authority from her to do the work, but had it done on his own responsibility, and did not act or assume to act as her agent. The court said: "Consent cannot be inferred from mere silence under these circumstances. So far as we are advised, she may have supposed that the work was being done upon the personal credit of her husband. For that reason no element of estoppel can intervene. Not having been consulted as to the improvements, and being under such arbitrary dominion as the evidence shews, she was not bound to have a row with her husband, and order the workmen from the premises, at the risk of having her property encumbered by a lien. Being a married woman, she was not free to act entirely as she pleased. Notwithstanding the liberality of modern legislation, married women are somewhat under the dominion and control of their husbands, and such relation must be considered when it is sought to bind the wife's property on the ground of ratification by silence."

In *Lentz* v. *Eimermann* (1903) 119 Wis. 492, 97 N.W. 181, the claimant was held to be entitled to a lien, where it appeared that, soon after the excavation for the house in question was commenced, defendant knew it was being

Annotation.

been thus explained: "The language used in the statute is broad enough to include all contracts made by the husband or wife of the owner of the property for the purchase of material or the erection of improvements thereon, and when a contract is made and the materials furnished or improvements made, the party making or furnishing such improvements is entitled to a direct lien against the property. . . . Where the husband of the owner of the property purchases material, which the statute provides he may do, the person furnishing the materials under such a contract may presume, and he has the right to do so, that it is furnished to the husband of the wife, to be charged to her, and upon her property, and has a right to file a lien to secure its payment (*a*).

There is a similar clause in the Oklahoma statute (*b*).

By sec. 7024 of Minn. Gen. Stat. 1913, it is provided that improvements upon real estate are presumed to have been made upon the authority of the owners. As applied to cases in which a lien is claimed on the land of a married woman, this enactment apparently produces the same effect as the Ontario one which is referred to infra. But its operation in this point of view has not so far as the writer knows, been discussed.

---

erected, and that subsequently she executed a mortgage on her land, and turned the money over to her husband, to be used in the building of the house.

See also *McGeever* v. *Harris* (1906) 148 Ala. 503, 41 So. 930, where the findings of the trial judge upon conflicting evidence (not stated) were upheld.

(*a*) *Bethell* v. *Chicago Lumber Co.* (1888) 39 Kan. 233, 17 Pac. 813. The contention of the defendant that, as the findings shewed that the husband was a contractor, and had written a contract with his wife to erect the improvements and furnish the material, and to receive certain compensation therefor, the plaintiff, if he was entitled to enforce any lien against said property, could do so only on the ground that he was a mere subcontractor, was thus disposed of: "It is true that a person dealing with an agent must, at his peril, know the rights of the agent in the premises, and if this contract had been made with any person other than the husband, this lien could not be upheld; but as the husband under the law has the right to contract, this rule cannot be applied in this case. The parties can rely upon the presumption that they were not dealing with the husband as agent, but as owner under the statute. If the claim of the defendants can be upheld, then the way is left open for great wrongs and frauds to be perpetrated. A contract is entered into between husband and wife; no disclosure is made of the extent of that contract; material is furnished; afterward, when the time for filing a subcontractor's lien has expired, a contract is produced under which the building was erected, the wife receiving the benefit of the transaction, and the husband and wife thereby defeating the Lien Law.

(*b*) In *Limerick* v. *Ketcham* (1906) 17 Okla. 532, 87 Pac. 605, the court, relying on the *Bethell* case (Kan.) supra, laid down in the syllabus prepared by it the following doctrine: "Where the wife is the exclusive owner of real estate, and the husband enters into an oral contract with a materialman to furnish material for the erection of a building on such real estate, the materialman is entitled to a lien on the property for the amount of the material furnished and used in such building."

See also *Block* v. *Pearson* (1907) 19 Okla. 422, 91 Pac. 714.

Annotation.

By sec. 2521 of the Mississippi Code 1906, it is enacted that "all business done with the means of the wife by the husband shall be deemed to be on her account, and for her use." With reference to this provision, it has been held that a husband who had, as contractor with his wife for the erection of a house, purchased materials for it, was to be regarded as having made the purchase as her agent, and consequently that a lien might be enforced against her property for the amount due to the vendor (*c*).

By sec. 4 of the Pennsylvania Act of June 4, 1901, P.L. 431, it is provided that if an owner knowingly permits any person acting as if he were the owner to make a contract for which a claim could be filed, without objecting thereto, he shall be treated as ratifying the act of such person; in which case the claim may be filed against the real owner with the same effect as if he had made the contract (*d*).

By sec. 5 of the Ontario Mechanics' Lien Act (59 Viet. chap. 35) it is provided that, where work or service is done or materials are furnished upon or in respect of the lands of any married woman with the privity or consent of her husband, he shall be conclusively presumed to be acting as well for himself, and so as to bind his own interest, and also as the agent of such married woman for the purposes of the Act, unless the person doing such work or service or furnishing such materials shall have had actual notice to the contrary before doing such work or furnishing such materials (*e*). So far as the present writer has been able to

---

(*c*) *Banks* v. *Pullen*, (1917), 4 A.L.R. 1013. The court said: "We see in this case a husband building a house on the land of his wife, and entering into a contract whereby he was to receive the means of the wife for the purpose of securing the material with which to erect the house."

(*d*) In *National Supply & Constr. Co.* v. *Fitch* (1913) 55 Pa. Super. Ct. 212, a case within the purview of the statute was held to be shewn by evidence to the effect that the contract in question was in the name of the husband; that the plans and specifications exhibited to the plaintiff as a basis for its bid on the material desired were also in the name of the husband; that the husband had charge of the business for his wife, and acted for her in procuring the contracts and looking after the completion of the building in question; and that, apart from the constructive notice arising out of her recorded deed, the plaintiff had no knowledge that the wife owned the property. The court was also of opinion that there was some evidence of the ratification defined in the same section, as the wife "was about the premises from time to time, and had notice that the plaintiff was furnishing material for the construction of the house," and "no notice of repudiation was given to the plaintiff, nor was any such notice posted on the premises."

(*e*) In *Gillies* v. *Gibson* (1908) 17 Man. L.R. 479, Mathers, J., mentioned that he had unsuccessfully urged the insertion of a similar provision in the Manitoba Lien Act, and that his suggestion was declined by the Attorney-General of that Province on the ground that, under the circumstances specified in the Ontario statute, a presumption arose that the husband was acting as the wife's agent. The learned judge did not specify the decisions upon which his own opinion was based.

ascertain, no similar provision has been enacted in any of the American States. Annotation.

The contention that the following provision in sec. 4637 of the Arkansas Digest should be construed in such a sense as would render it applicable to cases involving claims for liens has been rejected: "The fact that a married woman permits her husband to have the custody, control, and management of her separate property shall not of itself be sufficient evidence that she has relinquished her title to said property, but in such case the presumption shall be that the husband is acting as the agent or trustee of his wife" (*f*).

(*f*) *Hoffman* v. *McFadden* (1892) 56 Ark. 217, 35 Am. St. Rep. 101, 19 S. W. 753. The court, after having pointed out that, in the earlier case of *Rudd* v. *Peters* (1883) 41 Ark. 184, this section had been construed to mean that the husband shall not acquire title by the wife's permission to use, control, or manage her property, continued thus: "The presumption it raises is for the protection of the wife's property against the seizure for the husband's debts. It makes the latter's control or management of the property evidence only of an agency for that purpose, and not of any power to bind the property by the contract. If the presumption of the statute could be resorted to for the purpose of shewing the authority to make a contract by virtue of which the wife's property may be subjected to a lien, it might become an instrument for depriving her of the rights it was designed to protect." C.B.L.

BEST v. DUSSESSOYS.

MAN.

C. A.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart and Dennistoun, JJ.A. April 27, 1920.

VENDOR AND PURCHASER (§ I E—28)—AGREEMENT FOR SALE OF LAND—ASSIGNMENT BY WAY OF SECURITY—DEFAULT—JUDGMENT—ORDER FOR PAYMENT—FAILURE—FORECLOSURE.

A judgment having been obtained by the vendor against the purchaser and other encumbrancers for default under an agreement for sale of land which judgment provides for the payment of all moneys due on a certain date, failing which the agreement shall be cancelled and rescinded, and the purchaser not having fulfilled his obligation, the vendor is entitled to the relief provided for in the judgment.

[Review of authorities.]

APPEAL from a judgment of Galt, J., allowing an appeal from an order made by the referee extending the time for payment into Court under an order previously made by him in the circumstances fully set out in his judgment, (1919), 50 D.L.R. 640. Statement.

C. H. Locke, for Mary Muys; *C. P. Wilson*, K.C., and *H. W. H. Knott*, for Central Canada Investment Corporation.

PERDUE, C.J.M.:—The plaintiff in this action is the vendor in an agreement for the sale of land. The following facts are alleged in the statement of claim: The purchaser, one Charles Muys, entered into an agreement in writing dated June 16, 1913, Perdue, C.J.M.

MAN.

C. A.

BEST
v.
DUSSESSOYS.

Perdue, C.J.M.

to purchase certain farm lands from the plaintiff for the sum of $12,000. Of the purchase money $2,750 was paid by Muys transferring to the plaintiff another piece of land. The rest of the purchase money was made payable in instalments falling due on certain dates in the years 1914, 1915, 1916 and 1917. The final payment fell due on December 1, 1917. Interest at 6% per annum was to be paid on the amount from time to time remaining unpaid. On February 3, 1916, Muys assigned all his interest in the agreement and in the land to the defendants, the Central Canada Investment Corporation, Limited, as a security. This assignment was registered by way of caveat in the Land Titles Office.

On July 11, 1918, Muys executed a quit claim deed of the land to the defendant Dussessoys. In the agreement between the plaintiff and Muys it was provided that "time should be in every respect the essence of the agreement." At the time of filing the statement of claim, namely, December 12, 1918, there was still due for purchase money the sum of $3,892.30 and for interest the sum of $1,011.

Paragraph 7 of the statement of claim is as follows: "The plaintiff is willing and hereby offers to carry out the said agreement on his part."

The relief claimed by the plaintiff is:—

That it be referred to the Master of this Honourable Court to take the account of the amount due to the plaintiff under and by virtue of the said agreement for sale and that a time may be fixed by this Honourable Court for payment of the amount so found to be due and that in default of payment being made within the time so fixed, that the payments already made under the said agreement may be declared forfeited and that the said agreement for sale be declared cancelled and rescinded and at an end, and that the defendants do stand absolutely debarred and foreclosed of and from all right, title, interest and claim to, in, for and out of the said lands referred to in the said agreement and described in paragraph 3 hereof.

A defence was put in by the Central Canada Investment Corporation, whom I shall call "the corporation," disputing the amount due, claiming that Muys should be a party to the suit, and setting up the Moratorium Act. The corporation, however, did not ask for a return of the purchase money in the event of cancellation.

The judgment declares that the plaintiff is entitled to have the agreement "specifically performed by the defendants" and orders

and adjudges the same accordingly. It then proceeds to order "that all necessary enquiries be made, accounts taken, costs taxed and proceedings had for the cancellation and foreclosure of the agreement," and refers it to the Master to take an account of the amount due to the plaintiff, etc., and that the Master do appoint a day 3 months after the making of his report for the payment by the defendants of the amount found due. The judgment also directs an enquiry as to subsequent encumbrancers, that they be notified to come in and prove their claims, etc., also, that in case any of the encumbrancers neglects to prove his claim that his interest in the land be foreclosed. The judgment then orders that in the event of the defendants or the encumbrancers making default in payment according to the report of the Master, that the agreement for sale "be declared determined, rescinded, cancelled, foreclosed and at an end and be delivered up to the plaintiff, and that payments made thereunder be declared forfeited and that all improvements made upon the said lands be declared the property of the plaintiff;" that possession of the land be delivered to the plaintiff; that the defendants and the encumbrancers, if any, who prove their claims "stand absolutely debarred and foreclosed of and from all equity of redemption in and to the said lands;" that any caveats filed by the defendants or any persons claiming through or under them be vacated and discharged, "and that the plaintiff shall be entitled to an order on their (*sic*) application therefor."

The reference directed by the judgment took place before the Master, who made his report on July 8, 1919. He found the amount due to the plaintiff on that date for principal and interest to be $5,331.34. He calculated subsequent interest for three months to be $73.61, and this sum added to the other made $5,404.95 as the full amount due to the plaintiff on October 8, 1919, which was appointed as the last day for redemption being 3 calendar months after the making of the report.

The corporation intended to make payment in accordance with the report, but by reason of the absence from town of their solicitor who was in charge of the matter, the money was not paid by the day appointed. The plaintiff thereupon applied to and obtained from the Referee in Chambers an order, dated October 11, 1919, by which it is ordered that the agreement of

MAN.

C. A.

BEST
v.
DUSSESSOYS.

Perdue, C.J.M.

sale be cancelled, determined and at an end, that the defendants do stand absolutely debarred and foreclosed of and from all equity of redemption in the lands, that all payments made under the agreement are forfeited; that all improvements made on the lands are the property of the plaintiff, and that the defendants deliver up to the plaintiff immediate possession of the lands. It also orders that any caveat filed by the defendants be vacated and discharged.

On October 22, 1919, the corporation served on the plaintiff notice of motion before the Referee in Chambers for an order vacating the final order of foreclosure, allowing the applicant in to redeem and extending the time for redemption. In the meantime it had transpired that the plaintiff on the same day that the final order was made accepted a proposal from Mary Muys, the wife of the original purchaser Charles Muys, to purchase the land for the price of $5,650 and he afterwards, in consideration of $100, gave her an option until April 1, 1920, to buy at this price. On the motion before the referee on November 25, 1919, Mary Muys was made a party to the suit and it was ordered that upon payment of the sum of $5,453.81 into the Bank of Hamilton to the joint credit of the plaintiff and the accountant of the Court, on or before December 2, 1919, the final order of foreclosure be vacated and the plaintiff stand redeemed. It was admitted on the argument that the corporation paid in the redemption money in accordance with the terms of the order. From this order Mary Muys appealed to a Judge in Chambers. The appeal was heard by Galt, J., and allowed by him (1919), 50 D.L.R. 640. From this last order the present appeal to this Court is brought.

It is important to note that the plaintiff in his statement of claim alleged that he was willing to carry out the agreement on his part and offered to do so (par. 7). By this offer, it seems to me, the plaintiff waived the default of the purchaser and those claiming under him. In *Kilmer* v. *B.C. Orchard Lands*, 10 D.L.R. 172, [1913] A.C. 319, by the terms of the agreement for sale the purchase money together with interest was payable by instalments at specified dates. Time was declared to be of the essence of the agreement. In default of punctual payment at an appointed date of the instalment of purchase money and the interest then payable or any part thereof, the agreement was to be null and

MAN.
C. A.
BEST
v.
DUSSESSOYS.
Perdue, C.J.M.

void; all payments made under the agreement were to be absolutely forfeited to the vendor, and the vendor was to be at liberty to resell the property immediately. The vendor brought an action for cancellation of the agreement. The purchaser counterclaimed for specific performance and the money due was paid into Court. The trial Judge dismissed the action and decided in favour of the purchaser on the counterclaim: (1912), 2 D.L.R. 306, 17 B.C.R. 230. The Court of Appeal reversed the trial Judge and the purchaser appealed to the Privy Council. Lord Macnaghten, who prepared the judgment of the Judicial Committee, pointed out that the respondents, the vendors, had extended the time for the payment of the second instalment. When the extended time elapsed without payment being made the vendors brought the action. His Lordship held that the case was brought entirely within the ruling in *In re Dagenham (Thames) Dock Co.* (1873), L.R. 8 Ch. 1022, that it was even a stronger case, for the penalty, if enforced according to the letter of the agreement, became more and more severe as the agreement approached completion, and the money liable to confiscation became larger. The appeal, therefore, was allowed and the judgment of the trial Judge restored, which gave the purchaser the right to specific performance.

In *Steedman* v. *Drinkle*, 25 D.L.R. 420, [1916] 1 A.C. 275, the above case came up for discussion. In the *Steedman* case it was held that the parties having made time of the essence of the agreement specific performance would not be granted at the suit of purchasers who were in default in payment of part of the purchase money. Lord Haldane in delivering the judgment of the Board, after referring to the judgment in the *Kilmer* case, 10 D.L.R. 172, [1913] A.C. 319, in so far as it gave relief against the forfeiture, proceeded as follows, at page 423:—

> So far the decision, which merely applied a well-known principle, is easy to follow, and in their Lordships' opinion so far it governs the present case. But the Board went on to decree specific performance. As time was declared to be of the essence of the agreement, this could only have been decreed if their Lordships were of opinion that the stipulation as to time had ceased to be applicable. On examining the facts which were before the Board it appears that their Lordships proceeded on the view that this was so. The date of payment of the instalment which was not paid had been extended, so that the stipulation had not been insisted upon by the company. The learned counsel who argued the case for the purchaser contended that

MAN.
C. A.
BEST
v.
DUSSESSOYS.
Perdue, C.J.M.

when the company had submitted to postpone the date of payment they could not any longer insist that time was of the essence. Their Lordships appear to have adopted this view, and on that footing alone to have decreed specific performance as counterclaimed.

In *Tooley* v. *Hadwen*, (1918), 41 D.L.R. 190, 13 Alta. L.R. 447, Walsh, J., held that the effect of the *Kilmer* case as above explained by Lord Haldane is that where time is expressed to be of the essence of a contract, consent to an extension of the time, even to another definite date, prevents time from being any longer of the essence of the contract.

The remedy to which a purchaser who made default is entitled is shewn in *Brickles* v. *Snell*, 30 D.L.R. 31, [1916] 2 A.C. 599. He cannot claim specific performance if he is in default—unless, as pointed out in *Steedman* v. *Drinkle*, 25 D.L.R. 420, [1916] 1 A.C. 275, the default has been waived by the vendor; but he may apply to be repaid the money paid on account of the purchase, less, of course, the loss and damage sustained by the vendor through the purchaser's default. This rule was recently applied by the Appellate Division of the Supreme Court in Ontario in the case of a contract for the sale of goods: *Brown* v. *Walsh* (1919), 45 O.L.R. 646. Meredith, C.J.C.P., after referring to the *Brickles* case and the *Steedman* case, said, at page 649: "So that the Privy Council at all events has gone pretty near to the rule that if the seller be fully compensated that is enough: a very reasonable rule, at all events under ordinary circumstances."

The above decisions are of importance in the present case in shewing how far the Courts will go in relieving against a forfeiture. In this case the plaintiff offers to carry out the agreement. He asks that an account be taken by the Court of the amount due to him under the agreement and that a time be fixed for payment. This offer in itself does away with the condition that time is of the essence of the contract, and all provisions for forfeiture of moneys, improvements, etc., based upon that condition should fall with it. Plaintiff does not set out or allege in his statement of claim any provision of the agreement giving to the plaintiff the right of forfeiture of the monies paid on account in case the purchaser makes default. Judgment, however, was pronounced and entered in the form above mentioned declaring a cancellation of the agreement and a forfeiture of the moneys already paid unless the amount of unpaid purchase money be paid on the day to be fixed

MAN.

C. A.

BEST v. DUSSESSOYS.

Perdue, C.J.M.

by the Master. This judgment was not appealed from and binds the corporation.

Suits for the cancellation of contracts for the sale of land and the forfeiture of moneys paid by purchasers on account of purchase money have been very common in this Province. The form of action adopted from time to time is shewn in *Hudson's Bay Co.* v. *Macdonald* (1887), 4 Man. L.R. 237, 480; *West* v. *Lynch* (1888), 5 Man. L.R. 167; *Canadian Fairbanks* v. *Johnston* (1909), 18 Man. L.R. 589. In the last mentioned case, Cameron, J., following Killam, J., in *Hudson's Bay Co.* v. *Macdonald, supra*, at page 240, and Jessel, M.R., in *Lysaght* v. *Edwards* (1876), 2 Ch. D. 499 at 506, suggested (at page 601), that one party to the contract may file a bill asking that a time may be fixed within which the other party may perform it and that, in default of such performance, it may be rescinded.

In the judgment appealed from, 50 D.L.R. 640, Galt, J., pointed out the difference between the position of mortgagor and mortgagee on the one hand and purchaser and vendor on the other. This distinction is very clearly shewn in the recent case of *Davidson* v. *Sharpe*, decided in the Supreme Court of Canada; ante page 186. The judgment in that case was that, on default of payment to the plaintiff of the amount found due, the defendant "thenceforth do stand absolutely debarred and foreclosed" from all right, title, interest and equity of redemption in and to the agreement and the lands, that the agreement be cancelled and the moneys paid thereunder be forfeited. After obtaining this judgment the vendor brought an action in another Province against the purchaser on the covenant in the agreement. It was held that the plaintiff could not maintain the action, the agreement being at an end.

In the judgment in the present case the expression used, 50 D.L.R. at page 646, is "that the said agreement for sale be declared determined, rescinded, cancelled, foreclosed and at an end." It also declares that the payments made under the agreement be forfeited, and, at page 647,

> that the defendants stand absolutely debarred and foreclosed of and from all equity of redemption in and to the said lands and that all caveats filed by the said defendants or any persons claiming through or under them be vacated and discharged, and that the plaintiff shall be entitled to an order on application therefor.

MAN.

C. A.

BEST v. DUSSESSOYS.

Perdue, C.J.M.

The reference to the "equity of redemption" seems to me to be needless. An equity of redemption is not involved in the case.

The view I take of the judgment is that it was intended that, on default in payment by the defendants, a final order might be taken out which would be of evidential value in clearing the title to the land. Liberty to apply was not expressly reserved by the judgment, but that was unnecessary under K.B. Rule 653. Under that rule any party may apply to the Court from time to time as he may be advised. Such application should be made to a Judge sitting in Court or exercising the powers of the Court: *Fritz* v. *Hobson* (1880), 14 Ch. D. 542, 561; *Poisson* v. *Robertson* (1902), 86 L.T. 302.

Where there is judgment for specific performance, as there is in this case, and payment of the purchase money has been ordered at the suit of the vendor, if the purchaser makes default in payment within the time appointed, the Court may on the application of the plaintiff order that the contract be rescinded. The application in that case is made to the Court: *Foligno* v. *Martin* (1853), 16 Beav. 586; *Sweet* v. *Meredith* (1863), 4 Giff. 207, 7 L.T. 664; *Henty* v. *Schrder* (1879), 12 Ch. D. 666; *Clark* v. *Wallis* (1866), 35 Beav. 460; *Hutchings* v. *Humphreys* (1885), 54 L.J. (Ch.) 650, 52 L.T. 690. I agree with Galt, J., that the Referee in Chambers had not power to extend the time fixed for redemption under the judgment and Master's report. The powers conferred on the referee by the rules and practice in regard to mortgage foreclosures do not extend to suits for specific performance or cancellation of agreements for sale of land. If anything in the nature of a final order declaring the cancellation of the agreement is required,—and I do not say that such an order is necessary—that order should, I think, under the above authorities, be made by a Judge in Court or by a Judge in Chambers exercising the powers of the Court under Rule 462. It is only necessary to glance at the final order made in this suit by the referee to see how widely it differs from the ordinary final order of foreclosure in a mortgage suit. The order is in fact a final or declaratory judgment. It declares that the agreement of sale is cancelled and determined, that the payments made under it are forfeited, that the improvements are the property of the plaintiff and the defendants are ordered to

deliver to the plaintiff immediate possession of the land. But the order goes still further. It orders that any caveat filed by defendants or any person claiming under them be discharged. The effect of the order made by Galt, J., is that the referee's order of October 11, 1919, stands, for whatever validity it may possess. I have reluctantly come to the conclusion that the appeal must be dismissed. This leaves the matter in a very unsatisfactory condition. The plaintiff, the vendor, retains the land and also the money paid, being much more than half the purchase money, besides interest. This is contrary to the established equitable principle, that the vendor cannot have the land and the purchase money also: See *Davidson* v. *Sharpe*, ante, at page 186. The balance of the money is now in Court; the purchaser is anxious to complete the purchase; he was only prevented from doing so by a slip on the part of his solicitor. In such a case it would be unfortunate if some means cannot be found to prevent so manifest an injustice from being perpetrated. Mrs. Muys is no longer a party to the suit, the order of November 25, 1919, making her a party having been set aside. I cannot see how she is in a better position than the plaintiff.

CAMERON, J.A.:—It is sought to make the doctrine of the Courts of Chancery that a mortgagee is liable to be redeemed after he has obtained a final order of foreclosure applicable to the relations existing between a vendor and purchaser under such an agreement as is in question in this case. If this contention be upheld an entirely new departure will be established and a term added to the contract not hitherto recognised. Cameron, J.A.

The rights of a mortgagor to reopen a final order of foreclosure are set out by Lord Jessel in the well-known case of *Campbell* v. *Holyland* (1877), 7 Ch. D. 166, where a foreclosure was opened up as against a purchaser after the date of the foreclosure absolute.

A mortgage, in the modern acceptation of the term, is a security created by contract for the payment of a debt already due or to become due, or of a present or future advance, effected by means of an actual or executory conveyance of real or personal property, charging the mortgaged property with the payment of the money secured, redeemable at law only according to the strict legal conditions of the conveyance, but redeemable in equity independently of such conditions, and enforceable, in default of payment, by foreclosure or sale in lieu thereof. (Coote's Law of Mortgages (ch. 2), page 6.)

According to the above definition, a mortgage arises out of contract between a debtor and a creditor for the payment of a debt or loan; and herein

MAN.

C. A.

BEST v. DUSSESSOYS.

Cameron, J.A.

it is distinguished from a charge arising by operation of law, either under a judgment or charging order made by a Court of competent jurisdiction, or by way of lien as incident to contracts in which the parties stand in a relation to each other than that of debtor and creditor by virtue of the mortgage contract itself, as, *e.g.*, vendor and purchaser, solicitor and client, and factor and principal. (Coote's Law of Mortgages, (ch. 2) page 6.)

Some of the extraordinary characteristics that have been imposed upon a mortgage security are set forth in the judgment of Lord Bramwell in *Salt* v. *Marquess of Northampton*, [1892] A.C. 1, cited in Galt, J's judgment, 50 D.L.R. 640, at page 646. I quote the following further sentence from Lord Bramwell's decision at page 19: "It seems that a borrower was such a favourite with Courts of Equity that they would let him break his contract and, perhaps, by disabling him from binding himself, disable him from contracting on the most advantageous terms to himself."

But the purchaser under the agreement in this case was not a borrower. He was not giving a security for payment of a debt. He entered into a contract with the vendor for the purchase of certain lands on certain terms of payment and otherwise on the performance of which the vendor agreed to convey and time was made the essence of the contract. Nothing has been paid on the agreement since November 2, 1916.

There is no reason and no authority to justify the imposition on such an agreement as that before us of a right to re-open the first order made by the referee in the circumstances. To do so might, as in this case, be nothing short of judicial legislation. It would affect the rights a third party acquired in good faith. It would create an insecurity in the vendor's rights under his contract. It would be further enlarging the purchaser's rights and privileges against the vendor which are surely already sufficiently extensive.

As I understand the present situation in this Province, the contention made by the appellant on this motion would, if given effect to, give the purchaser under an agreement of sale a privilege not enjoyed by a mortgagor under a mortgage pursuant to the Real Property Act, R.S.M., 1913, ch. 17. The section under which the Supreme Court decided *Williams* v. *Box* (1910), 44 Can. S.C.R. 1, was repealed in 1911.

The practice followed in this case of securing a rescission of the agreement through an action for specific performance has

been well established in this Province. There is no particular virtue in calling the order made pursuant to the judgment a final order of foreclosure. That is a term which is usually confined to a final order in an action for foreclosure of mortgage. But as applied to the first order of the referee in this case it is merely descriptive and cannot affect its meaning and substance and to call it such has no legal effect. It might just as well be called an "order" or "final order" or "order pursuant to judgment" or "order for rescission."

I would affirm the order made by Galt, J.

I am fortified in these views by the recent decision of the Supreme Court in *Davidson* v. *Sharpe*, ante, page 186, where an action was brought by a vendor in Saskatchewan to recover on a judgment obtained against the defendant in the Supreme Court of British Columbia, or alternatively on the agreement for sale on which the action in British Columbia was taken. It was held that vendor could not recover. Mr. Justice Anglin says:—

> The anomalies introduced by Courts of Equity in regard to the relations between mortgagor and mortgagee do not exist in regard to vendor and purchaser. A judgment or order declaring that on the happening of a certain event an agreement for sale shall be cancelled and at an end means precisely what it says and not merely that the plaintiff shall thereupon be entitled to have it cancelled and put an end to. When the purchaser under the order of the Chief Justice of British Columbia made default the agreement ceased to exist and the foundation for any right of personal recovery from the purchaser (except for costs) was gone. The purchaser had no further right to the land and the Court has no jurisdiction to restore him to his former position. The vendor has the land. He cannot have the purchase-money also.

In this present case the purchaser or those claiming under him has no further right to the land and the Court has no jurisdiction to restore them to their former position.

I think the order made by Galt, J., was right and this appeal must be dismissed.

HAGGART, J.A.:—I think that substantial justice will be done in this case by allowing the defendants The Central Canada Investment Corporation, Ltd., to redeem. McCaul on the Remedies of Vendors and Purchasers devotes a section under the heading of "Definition of Forfeiture," ch. 4, sec. 4, sub-sec. (B.), to the discussion of the questions that were raised before us on the argument. The author there says, at page 92:— Haggart, J.A.

> Here again the necessity of a clear definition of terms presents itself. Relief against *forfeiture?* Forfeiture of what? Is it the money that has

MAN.

C. A.

BEST v. DUSSESSOYS.

Haggart, J.A.

been paid to the vendor and which he seeks to retain that is "forfeited," or is it the equitable estate of the purchaser, or both?

And in the author's text he cites very freely from the reasons of Stuart, J., in *C.P.R.* v. *Meadows* (1908), 1 Alta. L.R. 344. I shall cite the author's words, which appear to me to be very applicable in the present case (at page 92):—

At law the money had to be paid on the day named, but as long as the purchaser came in in a reasonable time and was not guilty of *laches* he could get specific performance if he went into equity. In granting specific performance at the suit of the vendor, the Courts always fixed a day for the payment of the money necessarily much later than the date fixed in the agreement, and there are numerous cases where, although the purchaser did not pay on that day, a new day was given. Surely this is relieving against a forfeiture. Moreover, such a course is, in my view, the only thing that can in strictness be called relieving against a forfeiture, I mean the course of preserving by postponement after postponement the rights of the purchaser under the agreement. What, it must be asked, is the right of the purchaser under the agreement which the Court will endeavour as long as possible to preserve from destruction? The right is simply to have a conveyance of the land upon payment of the purchase-money. The Court, I grant, will struggle to preserve that right for the purchaser as long as it possibly can, and does so by naming new days for the payment. But if the purchaser will not or cannot pay there comes a time when it is impossible to preserve his rights, simply because he is, in the last resort, the only one who can preserve them and that only by exercising them. The purchaser who has paid some money under an agreement of sale has, as I conceive it, two interests, first, an interest in the property to the extent of the money paid; second, a right to receive a title when he pays the balance. I agree that the Court may and ought, with certain limitations presently to be mentioned, to preserve the first from forfeiture. I agree also that it will, as long as possible, preserve the second right by postponements of the day for completion, but I cannot agree that when the Court lays its own hands upon the property and orders a sale, calling in a new purchaser and forcing a new agreement, it is thereby merely preserving from destruction the purchaser's rights under the agreement, which, as I have said, are merely that he may pay the purchase-money and receive a title. This latter alone can, in my view, be called a relief from forfeiture. By ordering a sale the Court gives the purchaser something vastly different from his rights under the agreement. Instead of preserving his right to pay the purchase-money and get a title, it allows a new party to pay, not the purchase-money, but other purchase-money, under a new agreement, and to get a title, and it gives the original purchaser not his rights under the agreement, but the proceeds of the sale. By ordering a sale the Court is not relieving against a forfeiture, it is actually enforcing one. Once the property is sold under a decree the purchaser's right to get that property upon payment of money is forever gone, and instead he may have a judgment against him enforceable by execution if there happens to be a balance still due after the application of the proceeds. This only makes it clearer that it is impossible in the nature of things to avoid a forfeiture in the long run if the purchaser will not or cannot exercise his rights by payment. In my view it is no answer

to say that the Court gives him or preserves him his rights by giving him the benefit of the proceeds of the sale. The purchaser has, as I have said, a pecuniary interest in the property to the extent of payments made. He has no *pecuniary* interest beyond that; he has simply a right to get the title if he pays the balance. That is a different thing altogether, in my view, from a pecuniary interest in the property over and above the amounts paid, and it is this non-existent pecuniary interest that the Court gives him when it hands over to him or to his benefit the proceeds of the sale beyond what he has paid . . .

We all know what is meant when we say that equity relieves against the penalty on a bond—it is simply that the Court will not allow the obligee to enforce payment of the penal sum according to the letter of the bond, where there is only a smaller sum due, or ascertainable as damages. . . . The forfeiture against which equity relieves for breach of condition in a lease is clearly the forfeiture of the term, it has no relation to moneys paid for rent; and so with mortgages. "The absolute forfeiture *of the estate* at common law on breach of the condition was, in the eye of equity, an injustice and hardship;" (Coote on Mortgages, page 11), and it was against this the Court relieved; the expression "forfeiture" was never applied to moneys paid to the mortgagee whether on account of principal or interest.

The foregoing citations set forth the law and the procedure in reference to the subject matter of this suit.

The case of *Campbell* v. *Holyland*, 7 Ch. D. 166, was cited to us on the argument as to the treatment of mortgagors and mortgagees as to the opening of foreclosures even after the order of foreclosure is absolute. In such a case it was held the mortgagor could redeem after the order for foreclosure was absolute and notwithstanding that after the order the mortgagee may have disposed of his interest to a purchaser, but whether or not he should be allowed to redeem lies in the discretion of the Court and depends on the circumstances of each particular case and there is discussed the general nature of the circumstances under which foreclosure may be opened.

I think that substantial justice would be done to all parties here by allowing the loan company to redeem and extending the time for payment into Court.

Since the argument our attention has been directed to a very recent case of *Davidson* v. *Sharpe*, ante, page 186. That was a case of the sale of land. The vendor sued on the agreement. The vendor took an order providing that on default of payment within a fixed period the purchaser should be foreclosed and the agreement cancelled. The question arose whether the vendor could sue in another Province on the personal covenant. I do

MAN.

C. A.

BEST v. DUSSESSOYS.

Haggart, J.A.

not think that the circumstances were such that they apply to the case before us.

There is no question about it that this Court has the power to grant the relief asked for by the defendants, the Central Canada Investment Co.

A new day should be appointed for the payment of the moneys in question and I think in justice to all the parties these defendants should pay the costs of this appeal and the costs necessitated by their application for a new day.

Dennistoun, J.A.

DENNISTOUN, J.A.:—On April 15, 1919, by a judgment of the Court of King's Bench, pronounced by Mathers, C.J.K.B., the plaintiff was declared entitled to specific performance of an agreement for the sale of land set forth in the statement of claim.

The judgment went on to provide for a reference to the Master at Winnipeg to take accounts of the amount due to the plaintiff and that "the Master do appoint a day three months after the making of his report for the payment by the defendants at such time and place as the Master shall direct of the amounts so found due." The judgment further directed a reference as to subsequent encumbrancers and the taking of their accounts and the settlement of their priorities.

Then followed a direction that upon the defendants or any added party paying the amount so found due at such time and place the plaintiff should transfer and convey the lands to the said parties or to whom the Master should appoint.

Lastly the judgment provided in the event of the defendants or encumbrancers (if any) making default in payment according to the report of the Master,

that the said agreement for sale be declared determined, rescinded, cancelled, foreclosed, and at an end and be delivered up to the plaintiff, and that payments made thereunder be declared forfeited and that all improvements made upon the land be declared the property of the plaintiff and that the defendants deliver to the plaintiff immediate possession of the said lands and that the defendants and the said encumbrancers, if any, who have proved their claims stand absolutely debarred and foreclosed of and from all equity of redemption in and to the said lands and that any caveats filed by the said defendants or any persons claiming through or under them be vacated and discharged, and that the plaintiff shall be entitled to an order on his application therefor, and doth order and decree the same accordingly.

This is a drastic judgment and if the defendants had seen fit to appeal it would in all likelihood have been reformed in

accordance with the decisions of the Judicial Committee of the Privy Council in *Kilmer* v. *B.C. Orchard*, 10 D.L.R. 172, [1913] A.C. 319; *Steedman* v. *Drinkle*, 25 D.L.R. 420, [1916] 1 A.C. 275; and *Brickles* v. *Snell*, 30 D.L.R. 31, [1916] 2 A.C. 599; but no objection was taken to the form of the judgment and it cannot be questioned or reformed in these proceedings.

This judgment was taken into the Master's Office and on July 8, 1919, he made a report finding due to the plaintiff the sum of $5,404.95 for principal, interest and costs payable on October 8, 1919, and directing same to be paid into a designated bank on or before that date.

Default in payment having been made an *ex parte* application was made to the Referee in Chambers on behalf of the plaintiff and on October 11, 1919, the referee made an order declaring the agreement for sale referred to in the statement of claim cancelled, determined and at an end and the defendants foreclosed, and otherwise as set forth in the judgment of the Court above set forth.

On October 18, the plaintiff, believing the agreement to be determined and that he had a right to deal with the land, gave an option to purchase at $5,650, to one Mary Muys, who paid him the sum of $100 therefor. She was the wife of the original purchaser of the lands and had knowledge of the proceedings taken by the plaintiff to determine the agreement, the purchaser's rights under it having passed into the hands of the defendant the Central Canada Investment Corporation, Ltd.

On October 30, the solicitors for this company, who had been instructed to pay off the plaintiff in accordance with the Master's report, discovered that through error and oversight on their own part the day fixed by the Master had gone by and that meantime Mary Muys had acquired rights in the land under her option to purchase. They moved promptly and on November 25, 1919, the Referee in Chambers made an order joining Mary Muys as a party defendant in the action and providing that on payment into Court of $5,453.31 on or before December 2, 1919, his order of October 11 should be set aside, and the plaintiff stand redeemed.

The plaintiff did not appeal but Mary Muys did and her appeal was allowed by Galt, J., 50 D.L.R. 640, from whose order this appeal is taken.

MAN.

C. A.

BEST
v.
DUSSESSOYS.

Dennistoun, J.A.

Under similar circumstances had this been a mortgage contract there can be no doubt relief would have been given to the mortgagor and the time for redemption extended, notwithstanding the fact that a new purchaser had intervened, for there is authority for holding that a purchaser who contracts with a mortgagee in possession even after final order of foreclosure has notice that his vendor may be redeemed by order of a Court of Equity and that the order for redemption will prevail over his agreement to purchase if the Court thinks fit to so direct: *Campbell* v. *Holyland*, 7 Ch. D. 166; *Johnston* v. *Johnston* (1882), 9 P.R. (Ont.) 259; *Independent Order of Foresters* v. *Pegg* (1900), 19 P.R. (Ont.) 254.

The contract in question is not a mortgage contract but one for the sale and purchase of land, and the rights of the parties are not the same. The Courts have in recent years consistently refused to regard a defaulting purchaser as entitled to the rights and remedies which have become associated with a defaulting mortgagor "that spoiled child of equity."

A purchaser who is in default, time being of the essence of the agreement, has no right to specific performance, and so soon as the contract has been determined, he has no further right to the land and the Court has no jurisdiction to restore him to his former position: *Steedman* v. *Drinkle*, 25 D.L.R. 420, [1916] 1 A.C. 275; *Davidson* v. *Sharpe*, ante page 186.

The judgment of the Supreme Court of Canada in *Davidson* v. *Sharpe* has very recently been delivered and was not referred to upon the argument of this appeal. It has an important bearing upon the point under consideration.

Anglin, J., says as follows, ante page 194:—

> By taking a foreclosure judgment the mortgagee does not take the property for his debt. The judgment notwithstanding its absolute form is construed as merely authorizing him to do so. The foreclosure judgment in the mortgage action is merely a means of enforcing the mortgage contract, which it deals with as subsisting; whereas the judgment for rescission or cancellation of a contract between vendor and purchaser is a judgment not for the enforcement but for the extinguishment of the contract. When the vendor sought and obtained a judgment fixing a period for payment and providing that on default "the agreement shall be cancelled and at an end and all monies paid thereunder forfeited to the plaintiff," he elected, in my opinion, on that event happening to take the property in satisfaction of so much of the purchase money as then remained unpaid.

In the present case the plaintiff Best sought specific performance and in default of payment within a fixed time deter-

mination of the contract; he asked for no personal relief against the defendant. He had no right under the judgment to issue execution. He made his election from among several remedies open to him as discussed by Lamont, J., in *Standard Trust* v. *Little* (1915), 24 D.L.R. 713, 8 S.L.R. 205, approved by Anglin, J., in *Davidson* v. *Sharpe*, ante page 186, and has taken the necessary steps to put an end to the contract in the manner directed by the Court of King's Bench.

The judgment provides that in the event of the said defendants or the encumbrancers making default in the payment according to the report of the Master the said agreement for sale "be declared determined, rescinded, cancelled, foreclosed and at an end" and "that the plaintiff shall be entitled to an order on his application therefor *and doth order and decree the same accordingly.*"

This differs somewhat from the form of the judgment in *Davidson* v. *Sharpe*, ante page 186, which was as follows: "In default of the defendant paying to the plaintiff what shall be certified to be due to her as aforesaid by the time aforesaid that the defendant *thenceforth do stand absolutely debarred and foreclosed*," etc. Of this Anglin, J., ante page 195, says:—

> A judgment or order declaring that on the happening of a certain event an agreement for sale shall be cancelled and at an end means precisely what it says, and not merely that the plaintiff shall thereupon be entitled to have it cancelled and put an end to. When the purchaser under the order of the Chief Justice of British Columbia made default the agreement ceased to exist.

In my opinion the judgment of Mathers, C.J.K.B., in this case terminated the rights of the defendants under the contract when they made default and no further or final order was necessary.

Provision was made by the judgment itself for the issue of a further order no doubt to enable the plaintiff to clear up his title in the Land Titles Office, and as evidence that default in payment into the bank had been made.

This order was, in accordance with the usual practice, made by the Referee in Chambers, who acted upon the direction contained in the judgment that upon default "the plaintiff shall be entitled to an order on his application and doth order and decree the same accordingly."

Objection has been taken on this appeal to the jurisdiction of the Referee in Chambers to pronounce a foreclosure order in

MAN.

C. A.

BEST v. DUSSESSOYS.

Dennistoun, J.A.

other than a mortgage action. Attention is directed to the words of the judgment quoted to shew that the referee did not presume to act upon his own authority. The contract had been terminated by the judgment and that judgment directed an order to issue when default occurred for the purpose of advertising the fact to all concerned. The referee did nothing more than was authorized by the judgment. His order of October 8 did not affect the rights of the parties in any way and his order of November 25, setting aside his own order, could in no way restore the rights which had been settled by the judgment. It was properly set aside by the order of Galt, J., now appealed from, and I agree with the reasoning of the Judge upon which his order was based.

This appeal should be dismissed with costs.

Appeal dismissed.

ALTA.

S. C.

RURAL MUNICIPALITY OF STREAMSTOWN v. REVENTLOW-CRIMINIL.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Beck, Ives, and Hyndman, JJ. February 13, 1920.

TAXES (§ III F—149)—NON-PAYMENT—FORFEITURE OF LAND—CONFIRMATION—NOTICES—IMPOSSIBILITY OF COMPLYING WITH ACT—SUSPENSION OF PROCEEDINGS.

Where the methods of giving the notices required by secs. 314, 316 (4) and 316 (5) of the Rural Municipalities Act (Alta.), 2-3 Geo. V., 1911-12, ch. 3, become illegal by the outbreak of war and are prohibited, proceedings which rest on the giving of such notices are suspended until such notices can be legally given.

Statement.

APPEAL by defendants from the trial judgment in an action to set aside a sale of land for non-payment of taxes. Affirmed.

S. B. Woods, K.C. and *R. D. Tighe*, for appellant.

Frank Ford, K.C., and *C. F. Newell*, K.C., for respondent.

Harvey, C.J.

HARVEY, C.J.:—The plaintiff was, at least from 1912 on, the owner of three sections of land in the defendant municipality. She was assessed for them by the name "Hoyos, Lillian, Countess" and the address given was "c/o Oldfield, Kirby & Gardiner, Winnipeg."—Hoyos being apparently her maiden name, and Oldfield, Kirby & Gardiner being agents who paid the taxes prior to the year 1914. It is stated by counsel that the certificate of title is in the plaintiff's name as in this action and that her address

is there given as Fiume, Austria, and in the evidence the secretary-treasurer says he sent a notice to "Alice Lillian Reventlow-Criminil, Fiume, Austria-Hungary," by registered post as well as to Oldfield, Kirby & Gardiner. When giving this evidence he is asked what he is reading from and he answers "Tax Enforcement Return, here is the Certificate of Registration."

Neither the Tax Enforcement Return nor the Registration Certificate is an exhibit though they were, as appears, in Court at the trial and I think it is sufficiently clear that the name and address for which the notice was sent to Fiume were those shown by the Registrar's abstract since the Act requires notices to be sent to the persons "shown by the records of the land registration district within which the lands lie, or by the said return to have any interest in the lands mentioned in the said return in respect of which confirmation is desired and whose post office address is shown by said records or return." (Sec. 314, ch. 3, of the Rural Municipalities' Act, 2-3 Geo. V., 1911-12) (Alta.).

It was also assumed as a fact by counsel and the trial Judge that the plaintiff was in fact a resident of Fiume.

Owing to the outbreak of the war in August, 1914, her agents in Winnipeg found themselves unable to communicate with her and the taxes for 1914 were not paid. In the fall of 1915 the defendants took proceedings to have the lands forfeited in accordance with the provisions of the Act and it was in that regard that the notices above mentioned were said to have been sent. A tax enforcement return was confirmed and registered in the Land Titles Office, and the requisite year having expired certificates of title were obtained in the name of the defendants.

Under the Act the lands can then be sold with the approval of the Minister. An application was made as promptly as possible and authority obtained to offer the land for sale at auction. Although all the steps were taken apparently as expeditiously as possible it was December, 1916, before the land could be sold.

A few days before the expiration of the period of redemption in November, 1916, the plaintiff's agents, having obtained sufficient money for the purpose, redeemed one section. Between the expiration of that period and the date of the sale a New York attorney advised the defendants that a sister of the plaintiff being in New York wished to redeem the land. No money how-

ALTA.

S. C.

RURAL MUNICIPALITY OF STREAMSTOWN. v. REVENTLOW-CRIMINIL

Harvey, C.J.

ever was forwarded and the defendants proceeded with the sale and at the auction the lands were sold for about one-quarter of their assessed value.

Before the sale was approved by the Minister a caveat was filed and the Minister refused to consider the matter further until the dispute was settled. Notice was given to the plaintiff to remove or maintain the caveat and this action was brought to support the caveat. An application was made to dismiss the action on the ground that the plaintiff was an alien enemy who could not resort to the Courts during the war. The Master held that it was the defendant's own act in giving the notice that brought about the action and that it should not be dismissed. Although this was not appealed from it was argued in this appeal that it was wrong because the plaintiff was really responsible because she filed the caveat. The matter is, I think, not open for argument now, but I do not hesitate to say that in my opinion the Master was right. The caveat was nothing but a notice that the plaintiff claimed an interest in the land. The notice of the defendants was on the contrary an invitation to the plaintiff to bring the action and that in default her claim would be lost. In *In re Merten's Patents*, [1915] 1 K.B. 857, 32 R.P.C. 109, 112 L.T. 313, it was held that an alien enemy had a right to launch and carry on an appeal from a judgment against him. The principle of that decision is, I think, applicable.

As I have already indicated the municipality in order to obtain the forfeiture must give certain notices to the persons interested. These notices are provided for by secs. 314, 316 (4) and 316 (5) all of which must be sent to the recorded address. It was necessary therefore for the municipality to send these notices to a person within an enemy country.

In *Esposito* v. *Bowden* (1857), 7 El. & Bl. 763, Willes, J., delivering the judgment of the Court of Exchequer Chamber, at page 779, said that it was finally established

> that one of the consequences of war is the absolute interdiction of all commercial intercourse or correspondence between the subjects of the hostile countries except by the permission of their respective sovereigns.

In the other case, to which I have already referred, cited also under the name *Porter* v. *Freudenberg*, Lord Reading, C.J., delivering the judgment of a very strong Court of Appeal, reaffirmed the declaration of Scrutton, J.

In both cases however it was pointed out that what was meant by "enemy alien" or "enemy subject" was a person subject, even though only temporarily, to the enemy sovereign by residing within his jurisdiction and did not include an alien enemy residing within our own country.

Porter v. *Freudenberg, supra*, holds that while an alien enemy may not maintain an action for his benefit yet an action may be maintained against him for the benefit of the plaintiffs, but Lord Reading points out, at page 887, that the alien enemy is "according to the fundamental principles of English law entitled to effective notice of the proceedings against him." He also points out that substituted service cannot be made when personal service would not be legally possible and that it must be shewn that knowledge will reach the defendant by the service proposed to be adopted.

The Canada Gazette of March, 1915, contained a notice from the Imperial Foreign Office in which the following appears:—

> Private letters to Germany and Austria-Hungary through neutral countries are now allowed to be forwarded subject to the usual conditions of censorship. Letters cannot, however, be forwarded direct to Germany or Austria-Hungary. British subjects and others wishing to communicate with friends in enemy countries must forward their letters through an agency in a neutral country and correspondents may select their own agency.

This of course does not purport to be a statute or order-in-council but presumably is a notice of the Sovereign's license to communicate with persons in the enemy country which as the cases shew would be otherwise illegal. It does not, however, authorise a direct communication but distinctly gives notice of the illegality of that method.

This is not the case of a municipality being required by statute to do something which subsequently becomes illegal and thereby the doing of which may be excused.

It is the case of the impossibility of complying with one of the conditions of its acquiring certain rights. Until the Legislature dispenses with that condition it cannot acquire the rights consequent upon the performance of the condition. In that regard I agree with the trial Judge that the Act was made with regard to peace and not war conditions but it was quite competent for the Legislature to adapt it to the war condition if it thought

ALTA.

S. C.

RURAL MUNICIPALITY OF STREAMSTOWN. v. REVENTLOW-CRIMINIL

Harvey, C.J.

necessary and as we all know the 5 years of the war have been a great mass of legislation simply for the purpose of adaptation to war conditions.

The purpose of sending the notice as required by the statute is to give notice to the persons to whom it is to be sent. To give that notice in the manner required by the statute had become illegal by the outbreak of the war and was therefore prohibited and the right of the municipality to take the proceedings which must rest upon the giving of such notice was in my opinion suspended until such notice could be legally given. It is of no consequence in this regard that the plaintiff was in fact a subject of Austria-Hungary. It would have been the same if she had been a British subject residing there.

For this reason I am of opinion that the confirmation proceedings were a nullity and I would dismiss the appeal. The defendants should pay the costs of the appeal. There might be circumstances under which costs would not be given against a municipality in an action such as this but as I stated in the argument I can see no justification for the defendants having brought this appeal. All they could be entitled to whether they win or lose is their taxes, costs and expenses, and the judgment appealed from gives them all of that. It creates some suspicion that they should appeal under such circumstances.

I may also add that there are other grounds upon which I think I might have come to a conclusion adverse to the defendants which would have given the plaintiff the same benefit but which I have not deemed it necessary to consider.

Beck, J.

BECK, J.:—This is an appeal from the judgment of Stuart, J. who gave judgment for the plaintiff subject to the fulfilment of certain conditions.

The claim of the plaintiff set up in her statement of claim and in amendments thereto is in substance as follows: The plaintiff is the rightful owner of the whole of sec. one in tp. 53, and the whole of sec. 35, in tp. 52, range 3, west of the fourth meridian, and the title to these lands stood in her name in the register in the Land Titles Office. The defendant municipality has illegally and wrongfully attempted to dispose of these lands for arrears of taxes.

The plaintiff in order to protect her interest registered a caveat on January 23, 1917.

The defendant municipality by notice dated February 12, 1917, notified the plaintiff pursuant to sec. 89 of the Land Titles Act that the caveat would cease to have any effect after the expiration of 60 days next ensuing the date of the service of the notice unless in the meantime the plaintiff should have taken proceedings on the caveat and the plaintiff accordingly brought this action.

The defendant municipality became the registered owner of the lands by means of proceedings under the Rural Municipalities Act, 2-3 Geo. V., 1911-12 (Alta.), ch. 3, following on failure of the plaintiff to pay the taxes against the lands.

The plaintiff alleges certain specific instances on non-compliance with the provisions of the statute.

The plaintiff also (by amendment) asserts that the defendant municipality in making the assessment of the lands illegally and fraudulently made the assessment of the plaintiff's lands and the lands of other non-residents at a rate per acre higher than the lands owned by residents, and fraudulently endeavoured to collect from the plaintiff such an amount as would make the taxes unequal and by reason thereof the assessment against the plaintiff's lands is void.

The plaintiff for the sake of peace and without admitting the validity of the assessment and taxation or of the forfeiture proceedings offered to pay all arrears of taxes, penalties and expenses if the defendant municipality would transfer the lands to the plaintiff, but the defendant municipality refused to do so.

The defendant municipality wrongfully purported to attempt to make a sale of the lands; the purchase price obtained at the purported or attempted sale is grossly inadequate, and the purported or attempted sale is unfair to the plaintiff and was not *bonâ fide*. The Minister of Municipal Affairs has not approved of the alleged sale, his approval being essential under the provisions of the Rural Municipalities Act, or, alternatively, if the Minister has given his approval of the offering of the lands for sale such approval was given conditional upon the lands being advertised for sale in a specific manner, which was not done.

ALTA.

S. C.

RURAL MUNICIPALITY OF STREAMSTOWN. v. REVENTLOW-CRIMINIL

Beck, J.

The plaintiff claims: 1. An order continuing the caveat. 2. A judgment substantiating the interest claimed by the plaintiff in the lands. 3. A judgment to enforce the defendant municipality to transfer the lands to the plaintiff. 4. Costs. 5. Further or other relief.

The lands appear in the assessment roll of the defendant municipality for the year 1914 (the year in question) assessed under the name of "Hoyos, Lillian, Countess, c/o Oldfield, Kirby & Gardiner, Winnipeg."

Each of the four quarter sections of sec. 35 was assessed at $2,080, and each of the four quarter sections of section one was assessed at $2,240.

The lands were advertised for sale in quarter sections. Sec. 35 was knocked down in quarter sections to a purchaser at $2,175—the total assessment value being $8,320, and section one was knocked down by quarter sections at $1,960—the total assessment value being $8,960.

The secretary-treasurer of the defendant municipality who asserted that he had personally examined every parcel of land assessed, said:—"The lands are assessed at what I believed and still believe their actual cash value."

The Rural Municipalities Act is ch. 3 of 2-3 Geo. V., 1911-12 (Alta.).

Section 309 provides that the treasurer shall in January of each year prepare a "Tax Enforcement Return" in which shall be set out all taxes not paid for the year, next preceding year or for any former years.

Subsequent sections provide for the confirmation of the "Tax Enforcement Return."

Section 316 (see amendment 4 Geo. V., 1913, ch. 7) provides that "the effect of such adjudication when registered as hereinafter provided shall be to vest in the municipality the said lands freed from all liens . . . subject however to redemption by the owners within one year from the date of the adjudication by the payment to the treasurer of the municipality of the amounts named, including expenses as aforesaid" (a reasonable amount for the expenses of advertising together with such sum as the Judge may fix for costs of the application) "together with . . . any taxes which may have accrued due on the said

lands since the date of such adjudication including any penalties imposed under sec. 301 hereof, . . ."

The forfeiture proceedings were taken in respect of the taxes for the year 1914.

The taxes, penalties and costs for that year against sec. 35 were $144.20, and against sec. 1 were $155.20.

The Tax Enforcement Return was confirmed on November 9, 1915.

The evidence is not clear what was the amount of the taxes, penalties, etc., for the years succeeding 1914, but they appear to have been approximately in each year the same as in 1914.

A copy of the Judge's adjudication of confirmation is to be sent to the Registrar of Land Titles.

Clause 5 of sec. 316 provides that the treasurer of the municipality shall "after the expiration of 10 months and before the expiration of 11 months from the date of such adjudication cause to be published a notice"—a form of which is given in the amendment of 1913.

Section 317, as amended in 1913, provides for redemption within one year from the date of adjudication.

Section 318 (as amended in 1913) provides for the issue by the Registrar of a certificate of title to the municipality if after the expiration of one year from the date of the adjudication the taxes which had accrued due to that date both before and after the date of adjudication together with any penalties imposed under the provisions of sec. 301 and expenses etc., have not been paid.

Section 320 (amended sec. 26, ch. 9 of 1914) is as follows:

Any lot or parcel of land which becomes the property of the municipality in the manner provided by sec. 316 hereof may, subject to the approval of the Minister, be sold, leased or otherwise disposed of by the council of the municipality on such terms and conditions as it may fix.

(2) Where any land has been sold under the provisions of this section, any balance remaining after the payment of all taxes, costs, charges and expenses up to and including the date of such sale shall be paid by the municipality to the person as against whom such land was forfeited and such person may sue for and recover the same with costs in any court of competent jurisdiction.*

*See further amendment, 8 Geo. V., 1918, ch. 49.

The defendant municipality having obtained a certificate of title soon after November 9, 1916, offered the land for sale by

ALTA.

S. C.

RURAL MUNICIPALITY OF STREAMSTOWN. v. REVENTLOW-CRIMINIL

Beck, J.

public auction on December 30, 1916. The arrears of taxes etc. against sec. 35 at that date were approximately $450, and against sec. 1 approximately $475. The prices obtained at the sale were evidently grossly inadequate having regard to the real value of the lands.

This Court considered the position of a municiplaity which had secured an adjudication of forfeiture in *Town of Castor* v. *Fenton* (1917), 33 D.L.R. 719, 11 Alta. L.R. 320. It was there held that such an adjudication extinguished the taxes and that sec. 320, clause 2, did not place the municipality in the position of a trustee of the land or in a position analogous to that of a mortgagee. Harvey, C.J., dissented and I find that I merely concurred with the opinion of the majority, and that had I concurred with the Chief Justice the result would have been the same inasmuch as the appeal would in that event have been, as it was, dismissed.

In the light of the further consideration I have been able to give to the question I think the correct view was that taken by the Chief Justice. I have little respect for the maxim *stare decisis*, and on the contrary think that unless in exceptional cases the sooner a Court rejects a decision, whether of its own or of another Court whose decision is not that of a Court which has jurisdiction on appeal from itself, the better.

I cited the opinions of a number of Judges and Courts for thus placing justice before precedent in *In re Liquor Licence Ordinance; Finseth* v. *Ryley Hotel Co.* (1910), 3 Alta. L.R. 281.

I would therefore hold that the plaintiff in this case has still an interest in the forfeited lands.

I think that until the municipality has exercised the power given it by sec. 320 the former owner has a right of redemption. Even if this view is wrong I think the former owner has at the very least a right to intervene to see that the municipality in exercising that power does so validly, that is *bonâ fide*, fairly and with due regard to the interest of the former owner in what may ultimately revert to him.

Hall v. *Farquharson* (1888), 15 A.R. (Ont.) 457, is authority for the proposition that a municipality selling for arrears of taxes is under an obligation of doing everything reasonable to prevent the property offered for sale being sacrificed.

I am of opinion therefore that the plaintiff had a *locus standi* to attack the "purported or attempted sale" of the forfeited lands; that her statement of claim sets out a case in that aspect and that on the evidence she is entitled to a declaration that the purported or attempted sale is invalid.

Objection was suggested to this during the argument because the intending purchasers were not parties. There are several answers to this. These intending purchasers acquired no estate or interest in the property, for their purchase was subject to the subsequent approval of the Minister, just as a Court sale is subject to the approval of a Judge or Master, except that the Minister's personal decision is no doubt final either way even though unjustifiable, except where if it is an approval it is brought about by fraud of the purchasers. Even if they had some kind of inchoate right which would ordinarily entitle them to be made parties, the Court may sometimes proceed in the absence of a proper party or parties interested. Here the evidence shews that after the sale the purchasers were given transfers and the certificates of title in the name of the municipality for the purpose of enabling them to get title. It was they who applied to the Minister for his approval and they failed to get it. They were certainly cognizant of this action and might, had they seen fit, have intervened to the extent of applying to be made parties or of indemnifying the defendant municipality against costs, and defending the action in its name. In fact, Mr. Ewing, K.C., retained by one of the purchasers, appeared before us for the purpose of watching the case on behalf of his client, and I understand that he also appeared at some earlier stages of the case. He said that so far as his client was concerned he was satisfied that the case should proceed with or without his client being made a party.

It is hardly possible to suppose that the Minister will approve any of these attempted sales in view of what has been disclosed in this action, and if the plaintiff as a result of this action succeeds no further than in preventing the approval by the Minister, there seems to be little doubt that ultimately she will be able to recover her lands after satisfying all just and reasonable charges against them in favour of the municipality, whether the decision in *Town of Castor* v. *Fenton, supra,* is held to be right or wrong.

ALTA.

S. C.

RURAL MUNICIPALITY OF STREAMSTOWN. v. REVENTLOW-CRIMINIL

Beck, J.

Looking at the case from the point of view of the trial Judge I readily agree with him substantially, but in my opinion some of his expressions call for limitation. The question for consideration I think is not as to the relative positions of subjects and aliens, with in the result an advantage to the alien; but of persons whether aliens or subjects living in non-enemy countries and with and from whom therefore communication is not prohibited by reason of war, and persons whether aliens or subjects living or detained in enemy countries and with and from whom therefore communication is prohibited. A British subject, a civilian or a soldier, detained or imprisoned in Austria during the war would have been in the same position as the plaintiff so far as related to such questions as are before us.

In my opinion when such a condition of things was brought to the knowledge of the defendant municipality it should have stayed its proceedings, though had it without such knowledge proceeded, no blame could have been attached to it. In my opinion these proceedings would not have been void. There are few acts which are absolutely void. If not absolutely void they may furnish grounds upon which rights subsequently acquired *bonâ fide* without notice may validly stand.

As to the arguments based upon the impossibility of communication between the municipality and the plaintiff—the transmission of the notice and the remittance of money—there is a rule of law which I think is applicable unless perhaps there is a distinction as is suggested by the Chief Justice, between the supervening of a physical or moral impossibility and an illegality. It is founded on the maxim *lex non intendit aliquid impossibile* or *lex non cogit ad impossibilia*.

Numerous cases will be found discussing the maxim in Broom's Legal Maxims, 8th ed., pp. 201 *et seq.* Maxwell on Statutes, 5th ed. pp. 61 *et seq.* Endlich on Statutes, sec. 441.

One of the leading cases constantly referred to is *Paradine* v. *Jane*, Aleyn 26, 82 E.R. 897. It is there laid down, 82 E.R. at 897, as a rule that: "Where the law creates a duty or charge, and the party hath no remedy over, there the law will excuse him."

Numerous subsequent cases in which the case cited is referred to will be found noted in the English Reports and in Wood & Ritchie's Digest Over-ruled Cases.

The rule refers to a duty or charge created by law as distinguished from contract. The law modifies the harshness of the converse rule applicable to contracts by implying terms more freely I think in later than in earlier cases. On the other hand, where the law creating the duty or charge is statutory the application of the rule is perhaps more restricted than where it is common law. I think, however, the rule has an application to the present case.

Though its application might, perhaps, excuse the municipality from giving the notice required by the statute, or from giving an effective notice, that is seeing to its transmission in some special way, yet it would at the same time excuse the plaintiff from the obligation of remitting the moneys required to pay the taxes. The municipality having become aware of this inability on the part of the plaintiff was I think bound to stay its proceedings. The collection of the taxes would merely have been delayed.

A careful consideration of the evidence with regard to the assessment of the land satisfies me that the assessment was a fraudulent one. The lands of non-residents were not only deliberately assessed at figures considerably in excess of those at which the lands of residents were assessed, but in addition to this the municipality gave to residents whose lands were cultivated and cropped a reduction of 25% upon taxes in pursuance of sec. 196, clause 11.

I suppose the council thought it could so deal with the assessment and taxation, but in my opinion a deliberate use of legal machinery to bring about an unjust discrimination between different classes of ratepayers is a fraud. It is not too late I think for this plaintiff now to raise that question, and I think that under the practice and procedure of this Court it can be raised in this action.

I would dismiss the appeal, but in view of the grounds upon which I come to this conclusion I would give the plaintiff the costs below as well as the costs of appeal.

Ives, J.

IVES, J. (dissenting):—This is an appeal from the judgment of Stuart, J. The action was tried without a jury. The facts are sufficiently set out in the judgment appealed from.

At the trial plaintiff obtained leave to amend by making an allegation of fraud in the method of assessment. At the argu-

ALTA.

S. C.

RURAL MUNICIPALITY OF STREAMSTOWN. v. REVENTLOW-CRIMINIL

Ives, J.

ment I felt impregnated with the atmosphere of fraud as I listened to plaintiff's counsel and I have devoted unusual care to reading the appeal book with the result that I have found the fraud to be a smoke screen.

The trial Judge cannot have been greatly impressed with any evidence of fraudulent conduct on the part of the defendant's secretary-treasurer. He says: "The plaintiff attempted to discover irregularities in the assessment, confirmation and forfeiture proceedings but I think with no success. At the opening of the trial the plaintiff's counsel obtained leave to amend by making an allegation of fraud in the method of assessment. This was alleged to be shewn by the fact that the assessment roll for 1914 showed that the lands of non-residents (including the plaintiff's) were assessed regularly at a considerably higher figure than those of resident tax-payers. I am bound to say that the evidence is such as to point very strongly to that conclusion but I do not propose to rest my decision on that point." So that upon the charge of fraud the trial judge first finds as a fact that the attempt to "discover irregularities" is without success and goes no further than to say that the evidence points strongly to the conclusion that lands of non-residents (including the plaintiff's) were regularly assessed at a considerably higher figure than those of resident tax-payers. When one reads the evidence of the assessor explaining the difference in the assessment figures that he was asked about even to the limited opportunity given him, by counsel, the suggestion of fraud cannot longer be supported.

Even if we put the matter on the strongest hypothesis and admit that the lands of the plaintiff were assessed at double the figure of any resident tax-payer, could she have the assessment set aside as fraudulent without first pursuing her remedy in the Court of Revision and thence to the District Court as directed by the Act? After the judgment of the Supreme Court of Canada in *Town of Macleod* v. *Campbell* (1918), 44 D.L.R. 210, 57 Can. S.C.R. 517, I apprehend not.

The complaint of this plaintiff is that defendant has made a distinction between resident and non-resident tax-payers, not that her lands are not assessable or that her asseessmnt is excessive, which amounts to no more than saying, as this Court

said in the above case, that the assessor had totally disregarded the basic principle of assessment directed by the Act, though in the last analysis the amount of the assessment is the question involved. In the case of *Town of Macleod* v. *Campbell, supra*, Idington, J., says, at page 211:

> It has been strenuously argued before us that inasmuch as the basis of such taxation as imposed and in question herein is imperatively required by law to rest upon an actual value, of the kind defined, that a serious departure therefrom is also beyond the jurisdiction of appellant and hence void. Such a view of the law would be to render the collection of taxes dependent in many cases upon the very doubtful result of an issue to try what is actual value such as defined in the statute in question. No decision binding on us has ever gone so far.

I have no doubt that the remedy for plaintiff's complaint about the assessment is first to be sought in the Court of Revision and thence to the District Court.

The real question here is the effect of an existing state of war upon the Rural Municipalities Act, 3 Geo. V., 1911-12 (Alta.), ch. 3. To what extent are the requirements of that statute suspended?

The trial proceeded upon the assumption that the plaintiff was an alien enemy and was from the year 1914 actually resident at Fiume in Austria-Hungary. Broadly stating the common law we know that war makes illegal all communciations between subjects and alien enemies and I have no doubt that one result is correctly stated in the case of *Semmes* v. *Hartford Ins. Co.*, (1871) 13 Wall 158 at 160, 80 U.S. 491, that: "The law imposes the limitation and the law imposes the disability. It is nothing therefore but a necessary legal logic that the one period should be taken from the other." But I apprehend the common law rule does not prohibit communication between subjects and alien enemies resident in the subject country and for all purposes of the provisions of the Rural Municipalities Act in this case was the plaintiff not resident at Winnipeg by her agents?

The trial Judge takes it for granted in beginning his able judgment that she had agents at Winnipeg. There are a number of letters in evidence from Oldfield, Kirby & Gardiner, of Winnipeg, and in 2 at least they say that they are this plaintiff's agents and they were so treated by the defendant. These agents had been paying plaintiff's taxes on the lands in question to this

ALTA.

S. C.

RURAL MUNICIPALITY OF STREAMSTOWN. v. REVENTLOW-CRIMINIL

Ives, J.

defendant since 1912. Not a suggestion throughout the book of any communication ever at any time from the plaintiff personally. And in 1916 Oldfield & Co., as this plaintiff's agents and in no other capacity, paid taxes, arrears of taxes and penalties on adjoining lands of this plaintiff and on behalf of this plaintiff to the defendant. The letter of May 15, 1916, from Oldfield & Co. to defendant is clear. It in part says: "Re Countess Criminil's lands. We are in receipt of your letter of the 6th inst. We have no particular wish for your counsel to grant any special exemption to an alien enemy, *but as we have for some years acted* as Countess Criminil's agents it was obviously our duty to tender to you what money we have of hers on hand . . . "

And previously in their letter of May 1, 1916, Oldfield & Co. among other things, write: "As we have been acting as her agents for some years past we are desirous of making the best arrangement possible on her behalf . . . "

Nowhere in the plaintiff's factum is the fact of agency contested. What then is the effect of war upon the relationship of agency?

In Cyc., vol. 40, page 321, under the para. "Agency," it is said—

> The relation of principal and agent existing between residents of hostile jurisdictions at the beginning of the war is terminated or suspended *to the extent* that further discharge of the duties of the agency is contrary to the policy or interests of one or both of the belligerents.
>
> But war does not necessarily, and as mere matter of law, revoke every agency, and when the agency does not require forbidden acts, and the assent of the principal or his subsequent ratification actually appears, or may *justly be inferred*, the authority of the agent will be held to continue until otherwise terminated. Under such conditions the Courts have upheld sales by the agent of the property of the principal . . . as well as arrangements with an agent for protection and safe-keeping of the principal's property.

We must keep clearly in mind that this agency has no concern with commercial matters. It cannot be said, surely, that the payment of annual taxes to this municipality was contrary to the interests or policy of either of the belligerents. If not contrary to the interests or policy of the belligerents then the relationship should be held not to have terminated or become suspended by declaration of war and under the circumstances it ought to be inferred in this case that the agents were authorized to do all things necessary to conserve their principal's property. What,

under the circumstances of this case, would have been the rights of a Canadian owning lands in this municipality, who, upon the outbreak of war, appointed Oldfield & Co. his agents to look after his lands (but failed to provide them with sufficient funds to pay taxes), and thereupon got himself into Fiume? Could he succeed in having the tax enforcement return set aside upon the plea that impossibility physical or legal of communication with his agents left them without funds to pay his taxes? Is the position of this plaintiff different? The evidence in this case is clear that this plaintiff's taxes were not paid because her authorized agents had not sufficient funds of their principal in hand to pay them, and I apprehend that absence of funds is the usual reason for not paying taxes but does not suspend the operation of a statute dealing with their collection.

As to the validity of the notices sent out in pursuance of the requirements of the Act, it is not seriously contended that the required notices were not sent to and received by Oldfield & Co. all in due and sufficient time. The plaintiff's lands are assessed to "Countess Lillian Hoyos, c/o Oldfield, Kirby & Gardiner, Winnipeg." It is admitted that this was her maiden name and correct when the roll was made up. In the records of the Land Titles Office the name is Reventlow-Criminil, of Fiume, Austria-Hungary. It is not clear when the marriage took place. It is not contended that any confusion has arisen or that any notices have failed to reach the agents by reason of the married name not being upon the roll instead of the maiden name. The Act requires notices to be sent to those who appear by the return *or* the records of the Land Titles Office to have interest, at the address shewn by such return *or* records. In the present case this plaintiff appears by the Land Titles Office records to be a person interested and the evidence is clear that she is in fact the person whose name and address appear on the return. The mailing of a notice to the plaintiff at Fiume was but an added precaution and not from statutory compulsion. In my opinion the confirmation of the tax enforcement return should not be disturbed.

The plaintiff secondly contends that the sale resulted in a grossly inadequate price and should be set aside. It must be remembered that the defendant has not become the registered

ALTA.

S. C.

RURAL MUNICIPALITY OF STREAMSTOWN. v. REVENTLOW-CRIMINIL

Ives, J.

owner by reason of any contract relationship, but by reason of the operation of a statute. A foreclosure has in effect been decreed by the Legislature. The defendant can deal with the lands only as directed by legislative authority, and did so in the present case, according to the evidence. This Court cannot interfere with the sale if conducted under the provisions of the statute, as it undoubtedly was, nor make any order as to the exercise of the Minister's discretion in approving the sale which is a statutory requirement.

I have no hesitation in saying that in my opinion this sale ought not to be approved but that the Minister should advise a re-sale, because such a course would almost surely result in a much better price and would in fact enable this plaintiff to protect fully her interests. But this Court cannot order such a course.

In my opinion this appeal should be allowed, with costs. And as this plaintiff alleged but failed to prove fraud she should pay the costs of the trial.

Hyndman, J.

HYNDMAN, J., concurs with HARVEY, C.J.

Appeal dismissed.

ONT.

S. C.

Re DOMINION PERMANENT LOAN Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford and Middleton, JJ. February 6, 1920.

COMPANIES (§ V F—261)—WINDING UP—CONTRIBUTORIES—HOLDERS OF SHARES PARTLY PAID UP—ACCEPTANCE BY SHAREHOLDERS OF SHARES IN NEW COMPANY—CERTIFICATE FOR WHOLE SHARE GIVEN FOR FRACTION OF SHARE—LIABILITY FOR AMOUNT UNPAID—LOAN CORPORATIONS ACT, R.S.O. 1897, ch. 205, SEC. 15 (3).

When the shareholders of one company accept shares in another, and certificates for whole shares in the latter company are issued for fractional shares in the former company, such shareholders by virtue of the provisions of R.S.O. 1897, ch. 205, sec. 15, are liable to the extent of the amounts unpaid on such shares.

[*Ooregum Gold Mining Co. of India* v. *Roper*, [1892] A.C. 125; *Welton* v. *Saffery*, [1897] A.C. 299, followed].

Statement.

Appeal on behalf of Florence Adams and all other persons named in the summons to contributories whose names appeared upon the records of the company as members or shareholders thereof in respect of shares of that company theretofore issued to them in substitution for shares of the capital stock of the Provincial Building and Loan Association, from an order of an Official Referee, made in the course of a reference to him for the winding-up of the

affairs of the company, settling the appellants on the list of contributories and holding them liable to the liquidator for the balances by him claimed as unpaid upon their shares.

The judgment appealed from was as follows:—

LENNOX, J.:—In pursuance of the terms of the Ontario Loan Corporations Act, R.S.O. 1897, ch. 205, the Provincial Building and Loan Association sold and transferred the assets and undertaking of this company to the company now in liquidation, on terms set out in an agreement dated the 2nd April, 1902.

The Act referred to authorised a sale, but prescribed the conditions as well, and, amongst other things, provided for the protection of shareholders of both companies by enacting that, in addition to ratification by the shareholders, the agreement should not go into effect until duly assented to by the Lieutenant-Governor in Council.

The agreement contained the following provisions, namely:—

1. This agreement shall not be deemed to be an agreement for the union, merger, or amalgamation of the said two companies, but it shall be deemed to be an agreement for the purchase and acquisition by the "purchasing company" of the assets and undertaking of the "vendor company."

3. As and for the consideration for the said sale, the "purchasing company" shall allot and issue to the shareholders of the "vendor company," as hereinafter mentioned, permanent stock of the "purchasing company" at par, as fully paid-up and non-assessable, for an amount exactly equal to the net value of the assets of the "vendor company," as the same are hereinafter defined, and as the same shall be valued and ascertained as hereinafter mentioned, less the amount of all debts, liabilities, and obligations of the "vendor company" as hereinafter mentioned.

6. The "purchasing company" shall issue and allot its said permanent stock in manner following, that is to say: The "vendor company" shall prepare and submit to the "purchasing company" a schedule or schedules of all its shareholders who are entitled to participate in the distribution of the said stock, together with their post-office addresses and additions, and the amount of the full distributive share to which each of such shareholders is entitled; and such schedule or schedules shall be final and conclusive upon

ONT.

S. C.

RE DOMINION PERMANENT LOAN CO.

both of the companies parties hereto, and upon the shareholders thereof respectively; and the allotment and issue of such stock to such persons shall be a full and complete discharge to the "purchasing company" for the purchase-price or purchase-money for the said assets; and such schedule or schedules shall be attached to this agreement, and for all purposes shall be deemed and taken to form part thereof, and shall be submitted to the shareholders' meetings hereinafter mentioned as part of this agreement, and shall be as binding and conclusive on the shareholders of the "vendor company" as this agreement itself; and, from the date of the assent hereto of the Lieutenant-Governor in Council, each holder of shares in the "vendor company," as exhibited by such schedule or schedules, shall be deemed, by virtue of the said assent, *ipso facto* to have surrendered the said shares and to have accepted and to hold (substituted therefor) shares of the stock of the "purchasing company" to the extent and in the manner provided for by this agreement; but in case the amount of stock in the "purchasing company" to which any shareholder of the "vendor company" is entitled is a fraction of a share or a number of shares and a fraction, then in either of such cases the stock to be issued for such fraction shall be one share with the amount of such fraction paid-up, and the shareholder to whom such stock is allotted shall have the privilege of paying up the balance of such shares of stock so issued.

10. This agreement shall be deemed to prescribe the terms and conditions of sale of the assets of the "vendor company "to the "purchasing company" and the mode of carrying the same into effect, in accordance with the provisions of the Ontario Loan Corporations Act.

Attached to the agreement was a schedule of the participating shareholders, with amounts, etc., as provided for in clause 6; and, after it had been ratified by the shareholders of both companies, and in this form, and as a completed agreement—subject to the sanction aforesaid—it was submitted to and sanctioned and approved of by the Lieutenant-Governor in Council, as by endorsement, under the seal of the Province, thereon appears.

It is admitted and asserted by counsel on both sides that every requirement and formality of company law generally, and of the statutes, was punctiliously observed. In pursuance of the exact

terms of the agreement, each shareholder of the Provincial Association was given fully paid-up shares in the now insolvent company, so far as his interest would entitle him to fully paid-up shares, and, for any sum in excess of even hundreds of dollars, he was given one share of nominal or face value of $100 with the amount of such excess endorsed as paid. The shareholders affected did not avail themselves of "the privilege of paying up the balance" as provided for in clause 6. For illustration, Florence Adams was entitled to $415 as her net interest in the Provincial Association, and was allotted and given four fully paid-up shares and a fifth share with $15 endorsed as paid thereon. The interest of Florence Adams in the insolvent company has always been recognised and treated on both sides as $415, and she has been paid dividends only on this amount, and the other shareholders in this class have been dealt with on the same basis. Say what you like about the subtleties and the technicalities of company law, and the statutory liability to pay the balance unpaid on the shares standing in the name of the shareholders, the law is intended for justice, and Judges hold office to give it effect. This is in effect a statutory agreement, special legislation, controlling and superseding general enactments where they conflict, and in truth and in fact the shareholders in question, neither at the date of the winding-up order nor at any time, held shares for more than the amount said to be and in fact paid-up. They got exactly what the order in council said they were to get, and in the form provided, neither more nor less; and they occupied exactly the position they were compelled to occupy by reason of the statute and the action of the Lieutenant-Governor in Council, representing (and intended to protect) them. They were sellers, not buyers, and the Administration determined and defined the form of their security. Subject to the power of the Legislature to enact what it will, and to the voluntary exercise of the "privilege" referred to—which creates no obligation—the agreement is specific and final to all intents and purposes. Nobody was deceived or misled, nobody can be wronged except by the opposite conclusion. The creditors get exactly what the companies bargained for within the provisions of the statute, and with the sanction and approval of the Administration. It is only an opinion, but, in my opinion, and with great respect, it would be monstrous and intolerable were the law otherwise.

The appeal will be allowed with costs.

ONT.

S. C.

RE DOMINION PERMANENT LOAN CO.

Middleton, J.

M. L. Gordon, for appellant.

I. F. Hellmuth, K.C., and *J. J. Maclennan*, for respondent.

MIDDLETON, J.:—Under the agreement of the 2nd April, 1902, which I shall assume to be valid and effectual, the shareholders of the "Provincial" accepted stock in the "Dominion," paid-up by the transfer of assets; "but in case the amount of stock . . . to which any shareholder . . . is entitled is a fraction of a share or a number of shares and a fraction, then in either of such cases the stock to be issued for such fraction shall be one share with the amount of such fraction paid-up, and the shareholder to whom such stock is allotted shall have the privilege of paying up the balance of such share of stock so issued."

The shares spoken of are shares of permanent stock of the par value of $100 each.

Pursuant to this agreement, certificates were issued for the "fractions" in this form:—

"Permanent Stock Certificate. $100 shares.

"This is to certify that A.B. is the registered holder of one share numbered ——— of the permanent stock in the above named company subject to the by-laws thereof and that the sum of $—— has been paid on the said share."

These certificates were signed by the president and general manager of the company and sealed with its corporate seal.

What I regard as of vital importance is that no attempt was made to constitute the shareholders of the Provincial holders of fractions of shares or of fully paid-up shares for uneven amounts, but by the terms of the agreement these shareholders became holders of shares for $100 on which the named amount was paid.

Under the statute then in force, the Loan Corporations Act, R.S.O. 1897, ch. 205, sec. 15, sub-sec. 3: "No shareholder shall be liable for or chargeable in respect of permanent shares with the payment of any debt or demand due by the corporation, save only to the extent of the amount unpaid on his shares in the capital stock of the corporation."

The case is covered by the reasoning of the House of Lords in *Ooregum Gold Mining Co. of India* v. *Roper*, [1892] A.C. 125. Lord Halsbury says (p. 133):—

"The whole structure of a limited company owes its existence to the Act of Parliament, and it is to the Act of Parliament one

ONT.

S. C.

RE DOMINION PERMANENT LOAN CO.

Middleton, J.

must refer to see what are its powers, and within what limits it is free to act. . . . The Act of 1862 . . . makes one of the conditions of the limitation of liability that the memorandum of association shall contain the amount of capital with which the company proposes to be registered, divided into shares of a *certain fixed amount*. It seems to me that the system thus created by which the shareholder's liability is to be limited by the amount unpaid upon his shares, renders it impossible for the company to depart from that requirement, and by any expedient to arrange with their shareholders that they shall not be liable for the amount unpaid on the shares."

Lord Watson says much the same thing (p. 136): "In my opinion, these enactments read together indicate the intention of the Legislature that every member who takes shares from the company in return for cash shall either pay or become liable to contribute their full nominal value. 'The amount, if any, unpaid,' obviously refers to the 'fixed amount' of the shares into which the capital is divided, as set forth in the memorandum, and not to any lesser amount which may be agreed upon between the company and its shareholders; and the statutory liability of each shareholder is for the difference between the amount fixed by the memorandum and the sum which has actually been paid upon his shares."

Welton v. *Saffery*, [1897] A.C. 299, shews that this is so as between contributories as well as when the claim is that of creditors.

What was done in this case was to issue $100 shares upon which a certain sum was paid up. These shares were accepted; and, even if the unpaid balance could not have been called in by the company, by reason of the wording of the agreement which gave the privilege of payment to the shareholder, the shareholder would remain liable to the creditors by virtue of the statute until the full amount should be paid. The possibility of a company precluding itself by agreement from making a call, while the shareholder would remain liable to the creditors, is suggested by Lord Herschell in the *Ooregum* case, [1892] A.C. at p. 143; but here the insolvency is so great that the creditors can only hope for a dividend.

The appeal should be allowed and the order of the Master restored.

RIDDELL, J.:—Feeling the very great hardship on some of the respondents in allowing this appeal, I have struggled to uphold the

Riddell, J.

ONT.

S. C.

RE DOMINION PERMANENT LOAN CO.

Riddell, J.

judgment of my learned brother Lennox. A careful examination of the facts and the law, however, has convinced me that the appeal must be allowed.

The only way, as it seemed to me on the hearing, by which the judgment could be sustained, was to consider the "unpaid stock" as not in reality stock at all, but simply as certificates that the holders would be entitled to stock if and when they paid the balance.

Further consideration has excluded such a theory—what the holders received was partly paid-up stock and nothing else. To this was attached a privilege of increasing their investment, but that does not exclude the possibility at some time of being compelled to increase it.

Dealing then with a statute—a tyrant—and not the common law—a nurturing father—we are bound to give the statute its full effect and hold that the partly paid-up stock has all the incidents of such stock.

The appeal should be allowed with costs.

Latchford, J.

LATCHFORD, J.:—As between the company and the holders of a share on which but a fraction of the par value had been paid, it is a matter of contract unequivocally expressed that the holder could not be compelled to pay the balance unpaid on such a share. He had the option of paying the balance, but none of the shareholders affected by this appeal had exercised that option. Each held a share paid for but in part, and in part unpaid for.

To the extent of the amount unpaid, the statute, in my opinion, renders the holder liable. I therefore think the appeal should be allowed.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P. (dissenting):—I cannot but still think that my learned brothers have missed the true mark in this case: that they have assumed a liability and been content with seeing only that that liability has not been discharged. I am unable to find any such liability.

Liability to pay for shares in the capital stock of a company must arise out of some contract creating an obligation to pay for them: there is not only no such contract here, but there is a distinct and unquestionable contract that there shall be no obligation to take them. Need I add that estoppel is only a method of proof of a contract? It permits of no denial of it.

ONT.

S. C.

RE DOMINION PERMANENT LOAN CO.

Meredith, C.J.C.P.

Under general company law, by reason of statutory provisions—not applicable to this company—shares taken must be paid for in money or "money's worth:" but how could any such law, even if applicable, create a liability, not to pay for shares bought, but to buy shares?

Shew me that the shares in question were in any way acquired by any one, and I shall readily agree that they must be paid for; the respondents themselves take that position: they cannot but do so, for there has been no kind of payment by them for the shares sought to be imposed upon them; but, on the other hand, if it appear that they were never acquired by any one, that the most that can be said in that respect is that there was a right, or, as commonly named, an option, to buy, how can there be any kind of liability to pay?

Cases such as that of the *Ooregum* company, [1892] A.C. 125, and *Welton* v. *Saffery*, [1897] A.C. 299, would, under like enactments, be conclusive if there were in this case, as there was in them, a contract to buy the shares: but they are only misleading if the primary, the all-important, question, whether there ever was any obligation to take, or a taking of, the shares, is overlooked.

All that those cases settled in the law is that under the Companies Acts in force in England shares could not be issued at a discount; that they must be paid for in money or money's worth.

The case we have to deal with is one of the "amalgamation" of two companies, each of which was incorporated under the provisions of the Ontario Building Societies enactment of 1887: an Act which contained no such provisions as those upon which the judgments in the cases I have mentioned were based: and an amalgamation which in all respects was authorised by the Ontario enactment.

Under that amalgamation the shareholders of the "Provincial" company were to receive permanent stock of the other company "at par, as fully paid-up and non-assessable, for an amount exactly equal to the net value of the assets of the" Provincial company; "and, from the date of the assent hereto of the Lieutenant-Governor in Council, each holder of shares in the 'vendor company' . . . shall be deemed, by virtue of the said assent, *ipso facto* to have surrendered the said shares and to have accepted and to hold (substituted therefor) shares of the stock of the

ONT.

S. C.

RE DOMINION PERMANENT LOAN CO.

Meredith, C.J.C.P.

'purchasing company' to the extent and in manner provided for by this agreement; but in case the amount of stock in the purchasing company' to which any shareholder of the 'vendor company' is entitled is a fraction of a share or a number of shares and a fraction, then in either of such cases the stock to be issued for such fraction shall be one share with the amount of such fraction paid-up, and the shareholder to whom such stock is allotted shall have the privilege of paying up the balance of such share of stock so issued."

Two things are manifest: that there was no power to compel shareholders to take up unpaid stock; and that no attempt to do so was made. The rights of the shareholders of the "Provincial" company—called in the amalgamation agreement the "vendor company"—was to have "fully paid-up and non-assessable" shares in the other company "for an amount exactly equal to" their shares in "the net value of the assets" of their company. It would have been more convenient for the "purchasing company" if those shareholders who were thus entitled to a share of less than $100 should take one of $100 and pay up the difference, hence they were accorded the "privilege," right, or option of doing so; but no attempt was made, nor could be lawfully, to bind them to do so.

It necessarily follows that those of them who never exercised the privilege, right, or option, and who have done nothing that estops them from asserting that fact, are not and never were the holders of any unpaid share in the stock of the "purchasing company;" and so cannot lawfully be compelled to pay anything.

If the actual facts were not so plain that there is not—and in view of the writings never could sensibly be—any controversy over them, the fact of the issue of the certificates in the form in which the "purchasing company" found it convenient to issue them, might have made it difficult for the respondents to prove that they had not agreed to take unpaid shares; but no such difficulty exists, no such contention is, or can be reasonably, made. They were in no way bound to take, but, on the contrary, had the privilege of taking, more than their paid-up share of the stock.

Some, doubtless, exercised that right; some, doubtless, may be estopped from urging that they did not; but there is no proof of any kind that any of these respondents exercised the right or is estopped.

There is no evidence that they received dividends or voted upon the unpaid shares, or of the exercise of any kind of ownership over,

ONT.

S. C.

RE DOMINION PERMANENT LOAN CO.

Meredith, C.J.C.P.

or in respect of, them: but, so far as the evidence shews, all things remain as they were when the assent of the Lieutenant-Governor in Council was given to the amalgamation.

The transfers which were made by the then shareholders were transfers only of their rights as existing at the time of the making of the transfers, that is, the transfers were of the paid-up stock and of the privilege of taking more; putting the transferee in the same position as the transferor exactly.

Mr. Gordon's reliance on sec. 24 of the Act of 1914 (R.S.O. 1914, ch. 184), seems to me to be only another misdirected aim. If, as seems to me to be manifestly the fact, the respondents are not holders of unpaid shares, the section is inapplicable to them; whilst, if they had been, its aid would not be needed in putting them on the list of contributories.

I can see nothing tyrannous or inexorable or unreasonable in the law: the hardship which these respondents are to suffer seems to me to be created only by a judicial mistake, or overlooking, of fact; and therefore I am obliged to express my dissent from the judgment to be pronounced allowing this appeal; which I think should be dismissed. *Appeal allowed.*

SASK.

C. A.

IN re VOLUNTEERS & RESERVISTS RELIEF ACT AND WHEELER.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, J.A., and Brown, C.J.K.B. May 3, 1920.

MORTGAGE (§ VI E—90)—FORECLOSURE DESIRED BY FIRST MORTGAGEE—INTEREST OF MORTGAGOR—WHETHER NOMINAL OR NOT—VOLUNTEERS AND RESERVISTS ACT, 6 GEO. V. 1916 (SASK.), CH. 7, SEC. 8.

Where foreclosure of a mortgage is sought by the first mortgagees, and the value of the property exceeds the amount of their mortgage, the interest of the mortgagor cannot be said to be nominal within the meaning of sec. 8 of the Volunteers and Reservists Act, 6 Geo. V. 1916 (Sask.), ch. 7.

Statement.

APPEAL by mortgagees from an order of a Judge in Chambers refusing an application for permission to take foreclosure or sale proceedings under their mortgage notwithstanding the Volunteers and Reservists Act, 6 Geo. V., 1916, ch. 7, and amendments.

P. H. Gordon, for first mortgagees, appellants.

Other parties not represented.

Haultain, C.J.S.

HAULTAIN, C.J.S., concurs with Brown, C.J.K.B.

Lamont, J. A.

LAMONT, J.A.:—Frank H. Wheeler by a memorandum of mortgage, dated September 15, 1910, mortgaged Lot 6 and the

SASK.

C. A.

IN RE VOLUNTEERS & RESERVISTS RELIEF ACT AND WHEELER.

Lamont, J. A.

north half of Lot 7, Block 4, Rosemount Addition, Moose Jaw, to the Royal Trust Co. to secure the repayment of $3,500. This mortgage was duly registered. It would appear, although in my opinion there is no clear evidence of the fact, that Wheeler, on December 1, 1913, gave a second mortgage covering the same property, to whom does not appear. The Royal Trust Co. transferred its mortgage to the Holland Canada Mortgage Co., Ltd., who applied to a Judge in Chambers for an order dispensing with the provisions of the Volunteers and Reservists Relief Act, 6 Geo. V. 1916, ch. 7, and giving the company leave to commence and maintain an action for the foreclosure of their mortgage. The general manager of the company, in his affidavit, says that there was due under the company's mortgage on July 1, 1919, the sum of $4,642.41. He further says that he is informed by Mr. Horton, who is the transferee of a mortgage dated the first day of December, 1903, covering the above mentioned property, and verily believes that there is due in respect of such last mentioned mortgage the sum of $2,500. The company's inspector placed a valuation on the mortgaged property of $6,375. The contention on part of the company is, that under these circumstances, Wheeler's interest in the property is merely nominal within the meaning of sec. 8 of the Act.

Section 3 of the Act prevents a mortgagee bringing an action for the foreclosure of a mortgage made by a volunteer or reservist until after the expiration of one year from the close of the war or the discharge of the volunteer or reservist; but sec. 8 provides that, when it is made to appear to a Court, Judge, etc., that any interest of a volunteer or reservist in the land in question is merely "nominal," such Court or Judge may allow the proceedings to go forward as if the Act had not been passed.

The question involved in this application is this: Is Wheeler's interest in the said lots merely nominal?

The appellants claim that it is, because the amounts unpaid on the two mortgages registered against the property are together greater than the total value thereof.

Wheeler is the registered owner of the lands in question. Being owner, he has, *primâ facie*, all the legal and beneficial estate and interest therein, subject only to the exceptions and reservations implied under the Act and to the encumbrances,

liens, and interests endorsed on his certificate of title. The only encumbrances of which we know anything are the two mortgages in question. Under the Act, neither the giving nor the registration of a mortgage transfers to the mortgagee any estate or interest in the land. A mortgage has effect solely as security. Wheeler's interest in the property is, therefore, the entire estate and interest therein, subject to the right of the respective mortgagees to take sufficient of his interest to satisfy their respective mortgages.

In this case the first mortgagees seek to obtain by foreclosure property worth $6,375, to satisfy a mortgage of $4,642.41. The difference between the value of the property and the amount due on the first mortgage is over $1,700. That $1,700 interest belongs to Wheeler, subject to the right of the second mortgagee to step in and redeem the first mortgage and apply that $1,700 interest on his own mortgage. Were he to do this, all Wheeler's interest would be wiped out. But suppose the second mortgagee decides not to take that course. He may not be in a position to pay off the first mortgagees, or he may be content to rely on Wheeler's covenant to pay the amount of his mortgage. He might not even be willing to foreclose his mortgage and take the property subject to the first mortgage, because that would obligate him to pay off the first mortgage. Although there might be value in the property in excess of the first mortgage, such value, we know, cannot always be turned at once into cash, which the first mortgagees could demand.

If the second mortgagee was not prepared to step in and convert Wheeler's $1,700 interest to his own use, to be applied in satisfaction, *pro tanto*, of his mortgage, the first mortgagees under their foreclosure would appropriate that interest to themselves, and Wheeler would still be liable for the full amount of the second mortgage. A $1,700 interest cannot be said to be merely "nominal." That interest is Wheeler's until the second mortgagee steps in to have it applied on his second mortgage. We have no guarantee that he will step in. Had foreclosure been sought by the second mortgagee, subject to the first mortgage, the argument that Wheeler's interest was merely nominal might have been made with considerable force, as the whole of Wheeler's interest would, in that case, be appropriated to the mortgages.

SASK.

C. A.

IN RE VOLUNTEERS & RESERVISTS RELIEF ACT AND WHEELER.

Lamont, J.A.

But where the foreclosure is sought by the first mortgagees, and the value of the property exceeds the amount of their mortgage, it cannot be said that the interest of the mortgagor in the property is merely nominal, because it cannot be said that any subsequent incumbrancer will take the necessary steps to have the excess value applied on his encumbrance, and, until that is done, the interest represented by that excess value belongs to the mortgagor.

The appeal should, therefore, be dismissed.

Brown, C.J.K.B.

BROWN, C.J.K.B.:—The application was made in the first instance to a Judge in Chambers and refused, and the applicants have appealed from that decision.

A perusal of the Act indicates that it is contemplated thereby that generally speaking a man who has enlisted for service in the war will not be in a position during the period of the war and for two years thereafter to adequately protect his interest in mortgaged property in the event of sale or foreclosure proceedings being taken under the mortgage. It is therefore provided that a volunteer who holds property *bonâ fide* and in his own right shall not during the period mentioned be foreclosed or otherwise deprived of his interest in the mortgaged property without at least special permission to that effect being first obtained from a Judge or other authority therein named. The Act, however, as already indicated does not constitute an absolute bar to such proceedings being taken It contemplates by sec. 8 thereof that the volunteer's interest in the property may be so trivial and unsubstantial as not to merit or demand any special protection, and such interest is referred to in the section as being merely *nominal*. In such event, the mortgagee desirous of taking action may apply to one of the persons mentioned in the section for permission to proceed, and may be allowed to proceed as if the Act had not been passed.

Moreover, even though the volunteer's interest is substantial, he is not under the Act absolutely immune from action, but in such event the mortgagee can only proceed after leave obtained from a Superior Court Judge as provided for in section 16 of the Act. In the case at Bar it is admitted that the mortgagor Wheeler is entitled to the protection of the Act, but it is contended that Wheeler's interest in the property is merely nominal, and that therefore the applicants should be allowed to launch an action

for foreclosure or sale proceedings under the mortgage, notwithstanding the provisions of the Act.

The evidence shews that there are two mortgages against the property, both put on by Wheeler. Under the first mortgage, being that of the applicants, there is due some $4,827, and under the second mortgage there is due apparently some $2,500. The property at its outside value, according to the material filed, is worth only $6,375. It will thus be seen that the total amount owing under the two mortgages exceeds the value of the property. It is because of that fact that the applicants contend that Wheeler has only a nominal interest in the property. In deciding whether Wheeler's interest is nominal or otherwise, his interest must be appraised having in view the nature of the proceedings taken. The proceedings are here to be taken under the first mortgage. There is an admitted difference between the amount owing under the first mortgage and the value of the property of about $1,500. In the event of foreclosure Wheeler would still be liable on the second mortgage, and he is therefore interested in these proceedings to the extent of $1,500, which is certainly not a mere nominal interest. In the event of sale proceedings being taken, Wheeler would be liable on both mortgages to the extent of the difference between the total owing on the two mortgages and the price realized at the sale. That might be a very large amount, and could not at least until after the event be ascertained, and could not therefore at this stage be designated as merely nominal.

I am of opinion, therefore, that in so far as any attempt to get relief under sec. 8 is concerned, the application must be rejected.

It will be seen that had the second mortgagee sought to take foreclosure proceedings, the matter would stand in a different light. Although the applicants are denied any relief under sec. 8 of the Act, that does not, however, dispose of the application. The application was made in the first instance as already indicated to a Judge in Chambers, and the applicants' rights under sec. 16 and 17 must still be considered. These sections give the Judge a wide discretion. Each case must be dealt with on its merits, and I would say subject to the general principle that the interests of both applicant and volunteer must be considered and as far as

SASK.

C. A.

IN RE VOLUNTEERS & RESERVISTS RELIEF ACT AND WHEELER.

Brown, C.J.K.B.

possible protected. Wheeler is no longer engaged in war duties, and it cannot be urged that proceedings of this character are likely to interfere with, or embarrass him in his duties to the Empire. He is now resident in Canada where he can give some supervision and attention to the matter and in protection of such interest as he has in the property. By sec. 17 the Judge may impose such conditions as appear necessary under the circumstances. In view of the fact that Wheeler, although served with notice of the application, did not appear to oppose same or to refute the valuation put upon the property by the applicants, I would be disposed to allow the proceedings to be taken, having in view a sale of the property, but subject to a reserved bid of $6,375, the outside valuation placed upon the property by the applicants in the material filed. A suggestion of this character was, however, made to the counsel for the applicants during the course of the argument and declined, and I would therefore dismiss the appeal. *Appeal dismissed.*

N. B.

S. C.

WILSON v. WILSON.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. February 20, 1920.

CROWN LANDS (§ II B—5)—FARM LANDS—CREATION OF FARM SETTLEMENT BOARD—POWERS OF SAME—2 GEO. V. (N.B.), CH. 28.

The Farm Settlement Board created by 2 Geo. V., 1912 (N.B.), ch. 28, whose powers are defined and limited by the statute creating it, cannot give a valid deed to a second party of lands which have already been sold to a former party, until it first repossessed itself of the land, after proper notice given to the first party according to the terms of the statute.

Statement.

APPEAL by plaintiff from judgment of McKeown, C.J. K.B.D. Affirmed.

G. H. V. Belyea, K.C., supports appeal; *W. B. Wallace*, K.C., *contra*.

Hazen, C.J.

HAZEN, C.J., agrees with GRIMMER, J.

White, J.

WHITE, J. (oral):—I agree with the judgment of my brother Grimmer in so far as he bases it upon the fact that the Board, whose powers are defined and limited by the statute, were not in a position to give a valid deed to the plaintiff until they had first repossessed themselves of the land, after notice given to the defendant; but I wish to make it clear that in my opinion the fact that the plaintiff was a dentist, residing at St. Stephen, cannot

N. B.

S. C.

WILSON v. WILSON.

Grimmer, J.

affect his rights under the deed in question. It is no part of our duty as a Court to criticize the conduct of any public body, save where such conduct affects the legal rights in question before us.

GRIMMER, J.:—This action which was brought to secure possession of certain lands and premises situate in the Parish of Cambridge, in the County of Queens, and for mesne profits and damages for the wrongful detention of said property by the defendant was tried at the St. John Circuit in May, 1919, before McKeown, C.J., without a jury. At the trial the plaintiff abandoned everything else and proceeded solely upon his claim for possession.

It appears that the Farm Settlement Board, created by the Act, 2 Geo. V., 1912 (N.B.), ch. 28, being the owner of the property, on July 1, 1913, entered into an agreement as provided by the statute, for the sale of the land to the defendant for the sum of $1,000. Of this $300 was to be paid at the date of the agreement, and the balance in ten equal payments of $70 each, with annual interest until payment in full was made, when the Board would by deed convey the land to the defendant. The first payment was made and the defendant took possession of the property, moved thereon, and has since resided there, but failed to make his annual payments as stipulated for, and at the time the suit was started he had only paid about $65 in addition to his first payment. The plaintiff, a dentist by profession, residing at the town of St. Stephen, and brother of the defendant, having learned of the default made by the latter in respect to his payments, procured the Farm Settlement Board to enter an agreement with him on September 30, 1916, similar in all respects to that made with the defendant and dated back to the first day of July, 1913, by which it became bound to sell the same premises to him, the plaintiff, thus simply substituting the plaintiff for the defendant and giving him the benefit of the initial payment made by the defendant. Before making the second agreement, however, the Board, following the provision of the statute and the first agreement, gave notice in writing to the defendant that on account of his default in payment it would on a certain day retake possession of the premises, which notice was as follows:

To C. B. Wilson, of the Parish of Cambridge in the County of Queens and Province of New Brunswick.

N. B.

S. C.

WILSON v. WILSON.

Grimmer, J.

This is to notify you that unless the principal and interest moneys owing to the Farm Settlement Board by virtue of the agreement between you, the said C. B. Wilson and the said The Farm Settlement Board, bearing date the first day of July, A.D. 1913, be paid at the expiration of one month from the date hereof, the said The Farm Settlement Board will under the provisions of sec. 5 of 2 Geo. V., ch. 28, of the Acts of Assembly, 1912, take possession of the lands and premises set forth and described in the said agreement, and will deal with the said lands so repossessed as they might have done in the first instance, or as authorized by sec. 1 of ch. 48 of 4 Geo. V., 1914, and in such case you, the said C. B. Wilson, shall have no recourse at law or in equity against the said The Farm Settlement Board, but shall be at liberty to lay any claim before the Lieutenant-Governor-in-Council, whose decision shall be final.

Dated at the City of Saint John, in the City and County of Saint John and Province of New Brunswick, this 28th day of August, A.D. 1916.

THE FARM SETTLEMENT BOARD,
per James Gilchrist, Secretary.

Nothing further was done by the Board so far as repossessing the land was concerned, and on September 30, 1917, the plaintiff paid off all arrearages due by his brother the defendant on the land. The defendant claims this payment was made by the plaintiff at his request, to enable him to complete the purchase, but the plaintiff states that the defendant, knowing that he could not meet the payments, agreed that the plaintiff should take his place and carry the matter through as his own. No consideration however appears to have existed between these parties for the arrangement which the plaintiff claims was made between them, and McKeown, C.J.K.B., in his conclusions found against the plaintiff upon his contentions in this respect. However, the arrears were paid by the plaintiff and a new agreement was made with him by the Board, which at the commencement of this suit was his sole title to the premises. Afterwards this action was commenced, both the plaintiff and the Board claiming that the defendant, having made default and the Board having given the notice above set out, it was competent for the Board to enter into the new agreement with the plaintiff as the notice in fact accomplished the dispossession of the defendant without further act or operation on the part of the Board, the defendant only being entitled to possession so long as he made the payments stipulated in the agreement. Finally, September 10, 1918, some time after the commencement of this suit, the plaintiff paid the Board the balance of the purchase price of the land, notwithstanding the same was not due, and secured a deed of the property, which he

thereupon proceeded to and did sell for an increased price over that paid by him to the Board for the land. In view, therefore, of the fact that there are two agreements for the sale and purchase of the land as well as a deed to the plaintiff (not however in existence at the commencement of this suit) and that while the defendant had notice from the Board of its intention to retake possession by reason of his default, he is still in possession of the premises under his agreement, it becomes necessary to refer to the statute upon which the Board proceeded, and the agreement made with the defendant, to ascertain if it was justified in the conclusion it reached, and under the circumstances was authorized to make the conveyance to the plaintiff.

Section 2 of the Act (1912), ch. 28, authorizes the Board to purchase, hold and possess real estate suitable for general farming purposes and improve the same and erect houses thereon when necessary; to sell and convey to *bonâ fide* settlers the real estate so acquired upon the terms named in the section; to enter into all agreements and make and execute deeds and conveyances, and to make by-laws and regulations for the purposes of the Act.

Section 5 provides as follows:—

In case of default by any purchaser in making the payments agreed upon, or in fulfilling any conditions that may be agreed upon, the said Board shall be at liberty to *take possession* of the lands of any purchaser so in default, on giving the said purchaser one month's notice in writing *of its intention so to do* or if the purchaser cannot be found by posting said notice on the dwelling house or other conspicuous place on the premises of such defaulting purchaser, and *on so taking possession* of any premises under this section the Board may deal with the said lands so repossessed as it might have done in the first instance.

It will be observed these sections provide for the purchase and sale of lands by the Board and the course to be pursued in case any purchaser defaults in his payments, and under and by virtue of the authority conferred by these sections the Board entered into the agreement for sale to the defendant, of which agreement secs. 2, 3 and 7 are very pertinent to this case, and are as follows:—

2. The party of the second part (defendant) for himself, his heirs, executors or administrators and assigns, hereby agree to pay the party of the first part (the Board) its agent or attorney, the said sum of one thousand dollars, in manner following:—The sum of three hundred dollars at or before the ensealing and delivery of this agreement, and the balance of seven hundred dollars in ten equal annual instalments of seventy dollars each, with interest thereon at the rate of five per cent. per annum, payable annually, the said annual instalments, together with the interest on all unpaid balance to be paid

N. B.

S. C.

WILSON v. WILSON.

Grimmer, J.

on the first day of July in each year, the first payment being due on the first day of July, A.D. 1914, the last payment to be made on the first day of July, A.D. 1923.

3. It is hereby agreed between the parties hereto that the party of the second part shall, upon execution of this agreement and the payment of the said sum of three hundred dollars aforesaid, be entitled to the possession of the lands the premises hereinbefore described and to retain such possession until default shall be made by said party of the second part, as hereinafter provided.

7. It is hereby agreed between the parties hereto, that if the party of the second part shall make default in making payments herein agreed upon or unfulfilling (in fulfilling?) any conditions herein agreed upon, that the party of the first part shall be at liberty to take possession of the hereinbefore described premises on giving the party of the second part one month's notice in writing of its intention so to do, or if the party of the second part cannot be found, by posting said notice on the dwelling house or other conspicuous place on the said premises, and if the said party of the first part should so take possession of the said premises, it may deal with the said lands so repossessed as it might have done in the first instance, and in such case the party of the second part shall have no recourse at law or equity against the said party of the first part, but shall be at liberty to lay any claim before the Lieutenant-Governor-in-Council, whose decision shall be final.

Section 2 merely refers to the terms of the sale and purchase and is of no further interest so far as this case is concerned.

Section 3 relates to the position of the defendant, and makes it clear that under the agreement the defendant was entitled to possession of the land which he should retain until he made default in his payments, whereupon he might be deprived of that possession in the manner provided by sec. 7.

This last named section strictly follows the provisions of sec. 5 of the statute, which to me are perfectly plain and clear and distinctly provide that in case any purchaser makes default in his payment as agreed upon, the Board shall be at liberty to take possession of the lands sold him, how, on giving him the purchaser one month's notice in writing of its intention so to do, or if he cannot be found by posting the notice on the dwelling house or some other conspicuous place on the premises, and upon so taking possession may then proceed to deal with the land as in the first instance.

The real question then in this case is, did the Board comply with the statute and the agreement and repossess the land before entering into the second agreement with the plaintiff? The evidence discloses that the Board took no further step in this respect than the giving of the notice, and in my opinion this was

not sufficient. It will be observed the statute and the agreement both use the words "take possession" which for want of definition or consideration as to any special method of application must be given their literal meaning, and will make necessary some further act than the mere giving notice of an intention to do a certain act or thing. This repossession can only be taken after the notice has been given one month, and nowhere is it stated in nor can it be inferred from the statute or the agreement that the mere notice is all the Board has to do to become reinvested with the land. This view is also borne out by the fact that the provision made, that the Board "on so taking possession" which infers some distinctive and positive act on its part in this respect, may then proceed to again deal with the land. Had it been intended that the giving the notice only should constitute a repossession of the land and was all the Board had to do to become repossessed thereof, it would undoubtedly have said so in plain terms, and there would not have been the language, such as "at liberty to take possession" and "on so taking possession" that is now found in sec. 5, and the words "and possession of said real or personal property is taken under said section" as found in sec. 7.

In my opinion some other act, such as going upon the land, demanding and taking formal possession, was necessary on the part of the Board before it could or would become reinvested with the land, and as this was not done the Board was not in a position to make a second agreement in respect to the disputed land, the possession whereof remained and still remains in the defendant. There can be no question of the right of the Board to repossess the land, but it must proceed in a legal way to do so, and cannot legally deal with the same until it is so repossessed, when, as the statute states, it may deal therewith as it might have done in the first instance. Neither could the plaintiff maintain the action because he was not the owner of the land when the same was commenced this deed being made some time after the writ was issued, nor was he in possession thereof.

Before concluding this judgment I desire to point out that the proceeding so far as the second agreement referred to herein is concerned, was evidently on the part of the Farm Settlement Board a direct violation of the purposes and intention of the Act. This Act so-called "An Act to encourage the Settlement of Farm Lands" in its preamble states that whereas inducements in the

N. B.

S. C.

WILSON v. WILSON.

Grimmer, J.

nature of improved farm lands are being offered as an attraction to intending settlers to locate in other parts of the Dominion, and this scheme where adopted has been attended with a large measure of success; and whereas in order to encourage the young people of this Province to settle therein, instead of going elsewhere, and to encourage the repatriation of our people who have gone abroad, and also to attract the best class of immigrants to settle here, it is advisable that this Province adopt some similar scheme to promote the settlement of our vacant lands. This very shortly defines the purposes and the intention of the Legislature in passing this statute.

In respect then to the second agreement, it clearly appeared that the Board had notice when it was making the same that the plaintiff in this case was a dentist residing at the Town of St. Stephen, who had no intention whatever of going to reside upon this property, and did not want it for that purpose. While, therefore, the Board under the Act had the power to sell, it was clearly acting in violation of the purposes and intention of the statute when it entered into the second agreement with the plaintiff, and not only was it making this agreement in violation of the law, but having made it they deprived the defendant of the benefit of the initial and subsequent payments which he had made to the Board, which together amounted to the sum of $365, and they made no arrangement whereby he was protected in this respect, as it would in all fairness seem to have been the proper and necessary thing for the Board to have done.

The judgment appealed against must be sustained, and this appeal dismissed with costs. *Appeal dismissed.*

B. C.

C. A.

MOULD v. THE KING.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher and McPhillips, JJ.A. April 6, 1920.

MUNICIPAL CORPORATIONS (§ II C—66)—BY-LAWS—PREVENTION OF DISEASE —REGULATION—EXCLUSION.

The Municipal Act, 4 Geo. V. 1914 (B.C.), ch. 52, secs. 105 to 109, authorizes a municipality to pass by-laws for the purpose of preventing the spread of infectious and contagious diseases, but the power given is for regulation only and a by-law excluding the entry of any animal is *ultra vires*.

Statement.

APPEAL from a conviction in the County Court for importing a diseased animal contrary to the provisions of a municipal by-law. Reversed.

B. C.

C. A.

MOULD v. THE KING.

R. C. Lowe, for appellant; *H. B. Robertson*, for respondent.

MACDONALD, C.J.A.:—I would allow the appeal.

GALLIHER, J.A.:—In my opinion the municipality had no power to pass clause 35 of by-law 62, under which conviction was had.

Galliher, J.A.

I would allow the appeal.

McPHILLIPS, J.A.:—The appeal, in my opinion, should be allowed. A constitutional point was taken that the By-law No. 62, a by-law relating to public health of the corporation of the District of Saanich, was *ultra vires* of the municipal council to enact, *i.e.*, that the field of legislation was occupied by Federal legislation, which displaced the Provincial legislation. See Animal Contagious Diseases Act, R.S.C. 1906, ch. 75. The Provincial Act is, in somewhat similar terms, entitled the "Contagious Diseases (Animals) Act," R.S.B.C. 1911, ch. 46. I do not find it necessary to pass upon this point as the decision I have come to renders it unnecessary. The challenged by-law is claimed to be supported by sec. 54, sub-secs. 105, 106, 107, 108, 109 of the Municipal Act, 4 Geo. V. 1914 (B.C.), ch. 52. The counsel for the respondent very ably addressed his argument to the support of the validity of the by-law upon the authority given by the Municipal Act and did not consider that the Federal or Provincial legislation in any way affected the by-law, *i.e.*, that it was *intra vires* not *ultra vires* of the municipal council to enact. With deference, I do not consider that the by-law is supportable by the Municipal Act, and a close analysis of the powers conferred, and an examination of the authorities, persuades me that the by-law is too extensive in its terms; it is prohibitive in its effect. The powers conferred are regulatory powers, not prohibitive powers. If the Legislature intended to confer upon the municipal authority the power of prohibition and exclusion of animals, suffering from infectious or contagious disease, it would have been done in apt language and without that apt language the by-law is incapable of being supported. Section 35 of the by-law is in the following terms: "35. No animal affected with any infectious or contagious disease shall be brought into the municipality." This is absolutely prohibitive in its effect, and I find no warrant for its enactment. The counsel greatly relied upon certain expressions of Sir F. H. Jeune in the Court of Appeal of England in *Thomas*

McPhillips, J.A.

B. C.

C. A.

MOULD v. THE KING.

McPhillips, J.A.

v. *Sutters* (1899), 69 L.J. (Ch.) 27, at page 30, [1900] 1 Ch. 10, where that eminent and distinguished Judge said:—

> If there were a difference between a by-law and a public Act of Parliament—I mean if a by-law declared something to be legal, which the public law declared to be illegal or *vice versa*—I agree that the by-law could not be set up against the general law in that sense . . . It may be that the by-law goes beyond that but I cannot myself see any real objection to the by-law even if it does go somewhat beyond the Act of Parliament. The Act, speaking for the whole country, makes certain things illegal. It does not follow that a by-law speaking for a particular locality may not make some more stringent provisions with the same object.

The difficulty here, however, is that the Act of Parliament—the Municipal Act—does not declare that it is illegal to bring into a municipality any animal affected with any infectious or contagious disease, but we find the by-law so declaring. It might as well be contended that a by-law would be effective if it in terms excluded persons as well as animals. It is only necessary to state this proposition to see the extent of the contention made. It cannot be assumed or implied that the power to pass by-laws relative to health, protection or preservation—the heading appearing above—see sec. 105 *et seq.* authorizes any such drastic power of exclusion from the municipalities. It is not a power that would be attempted to be conferred by Parliament in other than positive and clear terms—so dislocating to the affairs of mankind and domestic life.

Upon the facts of the present case, we had an animal bought in the Saanich municipality taken into the City of Victoria, examined by the veterinary inspector and ordered to be destroyed. The animal was taken back into the municipality and there destroyed. In the absence of clear statutory enactment declaring it to be illegal to have proceeded in this way and a by-law supportable upon such statute law, it is idle to contend that that which was done was an illegal act. I cannot, with respect, come to the same conclusion as Lampman, Co. Ct. J. In his reasons for judgment the Judge said:—

> Clause 35 of the by-law under which the information was laid enacted that: "No animal affected with any infectious or contagious disease shall be brought into the municipality." This enactment seems to me to be within the scope of the legislation under which it was passed. Power to prevent the spread would, I think, include power to prevent the importation.

On the contrary, it is clear to me, after a careful consideration of the whole matter, and attention given to the authorities, that the by-law must be held to be invalid and beyond the scope

of the powers conferred by the Municipal Act. As I have already said the by-law is prohibitive, not regulatory and prohibitive powers have not been conferred—that which has been attempted is, in its nature, totally exclusive and exceedingly drastic in its effect and would mean that a farmer once having taken an animal affected with disease beyond the confines of the municipality in which he was resident could not again bring the animal within the municipality—even for the purpose of its destruction. It impels one to the thought that there must be, or will be found, other legislation dealing with such a situation—but all that it is necessary now to pass upon is, the validity or invalidity of the challenged by-law and as to that I have no hesitation in saying that it is *ultra vires* of the municipal council and must be held to be invalid and illegal.

I think Lord Sumner's language in *Rex* v. *Broad*, [1915] A.C. 1110 at 1122, 84 L.J. (P.C.) 247, at 254, is particularly applicable to the present case:

> The rule is well established that if by-laws involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, "Parliament never intended to give authority to make such rules," *per* Lord Chief Justice Russell of Killowen in *Kruse* v. *Johnson*, [1898] 2 Q.B. 91, 99, 67 L.J.Q.B. 782, 785.

In the present case, the result must be, in my opinion—that the conviction be quashed—the by-law being, as to sec. 35 thereof—upon which the conviction was made, invalid, *i.e.*, section 35 of the by-law not being sustainable, it follows that the conviction cannot be upheld.

I would, therefore, allow the appeal—the appellant to have his costs here and throughout in the Courts below.

Appeal allowed.

BOWEN v. LIGHTFOOT.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, Fullerton and Dennistoun, JJ.A. April 6, 1920.

MUNICIPAL CORPORATIONS (§ II C—50)—MUNICIPAL BY-LAW—BENEFIT OF PUBLIC—OBLIGATIONS IMPOSED.

A municipal by-law passed for the benefit of the public, and not of any particular class, does not impose any other or greater obligations than those imposed at common law, except the penalties provided in the by-law itself.

Statement.

APPEAL by plaintiff from a nonsuit in an action claiming damages by reason of an attack made on him in the public streets by two bulldogs. Affirmed.

MAN.

C. A.

BOWEN v. LIGHTFOOT.

Fullerton, J.A.

J. C. Collinson, for appellant; *W. W. Kennedy*, for respondent.

PERDUE, C.J.M., and CAMERON, J.A., would dismiss the appeal.

HAGGART, J.A. (dissenting), would allow the appeal.

FULLERTON, J.A.:—The defendant was attacked on a public street in the City of Winnipeg by a bulldog and a bitch; his clothes were torn and he was severely bitten.

The defendant Wilkes was the owner of the bulldog. So far as Wilkes is concerned the only evidence of *scienter* is that of the plaintiff himself, who says that some months before he received the injuries complained of, he and the defendant Wilkes were engaged in fixing a piano wagon, that the bulldog came along and he went to pat him, when Wilkes said, "Oh, don't put your hands on that dog for he 'aint safe." If I had been trying the case, I would have held this sufficient evidence of *scienter*. The trial Judge, however, took the contrary view and we should not interfere.

The defendants James Lightfoot and George Lightfoot were sued as doing business under the name, style and firm of "Lightfoot Transfer Co." and George Lightfoot was sued individually.

There is no evidence in the case which would justify a verdict against the partnership.

The business was apparently carried on by the defendant George Lightfoot. There is no evidence whatever to shew that George Lightfoot had any knowledge of the vicious character of the dogs.

It is contended, however, that such proof of the *scienter* was unnecessary as the dogs were, at the time of the attack, running at large, contrary to a by-law of the City of Winnipeg.

In other words, the plaintiff contends that a breach of a statutory duty followed by damage gives rise to a cause of action.

The leading case on the subject, and one which has been approved and followed in all subsequent cases, is *Cox* v. *Burbidge* (1863), 13 C.B. (N.S.) 430, 143 E.R. 171. In this case the plaintiff, a little boy about five years of age, was playing in the road, when a horse, which was on the footpath, struck out and kicked him in the face, injuring him severely.

Section 25 of the Highway Act, 1864 (Imp.), made it unlawful, except where there are wastes or unenclosed lands, to allow

animals to stray on to the highway, and the owner is liable to a fine if he does so.

The Court, consisting of Erle, C.J., Williams, Willes and Keating, JJ., held that the plaintiff could not recover.

The argument for the plaintiff was that the fact of the horse being loose on the highway contrary to the statute was *primâ facie* evidence of negligence.

Erle, C.J., at page 435, said:—

As between the owner of the horse and the owner of the soil of the highway or of the herbage growing thereon, we may assume that the horse was trespassing; and, if the horse had done any damage to the soil, the owner of the soil might have had a right of action against his owner. So, it may be assumed, that, if the place in question were a public highway, the owner of the horse might have been liable to be proceeded against under the Highway Act. But in considering the claim of the plaintiff against the defendant for the injury sustained from the kick, the question whether the horse was a trespasser as against the owner of the soil, or whether his owner was amenable under the Highway Act, has nothing to do with the case of the plaintiff (page 436) . . . I take the well-known distinction to apply here, that the owner of an animal is answerable for any damage done by it, provided it be of such a nature as is likely to arise from such an animal, and the owner knows it . . . It reduces itself to the question whether the owner of a horse is liable for a sudden act of a fierce and violent nature which is altogether contrary to the usual habits of the horse, without more (page 437).

Hadwell v. *Righton*, [1907] 2 K.B. 345, was the case of a fowl flying into the spokes of a bicycle causing it to upset.

Phillimore, J., on the assumption that the fowls were unlawfully upon the highway, held that the damage which in fact happened was not of such a nature as was likely to result from their unlawful presence there and that the defendant was not liable.

To the same effect is the case of *Heath's Garage Ltd.* v. *Hodges*, [1916] 1 K.B. 206, 32 T.L.R. 134 (affirmed, [1916] 2 K.B. 370, 32 T.L.R. 570).

The leading English cases on the point are reviewed in *Millar* v. *O'Dowd* (1917), 36 N.Z.L. Rep. 716.

In *Nass* v. *Eisenhauer* (1907), 41 N.S.R. 424, the plaintiff sought to recover damages from the defendant for injuries to plaintiff's ox caused by defendant's oxen which were at the time upon the public highway in violation of a by-law of the municipality.

The Court of Appeal held that "without proof of *scienter* defendant could not be held liable" (see headnote 41 N.S.R. 424).

MAN.

C. A.

BOWEN v. LIGHTFOOT.

Dennistoun, J.A.

The by-law in the case under consideration does not, therefore, help the plaintiff, and there can be no recovery.

DENNISTOUN, J.A.:—The plaintiff bases his action on two grounds—first, that the defendants knew that the dogs were vicious, and alternatively, that they were on the highway contrary to the provisions of By-law No. 1603, sec. 31, of the City of Winnipeg, which reads as follows:—

No person or persons shall permit or suffer his, her or their dog, and no dog shall be permitted or suffered to run at large in the city without a collar and metallic plate mentioned in sec. 27 of this By-law, nor unless such dog is accompanied by and is under the immediate charge and control of some competent person, and any dog found running at large, contrary to this provision, shall be liable to be captured and disposed of as hereinafter provided.

A well-known case on action for damages for breach of statutory duty is *Groves* v. *Wimborne*, [1898] 2 Q.B. 402. This was a case under the Factory & Workshop Act, 41-42 Vict. 1878, ch. 16. It imposes a duty to fence certain machinery. The Act is a public Act, passed in favour of the workers in factories and workshops to compel their employers to do certain things for their protection and benefit. It was held that an injured workman had an action for breach of statutory duty notwithstanding the provisions in the Act that the employer should be liable to fine in respect to that breach of duty. In dealing with the intention of the Legislature it is material, as Kelly, C.B., pointed out in giving judgment in the case of *Gorris* v. *Scott* (1874), L.R. 9 Exch. 125, to consider for whose benefit the Act was passed, whether it was passed in the interests of the public at large or in those of a particular class of persons.

In the case under consideration there can be no doubt that the by-law prohibiting dogs from running at large was passed in the interest of the general public and not of any class of citizen.

Tompkins v. *Brockville Rink Co.* (1899), 31 O.R. 124, 133, is a case in which Meredith, C.J.O., dealt with the claim for damages of a plaintiff who alleged that his property would be depreciated in value, and his insurance premiums increased by reason of the erection of the defendant's building in contravention of a fire by-law of the Town of Brockville. He says at page 130:—

When one looks at the number of acts lawful to be done at common law which municipal councils are by the Municipal Act permitted to prohibit or to regulate, and the number of duties which do not exist at common law

which they are permitted to impose . . . one is startled by the proposition that in each case a duty is imposed for the failure to perform which an action lies by one who is injured owing to the non-performance of it.

And at page 132:—

The proper conclusion to be come to on the main question is, I think, that no such right of action as the plaintiff asserts is vested in him.

In *Ward* v. *Hobbs* (1878), 4 App. Cas. 13, the defendant, in violation of the Contagious Diseases (Animals) Act (Imp.), sent pigs to market which were suffering from typhoid fever. They were bought by the plaintiff without warranty subject to previous inspection. The pigs died and infected other pigs of the plaintiff and he sued for damages, relying on the violation of the statute as sufficient to maintain his cause of action. It was held that the Act was passed for the benefit of the public and has nothing to do with the bargains of particular persons: (Lord O'Hagan, at page 28).

This case was followed in Saskatchewan in an action based on a violation of the Noxious Weeds Ordinance, on the ground that an individual had no right of action under the statute which he did not have without it. *Nargang* v. *Kirby* (1911), 4 S.L.R. 309.

In *Baldrey* v. *Fenton* (1914), 20 D.L.R. 677, 7 S.L.R. 203, it was held that a right of action accrued to a plaintiff whose horse fell into an open well of the defendant. The statute, R.S.S., 1909, ch. 124, sec. 2, provides:—

(2) No person shall have on his premises or on any premises occupied by him any open well or other excavation in the nature thereof of a sufficient area and depth to be dangerous to stock and accessible to stock of any other person which may come or stray upon such premises.

The judgment is based on *Butler* v. *Fife Coal Co.*, [1912] A.C. 149, and *Watkins* v. *Naval Colliery Co., Ltd.*, [1912] A.C. 693, but an examination of these cases and of the statute quoted clearly shews that the legislation referred to was passed in the interest and for the benefit of a particular and specified class of persons, workmen or stock owners, and that a right of action for breach of the statutory duty was given to such persons in accordance with the rule laid down in *Groves* v. *Wimborne*, [1898] 2 Q.B. 402. The intention of the Legislature to enlarge the common law rights and liabilities of the respective parties is apparent.

In *Moon* v. *Stephens* (1915), 23 D.L.R. 223, 8 S.L.R. 218, two mules running at large in contravention of and contrary to a by-law of the municipality, trespassed upon the plaintiff's property and caused damage. The defendant was held liable, but, I take

MAN.

C. A.

BOWEN v. LIGHTFOOT.

Dennistoun, J.A.

it, was liable at common law, the breach of the by-law being taken as evidence of negligence on his part and not the foundation of the right of action.

Where a statutory duty is imposed upon a railway company in the nature of a duty to take precautions for the safety of persons lawfully travelling in its carriages, crossing its line, or frequenting its premises, the company will be responsible in damages to a member of any one of these classes who is injured by their negligent omission to discharge, or secure the discharge of, that duty properly, but the injury must be caused by the negligence of the company or its servants: *per* Lord Atkinson in *G.T.R.* v. *McAlpine*, 13 D.L.R. 618, [1913] A.C. 838, 16 Can. Ry. Cas. 186. This is another example of legislation in favour of specified classes as distinguished from the general public and moreover by sec. 385 of the Railway Act, 9-10 Geo. V. 1919, ch. 68, a cause of action is declared to exist by the express words of the statute itself.

In *Zumstein* v. *Shrumm* (1895), 22 A.R. (Ont.) 263, the judgment of the Court of Appeal for Ontario was given by Hagarty, C.J.O., to the effect that the owner of a turkey cock which, without negligence, strays upon the highway contrary to a by-law of the municipality is not liable for damages resulting from a horse taking fright and running away at the sight of the bird acting as turkey cocks generally do. Disobedience of the by-law was distinctly raised on the argument by Moss, Q.C., but the Chief Justice, at page 267, disposed of the case on the ground that there was "no evidence from which negligence on the defendant's part can be proved or presumed or any knowledge possessed by him of the possibility of his turkey cock acting so as to frighten horses."

The law in the United States on this subject is collected in Corpus Juris—*sub nomine* Animals—vol. 3, page 94, secs. 324 to 340. It varies in different States and as laid down by different Courts, but as a general rule it appears that *scienter* continues to be an element of liability unless expressly dispensed with by the statute. Vide Corp. Jur., sec. 340.

The owner of a dog is no doubt answerable at common law for damages of a certain class caused by such dogs when negligently running at large, but such owner is not liable for damages caused by the dog which could not be contemplated in the absence of any knowledge that the dog was so disposed: *Turner* v. *Coates*, [1917] 1 K.B. 670.

MAN.

C. A.

BOWEN v. LIGHTFOOT.

Dennistoun, J.A.

In my opinion this by-law was intended to license, regulate, and restrain, as well as to tax dogs and was passed for the benefit of the public and not of any particular class, and that a breach of it does not impose any other or greater obligations upon the owner than those imposed at common law, excepting, of course, the penalties provided by the by-law itself, which are confiscation and fine.

The view is taken that the prohibition contained in the by-law is as valid as a direct enactment of the Legislature itself, but that it was not within the contemplation of the Legislature, or the city council, to do more than regulate the running of dogs upon the streets. It was never contemplated that the owner of a dog would be subject to more than the prescribed penalties for a violation of the by-law. Had it been otherwise an unattended dog upon the highway, without any negligence on the part of his owner, might subject that owner to heavy damages by interfering with motor traffic, frightening horses, and so forth. I am unable to agree that the numerous municipal by-laws which are in operation have overturned the common law rights of the citizens to any greater degree than is necessary to give effect to the clearly expressed purpose of those by-laws, or that it was the intention of the Legislature to make non-performance of a duty imposed by a by-law statutory and actionable negligence, unless such intention expressly or impliedly appears as part of the enactment.

Upon the authorities the conclusion is reached that the presence of these dogs upon the highway in contravention of the by-law in itself gave no right of action to the plaintiff. In attacking the plaintiff they were displaying a degree of ferocity for which the defendants can only be held responsible at common law if they knew that the dogs were so disposed and failed to prevent them from coming into contact with the plaintiff.

The County Court Judge granted a nonsuit on the ground that there was not sufficient evidence of *scienter* as to viciousness in the dogs. There was no jury in the case, and had he called upon the defence his judgment would have been the same. I do not feel justified in reversing him on this point as the evidence is not sufficiently strong to convince me that he was wrong.

I would dismiss the appeal with costs. *Appeal dismissed.*

ONT.

S. C.

EDDY v. MILLMINE.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Sutherland and Masten, JJ. March 26, 1920.

1. PARTIES (§ I A—50)—CORPORATION—PROPER PLAINTIFF—INDIVIDUAL SUING ON BEHALF OF HIMSELF AND OTHERS—ADDING CORPORATION.
Where a corporation is a proper plaintiff circumstances may entitle an individual taxpayer to bring an action on behalf of himself and all others of his class for the benefit of the corporation, but he must first shew the Court sufficient reason for the corporation not being a party plaintiff and when so excused the corporation should be made a party defendant.

2. MUNICIPAL CORPORATION (§ II C—69)—MUNICIPAL ACT (ONT.)—EXPRESS WORDS—SCOPE.
The words "travelling or other expenses incurred in respect to matters pertaining to or affecting the interests of the corporation" as used in the Municipal Act (Ont.), 4 Geo. V. 1914, ch. 33, sec. 19, are wide enough to cover the expenses of a delegation sent to Ottawa to induce the Government of Canada to exempt from military service men engaged as farm workers in the township.

Statement.

APPEAL by the defendants from the judgment of a County Court Judge in favour of the plaintiff in an action to compel the restoration to the treasury of the Municipal Corporation of the Township of Burford of a sum of $219.13 paid out of corporation funds, upon a resolution of the township council, for the expenses of a deputation to Ottawa in support of the repeal of an Order-in Council.

W. S. Brewster, K.C., for appellants, other than the defendant Barker; *Gordon Waldron*, for defendant Barker, appellant; *W. T. Henderson*, K.C., for plaintiff, respondent.

Mulock, C.J.Ex.

MULOCK, C.J. EX.:—This is an appeal from the judgment of the learned Judge of the County Court of the County of Brant ordering the defendants to pay to the Treasurer of Burford $219.13. The facts out of which this litigation has arisen are as follows:—

In the year 1918, at a public meeting held in the Township of Burford, in the County of Brant, it was resolved that a delegation from the said township should be sent to Ottawa to join with delegations from other portions of the Province in a protest to the Government against a certain Order-in-Council amending the Military Service Act, and rendering liable to conscription men who were engaged on farms in the production of food. In response to such resolution, the township council sent to Ottawa a delegation composed of the five defendants and four others, and the travelling expenses of the delegation, amounting to $219.13, were paid out of moneys of the township.

ONT.

S. C.

EDDY v. MILLMINE.

Mulock, C.J.Ex.

The plaintiff, a ratepayer of the township, who sues on behalf of himself and all other ratepayers of the township, contends that such payment was illegal, and asks that the defendants who were the members composing the said council, and who directed the payment of said sum, be ordered to repay the same to the municipal corporation.

Objection was taken to the constitution of the action, it being argued that it could not be maintained at the suit of an individual ratepayer, though suing on behalf of himself and all other ratepayers, but should have been brought in the name of the corporation. The corporation is the proper plaintiff; circumstances may entitle an individual ratepayer on behalf of himself and all others of his class to bring an action for the benefit of the corporation; but he must first shew to the Court sufficient reason for the corporation not being a party plaintiff, and, when so excused, the corporation should be made a party defendant. Here, if the corporation is not a party plaintiff or defendant, there is no person before the Court to receive any moneys which may be found owing to it, or to give acquittance in respect thereof. Further, the corporation would not be bound, and the defendants would be liable to as many actions as there are ratepayers: *Bowes* v. *City of Toronto* (1858), 11 Moo. P.C. 463; *Foss* v. *Harbottle* (1843), 2 Hare 461; *Mozley* v. *Alston* (1847), 1 Phillips 790; *Hamilton* v. *Desjardins Canal Co.* (1849), 1 Gr. 1, 21.

So far as appears, no attempt was made before action begun to have the corporation bring the action; but, after the defendants other than Barker, in their statement of defence, had denied the right of the plaintiff to maintain the action, his solicitor wrote to the township council asking the corporation to join in it as a party plaintiff. The council, however, by resolution, refused to do so, the resolution being also open to the construction that the council would not bring an action in the corporation's name for the purpose of recovering the moneys alleged to have been misapplied.

Under these circumstances, the plaintiff, suing on behalf of himself and all other ratepayers, is entitled, on adding the corporation as a party defendant, to maintain this action, and leave should be given so to amend.

ONT.

S. C.

EDDY
v.
MILLMINE.

Mulock, C.J.Ex.

I infer from the action of the council that the corporation is opposed to the plaintiff's claim. If such be the case, I see no reason for withholding my opinion in regard to the merits of the action. Nevertheless the corporation, when added as a party should, if it desires it, be heard before the order on this appeal is issued.

Dealing then with the merits of the question. The council, unless authorised by statute, would have no right to expend moneys of the ratepayers in payment of the travelling expenses in question. The defendants, however, contend that the payment was authorised by sec. 427 of the Municipal Act (4 Geo. V. ch. 33, sec. 19), which is as follows: "(1) The council of a city, town, village, county or township may pay for or towards the reception of" (doubtless meant for "or") "entertainment of persons of distinction or the celebration of events or matters of national interest or importance, of for or towards travelling or other expenses incurred in respect to matters pertaining to or affecting the interests of the corporation, a sum not exceeding in any year," etc.; and the question is, was the mission of the delegation to Ottawa a matter pertaining to or affecting the interests of the corporation? The term "corporation" is not, I think, here used in its strict sense, as defined by Dillon on Corporations, 5th ed., sec. 31: "A municipal corporation, in its strict and proper sense, is the body politic and corporate constituted by the incorporation of the inhabitants of a city or town for the purposes of local government thereof."

Further on, in sec. 33, he states that the primary and fundamental idea of such a corporation is "an institution to regulate and administer the internal concerns of the inhabitants of a defined locality in matters peculiar to the place incorporated, or at all events not common to the State or people at large."

The Legislature has, however, from time to time enlarged the powers of municipal corporations beyond those merely local or municipal; and sec. 427 is an instance of the grant by the Legislature to the corporation of extra-municipal powers. That section empowers councils to expend a limited amount of the taxpayers' money in the reception or entertainment of persons of distinction, in the celebration of matters of national interest or importance, and in payment of travelling expenses in respect of matters per-

taining to or affecting the interests of the corporation. The object of the delegation's mission to Ottawa was to induce the Government to exempt from military service men who in the township were engaged as farm-workers. Was that object a matter affecting the interests of the corporation? It is the duty of the corporation to regulate and administer certain matters affecting inhabitants of or persons within the township, and, in the discharge of such duty, the corporation is empowered to levy and collect taxes from the ratepayers. The learned trial Judge expressed the view that the mission of the delegation to Ottawa affected the interests not of the corporation but of a mere section of the inhabitants of the township, namely, those who were of opinion that the cause of the Allies would be better promoted by men who were engaged in farm-work remaining at home and producing food rather than by their serving in the army.

With respect, I am unable to share this view of the learned trial Judge. The Legislature has cast upon the corporation certain statutory duties, such as the maintenance of roads, bridges, schools, gaols, police service, etc., which require expenditure of public money, and has authorised the corporation to raise the necessary funds by taxing the ratepayers of the township. The withdrawal from the township for military or other purposes of men engaged in farm-work would doubtless diminish the profits derived from the farm, and would also relieve such men from payment of the share of taxes theretofore borne by them. In either case there would remain less wealth and fewer persons in the township liable to taxation. Those who continued ratepayers would be obliged to bear greater burdens, and if the depopulation were to assume sufficiently large proportions the corporation might be unable to exact from the remaining ratepayers sufficient moneys wherewith to enable it to perform its statutory duties. Whether, therefore, such depopulation were to assume such proportions as to render it impossible for the corporation to perform its statutory duties, or were so slight as merely to reduce to a material extent the tax-paying power of the remaining ratepayers, in either case the interests of the corporation would be affected.

I am of opinion that a public measure such as the Order-in-Council in question, if acted upon, would have had the effect of

ONT.

S. C.

EDDY v. MILLMINE.

Mulock, C.J.Ex.

reducing the number of farm-workers in the agricultural Township of Burford, with the consequent impairment of the corporation's ability to perform its statutory duties; and, therefore, the travelling expenses of the delegation in proceeding to Ottawa in order to induce the Government to repeal the Order-in-Council was a matter "pertaining to or affecting the interests of the corporation" of Burford.

For these reasons, I think this appeal should be allowed, that the judgment below should be set aside, and that judgment should be entered dismissing the action with costs here and below.

Clute, J. Sutherland, J. Masten, J.

CLUTE and SUTHERLAND, JJ., agreed with MULOCK, C.J. EX.

MASTEN, J.:—I have had an opportunity of perusing the judgment of my Lord the Chief Justice, and I agree with his conclusion that this appeal should be allowed.

The issue in this action falls to be dealt with under the interpretation to be placed on sec. 427 of the Municipal Act (4 Geo. V. ch. 33, sec. 19), which reads as follows:—

(1) The council of a city, town, village, county or township may pay for or towards the reception of (or) entertainment of persons of distinction or the celebration of events or matters of national interest or importance, or for or towards travelling or other expenses incurred in respect to matters pertaining to or affecting the interests of the corporation, a sum not exceeding in any year in the case of

(*a*) a city having a population of not less than 100,000	$20,000
(*b*) a city or town having a population of not less than 20,000	2,500
(*c*) a city or town having a population of not less than 10,000	1,000
(*d*) a county	1,500
(*e*) other municipalities	500

The question is, was the expenditure here in question an expenditure for or towards the travelling or other expenses incurred in respect to matters pertaining to or affecting the interests of the Corporation of the Township of Burford?

In determining that question it is necessary to bear in mind sec. 8 of the Municipal Act: "The inhabitants of every county, city, town, village, and township shall be a body corporate for the purposes of this Act;" and that the body corporate so constituted is an entity distinct from the inhabitants which constitute it, just as an ordinary company is an entity distinct from its shareholders.

This leads to the conclusion that the words "matters pertaining to or affecting the interests of the corporation" mean matters pertaining to or affecting, not the private interests of one inhabitant or several inhabitants, or even all the inhabitants as such, but matters pertaining to or affecting some power, duty, or other function of the corporate entity known as the "Municipality of the Township of Burford," or its revenues or property.

It appears in the present case that the interests of a substantial number of inhabitants of the township were affected in common by a certain proposed public action, namely, an Order-in-Council providing for the conscription of men engaged in agricultural pursuits. That being shewn, I think the onus was cast upon the plaintiff of establishing clearly that neither the revenues nor property nor any of the powers, duties or functions of the corporation were affected by the proposed action. That has not been established here; and, without going into detail (though I agree with all that has fallen from my Lord), I am wholly unable to see how it can be contended that it *might* not affect the interests of the corporation, as above defined, if it were depleted of its young men engaged in agricultural pursuits. If it might affect those interests, and if the council honestly believed that they might be affected, then it is not for the Court to judge of the reasonableness or suggested unreasonableness of the action taken by the council in paying the expenses of sending a delegation of councillors to Ottawa to oppose the proposed law.

I ought not to part with the case, however, without emphasising the fact that the members of a municipal council, while not trustees, are yet guardians of the funds of the municipality committed to their charge; that no expenditure can be justified unless it is made in good faith; and that, where the funds of the municipality are used for or towards the travelling or other expenses of councillors themselves, the onus is on them to shew that the expenditure was *bonâ fide* in the interests of the corporation, and not for the pleasure of councillors desirous of taking a junketting tour. The Court will scrutinise such expenditures with a jealous eye. Every such expenditure must from this aspect be justified by its own particular facts, and should not be made by wise and honest councillors without taking care that there are ample facts to justify it.

ONT.

S. C.

EDDY v. MILLMINE.

Masten, J.

In the present case I think there was ample justification, and I concur in the disposition proposed by my Lord the Chief Justice, that judgment be entered dismissing the action, with costs here and below.

I prefer to reserve for future consideration the question of the plaintiff's right to maintain the action, in the circumstances and in the form here shewn, as well as the propriety of allowing an amendment at this stage of the action. These seem to me to be very difficult questions not necessary to be determined in the present case.

Appeal allowed.

[The order of the Court, as drawn up and entered, provided that costs should be paid by the plaintiff to the defendants forthwith after taxation thereof—"And the Taxing Officer is to determine whether the defendants had sufficient reasons for severing their defences, and if and so far as it shall appear that they had not, then the said Taxing Officer shall allow only one set of costs."]

PETROPOLIS v. THE KING.

CAN.
S. C.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, and Mignault, JJ. May 4, 1920.

BAIL AND RECOGNIZANCE (§ I—11)—CRIMINAL CASE—MEANING OF WITHIN SUPREME COURTS ACT—FINALITY OF ORDER OF PROVINCIAL COURTS.

Order of the Supreme Court of Nova Scotia on dismissing an application to set aside an order authorizing the estreat of a recognizance arising out of a criminal charge is a *criminal case* within the meaning of sec. 36 (b) of the Supreme Court Act and there is no appeal to the Supreme Court of Canada from such order.

[*Mitchell* v. *Tracey* (1919), 46 D.L.R. 520, 58 Can. S.C.R. 640; *Re McNutt* (1912), 10 D.L.R. 834, 47 Can. S.C.R. 259; English Judicature Act 1877, sec. 47; Criminal Code sec. 1100, considered.]

Statement.

APPEAL by special leave, by a surety, from a judgment of the Supreme Court of Nova Scotia (1919), 50 D.L.R. 427, *sub nom. The King* v. *Mandacos*, dismissing a motion to set aside an estreat of a recognizance. The Crown took the preliminary objection that the appeal being a criminal case an appeal did not lie. Appeal quashed.

J. J. Power, K.C., for appellant.

F. F. Mathers, K.C., Deputy Attorney-General, for the Crown.

Davies, C.J.

DAVIES, C.J.:—I concur with my brother Anglin.

Idington, J.

IDINGTON, J. (dissenting):—The appellant entered into a recognizance taken before a stipendiary magistrate in and for the County of Halifax, who had committed one Basil Mandacos for trial upon a charge of indecent assault, for the sum of $1,000, which was made upon the following condition:—

> The condition of the within recognizance is such, that whereas the said Basil Mandacos was this day committed for trial to stand his trial at the next term of the Supreme Court of Criminal Jurisdiction to be holden in and for the County of Halifax on the 6th day of October A.D. 1918, for that he did at Dartmouth in the County of Halifax on the 1st day of May, A.D. 1918, unlawfully and indecently assault one Jennie Young.
>
> If, therefore, the said Basil Mandacos will appear at the next Court of Criminal Jurisdiction to be holden in and for the County of Halifax and there surrender himself into the custody of the keeper of the common jail there and plead to such indictment as may be found against him by the grand jury for and in respect to the charge aforesaid, and take his trial upon the same, and does not depart the said Court without leave, then the said recognizance to be void, otherwise to stand in full force and virtue.

The Judge who was first applied to for an order enforcing the same, directed it to be estreated because the accused did not appear and plead to an indictment for rape found by the grand jury.

Thereupon another Judge was applied to by the appellant to set aside the order and the writ of *fieri facias* issued thereon.

CAN.
S. C.
PETROPOLIS
v.
THE KING.
Idington, J.

Due notice was given of said motion by service on the Attorney-General of Nova Scotia.

The Judge, so applied to, referred the motion to the Supreme Court of Nova Scotia at the November Sittings, 1919.

The Court entertained the motion without making any question of such a course of procedure being correctly adopted as the mode of relief, so far as hearing of argument and deciding it.

The majority of the Court held, 50 D.L.R. 427 (Longley, J., dissenting), that the motion should be dismissed because upon their construction of the recognizance and conditions the accused having been presented by the grand jury in a true bill accusing him of rape, and failed to plead thereto the surety was liable.

It is objected by counsel for the Attorney-General that the appeal here, though allowed by the Court below, admittedly the Court of last resort in the Province, is not within our jurisdiction.

The question must be determined by the interpretation and construction of sec. 36 of the Supreme Court Act, R.S.C. 1906, ch. 139, which reads as follows:—

> 36. Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court from any final judgment of the highest Court of final resort now or hereafter established in any Province of Canada, whether such Court is a Court of Appeal or of original jurisdiction, in cases in which the Court of original jurisdiction is a Superior Court, provided, that (a) there shall be no appeal from a judgment in any case of proceedings for or upon a writ of *habeas corpus*, *certiorari* or prohibition arising out of a criminal charge any case of proceedings for or upon a writ of *habeas corpus* arising out of any claim for extradition made under any treaty; and (b) there shall be no appeal in a criminal case except as provided in the Criminal Code.

I am unable to understand how proceedings for the recovery of the alleged debt due the respondent can be as urged either a criminal case or within any of the other exceptions in foregoing.

The Crown Rules made February 2, 1901, by the Judges of the Supreme Court of Nova Scotia, seem to substitute for all earlier procedure a clear and explicit method of dealing with all such debts by Rule 83, rendering it the duty of anyone taking a recognizance to transmit it to the office of the Clerk of the Crown in the county in which the proceedings are instituted and file the same there.

The procedure for enforcing same does not in any way savour of criminal charge nor in any respect does the judgment enforcing the recognizance constitute the surety a criminal or the motion

to set aside the judgment against him, a criminal case within the meaning of sec. 36 quoted above.

I, therefore, have no doubt of our jurisdiction. The provisions in the Criminal Code relative to the enforcement of such an obligation are obviously made to adopt the local Court and officers who may be applied to therefor, and the legal machinery provided thereby as it were as that through which such enforcement is made as that which is most appropriate.

The case of those claims arising in Nova Scotia would seem to fall under sec. 1099 of the Code which is supplemented by the rules I have already referred to.

The power and procedure are what the Province may have furnished by virtue of its legislative authority under the B.N.A. Act.

The motion on its merits ought, I think, to have been allowed.

The language of the instrument seems to me, with great respect, incapable of any other meaning than what it says.

Hagarty, C.J., is good enough authority for me, and his several judgments on behalf of the Queen's Bench hearing a motion of same nature as that in question herein in the cases of *The Queen* v. *Wheeler* (1865), and *The Queen* v. *Ritchie* (1865), 3 Can. Cr. Cas., note pp. 7, 8, I should abide by.

The high regard I hold for the late Killam, J., should induce me also to give heed to his in the *Queen* v. *Hamilton* (1899), 3 Can. Cr. Cas. 1, but that case he decided is not so clearly in point.

All these cases, however, clearly indicate that the law for relief for an improper forfeiture of recognizance is recognized elsewhere in Canada as well as in Nova Scotia to be the same.

If the converse case had been made to appear and a recognizance taken to ensure the accused answering the higher charge of rape and an indictment found for only indecent assault, the respondent's contention herein might be more arguable, but we need not follow that, I submit, further or pass any opinion thereon.

I may point out, however, that the Criminal Code by sec. 856, seems to authorize any number of counts in an indictment save in the case of murder, and hence the Crown officer retained in such a case as this might be well advised to meet the difficulty which

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

has arisen here by following a count for rape with one for indecent assault.

I would, therefore, allow the appeal with costs.

ANGLIN, J.:—In my opinion this is an "appeal in a criminal case" within clause (*b*) of the proviso to sec. 36 of the Supreme Court Act, which enacts that, "There shall be no appeal in a criminal case except as provided in the Criminal Code."

This Court quite recently determined in *Mitchell* v. *Tracey* (1919), 46 D.L.R. 520, 58 Can. S.C.R. 640, in accordance with the view expressed by three of its members in *Re McNutt* (1912), 10 D.L.R. 834, 47 Can. S.C.R. 259, that the words, "criminal charge," in clause (a) of the same proviso are used in a very wide sense—in contradistinction to the word "civil." I think the words, "criminal case" in clause (b) should receive a similar construction. These words in my opinion were used to signify what is more artfully expressed in sec. 47 of the English Judicature Act of 1877 in the words, "any criminal cause or matter." These latter words have, time and again, been held to extend to all the various proceedings incidental to a criminal prosecution. *Ex parte Alice Woodhall* (1888), 20 Q.B.D. 832; *The Queen* v. *Steele* (1876), 2 Q.B.D. 37; and *Rex* v. *Governor of Brixton Prison*, [1910] 2 K.B. 1056, cited by Mr. Mathers in his excellent argument, are instances. As put by Fletcher Moulton, L.J., at page 1065, in the case last cited, discussing the scope of the words, quoted from the English section:

> If any portion of an application or order involves the consideration of a criminal cause or matter, it arises out of it and in such a case this Court (the English Court of Appeal) is not competent to entertain an appeal.

Lord Esher, in the *Woodhall* case had said, at page 836:

> I think that the clause of sec. 47 in question applies to a decision by way of judicial determination of any question raised in or with regard to proceedings the subject-matter of which is criminal at whatever stage of the proceedings the question arises.

He repeated this language in *Reg.* v. *Young* (1891), 66 L.T. 16. See also *Ex parte Schofield*, [1891] 2 Q.B. 428. The Criminal Code makes no provision for the appeal before us, sec. 1024. It therefore does not lie.

In substance what is sought—what the appellant must obtain in order to succeed—is the setting aside of the order for the estreat or forfeiture of the recognizance given by him for the appearance

CAN.

S. C.

PETROPOLIS v. THE KING.

Anglin, J.

of one Mandacos to answer "such indictment as may be found against him by the grand jury in respect to the charge aforesaid," viz., a charge "that he . . . unlawfully and indecently assaulted one Jennie Young."

The information laid was for rape. The magistrate holding the preliminary investigation thought the evidence would not support that charge and committed the accused for trial "for the lesser charge of indecent asaault" and thereupon took the recognizance of himself and the present appellant for his appearance to stand his trial. The grand jury in due course presented an indictment for rape. Mandacos failed to appear for trial. By an order, dated April 14, 1919, entitled, "In the Supreme Court; March Criminal Sittings, 1919: Between, the King, plaintiff, and Basil Mandacos, defendant," the recognizance was ordered "forfeited and estreated" and directed to be "placed upon the estreat roll." The roll prepared by the clerk of the Court is produced and after setting out the recognizance proceeds:—

and afterwards the said Basil Mandacos did not fulfil the conditions of the said recognizance but failed to surrender himself and take his trial as therein provided and after having been duly called in open Court the said recognizance was, on the 14th day of April, A.D. 1919, at Halifax aforesaid, declared and adjudged by the Court to be forfeited and estreated. Therefore it is considered that Our Sovereign Lord the King, do recover, etc.

These proceedings were all taken under the Criminal Code, and (except possibly the final adjudication on the roll) in the discharge by the Supreme Court of its duties as a Court of criminal jurisdiction.

The contention of the appellant on the merits is that the condition of the recognizance did not require the principal to appear to answer an indictment for rape, but only for indecent assault; and that there was, therefore, no breach justifying estreat.

The forfeiture and estreat of bail always was a function of the Criminal Courts. No other Court has judicial cognizance of the fact of the default on which the estreat is based, which occurs *in facio curiae*. Sec. 1100 of the Criminal Code enacts that the forfeiture and estreat of recognizance is to be made "by the Court before which the principal party thereto was bound to appear."

That Court was, in this instance, the Supreme Court of Nova Scotia at its criminal sittings. In adjudicating the recovery by the Crown of the debt resultant from the forfeiture or estreat and

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

directing the levy of execution therefor it may be that the Supreme Court of Nova Scotia was exercising a civil jurisdiction, *Re Talbot's Bail* (1892), 23 O.R. 65-72; but see *The King* v. *Harvie* (1913), 9 D.L.R. 432, 20 Can. Cr. Cas. 369, that formerly belonged to the Court of Exchequer in England into which it was the duty of the clerk of the Crown, sitting in the Criminal Court, to "estreat" the recognizance duly certified. Archbold's Criminal Pleading and Evidence, 21st ed., 101. The practice followed in the present case under the Criminal Code and the Nova Scotia Crown Rules, appears to be similar to that prescribed by the 22-23 Vict. (1859) (Imp.), ch. 21, sec. 32, whereby the return of recognizance into the Court of Exchequer is done away with and the Clerk of Assize is directed instead to enroll forfeited recognizance, fines, etc., and to send a copy of the roll, accompanied by a writ of execution, in a prescribed form, to the sheriff whose duty it is to levy thereupon.

The appellant's motion in the Nova Scotia Courts was to set aside the order for estreat and forfeiture. Unless he can obtain that relief his appeal cannot succeed. He has no good ground of complaint against the subsequent proceedings assuming the validity and regularity of the estreat itself. That the estreat and forfeiture of the recognizance was a proceeding in a criminal case, taken in a Criminal Court, and governed by criminal procedure, and as such not appealable to this Court I have no doubt.

I would, therefore, quash the appeal.

Mignault, J.

MIGNAULT, J.:—I concur with my brother Anglin.

Duff, J.

DUFF, J., concurred in the result quashing the appeal for want of jurisdiction in the Supreme Court of Canada.

Appeal quashed.

REX v. VICTORIA.

B. C.
C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin and McPhillips, JJ.A. April 6, 1920.

NUISANCES (§ III—55)—COMMON NUISANCE AS DESCRIBED IN SEC. 223 OF CRIM. CODE—NOT A CRIMINAL OFFENCE—PROSECUTION FOR—REFUSAL TO RESERVE CASE UNDER SEC. 1015 CRIM. CODE—APPEAL.

Committing a common nuisance such as is described in sec. 223 of the Criminal Code is not a criminal offence, and although under the section the offender may be prosecuted in the Criminal Courts to conviction, the proceedings thereafter should be for a civil wrong and no appeal lies from a refusal of a trial Judge to reserve a case under sec. 1015 of the Criminal Code.

[*Toronto R. Co.* v. *The King*, 38 D.L.R. 537, [1917] A.C. 630, 29 Can. Cr. Cas. 29, 23 Can. Ry. Cas. 183, distinguished.]

B. C.
C. A.
REX v. VICTORIA.
Macdonald, C.J.A.

MOTION for Crown to appeal from refusal of Clement, J., to reserve a case under sec. 1015 of Criminal Code.

F. A. McDermid, for motion.

H. B. Robertson, contra.

MACDONALD, C.J.A.:—The Corporation of the City of Victoria was indicted for a common nuisance of the character described in sec. 223 of the Cr. Code which reads:—

> Anyone convicted upon any indictment or information for any common nuisance other than those mentioned in the last preceding section, shall not be deemed to have committed a criminal offence but all such proceedings or judgments may be taken and had as heretofore to abate or remedy the mischief done by such public nuisance to the public right.

In *Toronto Ry. Co.* v. *The King*, 38 D.L.R. 537, [1917] A.C. 630, 29 Can. Cr. Cas. 29, 23 Can. Ry. Cas. 183, the Privy Council reviewed the judgment of the Ontario Courts, where it was held that a person guilty of a nuisance alleged to be of the character aforesaid, could be prosecuted in the Criminal Courts to conviction though the proceedings, thereafter, should be as for a civil wrong. Their Lordships rejected this construction of the section and held, as I understand their judgment, that such an offence would be a civil wrong *ab initio*. At page 538 (38 D.L.R.), their Lordships say:—

> The effect of this section is, in their Lordships' opinion, to leave indictment as a method of procedure for trying the general question whether a common nuisance to the detriment of the property, or comfort of the public, or by obstruction of any right other than one affecting life, safety or health, which is common to all His Majesty's subjects, has been committed, but it does deprive a conviction on indictment in these cases of its criminal character. The method of indictment is at times used in English law as a convenient one for trying a civil right; and the section of the Canadian statute appears to give recognition to this use of the method, and to deprive it of any result in criminal consequences.

And again at page 541:

> The wrong done is, therefore, in their Lordships' opinion, only a civil wrong. That indictment should be recognized in a statute as a method of trying a civil right is nothing new.

Their Lordships gave as an example, sec. 1 of the English Evidence Act, 40-41 Vict. 1877, ch. 14.

It does not appear to have been called to their Lordship's attention that sec. 92 of the B.N.A. Act, sub-sec. 14, reserves the exclusive jurisdiction of Provincial Legislatures "the administration of justice in the Province, including the Constitution, Maintenance and Organization of Provincial Courts, both of

B. C.

C. A.

REX v. VICTORIA.

Macdonald, C.J.A.

Civil and of Criminal Jurisdiction, and *including procedure in civil matters in those Courts.*" Procedure in criminal matters is reserved to the Dominion; in civil matters to the Province.

Their Lordships' decision turned entirely upon the question as to whether the wrong complained of in that appeal was or was not a public nuisance. They held that it was not a public nuisance but a private wrong, and, therefore, held that the demurrer ought to have been allowed. Their reference to procedure under an indictment for a civil wrong was therefore *obiter dicta*.

Had their Lordships' attention been directed to said sec. 92, sub-s. 14, and the language quoted had then been used with that section in mind, I should not have found it easy or agreeable to arrive at a conclusion inconsistent with what their Lordships have said, although what they have said was merely *obiter*, but in the circumstances it seems to me to be my duty to decide this case as the law governing it seems to demand. I think, therefore, the learned trial Judge was right in the course which he adopted in quashing the indictment.

Martin, J.A. McPhillips, J.A.

MARTIN and MCPHILLIPS, JJ.A., concurred in dismissing the appeal. *Appeal dismissed.*

N. B.

S. C.

CASEY v. KENNEDY.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. April 23, 1920.

EVIDENCE (§ IV—405)—PUBLIC DOCUMENTS—MEDICAL HISTORY SHEET—ADMISSION OF RULES GOVERNING.

A medical history sheet given by a properly constituted Medical Board under the Military Service Act is a public document and receivable in evidence under the rules governing the admission of such documents.

[Review of authorities as to what are public documents and their admission as evidence.]

Statement.

MOTION by defendant for new trial, in an action for assault, in which plaintiff was given judgment for $1,500 with costs. Motion refused.

J. F. H. Teed, for defendant.

D. Mullin, K.C., and *F. R. Taylor*, K.C., contra.

The judgment of the Court was delivered by.

Hazen, C.J.

HAZEN, C.J.:—This is a motion for a new trial, by the defendant. The action was for assault committed in February, 1917, and was tried before Chandler, J., and a jury, at the St. John

Circuit in December last, when a verdict was found for the plaintiff for $1,500. At the trial the defendant admitted that there had been an assault, so that the only question to be determined by the jury was that of damages. The evidence concerning the extent and nature of the assault was somewhat conflicting, it being contended by the plaintiff that it was of a serious character and resulted in injuries from which he suffered for a long time, while on the part of the defendant it was contended that it was of a trifling character and that no serious injury was caused to the plaintiff by it. The defendant has moved for a new trial on the ground of wrongful admission of evidence.

At the trial, what is known as a medical history sheet was offered and put in evidence, although the trial Judge ruled that, in his opinion, it was inadmissible. It was, nevertheless, allowed in evidence, subject to objection, the plaintiff's counsel stating that he would take the responsibility therefor. This medical history sheet purports to be the result of an examination of the plaintiff made in Halifax on October 30, 1917, about 8 months after the assault occurred. It bears certain signatures which were said by the plaintiff to be those of medical men, and at the foot, under the heading "Examined or discharged by a Medical Board" under the subheading "Disease" appear the words "Recovering from injury to side" and under the sub-heading "Result"—"Category D-3" shewing that in consequence of his physical condition he was not considered fit for active service at the time, and written at the bottom of the sheet are the words "return in three months" which suggest the idea that by that time the defendant might have wholly recovered. It is stated upon the face of the sheet that if the man's name does not appear upon the schedule of men reporting for service or if he has not made application for exemption or reported for service, or although having made one does not know the number, he will be instructed that the copy of this medical history sheet which will be handed to him must be attached by him to a report for service or claim for exemption which he may make on application to any postmaster in Canada or be sent by him after he has noted on it the number of the receipt he obtained from the postmaster, to a registrar or deputy registrar under the Military Service Act, 7-8 Geo. V. 1917 (Dom.) ch. 19. *In any event*, the duplicate medical history sheet

N. B.

S. C.

CASEY v. KENNEDY.

Hazen, C.J.

will be sent by the Medical Board to the District Officer Commanding unless instructions have been given by the latter to forward it direct to a registrar or deputy registrar.

The object of putting this sheet in evidence undoubtedly was to convince the jury that the injury which the plaintiff suffered to his side at the time of the accident continued at the time he was examined by a medical board under the provisions of the Military Service Act, 1917, for while the plaintiff himself swore to the injury to his side, there was little if any evidence to corroborate it. I think it desirable, in order that there may be a clear understanding of what took place at the trial, when this sheet was offered in evidence, to cite from the record, pp. 33 to 37:

Q. Did you come under the Military Service Act? A. Yes. I had been in the army and discharged. Q. Just confine it to this. You did come under the Military Service Act? A. Yes. Q. Were you in uniform? A. Yes. Well not at the time of the Military Service Act went into effect. Q. Were you medically examined under the Military Service Act? A. Yes, the latter part of October, 1917, I came up from Sydney. Q. By a Board where? A. In the Dennis Building, Halifax. Q. Do you remember what time? A. The latter part of October. I can't remember clearly what day it was, October 22 or 23, around there. I know immediately after pay day, we had a pay day on the 20th. Q. Did you ever see that paper before? (Shewn paper). A. Yes. Q. From whom did you get that? A. I got that from the Military Service Tribunal. Q. Where? A. At Halifax.

Offered in evidence.

Objected to.

Q. I propose to offer the medical history sheet.

The Court: It is the medical examination?

Q. Yes, your Honour.

Mr. Baxter: I am objecting on the ground it brings in unsworn testimony before the Court. It is notorious in the working out of the Military Service Act men have gone before the medical boards and made all sorts of statements and all sorts of tricks in connection with the examination. I do not say it occurred in connection with this plaintiff but it was so done as to be notorious. The certificate of a doctor not sworn in evidence. If that were evidence perhaps the claim on an insurance company for compensation, loss of time—it would seem to be little short of monstrous. You cannot cross-examine a document. You cannot find out under what circumstances the examination was made or what replies were given by the person being examined or find what questions were put to him.

Q. You say you were examined under the Military Service Act by a medical board? A. Yes. Q. Comprising how many doctors? A. Four. Q. Were they medical men? A. Yes, they were doctors. Q. Did you know any of them personally? A. No I just knew one man to see him. Q. You were personally acquainted with no one? A. No. Q. And you were examined physically? A. Yes. Q. Did they strip you? A. Yes. Q. And you were subjected to a thorough examination, or were you?

Objected to. Whether thoroughly examined or not or anything that was done before this Board is not relevant.

Mr. Mullin: We have the recognized official acts performed by medical men comprising a board under the Military Service Act. This was a tribunal entirely independent, whose sworn duty it was to pass on the fitness or unfitness of persons eligible by age.

Dr. Baxter: Where do you find they were sworn?

Mr. Mullin: I believe they were sworn, but I am not prepared to cite the section of the Military Service Act at the present moment. It is immaterial whether they were sworn or not. We have a solemn act of theirs. They could not have anticipated this action and I submit their official act in respect to the examination they held as to the physical condition of this young man who was then subject to the Military Service Act is admissible in evidence as to his physical state at that time as found by the medical board as shewn by that certificate. And on that ground I am submitting it as proper evidence.

The Court: I don't think it is evidence. It is not made evidence by law and it is exactly on the same footing as a certificate given by any other doctor. I don't think a certificate signed by a doctor is sufficient—I don't think this is. I don't think it is admissible, all it amounts to in the end is a certificate by some men said to have examined this witness. It is on the same footing as any other certificate from a doctor. No particular authority given to it, as far as I know, by law. I don't think the certificate itself is evidence.

Mr. Mullin: I am not offering it as evidence except on this ground, as shewing what the official act of a medical board under the Military Service Act was with reference to this plaintiff in the month of October, 1917.

Dr. Baxter: You are offering it as evidence of his condition at that time?

Mr. Mullin: As evidence of what it will shew they found. I certainly will take the risk of pressing it in.

The Court: If you do you press it in against my opinion.

Mr. Mullin: I will take the risk if it is admitted.

The Court: I am of opinion that this certificate is inadmissible as evidence and is subsequently offered by counsel for the plaintiff.

Dr. Baxter: Your Honour is admitting it subject to objection.

The Court: Oh yes, subject to objection.

Marked No. 1 and read by Mr. Mullin.

It will be noticed, therefore, that the only ground of objection urged by the defendant's counsel is that it brings in unsworn testimony and that it is impossible to cross-examine a document, or in other words that it is simply hearsay evidence. It seems to me that this ground is entirely untenable for it is a well-known fact that it is an established rule of law that public documents are admitted for a certain purpose. The point which has to be considered is as to what a public document is within that sense, and if this medical history sheet falls within it. No objection is taken on the ground that the Medical Board was not properly constituted, that the persons whose names are affixed were not

N. B.

S. C.

CASEY v. KENNEDY.

Hazen, C.J.

members of the Board, or that the signatures were not proved or that the document in question was not obtained by the plaintiff from the proper custodian. None of these grounds were urged at the trial, and I do not think they can be urged successfully now, for had they been urged at the trial and objection taken to the admission on any of these grounds, it might have been possible for the plaintiff to have met such objections by satisfactory proof. As a matter of fact he asked for the privilege of doing so at the time of this motion, which request the Court thought it unnecessary to comply with. The question of whether a Court of Appeal should allow a point of law not raised on the trial to be raised on appeal goes to discretion. See *Banbury* v. *Bank of Montreal*, 44 D.L.R. 234, [1918] A.C. 626. I think the objection should be confined to the ground taken at the trial.

As is stated in one of the text-books, the cases establishing the reception of public documents and certificates of public officers are neither uniform nor very satisfactory. The question as to what public documents may be admitted in evidence, as exceptions to the hearsay rule, have been much discussed by the text-book writers, and they have analyzed and considered in some cases most elaborately the different cases bearing upon the subject. We are told in 13 Hals., page 475, par. 652, that:—

> Surveys, assessments, inquisitions, and reports are evidence of the truth of the matters stated, even against strangers, if made under public authority and concerning matters of public interest. To render such documents admissible there must have been a judicial, or *quasi*-judicial, duty to inquire, undertaken by a public officer, and the matter must have been required to be ascertained for a public purpose.

It seems to me that these elements are present in connection with the medical history sheet. There was certainly a judicial or *quasi*-judicial duty on the part of those constituting the tribunal to inquire into the state of health of the plaintiff. It was undertaken by public officers, and the matter was required to be ascertained for an important public purpose, viz: the ability of the plaintiff to serve his country as a soldier.

It should be noted, however, that it is laid down in some cases and by some of the text-books that the opportunity of inspection by the public at large has by some Judges been advanced as one of the essential reasons on which the exception is based. If it is an essential reason and not merely an incidental and usual

advantage then it follows that documents not so open to general inspection are inadmissible even though made under an official duty. But Wigmore on Evidence (Can. ed.) vol. 3., sec. 1634, while citing in support of this contention Lord Blackburn in *Sturla* v. *Freccia* (1880), 5 App.Cas. 623, says "but this may perhaps be regarded as in fact a modern innovation in that country (England)." Before the opinion of Lord Blackburn in that case it does not seem to have been laid down distinctly as essential, and in the opinion of Wigmore the limitation does not seem to be a desirable one.

But (he adds, should it be accepted however the class of official documents excluded by it will after all be a narrow one, viz., those which are strictly confidential, for example, reports by inspectors, tax officers and the like. These would perhaps usually be privileged from disclosure in any case, so that perhaps the question is not likely often to arise. It can hardly be supposed that the scope of this limitation as expounded by Lord Blackburn was intended to include other than confidential documents, *i.e.*, to include that vast class of official records including certified copies which are customarily not compiled for reference by the general public nor placed where the public has constant opportunity to inspect.

In the case, *Sturla* v. *Freccia*, 5 App. Cas., at page 643, Lord Blackburn says:—

Now, my Lords, taking that decision (*Rex* v. *Debenham*, 2 B. & Ald. 185), the principle upon which it goes is, that it should be a public inquiry, a public document, and made by a public officer. I do not think that "public" there is to be taken in the sense of meaning the whole world. I think an entry in the books of a manor is public in the sense that it concerns all the people interested in the manor. And an entry probably in a corporation book concerning a corporate matter, or something in which all the corporation is concerned, would be "public" within that sense. But it must be a public document and it must be made by a public officer. I understand a public document there to mean a document that is made for the purpose of the public making use of it and being able to refer to it. It is meant to be where there is a judicial, or *quasi*-judicial, duty to inquire, as might be said to be the case with the bishop acting under the writs issued by the Crown. That may be said to be *quasi*-judicial. He is acting for the public when that is done, but I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards.

It seems to me that his medical history sheet falls within this description. It declares on the very face of the document that in any event the duplicate medical history sheet will be sent by the Medical Board to the District Officer Commanding unless he is given instructions to forward it direct to a registrar or deputy registrar. The document is, therefore, placed on record with

N. B.
S. C.
CASEY
v.
KENNEDY.
Hazen, C.J.

one who, I think, can properly be called a public official, viz: the the District Officer Commanding or the registrar or deputy registrar for the district. That is done, I think, for the purpose of its being kept public, so that access may be had to it afterwards by persons who are concerned.

I have come to the conclusion that this medical history sheet complies with all the conditions that are necessary in order that it should be admitted in evidence as an exception to the rule under which statements made by persons not called as witnesses are inadmissible to prove the truth of the facts stated. Had other objections been taken to its admission at the trial and had counsel for the plaintiff been unable to furnish proof to meet such objections, I might have been compelled to take a different view, but as it is, in my opinion, I think the objection is limited to the grounds taken at the trial, and that he cannot succeed on the ground that the evidence was improperly admitted.

But there was another reason apart from this. The assault as I have stated before was admitted. The question resolves itself into one of damages. The verdict was for $1,500 and the evidence shews that the plaintiff sustained actual financial damage to the amount of $733.20, made up as follows: Money payments, $308.20, loss of earnings for 4½ months $425, so it will be seen that for damages for the pain and suffering which he incurred and expenses to which he was put in the bringing of his suit, etc., and on all other grounds he was allowed by the jury the sum of $766.80. The jury was informed by the trial Judge that if they concluded that the assault was really a serious one, that the defendant really attacked the plaintiff in the way which had been detailed in evidence, and that the illness from which the young man suffered and the injuries from which he suffered for some time were the natural and reasonable results of violence on the part of the defendant, it would be their duty to consider carefully the amount of damages which they should give. He further told them that they could not be said to take a reasonable view of the case until they considered and took into account all heads of damages in respect to the way the plaintiff sustaining personal injuries was entitled to compensation. He pointed out that these were bodily injuries sustained, pain undergone, the effect on the health, suffering according to its degree and its probable duration as likely to be

temporary or permanent, expenses incidental to attempts to effect a cure or to lessen the amount of the injury, pecuniary loss sustained through inability to attend to profession or business, as to whether the injuries may be of a temporary character or may be such as to incapacitate the party for the remainder of his life, and having reference to the particular case to which he was referring he stated that it was further laid down that the jury having taken all these elements of damages into consideration and having awarded what they deemed to be fair and reasonable compensation under all the circumstances of the case, a Court would not unless in very exceptional circumstances disturb their verdict, because the question of damages is essentially for the consideration of the jury alone. He further told them that they were not confined to mere compensation in money, for what damages they might think done to the plaintiff, but that they could, within reasonable limits, give such damages to the plaintiff as they considered fair and reasonable, by way of punishment to the aggressor. He said: "It all depends of course upon your view as to the character of the assault committed by the defendant . . . and so far as I understand it in this case no attempt has been made to justify an assault, but the whole contention is as to the character and extent of the assault, and what degree of violence was applied by the defendant to the person of the plaintiff."

In other words, the Judge practically told the jury that they were entitled, if they believed the evidence of the plaintiff, to find exemplary damages. I think it is evident that the jury did so find. If they believed the story in regard to the assault, the damages, it seems to me, are not too large. It appears by the evidence that the plaintiff was a delicate man who had been suffering from heart trouble, a fact which was known to the defendant, while the defendant was a large man of powerful build, and the assault was of such a character that it caused the plaintiff to remain unconscious for a considerable length of time and to suffer from the effects of it for some time afterwards. The verdict is not of such an amount as to shock the judicial mind, and even if the evidence of the medical history sheet was wrongfully admitted I think there was ample evidence apart from it to justify the jury in finding the amount it did as damages, and, therefore, I do not think that it can be reasonably contended that any substan-

N. B.

S. C.

CASEY v. KENNEDY.

Hazen, C.J.

tial wrong or miscarriage of justice was occasioned to the defendant by its admission.

Courts as a rule are reluctant to order new trials where questions of damages only have to be tried, and the cases are many in which they have ordered a new trial unless the plaintiff was willing to accept an amount of damages less than that awarded by the jury. In this case, however, as the amount awarded is not large enough to shock the judicial mind, in my opinion, there is no reason for taking such action, and I think that on both grounds the motion should be dismissed with costs.

Motion dismissed.

ONT.

S. C.

METALS RECOVERY Co. v. MOLYBDENUM PRODUCTS Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Ferguson, JJ.A. December 19, 1919.

PARTIES (§ II B—119)—ACTION—MECHANICS AND WAGE EARNERS LIEN ACT—PARTY TO THE ACTION.

In an action under the Mechanics and Wage Earners Lien Act, the appellant company was held not to be a party to the action until it had been served with notice of trial and as the time for filing the lien had then expired the action as against it was at an end.

Statement.

APPEAL by the American Molybdenites Limited from the judgment of the Assistant Master in Ordinary in an action to enforce a mechanic's lien, in so far as the judgment purported to affect the rights of the appellant company, which was served with notice of trial, but not until after the time for bringing an action for the enforcement of the lien had expired. The title to lots upon which the plaintiff company sought to establish a lien was in the appellant company.

J. J. Gray, for the appellant company.

Gordon Waldron, for the plaintiff company, respondent.

J. Cowan, for nine lien-holders, respondents.

The judgment of the Court was read by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by American Molybdenites Limited from the judgment of the Assistant Master in Ordinary, dated the 2nd July, 1919. The action was brought under the Mechanics and Wage-Earners Lien Act for the establishment and enforcement of a lien on two lots in the township of Monmouth, the title to which is in the appellant, and the defendant company

holds an agreement for purchase of them at a large price, most of which is as yet unpaid. The work of the respondent company was done for the defendant company, and it is claimed that the selling value of the lands was increased by it and that the respondent is entitled to a lien in priority to the appellant for the amount of that increased value. The only defendant to the action as begun was the defendant company. The appellant was served with notice of the trial, but not until after the time for bringing an action for the enforcement of the lien had elapsed; the appellant did not appear and was not represented at the trial.

By the judgment of the Assistant Master in Ordinary it is declared that the respondent company and certain other lien-holders are entitled to a lien on one of the lots for the respective amounts mentioned in schedule 1 of the judgment. It is also declared that the selling value of this lot has been increased by the value of the work or services performed upon and of the material furnished or placed on or adjacent to it by the lien-holders. There is attached to the judgment a schedule (No. 3) giving the names of persons entitled to incumbrances other than mechanics' liens, one of whom is the appellant company, and the judgment provides that, in default of payment of the amount of the liens, the lot is to be sold and the purchase-money applied in payment of the claims mentioned in schedules 1 and 3—that is, the lien-holders and the incumbrancers other than lien-holders—as the Master shall direct. By what is manifestly an error, the judgment provides that, upon payment into Court of the amount of the lien-holders' claims, the persons named in the *third* schedule are to release and discharge their claims and assign and convey the premises to the defendant company. What was no doubt intended was that the persons named in the *first* schedule should do this.

I am of opinion that the appellant, if it ever became a party to the action, became a party only when the notice of trial was served upon it, and that the lien as against it, if it ever existed, was then at an end.

It was held in *Juson* v. *Gardiner* (1864), 11 Gr. 23, following *Byron* v. *Cooper* (1844), 11 Cl. & F. 556, that the action was not pending as against a party added by amendment, prior to the

ONT.

S. C.

METAL RECOVERY CO. v. MOLYBDENUM PRODUCTS CO.

Meredith, C.J.O.

date of the order making him a party. The plaintiff was a judgment creditor, whose judgment was registered prior to the conveyance under which the added defendant (Meloche) claimed. The law as to the registration of judgments was repealed, but provision was made in the repealing Act that the repeal should not affect any action pending on the 18th May, 1861, for the enforcement against the lands bound by it of the judgment. The order adding Meloche was made on the 10th June, 1864, and what was held was that the lien of the judgment creditor had then as to Meloche ceased to exist, the action not having been pending as against him on the 18th May, 1861, although it was begun in March, 1861.

In *Byron* v. *Cooper* it was held, that for the purposes of the application of a statute of limitations a suit as against an added party was begun when he was added as a party.

Larkin v. *Larkin*, (1900), 32 O.R. 80, is on all fours with the case at bar and is decisive against the respondents. That case was, we think, rightly decided, and the result is that the appeal must be allowed, and the judgment, in so far as it purports to affect the rights of the appellant, must be reversed. The reversal of the judgment and the allowance of the appeal should be without costs: had the appellant availed itself of the opportunity it had of attending the trial and taking the objection to the proceedings upon which it has succeeded, I do not doubt that the Assistant Master in Ordinary, as it would have been his duty to do, would have followed *Larkin* v. *Larkin* and given effect to the objection.

The order we make will of course not affect the liability of the appellant under the terms of the order of the Second Divisional Court extending the time for appealing, but they must be complied with.

Appeal allowed.

SASK.

C. A.

BOGAERT v. KEENEY.

Saskatchewan Court of Appeal, Haultain, C.J.S., and Lamont, J.A., and Bigelow, J. May 3, 1920.

AUTOMOBILES (§ III A—155)—COLLISION—CAR PASSING ANOTHER—FREE PASSAGE—MEANING OF—SASK. STATS. 1917, 2ND SESS., CH. 42, SEC. 38—INTERPRETATION.

Free passage within the meaning of Sask. Stats. 1917, 2nd sess., ch. 42, sec. 38, which requires "the person overtaken shall as soon as possible turn to the right so as to allow free passage to the left" means not merely sufficient space but sufficient space on a roadbed reasonably suitable to

motor traffic, and where such free passage already exists, the statute imposes no duty on the person overtaken to turn to the right.

[See Review of Canadian and English decisions on the law of Motor Vehicles, 39 D.L.R. 4.]

APPEAL by defendant from the trial judgment (1919), 50 D.L.R. 795, awarding damages for injuries received as the result of an automobile collision. Affirmed.

J. N. Fish, K.C., for appellant.

A. G. MacKinnon, for respondents.

LAMONT, J.A.:—This is an appeal from a judgment (1919), 50 D.L.R. 795, awarding the female plaintiff damages for personal injuries received as the result of an automobile collision, and the male plaintiff damages for expenses incurred in connection with the care of his wife while suffering from her injuries, and repairs to his automobile. Lamont, J. A.

In the evening of July 5, 1919, the plaintiffs were going south from Davidson in their automobile. The defendant, who was also in an automobile going in the same direction, overtook the plaintiffs and turned out to the left to pass them, and did pass them. In passing, the hub of the defendant's hind wheel caught the hub of the plaintiffs' front wheel, with the result that the plaintiffs' front wheels were turned to the right and the car ran into the ditch and was damaged, and the female plaintiff was injured.

Macdonald, J., the trial Judge found that the accident was due to the negligence of the defendant in turning to the right too soon while passing the plaintiffs' car, and that after the negligence on the part of the defendant arose the plaintiffs could do nothing to avoid the accident. He also found that the plaintiffs' car was not entirely to the right of the centre of the highway at the time, but that there was ample room to the left of the plaintiffs' car to allow free passage to the defendant's car. There was evidence to support these findings.

The only contention made before us requiring consideration is that based on sec. 38, sub-sec. 1, of the Vehicles Act, 8 Geo. V. 1917, (Sask., 2nd sess.) ch. 42. That sub-section so far as material is as follows:—

38.—(1) Every person driving a motor car or other vehicle or riding or driving an animal upon the highway, shall upon meeting another person so using such highway, seasonably turn to the right of the centre of the highway so as to pass without interference; and, upon overtaking any other person so

SASK.

C. A.

BOGAERT v. KEENE.

Lamont, J. A.

using the highway, shall so pass to the left, and the person overtaken shall as soon as practicable turn to the right so as to allow free passage on the left. . . .

The argument was that this sub-section required the plaintiffs to turn to the right when they were overtaken by the defendant, and this they admitted they did not do, but kept on driving their car with the left wheels a little to the left of the centre of the graded portion of the road; that their failure to turn to the right constituted statutory negligence, and that the accident must therefore be attributed to the joint negligence of both parties.

We have, therefore, to consider if the failure of the plaintiffs to turn to the right constituted negligence on their part under the circumstances of this case. The statutory requirement is, "the person overtaken shall, as soon as possible, turn to the right so as to allow free passage on the left." The object of imposing this duty on the person overtaken is clear. It is to allow the driver coming behind free passage in which to get by. "Free passage" here, as applied to automobiles, means, I take it, not merely sufficient space, but sufficient space on a road-bed reasonably suitable for motor traffic viewed in the light of the character of the road on which the parties are travelling. Sufficient space on the left in which to pass but with an impassable road-bed would not, in my opinion, be "free passage." Here, however, the evidence shows that to the left of the track on which the plaintiffs were driving the defendant had both ample space in which to pass and a sufficiently good road-bed. He had, therefore, "free passage," without any turning to the right on the part of the plaintiffs. Where free passage already exists, the statute, in my opinion, imposes no duty on the person overtaken to turn to the right.

I would, therefore, dismiss the appeal with costs.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—I agree that the appeal should be dismissed.

Bigelow, J.

BIGELOW, J.:—I am satisfied that the accident was caused by the defendant turning in too soon before he had completely passed the plaintiff, and that it was the hub of the defendant's car which struck the hub of plaintiffs' car.

The defendant relies on the Vehicles Act, 1917, 8 Geo. V. (Sask., 2nd sess.), ch. 42, sec. 38, and in particular the words:—"And the person overtaken shall as soon as practicable turn to the right so as to allow free passage on the left."

SASK.

C. A.

BOGAERT v. KEENEY.

Bigelow, J.

From the evidence I would have found that the plaintiffs' car was as far to the right on the road as was reasonably possible, but even accepting the defendant's measurements made some months afterwards, plaintiffs' left wheel could not have been more than one foot to the left of the centre of the highway, and there was still 16½ feet on the highway to the left of the plaintiffs' car on which defendant's car could pass. The road might not have been quite so good as the beaten track on which the plaintiffs were travelling, but it was quite passable, and, in my opinion, the plaintiffs complied with the Vehicles Act when they left sufficient room to allow free passage on the left.

The decision in *B.C. Electric R. Co.* v. *Loach*, 23 D.L.R. 4, [1916] 1 A.C. 719, 20 Can. Ry. Cas. 309, pressed by counsel for the appellant, does not apply to this case as to my mind there was no negligence on the part of the plaintiffs. I am convinced that there was nothing plaintiffs could have done to avoid the accident after the time they knew that the accident was going to happen.

I would dismiss the appeal. *Appeal dismissed.*

MORAN v. MORAN.

ALTA.

S. C.

Alberta Supreme Court, Simmons, J. February 13, 1920.

DIVORCE AND SEPARATION (§ IV—41)—DESERTION—RETURN—AGREEMENT —FAILURE TO KEEP—CONDONATION.

An agreement by which a wife whose husband has deserted her, but who subsequently is brought back to her house ill, allows him to remain for three months and if he conducted himself in a proper manner to resume marital relations is not a condonation of the husband's prior misconduct, and if he fails to carry out his part of the bargain, and she is compelled to put him out of the house, the desertion relates back to the first time of leaving.

[See Annotation on the Existence of Judicial Divorce in Manitoba, Saskatchewan and Alberta as determined in *Walker* v. *Walker* by the Privy Council (1919), 48 D.L.R. 1 and 7.]

ACTION by wife for dissolution of her marriage on the grounds of adultery, cruelty and desertion. Statement.

F. M. Brady, for plaintiff.

No one for defendant.

SIMMONS, J.:—The plaintiff, Beatrice Margaret Moran, claims dissolution of marriage with her husband on the usual grounds of adultery, cruelty and desertion. They were married on August 14, 1912, at Calgary, and lived together as man and wife until Simmons, J.

ALTA.
S. C.
MORAN
v.
MORAN.
Simmons, J.

October, 1917, during which time two children were born, one of which is still surviving. The defendant apparently was a man who was capable of earning a good livelihood, as he was a motorman on the street railway for 4½ years.

In October, 1917, he left his wife and children and has not contributed to their support since that time. During the period in which he lived with his wife he was frequently drunk and abused his wife and failed to provide the necessities for the family home. In December, 1918, the defendant became ill of the influenza and was brought to the plaintiff's house and the plaintiff was requested to take him in and care for him during his illness. She was then keeping a boarding house in the City of Calgary and her husband had no money. She took him in and cared for him but when he recovered he began drinking and became abusive. Discussions took place between the husband and wife as to the resumption of marital relations and apparently he was anxious that these should take place but the plaintiff would not consent to do so at once. She told him that he could remain with her and if he conducted himself in a proper manner for 3 months she would consent to resume marital relations. This was during the month of January, 1919. The defendant failed to carry out his part of the undertaking and became drunk and violent in her house and attempted to poison her and was convicted of this charge before the Magistrate on February 25, 1919. The plaintiff then refused to allow the defendant to come to her place of residence, but gave him some money with which to go away. There is evidence that he has been living in adultery with a prostitute in Vancouver since he went away, but the evidence is to the effect that he has not acquired a domicile there but intends to return to the Province of Alberta in the spring.

The action is undefended but I reserved judgment at the trial in order to consider whether the acts of the plaintiff in the latter part of 1918 and January, 1919, amounted to condonation of the husband's prior misconduct. It is quite clear, the plaintiff admits in January, 1919, that she took her husband on probation upon the terms that she would resume marital relations with him in 3 months if, during that time, he conducted himself properly. If this amounted to condonation in law the plaintiff's action could not succeed for two reasons; the first one is that he did not desert

her in February, 1919, but was compelled to leave her by her action and in the second place two years have not elapsed in any case even if it were suggested that the circumstances compelled her to make him leave her house.

The law as to condonation is very clearly explained and illustrated in *Keats* v. *Keats and Montezuma* (1859), 28 L.J. (P. & M.) 57, 1 Sev. & Tr. 334. This was shortly after the passing of the Matrimonial Causes Act in 1857, 20-21 Vict. (Imp.) ch. 85, and was the first considered opinion given by the English Courts under the new Act. Condonation is there defined as "a blotting out of the offence so as to restore the offending party to the same position which he or she held before the offence was committed." Some doubt is expressed by the Lord Chancellor as to whether an oral arrangement to condone which is not followed by a resumption of the complete marital relations would amount to condonation, but even if the more favourable proposition that condonation may be made by words alone is accepted, it would be necessary that there should be complete forgiveness and that evidence of an intention or an inclination to resume marital relations and to forgive past misdeeds would not amount to condonation.

In my opinion, the present case comes within the reservations enunciated by the Lord Chancellor in the above case. The circumstances were rather peculiar. The plaintiff did not seek an interview with her husband nor did she express any desire to meet him, but he was brought to her house under circumstances which would render it very unnatural for her to refuse his admittance even if he had been a stranger. She had her child and others living in the house, and has satisfied me that she did not resume co-habitation, although her husband was apparently ready and willing that she should do so. She held him off and insisted that he should re-habilitate his conduct and character before she would consent to a complete reconciliation and the resumption of marital relations. In my view, this did not amount to condonation in law, and the husband's desertion will then relate back to October, 1917. The action was not brought until November, 1919, which was more than 2 years after the desertion and the adultery of the husband has been fully established and is not disputed, and the plaintiff is, therefore, entitled to the relief she asks for. There

ALTA.
S. C.
MORAN v. MORAN.

will, therefore, be an order for the dissolution of the marriage with leave to apply to make the same absolute in 3 months and costs of the action under column 4 of the scale of costs. Plaintiff to have custody of the surviving child.

Judgment accordingly.

N. S.
S. C.

McGRATH v. SCRIVEN.

Nova Scotia Supreme Court, Harris, C.J., Longley and Ritchie, JJ.
May 5, 1920.

1. INTOXICATING LIQUORS (§ III H—90)—DESTRUCTION OF LIQUOR ORDERED BY MAGISTRATE—CONVICTION SUBSEQUENTLY QUASHED ON CERTIORARI—ACTION AGAINST MAGISTRATE FOR DAMAGES—R.S.N.S. 1900, CH. 10, SEC. 6.
Section 6 of ch. 10, R.S.N.S. 1900 is a complete answer to an action brought against a stipendiary magistrate for damages for destruction of liquor, the action having been brought before the order for the destruction of such liquor had been quashed on *certiorari*.
2. OFFICERS (§ II C—88)—WARRANT—ISSUED BY COMPETENT AUTHORITY—VALID ON FACE—LIABILITY FOR EXECUTING.
If a warrant is valid on its face and has been issued by competent authority it is absolute justification to the ministerial officer who executes it, although it may be in fact bad, for failure to comply with legal requirements.

Statement.

APPEAL from the judgment of Drysdale, J., in favour of plaintiff in an action claiming damages for the seizure of a quantity of liquor, the property of the plaintiff, on the premises of the Canadian Government Railways at Bedford in the county of Halifax. The liquor in question was seized for violation of the N. S. Temperance Act and was destroyed by order of one of the stipendiary magistrates of the county, who was joined as a defendant with the constable by whom the seizure was made.

S. Jenks, K.C., for appellant.

J. J. Power, K.C., for respondent.

Harris, C.J.

HARRIS, C.J.:—On April 23, 1918, the defendant, Rainard Scriven, a constable, laid an information before the defendant, Richard A. McLeod, Stipendiary Magistrate in and for the municipality of the County of Halifax, alleging that reasonably believing that liquor intended for sale in violation of the N.S. Temperance Act, 1 Geo. V. 1911, ch. 33, and Acts in amendment thereto, was contained in the premises occupied by the Canadian Government Railway at Bedford in the County of Halifax in the said municipality of Halifax (the said liquor being in course of delivery and the said Canadian Government Railway being a common carrier) did on March 29, A.D. 1918, enter such premises and seized and removed from the said premises 3 barrels and 2 boxes, containing intoxicating liquor addressed and consigned to John McGrath at

Bedford, N.S., and the said cases and barrels containing the said liquor are now in the custody of the said Rainard H. Scriven who says he believes that the said liquor was intended for sale in violation of the said N.S. Temperance Act.

Thereupon, a summons was issued by the defendant McLeod as such stipendiary magistrate to the plaintiff "to shew cause why such liquor should not be destroyed or otherwise dealt with as provided by the N. S. Temperance Act and Acts in amendment thereto."

After hearing evidence on both sides, the stipendiary, on May 1, 1918, found that the liquor was intended for sale or to be kept for sale in contravention of the Act and ordered that it and any vessels containing the same should be forfeited to His Majesty and destroyed. The liquor was destroyed under this order on May 1, 1918.

The proceedings were removed to the Supreme Court by *certiorari* and the order for destruction was quashed on May 9, 1919, by a Court of five—two Judges dissenting—the majority holding that the liquor could not be taken out of the possession of the Canadian Government Railways.

On July 31, 1918, before the order for the forfeiture and destruction had been quashed, the plaintiff issued a writ against the defendant claiming damages for the seizure and destruction of the liquor. The statement of claim was not delivered until September 22, 1919, and it sets out the order of the Supreme Court quashing the conviction.

The case was tried by Drysdale, J., with a jury and the trial Judge put three questions to the jury which, with their answers, are as follows:—

1. What premises was the liquor upon when seized? A. The Dominion Express Co. 2. Did Scriven reasonably believe that the liquor seized was kept for sale or to be sold in contravention of the Temperance Act? A. Yes. 3. What damages did the plaintiff suffer by reason of the seizure and destruction of the liquor in question? A. $375.

On the trial, the defendant Scriven had testified and his evidence with regard to the place where the liquor was seized is thus reported:—

Q. On March 29, 1918, you seized some liquor at Bedford? A. Yes. Q. Will you tell us the circumstances in respect to that seizure? A. I think there were two or three barrels and two boxes containing liquor in the express company's office. I seized it and I paid the duty or express charges on it; I paid them to McKenzie, the agent of the Canadian or Dominion Express

N. S.

S. C.

McGRATH v. SCRIVEN.

Harris, C.J.

Co., I am not sure which it is. Q. It is the Dominion Express Co.; you say you paid the charges on it? A. Yes. Q. Did you sign a receipt for it in the express company and take delivery from the express company? A. Yes. Q. This was on the premises occupied by the express company at Bedford? A. Yes.

And on cross-examination:—

Q. Did you not get the goods from the station master? A. Mr. McKenzie is station master; he is also agent for the express company; he occupies both positions. Q. And the premises you got them on were also Canadian Government Railway premises? A. Yes.

On the findings of the jury the trial Judge gave the following decision:—

I have concluded that under the findings herein the plaintiff is entitled to recover as against both the defendants if the amending Act of limitation is to be considered procedure and retroactive. The action is within time having regard to the time of destruction of the goods which is the real cause of plaintiff's action. There can be no justification under a destruction order which was granted in this Court May 9, 1919, and I am of opinion that the Acts cited do not protect either of these defendants. Plaintiff's damages were assessed at $375 and, in my view, he is entitled to an order for judgment for this amount with costs.

The defendants appealed to this Court against the whole of the decision and order made thereon and the plaintiff moved to set aside the first and second findings of the jury and to increase the damages.

The first question which arises is as to whether the judgment against the defendant McLeod can be supported.

Sec. 6 of R.S.N.S. 1900, ch. 40, provides:—

No action as mentioned in this chapter shall be brought for anything done under a conviction or order until such conviction or order is quashed; nor shall any such action be brought for anything done under any warrant issued by such justice to procure the appearance of a party and which has been followed by a conviction or order in the same matter, until such conviction or order is quashed.

As will be seen by the dates already referred to this action was brought before the order for destruction was quashed and I cannot understand why the statute is not a complete answer as far as the stipendiary magistrate is concerned.

It was strenuously urged that we should interpret the word "brought" in sec. 6 in the sense of "maintained" but I can see no reason why it should be so read.

As was said by the Court in *Goldenberg* v. *Murphy* (1882), 108 U.S. Rep. 162 at 163: "A suit is brought when in law it is commenced."

In *Hames* v. *Judd* (1890), 18 Civ. Pro. Rep. (N.Y.) 324, at 325, the Court said: "The phrase 'to bring an action' has a settled customary legal as well as general meaning and refers to the initiation of legal proceedings in the suit."

The action was brought in this case when the writ was issued and as the order for destruction had not then been quashed the statute is a bar and the judgment as against the stipendiary magistrate must, therefore, be set aside.

There were other grounds urged by counsel against this part of the judgment but if I am right as to the meaning of the statute it is unnecessary to consider them.

The other question is as to the liability of the constable.

It was argued that the provisions of ch. 40 of R.S.N.S., 1900, applied to the defendant Scriven and protected him also. I think it is clear that this statute does not extend to constables. But ch. 42 of R.S.N.S., 1900, applies, and if the demand of the perusal and copy of the warrant had been complied with it apparently would have afforded a complete defence to the action. For some reason which does not appear, the demand was not complied with and this statute does not help the defendant. It was passed for the protection of constables and does not impose any liability on them to which they were not subject at common law. The question therefore has to be considered quite apart from the provisions of this Act.

The plaintiff's claim is based:—1. On the initial seizure of the liquor on March 29, 1918; and 2. On the destruction of the liquor on May 1.

In considering the first of these questions it is to be remembered that the action was brought on July 31, 1918.

The liquor was seized under the provisions of sec. 36 of 1 Geo. V. 1911 (N.S.), ch. 33, which is the same as sec. 59, 8-9 Geo. V. 1918, ch. 8, and the Act of 1918, which was an Act to amend and consolidate the N.S. Temperance Act, was passed on April 26, 1918.

By sec. 70 of ch. 8 of the Acts of 1918 it is provided as follows:—

70. (1) No action, suit or proceeding shall be commenced nor shall any writ be issued against, nor a copy of any process served upon any inspector, or other person employed or engaged in carrying into effect any of the provisions of this Act, or in enforcing any process issued in pursuance thereof,

N. S.

S. C.

MCGRATH v. SCRIVEN.

Harris, C.J.

until one month after notice in writing has been delivered to him, or left at his usual place of abode, by the solicitor or agent of the party who intends to sue out such writ or process.

(2) The cause of action, the name and place of abode of the person who is to bring such action, the name and place of abode of the solicitor or agent and of the place where such action is intended to be tried, shall be clearly and explicitly set out in such notice, and no evidence of any cause of action shall be adduced, nor shall any conviction or judgment be given for the plaintiff unless he proves on trial that such notice was given, and in default of such proof the defendant shall recover a verdict or judgment with costs.

(3) Every action, suit or proceeding against such inspector or person as aforesaid must be brought within three months after the cause of action arose, and must be laid and tried in the county where the acts complained of were committed.

In sec. 5 of R.S.N.S. 1900, ch. 42, it is provided that: "No action shall be brought against a constable unless the same is commenced within six months next after the cause of action has accrued."

It will be seen that on March 29, 1918, when the liquor was seized the general statute then in force for the protection of constables limited the action to 6 months, but by the Acts of 1918, passed 28 days later, sec. 70, par. 3, the time within which an action could be brought against a constable engaged or employed in carrying into effect any of the provisions of the N.S. Temperance Act was limited to 3 months after the cause of action arose.

The question is whether the limitation is 3 or 6 months.

In the case of *The King* v. *Chandra Dharma*, [1905] 2 K.B. 335, the facts were that when the offence was committed, there was a statute limiting the prosecution to 3 months and by a subsequent statute the time was extended to 6 months. It was held that the subsequent statute related to procedure only and was therefore retrospective and the conviction which followed from a prosecution instituted after 3 months but within 6 months was upheld. Lord Alverstone, C.J., said, at page 338:—

The rule is clearly established that, apart from any special circumstances appearing on the face of the statute in question, statutes which make alterations in procedure are retrospective. It has been held that a statute shortening the time within which proceedings can be taken is retrospective (*The Ydun*, [1899] P. 236, 8 Asp. M.C. 551), and it seems to me that it is impossible to give any good reason why a statute extending the time within which proceedings may be taken should not also be held to be retrospective. If the case could have been brought within the principle that unless the language is clear a statute ought not to be construed so as to create new disabilities or obligations, or impose new duties in respect of transactions which were complete at the time when the Act came into force, Mr. Compton-Smith would

have been entitled to succeed; but when no new disability or obligation has been created by the statute, but it only alters the time within which proceedings may be taken, it may be held to apply to offences completed before the statute was passed. That is the case here. This statute does not alter the character of the offence, or take away any defence which was formerly open to the prisoner. It is a mere matter of procedure, and according to all the authorities, it is, therefore, retrospective. The convictions in all these cases must be affirmed.

Lawrence, J., Kennedy, J., Channel, J., and Phillimore, J., agreed.

I think the Act of 1918 and the limitation is 3 months and that the claim of the plaintiff, so far as it is based on the initial seizure of the liquor, is barred by this statute.

There still remains for consideration the claim of the plaintiff based on the destruction of the liquor.

The order of the stipendiary magistrate for the destruction of the liquor is as follows:—

Municipality of the County of Halifax.

Order for destruction in the Stipendiary Magistrate's Court.

Whereas three barrels and two boxes containing fifty gallons of overproof rum, hereinafter referred to as "said liquor" consigned to one John McGrath, at Bedford, in the municipality of the county of Halifax, were duly seized by Rainard H. Scriven, provincial constable, and county constable, for the county of Halifax, under the N.S. Temperance Act and Acts in amendment thereto, and the said liquor was removed by the said Rainard H. Scriven, under the provisions of the said Act and Acts in amendment thereto.

And whereas information was given under oath before me under the provisions of the said Act by the said Rainard H. Scriven as such constable and a summons was directed to the owner of the said liquor, the said John McGrath, at Millview, in the county of Halifax, calling him to appear before me on Wednesday, May 1, 1918, at 4 o'clock in the afternoon, at my office in the County Court House at Halifax in the county of Halifax, to shew cause why said liquor should not be destroyed or otherwise dealt with as provided by the N.S. Temperance Act and Acts in amendment thereto.

And whereas the said John McGrath duly appeared before me personally and by counsel at the time and place aforesaid claiming the said liquor.

And whereas after receiving evidence of the said constable and the evidence of the said John McGrath and the evidence of witness produced on behalf of the said constable and the said John McGrath in the same manner as upon a complaint or information made under the N.S. Temperance Act and Acts in amendment thereto.

And whereas after hearing the said evidence, I disallow such claim and find that it was intended that such liquor was to be sold or kept for sale in contravention of the N.S. Temperance Act and Acts in amendment thereto, I do order that said liquor and any vessels containing the same shall be forfeited to His Majesty and destroyed.

Dated at Halifax, in the county of Halifax, this 1st day of May, 1918.

(Sgd.) Richard A. McLeod.
(L.S.)

Stipendiary Magistrate in and for the municipality of the county of Halifax.

N. S.

S. C.

McGRATH v. SCRIVEN.

Harris, C.J.

In Clark and Lindsell's Law of Torts, Can. ed., at 747, the law regarding the liability of an officer acting under the order of an inferior Court is thus stated:—

He is bound to scan the terms of the order, and if it appears on the face of it to be such as the Court could not legally make, he is not justified in putting it in force, since he is supposed to know the law, and, therefore, to be aware that the document is a mere nullity. If the order be good upon the face of it, he is fully protected in its due execution, even though he may be aware that under the circumstances of the case it was illegally issued.

And Sedgewick, J., in *Sleeth* v. *Hurlburt* (1896), 25 Can. S.C.R. 620, at 628, said:—

If a mere ministerial officer executes any process upon the face of which it appears that the Court which issued it had not jurisdiction of the subject-matter, or of the person against whom it is directed, such process will afford him no protection for acts done under it. If the subject-matter of a suit is within the jurisdiction of a Court, but there is a want of jurisdiction as to the person or place, the officer who executes process in such suit is no trespasser unless the want of jurisdiction appears by such process. Bull N.P. 83; Willes 32, and the cases there cited by Willes, C.J.; and he proceeds to say, having reference to the case then under consideration:—"I am of opinion that the execution issued by the justice to the defendant, it being on proceedings over the subject-matter of which he had jurisdiction, and the execution not shewing on its face that he had not jurisdiction of the plaintiff's person, was a protection to the defendant for the ministerial acts done by him by virtue of that process."

And again, at page 629:—

The general principle running through all these cases and authorities is that even though a warrant may in fact be bad, though it may be or has been set aside by reason of failure to comply with legal requirements if it has been issued by competent authority, by a functionary duly authorized by statute or otherwise, and is valid on its face, it will afford absolute justification to the officer executing it, not only where he is proceeded against criminally but by civil action as well.

The warrant for the destruction of the liquor recites that the liquor was duly seized and contains a finding by the stipendiary that it was intended for sale in contravention of the N.S. Temperance Act, and so far as I can see is absolutely regular on its face. The authorities all agree that if there is no want of jurisdiction apparent on the warrant, the constable acting on it is justified. There is no suggestion that this warrant shews any want of jurisdiction on its face, and the defendant, Scriven can, therefore, set it up as a justification for the destruction of the liquor, an act which he did as constable under and by virtue of the warrant.

But it is suggested that Scriven seized the liquor and laid the information and, therefore, that he is not in the same position as another constable would have been in executing this warrant.

In *West* v. *Smallwood* (1838), 3 M. & W. 418, 150 E.R. 1208, a party had laid a complaint before a magistrate on a subject matter over which he had general jurisdiction and a warrant had been issued by the magistrate under which the party charged was arrested and it was held that the complainant was not liable as a trespasser although the particular case was one in which the magistrate had no authority to act.

During the argument the following discussion took place (page 419):—

Lord Abinger, C.B.: I do not see in what way the defendant can be a trespasser. He goes to a magistrate, and calls upon him to exercise his judgment, and though the magistrate, if he exceeds his authority, may be liable as a trespasser, the party who lays the complaint is not.

Alderson, B.: The complainant has nothing to do with the assumption of jurisdiction by the magistrate.

Lord Abinger, C.B.: The party does no more than lay the facts before the magistrate, who exercises his discretion judicially in granting a warrant. This distinguishes it from the case of a sheriff, who is put in motion by the party, as he does not act judicially; but in this case the defendant does not put the magistrate in motion; he applies to a magistrate having a general jurisdiction over the subject-matter, and makes his complaint, and the magistrate acts upon it or not, at his discretion.

And, in delivering judgment, Lord Abinger, C.B., said at page 420:—

I retain the opinion which I expressed at the trial. Where a magistrate has a general jurisdiction over the subject-matter, and a party comes before him and prefers a complaint, upon which the magistrate makes a mistake in thinking it a case within his authority, and grants a warrant which is not justifiable in point of law, the party complaining is not liable as a trespasser, but the only remedy against him is by an action upon the case, if he has acted maliciously. The magistrate acting without any jurisdiction at all is liable as a trespasser in many cases, but this liability does not extend to the constable, who acts under a warrant and the statute 24 Geo. II., ch. 44, was passed with this very object of protecting such officers. As to the other part of the case, I do not deny that the fact of the defendant's presence when the plaintiff was taken, and his pointing him out to the constable, might make it a case to go to the jury, but that was not pressed on the part of the plaintiff.

Bolland, J., said, at page 421:—

I am of the same opinion and for the same reasons. With regard to the case of the sheriff, that is clearly distinguishable from the present, because the party puts the sheriff in motion, and the latter acts in obedience to him. In the case of an act done by a magistrate, the complainant does no more than lay before a Court of competent jurisdiction the grounds on which he seeks

N. S.

S. C.

MCGRATH v. SCRIVEN.

Harris, C.J.

redress, and the magistrate, erroneously thinking that he has authority, grants a warrant. As to the subsequent conduct of the defendant, all he does is to point the plaintiff out to the constable as the person named in the warrant, but this does not amount to any active interference. If any malice could be shewn, it might have formed the ground of an action on the case.

And Alderson, B., said, at page 421:—

As to the first point, the party must be taken to have merely laid his case before the magistrate, who thereupon granted a warrant adapted to the complaint. Then, what has been done by the defendant to make him liable as a trespasser? He would be liable only in case, if he was actuated in what he did by malice.

It would, therefore, seem that if Scriven had acted simply as a constable in executing the warrant for destruction he would not have been liable; and if he had acted simply as a prosecutor he would not have been liable.

Can he be made liable for the destruction of the liquor—an act performed by him as constable—because of the fact that he had seized the liquor and laid the information upon which the warrant was based? It must be borne in mind that he is not liable for the seizure of the liquor, because that claim, if any, is barred by the statute.

There is no evidence at all of malice which the Judges in *West* v. *Smallwood*, *supra*, considered to be necessary in order to make a complainant liable for his actions subsequent to laying the complaint. On the other hand, the jury has found that the constable reasonably believed that the liquor seized was kept for sale or to be sold in contravention of the Act.

Sec. 59 of ch. 8 of 8-9 Geo. V., 1918 (the same as the Act in force at the time of the seizure), provides:—

59. (1) Where any inspector, constable or other peace officer finds liquor in transit or in course of delivery upon the premises of any carrier or at any wharf, warehouse or other place, and reasonably believes that such liquor is to be sold or kept for sale in contravention of this Act, he may forthwith seize and remove the same.

(3) Where liquor has been seized under subsection (1) or subsection (2) of this section, the person seizing the same shall give information under oath before a magistrate who shall thereupon issue his summons, directed to the shipper, consignee or owner of the liquor if known calling on him to appear at a time and place named in the summons and shew cause why such liquor should not be destroyed or otherwise dealt with, as provided by this Act.

(6) At the time and place named in the summons any person who claims that the liquor is his property, and that the same is not intended to be sold or kept for sale in violation of this Act, may appear and give evidence before the magistrate, and the magistrate shall receive such evidence and the evidence of the person who seized the liquor, and such other evidence as may be adduced, in the same manner as upon a complaint or information made under this Act.

It is difficult to point to anything done by Scriven in this case which he was not bound to do as a constable.

We must start with the finding of the jury that he reasonably believed that the liquor he seized was to be sold or kept for sale in contravention of the Act and ask ourselves what did Scriven do that the Act did not warrant him in doing or compel him to do? I can see no ground for holding him liable.

I think it was Lord Gifford who, in considering the contention of counsel that a Judge was liable to an action where he had exceeded his jurisdiction, said that if the contention was sound "no man but a beggar or a fool would be a Judge." If Scriven is to be held liable in this case in view of the finding of the jury to which I have referred, then it would seem to end the enforcement of the provisions of sec. 59 of the Act, because no constable but a beggar or a fool would seize liquor under that section.

Although it is not necessary to the decision, I cannot refrain from saying that it does seem pure nonsense that Scriven was bound to know the law in respect to which subsequently after solemn argument by counsel for days five learned Judges of the Court differed in opinion and divided three to two. It is obvious that this case is not one to which the principle in question applies.

The decision referred to was based, as of course it had to be based, on the fact set out in the information laid by the constable that the liquor had been seized in the possession of the Dominion Government Railways; whereas the jury has now found, and the fact clearly seems to be, that the liquor was not in the possession of the Canadian Government Railways but of the Dominion Express Co. Scriven probably did not know when he laid the information that the liquor had been brought to Bedford by the Dominion Express Co and was in the custody of their agent, McKenzie, who was also the station agent of the Canadian Government Railways, and if he had known it he probably would not have had any idea that it made the slightest difference in which way the charge was laid. He went to the stipendiary (as Lord Abinger, C.B., expressed it in *West* v. *Smallwood*, 3 M. & W. at page 419), and called "upon him to exercise his judgment, and though the magistrate if he exceeds his authority may be

N. S.
S. C.
McGRATH v. SCRIVEN.
Harris, C.J.

liable as a trespasser the party who lays the complaint is not."

I do not think it necessary to discuss the question as to whether or not Scriven, after having stated in the information that the liquor was in the possession of the Canadian Government Railways, could, in this action, shew the real facts of the case. It may be that he was precluded from setting up the real facts. I do not decide that question, but, quite apart from it, I reach the conclusion that the constable is not liable for the destruction of the liquor under the warrant in question.

The contention that the findings of the jury are not supported by evidence, in my opinion, fails.

I would allow defendants' appeal and dismiss the action against both defendants with costs.

The plaintiffs' application to set aside the findings of the jury will also be dismissed with costs.

Longley, J.

LONGLEY, J.:—I concur.

Ritchie, E.J.

RITCHIE, E.J.:—Sec. 36 of ch. 33 of the Provincial Acts of 1911 is as follows:—

(1) Where any inspector, constable or other peace officer finds liquor in transit or in course of delivery upon the premises of any carrier, or at any wharf, warehouse or other place, and reasonably believes that such liquor is to be sold or kept for sale in contravention of the N.S. Temperance Act, he may forthwith seize and remove the same.

Under this section the defendant Scriven, who was a constable, on March 29, 1918, seized a quantity of rum which was in transit, and was, according to his sworn information, in the station of the Canadian Government Railways at Bedford. On April 23, 1918, the defendant Scriven laid the information to which I have referred. It is as follows:—(See judgment of HARRIS, C.J.).

The rum was brought by the defendant Scriven before the defendant McLeod, who is a magistrate, and on May 1, 1918, the defendant McLeod, as such magistrate, made an order for the destruction of the liquor. The plaintiff, pursuant to his summons, appeared before the magistrate to shew cause why the liquor should not be destroyed. Under the order, the defendant Scriven destroyed the liquor. On June 28, 1918, a writ of *certiorari* issued to remove the proceedings into this Court, and on May 9, 1919, after argument by counsel for the respective parties in this action, an order of this Court passed

quashing the order for destruction of the liquor. The case is reported in 31 Can. Cr. Cas. 10.

This action is brought to recover from both defendants the value of the liquor and damages incident to its seizure and destruction. The action was tried before my brother Drysdale and a jury. The findings of the jury are as follows:—

(1) What premises was the liquor upon when seized? A. The Dominion Express Co. (2) Did Scriven reasonably believe that the liquor seized was kept for sale or to be sold in contravention of the Temperance Act? A. Yes. (3) What damages did the plaintiff suffer by reason of the seizure and destruction of the liquor in question? A. $375.

The Judge, notwithstanding these findings, being of opinion that there could be no justification under the order for destruction which had been quashed, and that the statutes relating to actions against magistrates and constables did not protect either of the defendants, gave judgment against them.

I deal first with the case against McLeod. The action was brought before the order for destruction was quashed, necessarily so, because otherwise it would have been out of time. Sec. 6 of ch. 40 of the Revised Statutes, is as follows:—(See judgment of HARRIS, C.J.).

This statute was passed for the protection of justices and must be construed with reference to its object. The first question that occurs to me in this connection is as to whether the order for destruction is the kind of order referred to in sec. 6. I am of opinion that it is. The order was not only for the destruction of the liquor, but it was a judicial adjudication that the liquor be forfeited to the Crown, and clearly within the meaning of sec. 6. The grievance which the plaintiff has against McLeod is for something done under this order for forfeiture and destruction. This brings me to the construction of the words "no action shall be brought." What does the word "brought" as used in this connection mean? Mr. Power, K.C., argued that the word "brought" might fairly be construed as "maintained" and that it ought to be so construed as the time limit for bringing actions against magistrates is so short that it is practically not possible to get a conviction or order quashed before the time when the writ must be issued to avoid the statutory limitation. I was impressed by this argument, but I cannot let it carry me so far that I distort the meaning of a word which is clear, plain and obvious. If the language of a statute is clear and explicit, it

N. S.

S. C.

McGRATH v. SCRIVEN.

Ritchie, E.J.

must receive full effect regardless of consequences. To bring an action is to issue a writ, initiate the proceedings: it has a well understood meaning and is something quite different from maintaining an action. It is one thing to bring an action and quite another thing to maintain it, as every lawyer has learned by experience. I may add that here I think there is no place for interpretation or construction because the word "brought" as it is used in the statute under consideration does not admit of two meanings; it is precise and unambiguous, and therefore I cannot expand or interpret its meaning by way of construction. This disposes of the case against McLeod, and it is not necessary that I should consider other points; as against him, the appeal should, in my opinion, be allowed and the action dismissed with costs.

I come now to the case against Scriven. Two things are beyond question, namely, that the liquor was the property of the plaintiff and that Scriven destroyed it; and this he did under and by virtue of an order which was made without jurisdiction; it was without jurisdiction from the beginning, and at the time of the trial it had been quashed for that reason. As the defendant is a constable, the first question which suggests itself is as to whether or not he is protected by any statute. Ch. 42 of R.S.N.S. provides that before any action is brought against a constable for anything done in obedience to process, a demand in writing of the perusal and copy of the process shall be served upon him. If there is compliance with the demand, then on proof of the process, where the action is against the magistrate and constable, the action is to be dismissed as against the constable. Scriven did not comply with the demand and therefore he has not set up this protective statute. He pleads ch. 40, which as I have said, affords a good defence for McLeod, but no defence for Scriven, because it does not apply to him. Ch. 40 is for the protection of justices and ch. 42 for the protection of constables. The jury found that the liquor was on the premises of the Dominion Express Co. The Judge allowed this question to go to the jury, but he expressed the opinion that the answer to it would be of no avail as a defence. I agree with this view. In my opinion, the question as to where the liquor was when seized is *res judicata*. The defendant Scriven laid the sworn information which stated that the liquor was "contained in the premises occupied by the Canadian Government Railways at

Bedford in the county of Halifax in the said municipality of Halifax (the said liquor being in course of delivery and the said Canadian Government Railways being a common carrier)."

The proceedings, as I have said, were brought into this Court and the order for destruction quashed upon the ground that the liquor was seized on the Canadian Government Railways premises. This was a judgment *in rem*. But the identical parties to this action were the identical parties who litigated the question as to whether the order for destruction should be quashed or not because the liquor was on Government premises when seized. When you have litigation between exactly the same parties about exactly the same liquor and a decision given based on a question of fact sworn to by one of the parties I cannot think this party should be permitted to litigate the same question of fact again *inter* parties. If I am right that this question is *res judicata* it is an end of any defence for Scriven, because a decision of the Supreme Court of Canada is against him. I refer to the case of *Martinello & Co.* v. *McCormick et al.* (1919), 50 D.L.R. 799. In that case the same point was involved, namely, the seizure of liquor from the Canadian Government Railways as a common carrier. In giving judgment Anglin, J., said, at page 803:—

> The original capture of the liquor having been illegal the defendant cannot, in my opinion, successfully set up in answer to the plaintiff's action for replevin that since he might have proceeded rightfully to take it as soon as the plaintiff had removed it from the railway premises, the case may be treated as if he had seized the goods after they had in fact been removed from the railway premises, whether rightfully or wrongly, and the detention of them were thus legal. The inspector in seizing was a mere trespasser *ab initio*. All the acts he did were trespasses. He was in the same position as a mere stranger without any legal authority whatever. The plaintiff is entitled to say: "Let me be put in the position in which I stood before your illegal act." *Attack* v. *Bramwell* (1863), 3 B. & S. 520. I agree with the view expressed by the majority of the Judges of the Supreme Court of Nova Scotia in *Re McGrath* (1919), 31 Can. Cr. Cas. 10.

Mr. Jenks, K.C., at the argument, raised the point that *res judicata* was not pleaded. There is a plea of estoppel. If it does not sufficiently raise the question of *res judicata* a few words added to it would be sufficient. Since the early days of the Judicature Act in this Province this Court, following well-known English decisions and the English practice, has frequently amended the pleadings to fit the evidence. Of course there are cases where it would not be done. An amendment would not be made

N. S.

S. C.

MCGRATH v. SCRIVEN,

Ritchie, E.J.

which would take the other party by surprise and raise a case which he might have answered by evidence at the trial, but there is nothing of that kind here. The defendant Scriven went to trial knowing that he had sworn that the liquor was on the Government premises and that on that ground the case had been decided against him. I cannot bring myself to think that he ought to be permitted to do away with the decision of this Court confirmed on appeal in the Supreme Court of Canada by setting up at the trial of this action that the liquor was in the express company's office. The information was put in evidence at the trial and while the order quashing the order for destruction does not state the ground for quashing, it is, I think, clearly referable to the information which is bad on its face and does not give jurisdiction, thereby shewing the ground on which the Court proceeded in quashing the order.

The maxim "He is not to be heard who alleges things contradictory to each other" is invoked. Referring to this maxim, Mr. Broom, in his work on Legal Maxims, 8th ed., page 135, says:—

> This elementary rule of logic, which is frequently applied in our Courts of justice, will receive occasional illustration in the course of this work. We may, for the present, observe that it expresses, in other language, the trite saying of Lord Kenyon that a man shall not be permitted to "blow hot and cold" with reference to the same transaction, or to insist, at different times, on the truth of each of two conflicting allegations, according to the promptings of his private interest.

I think this is just what the defendant Scriven is attempting to do. In his information, he sets up that the liquor was on the premises of the Canadian Government Railways, and on this ground the order for destruction was quashed, thereby inducing the bringing of this action. He now in litigation *inter parties* sets up according to the promptings of his private interests a different state of facts. This, I am of opinion, he ought not be permitted to do.

The result of the views which I have expressed is that the defendant Scriven, notwithstanding the findings of the jury, is liable in damages for the destruction of the plaintiff's property and that the appeal, so far as he is concerned, must be dismissed with costs.

As the opinion which I have expressed may not prevail, I deal with the motion to set aside the findings of the jury.

As to the first finding, I think it is as I have indicated, irrelevant. I am further of opinion that it should be set aside as being a finding which, viewing the evidence reasonably, a jury could not propery make. In view of the direction of the trial Judge to the jury, I think it was a perverse finding.

The second finding is, in my opinion, irrelevant, but I cannot say that the jury could not properly make the finding, the question having been submitted to them. The remaining finding is as to the damages: this, as the Judge told the jury, was the real question. I venture to think that it is the only question which should have been submitted to the jury. I would not interfere with this finding. $375 was what the plaintiff paid for the liquor and I assume was its value at the time he swears he bought it for his own use. There is no evidence that it had increased in value between the time of seizure and the time of destruction. I do not see that it is of any avail to give evidence of what the liquor would have been worth at the time of the trial. I think the jury were not bound to allow the charge of appearing in the magistrate's Court. I regard the claim of $100 for loss of time as too vague and general.

If the conclusions at which I have arrived were held to be sound, it follows that there must be costs against the defendant Scriven on appeal and below. It was urged that if the defendant McLeod was successful he should not have costs. I see no ground for this contention; he is entitled to his costs on appeal and below. *Judgment accordingly.*

REINSETH v. CAMPBELL.

B. C.
Co. Ct.

British Columbia County Court, Swanson, County Judge. May 4, 1920.

NEGLIGENCE (§ II D—104)—HIRE OF HORSE—HORSE BROUGHT BACK DAMAGED —REASONABLE CARE AND TREATMENT—LIABILITY OF HIRER.

If a horse hired is taken out sound and brought back damaged there is an onus on the hirer to shew that the injury was not caused through his fault. He is bound to ride it as moderately and treat it as carefully as a man of common discretion would his own and if, in spite of this care and treatment, the horse is injured, the hirer is not responsible.

[Review of Scotch cases.]

Statement.

ACTION to recover the value of a horse hired to the defendant, and other damages caused by the horse being brought back in a damaged condition. Affirmed.

B. C.

CO. CT.

REINSETH v. CAMPBELL.

Swanson, J.

M. L. Grimmett, for plaintiff; *J. R. Archibald*, for defendant.

SWANSON, CTY. CT. J.:—The plaintiff is a rancher residing at Glenwalker, in Coldwater Valley, in this County.

The defendant is the Dominion Government timber inspector for the district and resides at Salmon Arm.

As the plaint alleges, the defendant hired, or caused to be hired, a horse from plaintiff on September 15 last. The horse was returned to plaintiff in a lame condition on September 17, and has since been useless for work or any other purpose. It is alleged that the lame condition was due to the defendant's negligence while in his possession and use. The plaintiff claims damages amounting to $332 or as follows:—Value of horse $140, feed $94, loss of use of horse $45, paid veterinary surgeon $18, for special attendance on sick horse (bathing) $35 = $332.

Plaintiff at trial claimed an additional sum of $135, for feeding, caring for horse and loss of use, which additional amount he subsequently through his counsel abandoned.

It was proved by plaintiff and his wife that the horse was in first-class condition when delivered to defendant and the evidence shews also that when returned the horse was seriously lamed and has since been of no value to plaintiff. Plaintiff would have destroyed the animal some time ago, but treated same at suggestion of Mr. Page, who, though unlicensed, occasionally practises in the vicinity as a veterinary surgeon. I find the value of the horse is $140.

Should plaintiff be entitled to a verdict I do not think he would in any event be entitled to more than the value of the animal, $140. Clearly, he could not recover for any charges paid to Mr. Page, as he has no certificate or license to practise under the Act.

At the close of the plaintiff's case, Mr. Archibald asked for a non-suit on the ground that there was no evidence whatever of negligence. He relied on *Cooper* v. *Barton* (1810), 3 Camp. 5. I am unable to get the text of this judgment which is referred to in Beven on Negligence, 3rd ed., at page 795. Beven says:

> The onus of shewing negligence is, in some cases, thrown on the letter; so that a hirer is not bound to prove affirmatively that he used reasonable care, though he is *bound to account*, that is, to *give an explanation* of the *cause of the loss* or *injury*. It has however been held *not enough* to shew that a horse which was let sound was returned with its knees broken.

(Quoting *Cooper* v. *Barton*, 13 Camp. 5 (note)), Beal on Bailments (1900), page 221, quotes this case and adds: "Le Blanc, J., said that the plaintiff must give *some* evidence of negligence, and as he had given none in this case, the plaintiff must be nonsuited."

See also Beven, 3rd ed., at pages 138, 139. The rule of law in negligence cases, is that it is the duty of the Judge to determine where there is *any* evidence fit to be left to the jury, if not the case should be withdrawn from the jury.

The evidence also shewed that no reference whatever was made by defendant Campbell, nor by Mitchell, who accompanied Campbell on his journey by horseback to Spius Creek on inspection of timber, as to the condition of the horse when it was returned. In fact it looks to me as if both Campbell and Mitchell were anxious to conceal the injury which undoubtedly they knew the horse had suffered. They did not give any explanation as to cause of injury, in fact they made no reference whatever to same. Plaintiff goes so far as to plainly intimate that Campbell designedly diverted his attention from the horse and its condition when re-delivered on September 17, by engaging plaintiff's attention in a discussion on motor car matters.

Now I find a principle enunciated, which, at least, has the authority, and imprimatur of American decisions, touching on the question of the presumption of law, as to proof of some negligence which may thus arise. Beven on Negligence, 3rd ed., at page 795, (closing paragraph) says:

> The position of the bailor, if the bailee returns the article hired in a damaged condition, becomes dependent on the character of the damage done. The bailor commits his property to the bailee on the undertaking most generally implied that he will take due care of it. In ordinary circumstances *good faith requires that* if the property is returned in a *damaged condition some account should be given* of the time, place and manner of the occurrence of the injury. If, then, the bailee returns the property in a damaged condition and fails to give any account of the matter, the *law will authorise a presumption that he has been negligent;* because where there is no apparent cause for the accident and the bailee has possession he must shew how the accident happened. The bailor need only point out the deteriorated condition of the article.

Quoting 2 American cases, also Story on Bailment, 411, 414, *Cooper* v. *Barton*, 3 Camp. 5 (note); and *Byrne* v. *Boadle* (1863), 2 H. & C. 722, 159 E.R. 299; *Scott* v. *London etc. Docks Co.* (1865),

B. C.

Co. Ct.

REINSETH v. CAMPBELL.

Swanson, J.

3 H. & C. 596, 159 E.R. 665, the latter two being the leading cases on doctrine of *res ipsa loquitur*. Beven then continues at page 796:

> If however the deterioration is the *natural* consequence of wear and use the bailor must give *other* evidence to discharge the onus and raise a case of neglect or misuse. There are a hundred probable causes of a horse falling and breaking its knees quite apart from any default in the bailee. If not an ordinary incident of keeping a horse, such an occurrence is consistent with absence of negligence, and so negligence must be shewn and will *not* be presumed.

A number of Scotch cases are quoted by Beven, 3rd ed., at pages 796, 797. Lord Shand in *Bain* v. *Strang* (1888), 16 Rettie 186, at page 797, is quoted as saying:

> Where a horse, hired or lent is taken out sound and brought back damaged there is an *onus* on the borrower to shew that the injury was *not* caused through his fault, and that it was sustained notwithstanding all reasonable care on his part. 16 Rettie at page 191.

So Lord President Inglis in same case:

> If the article is returned in a damaged condition there is an *onus* on the borrower to shew that the damage did not arise through his fault. It is argued that the *onus* is heavier than that, and that he is bound to shew what was the specific cause from which the injury arose. I am not disposed to decide that question. . . . We have, I think, sufficient evidence to shew that reasonable care was used. 16 Rettie at page 189.

If the principle as to *onus* set out in these Scotch cases applies to our English and B.C. law, as I think it does (following the principles set out in *Byrne* v. *Boadle*, 2 H. & C. 722, 159 E.R. 299, and *Scott* v. *London Docks Co.*, 3 H. & C. 596, 159 E.R. 665, then Mr. Archibald's application for a non-suit should fail, and I so rule.

Mr. Archibald then put in his evidence. On the evidence of Campbell and Mitchell I am obliged to hold that no negligence has been proved.

They each describe in minute detail their movements from September 15 to the time of return of the horse on September 17. The horse was a substantial saddle horse, 4 years old, 1,200 lbs. in weight, bred in this country as I take it, although the evidence did not in as many words establish the latter fact. Now the horse was hired expressly for riding purposes to go on an inspection of timber in that district—Spius Creek. We know in this country that timber, merchantable timber, generally grows on the sides of the hills and mountains. There is nothing in this case to shew

that there was anything unusual in the character of the particular country traversed by defendant and Mitchell. It was, I think, a quite proper timber country to ride the plaintiff's horse through. Now Campbell and Mitchell describe the trip up the side of the hill or mountain out of Prospect Creek. But it was not in mountain climbing that this horse (shod on the front feet but unshod on hind feet) was injured. It was injured whilst the horse was being led (not ridden) by Campbell across the creek bottom, a crossing which had to be negotiated before they could make the ascent on the other side. Mitchell had ridden ahead of Campbell to reconnoitre the crossing which was not the regular Boston Bar crossing he had used before, and had safely passed over the creek bottom and was ascending on the other side. There are rocks or boulders in the creek bottom, and some water in the watercourse. The evidence was not very exact as to the size of the rocks, nor as to their being unusually wet or slimy, nor as to the volume of the water in creek. As Campbell proceeded along leading plaintiff's horse the animal slipped on some of these boulders and went down on its haunches. The horse was able to go on and was ridden by defendant. Mitchell says it was just an accident, that the place they went through was such that any good horse could go through. Campbell says he knew the horse injured itself when it fell down in the creek bottom; that he discussed the lameness with Mitchell and decided *not* to mention it to plaintiff (as they couldn't find any trace of swelling, thinking it would come alright again). Campbell admits that he may have told Mitchell to ride the horse fast on the day of its return home, September 17th, between Patchetts' and the plaintiff's to limber the horse up, and naturally with the object of making a good impression on plaintiff as to condition of the horse, when it would be re-delivered to him. Campbell was submitted to severe criticism by Mr. Grimmett for concealing from the plaintiff the true condition of the horse.

I think Mr. Campbell's actions in the matter certainly lacked candour. I think it was his duty to frankly inform the plaintiff as to the condition of the animal and as to how it happened. Had he done so with open frankness he might never have had to answer in Court for his actions in this matter. I can, however, find no evidence of negligence to make Campbell responsible to plaintiff. Page's evidence was to the effect that from an ex-

B. C.

Co. Ct.

REINSETH v. CAMPBELL.

Swanson, J.

amination of the horse's left hind leg he was quite satisfied that the horse must have gone through a bridge or got into a crevice or windfall, judging from injuries to the hock. Campbell and Mitchell disprove clearly such a theory as that of Page.

The degree of care which a hirer of a horse must take is set forth in Oliphant on Horses, 5th ed. (1896), page 233:

> In contracts . . . such as *hiring*, etc., such care is exacted as every *prudent man commonly takes of his own goods* and, by consequence, the hirer is answerable for *ordinary neglect*. If, therefore, a man so treat and manage his *hired* horse as any *prudent* man would act towards his *own horse* he is *not* answerable for any damage the horse may receive.

(Quoting *Cooper* v. *Barton*, *supra*) Beven on Negligence, 3rd ed., at page 792, quotes Lord Holt, C.J., in *Coggs* v. *Bernard*, 2 Ld. Raym. 909, at 916, Smith's Leading Cases, vol. 1, page 191, "From whence it appears that, if goods are let out for reward, the hirer is bound to the *utmost diligence* such as the most diligent father of a family uses, and if he uses that, he shall be discharged." Sir William Jones, in his work on Bailments, page 86, shews that Lord Holt's dictum as to "*utmost* diligence" is due to a mistranslation of the Latin, by Lord Holt, Bracton, Lib. 3, fol. 63 (b), and adds that the correct interpretation is "*ordinary diligence*."

The rule of "diligence" (as Sir Wm. Jones puts it) then is, "that which a good and prudent father of a family—diligentissimas paterfamilias—would take of his own." In other words, he is liable for *ordinary* negligence. If then, he hire a horse, he is bound to ride it as moderately and treat it as carefully as any man of common discretion would his own, and the law implies that proper treatment includes feeding a horse. *If in spite of this care*, and treatment, the horse is injured, the hirer is *not* responsible.

I am satisfied that Campbell employed that degree of care which the law casts upon him and that he is not responsible for the injury to plaintiff's horse. He is, therefore, in my opinion, entitled to judgment, but as his subsequent actions were not characterized by that degree of openness and candid dealing which the law enjoins on him in explaining to the owner the nature and cause of the injury, I am unable to allow him the costs of this action. Judgment accordingly for defendant but without costs. *Judgment for defendant.*

Re EARLY CLOSING BY-LAW AND PERLEY.

MAN.

C. A.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, Fullerton and Dennistoun, JJ.A. May 11, 1920.

1. STATUTES (§ I C—20)—BY-LAW—SHOPS REGULATION—SHOPS REGULATION ACT, R.S.M. 1913, CH. 180—VALIDITY OF.

A city by-law passed under authority of the Shops Regulation Act, R.S.M. 1913, ch. 180, closing certain shops, during certain hours, defining the words "shop" or "shops," and making certain exceptions to the general regulation is within the powers of the city.

2. MUNICIPAL CORPORATIONS (§ II C—60)—BY-LAW—SHOPS REGULATION—EXCEPTION TO GENERAL RULE—RESTRAINT OF TRADE—VALIDITY.

A city by-law excepting from a general shop closing regulation any shop where the only trade or business carried on is that of a fruiterer confectioner, pastry cook, tobacconist, news agent, hotel, inn, tavern, victualling or refreshment house, and providing that the by-law shall not apply to any such shop merely because bread, butter or milk is sold or offered for sale therein is not invalid because arbitrary and oppressive or in restraint of trade.

The exception does not apply where a full line of groceries is carried on one side of the shop, and fruit and confectionery on the other.

Statement.

CASE STATED by Sir Hugh John Macdonald, Police Magistrate of Winnipeg, under the Criminal Code and the Summary Convictions Act, R.S.M. 1913, ch. 189.

Isaac Campbell, K.C., and *J. Preudhomme*, City Solicitor, for respondents.

R. A. Bonnar, K.C., and *W. H. Trueman*, K.C., for appellants.

Perdue, C.J.M.

PERDUE, C.J.M.:—The above named H. W. Perley was convicted on Thursday, November 28, 1918, for that he "did unlawfully omit to close and keep closed his shop in the City of Winnipeg, where goods are offered and exposed for sale between the hours of 6 o'clock in the afternoon on said date and 5 o'clock in the morning of the next following day, contrary to the provisions of by-law 1853 and amendments thereto of the City of Winnipeg."

The validity of the above by-law as it originally stood was upheld in *Stark* v. *Schuster* (1904), 14 Man. L.R. 672.

On November 14, 1918, by-law No. 9789 was passed by the council of the City of Winnipeg amending by-law No. 1853. The main section of the last mentioned by-law as amended now reads as follows:—

1. From and after the 19th day of July, A.D. 1900, all classes of shops within the City of Winnipeg, where or wherein goods are exposed or offered for sale by retail shall be and each of them shall be and remain closed on each and every day of the week, between 6 o'clock in the afternoon of each day and 5 of the clock in the forenoon of the next following day, with the following exceptions:—

MAN.

C. A.

RE EARLY CLOSING BY-LAW AND PERLEY.

Perdue, C.J.M.

On Saturdays and during the last three weeks in December, and also the days immediately preceding the following days, namely:—New Years Day, Good Friday, May 24, and Dominion Day; and all classes of shops in the city, as aforesaid, shall be and remain closed from 10 of the clock in the afternoon of the days hereinbefore mentioned as excepted, namely, Saturdays, the week days in the last 3 weeks in December, and the days immediately preceding the following days: New Years Day, Good Friday, May 24, and Dominion Day, until 5 of the clock in the forenoon of the following day.

(a) Provided that this by-law shall not apply to any shop where the only trade or business carried on is that of a fruiterer, confectioner, pastry cook, tobacconist, news agent, hotel, inn, tavern, victualling or refreshment house, nor shall this by-law be held to apply to any such shop merely because bread, butter or milk is sold or offered for sale therein:

(b) The words "shop" or "shops" where contained in this by-law shall mean and include any building or portion of a building, booth, stall or place.

The following questions were stated for the opinion of this Court:—1. Is the conviction erroneous in law and should the same be quashed? 2. Was the shop of the accused lawfully open at the hour of 9 o'clock on the evening of November 28, 1918? 3. Is by-law 1853 as amended of the City of Winnipeg *ultra vires* and void? 4. Is the said by-law as amended arbitrary and oppressive, and does it discriminate between merchants of the City of Winnipeg selling the same articles or class of goods? 5. Is said by-law in restraint of trade and commerce?"

By sec. 3 of the Shops Regulation Act, R.S.M. 1913, ch. 180:—

Any municipal council may, by by-law, require that, during the whole or any part or parts of the year, all or any class or classes of shops within the municipality . . . shall be closed, and remain closed on each or any day of the week at and during any time or hours between six of the clock in the afternoon of any day and five of the clock in the forenoon of the next following day.

By sec. 2 of the Act, as amended by 8 Geo. V. 1918, ch. 81, sec. 1, the word "shop," in the 16 next following sections and in any by-law passed under the provisions thereof, means:—

any barber-shop or any building or portion of a building, booth, stall or place where goods are exposed or offered for sale by retail, but not where the only trade or business carried on is that of a tobacconist, fruiterer, confectioner, news-agent, hotel, inn, tavern, victualling house or refreshment house, nor any premises wherein, under license, spirituous or fermented liquors are sold etc.

The statute says that the expression "shop" when used in secs. 3 to 18 of the Act, or in any by-law passed under the provisions of the Act, does not include a place where the only trade or business carried on is that of a tobacconist, fruiterer &c. The

tobacconist and the others enumerated as exceptions in sec. 2 cannot be affected by an early closing by-law as long as each confines himself to his distinctive trade or business, but if he carries on an additional trade or business at his place he ceases to be an exception and may be made subject to such a by-law. Therefore, if the tobacconist deals also in bread, butter or milk his place becomes a "shop" within the meaning of the Act and may come under a by-law passed in accordance with it. But the municipal council under the powers given by the Act may still exclude him from the operation of the by-law. The council, it would seem, has power under the Act to so exclude him even if he added to his business of tobacconist a much more extensive line of groceries than bread, butter and milk. But if a municipal council in passing a by-law has acted strictly within the powers conferred upon it by the Legislature the question of the fairness or reasonableness of the by-law does not arise: *Re Boylan* (1887), 15 O.R. 13; *Simmons* v. *Malling*, (1897), 13 T.L.R. 447; *Stark* v. *Schuster*, 14 Man. L.R. 672, 684, 695.

I would answer the questions submitted as follows: To the first, second and third questions, "No."; To the fourth and fifth questions, "No answer is necessary."

Cameron, J.A.

CAMERON, J.A., (dissenting):—The contention is that by-law No. 1853 of the City of Winnipeg as amended by by-law No. 9789 is *ultra vires* of the Shops Regulation Act, R.S.M. 1913, ch. 180. As amended it extends the statutory exception given to tobacconists and others to the same persons when they sell or offer for sale bread, butter or milk. It is contended that this cannot be done by the council and that the test to be applied is whether it results in discrimination. In this case it is alleged that discrimination does and must arise as between tobacconists who sell or offer for sale bread, butter and milk and are not required to close and grocers who must close their shops to their manifest disadvantage. That result is possible and, indeed, inevitable. But any by-law such as this, even if indisputably within the powers given by the Act, is bound to give rise to inequities in its operation. But that consequence cannot affect the validity of the by-law so long as it is authorized by the terms of the statute. By sec. 3, the council may require all or any class or classes of shops to close as therein set forth and by sec.

MAN.

C. A.

RE EARLY CLOSING BY-LAW AND PERLEY.

Cameron, J.A.

7, it may make regulations "as to the classification of shops for the purpose of the preceding sections." A tobacconist (when that is his only trade) is by the Act excepted from the powers of the council. But when he commences to deal in bread, butter and milk he loses his privileged position. Is there any reason to be gathered from the Act why the council should not expressly exempt from the by-law tobacconsits who sell bread, butter and milk? The council has power to make regulations as to the classifications of shops for the purposes of the Act and those powers are not restricted in any way, but are general. It seems to me, therefore, that the council has the power to make a classification of shops in which the shops of tobacconists selling bread, butter and milk shall be considered as if they were still those of tobacconists carrying on that trade only and therefore exempt from the prohibitions of the by-law. The council is given full authority to classify shops as it sees fit so long as it observes the conditions of the statute, and it is not apparent that the discretion of the council should be hampered by any other considerations. The council is a representative body, amenable to the electors, acting presumably in the best interests of the community and empowered to pass by-laws in these matters as authorized by the Legislature. This early closing legislation concerns a difficult subject, which can only be dealt with by compromise between conflicting interests. With its merits or the merits of the by-law we have nothing to do. The classification made may be arbitrary and productive of inequalities and discriminations, but it is impossible to avoid such results in by-laws of this kind. That is all a matter for the council and in the exercise of its discretion. The sole question before us is whether this by-law is passed in accordance with the wide powers conferred by the statute under which the council can exclude from the operation of the by-law any class or classes of shops. It could, if it chose, exempt all grocery stores or confine its provisions to them exclusively.

Whether or not a municipal by-law is unreasonable is a question which should be decided on an application to quash rather than on a motion to set aside a conviction, which this application is in substance. See *Reg.* v. *Gravelle* (1886), 10 O.

R. 735. It is now generally conceded that if a statute gives powers to a body of persons to make rules for a specific purpose, the reasonableness of such rules, provided they are strictly confined to the purposes for which they are authorized to be made, is not examinable by the Judges: Biggar, Municipal Manual (1900), page 330, and the question . . . whether a municipal by-law is or is not reasonable appears to be, as a rule, only a branch of the question whether it is or is not *ultra vires*." *Ib.* page 331. See *Kruse* v. *Johnson*, [1898] 2 Q.B. 91; *per* Lord Russell of Killowen, C.J., who holds that a liberal rule must be applied to the by-laws of representative bodies entrusted by Parliament with legislative powers for the public good; and also the judgment of Lord Hobhouse in *Slattery* v. *Naylor*(1888), 13 App. Cas. 446, which has been followed in numerous cases. I refer also to the judgments of the Full Court in *Stark* v. *Schuster*, 14 Man. L.R. 672.

FULLERTON, J.A.:—This matter comes before this Court by way of a case stated by Sir Hugh John Macdonald, Police Magistrate of the City of Winnipeg. Fullerton, J.A.

Perley was convicted under by-law No. 1853 of the City of Winnipeg as amended by by-law No. 9789 for that he did

at the City of Winnipeg, on Thursday, November 28, 1918, unlawfully omit to close and keep closed his shop in the City of Winnipeg, where goods are offered and exposed for sale between the hours of 6 o'clock in the afternoon on said date and 5 o'clock in the morning of the said following day . . .

The evidence shews that the accused carries a full line of groceries on one side of his shop, and on the other side, confectionery and fruit.

The by-law in question and the amendment thereto could only have passed under the authority of sec. 3 of R.S.M. 1913, ch. 180, entitled the Shops Regulation Act.

The question reserved is whether by-law No. 1853 as amended is *ultra vires* and void.

By-law No. 1853 provides that:—

all classes of shops within the City of Winnipeg, where or wherein goods are exposed or offered for sale by retail (but not where the only trade or business carried on is that of a tobaccoist, news agent, hotel, inn, tavern, victualling or refreshment house), shall be and each of them shall be and remain closed

MAN.

C. A.

RE EARLY CLOSING BY-LAW AND PERLEY.

Fullerton, J.A.

on each and every day of the week, between 6 o'clock in the afternoon of each day and 5 of the clock in the forenoon of the next following day "with certain exceptions not here material."

By the meaning of by-law No. 9789 the words in parenthesis are struck out and the following section added:—

(a) Provided that this by-law shall not apply to any shop where the only trade or business carried on is that of a printer, confectioner, pastry cook, tobacconist, news agent, hotel, inn, tavern, victualling or refreshment house, *nor shall this by-law be held to apply to any such shop merely because bread, butter or milk is sold or offered for sale therein.*

It is contended that the by-law is *ultra vires*, on the ground that it discriminates against grocery shops.

The validity of the by-law of course depends upon the powers conferred on the council by the Shops Regulation Act. Sec. 2 (*a*) of that Act as amended by ch. 81, Statutes of Manitoba 1918, defines "shop" as follows:—

(a) The expression "shop" means any barber shop or any building or portion of a building, booth, stall or place where goods are exposed or offered for sale by retail, but not where the *only* trade or business carried on is that of a tobacconist, fruiterer, confectioner, news-agent, hotel, inn, tavern, victualling house or refreshment house . . .

Sec. 3: Any municipal council may, by by-law, require that, during the whole or any part or parts of the year, all or any class or classes of shops within the municipality . . . shall be closed, and remain closed on each day or any day of the week at and during any time or hours between 6 of the clock in the afternoon of any day and 5 of the clock in the forenoon of the next following day.

It is quite evident that "class or classes of shops" referred to in the last quoted section can have no reference to the classes of shops excepted by 2 (*a*). The statute gives the council no power whatever to regulate the closing of shops of the excepted classes so long as they confine themselves to carrying on their respective trades. The words of sec. 2 (*a*) are "where the *only* trade or business carried on is that of a tobacconist" &c.

The moment a member of the excepted class begins to carry on a business outside the named excepted classes his place of business becomes a "shop" within the meaning of the statute.

The effect of the by-law, if valid, is to allow a tobacconist for example to sell bread, butter and milk—a class of business clearly outside that of tobacconist. Under the statute his place of business thereupon becomes a shop and the result is discrimination in his favour as between himself and other traders selling bread, butter and milk. If the council can authorize the excepted classes to sell bread, butter and milk after the hour fixed by the

MAN.

C. A.

RE EARLY CLOSING BY-LAW AND PERLEY.

Fullerton, J.A.

by-law, it can go further and authorize the sale of all goods handled by other traders with the result that there would be the plainest possible case of discrimination.

A fifth property of a by-law is that it should be general and obligatory upon all persons equally and discriminately; it must not be made for the benefit or for the detriment of any particular person. Lumly on By-laws, 99.

In *Kruse* v. *Johnson*, [1898] 2 Q.B. 91, Lord Russell of Killowen, C.J., said, at page 99:—

Notwithstanding what Cockburn, C.J., said in *Bailey* v. *Williamson* (1873), L.R. 8 Q.B. 118, at page 124, an analogous case, I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws, made under such authority as these were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*."

In my opinion, the by-law as amended in question is *ultra vires* and void for the following reasons:—(1) No power is given to the council to pass any by-law in relation to the classes of trades excepted by the statute; (2) The by-law as amended discriminates against other traders carrying the same line of goods.

I would answer all the questions in the stated case in the affirmative.

Dennistoun, J.A.

DENNISTOUN, J.A.:—This is a case stated by Sir Hugh John Macdonald, Police Magistrate of Winnipeg. It turns upon the validity of by-law No. 9789 of the City of Winnipeg, which relates to the early closing of shops, and amends by-law No. 1853, which was upheld in *Stark* v. *Schuster*, 14 Man. L.R. 672. The portions of the by-law to be dealt with and the questions propounded by the magistrate are set forth by the Chief Justice in his reasons for judgment.

By sec. 3 of the Shops Regulation Act, R.S.M. 1913, ch. 180:—

Any municipal council may, by by-law, require that, during the whole or any part or parts of the year, all or any class or classes of shops within the municipality . . . shall be closed on each or any day of the week at and during any time or hours between 6 of the clock in the afternoon of any day and 5 of the clock in the forenoon of the next following day.

MAN.

C. A.

RE EARLY CLOSING BY-LAW AND PERLEY.

Dennistoun, J.A.

By sec. 2 of the Act as amended by 1918, ch. 81, "shop" is defined, but there is excepted from such definition a shop:—

where the only trade or business carried on is that of a tobacconist, fruiterer, confectioner, news-agent, hotel, inn, tavern, victualling house or refreshment house nor any premises wherein, under license, spirituous or fermented liquors are sold. . . .

The clause of the by-law which has been attacked as *ultra vires* of the City Council is 1 (*a*) which reads:—

Provided this by-law shall not apply to any shop where the only trade or business carried on is that of a fruiterer, confectioner, pastry cook, tobacconist, news-agent, hotel, inn, tavern, victualling or refreshment house, *nor shall this by-law be held to apply to any shop merely because bread, butter or milk is sold or offered for sale therein.*

The lines italicized are, it is urged, an enlargement of the scope of the statute and *ultra vires* of the City Council to enact, but a careful examination of the statute and by-law do not lead me to such a conclusion.

The statute does not apply to tobacconists etc., who confine themselves to their designated trade and make it the "only trade" carried on. So long as they devote themselves exclusively to that single purpose they are exempted by the statute from the operation of any by-law which the council may pass under that Act.

But so soon as the tobacconist etc. adds to his stock in trade, bread, butter and milk, he ceases to be a "tobacconist" etc. and becomes a "shopkeeper" and his statutory exemption is gone.

The by-law then presents a new set of exemptions and among them one which says in effect "all shopkeepers who sell tobacconists' (etc.) supplies together with bread, butter or milk shall be exempt from the provisions of this by-law." This seems to be authorized by the statute, which permits the creation of "classes of shops" without any limitation, and if the council see fit to classify shops which deal in specified groups of commodities, there is nothing in the words of the statute to prevent them from so doing. By-laws should of course be neither unreasonable, discriminating nor unjust and many by-laws have been quashed because they are so. But in municipal legislation of this character it is quite impossible to pass a by-law which does not offend against some class of shopkeeper, or employees. Discrimination and even injustice are certain to

be charged by one or other section of the shop-keeping community, but unless they are sufficient to shock the conscience of the Court it is better to leave the adjustment of such wrongs to the representatives of the people who may be expected to understand their requirements better than most Judges. Lord Russell said in *Kruse* v. *Johnson*, [1898] 2 Q.B. 91, at 98, and his reasoning was quoted with approval by this Court in *Re By-law No. 92, Town of Winnipeg Beach* (1919), 51 D.L.R. 712 at 713: "Municipal by-laws . . . are not like the laws of the Medes and Persians—they are not unchangeable." If experience shews that this by-law works hardly or inconveniently, the City Council will repeal it if they consider it in the interest of the general body of the citizens to do so.

For these reasons I am of opinion that the by-law is not *ultra vires* of the City Council and that this Court should not interfere upon the ground that it is discriminatory.

I would answer the Magistrate's questions:—1. No; 2. No; 3. No; 4. Not answered. 5. Not answered.

HAGGART, J.A., concurred in the result. Haggart, J.A.

Judgment accordingly.

BALLARD v. MONEY.

ONT.
S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., and Maclaren, Magee and Hodgins, JJ.A. February 6, 1920.

HUSBAND AND WIFE (§ III A—143)—ALIENATION OF WIFE'S AFFECTIONS—ACTION FOR—HUSBAND AND WIFE LIVING TOGETHER WHEN ACTION BROUGHT—JURISDICTION OF COUNTY COURT—EVIDENCE OF ADULTERY—EXCLUSION OF—COUNTY COURTS ACT, R.S.O. 1914, ch. 59, SEC. 22 (1B).

An action for alienation of a wife's affections and loss of consortium may be brought in the County Court. Although the husband and wife are living together at the time the action is commenced, the action is competent but no damages for loss of consortium will be given when there is no evidence that the husband, in effect, had lost the affections of his wife or that he was deprived of her love, services and society. In such an action evidence of adultery is to be disregarded as the County Court has no jurisdiction under the County Courts Act, R.S.O. 1914, ch. 59, sec. 22 (1b), to entertain an action founded on adultery.

[*Bannister* v. *Thompson* (1913) 15 D.L.R. 733, 29 O.L.R. 562; (1914) 20 D.L.R. 512, 32 O.L.R. 34, distinguished as to the facts; *Lellis* v. *Lambert* (1897), 24 A.R. (Ont.) 653, referred to.]

Appeal by plaintiff from a County Court judgment dismissing an action, to recover damages for the alleged alienation by the defendant of the affections of the plaintiff's wife while the plaintiff was overseas on active service. Statement.

ONT.

S. C.

BALLARD v. MONEY.

Hodgins, J.A.

A. C. Heighington, for the appellant.

J. M. Godfrey, for the defendant.

The judgment of the Court was read by

HODGINS, J.A.:—Appeal from the judgment of His Honour Judge Widdifield, dated the 19th December, 1919, whereby the action tried before him was withdrawn from the jury and dismissed, on the ground that the County Court had no jurisdiction.

The statement of claim alleged that, during the appellant's absence overseas, the respondent, on different occasions, paid improper attentions to the appellant's wife, the result of which was that he had been deprived of the society and affection of his wife. The cause of action, therefore, was limited to alienation of affection, causing loss of consortium.

The appellant and his wife were married in October, 1911, and resided together until he went overseas on the 23rd March, 1916. He returned on the 8th June, 1919, and lived with his wife until the 6th October, 1919, when he turned her out. This action had been begun on the 20th August, 1919, some time before this occurred.

The evidence indicated that adultery had been committed on several occasions between the wife and the respondent during the husband's absence in France.

It appears that shortly after the husband's return, namely, on the 28th June, 1919, the wife confessed her misconduct. Notwithstanding this, the husband and wife remained together after his return in June, 1919, until October, 1919, in their own house, and were so living when the writ was issued.

It was argued for the respondent that this was in truth an action for criminal conversation, and, being such, the County Court had no jurisdiction. On the other hand, it was urged on behalf of the appellant that an action lay for the alienation of the wife's affections as alleged in the statement of claim, whereby he had been deprived of her society and affection, quite apart from any cause of action resting upon adultery, and notwithstanding the fact that they were living together when the writ was issued.

The next point has, I think, been settled for this Court by the case of *Bannister* v. *Thompson*, (1913), 15 D.L.R. 733, 29 O.L.R. 562, (1914), 20 D.L.R. 512, 32 O.L.R. 34. In that case there were two causes of action alleged: (1) enticing away and (2) alienating the

ONT.

S. C.

BALLARD v. MONEY.

Hodgins, J.A.

affections of the plaintiff's wife by the defendant. The jury found damages under both heads, and declined to find adultery. Middleton, J., who tried the action, held that the husband had the right to recover damages against the defendant for any misconduct which deprived him of the love, services, and society of his wife, commonly called consortium, notwithstanding the fact that they were still living together, and he directed judgment to be entered for the amount of damages found by the jury upon the second cause of action, as well as for those separately assessed as to enticement, which consisted of occasional absences more or less prolonged.

An appeal was taken to this Court, on the ground that no such action would lie where the wife was still living with the husband, and where the jury had not found adultery. This Court, however, upheld the award of damages for alienation which had resulted in the loss of the wife's affection, love, services, and society, but held that those separately assessed for enticement should, in the circumstances disclosed, be deemed to be covered by the amount awarded for the second cause of action.

This decision, that alienation resulting in loss of consortium gives a cause of action, irrespective of separation or enticement followed by harbouring, is contrary to what is said by Osler, J.A., in *Lellis* v. *Lambert*, (1897), 24 A.R. (Ont.) 653, and to the decisions in a number of American cases, in one of which, *Houghton* v. *Rice* (1899), 54 N.E. Repr. 843, the Supreme Judicial Court of Massachusetts, in appeal, adopted and followed that case. But it is in line with Mr. Bishop's view (Bishop's New Commentaries on Marriage, Divorce, and Separation, vol. 1, para. 1361), where he says:—

"One who by improper means alienates a wife's affections from her husband, though she neither leave him nor yield her person to the seducer, injures the husband in that to which he is entitled, brings unhappiness to the domestic hearth, renders her mere services less efficient and valuable, and inflicts on him a damage in the nature of slander, so that for the redress of his wrong an action is maintainable."

But, notwithstanding the fact that such an action will lie, where, as here, the wife was living with the husband when the action was begun, and continued to live with him until a couple of months before the trial, I think the case fails on the facts.

ONT.

S. C.

BALLARD v. MONEY.

Hodgins, J.A.

There is no evidence that the husband in effect lost the affections of his wife or that he was deprived of her love, services, and society. Indeed in her own evidence she speaks of him as if she was still as fond of him as before he went away, and there is not a suggestion that she did not perform her wifely duties while they lived together after his return. The only wrong which the husband suffered was caused by the adultery indicated in the evidence; and, when he finally turned her out, it was because he feared a recurrence of the wrong. It is quite probable that they did not live very happily together. She says that on one occasion he struck her, but he denies this. Apart from that, there is nothing to throw doubt upon the fact that their relations were the ordinary ones of husband and wife while they remained together. In the *Bannister* case, the wife, while living under her husband's roof, had entirely ceased to discharge any wifely function. She slept in her own room, locking the door. She refused to speak to her husband, and he was as fully deprived of her consortium as if she were living in a separate building. If the plaintiff in that case was entitled to succeed, it was because, while living with her husband, her conduct amounted to a complete loss of his wife's consortium, notwithstanding that they lived under the same roof. Here, while an action for the alienation of affections is competent though the husband and wife are living together, no damages for the loss of consortium, which is really the gist of the action, can properly be awarded upon the evidence adduced, and consequently the action was rightly withdrawn from the jury, though not upon the ground of want of jurisdiction. The evidence suggesting adultery was properly disregarded, as the Court was not competent to entertain an action founded upon it.

The appeal should be dismissed, but the conduct of the defendant warrants depriving him of the costs of appeal.

Appeal dismissed without costs.

B. C.

C. A.

GREER v. GODSON.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher, McPhillips and Eberts, JJ.A. April 6, 1920.

BROKERS (§ III B—35)—SALE OF SHIP—AUTHORITY TO BROKER TO SELL—NEGOTIATIONS WITH OTHER BROKERS—LONG DELAY—FURTHER NEGOTIATIONS BY PRINCIPAL DIRECT WITH ONE OF BROKERS—REQUEST TO SPECIAL BROKER TO LEND ASSISTANCE—COMMISSION.

An agent duly authorized to conduct negotiations for the sale of a ship, is entitled to his commission, when, even after a long delay, a

broker having heard of the ship being for sale through him, and opened negotiations with the principal direct, the principal requests his assistance to close the transaction, and such assistance is given, and shewn by the evidence to be of great value.

B. C.

C. A.

GREER v. GODSON.

APPEAL by defendant from a judgment of Clement, J., in an action for commission on the sale of a ship. Affirmed.

A. H. MacNeill, K.C., for appellant.

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

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The action is for commision on the sale of a ship: the contract between the parties is contained in a letter dated December 7, 1916, written by defendant to plaintiff in which defendant said:—

> In the event of you making a direct sale of this steamer at a price designated by us, we will pay you 5% of the net amount received. You will understand that we are not giving you the exclusive sale of this steamer, as we may receive offers direct and any such offers will be handled by us.

It was conceded by counsel that the price was afterwards designated as $250,000. The plaintiff employed as a sub-agent one F. R. Robertson, a Vancouver broker, who brought the fact that the ship was for sale to the attention of one Aldridge, a Seattle broker, who says that he "passed the matter up to" one Dorr, of Tacoma, a member of the American Mercantile Co., shipping and commision brokers. Dorr says that he interviewed one Ward, of the firm of Saunders, Ward & Co., Tacoma, ship and customs brokers, and passed on to him the information he, Dorr, had got from Aldridge.

Ward mentioned the matter to one Thorndyke, of the firm of Trenholme, Thorndyke & Co., Seattle, brokers, and afterwards gave him some particulars concerning the ship. Thorndyke went to Vancouver and entered into an arrangement directly with the defendant, which resulted in his obtaining a purchaser for the ship, namely, J. M. Scott, a member of the Scott Shipping Agency of Alabama. There was some criticism of Thorndyke's method of obtaining direct instructions from the defendant, but I am not concerned with the ethics of his conduct. The fact is he was the broker who directly brought seller and buyer together.

It will be noted that the agency was created in December and it was not until the following August that Thorndyke and the defendant came into touch with each other. The several brokers above mentioned had, in the meantime, been making

B. C.
C. A.
GREER
v.
GODSON.
Macdonald, C.J.A.

efforts to obtain a purchaser, but they were not as I think in any true sense of the word the agents of Godson, or even of Greer. Godson knew nothing about any of them except Robertson; the others in order to make profit for themselves had added $25,000 to the defendant's selling price with the intention of taking this sum for themselves or one of them, in case a sale should be effected through their endeavours. Aldridge, Dorr and Ward, and also Thorndyke, up to the time he met the defendant, were mere speculators offering another's property for sale at their own price or prices without defendant's knowledge or consent.

There is a clear distinction between this case and *Wilkinson* v. *Alston* (1879), 41 L.T. 394, 48 L.J. (Q.B.) 733, where Brett, L.J., pointed it out and declined to say what the result ought to be in a case like the present one. *Gibson* v. *Crick* (1862), 1 H. & C. 142, 6 L.T. 392, though slightly distinguishable in its facts, is a case more in point, and, I think, supports the conclusion at which I have arrived in this case.

I do not think that any of these several brokers, other than Robertson, even supposed himself to be agent for the defendant or that any one of them would have lifted a finger but as a broker in search on his own account of a ship for sale. The sale was, I think, not one which falls within the plaintiff's contract, even if his agency should be deemed to be a general and not a special one.

But it was argued before us that what took place between the plaintiff and defendant after the plaintiff had become aware of Thorndyke's negotiations with defendant, amounted either to a new agreement to pay a commision on that sale should it be consummated, or to a request by defendant to plaintiff to assist him in carrying the transaction to a successful conclusion which the plaintiff did under circumstances which entitled him to remuneration by way of *quantum meruit*. This submission is founded on the following evidence.

Defendant's negotiations with Thorndyke began on August 14, he did not conceal this fact from plaintiff, and although there is evidence that the plaintiff opposed negotiations with Thorndyke, yet in the end and after the plaintiff had made the claim that Thorndyke had been procured by his, the plaintiff's connections, he insisted that if a sale should be made through Thorndyke, he felt that he was entitled to a commission.

The parties met on August 27, and plaintiff's version of what then took place between them is as follows:—

He said to defendant, referring to Thorndyke and Trenholme; why those are the same people I spoke to you about as having been sent up by my people and I have a letter in my office in connection with it. He says defendant replied: That makes it easier for you and Thorndyke to talk together, or you might go down and see them, or you had better wire them. But he says that on further consideration defendant said: that is not necessary, we will let it rest in the meantime. He says defendant also said: You see I shew you everything. I want you to be in on this and there are the telegrams which have been exchanged in connection with it and I am keeping nothing from you, and I want to see this deal go through with you in it.

Defendant denies the above; he denies that there was any such conversation, but he does not deny that there was that meeting between himself and the plaintiff and this brings me to the next circumstance of importance.

For some time prior to the date of this meeting, both plaintiff and defendant had been endeavouring to obtain the consent of the Canadian Government to a transfer, in case of sale of the ship, to Japanese registry. This was in view of negotiations being carried on for the sale of the ship to Japanese interests, and the only thing which stood in the way of the sale was the lack of such consent. These negotiations were brought about by the plaintiff and had a sale been effected, he would have earned his commision. At said meeting defendant asked the plaintiff if he had heard from Mr. Clements, a member of the Canadian Parliament who was then in Ottawa, and who had been appealed to by the plaintiff to assist in obtaining the said consent. Defendant had on August 23, no doubt with the Scott sale in view, sent a telegram to the Deputy Minister of Marine at Ottawa, in the following terms:—

Would you grant transfer to United States or France? Have expended very large sum of money on ship. Your wire causing me financial difficulties. Quick wire will be appreciated.

In these circumstances then the defendant got the plaintiff to sign a telegram to his friend Mr. Clements, in the following words:—

August 27, 1917. See Godson's wire to Johnson (Deputy Minister of Marine) twenty-third. Did you receive my wire twenty-second? What progress made? Imperative for permission transfer to ally, no demand for this ship in local waters. Wire.

On the following day defendant received from the Deputy Minister this telegram:—

B. C.

C. A.

GREER v. GODSON.

Macdonald, C.J.A.

Your telegram August twenty-third if it will answer your purposes transfer to United States registry will be approved.

and on the same day plaintiff received from Mr. Clements a telegram in these words:—

Godson's request to dispose of ship sanctioned a minute ago. Godson can only thank you and my special efforts.

Now this assent could only have the effect of putting an end to plaintiff's negotiations with the Japanese and enabling those of Scott to be brought to a successful conclusion, and I think the natural inference is that the plaintiff would not have become a party to bringing that about except in reliance on defendant's assurance that plaintiff should be "in on it," which could mean only in the circumstances, that he should have his commission if that result were accomplished. The defendant's explanations of this phase of the case appear to me to be wanting in frankness, and I accept unhesitatingly the plaintiff's version of what occurred between them on that occasion. In other words, the fair inference from the evidence and circumstances to which I have referred is, that plaintiff was requested by the defendant to join him in carrying on the negotiations with Scott through Thorndyke to a successful conclusion, which meant the plaintiff's giving up any hope he had of consummating the Japanese sale. The sale to Scott could not be effected without the consent of the Government to the transfer of the ship to United States registry, and I think the defendant realized the value of the plaintiff's assistance to obtain that end, and held out to him, if not the express at least the implied promise that he should be remunerated for those services on the basis of his original employment. I think, also, the fair inference is that it was the plaintiff's influence which brought about the consent to the transfer of the ship, but this is not very material.

I think par. 10 of the plaintiff's statement of claim sufficiently pleads such cause of action.

In my opinion, therefore, plaintiff is entitled to judgment, for the reasons I have already stated, for the sum awarded him in the Court below.

The appeal should, therefore, be dismissed.

Martin, J.A.

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

Galliher, J.A.

GALLIHER, J.A.:—I do not think this judgment can be maintained on the grounds stated by the trial Judge, in his reasons for judgment.

I agree with the reasoning of the Chief Justice in that regard, I think *Gibson* v. *Crick*, 1 H. & C. 142, 6 L.T. 392, is in point.

On the other ground on which the Chief Justice has held plaintiff entitled to succeed, I am, though not absolutely free from doubt, concurring.

McPHILLIPS, J.A.:—The evidence is somewhat voluminous but it can be said to establish a general employment, a continuous employment to affect a sale of the ship, and the plaintiff's services were accepted, authorized and taken advantage of by the defendant (appellant) throughout a long course of negotiation with several possible purchasers, in fact were it not that difficulties of transfer of registry of the ship a sale would have been accomplished to Japanese interests for a sum of $275,000—all the work of the plaintiff.

It may be said that the facts of the present case to a considerable extent are similar to those in *Burchell* v. *Gowrie and Blockhouse Collieries*, [1910] A.C. 614. There the efforts of the agent extended over two years, here for a year or more, and the principals were approached by parties with whom the agent had been negotiating and a sale was made for a different consideration by the principals without the intervention of the agent, although advised against entering into the agreement of sale by the agent who apparently had reason to believe that he could have secured better terms. Here there is some evidence that the plaintiff rather discouraged at one time the defendant negotiating with Thorndyke, thinking it would seem that Thorndyke would not be able to produce a purchaser, yet the information that was given to Thorndyke which brought him into contact with the defendant arose from the active work of the plaintiff and others that he had associated with him and in the end the purchaser, Scott, was obtained and the sale made by the defendant, the plaintiff's services being retained and accepted up to the culmination of the sale. I shall, with some detail, refer later to some of the salient facts upon which it may well be said that the plaintiff was the effective cause of the sale, which is so strenuously denied by the defendant. Lord Atkinson in the *Burchell* case, [1910] A.C., at page 624, said:—

It was admitted that in the words of Erle, C.J., in *Green* v. *Bartlett* (1863), 14 C.B. (N.S.) 681, 8 L.T. 503, "if the relation of buyer and seller is really

B. C.

C. A.

GREER v. GODSON.

McPhillips, J.A.

brought about by the act of the agent, he is entitled to commission although the actual sale has not been effected by him." Or in the words of the later authorities the plaintiff must shew that some act of his was the *causa causans* of the sale. (*Tribe* v. *Taylor* (1876), 1 C.P.D. 505, 510), or was the efficient cause of the sale.

and Lord Atkinson, at page 626, further stated that:—

> The referee found that the "power of sale was a continuing power of sale." By that presumably he meant that the agent's employment was "a general employment," in the sense in which Lord Watson in his judgment in *Toulmin* v. *Millar* (1887), 12 App. Cas. 746, 58 L.T. 96, uses those words. This means, however, that Burchell's contract was that should the mine be eventually sold to a purchaser introduced by him, he (Burchall) would be entitled to commission at the stipulated rate, although the price paid should be less than, or different from, the price named to him as a limit. The secret sale deprived him of the benefit of that contract. He lost his chance of earning this commission.

It is clear to me when all the facts are analyzed and sifted, that it was the plaintiff's direct agency that brought the purchaser to the owner, and it is not, of necessity, to earn the commission that the sale should be the immediate result of that agency. (See *Bray* v. *Chandler* (1856), 18 C.B. 718, 139 E.R. 1553; *Jeffrey* v. *Crawford* (1891), 7 T.L.R. 618; *Bayley* v. *Chadwick* (1878), 39 L.T. 429; *Beable* v. *Dickerson* (1885), 1 T.L.R. 654; *Walker et al.* v. *Fraser's Trustees* (1909-10), Sess. Cas. 222.)

That the defendant in the present case acquired benefit from the services of the plaintiff is a point that cannot be open to any variation of opinion, the evidence is all the one way, the defendant accepted the active intervention of the plaintiff and his valuable services and influence throughout the long course of dealing, having in view throughout the whole time the sale of the ship, the plaintiff's energies, time and money being directed with the defendant's knowledge and continued co-operation to the end that a sale be made of the ship.

Were it necessary to rely upon an implied contract to pay the plaintiff remuneration the facts amply support liability upon the defendant to pay a commission to the plaintiff. (See *Bryant* v. *Flight* (1839), 5 M. & W. 114, 151 E.R. 49; *Mason* v. *Baillie* (1855), 2 Macq. 80; *Turner* v. *Reeve* (1901), 17 T.L.R. 592.)

It has been said that the real question to be answered when presented to a Judge, is: "Did the sale really and substantially proceed from the agent's acts?" (See *Wilkinson* v. *Martin* (1837), 8 C. & P. 1.) Upon the facts of the present case—there can be

but one view in my opinion—and that view is overwhelmingly that the effective cause of the sale was the energy, zeal and assiduity of the plaintiff which resulted in producing the purchaser, smoothed all difficulties and made it possible to effectuate a sale of the ship. There was no revocation of the employment previous to sale and remuneration may even be payable where that has taken place if the transactions are in their effect part of the transaction in which the agent was employed. (See *Gibson* v. *Crick*, 1 H. & C. 142, 6 L.T. 392; *Curtis* v. *Nixon* (1871), 24 L.T. 706; *Mansell* v. *Clements* (1874), L.R. 9 C.P. 139; *Burton* v. *Hughes* (1885), 1 T.L.R. 207; *Barnett* v. *Isaacson* (1888), 4 T.L.R. 645; *Robey* v. *Arnold* (1897), 14 T.L.R. 39; *Prentice* v. *Merrick* (1917), 38 D.L.R. 388, 391, 395, 24 B.C.R. 432-437 to 441.)

It is attempted to defeat the plaintiff's claim by pressing the point that owing to the time the negotiations for sale were on sub-agents of the plaintiff presumed unauthorizedly to increase the sale price, the excess price to be taken by the agents—there is no evidence that connects the plaintiff with any such intention or that it met with his approval—there was an increased price stated over and above what the defendant stated he would sell for but this was assented to by the defendant—and in any case no breach of duty did take place even by the sub-agents of the plaintiff, and certainly nothing took place that could be said to be imputable to the plaintiff which would terminate the agency or affect the right of the plaintiff to sue for and recover the commission for the services rendered. One circumstance to be remembered is this—that when the negotiations were pending, and the defendant was dealing with Thorndyke, Trenholme & Co., the plaintiff made it clear to the defendant that that firm was brought into the matter through his, the plaintiff's, connections and later and before the sale is made to Scott, the defendant utilizes the services of the plaintiff to get the Government of Canada's assent to the transfer of the ship to United States registry, an essential matter, as without this assent no sale to Scott was possible. The sale to the Japanese interests fell through only because of the non-assent of the Government of Canada to the transfer of the ship to Japanese registry. That the plaintiff was very instrumental in obtaining this assent is well demonstrated in the evidence. The sale to Scott was on September 10, 1917,

B. C.
C. A.
GREER
v.
GODSON.
McPhillips, J.A.

and on August 27, 1917, the plaintiff wired to Mr. Clements, M.P., at Ottawa, in the following terms:—

See Godson's wire to Johnson twenty-third did you receive my wire twenty-second? What progress made? Imperative to have permission to transfer to an ally. No demand for this ship in local waters. Wire.

And on the same day the defendant was in receipt of a wire from Thorndyke, Trenholme & Co. making an offer from an American firm in Mobile, Alabama, of $250,000 for the ship and, of course, assent to transfer to United States registry was an essentiality. Now the plaintiff's wire to the Deputy Minister of Marine of date August 23, 1917, referred to in the plaintiff's wire, reads as follows:—

Referring your wire twenty-second, collector here in early spring advised that Department would grant transfer to an ally providing route was designated and owners named. For these particulars see my letter July 20 to O. Stanton. What are reasons for refusal? Would you grant transfer to United States or France? Have expended very large sum of money on ship. Your wire causing me financial difficulties. Quick wire will be appreciated.

Under date August 28, 1917, the Deputy Minister wired the defendant as follows:—

Your telegram twenty-third. If it will answer your purpose transfer to United States Registry will be approved.

To indicate the extent of the plaintiff's services in obtaining this assent, it is only necessary to read the telegram of Mr. H. S. Clements, M.P., to the plaintiff of the same date, which reads:—

Godson's request to dispose of ship sanctioned a minute ago. Godson can only thank you and my special efforts.

It is also significant that upon that same date the defendant gets the offer of $260,000 which in the end is accepted. At this time and when the telegram of August 27, 1917, above set out, was sent, the defendant stated to the plaintiff who he was dealing with, and at pp. 28 and 29 of the appeal book, we have the plaintiff saying:—

[The learned Judge then quoted extensively from the appeal book pages 28 and 29 and continued.]

Certainly in view of the defendant's statement to the plaintiff it is difficult to see how it is possible for the defendant to now dispute liability to the plaintiff for commission and services rendered—"I want you to be in this"—can this mean other than that the plaintiff was continued in his employment and his services were being directly used to effectuate the actual sale made? (See *Wells* v. *Petty* (1897), 5 B.C.R. 353.)

B. C.

C. A.

GREER v. GODSON.

To further indicate the situation of matters and when it was that the defendant changed front as to the plaintiff's right to a commission on the sale, I would refer to that part of the plaintiff's evidence reading as follows:—(The learned Judge then quoted the evidence and continued.)

It is observable from the evidence, that the defendant continued the plaintiff in all the negotiations relative to the sale which was ultimately made to Scott as shewn by the agreement of sale of date September 10, 1917; the period of time that the negotiations for sale took was some nine months. I do not think it necessary to, in detail, further scan or canvass the evidence—it is evident that the employment was a general one and the plaintiff was always associated with the efforts to effect a sale of the ship, and his employment by the defendant was a continuous one—extending up to the day of the sale, the sale being made—it cannot, in my opinion, be said that the plaintiff was not, upon the facts, the effective cause of the sale—and the defendant has benefitted by and accepted the services of the plaintiff, all of which establishes the plaintiff's right to the commission, and remuneration for services which the trial Judge has allowed, and it has not been established that the trial Judge arrived at a wrong conclusion. On the contrary, I am of the opinion that he arrived at the right conclusion, and the judgment should be affirmed.

McPhillips, J.A.

I would dismiss the appeal.

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

Eberts, J.A.

Appeal dismissed.

LEWIS v. BOUTILIER.

CAN.

S. C.

Supreme Court of Canada, Davies, C.J., Idington, Anglin, Brodeur and Mignault, JJ. March 17, 1919.

1. JURY (§ V—90)—TRIAL—VERDICT—REASONABLENESS—SETTING ASIDE.
An appellate Court will not set aside a verdict of a jury in an action for damages for negligently causing the death of a boy by putting him to work in a dangerous place if the jury viewing all the evidence could reasonably find the verdict given.

2. MASTER AND SERVANT (§ II B—143)—PRESIDENT OF COMPANY—REGARDED AS OWNER—HIRING OF BOY—DANGEROUS WORK—ACCIDENT—DEATH—PERSONAL LIABILITY.
The president of a company whose activities are such that he is regarded as the owner of the business, and who has full authority to direct changes in the factory or machinery necessary to safeguard the employees is personally liable in damages for the death of a young boy who he has personally hired and put to work in a dangerous place, thereby causing his death.

CAN.

S. C.

LEWIS v. BOUTILIER.

APPEAL by defendant from the decision of the Supreme Court of Nova Scotia, affirming by an equal division the trial judgment in an action for damages for negligently putting a boy to work in a dangerous place in a sawmill, where he was killed. Affirmed.

V. J. Paton, K.C., and *C. J. Burchell*, K.C. for the appellant.

J. J. Power, K.C., for the respondent.

Davies, C.J.

DAVIES, C.J.:—This is an appeal from the judgment of the Supreme Court of Nova Scotia affirming by an equal division of the Judges the judgment directed by the trial Judge to be entered for the plaintiff on the findings of the jury with a slight variation.

I agree so fully with the reasons for his judgment stated by Harris, C.J., allowing the appeal and dismissing the action, substantially concurred in by Longley, J., that I see no good purpose in repeating these reasons in this Court.

The case turned largely upon the question whether the defendant had been guilty of negligence in putting a lad under 14 years of age to work at a certain place in a sawmill. The trial Judge charged the jury properly and specifically upon this vital point and instructed them, if they found the defendant guilty of negligence, they "would have to state what kind of negligence" they found which he told them "had got to be the real cause of the accident, the efficient cause."

The jury found in answer to the question "Was there negligence in placing the boy at work, and if so what was such negligence?" A. "Yes, there was not the proper equipment to protect the boy, no seat across the carrier, no guards on the side to protect against falling into the carrier."

As a fact, the principal controversy at the trial was whether there was a platform alongside of the chain carrier on which the boy was instructed to stand and which platform was on a level with the bottom of the carrier. The jury made no specific finding relating to this platform and it seemed to be conceded on the argument that if the boy had remained on this platform he would have been perfectly safe. The only conceivable meaning to the jury's finding that I could make was that the boy had, instead of remaining on the platform, climbed on the top of the carrier and that there should have been to meet such a contingency as the boy's disobedience of his orders, "a seat across the carrier and guards on the side to protect against falling into the carrier."

The finding was an absurd one unless the jury had ventured to find (in the face of the evidence), which they evidently shrank from doing, that there was no platform there at all. The absence of a finding that there was no platform alongside of the carrier or chute where the boy was put to work is, in my opinion, fatal to the plaintiff's claim.

This Court has decided in the case of *Andreas* v. *C. P. R. Co.* (1905), 37 Can. S.C.R. 1, and has frequently followed that decision since, that the finding by a jury of specific acts of negligence excludes other acts of negligence than those found.

Under all the circumstaces, I desire to be understood as agreeing fully with Harris, C.J., and would allow this appeal and dismiss the action.

IDINGTON, J.:—The appellant who, in apparent authority over a boy of tender years, having set him to work in a dangerous position which he (the appellant) knew or ought to have known was not properly safeguarded, seeks relief from a verdict of a jury and judgment of the trial Judge founded upon the consequences of such act of appellant and maintained by an equal division in the Court of Appeal. Idington, J.

The evidence supported a case of misfeasance which could not properly be withdrawn from a jury.

The record does not disclose exactly what transpired in relation either to the form of the questions submitted or the proceedings had upon the return of the verdict.

If the answer given relative to the safeguarding of the position in which the unfortunate lad was placed by appellant to work, did not meet the actual issue fought out, then it was the duty of the counsel for appellant to have pointed that out.

I do not think counsel can take chances of misapprehension in such a case from or by reason of an ambiguous answer, and none the less so when the trial Judge evidently assumed it answered what he had desired to submit to have answered.

The trial Judge was in a much better position than we are to correctly appreciate the import of the question and answer.

The pleadings, as framed, contemplated a consideration of any want of equipment being the cause of the accident.

The jury clearly understood what they were about, and, I respectfully submit, perhaps apprehended the real issue better than anyone else except the Judge at the trial.

CAN.

S. C.

LEWIS v. BOUTILIER.

Idington, J.

This was the second trial and the utmost relief in my view of the law applicable to the case would be to grant a third trial. Doing so, it seems to me, would be making a mockery of the administration of justice.

The action, if all the facts had been known, probably would have been brought against the company, but might have been against both it and the appellant.

The failure to do so does not exonerate the appellant, who improperly took a part in the doing of the wrong complained of and on the findings of the jury might have been sued jointly with the corporate master.

Mr. Paton, who argued the case very fairly and fully for the appellant, submitted that he was not so far master of the situation that he could have directed the creation of the necessary safeguards, therefore he was in no way liable.

I dissent from the correctness of such a submission which seems to have been the outcome of the consideration of the usual every-day case against the manufacturing employer alone.

Indeed Mr. Paton seemed to suggest that no case could be found holding the superintending fellow servant liable. He may be right in fact but I have not the time to search for such a case as the principle of law applicable seems abundantly clear.

I would refer the curious to Beven on Negligence (3rd ed.), vol. 1, book 4, ch. 5, page 685, under the caption of "Liability of Servants" and especially the authorities cited in the foot-note to page 686.

The common sense and characteristic answer of Bramwell, L.J., to the Committee of the House of Commons considering an employer's liability is worth quoting.

It is as follows (p. 686):—

> A workman would undoubtedly be able to maintain an action against the fellow workman who had done the mischief if he were worth suing.

The peculiar offence of appellant is contained in his knowledge of the sort of person he was dealing with and of the actual situation. If he honestly could not have remedied that situation (which I gravely doubt if he tried) his duty was to refrain from putting a child who could not, and evidently did not, apprehend the risk he was running, in such a position of improper danger.

The sooner presidents of companies realize that they have duties, the better for themselves and their fellow men.

CAN.

S. C.

LEWIS v. BOUTILIER.

Idington, J.

I agree with the reasons which Mellish, J., points out, in a most convincing way, for supposing that, though in a technical sense, under the Workmen's Compensation Act, the relation of master and servant may have existed between the corporate company and deceased, yet the original actual hiring was by the firm and not by the corporate body.

In my view, however, all that had nothing, necessarily, to do with the determination of appellant's liability. And if a jury see fit to disbelieve three men as against one, that is their province, and their duty, if so convinced as to relative credibility, to expressly act thereon; and their finding must prevail.

I doubt, however, if that necessarily must have been implied by their finding in this case.

There are some repulsive features in the case, however, which seem to be of the appellant's own creation which might, not improperly, tend in the minds of the jury to discredit him.

I think the appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—I have reached the conclusion, not, I must say, without doubt, that the judgment of the trial Court based on the verdict of the jury, upheld on an equal division of opinion in the Supreme Court of Nova Scotia *en banc*, cannot be disturbed. I am, by no means, satisfied that this result does actual justice; yet I find it impossible to say that a jury viewing all the evidence reasonably could not find the verdict rendered, and I, therefore, may not accede to setting it aside merely because I should myself have reached a different conclusion. *Brisbane* v. *Martin*, [1894] A.C., 249; *Metropolitan R. Co.* v. *Wright* (1886), 11 App. Cas. 152. I agree with Mellish, J., that if a view of the evidence consistent with the findings be reasonably open it should be taken by an appellate Court.

The jury clearly believed the boy, Robert Boutilier, corroborated to some extent by his father and his brother Peter, as against the defendant and one or two of his witnesses with whom they were in conflict. That is put beyond doubt by the explicit finding that the boy who was killed "was instructed as to his duties that morning" by Geo. E. M. Lewis, the defendant. The finding that there was negligence in failing to provide a "seat across the carrier (and) guards on the side to protect against falling into the carrier" make it reasonably certain that the jury

CAN.
S. C.
LEWIS
v.
BOUTILIER.
Anglin, J.

also accepted the statements of Robert, Herbert and Peter Boutilier that the deceased boy while engaged at the work at which the defendant placed him would be standing astride the carrier and chute and not on a side platform as suggested by the defence. The jury may have thought, as sworn to by Herbert, Robert and Stanley Boutilier, that there was no platform provided, or that, if there was, the boy was nevertheless obliged or expected to work in the position described by his father and brothers. In either view of the evidence I am unable to say that it was wholly unreasonable to find that the failure to supply the seat and guards mentioned by the jury amounted to negligence.

The finding that this omission was the cause of the accident presents a little more difficulty in view of the evidence of McDonald that twice on the day of the accident he found the deceased boy stealing rides on the carrier. But the jury either discredited this evidence, or (perhaps more probably) thought that McDonald's severe rebuke and warning on the second occasion of which he speaks had deterred the boy from again attempting anything of the kind. If he was put to work, as the evidence of the Boutiliers would indicate, standing astride the chute, losing his balance, falling into the carrier and becoming entangled in it is not such an improbable outcome that the jury's inference that it actually happened is unreasonable. If it did, the further inference that the safeguards indicated would probably have prevented it is not unwarranted. The case is undoubtedly very close to the line, but it seems to me to fall within the principle on which such a case as *McArthur* v. *Dominion Cartridge Co.*, [1905] A.C. 72, and *Craig* v. *Glasgow Corporation* (1919), 35 T.L.R. 214, were decided, rather than within that of *Wakelin* v. *London etc. R. Co.* (1886), 12 App. Cas. 41, relied on by the appellant—within *Toronto Ry.* v. *Fleming* (1913), 12 D.L.R. 249, 47 Can. S.C.R. 612, rather than within *Toronto Power Co.* v. *Raynor* (1915), 25 D.L.R. 340, 51 Can. S.C.R. 490, 15 Can. Ry. Cas. 386. I therefore find myself obliged, reluctantly, I confess, to maintain the impeached findings of the jury.

The defendant Lewis was the president of the company which employed the boy who was killed. According to the testimony of the Boutiliers he brought them all to the factory to work. His activities about it were such that the Boutiliers regarded him

CAN.

S. C.

LEWIS v. BOUTILIER.

Anglin, J.

as the owner. They would appear to have found out that he was not only in the course of the first trial. Herbert Boutilier states that the men in the factory were usually employed by the defendant Lewis personally. Robert Boutilier described him as "boss over the factory." Peter Boutilier says that Anderson was manager of the mill when Mr. Lewis was not around. He adds:—"He used to be around all the time and have more to say than Mr. Anderson when he was there."

The jury may well have inferred from this evidence that the defendant had full authority to direct any changes in the factory or machinery necessary to safeguard the employees. I cannot see that the fact that the unfortunate boy was employed by the Lewis Hardwood Co., Ltd., can enable the defendant to escape liability for having, as the jury found, himself placed Frank Boutilier at work under conditions negligently dangerous. Apart from the fact that according to the Boutiliers' evidence he probably had no small share in the direct responsibility for maintaining those conditions, the principle of the law of contract embodied in the phrase "*respondeat superior*" does not avail in the law of tort to excuse a wrong-doer whose act has occasioned or contributed to the injury of another. The doctrine of *Priestly* v. *Fowler* (1837), 3 M. & W. 1, if applicable at all where the person charged with negligence resulting in injury to an employee is the president and a director of the employing company, has nothing to do with the liability of fellow servants *inter se*. *Lees* v. *Dunkerly Bros.*, [1911] A.C. 5; *Greenberg* v. *Whitcomb Lumber Co.* (1895), 28 L.R.A. 439; *Campbell* v. *Portland Sugar Co.* (1873), 62 Me. 552 at 566. See, too, cases collected in 20 Hals. 276-7.

I would dismiss the appeal.

Brodeur J.

BRODEUR, J.:—This is an appeal by Lewis, who was condemned by the Supreme Court of Nova Scotia *en banc* to pay to the respondent $606.75 for an accident in which her son was killed. It is claimed by the appellant that the verdict of the jury, which found him guilty of negligence, was not substantiated by the evidence and that being president of the company for which the young Boutilier worked he was not personally liable.

Boutilier was a young boy of less than 14 years old and was employed contrary to the provisions of the Nova Scotia Factory Act, 1 Ed. VII. 1901, ch. 1. On the day of the accident, the boy

CAN.

S. C.

LEWIS v. BOUTILIER.

Brodeur J.

was ordered from the place where he was usually working to do what is, I think, unmistakably a dangerous work. The boilers which ran the engines in the manufacture were fed from shavings and sawdust. These were carried to the boilers by carrier chains. The apparatus which was used for that purpose on the day of the accident became out of order and the managers of the factory decided to use another carrier which, not being fit for carrying out automatically the refuse, necessitated the employment of a person to stand or squat across a trough in which the endless chain passed and shove with a stick the shavings and sawdust through a hole in the trough.

There is evidence to shew that this young boy, Boutilier, was selected by the appellant to do that work. That boy slipped or became caught in the chain and was pulled into a cogwheel and was killed.

The main issue at the trial was as to whether a platform should or should not have been provided for doing that work.

One of the questions submitted to the jury read as follows:—"Was there negligence in so placing the said boy at work; and if so, what was such negligence?"

In charging the jury on that question, Drysdale, J., said:—

The defendants say it was fitted with a platform, an easy place to work, and the boy was taken there and instructed. The other side say there was no platform and that it was a dangerous place. If you believe the boy's story you might say there was negligence in putting him there to work without a proper place to stand on. Then defendants make a reasonable story as to what was there for the boy to work from. It is for you. At all events, if you find negligence, you will have to state what negligence you find. The negligence has got to be the real cause of the accident, the efficient cause.

The answer of the jury to that question was the following:—"Yes, there was not the proper equipment to protect the boy, no seat across the carrier, no guards on the side to protect against falling into the carrier."

The appellant now contends that the finding of the jury means simply that the negligence consisted in not having a seat across the carrier and no guards on the side; and that those two acts of negligence are included in the first part of the answer where the lack of equipment is disclosed.

In view of the charge of the jury and of the issue at the trial, it seems to me that the finding of the jury properly construed means that they have believed the story of the plaintiff's witness

in preference to the defendant's witnesses. The latter claimed there was a proper equipment by means of a platform. That contention was disputed by the plaintiff; and the jury found that there was not a proper equipment and that there were also neither seat nor guards. They evidently believed the boy's story, as they were charged by the Judge, and found that there was negligence on defendant's part.

That was a finding confirmed by the Court of Appeal and I would not be disposed to reverse that finding of negligence.

It was contended by the appellant that he was not the owner of that factory but simply the president of the company who operated it.

Lewis, the appellant, seems to be connected with many companies. In his evidence he disclosed the fact that he was one of the partners of J. Lewis & Co. when it was an ordinary partnership; that he became thereof the president when it was incorporated; that he is also president of the Glendover Ship Co., the Lewiston Shipping Co., the Lewis Hardwood Co., and connected also with the Hat and Cap Manufacturing Co. He is then related with different commercial activities and it is somewhat hard for the public to know with which company they contract when negotiating with him.

In this case, a letter was written by the firm of J. Lewis & Co. asking the Boutilier family to leave Halifax and go and work at the factory where the accident happened. However, it is contended now by Lewis, the appellant, that the factory was run by the Lewis Hardwood Co. However, accounts were rendered by the J. Lewis Co. for goods sold to the Boutilier family and the wages of the family were credited on those bills.

It was found by the plaintiff to be difficult to know whom to sue. Then she directed her action against George M. Lewis, who had himself hired the boy and put him at work in the dangerous place.

When he filed his plea, he was cautious enough not to formally disclose the fact that the factory was run by one of his numerous companies; but he denied in general terms his personal liability. It is only at the trial that he disclosed the whole truth. Was it because the Statute of Limitations could then be invoked against any claims directed against the company? R.S.N.S. 1900, ch. 178, sec. 12.

CAN.

S. C.

LEWIS v. BOUTILIER.

Brodeur J.

Mignault, J.

It does not matter very much what reasons induced him to state all the facts in connection with his companies; for the jury found that the boy had been put to work and instructed by the appellant himself.

The judgment *a quo* declaring that he was liable for the accident should be confirmed with costs.

MIGNAULT, J.:—In this case, while I do not feel entirely free from doubt, I do not think the verdict of the jury should be disturbed.

The action was taken against Mr. George Lewis personally, the plaintiff alleging that her son, Frank, aged less than 14 years, had lost his life through the negligence of the defendant by whom he was employed at a factory owned by him at Lewiston, N.S. The jury found that the deceased was employed by the Lewis Hardware Co., Limited, but that the defendant, Mr. Lewis, who was the president of this company, had put him to work at the carrier on the morning of the accident and had instructed him as to his duties. They found that there was negligence in so placing the boy at work; that this negligence was that "there was not the proper equipment to protect the boy, no seat across the carrier, no guards on the side to protect against falling into the carrier;" and that this negligence was the efficient cause of the accident.

There was evidence to support this finding. The brothers of the deceased testified that they had worked on this carrier; that they had stood or sat astride the carrier, one foot on each side, and Robert Boutilier swore that he was working there and in that manner on the morning of the accident, and that Mr. George Lewis told him to come down and sent his brother, the deceased, to work in his place. If the jury believed these witnesses, and this was a matter for him to consider, it was entirely consistent with this evidence for them to find that there was negligence in not providing a seat across the carrier and guards on each side to protect against falling into the carrier.

I think that this verdict was one which the jury viewing the whole evidence could reasonably find. There can be no question that the employment of this boy under fourteen was illegal under the circumstances.

I felt some hesitation in view of the fact that the action was taken against Mr. George Lewis personally as having employed

CAN.

S. C.

LEWIS v. BOUTILIER.

Mignault, J.

the boy, and that the jury had found that he was employed by the Lewis Hardware Co., Limited. But I cannot but think that even granting the employment of the boy by the company, an action would lie against Mr. Lewis if he personally put the boy at a dangerous work without proper safeguards to protect him from mishap. The jury having found that Mr. Lewis did put the boy at this dangerous work, and they have also found that proper safeguards were not provided. Under these circumstances, liability was incurred, in my opinion, by Mr. Lewis, the president of the company, even although the boy was employed by the company.

I would dismiss the appeal with costs.

Appeal dismissed.

SASK.

C. A.

OVEROCKER v. OVEROCKER.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, J.A., and Bigelow, J. May 5, 1920.

DIVORCE AND SEPARATION (§ VIII A—81)—SEPARATION AGREEMENT—REMOVAL OF GRAIN BY WIFE—MOLESTATION—RECOVERY OF MONEY DUE UNDER AGREEMENT.

The removal of grain belonging to the husband, by the wife, and putting it in a stack on the same farm, does not constitute a molestation of the husband, contrary to the terms of a separation agreement whereby the parties agreed not to molest, annoy or interfere with each other in any manner.

Statement.

APPEAL by defendant from the trial judgment, in an action by a wife to recover money due under a separation agreement and which the defendant had not paid because he claimed that the wife had molested him contrary to the terms of the separation agreement. Affirmed.

P. G. Hodges, for appellant; *D. Buckles*, K.C., for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S., concurred with LAMONT, J.A.

Lamont, J. A.

LAMONT, J.A.:—For some time prior to December 5, 1916, unhappy differences existed between the plaintiff and her husband, the defendant. The land upon which the parties were living was owned by the plaintiff, but the defendant had put in a crop of oats thereon. Some time before harvest the defendant had bought his wife's interest in the oats for $150. When the oats were cut, he removed some of them, in sheaf, to feed cattle which he had elsewhere. The defendant at this time was running the Gordon Ironside ranch and was only home occasionally. About

SASK.

C. A.

OVEROCKER v. OVEROCKER.

Lamont, J. A.

this time the relations between the parties appear to have become exceedingly strained. On coming one day about December 1 for a load of oats with his hired man, the defendant found some of the stooks on fire and blamed his wife for setting fire to them. She ordered him off the land, and backed up her order by producing a gun. For this the defendant laid a charge of assault against her. On December 5, 1916, the parties came together, and through the intervention of some friends agreed to settle their differences. A separation agreement was drawn up and signed, the principal terms of which were: that the parties agreed to live absolutely separate from each other, and that neither party should thereafter take proceedings against the other for restitution of conjugal rights, or molest, annoy or interfere with the other in any manner. The defendant agreed to pay to the plaintiff during their joint lives the sum of $135 every three months for her maintenance and support, so long as she did not molest, trouble, abuse or slander him, his friends, relatives or business associates. He also agreed to withdraw the charge of assault, and she agreed to retract all derogatory, unkind or slanderous remarks hitherto made concerning certain persons therein mentioned.

On the evening of December 5, after signing the above agreement, the plaintiff returned to her home, where she remained until the following morning, when she left and went to Swift Current. That same morning, but after his wife had left the place, the defendant went there and found one Penner hauling the oat sheaves from the field and putting them in a stack, near the stable but on the same farm. The defendant says Penner told him that he was stacking the oats under instructions from the plaintiff, but he admits that Penner also said, "If you say to quit, I will." To this the defendant says he replied, "I have nothing to do with it. I am not going to tell you to stop or do anything." That same day the defendant went to a Mr. Massingill and instructed him to go to Swift Current and inform his wife that she had broken her agreement and had molested him by stacking the oats, and that, as a consequence thereof, he would not live up to the agreement on his part. Massingill as the defendant's agent delivered the message to the plaintiff and told her that the defendant would not now pay as in the contract he had agreed to do.

Massingill testified that the plaintiff "admitted she did take the oats, and wanted to know if that would break the contract." The defendant admitted that at the time he sent Massingill to inform his wife that the contract was at an end, his only reason for so doing was that the plaintiff or someone else had stacked the oats.

A large amount of evidence was put in at the trial for the purpose of establishing that the plaintiff had not gone to numerous persons concerning whom she was alleged to have made certain unflattering remarks and expressly retracted what she had said. This evidence in my opinion had no bearing upon the case. The signing of the agreement was a sufficient retraction on part of the plaintiff, unless her husband or someone referred to in the agreement had gone to her and requested her to retract some specific statement which she had made. Nothing of the kind happened here. The first time the plaintiff's husband talked to her after the signing of the agreement, she retracted certain things which she had said against him. Neither he nor anyone else, so far as the evidence shews, ever asked her to retract a single utterance.

After the morning on which the defendant saw Penner stacking the oats, he did not go near the place again, and all we know concerning the fate of the oats stacked is, that a man named Nubear some time later, apparently in the following spring, hauled the oats away. The defendant having refused to make any payments under the agreement, the plaintiff brought this action.

The only question material is, did the removing of oat sheaves from the field and putting them in a stack constitute a molestation of the defendant within the meaning of the agreement of December 5? The trial Judge held that it did not, and I entirely agree with his conclusion. How could the stacking of the oats be a molestation of the defendant's property, or be in any way prejudicial to his rights? Neither Penner nor the plaintiff was converting the property to his or her own use. It was still upon the farm, and Penner was willing to leave the oats in the field if the defendant so wished. It was just as convenient, in fact more convenient, to take the oats from the stack than from the field. How, then, was the defendant molested? If the property in question had

SASK.

C. A.

OVEROCKER v. OVEROCKER.

Lamont, J. A.

been a wagon in the plaintiff's yard, and she had moved it to another part of the yard, could it be said that she was molesting the defendant thereby? When he went to the farm the morning after the agreement was signed, he could have taken away every sheaf of his oats, and that without any extra trouble or inconvenience by reason of the same having been brought from the field to the stable.

Great stress was laid upon the admission of the plaintiff to Massingill that she had taken the oats. But what did she mean by that? She did not mean that she had converted the oats to her own use, because the statement was made within 3 days after the signing of the agreement and the oats were then all on the farm, and Penner, who was evidently in occupation, was willing that the defendant should take them. All she meant by that statement, all she could possibly have meant, was, that she took them out of the field and put them in the stack. Why this was done, the evidence does not shew, nor does it shew that the plaintiff had anything to do with the oats afterwards. Even had she sold them to Nubear, she might still have been justified in doing so on the ground of preserving the property, but with that we are not here concerned.

Once the defendant admitted, or it was established, that he could have had all his oats on the morning he saw Penner stacking, and that without any greater inconvenience than he would have experienced in taking them from the field; his refusal to pay was without justification.

The appeal should be dismissed with costs.

Bigelow, J.

BIGELOW, J.:—The day after the separation agreement was made the defendant went to the plaintiff's land to get his oats and found a man named Penner interfering with them by hauling them off the plaintiff's land and stacking them. It is suggested that they were better stacked, but, it seems to me, that was for the defendant to say. They were his property and he resented any interference. Penner told the defendant he was doing this on the instructions of the plaintiff. That, of course, is hearsay evidence and should not have been admitted. Penner himself was not called as a witness. I would not attach any importance to this evidence except for the other evidence in the case. It does not appear from this whether Penner's instructions had been

given before the separation agreement or not. The defendant was much annoyed and told Penner that he would not have anything further to do with it and sent an agent to the plaintiff to inform her that as she had molested him by taking the oats he would not carry out the separation agreement. When the agent so informed her she admitted that she had taken the oats. Considering their previous trouble over the oats it seems to me that this act of the plaintiff's could only have been done with the intention of annoying and molesting the defendant.

The agreement contains a provision to pay the separation allowance "so long as the party of the second part (the plaintiff) does not molest, trouble, abuse or slander the party of the first part (the defendant)." Molestation is defined in *Fearon* v. *Earl of Aylesford* (1884), 14 Q.B.D. 792, 54 L.T. (Q.B.) 33: see Brett, M.R., at 801:—

> What kind of act must be done in order to constitute a molestation? I am of opinion that the act done by the wife or by her authority must be an act which is done with intent to annoy and does in fact annoy.

See also Cotton, L.J., at 806:—

> In my opinion the first branch of the definition given by the Master of the Rolls really involves the whole, namely, that in order to hold there has been molestation within the words of the covenant, there must be an act done by Lady Aylesford with the purpose and intent to annoy and injure, and of course when a person does an act the natural tendency of which is to annoy and injure, *primâ facie* she must be supposed to have that intention.

I would allow the appeal.

Appeal dismissed.

REX v. RITCHIE, EX PARTE BRODERICK.

N. B.
S. C.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., and White and Grimmer, JJ. February 20, 1920.

CERTIORARI (§ I A—9)—INTOXICATING LIQUOR—CONVICTION—PUNISHMENT GREATER THAN ALLOWED BY ACT—AUTHORITY OF APPELLATE COURT TO AMEND.

Sections 125 and 126 of the Intoxicating Liquor Act, N.B., 6 Geo. V. 1916, ch. 20, do not give an appellate Court authority to amend a conviction where the penalty imposed is greater than that authorised by the Act, and where such excessive penalty has been imposed the conviction will be quashed.

[*Reg.* v. *Sullivan* (1884), 24 N.B.R. 149, followed; *The King* v. *O'Brien* (1908), 38 N.B.R. 385, distinguished.]

Statement.

APPLICATION by way of *certiorari* to quash a conviction under the Intoxicating Liquor Act, N.B., 6 Geo. V. 1916, ch. 20. Conviction quashed.

N. B.

S. C.

REX
v.
RITCHIE
EX PARTE
BRODERICK.

Hazen, C.J.

P. J. Hughes shews cause against rule *nisi* to quash conviction.

W. M. Ryan supports rule.

The judgment of the Court was delivered by

HAZEN, C.J.:—The appellant was charged before the Police Magistrate of the City of St. John that he the said Edward J. Broderick at the City of St. John on June 3, 1919, did unlawfully prescribe liquor for one Henry E. Berry, so as to enable the said Henry Berry to obtain liquor in violation of the Intoxicating Liquor Act, 6 Geo. V. 1916 (N.B.), ch. 20, and was adjudged guilty, and it was further adjudged that he forfeit and pay the sum of $200 and that, in default of payment, he be imprisoned in the common jail of the City and County of St. John for the space of 3 months.

It was admitted on the return of the rule which was granted at the previous session of this Court that the penalty imposed was not the appropriate penalty or punishment for such offence, and that he was liable to a penalty of not less than $25, nor more than $100, and in default of immediate payment to imprisonment for not less than 2 months nor more than 4 months. (See sec. 93 Intoxicating Liquor Act, 1916). It was contended, however, on the argument, that the Court had power to amend the conviction in this respect and to reduce the fine to such amount between the limits of $25 and $100 as might appear to the Court to be right and proper under the circumstances. This contention was supported by reference to secs. 125 and 126 of the Intoxicating Liquor Act, 1916, which read as follows:—

125. No conviction or warrant for enforcing the same or any other process or proceeding under this Act shall be held insufficient or invalid by reason of any variance between the information and the conviction or by reason of any other defect in form or substance, provided it can be understood from such conviction, warrant, process or proceeding that the same was made for an offence against some provision of this Act within the jurisdiction of the Court, Magistrate, Justice or Justices or other officer who made or signed the same, and provided there be evidence to prove such offence, and that it can be understood from such conviction, warrant or process that the appropriate penalty or punishment for such offence was thereby adjudged.

126. Upon any application to quash or set aside any such conviction or order, or the warrant for enforcing the same or other process or proceeding, the Court or Judge to which or to whom such appeal is made, shall dispose of such appeal or application upon the merits, notwithstanding any such variance, excess or jurisdiction or defect as aforesaid; and in all cases where it appears that the merits have been tried, and that the conviction, warrant, process or proceeding is sufficient and valid under this section or otherwise and there is

evidence to support the same, such conviction, warrant, process or proceeding shall be affirmed, or shall not be quashed (as the case may be); and such Court or Judge may in any case amend the same if necessary; and any conviction, warrant, process or proceeding so affirmed, or affirmed and amended, shall be enforced in the same manner as convictions affirmed on appeal, and the costs thereof shall be recoverable as if originally awarded.

In opposition to this contention reference was made by counsel for the applicant to the case of *Reg.* v. *Sullivan* (1884), 24 N.B.R. 149. In that case the conviction was for a first offence, and the magistrate in drawing up the conviction adopted the form (I-2) of the Dominion Summary Convictions Act, 32-33 Vict. 1869, ch. 31. The objection was that by adopting the form of conviction (I-2) which awards imprisonment for non-payment of a fine, instead of form (I-1) which awards a distress and in default of distress then imprisonment, the magistrate imposed a greater penalty than the Canada Temperance Act, 41 Vict. 1878, ch. 16, authorized. In delivering judgment Allen, C.J., expressed the conviction that the case was bad because it imposed a greater penalty which the law did not authorize. The prosecution was for selling liquors contrary to the provisions of the Canada Temperance Act, 1878, sec. 100 of which authorized the imposition of a penalty of $50 for a first offence. Form I-1, was the form of conviction for a penalty to be levied by distress and in default of distress by imprisonment, and this, said Sir John Allen, is the form which is applicable for a first or second offence, under sec. 100 of the Canada Temperance Act, while form I-2 would apply where the non-payment of the fine imposed was enforceable by imprisonment in the first instance, without issuing any distress warrant, but the Canada Temperance Act did not authorize such a mode of imposing the penalty, and consequently in the opinion of the Court the conviction could not be sustained.

But (and I quote from Sir John Allen's judgment, at page 152), it was contended that it was amendable under the 117th and 118th sections of the Canada Temperance Act (which should be read together), the former of which enacts that "no conviction or warrant enforcing the same, or other process or proceeding under the Act shall be held insufficient or invalid by reason of any variance between the information *or* (*sic*) conviction, or by reason of any other defect in form or substance, provided it can be understood from such conviction, etc., that the same was made for an offence against some provision of such Act within the jurisdiction of the Justices or Magistrate who made or signed the same; and provided there is evidence to prove such offence, *and no greater penalty is imposed than is authorized by such Act.*"

N. B.

S. C.

REX v. RITCHIE; EX PARTE BRODERICK.

Hazen, C.J.

Sec. 118 enacts that upon any application to quash such a conviction, whether made in appeal or upon *habeas corpus*, or by *certiorari*, or otherwise, the Court or Judge to whom such application is made shall dispose of the same on the merits, notwithstanding any such variance or defect as aforesaid, and may in any case amend the same if necessary; and in all cases where it appears that the merits have been tried, and that the conviction, etc., is valid under this section, or otherwise, such conviction, etc., shall be affirmed, or shall not be quashed (as the case may be).

It will be seen, therefore, that secs. 117 and 118 of the Canada Temperance Act, under which *Reg.* v. *Sullivan* was decided are very similar to secs. 125 and 126 of the Intoxicating Liquor Act, 1916, under which it is sought to amend the conviction in the present case. The concluding words of sec. 125 of the Intoxicating Liquor Act are: "And provided there be evidence to prove such offence, and that it can be understood from such conviction, warrant or process that the appropriate penalty or punishment for such offence was thereby adjudged," while the concluding words of sec. 117 of the Canada Temperance Act are: "And provided there is evidence to prove such offence and no greater penalty is imposed than is authorized by such Act." Words which to my mind convey an exactly similar meaning, so that there is the same proviso in both sections to the effect that no conviction or warrant for enforcing the same shall be held insufficient by reason of any variance between the information and conviction or by reason of any other defect in form or substance, provided . . . that no greater penalty is enforced than is imposed by the Act. In this case it is perfectly clear, as in the case of *Reg.* v. *Sullivan, supra*, that a greater penalty was imposed than authorized by the Act, or, in the language of the Intoxicating Liquor Act, 1916, that the appropriate penalty or punishment was not adjudged. This would clearly settle the matter if it were not for sec. 126 of the Intoxicating Liquor Act, which corresponds with sec. 118 of the Canada Temperance Act, but which it is contended goes further and authorizes the Court or Judge to deal with the matter on its merits not only in the case of a variance or defect, as in sec. 125, but also in the case where there may happen to be excess or jurisdiction. I will deal with this phase of the matter a little later on.

In *Reg.* v. *Rose* (1882), 22 N.B.R. 309, it was held by Sir John Allen (Weldon, Wetmore, Palmer and King, JJ., concurring), that under secs. 117 and 118 of the Canada Temperance Act, 1878,

the Court had no power to amend the conviction when the penalty imposed was greater than the Act authorized, but that such conviction was invalid. In his judgment the Chief Justice said that reading secs. 117 and 118 of the Act together, as they would have to be read, it was very clear that the conviction could not be amended in the manner claimed, that is, by reduction of the penalty. And continuing he says, at page 310:—

Sec. 117 points out what variances or defects may be amended; but expressly excludes any such power where a greater penalty has been imposed than is authorized by the Act. Then sec. 118 directs that on any application to quash such a conviction, the Court shall dispose of the application on the merits "notwithstanding any such variance or defect as aforesaid;" that is, such variances and defects as are mentioned in sec. 117, and may, in any case, amend the same, if necessary; and that no conviction shall be quashed where it appears that the merits have been tried, and that the conviction is sufficient and valid under that section or otherwise. It clearly appears, he says, that this conviction is invalid in consequence of the penalty imposed being greater than the Act authorizes, therefore the power to amend is expressly excluded.

The decision of the Court in *Reg.* v. *Sullivan*, 24 N.B.R. 149, was the Court consisting of Sir John Allen and Palmer and King, JJ., and was that these two sections should be read together. The Chief Justice (Sir John Allen) stated at page 152 that the powers given by the section were very large; but (he added),

we cannot think that it was intended to give the Court power to amend the judgment which the Justice has given, and to alter a conviction awarding imprisonment for nonpayment of a fine, into a conviction awarding a distress, and in default of distress, then imprisonment; thus substituting the form of conviction (I-1) given by the Act, for (I-2) which the justice had adopted.

He points out that by an Imperial statute, 12-13 Vict., ch. 45, sec. 7, after reciting that many orders or judgments had been quashed or set aside upon objections to the form thereof, irrespective of the merits, it was enacted that if upon the return to a *certiorari* any objections to the form thereof, irrespective of the merits, it was enacted that if upon the return to a *certiorari* any objection should be made on account of any omission or mistake in the drawing up of such order or judgment, and it should be shewn to the satisfaction of the Court that sufficient grounds were in proof before the justice making such order or giving such judgment, to have authorized the drawing up thereof, free from the omission or mistake, it should be lawful for the Court to amend such order and judgment, and that it was held on the construction of that section that where the adjudication was wrong in substance,

N. B.

S. C.

REX v. RITCHIE; EX PARTE BRODERICK.

Hazen, C.J.

the order could not be amended, because to do so would be to amend the judgment itself, and cites *Reg.* v. *Tomlinson* (1872), L.R. 8 Q.B. 12.

It was then pointed out by Sir John Allen that the words of sec. 117 of the Canada Temperance Act—"any defect in form or substance"—were, perhaps, somewhat more extensive than those of the Imperial statute above cited; and he adds, at p. 153:—

> But if they are, this case (*Reg.* v. *Sullivan*), is excepted from the power to amend given by sec. 118, by the words of sec. 117, "provided no greater penalty is imposed than is authorized by such Act;" for here a greater penalty was imposed than the Act authorized; it directed an imprisonment of the party, which the Justice was not entitled to award except in default of distress.

It was held by the Supreme Court of Nova Scotia in the case of *The Queen* v. *Porter* (1888), 20 N.S.R. 352, that in a case under the Canada Temperance Act where the penalty imposed was in excess of that authorized by the Act the conviction was bad, and that the power of the Court to amend was taken away by the words of sec. 117—"provided there is evidence to prove such offence, and no greater penalty is imposed than is authorized by such Act."

The attention of this Court was called to the case of *The King* v. *O'Brien; Ex parte Chamberlain* (1908), 38 N.B.R. 385, in which the judgment of the Court (Barker, C.J., Hanington, Landry and McLeod, JJ.), was delivered by Landry, J. In that case the accused was charged under the Liquor License Act (Consolidated Statutes, 1903, ch. 22), with a third offence, and the conviction stated it was for a third offence, but was in other respects in the form of a conviction for a first offence, and the only proof was of a first offence, and the prosecution on the trial asked to have a conviction entered for a first offence, and it was held that the conviction might be amended under sec. 89 of the New Brunswick Liquor License Act. That section is practically the case of the sections of the Canada Temperance Act to which I have referred and from which I have quoted.

In delivering judgment no attempt was made to distinguish the case from *Reg.* v. *Sullivan*, in fact neither that case nor any other was referred to by counsel in their arguments, or by the Judge in delivering judgment, at page 387, and all that was said in the judgment on the point referred to was as follows:—

> Chamberlain was prosecuted for a third offence under the charge of selling, was found guilty of selling, and was asked if he had been previously

convicted of a first and second offence. He made no reply, and the prosecution proceeded to prove the first and second convictions. The proof of the first and second convictions failed. Then the prosecutor asked that a conviction for a first offence be recorded. A minute of conviction was made adjudging the defendant "guilty," and making no mention of any previous offence. The conviction states that it is for a third offence, but makes no mention or statement of a first or second offence as required by the form in a conviction for a third offence. The fine is for $50 and costs, being the fine for a first offence. The conviction imposes the fine, orders distress and sale in default of payment, and imprisonment in default of sufficiency of goods. It also orders cost of commitment and of conveying the defendant to gaol, and fixes such additional cost at $4. The Court is now asked to make an order to quash the conviction, because: (1) on the face of the conviction it is alleged to be for a third offence, and no statement is made of a first and of a second conviction being had.

On the argument the conviction was admitted irregular, but it was contended that it could and should be amended in this respect. After referring to the power of amendment given by sec. 89 of the Liquor License Act, ch. 22, Judge Landry says, at page 388: "The Court being satisfied that all the necessary conditions as recited in this section exist, the power to amend is clear, and the words 'being for a third offence' may be struck out of the conviction."

It might be urged that this case overrules the judgment in *Reg.* v. *Sullivan, supra*, but to my mind there is a perfectly clear distinction, for the penalty imposed on Chamberlain of $50 was the penalty for a first offence and was not, therefore, a greater penalty or punishment than was authorized by the chapter. The fact that he was found guilty of selling, that the proof of the first and second convictions failed, that the prosecutor asked for a conviction for a first offence to be recorded, and that the fine was for $50 and costs, being the fine for a first offence, no doubt led the Court to conclude that the words "being for a third offence" were simply a clerical mistake, and while in *Reg.* v. *Sullivan* the judgment refusing to amend is based on the words "no greater penalty or punishment is imposed than is authorized by this chapter," that exception was absent in the *O'Brien* case. I have come to the conclusion that that case does not in any way conflict with the judgment of the Court in *Reg* v. *Sullivan*. I would therefore have no hesitation in concluding that that judgment was binding upon this Court in the present case, were it not for a judgment that was delivered a short time ago by

N. B.

S. C.

REX v. RITCHIE; EX PARTE BRODERICK.

Hazen, C.J.

McKeown, C.J., of the King's Bench Division, in *The King* v. *Ritchie, Ex parte Galbraith*. In that matter the applicant was convicted before the Police Magistrate with having unlawfully imported into the Province of New Brunswick a quantity of liquor from a place outside the Province, intending that it should be dealt with in violation of the Provincial Prohibition Act, and was adjudged guilty and sentenced to pay a fine of $200 or failing that to imprisonment.

The learned Chief Justice held that the penalty was not authorized by the Act, which provided that anyone committing the offence of which Galbraith had been found guilty should be liable to a penalty for the first offence of not less than $100 or imprisonment for a term not exceeding two months with or without hard labor, and following the judgment in *In re Richard* (1907), 38 Can. S.C.R. 394, he held that the magistrate's power to fine was confined to the sum named, viz., $100, quoting the judgment of Duff, J., in support thereof. He held, however, that the conviction could be amended, and he amended the same by striking therefrom the words "to forfeit and pay the sum of $200" and inserted in lieu thereof the words "to forfeit and pay the sum of $100" and discharged the order *nisi* to quash the conviction. The Chief Justice of the King's Bench did not think that it was necessary to read secs. 125 and 126 together, but held that under sec. 125 if for either of two reasons, viz.: (1) variance between the information and the conviction; and (2) any other defect in form or substance, the conviction was invalid on the face of it, such conviction should not be set aside, but that such provision was materially qualified by the further provision that an examination of the conviction must shew (a) that it was made for an offence against some provision of the Act within the jurisdiction of the magistrate; and (b) that there was evidence to prove such offence; and (c) that the appropriate penalty was adjudged, and added—"I think it is clear that in cases in which either (a) (b) or (c) would be lacking a conviction insufficient in itself could not be sustained under section 125 standing alone."

Then turning to sec. 126 he said:—

It is I think clear that on application to quash a conviction, a Judge is given power to dispose of such application upon its merits notwithstanding the existence of the "variance" or "defect" alluded to in the preceding section. If the remedial power of the Judge stopped here this sec. 126 would sub-

stantially embody the provisions of sec. 118 of the Canada Temperance Act, but the section under consideration goes further and it authorizes the Judge to deal with the matter on its merits, not only in the face of a "variance" or "defect" but also in the case where there may happen to be "excess or jurisdiction." Whatever effect may be given to the words "excess or jurisdiction" it must, I think, follow there is a corresponding enlargement of the powers of the Judge in this section as compared with the powers given by sec. 118 of the Canada Temperance Act. So that in addition to dealing in a remedial way with cases to which the terms "variance" or "defect" are applicable he may also so deal with cases in which there has been an exercise of jurisdiction by the magistrate in excess of that which is given to him by the Act.

He goes on to say that he construes the words of the Act "excess or jurisdiction" as if they read "excess of jurisdiction," although he has ascertained that there was no mistake by the publisher in printing the section and that the Act as assented to by the Lieutenant-Governor contained the same phraseology as that reproduced in the section, viz., "excess or jurisdiction." Notwithstanding that fact he says he is giving the words the only meaning which it seems to him reasonable to put upon them.

I doubt very much whether a Court or Judge has the right to place in a statute different words from those which were in the Act at the time it passed the Legislature and was assented to by the Lieutenant-Governor of the Province, and if the words stand without change "excess or jurisdiction" they appear to be meaningless, but even changing them in the way in which they have been changed by the Chief Justice, I, with all possible respect, have to dissent from his conclusion that they give such enlarged powers over and above those contained in sec. 125 as to authority to change and amend a conviction when appropriate penalty or punishment has not been thereby adjudged. The words in sec. 126, 6 Geo. V. 1916, ch. 20, are:—

> Upon application to quash or set aside any such conviction or order or the warrant for enforcing the same or other process or proceeding, the Court or Judge to which or to whom such appeal is made shall dispose of such appeal or application upon its merits, notwithstanding any such variance, excess or jurisdiction or defect as aforesaid.

The words "as aforesaid" must refer to the previous section, as there is nothing in sec. 126 up to the time they are used to which they can possibly refer, and in sec. 125 the words "excess or jurisdiction" or "excess of jurisdiction" do not appear at all. I do not feel that the words "excess or jurisdiction" give any power to a Judge more extensive that the powers given by the Canada Temperance Act, and the New Brunswick Liquor License

N. B.
S. C.
REX
v.
RITCHIE
EX PARTE
BRODERICK.
Hazen, C.J.

Act, and that reading the two sections together meaning the force must be given to the provision excepting from the power to amend provided it can be understood from such conviction or process that the appropriate penalty or punishment for such offence was thereby adjudged. It seems to me that the words "notwithstanding any such variance, excess or jurisdiction or defect as aforesaid" render it necessary to read sec. 125 in connection with sec. 126, and under sec. 126 the Court or Judge to whom such appeal is made shall dispose of such appeal or application upon the merits, that is, subject to the provision which I have just referred to, and in cases where the appropriate penalty or punishment has not been adjudged the provisions of the section as to amendment shall not apply. If it is open to the Court by virtue of the words "dispose of such appeal or application upon the merits," to amend the penalty imposed in any case it can in effect change the conviction in any and all other respects as well, the logical result of which would be that the Court could make a conviction entirely different in substance and in law from one which has been made by the magistrate who has tried the case and heard the witnesses, and would lead to a state of affairs that cannot have been contemplated or intended by the framers of the Act.

I agree with the decision of the Court in *Reg.* v. *Sullivan*, *supra*, and do not think that the difference in sec. 126 of the Intoxicating Liquor Act as compared with sec. 118 of the Canada Temperance Act affects the question. I am, therefore, of opinion that the rule should be made absolute and the conviction quashed.

Conviction quashed.

SASK.
C. A.

KALENCZUK v. KALENCZUK.

Saskatchewan Court of Appeal, Haultain, C.J.S., and Newlands and Lamont, JJ.A. May 3, 1920.

DOMICILE (§ I—1)—DIVORCE ACTION—PETITION—STATEMENT OF IN—ENGLISH PRACTICE—KING'S BENCH ACT, SASK.

The practice in England requiring the domicile of the parties to a divorce action to be stated in the petition does not, in view of the provisions of sec. 13, of the King's Bench Act, Sask. Stats. 1915, ch. 10, apply to Saskatchewan.

The rules as to the admission of affidavit evidence being new and the cases conflicting, failure to comply with same may not unreasonably be overlooked.

Statement.

APPEAL from the judgment of the trial Judge dismissing an action for dissolution of marriage on the ground the petition did

SASK.

C. A.

KALENCZUK v. KALENCZUK.

Haultain, C.J.S.

not allege and the evidence did not shew the domicile of the parties. New trial ordered.

D. Fraser, for petitioner; no one contra.

The judgment of the Court was delivered by

HAULTAIN, C.J.S.:—In this action the petitioner petitioned for dissolution of his marriage with the respondent on the ground of adultery. The action was not defended but the trial Judge dismissed the action on the ground that the petition did not allege and the evidence did not shew the domicile of the parties, and that it was, therefore, not shewn that he had any jurisdiction in the matter.

The evidence did not go any farther than to shew that the petitioner was residing in this Province in 1913, when he was married to the respondent, and has resided there ever since. While long residence in a place may raise a presumption of intention of remaining and thereby acquiring a domicile, it is not decisive, and I entirely agree with the trial Judge that in divorce cases particularly jurisdiction in this respect should be clearly established.

In the case of *Armytage* v. *Armytage*, [1898] P. 178, it was decided, at page 185, that,

> it may now be taken as settled that this Court has no jurisdiction to entertain proceedings for the dissolution of the marriage of parties not domiciled in this country at the commencement of the proceedings . . . The jurisdiction to dissolve marriages was conferred upon this Court by the Matrimonial Causes Act, 1857, and, although that Act does not expressly make domicile a test of jurisdiction, that test is applied by the Court to the exercise of jurisdiction in cases of dissolution of marriage.

Counsel for the petitioner cited the case of *Niboyet* v. *Niboyet* (1878), 4 P.D. 1, in which it was held that as the parties were resident in England at the commencement of the suit and the matrimonial offence had been committed in England the Court had jurisdiction to entertain the petition for divorce.

This decision was held to be virtually overruled in England by Gorell Barnes, J., in *Armytage* v. *Armytage*, *supra*, and by *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517. In that case Lord Watson, in delivering the judgment of the Privy Council, said, at page 540, "Their Lordships have . . . come to the conclusion that, according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage."

SASK.

C. A.

KALENCZUK v. KALENCZUK.

Haultain, C.J.S.

This decision was approved and followed by the Court of Appeal in England in *Bater* v. *Bater*, [1906] P. 209.

It was also decided in *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517, that matrimonial domicile acquired by residence as distinct from domicile in the ordinary sense is not recognized in English law as giving any jurisdiction to divorce.

Prior to 1905 the practice in England did not require the domicile of the parties to be stated in the petition. In that year rule 220 requiring that statement in the petition was prescribed.

In view of the provisions of sec. 13 of the King's Bench Act, Sask. Stats. 1915, ch. 10, that rule does not apply to these proceedings.

Certain affidavits were offered in evidence on behalf of the petitioner, but the trial Judge refused to admit them.

Sec. 46 of the Matrimonial Causes Act, 20-21 Vict. 1857 (Imp.), ch. 85, enacts as follows:—

46. Subject to such rules and regulations as may be established as herein provided, the witnesses in all proceedings before the Court where their attendance can be had shall be sworn and examined orally in open court: Provided that parties, except as hereinbefore provided, shall be at liberty to verify their respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party or by direction of the Court, be subject to be cross-examined by or on behalf of the opposite party orally in open Court, and after such cross-examination may be re-examined orally in open Court as aforesaid by or on behalf of the party by whom such affidavit was filed.

Under the English rules, leave to use affidavit evidence must be obtained on summons from a Judge in Chambers. Rules 52-55 provide for the use of affidavits and counter-affidavits in defended cases, and for the procedure for cross-examination of deponents in open court.

Rule 188 applies to undefended cases, and is as follows:—

188. In an undefended cause when directions have been given that all or any of the facts set forth in the petition be proved by affidavits, such affidavits may be filed in the registry at any time up to 10 clear days before the cause is heard.

These rules were not complied with in the present case. No directions to give affidavit evidence were given and the affidavits were first heard of at the trial.

While it may be generally stated that, in matrimonial causes, leave may be given to parties to prove their cases in whole or in part by affidavit, "leave is now practically never given (in England)

except where there is no defence . . ." 16 Hals., page 534, note (p).

The cases on this point are numerous and conflicting. Leave to prove the petition by affidavit was refused in the cases mentioned in the note to *March* v. *March* (1858), 2 Sw. & Tr. 49, 27 L.J. P. & M. 30. In *Adams* v. *Adams* (1873), 29 L.T. 699, Sir James Hannen, in granting leave to prove domicile, etc., by affidavit, said that, "the Court would never allow the substantive portion of a case to be proved by affidavit, but as what you propose thus to prove is only preliminary and introductory matter, what may be called the mere fringe of the case—the motion may be granted."

On the other hand, leave was granted in *March* v. *March*, *supra*, and in other cases mentioned in notes (o), (p) and (q) in 16 Hals., page 534.

In *Burslem* v. *Burslem* (1892), 67 L.T. 719, where the witnesses in a divorce suit were all resident in America and the expenses of a commission were beyond the petitioner's means, Gorell Barnes, J., made an order allowing the bigamous marriage, the subsequent adultery and the identity to be proved by affidavit.

In my opinion, this is a proper case in which to allow affidavit evidence, and, as the action is undefended, non-compliance with the rules of a new and somewhat unsettled practice may not unreasonably be overlooked.

I think that, under the special circumstances of this case, there should be a new trial, and that the petitioner should be given leave to verify his case by affidavit.

New trial ordered.

SASK.

C. A.

KALENCZUK v. KALENCZUK.

Haultain, C.J.S.

UNION BANK v. TATTERSALL.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., and Stuart, Beck and Ives, JJ. May 28, 1920.

BANKS (§ IV A—67)—CHEQUE—POST DATED—DEPOSITED IN BANK—CHEQUES DRAWN ON—PAYMENT STOPPED BY DRAWER—LIABILITY OF BANK.

Where a customer deposits a cheque with his bankers with the intention that the amount of it shall be at once placed to his credit and the bankers carry the amount of it to his credit accordingly they become immediately holders of the cheque for value. It does not matter that the cheque is post dated when the deposit is made.

[*Ex parte Richdale* (1882), 19 Ch. D. 409; *Royal Bank of Scotland* v. *Tottenham*, [1894] 2 Q.B. 715, followed.]

Statement.

APPEAL by defendant from the trial judgment in an action to recover payment of a post dated cheque given by the defendant,

ALTA.

S. C.

UNION BANK v. TATTERSALL.

who afterwards stopped payment, after it had been deposited to the credit of the payee and drawn against by him. Affirmed.

The judgment appealed from is as follows:

WALSH, J.:—The defendant on June 3, 1919, drew his cheque dated June 5, 1919, on the Royal Bank at Holden, for $600, payable to Shaw & Mountifield or order. This cheque endorsed Shaw & Mountifield Limited, *per* H. R. Mountifield, was on June 4, 1919, deposited by Shaw & Mountifield, Limited, in the plaintiff's Edmonton branch, and $598.50 was on that day placed to the credit of its account at that branch, being the face of the cheque less exchange. The defendant gave it as a deposit on the purchase by him of some cattle from Shaw & Mountifield, Limited, post-dating it so that he might, before it was presented for payment, have an opportunity to inspect these cattle. He saw them and was satisfied with them but his vendor was unable to deliver them. The deal for them, therefore, fell through, and the defendant never got them. He, therefore, received no consideration for his cheque and so before it was presented to his bank he stopped payment of it. The plaintiff claiming to be the holder of it for value sues for the amount of it. Before this cheque was deposited, the company's current account with the plaintiff was overdrawn to the amount of $3.04. This deposit converted this debit balance into a credit balance of $595.46 on the same day and immediately following the credit of this deposit in this account, two cheques of $24.50 and $15 respectively were paid and charged against it. On the same day and immediately following the debit of these two cheques, the proceeds of two discounts went to the company's credit for $172.98 and $165.75 respectively. On the following day, June 5, four cheques aggregating $124.40 were charged to the account and then, at the close of the day, a note of the company and held by the plaintiff for $1,150 was charged up. The result was that the credit balance created by this cheque and the two discounts disappeared and a debit balance of $379.71 took its place. Thereafter, there always was a balance to the debit of this account until July 15, last, when it was practically closed. The cheque in question was never charged back to this account but since its dishonour has been held by the plaintiff as a past due bill.

If this cheque had remained in the hands of the payee, the defendant of course could not have been made to pay it. The

question is whether or not the plaintiff is the holder of it for value and so entitled to payment of it.

The cheque was evidently intended for the company known as Shaw & Mountifield, Limited, but the word "Limited" was not used in describing the payee in the body of the cheque. It is simply a case of the payee being wrongly designated by the omission of this word and it was therefore, under sec. 64 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, properly endorsed by the proper signature of the payee being placed upon the back of it.

This cheque was post dated. It was not payable when it was deposited in the plaintiff's Edmonton branch, for that was done on June 4, and it bears date June 5. Under sec. 27 (*d*) of the Bills of Exchange Act, a bill is not invalid by reason only that it is post-dated and by sec. 165 (2) except as otherwise provided in Part 3 the provisions of the Act applicable to a bill of exchange payable on demand apply to a cheque. There is nothing in Part 3 which otherwise provides in this respect and so sec. 27 (*d*) applies as much to a cheque as to a bill of exchange. This cheque, therefore, is not invalid simply because it was post-dated. *Carpenter* v. *Street* (1890), 6 T.L.R. 410; *Hitchcock* v. *Edwards* (1889), 60 L.T. 636; *Wood* v. *Stephenson* (1858), 16 U.C.Q.B. 419. There is no suggestion that the plaintiff did not take this cheque and carry the proceeds of it to the payee's credit in the most perfect good faith, nor is there anything to warrant the inference that it had the slightest knowledge of the circumstances under and the consideration for which it was given. The English Court of Appeal in *Ex parte Richdale* (1882), 19 Ch. Div. 409, and *Royal Bank of Scotland* v. *Tottenham*, [1894] 2 Q.B. 715, held that where a customer pays a cheque to his bankers with the intention that the amount of it shall be at once placed to his credit and the bankers carry the amount to his credit accordingly they become immediately holders of the cheque for value. The cheque in each of these cases was, as here, post-dated, so that they are on all fours with this case. The total failure of consideration for this cheque would be a good defence to this action if the plaintiff had not given value for it. On the above authorities, I would be justified in deciding that the plaintiff is a holder for value by reason alone of the placing of its proceeds to the credit of the

ALTA.

S. C.

UNION BANK v. TATTERSALL.

payee, but its position is strengthened by the fact of the payment by it of the two cheques aggregating $39.50 on the same day on the strength of this deposit. The charging up on the next day of the payee's note held by the plaintiff might be an additional factor in ascribing to the plaintiff the position of a holder for value but there is nothing in the evidence to shew whether or not its position with respect to this note was altered by the fact of credit being given to the payees in their current account for the proceeds of this cheque.

It is much to be regretted that the defendant should be called upon to pay this cheque, but I can see no way to give him relief from the liability which, in my opinion, he is under in respect of it, and so the plaintiff must have judgment as prayed. The plaintiff's manager offered to apply on this claim the amount standing to the credit of the payee in a suspense account, and this, I hope, will be done, though I have no power in this action to so order.

N. D. Maclean, for appellant; *S. F. Field*, for respondent.

The judgment of the Court was given by

Harvey, C.J.

HARVEY, C.J.:—On June 3, 1919, the defendant agreed to buy some cattle from one Shaw representing Shaw & Mountifield Ltd. and gave a cheque for $600 payable to Shaw & Mountifield. He desired however to inspect the cattle and for that reason dated the cheque June 5. On the same day he sold Shaw some cattle and received from him a cheque of Shaw & Mountifield Ltd. for $400. Why two cheques were given instead of one for the difference is not very clearly explained by the defendant who was the only witness other than the plaintiffs' local manager. The cheque for $600 was endorsed for deposit "Shaw & Mountifield Ltd. *per* H. R. Mountifield," and was deposited to the company's credit in the plaintiff bank at Edmonton on June 4. There was then a slight overdraft and on June 5 a note was charged to the account which again left an overdraft. The defendant inspected the cattle and found them satisfactory but for some reason he never received them and on the 12th of June before the cheque had been paid by his bank he stopped payment. The plaintiffs sued and recovered judgment.

The only specific ground of appeal is that "the trial Judge erred in holding that the plaintiffs were holders for value in good faith and in due course." In this respect the decision of the

English Court of Appeal in *Royal Bank of Scotland* v. *Tottenham*, [1894] 2 Q.B. 715, is very much in point. In that case a cheque drawn on August 3rd was post dated August 10th. It was deposited in the plaintiffs' bank on August 8th and cheques were drawn against it on August 10 and 11. On August 10, the defendant gave notice to his bankers to stop payment and on the 11th the plaintiffs received notice of the dishonour whereupon the cheque was charged back to the customer leaving a debit balance of about half the amount of the cheque. The plaintiffs recovered judgment for the full amount of the cheque which was affirmed on appeal. The Court held following a previous decision that the mere giving of credit on the deposit was good consideration and that the bank thereby became holders for value. In the present case there is no doubt about the good faith of the plaintiff or the negotiation being in due course.

But it is said that this cheque was never properly endorsed first because it is to a firm and is endorsed by a company and secondly because it is not properly endorsed even by the company.

The trial Judge finds that: "the cheque was evidently intended for the company," and in my opinion the evidence of the defendant fully supports that. Two or three times he states that the cheque he received was from the same persons to whom he gave his cheque. Moreover, though there had been a firm of Shaw & Mountifield there is nothing to suggest that there was such a firm at the time of the transaction. It is clear as the trial Judge points out that by sec. 64 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, an endorsement by the company was a proper endorsement. Then by a resolution of the directors under the authority of a resolution of the shareholders both of which are produced at the trial it is provided that the bank may accept for deposit cheques, etc., "purporting to be endorsed by any one director or the secretary or treasurer." This cheque was endorsed by Mountifield and the resolution shews that he was both a director and the secretary but it is said that he does not purport to sign as secretary or director but that is not what the resolution calls for. It says "purporting to be endorsed" not endorsed by some one "purporting to be" director. The provisions of the resolution as to the making of negotiable instruments is much more particular and sets out the name of the officer with the

ALTA.

S. C.

UNION BANK v. TATTERSALL.

Harvey, C.J.

designation of his office. This endorsement does purport to be made on behalf of the company by one who is a director and secretary.

The defendant sought on the argument to raise another ground, viz.: that the defendant was discharged because the document being post dated was not payable on demand and was an ordinary bill of exchange and was not presented within a reasonable time.

In the case cited, the objection was taken that the cheque was in reality only an ordinary bill of exchange but no effect was given to it. This ground, besides not being raised in the notice of appeal, is not directly raised by the defence, and there is no evidence directed to the time or circumstances of presentment to enable one to say whether June 12, the date of presentment shewn by the protest, was a reasonable time or whether it was, in fact, the first time of presentment.

I do not think any effect could be given to this argument even if it could be considered.

The appeal should be dismissed with costs.

Appeal dismissed.

SASK.

C. A.

WURZ v. DEVLIN.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, J.A., and Brown, C.J.K.B. May 3, 1920.

CONTRACTS (§VC—402)—SALE OF CHATTEL—INNOCENT MISREPRESENTATION —AVOIDANCE OF CONTRACT—RIGHTS OF PARTIES.

An innocent misrepresentation inducing a contract will not support an action for damages, but the party induced to enter into the contract may avoid it, and is entitled to be put back in the position he was, at the time he entered into the contract.

Statement.

APPEAL by the plaintiffs from the trial judgment setting aside a contract for the purchase of a chattel and allowing damages. Reversed as to damages.

G. H. Yule, for appellants.

R. F. Hogarth, for respondent.

The judgment of the Court was delivered by

Lamont, J. A.

LAMONT, J.A.:—The plaintiffs sue for the amount of two lien notes given by the defendant as the purchase price of a gasoline engine.

The trial Judge found that the contract was induced by misrepresentation and that the defendant was entitled to have it

SASK.

C. A.

WURZ v. DEVLIN.

Lamont, J. A.

set aside, as he repudiated it after a trial of the engine which disclosed the misrepresentation. In his pleading the defendant counterclaimed for a return of the notes sued on, and for special damages, being the wages he had paid experts during the trial of the engine, oil, gasoline and repairs. The trial Judge set aside the contract, and allowed the damages claimed on the counterclaim at $128.06. The plaintiffs now appeal.

There was, in my opinion, ample evidence to warrant the Judge in finding that the contract had been induced by misrepresentation and that the dealings of the defendant amounted to nothing more than an exhaustive trial thereof. The defendant was, therefore, entitled to have the contract rescinded and the action dismissed.

Was he entitled to damages in respect of the matters set up in his counterclaim? The trial Judge did not find that the representation was fraudulent, although fraud was alleged, and there was evidence in support of it. I think, therefore, that we must proceed on the footing that the representation inducing the contract was made innocently. An innocent misrepresentation inducing a contract will not support an action for deceit which is an action for damages for the loss sustained by reason of the misrepresentation. This was established in *Derry et al.* v. *Peek* (1889), 14 App. Cas. 337.

In referring to that decision, Lord Moulton, in *Heilbut, Symons & Co.* v. *Buckleton*, [1913] A.C. 30, at 49, said:—

> The opinions pronounced in your Lordships' House in that case show that both in substance and in form the decision was, and was intended to be, a reaffirmation of the old common law doctrine that actual fraud was essential to an action for deceit, and it finally settled the law that an innocent misrepresentation gives no right of action sounding in damages.

In *Harrison* v. *Knowles & Foster*, [1918] 1 K.B. 608, Scrutton, L.J., at page 610, said:—

> A statement may form part of a contract which the party making it promises to be true, or it may be an innocent representation of fact which he does not promise to be true, but which, if it was untrue in a material particular, and formed part of the inducement to enter into the contract, may give rise to a claim to rescind, but does not give rise to a claim for damages.

It would, therefore, appear to be clear that, in the case of a contract induced by misrepresentation without fraud, the party induced to enter into the contract may avoid the con-

SASK.

C. A.

WURZ v. DEVLIN.

Lamont, J. A.

tract, but he cannot recover damages, as such damages can be recovered only in action for deceit. He is, however, entitled to be put back in the position he was at the time he entered into the contract.

This is stated by Bowen, L.J., in *Newbigging* v. *Adam* (1886), 34 Ch.D. 582 at page 592, in the following language:—

> If we turn to the question of misrepresentation, damages cannot be obtained at law for misrepresentation which is not fraudulent, and you cannot, as it seems to me, give in equity any indemnity which corresponds with damages . . . but, when you come to consider what is the exact relief to which a person is entitled in a case of misrepresentation it seems to me to be this, and nothing more, that he is entitled to have the contract rescinded, and is entitled accordingly to all the incidents and consequences of such rescission. It is said that the injured party is entitled to be replaced in *statu quo*. It seems to me that when you are dealing with innocent misrepresentation you must understand that proposition that he is to be replaced in *statu quo* with this limitation—that he is not to be replaced in exactly the same position in all respects, otherwise he would be entitled to recover damages, but is to be replaced in his position so far as regards the rights and obligations which have been created by the contract into which he has been induced to enter. That seems to me to be the true doctrine, and I think it is put in the neatest way in *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1.

In *Redgrave* v. *Hurd*, 20 Ch.D. 1, the defendant was induced to leave his place at Stroud and go to Birmingham and enter into partnership with the plaintiff, and agreed to purchase from him a residence, on the representation that the plaintiff's business was bringing in £300 to £400 per year. A short time afterwards the defendant ascertained that the representation was false, and refused to complete the purchase of the house. The plaintiff brought an action for specific performance. The defendant set up the misrepresentation, but did not allege that it had been made fraudulently, and he counterclaimed for rescission of the contract and a return of the deposit, and also for £100 damages for trouble and expenses in removing from Stroud, and £200 damages for giving up his business there. The Court of Appeal held that he was entitled to have the contract rescinded and the deposit returned, but that he was not entitled to damages.

See also *Whittington* v. *Seale-Hayne* (1900), 82 L.T. 49.

In 20 Hals., at page 744, par. 1755, the learned author points out the relief to which a person induced to enter into a contract by innocent misrepresentation is entitled if he desires to rescind. That relief is,

SASK.

C. A.

WURZ v. DEVLIN.

Lamont, J. A.

an order rescinding or setting aside the contract, with or without a prefatory declaration, and, in certain special cases, to an order for the delivery up of the instrument in which the contract is contained or recorded to be cancelled, or for rescission of the conveyance by which it was completed; and to such further orders for repayment of money with interest, reconveyance and retransfer, indemnity, not being in the nature of damages, injunction, accounts and inquiries, rectification of any entry in a statutory register which otherwise would or might import liability, and generally, and otherwise, all such directions as, in the circumstances of the particular case, may be required for the purposes of complete *restitutio ad integrum*; which means that, on his part, the representee must also make all such corresponding repayments, retransfers, and reconveyances as are necessary to restore the *status quo* on both sides.

I am, therefore, of opinion that the appeal should be allowed in so far as the damages awarded on the counterclaim are concerned. In other respects it will be dismissed. The defendant is entitled to have the notes sued on returned to him, and he will hand over the engine to the plaintiffs when it is called for. As the appellants fail on the main appeal but succeed on the counterclaim, I would allow no costs of appeal.

Appeal allowed as to damages.

EX PARTE CARVILL.

N. B.

S. C.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., and White and Grimmer, JJ. February 20, 1920.

MUNICIPAL CORPORATIONS (§II C—134d)—BY-LAW RESTRICTING BUILDING AND USE OF GARAGES—"CHURCH OR PLACE WHERE DIVINE SERVICE IS CONDUCTED"—MEANING OF.

A chapel resorted to only by certain members of a religious society for private worship, and the doors of which are not open to the public is not a "church or place where Divine service is conducted" within the meaning of a by-law restricting the building and use of garages.

Statement.

APPLICATION by way of *certiorari* to quash a by-law respecting the building and use of garages, and for a mandamus to compel the building inspector to grant a permit to erect a building to be used as a garage. The application was made to Grimmer, J., and referred by him to the full Court. Applications granted.

F. R. Taylor, K.C., supports rules.

The judgment of the Court was delivered by

Grimmer, J.

GRIMMER, J.:—This is an application by *certiorari* to quash a by-law of the City of Saint John intituled: "A law respecting the offensive occupation of buildings within the City of Saint John," enacted by the common council on August 17, 1915, on the ground that the same is unreasonable and unjust, and for a writ of man-

N. B.

S. C.

EX PARTE CARVILL.

Grimmer, J.

damus to compel the building inspector of said city to grant a permit to Mr. Carvill to erect a building on his land on the westerly corner of Cliff and Waterloo Streets.

The by-law referred to is as follows:—

Be it ordained by the City of Saint John, in common council convened, that hereafter the occupation as a public garage, livery stable, tannery, soap boilery or fertilizer manufactory of any building or buildings previously erected and now existing within one hundred and fifty feet of any church or place where Divine service is usually conducted, and the occupation for any of such purposes of any building or buildings hereafter to be erected within three hundred feet of any church or place where Divine service is usually conducted, is hereby declared to be deemed offensive occupation of such building or buildings in any part of the City of Saint John.

Provided that the common council may grant special permission for such occupation of any such building when it shall be made to appear that the authorities of such church or place where divine service is usually conducted do not object thereto.

And be it further ordained that in view of the expressed intention of an applicant for permission to erect a building within such prescribed distance of a church, and to use said building when completed for one of the purposes forbidden by this by-law, it is hereby declared that the passage of this by-law is urgent for the immediate preservation of the public safety and public peace, and the same shall go into effect and operation forthwith.

The application was made to me for an order for writ of *certiorari*, as stated, in this matter on January 9, last. The affidavits of the above-named George Carvill and of Fred R. Taylor, K.C., were read in support of the motion, but I deemed it advisable to have the opinion of the full Court on the matter, and so referred the matter to the Court of Appeal. Upon the same being renewed in this Court, the affidavits used before me of said Carvill and Taylor, and of one Frank E. Williams, were read in support of the application, but no affidavits in reply were presented on behalf of the City of Saint John, nor of any others who might reasonably have been interested therein, to the case presented by Mr. Carvill.

In accounting for the enactment of the by-law, it appears from the affidavit of said Williams that he was the proprietor of a lot of land adjacent to the Stone Church, so-called, on Carleton St. in the City of Saint John, upon which a building known as the Mechanics' Institute formerly stood. The same having been destroyed by fire, Williams in 1913 decided to erect a garage upon the site. He applied for a permit, but having had some differences with the then Commissioner of Public Safety of the city, the

application was refused, the Commissioner it seems having stated that he, Williams, would never get the permit. Thereupon, and as appears from the para. 3 of the by-law, in view of the expressed intention of an applicant for permission to erect a building within such prescribed distance of the church, and to use said building when completed for the purposes forbidden by the by-law, and to endorse and maintain the attitude taken by the Commissioner the above by-law was passed. In September, 1916, and many times thereafter, Carvill, being the owner of a large lot of land on the corner of Cliff and Waterloo Streets, applied to one James W. Carleton, building inspector of said city, for a permit to erect a garage on the rear portion of his said lot, where it fronted on Cliff St., but the said inspector refused and still refuses to grant the same, contending that the by-law prohibiting the erection among other things of a garage within three hundred feet of a church or place where divine worship is usually conducted, prevented him from issuing the same, or at all events he would not issue it without instruction from the common council. Thereupon, Carvill made application to the common council for an order to the inspector to issue the permit which was opposed by His Lordship the Roman Catholic Bishop of Saint John, represented by attorney, and after a hearing the council refused to issue the permit and the same has never been issued, and without it Carvill states he is unable to erect the building and is deprived of the beneficial use of his property. The pretext, Carvill alleges in his affidavit, that was given at the hearing before the common council for the refusal to order the building inspector to grant the permit was that the Sisters of Charity used a building situate on Cliff St. opposite or nearly so to his property as a chapel, but he states as a matter of fact the building is only occasionally if at all resorted to by them on Sunday as a chapel, and that the same was and is in no sense a place of public worship, and that the doors thereof on the street are seldom if ever opened, and the same is not frequented on Sundays and other days by the public as a place of public worship, and that the use of his property as a garage would be of no possible hindrance to the use of said chapel.

Further, in para. 6 of his affidavit, Carvill states as follows:—

That there was no church or place where divine service is usually conducted within 300 feet of that portion of my property as to which I applied

N. B.

S. C.

EX PARTE CARVILL.

Grimmer, J.

for such building permit for the erection of such garage, and upon which I intended if permitted to erect such garage.

Also in para. 13:—

That the Roman Catholic Bishop of St. John has himself operated a public garage on said Cliff St. aforesaid, next door to said alleged chapel and much nearer than my proposed site, without any objection from the city or anyone, and without a permit, notwithstanding such by-law, and has also used a certain building on Cliff St. next door thereto as a bowling alley and place for assembling divers and sundry noisy and troublesome children, to the great annoyance of the public and of my tenants on the said lot, and that it is absurd to class the use of a building on such street as a garage as an annoyance at all comparable to the annoyance continuously created thereon by His Lordship the Bishop by his occupation and use of buildings in the immediate vicinity of said alleged chapel. That the said bowling alley being directly across the street from where I propose to erect said garage effectively prevents by its noise the use of such lot for residential purposes.

Further, that the building inspector acting, as he claimed, under the said by-law, on December 6 last refused to grant a permit to him to erect a warehouse on his said property to be used as an automobile show-room, whereby he was entirely deprived of any beneficial use of said property.

It also appears from the Carvill affidavit that garages are operated on many of the principal streets of the said City of Saint John without being in any sense an annoyance or inconvenience to the public or on public grounds objectionable, and that there is no offensive odour, annoyance, noise or disturbance resulting from or incident to the reasonable operation of a garage, and the same should not be classed with such offensive business as a soap boilery or fertilizer factory. Also that the common council has recognized that the operation of garages within the city is not of an offensive character, for in many cases it had permitted the occupation of buildings for that purpose within 300 feet of a church, and this has repeatedly occurred since the passage of the said by-law, and that the by-law being enforced in his particular case prevents him from enjoying the rightful and reasonable use of his property.

None of these statements or the facts alleged in the affidavits are, in any manner, questioned or disputed by the city or any other person or persons.

The three following grounds were urged before the Court for the granting of the motion, namely: 1. That notwithstanding the by-law the building inspector had no right to refuse the

building permit. 2. That a private chapel resorted to (as it were for family prayers), only by the members of a religious society, cannot be legally considered to be "a church or place where Divine service is usually conducted." 3. That in any event the by-law is unreasonable and manifestly unjust in that it deprives citizens of Saint John of the beneficial use of their property, and also unwarrantably restricts the motor car owners of Saint John in the use of reasonable facilities. If a garage can be prohibited next to a church it could legally be prohibited next to any other building, and all beneficial use of property in the city at the whim of the common council could be prevented.

It was contended the inspector had no power to refuse the permit in consequence of the proposed or expected occupation of the building, he being concerned only with the building being of a proper type of construction, consistent with the public safety. The by-law relates to the occupation of any building or buildings erected previously to its enactment, and then existing within 150 feet of any church or place where divine worship is usually conducted, for certain purposes, such as a garage, livery stable, tannery, etc., and the occupation for any such purpose of any building or buildings thereafter erected within 300 feet of any church or place where divine worship is usually conducted, and which when or if so occupied may be deemed and declared offensive occupation. But it, in no way, relates to the erection itself in the concrete of any building, nor in my opinion does it confer upon the inspector any discretion so far as a permit for the erection of a building is concerned, but is confined wholly and entirely to the manner of occupation of the building or buildings. The contention of the first ground must, therefore, prevail.

As to the second or third grounds, in view of my interpretation of the by-law so far as this case is concerned, they are of little importance, but from the statements contained in the affidavits it cannot be seriously contended there is one tittle of evidence before the Court to shew that the proposed building on the Carvill lot comes within the purview of the by-law so far as being within 300 feet of a church or place where divine worship is usually conducted. Carvill distinctly swears there is no church or place where divine worship is usually conducted within 300 feet of that portion of his lot where he proposes to erect a building, and that as to the chapel

N. B.

S. C.

EX PARTE CARVILL.

Grimmer, J.

used by the Sisters of Charity, it is only occasionally if at all resorted to by them on Sunday, and is not in any sense a place where public worship is usually conducted, and that the doors thereof leading to the street are seldom if ever opened, and that it is not frequented on Sundays or other days by the public as a place of public worship. If these statements are true, and not being contradicted or denied, I am permitted no discretion but to treat them as being true, then it can scarcely be seriously contended that the private chapel used, if it be so, by Sisters of Charity for private worship without even entering the same from the street, is a church within the meaning and intention of the by-law, and the inspector would not be justified in refusing the permit on the second ground.

Having reached the above conclusions it becomes unnecessary to make a decision upon the third ground, but in view of the absolute necessity at the present day, particularly in this community, of the existence of buildings know as garages, to provide for the housing, care and repair of motor vehicles, which have become so necessary and are taking so prominent a part in the every-day business life, and of the circumstances disclosed by the affidavit as well as by para. 3 of the by-law, which led up to its enactment, and that it cannot be reasonably contended it was passed for the preservation of or in the interest of alleged public safety and public peace, it may well be that the common council should consider in the public interest the revocation and repeal of the by-law, which may at any time become a source of trouble as well as litigation, in that it might lead to an infringement of private interests and interfere with the rightful enjoyment of private property.

I also desire to state that the resistance offered on the part of the inspector and the city to the motion was confined solely and entirely to the reasonableness and justice of the by-law, and did not, in any way, or in any particular, relate to or answer the statement of facts presented by the affidavits or question the same.

I am, therefore, of the opinion that the order *nisi* to quash should be discharged, but that an order absolute should be made for a writ of mandamus commanding the building inspector of the City of Saint John to grant a permit to the said George Carvill for the erection of a building on his land on the westerly corner

N. B.
S. C.
EX PARTE CARVILL.

of Cliff and Waterloo Streets in the City of Saint John, of such dimensions, materials and construction as are consistent with law.

The applicant will be allowed the costs of the motion before this Court.

SASK.
C. A.

SEIBEL v. GRAND TRUNK PACIFIC R. Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Bigelow, JJ.A. May 3, 1920.

PLEADING (§II J—231)—STATEMENT OF CLAIM—SUFFICIENCY OF ALLEGATIONS—CAUSE OF ACTION—EVIDENCE—JUDGMENT.

A statement of claim which claims damages "by reason of a fire started upon defendant's right of way by a railway locomotive" and in the alternative plea claims negligence and states that the defendants were negligent, in that they failed to maintain proper fireguards, informs the defendant that the plaintiff will claim that a fire occurred near its right of way and that the plaintiff was injured thereby because the defendant had failed to properly maintain fireguards. The ground of liability is not that the defendants started a fire but that they failed to maintain proper fireguards, and the plaintiff is not limited to a fire arising from a spark from defendant's locomotive.

Statement.

APPEAL by defendant from the trial judgment in an action for damages for loss sustained by reason of a fire burning over the plaintiff's pasture and hay lands. Affirmed.

P. H. Gordon, for appellant; *F. W. Turnbull*, for respondent.

The judgment of the Court was delivered by

Lamont, J. A.

LAMONT, J.A.:—The trial Judge found that the fire which did the damage started between the defendants' tracks and the fireguard, and that it spread over the fireguard by reason of the omission of the defendant company to properly maintain the said fireguard. He further found that the spark which started the fire came from one of the defendants' trains which passed shortly before the fire stated, and he awarded the plaintiff $750 damages. The defendants now appeal.

The grounds of appeal are of a technical character, of which only three need be noticed. They are: (1) That the cause of action upon which judgment was given in favour of the plaintiff was not the cause of action upon which the parties went to trial; (2) The statement of claim did not set forth any statutory duty on the part of the defendants to make and maintain fireguards or any breach of such duty; (3) There was no proper evidence before the Court of any order of the Board of Railway Commissioners of Canada requiring the making or maintaining by the defendants of fireguards.

SASK.

C. A.

SEIBEL v. GRAND TRUNK PACIFIC R. CO.

Lamont, J. A.

1. In the first four paragraphs of his statement of claim the plaintiff claimed damages "by reason of a fire started upon the defendants' right-of-way by a railway locomotive." In para. 5 he alleged as follows:—

> 5. In the alternative, the plaintiff repeats paragraphs 1 to 4 hereof, both inclusive, and says that said damages resulted from the negligence of the defendant company, which negligence consists *inter alia* of the following:
>
> (c) The defendants failed to establish or maintain proper or any fireguards along its right-of-way at the point where the fire occurred, or to keep the ground between its tracks and said fireguard, if any, free from all combustible matter.

The contention on part of the defendants was, that, as the plaintiff first claimed that the fire came from the defendants' locomotive, and on the alternative plea repeated paragraphs 1 to 4, and then set up damages resulting from negligence, the only cause of action thus set up was damage from fire which came from the defendants' locomotive, and that no issue was raised of fire arising from some other source and spreading to the plaintiff's land by reason of the failure of the defendants to observe the order of the Railway Board in reference to fireguards.

This contention, in my opinion, cannot be maintained.

The plaintiff in his alternative plea claims damages for negligence and states in what respect the defendants were negligent. That plea informs the defendants that the plaintiff will claim that a fire occurred near its right-of-way, and that the plaintiff was injured thereby because the defendant had failed to properly maintain fireguards. Under such a plea the plaintiff was not, in my opinion, limited to a fire arising by reason of a spark from the defendants' locomotive. It was immaterial to him how the fire started. The ground of liability under this plea is not that the defendants started a fire, but that they failed to maintain fireguards. Under the circumstances of this case, if it were necessary, I should be prepared to hold on the evidence that the spark which started the fire did come from the defendants' locomotive. The fire started fully 100 feet from the track on the side opposite to that from which the wind was blowing. The fireman of the train from Regina to Melville—from which it was contended the spark escaped—stated in his testimony that it was his duty to report any fires he saw along the railway. As he did not testify to reporting any, I think it may be taken that he did not

see any. Ten or fifteen minutes after the train passed, the fire was noticed. At the point where the fire started the locomotive was going up-grade. It is common knowledge that under such circumstances the locomotive is likely to emit sparks. *Smith* v. *London etc. R. Co.* (1870), L.R. 6 C.P. 14, 23 L.T. 678; *Dutton* v. *C.N.R. Co.* (1915), 23 D.L.R. 43, at page 48, 26 Man. L.R. 493, 19 Can. Ry. Cas. 72; (affirmed (1916), 30 D.L.R. 250, 21 Can. Ry. Cas. 294). No other reasonable explanation as to the source from which the spark came has been offered, nor do I think one can be. In my opinion, the proper inference to be drawn from the evidence is, that the spark which started the fire came from the defendants' locomotive. Compare *Caledonia Milling Co.* v. *G.T.R. Co.* (1909), 14 O.W.R. 394; *Hearn* v. *Nelson & Fort Sheppard R. Co.* (1914), 8 W.W.R. 99; *Kerr* v. *C.P.R. Co.* (1913), 12 D.L.R. 425, 15 Can. Ry. Cas. 193, 18 B.C.R. 389; affirmed (1913), 14 D.L.R. 840, 16 D.L.R. 191, 49 Can. S.C.R. 33, 16 Can. Ry. Cas. 25.

The next contention was, that it was necessary on the part of the plaintiff to allege the breach of a statutory duty where such breach was relied upon, and that an allegation of negligence did not cover such breach.

On this point the trial Judge said:—

Defendant's counsel contended that the failure to maintain the guards was a breach of statutory duty, and not negligence, and that as the pleading raises the issue only as negligence, that he had not had an opportunity to meet the issue as a breach of statutory duty. Perhaps it is wrong strictly to define a breach of statutory duty as negligence, but the pleading seems to me quite sufficient to raise the issue.

The contention of counsel for the defendant is, I think, concluded against them by the judgment of the Privy Council in *Blue & Deschamps* v. *Red Mountain R. Co.*, [1909] A.C. 361. In that case, Lord Shaw, who gave the judgment of the Court, said, at page 363:—

In the plaintiffs' statement of claim it is averred that the defendants "started a fire on their right of way;" that the right of way was not kept "free from dead or dry grass, weeds, or other unnecessary combustible matter;" and that the fire "was started through the negligence of the company." These allegations the company deny. Both parties refer to the provisions of the Railway Act, 1888, 51 Vict. ch. 29, and the Railway Act, 1903, 3 Edw. VII. ch. 58. By sec. 239 of the latter statute it is provided that "the company shall, at all times, maintain and keep its right of way free from dead or dry grass, weeds, and other unnecessary combustible matter." . . . It is

SASK.

C. A.

SEIBEL v. GRAND TRUNK PACIFIC R. CO.

Lamont, J.A.

plain that, if the company did not maintain and keep its right of way free from combustible matter, they directly contravened the substantive provision of the statute. This negligence the jury has affirmed.

As to an allegation of negligence covering the breach of a statutory duty, see also the *Halifax etc. R. Co.* v. *Schwartz* (1913), 11 D.L.R. 790, 47 Can. S.C.R. 590, 15 Can. Ry. Cas. 186, and *Dutton* v. *C.N.R. Co.*, *supra*.

These authorities establish that a charge of negligence is substantiated by proving the breach of a statutory duty, where the failure to observe such duty was set up, even although there was no allegation that the duty was a statutory obligation.

The third objection was that the order of the Board of Railway Commissioners for Canada, No. 107 (ex. "A"), and the regulations requiring the construction and maintenance of fireguards (ex. "B") had not been properly proved. Both were certified to be true and correct copies of the originals on file with the Board. It was contended that the certificate should have gone further, and should have stated that they had been made or adopted by the Board.

Sec. 69, sub-sec. (2) of the Railway Act, R.S.C. 1906, ch. 37,* is as follows:—

2. A copy of any regulation, order or other document in the custody of the secretary, or of record with the Board, certified by the secretary to be a true copy, and sealed with the seal of the Board, shall be *primâ facie* evidence of such regulation, order or document, without proof of signature of the secretary.

In my opinion both exhibits were sufficiently authenticated.

The appeal should, therefore, be dismissed with costs.

The plaintiff cross-appealed on the ground that the damages awarded were insufficient. In my opinion, the cross-appeal must be dismissed with costs. The plaintiff put in as part of his case a report on the fire made by the defendants' foreman, which contained the statement that the plaintiff claimed that he had been damaged to the extent of $5 per acre. This estimate of the damage the Judge evidently accepted, for he allowed $750 damage to some 150 acres of hay land.

Appeal dismissed.

*See amendment 9-10 Geo. V. 1919, ch. 68, sec. 68.

THE KING v. CURTIS.

SASK.

C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. March 30, 1920.

THEFT (§I—1)—PROSECUTION FOR—SALE OF LAND—CROP PAYMENTS—FAILURE TO DELIVER—STATED CASE—SEC. 1014 CRIM. CODE—CONTRACT—BREACH—LIABILITY.

Under an agreement for sale of land which requires the purchaser to deliver to the vendor or his assignee, one-half share of the crops grown on the land in each year during the currency of the agreement the wheat in question belongs under the common law to the purchaser until it is delivered in accordance with the terms of the agreement, and failure to so deliver is a breach of contract, not a criminal offence.

CASE STATED by the Judge of the Judicial District of Battleford for the opinion of the Saskatchewan Court of Appeal pursuant to section 1014 of the Criminal Code and amendments. Statement.

H. E. Sampson, K.C., for the Crown; *P. H. Gordon*, for accused.

The judgment of the Court was delivered by

HAULTAIN, C.J.S.:—The following case is stated by the Judge of the Judicial District of Battleford for the opinion of the Court: Haultain, C.J.S.

The accused was tried before me on December 22, 1919, on a charge of theft. At the conclusion of the trial, at the request of the acting agent of the Attorney-General, the following case is stated for the opinion of the Court of Appeal of the Province of Saskatchewan, pursuant to sec. 1014, R.S.C. 1906, ch. 146, and the amendments thereto.

The questions for the opinion of the Court are:—

1. Having found that one John A. Gregory of North Battleford, Saskatchewan, sold to the accused the north half of section thirty-three (33) township forty-five (45) range sixteen (16) west of the third meridian on crop-payment agreement dated April 8, 1916. And that the said agreement had been assigned by the said John A. Gregory to the Northern Trusts Co. of Winnipeg by agreement in writing dated May 16, 1916. And, that the accused had received due notice of the said assignment. And, that under the terms of the said agreement, the accused had to deliver to the said John A. Gregory, or to his assignee at the elevator, or in cars at Prince or Hamlin, Saskatchewan, one-half share of the crops grown on the said land in each year during the currency of the said agreement commencing with the year 1917. And that in the year 1917 the accused threshed eight hundred (800) bushels of wheat grown on the said land, one-half of which, being four hundred (400) bushels of wheat, he was required by the said agreement to deliver as aforesaid. And that the accused did not deliver the said four hundred bushels of wheat as required by the said agreement or account for the proceeds thereof to said Northern Trusts Co. or to the said John A. Gregory but appropriated the said wheat to his own use. Whether I was right in finding the accused not guilty under a charge, that he did unlawfully steal a quantity of grain, to wit, four hundred bushels of wheat, the property of the Northern Trusts Co.

2. Having found as aforesaid whether I was right in finding the accused not guilty, under a charge that being in possession of eight hundred bushels of wheat, the property of the said accused and of the said Northern Trusts

SASK.

C. A.

THE KING v. CURTIS.

Haultain, C.J.S.

Co., in equal shares and being in possession as joint owner with the said Northern Trusts Co., the accused did unlawfully and fraudulently sell and dispose of the said wheat and did unlawfully and fraudulently convert to his own use the whole proceeds thereof.

In my opinion the trial Judge was right in finding the accused not guilty on both counts, for the following reasons:

Under the common law the wheat in question belonged absolutely to the accused until it was delivered to the vendor or his assigns. Until that was done, the Northern Trusts Co. had no property in the wheat. It only had a contractual right to its delivery. Failure to deliver on the part of the accused would only be a breach of contract and not a criminal offence. The provisions of an Act respecting Agreements for Payment to Vendors, Lessors and Others by Shares of Crops, 6 Geo. V. 1915 (Sask.), ch. 34, do not, in my opinion, alter the law in this respect. Sec. 3 of that Act is as follows:—

3. When land has been sold under an agreement of sale providing for payment of the purchase money or part thereof by the purchaser delivering to the vendor a share of the crops grown on the said land or paying to the vendor the proceeds of such share, then, notwithstanding anything contained in the Chattel Mortgage Act or in any other statute, or in the common law, the vendor, his personal representative and assigns shall, without registration, have a right to the said crops or the proceeds thereof to the extent of the share or interest agreed to be delivered or paid over, in priority to the interest of the purchaser, his personal representative or assigns in such crops or the proceeds thereof and to the interest of any other persons claiming through or under the purchaser, his personal representatives or assigns, whether as execution creditor, purchaser, mortgagee or otherwise.

The manifest intention of the statute is to protect vendors against persons claiming as execution creditors, purchasers and mortgagees against the purchaser. As between the vendor and the purchaser it only gives

a right to the said crops or to the proceeds thereof to the extent of the share or interest agreed to be delivered or paid over, in priority to the interest of the purchaser, his personal representatives or assigns in such crops or the proceeds thereof.

These words do not seem to me to give the vendor any greater or further rights as against the purchaser than he has under his original contract. They certainly do not alter the legal ownership of the crop. The crop still remains the property of the purchaser subject to his contractual obligation to deliver a part of it to the vendor.

I would accordingly answer both questions in the affirmative.

Judgment accordingly.

OVERLAND v. HIMELFORD.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. June 1, 1920.

DOWER (§ I C—17)—DOWER ACT (ALTA.)—GRANT OF LAND BY HUSBAND AND WIFE—EXPLICIT DISPOSITION BY WIFE—BAR BY ESTOPPEL.

The Dower Act, 7 Geo. V., 1917 (Alta.), ch. 14, sec. 4, does not prevent a husband and wife from together, in the same instrument, granting certain lands for the lifetime of the husband and wife, and the wife having made a distinct, separate and explicit disposition of her contingent life estate is bound by estoppel.

Statement.

APPEAL by plaintiffs from the judgment of Walsh, J., in an action by husband and wife to set aside a lease of land on the ground that the wife had not barred her dower. Affirmed by equally divided Court.

B. Pratt, for appellants; *C. C. McCaul*, K.C., for respondent.

Harvey, C.J.

HARVEY, C.J., concurred with BECK, J.

Stuart, J.

STUART, J.:—The plaintiffs, appellants, are husband and wife. The husband had acquired title under the Dominion homestead law to a certain quarter section of land, with the exception of 26¼ acres on which there exists a valuable gravel pit and as to which there had been some reservation in the original homestead entry.

On September 18, 1918, a document was executed in which the plaintiffs were referred to as "parties of the first part" and as "hereinafter called the lessors" and the defendant as "party of the second part," and in which, after reciting that William Overland was the registered owner of the land in question except the 26¼ acres, that there were on the land certain crops, stock, implements and improvements and that William Overland had applied for a patent to the 26¼ acres, *it was witnessed* that in consideration of the premises and of the sum of one dollar it was agreed that "the lessor leases and immediately delivers up possession" of the said lands unto the lessee including the 26¼ as soon as the lessor should receive a grant thereof, that the lessor "gives and grants unto the lessee during the term of this lease" the crop, stock and implements aforesaid, that the duration of the lease should be during the life "of the lessors or the survivor of them" and should commence on September 20, 1918, that the lessee should pay "the lessors" the yearly rental of $1,000 payable in monthly instalments of $83.34 each "and continuing during the duration of the lease which as aforesaid is during the life of the lessors or either of them or the survivor of them the said monthly

ALTA.

S. C.

OVERLAND v. HIMELFORD.

Stuart, J.

payment of $83.34 each to be paid $41.67 to the said William Overland and $41.67 to the said Elizabeth Ann Overland;" and that the lessee undertook to pay all taxes, to keep buildings and improvements in repair; to care for the stock, implements and goods in a proper and workmanlike manner and would not permit any waste, etc. It was also by the document agreed that upon the death of the survivor of the lessors all the lands, goods and chattels aforesaid together with the increase if any of the live stock should "revert (*sic*) to and be and become the absolute property of the lessee" and the lessors undertook and agreed to make no other or contrary disposition of the said lands and goods.

The document contained certain other provisions relating to a right of re-entry which it is not now necessary to set forth in detail.

On March 4, 1919, the plaintiffs began an action against the lessee in which they sought to avoid the lease on the grounds, first, that the wife, being unable to read and write, had never acknowledged her signature apart from her husband as prescribed by sec. 7 of the Dower Act, 7 Geo. V. 1917, ch. 14, although it had been read over to her and all parties had been advised by the same solicitor in the presence of each other; secondly, that with respect to the 26¼ acres there had been a violation of the Dominion homestead law against agreements before issue of patent; and thirdly, that there had been a forfeiture on account of a breach of certain alleged covenants in the lease.

The trial Judge dismissed the action and the plaintiffs are appealing.

At the hearing of the appeal, the second and third of the above mentioned grounds for setting aside the lease were held upon the facts to be untenable but judgment was reserved with respect to the question of the provisions of the Dower Act.

Sec. 3 of the Dower Act, 7 Geo. V. 1917, ch. 14, as it stood in 1917, reads as follows:—

> Every disposition by act *inter vivos* of the homestead of any married man whereby the interest of such married man shall or may vest in any other person at any time during the life of such married man or during the life of such married man's wife living at the date of such disposition shall be null and void unless made with the consent in writing of the wife aforesaid.

The words "homestead" and "disposition" are defined in the Act, sec. 2, and admittedly cover the facts of the present case.

ALTA.

S. C.

OVERLAND v. HIMELFORD.

Stuart, J.

Sec. 4 of the Act reads as follows:—

Every disposition by will of such married man and every devolution upon his death intestate shall as regards the homestead of such married man be subject and postponed to an estate for life of such married man's wife hereby declared to be vested in the wife so surviving.

In *Choma* v. *Chmelyk* (1918), 40 D.L.R. 731, 13 Alta. L.R. 298, Scott, J., held that the true meaning of sec. 3, 7 Geo. V. 1917, ch. 14, was not that the disposition should be utterly null and void to all intents and purposes without the required consent in writing, but that it should be null and void only in so far as it affects the interest of the wife under the Act. That case was not appealed, and in 1919 by sec. 2, 9 Geo. V., ch. 40, the Legislature by an amendment made the section explicitly conform in meaning to what Scott, J., had said was its meaning as it stood before.

I am not sure that we should here find any legislative interpretation of the original Act because the action of the Legislature in making the amendment is itself clearly open to two interpretations. My own observation has been that when the Court places an interpretation upon a statute which is satisfactory to the Legislature and confirms its real intention it generally is satisfied to let the statute stand. No doubt the Legislature indicated by the amendment that it then thought the law ought to be as laid down by Scott, J., but Legislatures, like others, can have one intention at one time and another at another time.

And I have with much respect some doubt as to the correctness of the view expressed in *Choma* v. *Chmelyk*, *supra*. In 1915 the Legislature had passed an Act called the Married Women's Home Protection Act, 5 Geo. V., ch. 4, which permitted a married woman to file a caveat in the Land Titles Office against the registration of any transfer or other instrument affecting the homestead as defined by the Act (sec. 2), which was "the house and buildings occupied by such married woman as her home . . . and the lands, and premises and appurtenances thereto occupied thereby or enjoyed therewith."

The Act was obviously a rather crude attempt to prevent a married woman from being deprived of the enjoyment of the family home without her consent.

Two years afterwards the Dower Act was passed and was obviously a substitution for the former. Sec. 8 of the Act of 1917, 7 Geo. V., ch. 14, repeals the Married Women's Protection Act.

ALTA.

S. C.

OVERLAND v. HIMELFORD.

Stuart, J.

But the word "homestead" is continued and it is again defined as meaning land "on which the house occupied by the owner thereof as his residence is situated."

Then, whereas for two years a married woman could prevent alienation of this house, home or homestead by filing a caveat, the Legislature proceeded to enact that every disposition *inter vivos* of this homestead by a married man whereby the interest of such married man should vest in any other person should be null and void without the consent in writing of the wife. And it declared by section 5 that for the purposes of the Act the residence of the married man should not be deemed to have been changed without her consent in writing.

I am bound to say that these expressions give me the impression that the Legislature was intending still to secure to a married woman the enjoyment of the family home during even the husband's life unless she consented to change it. To substitute for the protection given by the Act of 1915, 5 Geo. V., ch. 4, crude as it was, a mere inchoate right of dower in the homestead was certainly to cut down considerably the protection and advantage previously given particularly in the case of comparatively young people or people in middle life.

To say that sec. 3 made the disposition null and void only so far as it affected the wife's interest as created by sec. 4 is to assume that sec. 3 did not itself create an interest in the wife. It is to say that the section itself created no interest in the wife *because* it means that the forbidden disposition is to be null and void only as it affected an interest created by another section.

The Legislature may have changed its mind between 1917 and 1919, as it had between 1915 and 1917.

My opinion is that the Act of 1917, 7 Geo. V., ch. 14, was clearly intended to create a right in the wife to stick to her home and residence if she pleased even while her husband lived *and in addition to that* to give her a life estate after his death notwithstanding any disposition by will or by the statutes affecting distribution on an intestacy.

It is of importance to remember that neither the Act of 1915 nor that of 1917 professed to deal with a married man's lands generally which were in older days all subject to dower. They deal only with the family home or residence. I think the amending

Act of 1919 did not declare the law but altered it to the detriment of the married woman. I think therefore the document was null and void even with respect to the occupation and enjoyment of the land during the husband's lifetime unless the required consent was shewn.

We have therefore to consider whether the admitted absence of the acknowledgment of the wife apart from her husband is fatal.

I think that it is. It seems as if the case should send one back to restudy the old, and by me at any rate forgotten, if ever known, law of Upper Canada in respect to the bar of dower. It seems from such cases as *Hill et ux* v. *Greenwood* (1864), 23 U.C.Q.B. 404; *Huffman* v. *Askin* (1853), 2 U.C.C.P. 423; *Buck* v. *McCallum* (1863), 13 U.C.C.P. 163, and *Bonter* v. *Northcote* (1869), 20 U.C.C.P. 76, that by 37 Geo. III. 1797, ch. 7, any person entitled to dower might by deed executed alone or jointly with others release her dower but no such release should be effectual unless such person should come before one of certain officials and be examined touching her consent to be barred of her dower and unless such official should find her consent to have been voluntary and free from coercion and so certify by endorsement on the deed.

Now I have no doubt whatever from the cases I have read that while the law stood thus the mere fact that the wife joined with the husband in a deed and executed it along with him was not sufficient to make the bar of dower effectual if there was no acknowledgment in the prescribed form, because it appears that by 2 Vic. 1838, ch. 6, sec. 3, it was for the first time enacted that whenever a married woman should join with her husband in any deed or conveyance whatever wherein a release of dower is contained it should not be necessary to acknowledge the same before any Court, etc., and in *Bonter* v. *Northcote*, 20 U.C.C.P. 76, Gwynne, J., at 79, states that this statute was passed for the purpose of affording still greater facility in barring dower than had been given by an amending Act of 3 Wm. IV., 1833, ch. 9.

So far, therefore, as any assistance is to be derived from the old law of Upper Canada and the decisions in that Province I think these point to the necessity of an acknowledgment under our present Act even where, as in this case, the wife has joined in the deed.

ALTA.

S. C.

OVERLAND v. HIMELFORD.

Stuart, J.

It is to be observed that there is nothing in the Act providing that the wife may secure a certificate of title from the Land Titles Office for the estate which she is given. She might perhaps even under the Land Titles Act as it stands demand a certificate of title after the husband's death but it would appear to be certain that during his life she cannot register her interest. It is for this reason that her consent to some act which may defeat it is required by the Act to be given. A disposition by the husband of his interest, he being the registered owner of the whole fee simple, would upon registration destroy her interest at least in favour of a person obtaining the conveyance without notice and getting registration in his own name.

On the other hand, where the wife has an estate of which she is the registered owner she possesses the certificate of title and under the modern statute law she can dispose of it as if a *feme-sole*. And there would in that case be much less danger of undue influence. But the interest or estate created by the statute is of a special kind and should not be looked upon as one of the estates or interest with which the Land Titles Act, 6 Edw.VII. 1906, ch. 24, deals. So far as she and her special estate or interest are concerned, therefore, I am of opinion that we ought not to think of it and her in the terms of the Land Titles Act and with the idea of registration in our minds. The Act, so far as her occupation and dower right are concerned, throws us back to the condition of affairs before the registration laws.

If it is open to a conveyancer to avoid the protection given by the Act by merely a change in the form of the document, by making the wife appear to be a direct party thereto and by getting her to sign as a direct party the whole purpose of the statute would seem to me to be nullified.

The trial Judge thought that sec. 7 which provides for an acknowledgment was, aside from the necessity in case of registration, directory only. With much respect I cannot accede to that view. If the wife herself could get a certificate of title for her estate the case might be different, but she cannot. And the statute after creating her interest proceeds to throw a protection around it and that protection includes I think the necessity of an acknowledgment under sec. 7.

ALTA.

S. C.

OVERLAND v. HIMELFORD.

Stuart, J.

The whole Act should, I think, be read together and putting secs. 3 and 7 together I think the effect is the same as if the words "executed (or evidenced) as hereinafter required" had followed the last words of sec. 3.

Moreover, it is pertinent to point out that sec. 6 says that the consent may be embodied in or endorsed upon the instrument effecting the disposition. The effect of this seems to me to be not that you are entitled to imply a consent from some general words in the instrument and from her execution of it but that the consent is to be either an independently endorsed memorandum or an independent paragraph or clause in the instrument itself. The document in question here is neither. This perhaps would be admitted but the argument is that the wife was by no means consenting to the conveyance of her husband's interest but was for herself conveying her own. But if that were so she should and would ordinarily have been a distinct "party." Instead of that she is *with* her husband, "party of the first part." That is a strange way to describe two persons, one of whom is to convey his estate and another to convey a separate and distinct estate of her own. They are in effect made both to do the same thing which of course they cannot do. Moreover, the parties are not referred to in the body of the document as "parties of the first part." Strangely enough, although these parties of the first part are described as "hereinafter called the lessors" when it comes to the recitals there is therein not a single reference to the wife being entitled to dower or indeed to the land being a "homestead" under the Dower Act at all. Then again, when it comes to the body of the agreement it says "the lessor leases and immediately delivers up possession, etc.," and "the lessor gives and grants unto the lessee the goods and chattels, etc." Even in one of the recitals it is said that the "lessor has" agreed to give a lease.

I do not think we can say that by inadvertence the singular was put for the plural in these sentences. The verbs are all put in the singular as well and repeatedly and when the term of the lease is referred to the necessity of the plural is at once remembered apparently. The question might be asked whether the wife even as the agreement stands agreed to anything.

This is certainly a peculiar instrument to be intrepreted as intended as an assignment or conveyance by the wife of her right of occupation and of dower.

ALTA.

S. C.

OVERLAND v. HIMELFORD.

Stuart, J.

In my opinion, to say the least, even if it were possible to draft the document so as to appear to convey distinctly the wife's interest and so as to avoid necessity if an acknowledgment by having her execute it in that form—a proposition which I do not admit—I think it should only be allowed where the document is made to contain a distinct and specific reference to her interest so that upon reading it she would at once understand that she was parting with her special rights.

I quite agree with what the trial Judge said in regard to the great advantage of the bargain to the plaintiffs, and I also am inclined to think he was right as to the wife having understood in a general way at least what was being accomplished by the agreement. But although there seem really to be no merits in this particular case in favor of the female plaintiff my difficulty is that we are interpreting for future cases where there may be a hardship non-existent here, the meaning of this new legislation which, whether we agree with its policy or not (which is immaterial) has been enacted to remove what was doubtless considered by the Legislature some injustice in the position of married women with respect to their homes and to give them the power to restrain the husband from alienating them.

I think the Act intended that before a husband can do that the wife must consent and her consent must be acknowledged apart from her husband before the agreement or document becomes effective at all. To adopt the view of the trial Judge would, I think, simply substitute for this separate acknowledgment the decision of a Judge when the matter comes up in an action.

I would, therefore, allow the appeal with costs and direct judgment to be entered for the female plaintiff declaring the agreement null and void so far as it destroys her right of residence and occupation and enjoyment during her life but this subject to the condition that the plaintiffs return to the defendant the payments already made.

In the circumstances, I would not allow the plaintiff even a reasonable occupation rent.

Beck, J.

BECK, J.:—This case, an appeal by the plaintiffs from the judgment of Walsh, J., calls only for a decision as to the proper interpretation of the Dower Act, 7 Geo. V. 1917, ch. 14.

That Act by sec. 4 confers upon and vests in a married woman surviving her husband "an estate" (inferentially denominated by the Act "dower") for "the life of such married man's wife" in the husband's "homestead" that is (with some restrictions as to quantity of the land connected with it), the house occupied by the husband as his residence. Sec. 3 of the Act enacts that:—

> Every disposition by act *inter vivos* of the homestead of any married man, whereby *the interest of such married man* shall or may vest in any other person at any time during the life of such married man or during the life of such married man's wife living at the date of such disposition, shall be null and void, unless made with the consent in writing of the wife aforesaid.

Then comes a provision to the effect that the residence of a married man shall not be deemed to have been changed unless the change in residence is consented to in writing by the wife (sec. 5).

Then a provision that such consent to a disposition or change of residence must be produced on the registration of the instrument; and that such consent must be formally acknowledged apart from her husband as being given of her own free will and accord and without compulsion on her husband's part (sec. 6).

The instrument in question here is one by which the husband and wife together granted certain lands for the lifetime of the husband and wife or the survivor of them at the yearly rental of $1,000: "which shall be payable in twelve equal monthly payments of $83.34 . . . continuing during the duration of the lease which, as aforesaid, is during the duration of the life of the lessors or either of them or the survivor of them, the said monthly payment of $83.34 to be paid *$41.67 to the said William Overland (the husband) and $41.67 to the said Elizabeth Ann Overland (the wife)*.

It seems to me that the obvious purpose of the Act is to preserve the wife's life estate in the homestead which she has contingent on her surviving her husband, where the disposition of the homestead is *his* disposition of *his* estate in the homestead. Unless she consents to *his* disposition, under the precautions laid down in the Act, *her* estate is preserved. Obviously the carefully guarded consent is to shield her from the persuasions—good or evil—of her husband to extinguish her contingent life estate merely at his request and without consideration to her.

This contingent life estate is certainly one which under our statutory laws giving her as full control over her real and personal

ALTA.

S. C.

OVERLAND v. HIMELFORD.

Beck, J.

estate as a *feme-sole*, she can dispose of by a disposition which is not that of her husband but her own disposition. She can undoubtedly make her own contracts relating to such an estate and is subject to estoppel, that is, to be prevented from making a claim to an estate, if, on all the facts and circumstances, it appears to the Court that it is inequitable that she should do so. To hold otherwise would be to put a check upon the whole present day current of legislation in favor of the equality of the sexes in regard to property and civil rights. A married woman could deal independently with her inchoate right to dower under the old law and could be bound by estoppel. See *Cory* v. *Gertcken* (1816), 2 Madd. 40; *Hoig* v. *Gordon* (1870), 17 Gr. 599; *Sarsfield* v. *Sarsfield* (1862), 22 U.C.Q.B. 59; *Allen* v. *Edinburgh Life Insurance Co.* (1877), 25 Gr. 306; Cameron on Dower, 292, 378, 384-5.

Here, though it was comprised in the same document, the wife made a distinct, separate and explicit disposition of her contingent life estate for a continuing consideration payable to herself—a considerable portion of which she has already received. I hold she cannot withdraw from it because of the want of the formal acknowledgment of consent mentioned in the statute. I hold so on three grounds: (1) The case is not contemplated by the Act—it is a disposition not by her husband but by herself; (2) She is bound by her own contract; (3) She is bound by estoppel.

Our opinion on the other questions involved were, I think, made evident during the course of the argument.

I would dismiss the appeal with costs.

Ives, J.

IVES, J.:—I agree with the conclusions of my brother Stuart in this appeal. Previous to the year 1915 the people of this Province had experienced a land boom, particularly in the cities and towns, with all its attendant speculation. The wives in Alberta said, in effect, to the Legislature, where this speculation affects our homes we want it stopped. We have a home in the morning but it is sold or mortgaged at night. Our husbands may deal with their lands as they please, subject only to their duty of providing us with a home which shall be placed beyond the risk of their speculation. These representations resulted in legislation in 1915 called the "Married Woman's Home Protection Act," 5 Geo. V., ch. 4. The name of this Act is very suggestive, although

it created no right of property in the wife. It gave her only a right of filing a caveat which forthwith clouded the title, and prevented the husband from dealing with the land, in so far as registration was required, from the moment the caveat was lodged.

This Act was followed and repealed in 1917 by the Dower Act, 7 Geo. V., ch. 14, and it is under that Act unamended that this appeal is to be decided. Sec. 3 of the Act, 7 Geo. V. 1917, ch. 14, concerns his dealing with the home by Acts *inter vivos*. Sec. 3 is in the following words:—

> Every disposition by act *inter vivos* of the homestead of any married man whereby the interest of such married man shall or may vest in any other person at any time during the life of such married man or during the life of such married man's wife living at the date of such disposition shall be null and void unless made with the consent in writing of the wife aforesaid.

So far this legislation has created no interest in the wife, but by what is, in effect, a prohibition, it assures to the wife uninterrupted enjoyment of the homestead from the moment of her marriage and only by her written consent can that enjoyment be interfered with. Having secured the home to the wife during her husband's life the Legislature then proceeds by sec. 4 to provide the same security for her in the event of her husband's death and grants to her a life estate. Then, realizing the influence of the husband, arising under the marital relationship, the Legislature surrounds the wife with a further protection by prescribing an imperative formality before she will be deemed to have consented. In my opinion there is no "consent" as required and contemplated under this Act which fails to comply with the formality prescribed in sec. 7.

In the case of *Choma* v. *Chmelyk*, 40 D.L.R. 731, 13 Alta. L.R. 298, I submit with great respect, that the trial Judge permitted the name "Dower" by which the Act is styled, to unduly influence his interpretation of the legislation. Save for sec. 4, the Act would be more aptly intituled as in 1915, viz., "The Married Woman's Home Protection Act," 5 Geo. V., ch. 4.

Appeal dismissed; Court evenly divided.

N. B.

S. C.

F. v. F.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., and White and Grimmer, JJ. April 23, 1920.

1. NEW TRIAL (§ II—7)—GROUNDS FOR—IMPROPER STATEMENTS BY COUNSEL IN PRESENCE OF JURY.

Statements improperly made in the presence of the jury by defendants' counsel, that the Court of Appeal had decided, in a former trial, that the facts proved with reference to a certain incident did not constitute adultery, does not entitle the plaintiff to a new trial, if the jury, deciding the case on the evidence that was properly before them and upon that alone, could not rightly have found for the plaintiff on the issue because of the decision that such evidence was insufficient to sustain such charge.

2. EVIDENCE (§ XIII—1000)—ADMISSIBLE FOR ONE PURPOSE—SATISFYING ALL RULES—CONSIDERATION BY JURY IN ANOTHER CAPACITY—RULES APPLICABLE.

When an evidentiary fact is offered for one purpose and becomes admissible by satisfying all the rules applicable to it in that capacity, it is not inadmissible because it does not satisfy all the rules applicable to it in some other capacity and because the jury might improperly consider it in the latter capacity.

3. TRIAL (§ II C—55)—ADMISSIBILITY OF EVIDENCE—POWERS OF JUDGE AND JURY.

Whenever the admissibility of evidence tendered depends upon questions of fact, it is for the Judge to decide as to whether or not the circumstances are such as to justify the admission of the evidence tendered, and the duty of the jury to give such weight to the evidence thus admitted as under all the circumstances they may decide it is entitled to.

Statement.

APPEAL by defendant from judgment of Crocket, J., Judge of the Court of Divorce and Matrimonial Causes, granting a new trial to plaintiff, after verdict found for defendant. Reversed.

J. B. M. Baxter, K.C., for defendant.

M. G. Teed, K.C., *contra*.

The judgment of the Court was delivered by

White, J.

WHITE, J.:—This is an action brought by the respondent against the appellant for divorce, on the ground of adultery. It was first tried before the Judge of the Court of Divorce and Matrimonial Causes without a jury in the month of January, 1918. The libel as it then stood contained three distinct charges of adultery: 1. With H. B., at St. John, in July and August, 1916; 2. With E. H., at Fredericton, in October, 1916; 3. With W. J. I., at the Golf Club, Fredericton, on August 31, to September 1, 1917.

The Judge found the third charge proven, and granted the divorce upon that ground, without making any finding as to either of the two other charges. From this judgment the respondent appealed to this Court. The matter was argued in April, 1918; and on June 21 following the Court gave judgment, allowing the appeal, setting aside the decree of divorce, and ordering a new trial. The judgment will be found reported in (1918) 41 D.L.R.

N. B.

S. C.

F.
v.
F.

White, J.

739, 45 N.B.R. 505. Subsequently, the libel was amended by adding two additional charges of adultery, viz: 4. With F. W. at the said Golf Club, Fredericton, on the same occasion and date as with W. J. I. 5. With M. J. B., in 1916 and 1917, in divers places, including McAdam Junction.

No pleadings on behalf of the defendant were served or filed.

The defendant applied to have the issues of fact tried before a jury. The Judge of the Divorce Court refused to make an order for a jury. The defendant thereupon appealed to this Court, which reversed the decision of the Judge of the Divorce Court, and held the defendant was entitled to a jury. This judgment will be found reported in (1919) 45 D.L.R. 529, 46 N.B.R. 259 at 279.

The action came on for a new trial before Crocket, J., and a jury in the month of July, 1919. Upon this trial eight questions were submitted to the jury, which, with the answers given thereto, are as follows:—

1. Did the defendant commit adultery with W. J. I., at the Golf House of the Fredericton Golf Club, on the night of August 31-Sept. 1, 1917? A. No. 2. Did the defendant commit adultery with F. W., at the Golf Club House on the night of August 31-Sept. 1, 1917? A. No. 3. Did the defendant commit adultery with F. W., at her residence, on the morning of Sept. 1, 1917? A. No. 4. Did the defendant commit adultery with H. B., at the City of Saint John, in the month of July or August, 1916? A. No. 5. Did the defendant commit adultery with E. H. F., at the City of Fredericton in or about the month of October, 1916? A. 5 say, No. 2 say, Yes. 6. Did the defendant commit adultery with E. H. F., at the City of Fredericton, in the months of March or April, 1917? A. No. 7. Did the defendant carry on an adulterous intercourse with M. J. B., at divers times and places, in the years 1916 and 1917? A. 5 say, No. 2 say, Yes. 8. Did the defendant commit adultery with M. J. B., at McAdam Junction, in the month of July, 1917? A. 6 say, No. 1 says, Yes.

After the jury had rendered their findings, Mr. Teed, counsel for the plaintiff, said that he would like to have an opportunity to consider what action he would take in the matter. Mr. Baxter, counsel for the defendant, then suggested that it might be entered on the record that he had formally moved for dismissal of the libel, and that consideration was reserved; whereupon the Court said: "The libel will not be dismissed at present, and leave will be reserved to move for a new trial or to make any other motion that may be deemed necessary."

Subsequently, the plaintiff moved before the trial Judge to set aside the findings of the jury, and for a new trial, upon the grounds following:—

N. B.

S. C.

F.
v.
F.

White, J.

1. Improper admission of evidence and improper questions by the defendant's counsel. (a) Improper questions and improper admission of evidence respecting the writer of a letter, and the evidence as to Mrs. L. on pages 298 to 302 of the stenographer's return. (b) Of the questions and answers Nos. 102, 168 and 197, in the depositions of C. F. W. referred to on page 458½ of the return. (c). Of the questions and answers in the examination of Miss B. on pages 493 to 496 of the return. 2. Defendant's counsel improperly stated in the presence and hearing of the jury that the Court of Appeal have decided that the facts proved with reference to the Golf Club incident did not constitute adultery. 3. Defendant's counsel improperly during the trial and in his address to the jury alleged and sought to set up adultery on the part of the plaintiff, and confused, diverted and misled the minds of the jury as to the real questions at issue. (See pages 298 to 302— and 724.) 4. Misdirection of the trial Judge, in directing the jury on pages 712-714 of the return that if they believed this letter from Mr. B. in evidence had not been received by the defendant, they should eliminate it from the case. 5. The findings of the jury upon all the questions submitted were contrary to the evidence and against the weight of evidence.

To these five grounds was added, by amendment allowed after the filing of the notice, a sixth ground, viz: "That the action was in properly tried before a jury, the provincial statute authorizing a jury to try contested matters of fact in a divorce case being *ultra vires* of the Provincial Legislature."

The trial Judge having taken time to consider, gave a written judgment granting a new trial upon grounds 2, 3 and 4. With regard to ground 1 (b), the Judge states that the three exceptions to the admission of evidence covered by that ground were abandoned on the argument. He further states that,

the evidence excepted to in (c) related to an incident described by Mrs. A. M. C. in her direct examination by plaintiff's counsel, as to some one taking liquor clandestinely to the defendant's house when Miss B. was living there. The plaintiff's counsel having in his case introduced the subject to which the testimony excepted to was directed, I do not think he can now be heard to object that the subject was irrelevant. It developed nothing more important than a statement by Miss B. that Mrs. C. knew that the particular bottle of liquor in question was coming, and a possible suggestion that she was a party to its being brought to the house. Assuming that the matter was not strictly relevant, I do not think that it could properly be held that any substantial wrong or injustice had been occasioned by the admission of the evidence excepted to, so that in no event could it be a sufficient ground for setting aside the jury's findings and ordering a new trial.

On the argument before this Court, no exception was taken to this part of the Judge's judgment.

The remaining exception (a), as stated by the trial Judge, applies to questions put to the plaintiff in cross-examination regarding the authorship of a letter which was shewn to him but

N. B.
S. C.
F.
v.
F.
White, J.

which was not offered in evidence; and, as to his association with the lady he admitted had written the letter. The Judge says:

> The question was allowed only after it was pressed by defendants' counsel, and only upon the ground that it might affect the credit of the plaintiff's testimony. I think now, having regard to the fact that the plaintiff's testimony bore so indirectly upon the issues which were submitted to the jury, and that the probability of the plaintiff's affirmative answer affecting the credibility of his testimony was so disproportionate to the danger of a jury in such a case as this being blinded to the real issue by it, that I should not have allowed it even when the counsel pressed it. The counsel's closing address to the jury is not included in the return, but it is only necessary to read the statements made by him by way of argument in contending for the allowance of the question, as reported at pages 300 and 301, and the statement made by him, at the conclusion of the charge in requesting a direction which I cannot help but think he knew I would not be justified in giving, to see the use of which the defendant's answer was capable in the hands of an astute and effective advocate who might desire to divert the minds of the jury from the conduct of the defendant's wife, which alone was in issue in the case. The counsel's address to the jury and the statements referred to, however, are the subject of a substantive objection, which I shall deal with in its order.

On the argument before this Court, this exception (a) was argued in connection with ground 3; and, as I think it can be conveniently discussed in that connection, I will deal with it when I come to consider ground 3. The Judge refused to grant a new trial upon ground 5, stating that in view of the conclusions at which he had arrived upon grounds 2, 3 and 4, he did not think it was necessary for him to say anything further than that had there been no other well-founded objections to the conduct of the trial, he would not have been disposed to have set aside the jury's findings upon questions which were so obviously pure questions of fact, depending upon the credibility of witnesses;—and in that view I concur.

Ground 6, added by amendment, is not open to discussion on this motion, because, so far as this Court is concerned, the question has already been decided by the judgment of this Court to which I have already referred, as reported in 45 D.L.R. 529, 46 N.B.R. 259 at 279.

There remain, therefore, for consideration on this appeal, grounds 2, 3 and 4, and exception (a) under ground 1.

Dealing first with ground 2: it is advisable, I think, to state the facts upon which this ground is based. These are to be found in the official stenographer's report, commencing at page 666. I quote:

N. B.

S. C.

F.
v.
F.

White, J.

Mr. Baxter: In the first place I am going to ask Your Honor to direct the jury, as to what we call the golf club charge, that they must find for the defendant. The evidence relating to this charge does not substantially differ from the evidence given on the previous trial. As far as the charge of adultery with Dr. I. is concerned, it is absolutely denied both by Dr. I. and Mrs. F., the only two persons who could have any possible knowledge of it, with the exception of Mr. W., who didn't give evidence at the previous trial. We now have his evidence—

The Court: Isn't that entirely a question of credibility of witnesses?

Mr. Baxter: I think not. Whether Your Honor agrees or does not agree with the judgment of the Court of Appeal in this matter, it is the law governing this case.

Mr. Teed: Not on the facts now before the Court.

Mr. Baxter: I think so. Hazen, C.J., quoting from *Allen* v. *Allen*, [1894] P. 248 at 252, cites Sir William Scott in *Loveden* v. *Loveden* (0000), 2 Hagg. Con. 1 at 2, where he says . . .

The Court: If the judgment of the Court is to be read, I do not think it should be read—

Mr. Baxter: I am going to read a proposition of law contained in it.

The Court: What is the proposition of law?

Mr. Baxter: A jury in that case, like the present—

Mr. Teed: If you are going to read law to the Court, I ask that the jury be excluded.

Mr. Baxter: I never saw it done before.

Mr. Teed: I have heard of it being done over and over again.

Mr. Baxter: If I were going to read Chief Justice Hazen's judgment on the facts, it would be different; but I am not going to do that. I could go and get the book containing *Allen* v. *Allen* and read from that—

The Court: If there is to be any reference to any opinion expressed by Judges, upon the facts of this case or otherwise, the jury should be excluded.

Mr. Baxter: I am not going to do that.

The Court: I may say at once that the matter is entirely a question of the credibility—of the truthfulness or untruthfulness of the witnesses who have been examined before this jury. It is essentially a question of fact, and if I directed the jury to acquit I would be treating it as a question of law.

Mr. Baxter: I would say Your Honor should take that branch of the case out of the hands of the jury, and my reason is that the Supreme Court of New Brunswick has already decided that these facts do not constitute adultery.

Mr. Teed: No. The Supreme Court of New Brunswick has never had these facts before it.

Mr. Baxter: Precisely the same. However, the proposition of law I want to state at present is this: That a jury in a case like the present ought to exercise their judgment with caution—

Mr. Teed: I do object to any law being read to the Court now, except in the absence of the jury.

The Court: If you intend to read anything that amounts to an expression of opinion upon facts, which is always a question for a jury which hears the witnesses, the jury will be excluded.

Mr. Baxter: I have said I wasn't going to read the opinion of the Supreme Court of New Brunswick at all—nothing that pertains to the facts of the case at all.

N. B.
S. C.
F.
v.
F.
White, J.

The Court: I may say, as far as that is concerned that the judgment is based upon an acceptance by the Supreme Court of evidence which I absolutely disbelieved, and I was said to have drawn certain conclusions from those facts. The judgment is entirely a misconception of the case in that regard.

Mr. Baxter: I have already assured the Court that I do not propose to read the opinion of the Court of Appeal; but it happens that in the judgment of the Court there are certain quotations from decisions in other cases, and those are all I propose to read.

The Court: The jury will be excused while citations are being read to the Court and questions of law argued. (Jury retires.)

The trial Judge in the course of his judgment granting a new trial upon this and other grounds, as stated, says:

With respect to the second ground, regarding the reference made by the defendant's counsel to the judgment of the Appeal Court upon the facts in relation to the Golf Club House charge, the return shews that the counsel made the following statement, in the presence of the jury: "I would say Your Honor should take this branch of the case out of the hands of the jury, and my reason is that the Supreme Court of New Brunswick had already decided that these facts don't constitute adultery." That statement was made after he had introduced the subject by asking me to direct the jury that they must find for the defendant on this issue, and stated that the evidence relating to that charge did not substantially differ from the evidence given on the previous trial, and that, whether I agreed or did not agree with the judgment of the Court of Appeal in this matter, it was the law governing this case. It was made too after I had plainly intimated that no reference should be made in the presence of the jury to any opinions expressed by Judges upon the facts of this case, and after I had stated my judgment that the matter was entirely a question of the credibility of witnesses, which I would not withdraw from the jury. There can be no doubt that the statement was one which should not have been made in the presence of the jury, for it was susceptible of no other meaning than that the Court of Appeal—the Court of last resort in this Province—had already considered the same question which the jury was sworn to try, upon the same evidence which the jury had heard, and had decided that it was not sufficient to warrant a verdict of adultery. It was quite as objectionable as if counsel had read the judgment of the Appeal Court, with its expressions of opinion and conclusions upon the questions of fact which it discussed. Had the counsel read the opinions of the Chief Justice upon the question of fact, he would undoubtedly have contravened the rule laid down by the unanimous judgment of the Supreme Court (Barker, C.J., Landry, McLeod and White, JJ.), in *Harris* v. *Jamieson* (1909), 39 N.B.R. 177, at pages 190 and 191.

He then refers to and quotes from the judgment in *Harris* v. *Jamieson*, *supra*, and gives a summary of the reasons which, as set forth in the judgment in that case, led the Court to refuse a new trial. Afterwards he goes on to say:

It is quite evident, therefore, under the rule above quoted, that had the opinions of Hazen, C.J., as to the facts concerning the Golf Club charge, as expressed in the judgment on appeal, been read on the trial in the presence of the jury, the defendant could escape a new trial only by shewing that,

N. B.
S. C.
F.
v.
F.
White, J.

notwithstanding the improper reading of such opinions, there were some such special reasons as those pointed out in *Harris* v. *Jamieson*, why the cause should not be sent down to another trial.

Since the trial Judge deals with the ground now under consideration, as indeed he does with both other grounds upon which he granted a new trial, very fully, and as his judgment will doubtless be published in our reports, I do not think it necessary to quote further from his judgment upon the question I am now discussing.

This Court, by its judgment already referred to, as reported in 41 D.L.R. 739, 45 N.B.R. 505, held that the evidence adduced on the first trial of the cause was insufficient to sustain the finding which the trial Judge had made, that the defendant was guilty of adultery at the Golf Club House. I did not hear the argument, or take part in that judgment; but, so long as that decision remains unreversed, I think it must be accepted as law, binding upon all the Courts of this Province. Taking the summary of the evidence as given in that judgment, and comparing it with the evidence given on the second trial, I think it appears that on all material points there is no substantial difference between the evidence on the two trials. Mr. W., one of the parties who was at the Golf Club with the defendant and Doctor I. at the time the alleged adultery was committed, was not called as a witness on the first trial. He did give evidence on the second trial, but his testimony, so far from adding to the evidence given upon the first trial any additional proof going to shew that adultery was committed by the defendant at the Golf Club House on the occasion referred to, rather tends to corroborate the defendant's denial that any adultery took place on that occasion. The trial Judge, in his judgment now under consideration, does not, as I understand him, claim that there is as a matter of fact any substantial difference between the testimony given on the two trials, with reference to the charge of adultery at the Golf Club House. Nor, upon the argument, did counsel for the respondent point out any substantial variance between the testimony given on the first trial and that given on the second. As I understand the judgment of the trial Judge, the error which he thinks the counsel for the defendant committed was, not in moving to have the case, so far as it depended upon the charge of adultery at the Golf Club, withdrawn from the jury, but was in using in the presence and hear-

N. B.

S. C.

F.
v.
F.

White, J.

ing of the jury, language which, in effect, alleged, first, that the facts proven in relation to the Golf Club charge were substantially the same on both trials, and secondly, that the Court had decided that these facts did not constitute adultery.

As the extract from the official report above set forth shews, while Mr. Baxter, on the one hand, made the statement quoted by the Judge, Mr. Teed immediately followed by stating that the Supreme Court of New Brunswick never had these facts before it. Assuming the jury in this case to have been one of ordinary intelligence, I do not think that after hearing the Judge's charge they could have entertained any idea that they would be justified in deciding this case upon the mere statement of counsel that the evidence in the case then before them was substantially the same as that given on the previous trial. But assuming that the counsel for the defendant was not justified in using the language which he did in the presence of the jury, I do not think his doing so entitles the plaintiff to a new trial under the circumstances in this case, even though it be also assumed that the jury were thereby influenced to find as they did in favour of the defendant upon the charge of adultery at the Golf Club House. And my reason for holding that view is, that had the jury decided the case on the evidence which was properly before them, and upon that alone, they could not rightly have found for the plaintiff upon that issue, because this Court decided, in the judgment referred to, that such evidence is insufficient to sustain a charge of adultery. It is true, that in granting a new trial, the Court did not send the case back for trial only upon the other two issues contained in the libel, but upon all the issues, including the charge of adultery at the Golf Club. In taking this course the Court, doubtless, had in mind the fact, that it might be possible on a second trial to secure the evidence of W. who was present at the time of the alleged offence; and likewise, that possibly some additional or different evidence might be adduced upon the new trial which would warrant the jury in finding that adultery had been committed at the Golf Club House. But now that we have before us the evidence taken upon the second trial, it seems to me that the Court could not, consistently with the judgment already rendered, do otherwise than hold that this evidence is insufficient to sustain the finding of adultery on that occasion.

N. B.

S. C.

F.
v.
F.

White, J.

Coming now to the second ground upon which the trial Judge held that a new trial should be granted, viz: that numbered ground 3. As appears by the official report, the defendant's counsel, in the course of his cross-examination of the plaintiff, shewed him a paper and asked—"In whose handwriting is that?" The witness at first refused to give the name of the person who wrote the document, whereupon Mr. Baxter asked his Honour to direct the witness to answer. The Court having stated that he thought Mr. F. should answer the question, the witness stated that the writer was Mrs. L. The witness stated, in answer to further questions, that this lady was a widow and lived in London, and that he first met her in June, 1917. Both counsel having stated that they thought he was mistaken as to the date, and Mr. Gregory having asked if it was not in December, 1916, when he was convalescent in England, when his wife was there, that he first met Mrs. L., the witness said that he might have, he was not sure. Then come the following questions and answers:—

Q. This particular letter that I shew you—did you ever receive that? A. No. Q. Were you in correspondence with her? A. Yes. Q. Did she commonly address you as "darling"?

Mr. Gregory: I object. My friend is addressing himself to an idea of conveying to the jury some impression of improper conduct on Mr. R.'s part, because the question indicates it.

Mr. Baxter: You are entirely mistaken so far.

Mr. Gregory: It indicates that. Mr. R.'s conduct is not involved in any issue that is before the Court.

The Court: The matter has no relevance at all, in my judgment, except as bearing upon the credibility of the witness. It has no bearing upon the issues involved in the case.

Mr. Baxter: The point is this: The whole way in which this witness looked upon the relations of married people with others, it seems to me, is fairly under review. Some men—for instance, in the case of B.—would have raised a tremendous row about the receipt of money, but apparently he thought that was perfectly all right to do, and found no fault with his wife for doing it. *Now there is the same standard, I think, and if he thinks it is all right for an unmarried woman—a widow—to write to him, using affectionate terms and discussing certain topics, and all that, he can scarcely draw a worse inference from a man writing in similar terms to his wife.* I presume the jury will be asked to infer from these things that she was guilty of adultery with B.

Mr. Gregory: Certainly.

Mr. Baxter: Now I want to shew that instead of adultery being the inference, the husband knew of these things, and that he, the most interested man in all the world, didn't draw that inference, and thought those relations were quite proper for him to have with other women, as well as his wife to have with other men. I suggest, too, that until Mrs. L. appeared on t[he]

N. B.
S. C.
F.
v.
F.
White, J.

scene there was no discarding of this unfortunate woman who was a victim of intemperance, but when a new star appeared he was all through with "Betty;" and this is very pertinent, on cross-examination, in view of what my friend brought out about the occurrences in London.

The Court: It has no bearing upon the issues in this case, it appears to me, and the only point is as to whether it has any effect upon the credibility of the witness. If you desire to press the question, I will allow it.

Q. (Question read as follows): Did she commonly address you as "darling"? A. Occasionally. Q. Was it sort of understood that if you were successful in obtaining a divorce from your wife that Mrs. L. would become Mrs. R.?

Mr. Gregory: I object to the question on the legal ground that it has nothing whatever to do with this case. Mr. R. may be perfectly willing to answer it, but if he has any desire to refrain from answering it, I submit he is perfectly within his rights.

The Court: I shall not require the witness to answer the question.

Q. Will you answer it or will you not? A. No. Q. You refuse to answer it? A. Yes. Q. I presume you cabled this lady about the result of your divorce case when the decree was granted, did you not? Objected to.

The Court: That question will be excluded.

Mr. Baxter: It is open to him to answer or not, as he pleases?

The Court: Yes.

Q. Do you refuse to answer that? A. Yes. Q. Had you met this lady before your wife arrived in England? A. I don't remember exactly; possibly I did. I don't remember when I met her, exactly. Q. Did you introduce her to your wife? A. I think so. I think she was in the hotel one day and met her there. Q. At all events, you knew her before you told your wife you were all through with her? A. No, I knew her very slightly at that time—hardly knew her at all. Q. The acquaintance has ripened, has it? A. Somewhat.

At or near the conclusion of the Judge's charge to the jury, Mr. Baxter addressed the Court as follows:—

Mr. Baxter: Another matter: There is nothing on the pleadings with reference to the plaintiff, and, as Your Honor properly says, there are no charges against him. I would ask Your Honor to direct the jury that if they find in the testimony facts from which they can properly infer that adultery has been committed by the plaintiff with anyone, that he disentitles himself to relief in this case.

The Court: I would not direct that, from the fact that there are no charges. Mr. R. might have met them.

I find it somewhat difficult to summarize the grounds upon which the trial Judge came to the conclusion that a new trial should be granted upon this ground 3, and therefore at the risk of prolixity will quote from his judgment more fully than I would otherwise have done. The Judge says:—

The third ground involves the alleged improper statements of defendant's counsel, to which I have already referred in considering the objection under the first ground, to the questions put to the plaintiff in cross-examination,

N. B.

S. C.

F.
v.
F.

White, J.

as well as other improper statements alleged to have been made by him in his closing address to the jury.

He then quotes from Mr. Baxter's statement the portion which I have above italicized, and proceeds:—

This statement plainly implied that the letter which the counsel had shewn to the plaintiff, but which was not in evidence and was not offered in evidence, was in similar terms to the letter written to the defendant by the co-respondent named in the last two questions. It cannot surely be seriously contended that counsel had any right to make such a statement concerning a letter which he produced to a witness on the trial, but which he did not so much as offer in evidence. Indeed, the only questions which were put to the plaintiff in regard to the letter were those which appear on page 298 of the return, as to the handwriting it was in, and the further question on page 299 which elicited the answer that he had never received it. There was not a word as to date or how or to whom it was addressed. The implication of the counsel's statement was beyond all question that this letter was addressed to the plaintiff and was in similar terms to the letter which had been written to his wife by the co-respondent named in the last two charges, and which letter was then in evidence and had been read to the jury. Then there was the further statement that until the writer of the unproved letter "appeared on the scene there was no discarding of this unfortunate woman (the defendant), who was the victim of intemperance, but when a new star appeared he (the plaintiff) was all through with 'Betty' (the defendant)." This statement was made after the plaintiff had been shewn the unproved letter and identified the handwriting, but before any evidence had been given concerning the plaintiff's association with the writer. This latter evidence disclosed that at the time the plaintiff and defendant finally separated in London the former had known the woman very slightly, and that any intimacy which existed had developed afterwards. Although there was nothing disclosed in any part of the case to warrant it, the counsel clearly suggested, I think, to the minds of the jury, by the statement above quoted, that an improper intimacy existed between the writer of the unproved letter and the plaintiff at the time the latter told his wife in London that he was through with her, and that this was the reason he then discarded his wife. The plaintiff's answers to the questions which had been allowed in cross-examination only as going to the credit of his testimony were not treated as in any way bearing upon the credibility of the plaintiff's testimony, but were used entirely for the purpose of attacking him as a husband, and, I think, of creating a suspicion or impression in the jury's minds that he himself, both before and after he separated from his wife, had been guilty of infidelity.

Now, reference to what I have quoted from the stenographer's report will shew that these statements of counsel for the defendant upon which the Judge animadverts, were made in argument addressed to the Court, in answer to Mr. Gregory's objection to the defendant's question, "Did she commonly address you as darling?" I do not think that the language used by Mr. Baxter in the argument must necessarily be construed as intended to

convey the impression that they were proven facts, but rather as matters which he would have the right to adduce evidence to establish. I find it difficult to believe that so astute and able a counsel as Mr. Gregory, if he had understood these statements to be made as matters of fact, rather than of argument, would have allowed them to pass unchallenged and without objection. The Judge holds that the statements were improperly made, and that the jury were in all probability unduly influenced by them. At all events no objection was made at the time, to these statements of defendant's counsel which the Judge hol 's to have been so improper and so liable to influence the jury that he considers them to be sufficient ground for a new trial. The objection not having been taken at the trial could not, I think, be properly entertained by the Judge on motion before him subsequently for a new trial. Moreover, in view of the Judge's charge in this case, I think the jury, unless wholly wanting in intelligence, cannot have failed thoroughly to understand that they were to try the issues upon the evidence before them and not upon any mere statement of counsel, unsupported by proper evidence.

As to what is said by the Judge to the effect that counsel for the defendant improperly made use of evidence submitted upon the sole ground that it went to the credibility of the witness, for other purposes than that for which it was admitted, I quote from Wigmore on Evidence, vol. 1, ch. 2, sec. 13 (page 42). The author says:—

> When an evidentiary fact is offered for one purpose and becomes admissible by satisfying all the rules applicable to it in that capacity, it is not inadmissible because it does not satisfy the rules applicable to it in some other capacity and because the jury might improperly consider it in the latter capacity. This doctrine though involving certain risks is indispensable as a practical rule.

In support of this rule the author cites *Willis* v. *Bernard* (1832), 8 Bing. 376, and two American cases: *The People* v. *Doyle* (1870), 21 Mich. 221, and *The State* v. *Farmer* (1892), 84 Me. 440, and then says:—

> Here the only question can be what the proper means are for avoiding the risk of misusing the evidence. It is uniformly conceded that the instruction of the Court suffices for that purpose; and the better opinion is that the opponent of the evidence must ask for that instruction; otherwise he may be supposed to have waived it as unnecessary for his protection.

The view thus expressed by Wigmore is in my opinion a correct statement of the law. The trial Judge says:—

N. B.

S. C.

F.
v.
F.

White, J.

It is idle to say that because I told the jury that the plaintiff's conduct was not in issue and that they had no concern with the plaintiff's conduct except in so far as it might bear upon the question of the credibility of the testimony he had given touching the seven questions which it was their duty to answer, the jury was not probably influenced in any way by these statements. There is no presumption, to my knowledge, that a jury heeds the directions of a trial Judge.

It is undoubtedly, I think, a fact within the experience of judges, that juries do not always obey or follow instructions given to them by the Judge; but, unless there is to be found in the conduct, or findings, of the jury, something to indicate that they have disregarded an instruction given to them by the Judge, it must I think, be assumed that they followed the instructions given them. In the present case there is nothing to indicate that the jury failed to obey the instructions given very forcibly and very clearly by the trial Judge.

The trial Judge in dealing with ground 5, in a passage from his judgment which I have already quoted, concedes that:

had there been no other well founded objections to the conduct of the trial than those resting on grounds 2, 3 and 4, he would not have been disposed to set aside the jury's finding upon questions which were so obviously pure questions of fact depending entirely upon the credibility of witnesses.

In other words, the jury might, in all respects, have followed the directions of the Judge and yet reasonably have answered the questions submitted to them exactly as they have done. Upon the mere supposition that the jury may not have heeded the directions of the Judge, I do not think we would be justified in granting a new trial.

Coming now to the third and last ground, upon which the new trial was granted (ground No. 4 in the notice): The letter referred to was proved to be in the handwriting of Mr. B., a man of wealth, and reads as follows:—

(Reads letter.)

It was proved that the defendant first met Mr. B. in 1912, at Dalhousie Junction, and that subsequently, in 1913, Mr. B. came to Fredericton, called at the plaintiff's house and was there introduced to the plaintiff by the defendant, and remained for a day and night as the guest of the plaintiff and his wife. The plaintiff says that at different times he (Mr. B.) "would run into Fredericton on the noon train. He would usually be down here on business. I think always he was when he made these side trips,

N. B.
S. C.
F.
v.
F.
White, J.

and I saw him half a dozen times." "Q. As a visitor at your house?" "A. Yes. He nearly always stayed at our house, as our guest, and perhaps all the time."

The plaintiff states that Mr. B. thus visited at his house four or five times, on all of which he was at home and that he does not know of Mr. B. making any such visits when he was not at home, though later in his evidence he says he recalls one occasion when the defendant mentioned to him that B. had visited at his home when he was absent. He further says that on one occasion Mr. B. solicited his consent to the defendant's going with her sister to Quebec; that the defendant and her sister accordingly did go to Quebec with Mr. B., and did this with the plaintiff's consent, the plaintiff testifying that at that time he had no suspicion of any improper intimacy between his wife and Mr. B.

It further appears from the plaintiff's own evidence that when he and his wife were in England, Mr. B. sent the defendant as a Christmas present a draft for one hundred pounds; that the plaintiff took this money and put it to his credit in his bank account; and that on another occasion, when the defendant was going to Boston, Mr. B. gave her some money to assist in defraying her expenses.

But without attempting to review or summarize all of the evidence, it is sufficient, I think, to say, that apart from the letter in question, there is nothing in the testimony which would justify a jury in finding that adultery had been committed by the defendant with Mr. B. On the other hand, if it were proven that Mr. B. wrote the letter in question, and that the defendant received it, then the jury, taking the whole testimony together, might very reasonably have found that the defendant had been guilty of adultery with Mr. B., as charged in the plaintiff's libel. The plaintiff, being at the time under examination as a witness on his own behalf, testified that he received this letter from M. McC., a domestic formerly in his employ, whose attendance he had been unable to procure, as she had disappeared from Fredericton and her whereabouts were unknown. The letter was tendered in evidence by the plaintiff's counsel, and the Judge expressing great doubt as to its admissibility, received it in evidence, subject to the objection of the defendant's counsel. After this letter was thus received in evidence the trial was adjourned

N. B.

S. C.

F.
v.
F.

White, J.

for some days, owing to a sudden illness of the plaintiff's counsel, and when the trial was resumed Mr. Teed appeared in the case as plaintiff's counsel for the first time, in place of Mr. Gregory, who continued too ill to attend. M. McC. was produced as a witness on behalf of the plaintiff, and testified that she had found this particular letter in the defendant's bedroom, in a house where the defendant had resided; that the letter when first she found it was in an envelope addressed to the defendant; that it had a postage stamp on it and had come through the post and was opened. She says she did not preserve the envelope, but kept the letter, and about September 26, 1918, gave the same to the plaintiff. The defendant in the course of her examination identified the letter as being in the handwriting of Mr. B., but, in answer to questions put to her upon direct examination, she testified that she never was in possession of the letter, and that it was absolutely strange to her, although she stated that prior to the trial she had seen a copy of it. She further testified that at the time the letter would be received in the ordinary course of post, she was in St. John with Miss T., and remained there for about three days. No objection was made by the plaintiff's counsel to the giving of any of this testimony by the defendant. In the course of his charge the Judge said:—

In the first place, with reference to this letter: The letter is in evidence because of a finding that it had come into the possession of Mrs. R. If the letter did not come into the possession of Mrs. R., it would not be evidence, in my judgment; but I admitted the letter upon evidence which was adduced and because of presumptions which I thought the law carried. My view of the law was that if a letter passes through the mail the presumption is that it reaches the party to whom it is sent; and this letter was dated at the Chateau Frontenac, an hotel in the City of Quebec, on July 5, 1916; it was produced by Mr. R., the plaintiff, who received it from a servant who had been employed by him as a servant for the both of them at one time, and who later, when Mrs. R. was preparing to leave Fredericton, was in the house and cleaning the house for her—employed by Mr. R.—and the letter was admitted in evidence upon, as I thought, a *primâ facie* case being made out that it had reached Mrs. R.'s possession, because I don't think any Court would presume that a letter was wrongly opened by a person to whom it was not addressed, and had never reached the possession of the person to whom it was addressed. So it was admitted; but since that evidence was adduced, Miss McC. has been upon the stand and sworn where she found it—that it was found in the R. home; that when she found it, it was in an envelope addressed, "Mrs. C. F., Rose Hall, Fredericton," and that there was a post stamp on it; that the envelope was open at the time, and that it was found in the gathering up of papers in her bed-room, as I remember her evidence; she wasn't sure

N. B.
S. C.
F.
v.
F.
White, J.

whether it was in a book-case or about a book-case or something. Now Mrs. R. has been upon the stand and said that that letter was not in fact received by her. If you believe that that letter was not received by Mrs. R., then I think I will direct you that you will have to eliminate it from the case. If, however, you believe it was received by Mrs. R., then it becomes necessary to consider it as evidence. But do you believe that Mrs. R. did not receive that letter? Do you believe that it is probable that that letter—probable or possible that that letter, which Mrs. R. swears herself is in Mr. B.'s handwriting, addressed in the way in which it is and enclosed in an envelope addressed as Miss McC. says it was addressed, was received at that time and opened by Miss McC. or by anyone else, and kept all this time, without Mrs. R. ever having received it? If you believe she received it, then you may consider it as evidence; and if you do, it is for you to draw the inferences which you think may fairly and reasonably and naturally be drawn from any statements that are contained in the letter.

In his judgment now before us on appeal, the Judge says:—

I think also that I was not justified in directing the jury, as I did, that if they believed the defendant's statement that she had not received the letter indicated in the fourth ground they should eliminate it entirely from the case. It was my duty as the trial Judge to decide the question of fact upon which the admissibility of the letter depended, viz, whether it had been in the possession of the defendant.

And in support of this view he cites *Bartlett* v. *Smith* (1843), 11 M. & W. 483, 152 E.R. 895; *Doe dem Jenkins* v. *Davies* (1847), 10 Q.B. 314.

It is, I think, established beyond question that when evidence is tendered and objected to it is for the trial Judge to decide whether the evidence is properly admissible. When the question of admissibility depends upon facts which are not in dispute, it is entirely a question of law which the Judge has to determine; but it not infrequently happens that the fact, or facts, upon which depend the admissibility of the evidence is or are in dispute; and in such case it is necessary to decide the fact or facts in dispute in order to determine whether the evidence objected to is properly admissible. Under our system of trial by jury it would tend to confusion, and indeed be almost impracticable, to require that whenever the admissibility of evidence tendered depends upon questions of fact, these facts should be determined by the jury before the evidence tendered is received. It has, therefore, been held, and is well settled, that it is for the Judge to decide as to whether or not the circumstances are such as to justify the admission of the evidence tendered. His decision in no way affects the right and the duty of the jury to give such weight to the evidence thus admitted as, under all the circumstances, they

N. B.
S. C.
F.
v.
F.
White, J.

may decide it is entitled to. See Wigmore on Evidence, vol. 1, ch. 3, sec. 29 (page 92), and cases there cited, including *Wright* v. *Tatham* (1837), 7 Ad. & El. 313, at 407, where Tindal, C.J., says:—

> The Judge who presides at the trial, by admitting this evidence is not determining, nor has he any right to determine, the question of the competency of the testator. That is a question which the jury are to decide, after the determination of a long course of conflicting evidence. All that the Judge has to determine is, whether a particular piece of evidence is, at a particular period of the cause, admissible for the consideration of the jury as the matter then stands.

Take the common case of an action upon a promissory note, the making of which is denied by the defendant. The note being tendered in evidence and objected to, it is for the Judge to decide whether or not there is sufficient evidence of the making of the note to warrant him in placing it before the jury. But the Judge's finding that there was evidence of the making of the note sufficient to warrant its being placed in evidence, in no way affects the right or duty of the jury to find upon the evidence whether or not in fact the note really was made by the defendant. In *Stowe* v. *Querner* (1870), 5 L.R. Exch. 155, where the action was upon a policy of marine insurance, the defendant pleaded among other things that he did not become an insurer as alleged. Bramwell, B., in delivering judgment said, at 157:

> In this case the question which was argued before us yesterday arose thus:—during the trial of an action on a policy of insurance it became necessary to produce the policy, and the plaintiffs gave evidence of a duly stamped policy having been executed, and of its being in the possession of the defendant. Notice to produce had also been given. Upon its being called for, however, the defendant declined to produce it, and thereupon the plaintiffs proposed to read a document which purported to be a copy, and which they had received from the defendant's broker. The defendant objected, and offered to displace the effect of the evidence of the existence of the policy which had been given by the plaintiffs, and to render the copy inadmissible by shewing that no policy had ever been executed at all. The Judge refused to hear this interlocutory evidence, and allowed the document to be admitted and read. We are all of the opinion that he was right. If the objection on the part of the defendant had been that there was a policy, but that it was not stamped, it would perhaps have been well founded. But here it was objected that there was no policy executed at all; an objection which goes to the entire ground of action, and one which, if it had prevailed, might have left the jury nothing to decide. . . . The distinction is really this: where the objection to the reading of a copy concedes that there was primary evidence of some sort in existence, but defective in some collateral matter, as, for instance, where the objection is a pure stamp objection, the Judge must,

N. B.

S. C.

F.
v.
F.

White, J.

before he admits the copy, hear and determine whether the objection is well founded. But where the objection goes to shew that the very *substratum* and foundation of the cause of action is wanting, the Judge must not decide upon the matter, but receive the copy, and leave the main questions to the jury.

The remaining three judges, Martin, B., Pigott, B., and Cleasby, B., concurred.

In the case before us, as I have already pointed out, there is, apart from this letter, no evidence upon which a jury could reasonably find the defendant guilty of adultery with B. If the jury believed that the letter had been received by the defendant then the whole evidence would have been such that the jury might reasonably have found the charge of adultery proven. And it is easily conceivable that the contents of the letter might have been such that the jury, if they believed it had been received by the defendant, could not, in view of the other testimony in the case, have reasonably come to any other conclusion than that adultery had been committed. The reception or non-reception by the defendant of the letter in question, although not technically one of the issues raised by the libel, is really the only matter which the jury had to try in determining the issue as to adultery with B. In other words, the question as to the reception or non-reception of the letter is substantially at issue. In *Hitchins* v. *Eardley* (1871), 40 L.J., P. & M. 70, L.R. 2 P. & D. 248, 25 L.T. 163, the head note states:—

> The only question at issue before the jury, in an administration suit, was whether M.D., through whom the defendants claimed, was legitimate. In the course of their case, which was opened first, they tendered his declarations in evidence. The plaintiffs objected to the admissibility of these declarations, and tendered evidence on the *voire dire*, for the purpose of shewing that the declarant was not a member of the family. The Court being of opinion that the defendants had made out a *primâ facie* case of the declarant's legitimacy, admitted the evidence of the declarations, and rejected the evidence on *voire dire* tendered by the plaintiffs.

Lord Penzance says, at page 71:—

> It is impossible to lay down an abstract rule on the subject, for each case must be determined by its own facts. It cannot be denied that a strong *primâ facie* case has been made out of the declarant's legitimacy, and I think it will be better that I should at once admit these declarations. The jury, however, will understand that they will ultimately have to form their own opinion upon the matter, in the full light of the whole of the evidence. I rule that I am sufficiently satisfied of the declarant being a member of the family, for the purpose of admitting the declarations, and I reject the evidence tendered by the plaintiffs on the *voire dire*.

If I may be permitted to say so, I think the judgment in that case correctly states the law. In admitting evidence, the admi-

N. B.
S. C.
F.
v.
F.
White, J.

sibility of which depends upon disputed facts, the Judge merely decides that certain facts are sufficiently established to justify the submission to the jury of the evidence objected to. But in the case before us there is this additional fact to be borne in mind, that the Judge had already admitted the letter in evidence, when the testimony of the defendant was tendered and received, denying that she had in fact received the letter. No objection was made by the plaintiff's counsel to the reception of this evidence, nor did he at the trial make any objection to the Judge's instruction to the jury, that if they believe the defendant's statement that she had not received the letter, they should eliminate it entirely from the case. For the reasons I have stated, I think the Judge erred in granting a new trial upon this ground.

The Judge in his judgment states that because of the provisions of sec. 5 of the Act of Assembly 2 Edw. VII., 1902 (N.B.), ch. 19, which provides that—"Questions of fact arising in proceedings in the said Court shall if the Judge of the Court deems it proper be tried and determined by the verdict of a jury"—he felt some doubt as to whether he might not have been justified in that Court, though it could not be justified at *Nisi Prius*, in leaving it to the jury to determine whether or not the letter in question had been received by the defendant. Referring to this section he says:—

> Although at first blush this would seem to give the Judge the right to submit to the jury for determination any question of fact arising on the trial, if he should deem it proper so to do, upon consideration of the terms of the whole section I am of the opinion that it was not the intention of the Legislature that these words should apply to any such *collateral questions of fact* as might arise with reference to the admissibility of evidence.

As to that, I wish simply to emphasize what I have already said, that in my opinion, while the evidence as to whether the letter was received or not by the defendant, might fairly be regarded merely as a collateral fact in determining whether the evidence was admissible or not, yet, when the jury came to consider the weight of the evidence, it remained no longer a collateral fact, but a question directly and vitally affecting the issue which they had to try.

I think the appeal should be allowed with costs.

Appeal allowed.

ROHOEL v. DARWISH. ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. June 1, 1920.

INTERPLEADER (§ II—20)—CLAIMANT'S EVIDENCE NOT BELIEVED BY TRIAL JUDGE—NO EVIDENCE OF OWNERSHIP OF GOODS—POWER OF JUDGE TO REJECT EVIDENCE.

In an interpleader action where the claimant to the goods is a very much interested witness and where his evidence is seriously impeached by cross-examination, and the execution debtor is in Court but is not called by the claimant it is within the Judge's right to reject and officially disbelieve the claimant's evidence *in toto* if he does not believe him, although there is no evidence of ownership in the judgment debtor.

Statement. APPEAL from the trial judgment in an interpleader action on the ground of wrongful rejection of evidence. Affirmed.

C. C. McCaul, K.C., for appellant.

Frank Ford, K.C., for respondent.

Harvey, C.J. HARVEY, C.J., concurred with Ives, J.

Stuart, J. STUART, J.:—There is a very valuable property right involved in this case.

It seems to me to be going rather too far to say that the trial Judge ought to have believed the claimant but I am so fully convinced by a perusal of the evidence that he had some important interest in this property and was not a mere employee of, or a mere dummy for, the execution debtor that I feel very reluctant to confirm the judgment below which absolutely deprives him of all interest whatever.

Owing to the illiteracy and foreign race of the claimant and the admitted necessity of having an interpreter brought in so that he could better understand and be better understood I think the passages in the record before us which on the face of them undoubtedly make him appear untruthful should not be held as strongly against him as might be done in the ordinary case.

Of course, from one point of view it may appear just that the claimant should lose all if by pure perjury he attempted to claim all when that was not the true situation.

But I gather from the remarks of the trial Judge in his reasons for judgment that he was under the impression that he ought not, in the state of the record, to consider the possibility of a joint ownership but was obliged either to award everything to the claimant or to deny him everything.

I should myself have felt very strongly inclined to entertain a suggestion that the Court should order a new trial upon some

ALTA.

S. C.

ROHOEL v. DARWISH.

Stuart, J.

terms so that the Judge might consider directly whether the claimant had not at least some interest in the goods and what that interest, if any, was. In *Witt* v. *Stocks* (1917), 33 D.L.R. 519, 10 Alta. L.R. 512, this Court adopted that course itself upon the evidence as it stood and gave the execution creditor a charging order on the debtor's interest as that was found on the evidence to be.

There was one person in the court house who certainly knew the facts; that was the execution debtor. Apparently both counsel were afraid to call him and no doubt they each had good reason to believe that in refraining from doing so they were acting in the best interests of their respective clients. The trial Judge undoubtedly acted according to the older traditional rule of the Courts in allowing the two counsel to conduct their case as they saw fit. But I think this is just one of those cases in which there would be absolutely nothing objectionable in the trial Judge himself calling a witness whom he knew to have knowledge of the facts in controversy and who was right there in the court house, asking him questions himself and letting both counsel examine and perhaps cross-examine, unless a strong leaning in favour of one side were revealed by the witness. This Court has decided that a Judge has a right to call a witness and it does seem to me that the present is just exactly a case where it would be advisable to do so, a case where in order to decide according to the very right and justice of the case the Judge would be justified in turning from the position of a mere umpire in the proceedings to that of a keen investigator on his own account. It is by no means unlikely that something might have been revealed which would have led to a clearer view of what the relative position of these two men, these two foreigners, actually was.

Owing, however, to the views held by the other members of the Court I do not care to press my view further and will therefore concur in dismissing the appeal.

Beck, J.

BECK, J.:—This is an interpleader between an execution creditor of one A. A. S. Darwish and H. A. Darwish the claimant; the execution creditor being the plaintiff and being so of course by reason of the practice settled by this Court in *Dickson* v. *Podersky* (1918), 39 D.L.R. 584, 13 Alta. L.R. 110. The issue was tried before Hyndman, J., who gave judgment in favour of the execution creditor. The claimant appeals.

The subject-matter of the issue is a quantity of raw furs valued at about $3,000. The furs were seized in the business premises of Sigler and Richardson Fur Co., Ltd., in Edmonton, on December 11, 1919. The company's business was the buying and selling of raw furs; occasionally they sold on commission. Sigler, a member of the company, had seen the furs in what he called A. A. S. Darwish's office; negotiations for the company's purchase of them took place but the parties could not agree upon the price. Then it was arranged that A. A. S. Darwish should have space in the company's store where he might leave the furs for the purpose of their being sold in the customary way by competitory bids by way of tender to be put in by persons recognized as fur buyers and whom according to custom the company would notify that the furs were open to competition. The furs were placed in the company's store in pursuance of this arrangement and while there under this arrangement were seized by the sheriff.

On evidence to the foregoing effect the case of the plaintiff—the execution creditor—was closed. Obviously, the plaintiffs rested upon possession by the debtor as establishing the ownership of the furs in him.

The claimant H. A. Darwish is the nephew of the debtor A. A. S. Darwish. They are both Syrians. Their mother tongue is Arabic. It is obvious that H. A. Darwish's knowledge of English outside of ordinary everyday affairs is quite limited. The trial Judge intervened more than once suggesting that he did not understand counsel's questions and during the course of his evidence an interpreter was introduced. He himself says that he cannot read or write either Arabic or English, except that he can make out a few words and can sign his name in Arabic.

The business of getting furs has been carried on in this country for a great many years and its general methods are quite well known. For the most part the furs are obtained in trade for goods. In earlier days this was practically always the case. Some large traders had stores or stocks of goods at various points in the north country. The smaller traders obtained the goods they intended to trade at Edmonton, and ordinarily all furs were brought to Edmonton for sale there or for trans-shipment to, *e.g.*, England or New York. In more recent years owing to greatly increased settlement in the north country purchases of

ALTA.
S. C.
ROHOEL
v.
DARWISH.
Beck, J.

furs are sometimes made for cash and sales are sometimes made at northerly points.

Though it does not appear very clear it seems that A. A. S. Darwish probably did engage in fur buying or fur trading, but his principal business seems to have been that he kept a store in Edmonton and seems to have kept in stock the classes of goods required by fur traders trading in the north, but it must be evident that the store business did not continue after the executions in question here came into the sheriff's hands. *Rohoel* v. *Darwish* (1918), 13 Alta. L.R. 180, is the case in which one of the execution creditors obtained judgment; by reference to the file I find that judgment was signed June 28, 1917, and execution issued September 7, 1917. On the other hand, H. A. Darwish says that he himself has been trading in furs for several years. It was only counsel's question that limited him to 1915 as the first year. He says:—

Q. When did you begin trading in furs? A. I began long ago and we kept it up about the time we formed the company in 1917. Q. Where were you trading in 1915 and 1916? A. I used to trade in furs in the north country in the Peace River. Q. Were you in partnership with your uncle at that time, A. A. S. Darwish? A. No, we were not in company. Q. Had your uncle any interest in your trading in the north country in 1915, 1916, 1917? A. I used to buy dry goods and other goods from him and used to take them there and trade them and when they (I) came back I used to pay him off everything I owed him, but nothing else. There was no partnership connections. Q. Was any person associated with you in trading in the north country in 1915, 1916, 1917? A. Yes, once. I went in partnership with another man; we bought goods from Mr. Darwish (A. A. S. Darwish) and we went north together; I and the other man. Q. Was the other man Bud Alley? A. Yes, Bud Alley.

(In cross-examination): Q. In settling with Bud Alley did you get $1,500 from Bud Alley? A. When I dissolved partnership with Bud Alley each had $1,100; but I had a team of horses and sleighs and trunks and other articles that I sold that came to over $400.

Bud Alley was called and fully confirmed the foregoing evidence of H. A. Darwish, saying that they went north in December, 1915, and returned in April, 1916.

It does not appear what H. A. Darwish did in the winter of 1916 and 1917. As to 1917 he says in substance that having planned to continue trading in furs in the north country on his own account he wanted his uncle (A. A. S. Darwish) to attend to his business in Edmonton, and took his uncle to the office of Friedman and Lieberman, solicitors, Edmonton, to have papers drawn. In the result these solicitors drew up a declaration

(dated November 3, 1917) under the Ordinance Respecting the Registration of Partnership Names declaring that H. A. Darwish intended to carry on trade and business as a dealer in furs, produce and merchandise of every description at Room 1, Paris Rooming House, 101 A Avenue, Edmonton, under the style and firm name of Darwish and Company. This declaration was duly filed on November 3, 1917. The solicitors also drew at the same time a power of attorney from H. A. Darwish to A. A. S. Darwish. It is a long printed form of a general power of attorney in which there are no changes and but one addition, viz: "And particularly to manage, conduct and carry on my business known as Darwish and Company."

H. A. Darwish says:

> I told him (the solicitor) to make out the authority, to make this paper for us and one signed to my uncle so he could do business here (in Edmonton) for me here in town because I can't talk very good English and he is here in town all the time and he is good to me and I trusted my uncle better than anybody else, that is what I was thinking; and I am all the time outside; that is all; and I signed it for him.

He said that the arrangement between himself and his uncle was to "Pay him $90 a month and one per cent. of the sales on all skins and furs except for fox furs—silver fox—I was to pay him 5 per cent."

He says he traded in furs up north on this arrangement starting his business with $1,500 of his own money. He says distinctly that he brought the furs which were seized on a train from the north. He was asked by his own counsel: "Q. How much money of your own had you at the time (of commencing business as Darwish and Company in 1917)—what capital had you? A. $1,500."

There is not a word further either in examination by his own counsel or in cross-examination as to the source whence this $1,500 came. It is true that much time was spent over the meaning of a memorandum written in Arabic, which is very confused and perhaps ambiguous and as to whether it was written wholly or in part by the uncle or the nephew, and it is also true that some little inquiry was made as to what H. A. Darwish did with the $1,400, the result of his trading in partnership with Bud Alley in the winter of 1915-16; but there was no pretence

ALTA.
S. C.
ROHOEL
v.
DARWISH.
Beck, J.

that it was precisely that money which formed the substance of the $1,500, for he asserted that he had been working continuously since that time. The cross-examination in other respects appears to have been confined to the transactions subsequent to and said to be in accordance with the plan arranged in November, 1917, with the view apparently of making it appear that the plan said to have been arranged was not in fact carried out and therefore that it was never intended to be carried out; but the cross-examination failed of this effect.

There is nothing contrary to law or conscience in the arrangement which H. A. Darwish says he made with his uncle. The fact of that arrangement is to some extent confirmed by the two documents drawn by the solicitors. Such an arrangement surely was far more probable than one that would constitute the business in reality that of A. A. S. Darwish against whom there were a number of executions and whose financial condition in this respect must in a general way at least have been known to H. A. Darwish.

The evidence of H. A. Darwish that he started with $1,500 of his own money is not only not improbable owing to his constant trading for several years and his having $1,400 in the spring of 1916—facts corroborated by Bud Alley—but his positive evidence is virtually as I have pointed out, not directly impugned by cross-examination as to the source from which he acquired it.

Furthermore, it seems to me the evidence of H. A. Darwish has been shewn to be confirmed by that of A. A. S. Darwish. Neither party saw fit to call him, but counsel for the execution creditors cross-examined H. A. Darwish:—

Q. Now your uncle on his examination (for discovery in aid of execution) said when he was asked: "You opened a new account for the company (Darwish & Company)?" (answered): A. Not me, my nephew—Is that true? (Read from question and answer 23). A. I don't understand what you mean.

I quote what follows notwithstanding it shews a passage at arms between counsel, because it not only gives the sworn statement of A. A. S. Darwish, but also shews that counsel for the execution creditor found that there was necessity for an interpreter for H. A. Darwish:

Mr. McCaul: My learned friend should have read the whole of question 23 and answer. It is absolutely unfair. Of course, if your Lordship is going to assume at once—

Mr. Ford: I am not through yet. I am waiting for the interpreter.

Mr. McCaul: I am addressing the Court.

Mr. Ford: I am asking for the interpreter. If my learned friend wants to charge me with unfairness he can go ahead.

Mr. McCaul: Perhaps I may be allowed to address the Court.

Mr. Ford: Not if you charge me with unfairness.

Mr. McCaul: Of course, if you are going to take the assumption that this is a fraudulent transaction from beginning to end, many of these insinuations will of course appear considerably all right. What I am saying now is that it was unfair of my learned friend to say, "That your uncle made a certain statement in an answer on examination" without reading the qualifications to that answer which were included in it.

Mr. Ford: It is not a qualification and I am not through with it yet.

Mr. McCaul: When you are through interrupting I will finish my address to the Court. He has no right to say that a statement is made as a bald statement when a statement is qualified. If you will look at question 23 in the cross-examination of A. S. Darwish (reading): "Q. You opened a new account for the company? A. Not me, my nephew, and I went to the bank for his company, for himself, not me; I am the manager to work for. Excuse me, I have no bank book, and I could prove it by those people over there, I never ask them for the bank book."

Mr. Ford: I had not finished.

Mr. McCaul: You had passed from that.

The Court: I thought that was the end of the answer.

Mr. Ford: I intended to go on.

The Court: That, of course, I rather gathered from what you said.

Mr. Ford: "Not me, my nephew" and then I wanted to get the interpreter.

The Court: Is this interpreter satisfactory to you, Mr. McCaul?

The interpreter is then sworn.

There are doubtless some inconsistencies and perhaps there may appear to be some self contradictions in the evidence of H. A. Darwish; but there is absolutely no contradiction of his evidence by any other witness upon or relating to any point in issue. It is true that a witness named Coleman, a porter on the G.T.R. Railway, made three statements—(1). That meeting H. A. Darwish "better than a year ago" but whether in 1917, 1918 or 1919 he could not say. "I just asked him what he was doing and he said he was getting some fur; and I asked him was he still working for the old man (A. A. S. Darwish) and he said yes he had been getting out some fur;" (2) That H. A. Darwish asked him to ask his uncle to send him some money; (3). That they had met yesterday and had a few minutes conversation.

Earlier in the case while H. A. Darwish was in the box he was asked about these three things. He denied having told Coleman

ALTA.

S. C.

ROHOEL v. DARWISH.

Beck, J.

that he was working for his uncle; he said, without saying whether he had told Coleman or not: "I started out with money of my own and when I was buying some I did not have sufficient to buy what I would like to buy and I wired for money from my uncle—he sent me $800—I received money when I needed it once in a while." He hesitated as to the meeting of yesterday. In most cases we have some more or less inconsistent statements by some witness and some contradictions between different witnesses which it is not always possible to explain satisfactorily. Indeed, in some cases we may be convinced that a particular witness has not told the strict truth in every respect even while in the box. But even in the face of such circumstances, if they exist, a trial Judge is in my opinion quite wrong to reject the witness' evidence *in toto*. There is ordinarily in such cases a substantial body of truth in the evidence, even of a witness who the Court is satisfied is in many respects untruthful and the duty of the trial Judge or of a jury is to endeavour to find out how much of it is true. For my part having studied the evidence in the present case with the greatest care, I am satisfied that the claimant's account of things is substantially true and I doubt if there is any instance in his evidence of deliberate falsehood even in relation to collateral matters. Every Judge accustomed to hear a witness whose knowledge of English is indifferent examined and especially cross-examined whether with or without an interpreter must know the difficulty of insuring oneself against misunderstandings whether on the part of the witness or the interpreter or by reason, for instance, of differences of idiom by the Judge or the jury. (See *Johnston* v. *Todd* (1843), 5 Beav. 597, at 599, 600-3.) It seems to me that the evidence of the claimant—uncontradicted as it is in any material point—not improbable but contrariwise probable must be taken to have established his ownership of the goods on the basis of the arrangement between himself and his uncle which he asserts was both *bonâ fide* in itself and *bonâ fide* carried out; while I am not at all sure that the right of the execution creditors to seize being founded merely on a possession by the debtor which undeniably was preceded by a possession by the claimant which explained the debtor's possession in a reasonable way is not in itself sufficient to shew a title in the claimant to succeed had the case stopped there. The trial Judge evidently

applied to the evidence of the claimant the method of treating evidence in cases of transactions between near relatives attacked for fraud which is constantly referred to and is expressed for instance by Duff, J., in *Koop* v. *Smith* (1915), 25 D.L.R. 355, 51 Can. S.C.R. 554; but I doubt whether as a distinct principle of action it was ever intended to apply other than where it appeared that the debtor was once the beneficial owner of the subject matter of the action and the claimant was setting up a case to shew that he was justly entitled to the thing which was originally the debtor's. In any case I think the trial Judge was too greatly impressed by the principle.

The evidence of the claimant as I have already observed is uncontradicted, it is not only not improbable but the probabilities are in my opinion in favour of its being substantially true; it is corroborated in some important particulars.

In Moore on Facts, ch. 3, secs. 66-131, is devoted to a consideration of "Uncontradicted Testimony" and exhibits how strongly the American Courts insist that as a general rule the *uncontradicted* evidence of a witness ought to be accepted. In a note to sec. 75 (page 120), the following is quoted:—

> The Court will assume that the witness speaks the truth unless there be impeaching testimony, contradictory testimony, inherent improbabilities in the statements, or circumstances surrounding the transaction testified to tending to throw discredit upon the statement made.

In my opinion, accepting the foregoing rule, the evidence of the claimant ought, for the reasons I have indicated, to be recognized as establishing the claimant's claim.

The foregoing rule as applicable to the defence has been laid down with great distinctness in criminal cases in well-known cases in England and in this Court. Though I know of no English or Canadian case in which the rule has been distinctly formulated in civil cases, expressions are to be found indicating the recognition of the same rule in such cases. See, for instance, *Ricketts* v. *Turquand* (1848), 1 H.L. Cas. 472, 488; *Newton* v. *Ricketts* (1861), 9 H.L. Cas. 262, 266; *Fish* v. *Fraser* (1875), 9 N.S.R. 514, 515; *Sanford* v. *Bowles* (1873), 9 N.S.R. 304; *Barron* v. *Kelly* (1918), 41 D.L.R. 590, 51 Can. S.C.R. 455, *per* Anglin, J., at pages 605-6 (D.L.R.); also *Grasett* v. *Carter* (1884), 10 Can. S.C.R. 105; *North British & Mer. Ins. Co.* v. *Tourville* (1895), 25 Can. S.C.R. 177; *Lefeumteum* v. *Beaudoin* (1897), 28 Can. S.C.R. 89; *Village of*

ALTA.

S. C.

ROHOEL v. DARWISH.

Beck, J.

Granby v. *Ménard* (1900), 31 Can. S.C.R. 14; *Dempster* v. *Lewis* (1903), 33 Can. S.C.R. 292; *Peters* v. *Perras* (1909), 13 Alta. L.R. 80, where the judgments of the Supreme Court of Canada, merely noted at 42 Can. S.C.R. 244, are reported at length; *Browne* v. *Dunn* (1893), 6 R. 67. Cases collected in Annual Practice 1920, in notes to O. 58, r. 1. "Trials without a jury," at p. 1075; "Inferences of fact," at pages 1090-1.

I would therefore allow the appeal with costs and direct judgment on the issue for the claimant with costs.

Ives, J.

IVES, J.:—This is an appeal from the judgment of Hyndman, J., upon an interpleader issue ordered by the Master in Chambers. The plaintiffs are execution creditors of A. A. S. Darwish. Early in December, 1919, the execution debtor brought a quantity of raw furs to the premises of Sigler and Richardson Co. Ltd., fur merchants in Edmonton, and was permitted to occupy necessary floor space there pending a sale of the furs to whoever might offer an acceptable price. Previous to A. A. S. Darwish bringing the furs to these premises, Mr. Sigler had endeavoured to buy them from him but no agreement was reached. Before the furs were sold and while in the premises stated they were seized under writs of execution on behalf of the plaintiffs. Thereupon the defendant came forward and claimed the furs as his property. The Master in Chambers directed an issue to be tried as to the claimant's ownership. The trial Judge in dismissing the defendant's claim says to him in effect: I have heard your story about these furs and I don't believe you; in my opinion you are not the owner of them as you say nor of any interest in them. The contention of counsel is, that in face of the evidence upon the central fact of ownership, irrespective of the credibility of the defendant concerning corelative facts, it was not open to the trial Judge to reject or judicially disbelieve the defendant's testimony *in toto*, but that in the absence of any evidence of ownership in the execution debtor, apart from the fact of possession, the uncontradicted statement of the defendant that the furs were his could not be judicially rejected even though the learned trial Judge did not believe his statement. I think the contention is answered by two facts clearly disclosed: First, that the claimant is a very much interested witness and, secondly, that his testimony was seriously impeached by cross-examination. There is the further circumstance that the execution

debtor was in Court, is an uncle by marriage of the claimant and would have been a witness with peculiar knowledge of the facts but was not called by the claimant. Under these circumstances, the question of credibility was for the jury and a jury would have been within its right in rejecting the claimant's testimony. In the absence of the jury, its function on a decision of fact devolved upon the Court and the trial Judge, rightly, I think, rejected the evidence. A Court is not bound by mere swearing but is bound by credible swearing.

I would dismiss the appeal with costs.

Appeal dismissed.

BELANGER v. THE KING.

Exchequer Court of Canada, Audette, J. March 15, 1920.

1. EXPROPRIATION (§ III C—135)—COMPENSATION—LAND IN IMMEDIATE NEIGHBOURHOOD—INFLATED VALUES—ESTABLISHING PROPER MARKET VALUE.

Where the evidence shews that land in the immediate neighbourhood has changed hands several times and under special circumstances which shew a hectic inflation of prices and which do not establish a proper market value, such prices cannot be considered in fixing the amount of compensation in expropriation proceedings.

2. LAND TITLES (§ I—10)—GRANT BY FRENCH MONARCH OF LAND IN NEW FRANCE IN 1626—DEROGATION OF ORDONNANCE DE MOULINS—VALIDITY.

The monarchy existing in France in 1626 was a royal monarchy in which the King's power was supreme and the title to land in Quebec cannot be successfully attacked on the ground that it was beyond the power of the monarch at that time to alienate such land in derogation of the *Ordonnance de Moulins* of February, 1566.

Statement.

PETITION of Right to recover compensation from the Crown for certain lands taken on the shores of the St. Charles River near the City of Quebec.

A. Marchand, K.C., and *Gordon Hyde*, K.C., for suppliant.

E. Lafleur, K.C., *E. Belleau*, K.C., *and W. B. Scott*, for respondent.

Audette, J.

AUDETTE, J.:—This matter now comes before the Court by way of a new trial under the hereinafter-mentioned circumstances and much I have said in my reasons for judgment touching the first trial has to be repeated here.

The suppliant, by his petition of right, and his reply to the amended statement in defence of the Crown, seeks to recover the sum of $800,085.65 (the same amount being still claimed even after the abandonment) as compensation for injurious affection to

CAN.

EX. C.

BELANGER v. THE KING.

Audette, J.

the land abandoned and returned to him since last trial, as well as for the value of certain lands expropriated from him by the Crown, on January 13, 1913, for the purposes of a public work of Canada, namely, for the construction, maintenance and repair of the Harbour of Quebec, and the improvement of navigation in the River St. Charles, at Quebec.

This Court has already, on June 28, 1917, pronounced judgment in this case upon the pleadings as they originally stood, (1917), 42 D.L.R. 138, 17 Can. Ex. 333, and that judgment having been appealed to the Supreme Court of Canada, that Court, on February 4, 1919, without expressing any opinion upon the merits of the case, ordered a new trial which has now come before this Court and upon which the present judgment is rendered.

Following the judgment of the Supreme Court of Canada ordering a new trial, the Crown, in pursuance of sec. 23 of the Expropriation Act, R.S.C. 1906, ch. 143, filed, on March 22, 1919, in the Registry Office, a declaration whereby it abandoned 1,418,310 sq. feet of the 1,863,599 sq. feet of lot 560 expropriated in 1913, whereby these 1,418,310 sq. feet became revested in the said suppliant from that date.

As a result of such abandonment the Crown still expropriates, from the front of this lot 560—1,083 feet on a depth of 340 feet on the east and 500 feet on the west, thus taking in all from lot 560, 455,289 sq. feet, as shewn on plan, ex. 1.

Furthermore the respondent also filed at trial, the following undertaking, with respect to the 445,289 sq. feet expropriated from lot 560, to wit:—

UNDERTAKING ON BEHALF OF THE CROWN.

The Attorney-General of Canada, on behalf of His Majesty, in the right of the Dominion of Canada, being thereunto duly authorized by Order-in-Council of the 18th February, 1920, undertakes and consents that so far as concerns any matters under the control of the Dominion Government the suppliant and his successors in title may, without further assurance or consent on behalf of His Majesty, enjoy the same rights of access to and egress from the portion of the property described as No. 560 on the official cadastre of the Parish of St. Roch North in the County of Quebec East, Province of Quebec, referred to in the notice of abandonment signed by the Honourable Frank B. Carvel, on the 21st day of March, 1919, and coloured red on the plan annexed to the said abandonment, over the southerly boundary thereof, as he previously had over the southerly boundary of his property as it existed at the date of the expropriation; and that the suppliant shall henceforth have the same right to erect and maintain structures or works on the southerly boundary

of the portion of said lot so abandoned as he formerly had to erect and maintain such structures or works upon the former boundary along low water mark, subject always to the provisions of the Navigable Waters Protection Act, R.S.C. 1906, ch. 115.

In the result the lands taken herein are composed of two different lots, to wit:—Of part of lot 513, containing an area of 295,652 sq. feet, the same as at the first trial, whereas by the original expropriation the whole of lot 560, containing an area of 1,863,599 sq. feet had been expropriated, the Crown had since abandoned and returned to the suppliant 1,418,310 sq. feet, thus leaving a balance of 445,289 sq. feet, making the total area expropriated at this date 740,941 sq. feet, for which the suppliant is still claiming the sum of $800,085.65 including a claim of damages for injurious affection to the part returned and revested in the suppliant.

The Crown denies the suppliant's title and makes no offer by its statement in defence; but declares that, if the suppliant proves title, a reasonable sum, ascertained under the provisions of the Expropriation Act, should be paid him for the value of the land taken and for damages, if any.

On this question of title, I cannot do better than embody herein what I have said in my judgment of June 28, 1917, that is to say: The original titles of concession of the lands in question go back to one of the first French regimes of our colony.

The first title consists in letters patent issued on March 10, 1626, by Henri de Levy, Duc de Vantadour, Lieutenant-General of His Majesty the King of France to the Government of Languedoc, Viceroy of New France, whereby the following piece of land, called Seigneurie de Nôtre Dame des Anges, was granted to the Jesuits, viz:—

> An extent of four leagues of land extending towards the hills on the west, or thereabouts, situate partly on the River St. Charles, partly on the great River St. Lawrence, bounded on one side by the river called Ste. Marie, which flows into the said great River St. Lawrence, and on the other side, ascending the River St. Charles, by the second stream above the little river commonly called Lairet, which streams and the said little river Lairet flow into the said River St. Charles: Therefore we have given to them and we hereby give them as a point of land with all woods and meadows and all other things contained in the said land, which is situate opposite to the said River Lairet on the other bank of the River St. Charles, going up towards the Recolets Fathers on one side and going down the great river on the other side.

CAN.
EX. C.
BELANGER
v.
THE KING.
Audette, J.

Subsequently thereto, by an *edit* of the King of France, all concessions made were revoked with the object of transferring all such titles in La Compagnie de la Nouvelle-France. On January 15, 1637, however, La Compagnie de la Nouvelle-France granted to the Jesuits the lands above described, confirming thereby the first grant of the Duc de Vantadour, including "the woods, fields, lakes, etc."

In compliance with an ordinance of January 12, 1652, with respect to "the preparing of a roll mentioning in detail the moving lands held subject to the seignorial rights and also those held free from such rights"—Monsieur de Lauzon, concillor in ordinary to the King in his Councils of State and Privy Councils, Governor and Lieutenant-General for His Majesty in New France for the length of the River St. Lawrence, did, on January 17, 1652, again grant and confirm the previous grants of the lands in question "even the fields which the sea covers and uncovers at each tide."

Then under a Royal *Edit et Ordonnance*, being an Arrêt du Conseil d'Etat du Roi, bearing date, at St. Germain-en Laye, May 12, 1678, the King of France, Louis XIV., granted total *amortissement* of the lands referred to in the above grants, with the object of removing any doubt as to the title granted the Jesuits by the Duc de Vantadour, la Compagnie de la Nouvelle-France and le Sieur de Lauzon. This deed of *amortissement*, which was registered at Quebec, on the last day of October, 1679, also mentions in the description of the lands, "the fields which the sea covers and uncovers at each tide."

It has been contended that all of these grants did not divest the Crown of its ownership in these foreshores and beds of navigable rivers which form par. of the public domain, and which cannot be alienated; resting for this contention upon l'Ordonnance de Moulins, of February, 1566, by Charles IX., which is to be found in the Recueuil d'Edits et Ordonnances Royaux, by Neron and Girard, at page 1099, whereby it is forbidden to alienate the public domain, except under the circumstances therein mentioned, but the present case does not come within such exception.

There can be no doubt that this doctrine has been the basis and foundation of the old public law in France. It was supported by the authors, and maintained by the Courts down to the time of the revolution, when the law governing the public domain

was subjected to material modification. However, the old doctrine was followed by the Code Napoleon, art. 538, which afterward found its way in our art. 400 C.C.P. This law, however, was necessarily subject to easy modifications under the unlimited powers possessed by the King.

Then it must be said that a number of *Edits et Ordonnances* passed subsequent to the Ordonnance de Moulins were cited, whereby part of the public domain was allowed to be sold and alienated, and in some of these, the grant goes so far as to say that it thereby derogates to that effect, as much as need be, from all the laws, *ordonnances et coutumes* to the contrary.

And this right to alienate part of the public domain, by the King of France, has always been recognized by the Courts of France even subsequent to the *Edit* de Moulins, Merlin, Questions de Droit, vol. 7, Rivage de la mer. Edits et Ordonnances, vol. 3, page 122. Pièces et documents relatifs á la Tenure Seigneuriale, vol. 2., page 126, 128—page 567.

Authorities have also been found to the effect that this right has been recognized in France since the Revolution, Sirey (Periodique) 1841, vol. 1 page 260—Dalloz, vo. Domaine Public, 29, 30—Dalloz vo. Organization Maritime, 751.

And after the cession many laws were passed in Canada recognizing the validity of the grants made before 1760, 47 Geo. III., ch. 12; 4 Geo. IV., ch. 18; 7 Geo. IV., ch. 11.

After the Revolution, the authors assert that all these concessions became null under the provision of a law of l'Assemblée Nationale Constituante of 1789, which abolished all these grants. These grants were then abolished by a new law, because they were considered good legal grants, until such new law would decide to the contrary. But all French legislation of 1789, in fact, all legislation since 1760, when Canada passed under the British flag, has no effect in Canada, not any more than the Code Napoleon has.

It is indeed, a somewhat strange position for the Crown to-day to take in denying the power of the King of France at the time the grant was made. No one, says Mr. Mignault (now Mr. Justice Mignault), Droit Civil Canadien, vol. 9, page 195, would dream of contesting the original title of concessions, and it is the ancientness of these titles which dispensed them from registration.

CAN.

EX. C.

BELANGER v. THE KING.

Audette, J.

However, to properly appreciate the grant in question and more especially the last one, which covers them all, and is under the signature and seal of the great King Louis XIV., one must go back to that heroic period. It was the period of great and autocratic politics, when justice in its mundane quality resided in the acts of the Prince; when there was no other justice than the Prince's justice. The King, at that time was all power. He could one day legislate by such *Edit et Ordonnance* as he saw fit, and the following day he could at his pleasure, derogate therefrom by another piece of arbitrary legislation. He was the source and foundation of power; and, indeed well he knew he was possessed of this absolute power, when the famous words, said to have fallen from his lips, were pronounced by him, "*L'Etat, c'est moi.*" He did then mark, as if with the engraver's tool, upon the table of the laws of France, the very character of his power. The monarchy existing in France in the 17th century was a royal monarchy and not a seignorial monarchy—and the monarchs wielded sovereign power, independent of *les Etats de la nation*, Furgole 10.

Even if the will of the King of France, either by special Grant or by General *Edits*, did clash with the *Edits* of his predecessors on the throne, there was no way to reproach him from a legal standpoint, whilst he might perhaps be criticized from a political view. The King was the sovereign master of the Kingdom in an absolute and unlimited monarchy. Parliament during his reign even became nothing but a court of justice losing its right of *remonstrance*.

The Seignorial Courts created under 18 Vict. ch. 3, whose great weight and authority, to which an almost authoritative sanction has been given by statute, commanding also the highest respect by reason of the composition of the tribunal, have passed upon the very point in question, recognizing the validity of the seignorial titles from the King of France. Answering the 27th question submitted to them, that Court answered it, as follows; to wit:—

> 3. As to the rights of the Seigneurs on the shores of the large rivers and navigable rivers: In such of the rivers as were subject to the ebb and flow of the tide, those rights, on the portions covered and uncovered by the tide, arose from a special grant in their title deeds; and without such a grant those rights extended only as far as the line of high tide.

4. The Seigneurs had the right to collect dues of "*lods et ventes*,"* on the transfers of beaches situated between high and low tide on the River St. Lawrence, or on the other navigable rivers, when, being entitled to such beaches by their title deeds, as already stated, they had granted them, and that right existed in the same cases when such dues would have been chargeable on other sales. See Seignorial Court decisions, page 69a.

Then the Act of Commutation granted to the suppliant or his predecessors in title, together with the receipts for the rents and seignorial dues or of their commuted capital, have recognized his right of ownership and made his title incommutable. See 3 Geo. IV., 1822 (Imp.), ch. 119, secs. 31 and 32; 8 Vict. 1844, ch. 42; and R.S.Q. 1909, arts. 7277, 7278, 7282.

These lands which had been granted to the Jesuits and which still belonged to the Jesuits in 1800 were then confiscated by the British Crown.

Then in 1838 the administration of the Jesuits' Estate was confided to Commissioner Stewart; but this Commissioner had nothing to do with the lands which had already left the hands of the Jesuits.

Moreover, the Jesuits' Estates, under art. 1587, of the R.S.Q. 1909, have been declared to be in the control of the Department of Lands and Forests. Therefore the original title has been recognized, and all grants, deeds, and titles given by the Department, or those acting under it, must be considered good and valid.

See also Journals of the Legislative Assembly, 1823-24, appendix "Y."

Commissioner Stewart has granted and sold some of the land from the Jesuits' Estate to the Hotel Dieu, who in turn sold to the suppliant or his predecessor in title.

I hereby find, following the decision of the Seignorial Court, and for the reasons above mentioned, that the original grant from Louis XIV., as well as the other three primordial grants, constitute a good title with full force and effect. And I further find that all titles, deeds or grants made by Commissioner Stewart, who was invested with full power, are also good and effective titles, and more especially after the Crown has taken the rents and revenues derived from such grants, waiving thereby the formality of the deed, *Peterson* v. *The Queen* (1889), 2 Can. Ex. 67.

*A French Tax imposed on all sales of immovables.

CAN.
EX. C.
BELANGER
v.
THE KING.
Audette, J.

Then, with the object of removing all doubts, the statute of 6 Geo. V., ch. 17, passed by the Legislature of Quebec, in 1916, with retroactive effect, has positively declared that the Crown has the right and power to alienate the beds and banks of navigable rivers and lakes, the bed of the sea, the sea-shore and land reclaimed from the sea, comprised within the said territory and forming part of the public domain. See also *Commrs. Harve Quebec* v. *Turgeon and Atty.-Gen. P.Q.*, decided the 24th June, 1910—unreported. This Act removes all doubt, if any could exist, and makes it clear that all previous grants, whatever may have been the system of government, are good and have full force and effect.

Only a few words need be said with respect to the contention that these lands formed part of the Harbour of Quebec, and thus became vested in His Majesty, as representing the Dominion of Canada. By sec. 2 of 22 Vict., 1858, ch. 32, an Act to provide for the improvement and management of the Harbour of Quebec, the lands forming part of the Jesuits' Estate are excluded from the harbour. By the same Act, the right of all the riparian proprietors are further duly saved and recognized. See also 62-63 Vict., 1899, ch. 34, sec. 6, sub-sec. (a) to sub-sec. 2 thereof, whereby acquired rights are saved and acknowledged. Therefore the lands in question do not form part of the Harbour of Quebec.

Having disposed of the two great objections raised against the suppliant's title, it becomes unnecessary to enter here into the long catena of title-deeds under which the suppliant claims. It will be sufficient to find the suppliant has proven his title, and is entitled to recover the value of the land expropriated from him.

Coming now to the question of compensation, a summary review of the evidence on the question of value and damages becomes of interest.

On behalf of the suppliant the following witnesses were heard upon these questions of value and damages: C. E. Taschereau, Joseph Collier, Dr. M. J. Mooney, Octave Bedard and Eugene Lamontagne.

C. E. Taschereau: This witness, a notary public practising in Quebec, prefaces his valuation by citing a number of sales on *terra firma*, at Hedleyville or Limoilou, at figures ranging from 64 cents to $2.27; but of small building lots varying in size from

40 and 30 feet by 60 feet which bear no relation to be compared with lots 513 and 560. He also cited sales of vacant beach lots, on the north side of the River St. Charles, from 1910 to 1915, at figures ranging from 24 cents, 38 cents, 50 cents to $1.25 and on the Quebec side as high as $1.94 and relied on the sale to the Government of lot 514, at 23 cents, in June, 1914. Then after stating that lot 513 might be used for private residences, shops and warehouses and 560 for ship-building and maritime purposes, and that both lots, which were not utilized in 1913, were both covered by water in monthly high tides, he placed a value on lot 513 at 35 cents—equal to $103,478.20, and upon lot 560 at 30 cents, and added 10 cents a foot on the abandoned part of 560, because of the taking of the front part, the invasion by construction on the piece taken and the sluiceway as well as from the closing of access at the back by the corporation of the city:—the total of his valuation amounting to $251,248.00.

Joseph Collier says that lots 513, 514 and 560 are of about the same value and that in 1913 wharves could be built on 513 and 560. He values lot 513, the front part, for a depth of 300 feet at 60 cents and the back at 30 cents, making for that lot $143,685. And coming to lot 560, adhering now to his former valuation for the whole lot, he placed a value of 45 cents upon the front part for a depth of 300 feet; and for the balance at the back at 25 cents. However, he added that since the Crown now only had a part, at the front, of lot 560, he placed a value of 60 cents upon such part and considered that the balance thereof which is worth 25 cents and which is now abandoned and returned is thereby damaged or depreciated by 50%, that is 12½ cents a foot.

In the result he explains that if lot 560 were all expropriated that he would allow 324,900 feet at 45 cents, $146,205.00; and 1,538,699 feet at 25 cents, $384,677.50; and that the amount payable should be $530,882.50. Then since the Crown only takes a portion of 560, he now values it as follows:—450,000 (but the right amount should be 455,289, giving $267,173.40) at 60 cents, $270,000; and 12½ cents as depreciation on the balance of 1,413,599 (which should be in exact figures 1,418,310 at 12½—$177,288.75, making in all $444,462.15) $176,699, $446,699.

If this mode of arriving at such valuation is analysed it will be seen that although, when valuing the whole lot, the witness

CAN.
EX. C.
BELANGER
v.
THE KING.
Audette, J.

allows 45 cents a foot for a depth of 300, and that the Crown actually retain of that lot a depth from the front on the east side of 340 feet and on the western side a depth of 500 it becomes difficult, if possible, to reconcile such valuation, considering that when the Crown would take the whole lot 560, according to him, it would have to pay $530,882.50 for the 1,863,559 feet, while it would still have to pay, according to his own figures $446,699 for this lot 560, after having returned 1,413,559 feet (or to be accurate 1,418,310), that is when the Crown retains less than a quarter of the whole lot. This reasoning is obviously difficult to reconcile with sound logic.

In addition to this fantastic price, he says that before the property can be used, $50,000 might be expended for wharves and $25,000 for filling, bringing the whole amount between half a million and $600,000 that would have to be expended upon this lot before it could be in a fit state of development, remaining however, without deep water wharves.

Dr. Malcolm J. Mooney says that lots 513, 514 and 560 are all of the same value and he values lot 513 at 30 to 40 cents a foot and lot 560 at 30 cents and contends that by the abandonment the balance of lot 560 is depreciated by 50%, and in arriving at that conclusion he assumes that the access by water has been taken away, contending further that before 1913 these two lots might be utilized for industrial purposes, by river or railway, for instance as pulp or paper mill sites, and that a revetement wall at a cost of $8.00 or $9.00 a foot and filling at $5.00 to $6.00 a foot would have to be done; but in the result without deep water wharves. He valued the whole of lot 560 at $559,079.70 and lot 513 at $88,695.00, in all $647,774.70.

Octave Bedard, barber, owner of the Chateau Frontenac stand, who as land agent has sold lots at Limoilou for $1,500,000 with the experience of two transactions in beach lots, values the beach lots on the River St. Charles, from 1910 to 1912 (about equal value in 1913) at 40 cents to 50 cents, from lot 514, going up to Drouin Bridge. Adding that near Ste. Anne Bridge lots are worth less.

Eugene Lamontagne values beach lots, in 1913, at 80 cents to $1.00, on River St. Charles, west of Ste. Anne Bridge. The lots immediately to the east of that bridge would be cheaper. He

would not see much difference between lots 513, 514 and 560. He values lot 513 and 560 at 30 cents to 35 cents and contends it would be a paying proposition to purchase at half a million dollars and further incur the necessary expenses to improve and develop the lots.

On behalf of the Crown, the following witnesses were heard upon the question of the value of the land and on the cost of development of these lots: Albert Forward, Edward A. Evans, Athol Tremblay, Sir William Price and Alfred Gravel.

Albert Forward was the chief engineer of Messrs. Quinlan and Robertson, who were the contractors with the Government for the works on the St. Charles River. As a result of these works being abandoned in June, 1917, Quinlan and Robertson's plant became idle, so they entered into a contract with the Imperial Munitions Board to build four vessels on lot 513 which involved the expense of $9,000 for 3 ways, $2,800 for a wooden wall and 58,000 yards of filling at 50 cents—$29,000, in all an expense of $40,800, having the advantage of having a dredge at that place and being allowed to take the material from the river.

This witness says that lot 560 is too low a site to be used in its present state for any purposes. It would have to be raised at the cost of a crib work and filling amounting to $236,935, together with the filling of the lot, 620,000 yards at 50 cents, provided the material could be taken from the river, $310,000, in all $546,935.

Lot 513 would require a concrete wall of 800 feet, at the cost of $100 a foot, $80,000, and the filling, 95,000 yards at 50 cents, $47,500=$127,500.

Edward A. Evans, civil engineer. He was in charge of the building of the Ste. Anne Bridge on the River St. Charles and he says in the site of the bridge he encountered a depth of 60 feet of quicksand. He would not advise the building of wharves on lot 560, when there are so many better available lots for that purpose. However, to make a wharf for small vessels on 560 it would cost $355,552, filling outside of the wharf $252,889=$608,441. Not a practical commercial proposition.

He says that lot 560 was sold in 1888 for $5,000, or ¼ cent a foot and that such price was really less than the value of the wharf and crib on the property then. These wharves were sold in 1891

CAN.
EX. C.
BELANGER
v.
THE KING.
Audette, J.

to McLaughlin. The property has not, to his knowledge, been used since 1889.

He would prefer the Turgeon-Dussault lots (582a and 583) to 560 because the foundation of the latter is on rock, is firmer ground. He said 582a and 583 were paid ½ a cent a foot. And he adds that no sane man would spend $608,441 to fit 560 for building lots.

Lot 513 not so costly to develop. In 1913, on the front and west it would require a retaining wall. The crib work would cost $9,600, filling, $38,750=$48,350. Not practical for commercial purposes. Filling with garbage, as suggested, not advisable if to be used for industrial purpose. Abandonment has no detrimental effect on balance of lot 560.

Athol Tremblay is a surveyor who was chief land agent for the Transcontinental from 1909 to 1912. He says that lot 560 cannot be utilized without being filled, and with a protection wall. Contends that lot 560 has no more value than lots 582a and 583, the Dussault-Turgeon lots, which were sold at 3-5 of 3-4 of a cent, or about half a cent as shewn by exhibit No. 9 and at ¾ of a cent in 1912, as shewn by exhibit No. 10.

He values lot 560 at $15,000 to $20,000. The sum of $15,000 would represent about ¾ of a cent, and $20,000 slightly more than one cent a foot. He does not consider that lot 560 should be used for building lots, when there are so many lots in the neighbourhood. It is not useful for commercial purposes because the filling would be too costly.

He values lot 513 at 5 cents a foot—$14,782.60. He considers that lots 440 etc., mentioned by witness Taschereau higher up the river and says that the perspective of the Government work on the St. Charles River had the effect of creating a fever of speculation in the neighbourhood.

He considers that the abandonment in no way can depreciate the balance of 560, especially is it so with the undertaking filed by the Crown.

Sir William Price, who is the president of Price Brothers, Ltd., was Chairman of the Quebec Harbour Commission for 1912 or 1913 to 1915 and as such has intimate knowledge of the harbour. He considers lot 560 of very small value for commercial purposes, because it could not be so used without filling and building wharves which would be too costly. No private company would undertake

it. No deep water wharves available there. The Quebec Harbour Board purchased in March, 1913, a much more valuable property at Indian Cove, including large wharves, at 2 cents a foot, as appears by exhibit No 13. He considers there is not much difference in value between lot 560 and the Turgeon-Dussault lots 582a and 583.

He values lot 560 at ½ a cent a foot and lot 513 at 2 cents a foot.

Alfred Gravel, Managing Director of the Gravel Mills, at Levis, who has been one of the Harbour Commissioners since 1912, states that lot 560 is prohibitive, no good for commercial purpose, in view of the necessarily large expenditure it would require before it could be used. He was on the Harbour Commission when they bought (ex. 13) the Indian Cove property at 2 cents a foot, including a wharf of 1,800 feet in length, which is opened all winter, and with deep water accommodation. Contends the Turgeon-Dussault lots are of about same value as 560.

He values lot 560 at ½ cent a foot and lot 513 at 2 to 3 cents a foot. He does not consider that the abandonment, coupled with the undertaking, has had a detrimental effect on lot 560.

The lands in question herein were purchased by the suppliant between 1900 and 1910 for the sum of $18,165.32 and were practically yielding no revenue save the small amount shewn in exhibit No. 7. These lots lie in the estuary of the river St. Charles and were in 1913 nothing but a stretch of muddy soil over sand, the land being entirely covered with water at monthly high tide, the property having been idle for years and years.

These properties cannot be used in the state in which they are. To be made useful they would have to be filled and protected by wharves or crib works, at a cost, according to witness Forward, in respect of lot 560 of $546,935 and with respect to lot 513, of $127,500, and according to witness Evans with respect to lot 560, at a cost of $608,441 and lot 513 at a cost of $48,350, yet in face of such statement some so called expert witnesses came and swore it would pay to fill and develop these lots at such tremendous costs to make of them either building lots or industrial sites. These wharves would not even be deep water wharves, but would have access to deep water only to the height of the water brought in by the tide. No sane man would expend such sums on these

CAN.
EX. C.
BELANGER
v.
THE KING.
Audette, J.

lots to use them for such purposes when better lands are available all around under normal and reasonable conditions.

It is true there is evidence that several beach lots changed hands at rather high figures, between Ste. Anne and Dorchester bridges, where the land is somewhat more valuable than below Ste. Anne bridge; but, as was said, at the time these lots changed hands, a hectic inflation in prices prevailed in that locality in view of the prospective works to be undertaken by the Crown.

It is true lot 514, which lies between lots 513 and 560, was purchased by the Crown at 23 cents in June, 1914; but under such special circumstances that will take that transaction out of the ordinary course of business and prevent using such a price as a criterion to determine the value of the lots in question. Indeed, as appears clearly, both by the deed itself (ex. 78) and from the testimony of witness Lefebvre, it having become known that lot 514 was required by the Crown, speculators took hold of it, option after option, to the number of five, linking into one another, and even under fictitious names were executed with the object of inflating the price of the lot. The very evening the first option was obtained at 23 cents a second one was out for 50 cents a foot. The Crown, through its officers, having been made aware of what was going on, and anxious to stop the property from passing into the hands of such speculators, went over to the owners, bought the property in face of this skein of options and undertook, by the deed itself, to indemnify the owners against any trouble which might be met or coming from the parties to whom they had presented these options. Visionary wealth at the expense of the Crown was in that transaction seen at a distance but not realized. However, the Crown's hand was forced and the property had to be bought at that high figure.

These lots 513 and 560 were of very little value to the owner. And it is now settled law that in assessing compensation for property taken under compulsory powers it is not proper to consider as part of the market value to the owner, such value as land taken may have to the party expropriating when viewed as an integral part of the proposed work or undertaking. But the proper basis for compensation is the amount for which such land could have been sold, had the present scheme carried on by the Crown not been in evidence, but with the possibility that the Crown or some company

or person might obtain those powers and carry on the scheme. And in the present instance, who, outside of the Crown, could undertake such colossal works? *The Cedar Rapids Co.* v. *Lacoste*, 16 D.L.R. 168, [1914] A.C. 569; *Sydney* v. *North Eastern R. Co.*, [1914] 3 K.B. 629.

The scheme must be eliminated, notwithstanding works had been started, subject, however, to what has just been said. *Fraser* v. *City of Fraserville*, 34 D.L.R. 211, [1917] A.C. 187.

When Parliament gives compulsory powers and provides that compensation shall be made to the person from whom property is taken, for the loss he sustains, it is intended he shall be compensated to the extent of his loss; and his loss shall be tested by what was the value of the property to him, not by what will be its value to the party acquiring it. *Stebbing* v. *Metropolitan Board of Works* (1870), L.R. 6 Q.B. 37.

The policy and object of the Expropriation Act is to enable the Court to compensate the owner but not to penalize or oppress the expropriating party. The Court must guard against fostering speculation in expropriation matters, and must not encourage the making of extravagant claims and more especially must not be carried away by subtle arguments of real estate speculators or so called expert witnesses and thus render the execution of public works impossible or prohibitive. While the owner must be amply compensated in that he is no poorer after the expropriation, there is no reason to charge the public exchequer with exorbitant compensation built upon imaginary or speculative basis.

The properties that offer the closest relation and similarity with lot 560 and are most apposite are certainly what has been called during trial the Turgeon-Dussault properties, lots 582a and 583, composed in part of *terra firma* and in part of a beach lot to the extent of 67 arpents and which was sold in 1909 at about half a cent a foot and in 1912 at about three-quarters of a cent. Then there is also that fine property with wharves and buildings with deep water wharves at Indian Cove, bought at 2 cents a foot by the Quebec Harbour Commissioners.

At the original trial there was no oral evidence that could justify the Court to allow a valuation at less than 10 cents a foot, for the land taken, while at this new trial the Court is absolutely untrammelled in that respect, having evidence ranging from 60 cents down to ½ cent a foot.

CAN.

EX. C.

BELANGER v. THE KING.

Audette, J.

Coming to the question of abandonment, I find, under the conflicting evidence in that respect, that with the undertaking filed by the Crown, and as above recited in full, that the returned piece or parcel of property is clearly not injured and has not been depreciated in value by such abandonment and its consequences. It is with some reluctance I have, under the evidence, to come to such conclusion because there would be ample justification for thinking that part of 560 would have been benefited by the public works in question, for reasons too obvious. Among others, there will be a deep water channel coming up from the St. Lawrence to the guide pier; moreover under the undertaking the Crown cannot build on that part of 560 which it retains thus placing the present front of 560 in a better position than it was before the expropriation. Can it be assumed that when such opinion was expressed by some of the witnesses it was predicated by the idea that the advantages might be offset by the disadvantages?

We have the advantage in this case, to be guided to a certain extent, as a determining element by the sales of lots 582a and 583, and the Indian Cove property, which applied with some flexibility, taking into consideration, as much as is known of the circumstances of the sales coupled in relation to 560 which is closer inshore than 582a and 583, become very cogent evidence and afford a very good test in arriving at a fair compensation herein. *Dodge* v. *The King* (1906), 38 Can. S.C.R. 149; *Re Fitzpatrick and Town of New Liskeard* (1909), 13 O.W.R. 806.

The suppliant endeavours to hold the Crown liable for the closing of the streets by the municipality on the northern part of lot 560 which is abandoned and returned to him. But away back in 1911, as will appear by ex. 6, the municipality of the City of Quebec openly manifested its intention of closing those streets, as will appear by the resolution of the council whereby it entered into contractual obligation with the C.N.Ry. for doing so. That was long before the date of the expropriation. Then after the C.N.Ry. had complied with its part of the agreement, the City of Quebec, on November 12, 1915, passed a by-law closing the streets from that date in compliance with its resolution of 1911. The Crown is in no way liable in that respect, there is no privity between the Crown and suppliant in that respect. If the suppliant has any claim against anyone in respect of the closing of the streets,

it will obviously be against those who did it. *Bell* v. *Corporation of Quebec* (1879), 5 App. Cas. 84.

Taking into account and consideration the fact of such abandonment or revesting of part of lot 560, in connection with all the other circumstances of the case, in estimating or assessing the amount of compensation to be paid to the suppliant, I have come to the conclusion to allow 5 cents a foot for lot 513—$14,782.60, and for lot 560, the front only being taken, the most valuable part, I will allow 2 cents—$8,905.78, making in all the sum of $23,688.38, with interest thereon from January 13, 1913, to the date hereof. Between the years 1900 and 1910 the suppliant bought these two lots composed of over two million feet of land for $18,000 and he is now getting $23,688.38 and interest for 740,941 feet thereof.

Therefore, there will be judgment as follows, to wit: 1. The lands expropriated herein are declared vested in the Crown as of January 13, 1913. 2. The compensation for the land so taken and for all damages whatsoever, if any, resulting from the expropriation and all circumstances flowing therefrom, is hereby fixed at the sum of $23,688.38, with interest thereon from January 13, 1913, to the date hereof. 3. The suppliant is entitled to recover the said sum of $23,688.38, with interest as above mentioned, upon giving to the Crown a good and satisfactory title free from all hypothecs, mortgages, ground rents and all encumbrances whatsoever. Failing the suppliant to discharge the ground rents, the capital of the same may be discharged by the Crown out of the compensation moneys and the balance thereof paid over to the suppliant. 4. The suppliant is further entitled to recover all costs occasioned by the expropriation. *Judgment accordingly.*

REX v. KAMAK.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. May 31, 1920.

1. MANDAMUS (§ I B—6)—TO COMPEL DISTRICT COURT JUDGE TO PROCEED.
Mandamus will lie to compel a District Court Judge to proceed where he has mistakenly decided that he has no jurisdiction.
[See *Rex* v. *Trottier* (1913), 14 D.L.R. 355, 22 Can. Cr. Cas. 102, 6 Alta.L.R. 451.]

2. NOTICE (§ II—10)—CONVICTION BY TWO JUSTICES—NOTICE OF APPEAL—SERVICE ON ONE JUSTICE—SUFFICIENCY.
It is not necessary under sec. 750 of the Criminal Code that both justices to a conviction should be served with notice of appeal. It is the duty of the one who has been served to bring the matter to the notice of the other.
[See 3-4 Geo. V. 1913 (Dom.), ch. 13, sec. 26, amending sec. 750 of the Code.]

ALTA.

S. C.

REX v. KAMAK.

Statement.

APPEAL from an order of Simmons, J., refusing the application of the defendant for a writ of mandamus to be directed to His Honour Judge Mahaffy ordering him to enter and hear an appeal by the defendant from a conviction made against him by two Justices of the Peace under the Inland Revenue Act, R.S.C. 1906, ch. 51.

H. L. Landry, for the Crown.

G. H. Steer, for appellant.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—The District Court Judge had refused to enter the appeal because it appeared that the appellant had not served each of the justices with a copy of the notice of appeal at least within the time limited or within any lawfully made extension of the time. There had been an order made extending the time but it was probably irregular.

One of the justices had been properly served within the prescribed time, and the real point to be decided is whether it is necessary, in order to give jurisdiction to hear the appeal, that both justices should be served.

A preliminary objection was taken by counsel for the prosecution that mandamus does not lie in such a case. The authorities cited, however, point clearly to the very contrary view. There is no doubt that mandamus will lie to compel the District Court Judge to proceed where he has mistakenly decided that he had no jurisdiction. It amounts merely to a reversal of his decision on that point. See *Rex* v. *Trottier* (1913), 14 D.L.R. 355, 22 Can. Cr. Cas. 102, 6 Alta. L.R. 451.

With respect to the objection taken by the Judge and insisted upon before us that it is essential under sec. 750 of the Code that both of the two justices be served with the notice of appeal, I confess it does not appear to have any very good reason of convenience or of evident purpose to support it. It was not until 1913 that it was made necessary to serve the justice at all, although prior and for some time subsequent to 1892 service on the justice was mentioned as a permitted alternative.

In *certiorari* the justices are interested, or may be interested, personally in respect of costs or an order of protection. But on an appeal there is absolutely nothing which can give either of them any personal interest in the matter. What the reason was for

making it necessary to serve the justice at all is not very clear unless it were merely for the purpose of calling his attention to what is his duty under sec. 757 quite irrespective of the existence of an appeal, viz., to return the conviction to the proper clerk.

By sec. 2, sub-sec. 18 of the Code the expression justice includes two or more justices if two or more justices act or have jurisdiction, unless the context otherwise requires.

The Court established by the sitting of two justices in pursuance of any Act is of course only a temporary tribunal. For most and possibly for all purposes it is dissolved when the decision has been given and the proper record made. But there are certainly some other sections in Part XV. dealing with matters arising after the appeal is disposed of wherein it is difficult to see how the words "the justice" can be held to mean both justices. For instance, sec. 757 provides that every justice before whom any person is summarily tried shall transmit the conviction or order to the Court to which an appeal is given. Certainly in a strict sense they cannot each do this act where two have sat. One must do it for both and no doubt in that sense both may be said to do it. Then again, by sec 757, sub-sec. 4, the Clerk of the Court appealed to is to remit the papers to "such justice" "to be by him proceeded upon etc." Now certainly the clerk cannot send these original papers back to each of the justices. Here again one is taken to represent both. Of course, it may be said that in these cases "the context otherwise requires." But at any rate these circumstances do shew that the Code for some purposes recognizes that one of the justices must represent the two of them and that the unity of the Court of summary jurisdiction is considered as still to exist to some extent at least.

I am, therefore, of opinion that, in these circumstances where neither justice has any personal interest whatever, for the purpose of service of a notice of appeal a service upon one of the justices should be considered as a sufficient service upon both even assuming that the statute upon a strict interpretation does really mean that both should be served, which seems to be at least doubtful. As I have said, the Code looks upon them as still to some extent connected with each other in duty, and that being so I think it is the duty of one of the justices when served with a notice of appeal to bring the matter to the notice of the other, so that service upon

ALTA.
S. C.
REX
v.
KAMAK.
Stuart, J.

one is really a service upon both. The statute does not use the words "personally serve" and I think the principle laid down by this Court in *Re Lawler and City of Edmonton* (1914), 20 D.L.R. 710, 7 Alta. L.R. 376, and in cases there cited, is, by analogy, applicable.

I would, therefore, allow the appeal with costs as against the prosecutor only and order the writ to issue as asked. The writ should strictly I think be directed to His Honour Judge Mahaffy to whom the application was made to enter the appeal. The proceeding should be looked upon as at that moment improperly interrupted. But of course the entry of the appeal by any other Judge properly acting in the judicial district in question would be obedience to the writ and no doubt even the issue of a writ or even of an order will not be necessary.

As the point was uncertain and new, I think there should be no costs of the application below before Simmons, J.

Judgment accordingly.

ALTA.
S. C.

STONY PLAIN v. CANADIAN NORTHERN TOWN PROPERTIES Co.

Alberta Supreme Court, Harvey, C.J., Stuart, Beck and Ives, JJ. May 31, 1920.

PUBLIC UTILITIES COMMISSION (§ I—1)—ARREARS OF TAXES—REDUCTION—COMPROMISE—REFUSAL OF MUNICIPALITY TO AGREE—POWER OF BOARD TO DIRECT.

Under sec. 86 (c.) of the Public Utilities Act, 8 Geo. V. 1918 (Alta.), ch. 42, the Board has jurisdiction to direct a compromise or reduction of arrears of taxes, notwithstanding the municipality's refusal to agree to any compromise.

Statement.

APPEAL from the Public Utilities Board on the ground of jurisdiction.

H. C. McDonald, for the town.

N. D. Maclean, for C.N.R. town properties.

Harvey, C.J.

HARVEY, C.J.:—The plaintiff's contention is that under sec. 86c of the Public Utilities Act added by 8 Geo. V. 1918, ch. 42 the Board has no jurisdiction to direct a compromise of arrears of taxes as against the municipality's refusal to agree to any compromise whatever, but that its power is limited to fixing terms of a compromise when the municipality is willing to compromise but cannot agree with the taxpayer on the terms.

Having regard to the terms of the section and of the two preceding sections enacted at the same time I am of opinion that such interpretation is too restricted.

ALTA.

S. C.

STONY PLAIN v. CANADIAN NORTHERN TOWN PROPERTIES CO.

Harvey, C.J.

The section is definitely limited to cases in which the municipality is legally empowered to compromise whereas the preceding section is not so limited but is limited to cases of taxes on parcels of more than 20 acres, as to which one member of the Board may against the will of the municipality direct that the taxes shall be compromised and declare the terms of such compromise, in other words, may reduce the taxes in his discretion and fix terms of payment.

Under 86c, the power of one member of the Board is to make a recommendation. He alone cannot direct the compromise but the Act expressly provides that the Board "May direct such compromise as to it may seem proper," not merely fix the terms of a compromise for consulting parties. The section there provides that such direction shall have same effect as a compromise made under the statute permitting it. The words of this section hardly leave room for doubt that the direction of the Board is a direction of a compromise itself, and it is merely that the Board's jurisdiction is declared to arise only where the taxpayer and the council cannot agree on the terms of the compromise that leaves room for the argument that there must be a compromise agreed on before the Board can act. But when one considers the practical working out of a compromise one realizes that people do not usually agree on a compromise as such unless they can agree on the terms on which they will compromise. Moreover, a compromise usually involves the giving up of something on both sides while in this case it clearly means simply a reduction on the part of the municipality of the amount due to it which in most cases will be unquestioned. The terms of the compromise and the fact of the compromise are thus so connected that they can scarcely be separated.

I am, therefore, of opinion that under sec. 86c the Board has jurisdiction to direct a compromise or reduction of arrears of taxes, notwithstanding the municipality's refusal to agree to any compromise, and I would dismiss the plaintiff's appeal with costs.

Stuart, J.
Beck, J.

STUART and BECK, JJ., concurred with IVES, J.

Ives, J.

IVES, J.:—This is an appeal from an Order of the Board of Public Utilities, directing that the arrears of taxes, due the plaintiff municipality in respect of certain subdivided lands of the defendant be compromised at the sum of $1,250.

ALTA.

S. C.

STONY PLAIN v. CANADIAN NORTHERN TOWN PROPERTIES CO.

Ives, J.

The plaintiff contends that the Board had no jurisdiction; that sec. 86c of 8 Geo. V. 1918, ch. 42, only authorizes the Board to fix the terms of a compromise in the event of a failure between the town and the taxpayer to agree upon terms after the town has consented to compromise. The section of the statute referred to is one of three sections added to the Public Utilities Act in 1918 by way of an amendment. The effect of these three sections is shortly this—86a deals with a parcel of land of not less than twenty acres in area of which no subdivision plan has been registered, or if one has been registered, then upon its being cancelled, the Board may upon petition by the owner, separate the parcel from the city, town or village or may *direct* a different assessment of it by the municipality. 86b deals with a like parcel of land burdened with arrears of taxes and provides that upon an appeal (petition) to the Board by the taxpayer any member of the Board may hear the appeal and may thereupon *direct* such compromise between town and taxpayer as seems expedient and without limiting the general power of the Board the section sets out what the compromise may be, viz, extension of time for payment, reduction of the amount of arrears, acceptance of the land or a part of it or of other land in whole or part payment of the arrears, payment to the town of an increment in value upon a subsequent sale. And all this irrespective of whether or not the town is empowered by statute to make a compromise. Then follows sec. 86c which provides that where the town has statutory authority itself to compromise, but fails to agree with the taxpayer on the terms—that is, what the compromise shall be—then the taxpayer may appeal (petition) to the Board and any member may hear the appeal and upon his recommendation the Board may *direct* such compromise as to it seems proper. Under this section, the size of the parcel or whether subdivided or not is immaterial. And the section provides that the compromise directed by the Board shall have the like effect as if arrived at under the authority of the statutory provision permitting the town itself to compromise with the taxpayer. Upon reference to Murray's New English Dictionary, I find the word "compromise" ordinarily defined as "the settlement or arrangement made by an arbiter between contending parties;" "a coming to terms, or arrangement of a dispute, by

ALTA.

S. C.

STONY PLAIN v. CANADIAN NORTHERN TOWN PROPERTIES CO.

Ives, J.

concessions on both sides etc." "A settlement of debts by composition." As a transitive verb it is "to settle differences, conflicting claims etc. between parties." Clearly then, the language of sec. 86b and 86c empowers the member of the Board in the one case and the Board on recommendation of the member in the other case to *direct* a settlement or adjustment of the arrears of taxes by requiring concessions from the town and taxpayer. Sec. 163, sub-sec. 4, of the Town Act, 1911-12 (Alta.), ch. 2, authorizes the town here to compromise the payment of arrears of taxes. The town refuses. The Board by the order appealed from directs the compromise and fixes the terms as 86c empowers it to do. I think the appeal must be dismissed with costs.

Appeal dismissed.

PARRY v. REID.

SASK.

C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. April 14, 1920.

WATERS (§II—60)—NATURAL WATER COURSE DRAINING SLOUGH—RIGHT TO BOX DRAIN—RIGHT TO REMOVE.

By filling up a natural water course which drains a slough on his land having first put a box drain in it the owner does not abandon his natural right of property to have the slough drain through it, and he has a perfect right to open up the old water course if the box drain in it does not work satisfactorily.

[*Farnell* v. *Parks* (1917), 38 D.L.R. 17, applied.]

APPEAL by plaintiff from the trial judgment in an action for damages for wrongfully diverting a water course. Affirmed. Statement.

J. C. Martin, for appellant; *P. M. Anderson*, K.C., for respondent.

HAULTAIN, C.J.S., concurred with NEWLANDS, J.A. Haultain, C.J.S.

NEWLANDS, J. A.:—There was a slough on defendant's land, which drained through a natural water course on to plaintiff's land. For his own convenience, defendant filled up this water course, first putting a box in it through which the water could flow as originally. In the spring of 1917, this box getting blocked up, the defendant partially opened the original water course through which water flowed to plaintiff's land, which, he claims, caused him injury. The original water course being a natural one it was a right of property, and plaintiff would have no complaint against the defendant no matter how much water ran through it on to his land, or what injury such water did him. Newlands J.A.

SASK.

C. A.

PARRY v. REID.

Newlands J.A.

The law applicable to such a right of property is similar to the law respecting easements. See *Bonomi* v. *Backhouse* (1859), El. Bl. & El. 646 at 654, where Willes, J., says:—

> The right to support of land and the right to support of buildings stand upon different footings as to the mode of acquiring them, the former being *primâ facie* a right of property analogous to the flow of a natural river or of air . . . whilst the latter must be founded upon prescription or grant, express or implied: but the character of the rights, when acquired, is in each case the same.

The right to an easement is not lost by using it in a different way. See *Hale* v. *Oldroyd* (1845), 14 M. & W. 789. Parke, B., at 793, says, in reference to an easement:—

> The use of the old pond was discontinued only because the plaintiff obtained the same or a greater advantage from the use of the three new ones. He did not thereby abandon his right, he only exercised it in a different spot; and a substitution of that nature is not an abandonment.

So in this case, the defendant by filling up the natural water course, having first put a box drain in it, did not abandon his natural right of property to have the slough drain through it, and he had the perfect right to reopen the old water course when he found the box drain in it did not work satisfactorily. As he could completely open it, so, as the District Court Judge says, he could open it partially. He did nothing, therefore, that he had not a right to do.

The trial Judge has found that there was no evidence that what defendant did caused any more water to flow on to plaintiff's land than would have done so if the land had remained in its natural state. The plaintiff has therefore no cause of complaint, and the appeal should be dismissed with costs.

Lamont, J.A.

LAMONT, J. A.:—The plaintiff and defendant are adjoining farmers, with only a road allowance between their farms. The defendant's land is higher than a portion of the plaintiff's, and the natural drainage runs to the plaintiff's land. On the defendant's land there is a slough which collects considerable surface water. This water runs from the slough to the lower land of the defendant and from there finds its way across the road allowance on to the land of the plaintiff. In its natural state the water from the slough runs in a narrow draw or ravine, three or four feet in depth, for about 20 rods. The ravine flattens out some 10 or 15 rods from the road allowance. Some years ago, the defendant, finding it difficult to get across the narrow ravine

SASK.

C. A.

PARRY v. REID.

Lamont, J.A.

with his implements, laid down a box drain on the bottom of the ravine, and then filled up the ravine with earth until it was level with the ground on each side. The water from the slough ran down the ravine through this wooden drain. In the spring of 1917 the defendant found the wooden drain clogged up. Instead of digging out the two or three feet of earth which he put on top of the drain and opening it up, he dug a ditch some 8 inches deep through the earth filled in for the wooden drain. The bottom of this ditch was 13 inches above the drain. The plaintiff claims that by digging the ditch "the defendant wrongfully diverted to the propety of the plaintiff a large body of water which had collected in the slough." The trial Judge dismissed the plaintiff's action, on the ground that by the defendant's ditch not only was there no more water conveyed to the plaintiff's land than would have run from the slough in its natural state, but that there was actually less, and there was no evidence to shew that the manner in which it came down through the ditch injuriously affected the plaintiff. The plaintiff appeals.

In my opinion we are not called upon in this case to consider the question upon which there has been such a diversity of judicial opinion, namely, whether the doctrine of the civil law, or the doctrine of what is called the common law, applies to this Province. The doctrine of the civil law is that the rights of drainage of surface water, as between owners of adjacent lands of different elevations, is governed by the law of nature, and that the lower proprietor is bound to receive the waters which naturally flow from the estate above. The doctrine of the common law is that the upper proprietor has no legal right as an incident of his estate to have the surface water falling on his land discharged over the lower proprietor, although it naturally would find its way there, but that the lower proprietor may lawfully in the course of the proper user of his land erect obstructions to prevent the water from overrunning his land, even if such obstruction has the effect of forcing the water back on the land of the upper proprietor to his injury. *Ostrom* v. *Sills* (1897), 24 A.R. (Ont.) 526; (1898), 28 Can. S.C.R. 485.

The trial Judge having, on the evidence, found against the plaintiff that any more water reached his land by reason of the

SASK.

C. A.

PARRY v. REID.

Lamont, J.A.

ditch than would have reached it had the land remained in its natural state or that the course of the water was in any way changed, and there being evidence to support these findings, the only question left is, was the defendant obliged to leave his drain closed when it clogged up, for, if he had a right to open up the wooden drain, he had surely a right to dig the ditch in question.

I agree with the trial Judge that the defendant had not only the right to dig the ditch in question, but that he had also a right to remove all the filling that he had placed in the draw and return the land to its natural state. The drain was put in for the purpose of enabling the water to run from the slough through the ravine, as it would have done in the natural state of the land. The blocking up of the drain was the equivalent of an obstruction getting into the draw and blocking back the water. Had the draw in its natural state become filled up so that it held back the water, it does not seem to me to admit of argument that the defendant would not have had the right to remove the obstruction.

In *Farnell* v. *Parks* (1917), 38 D.L.R. 17, the head note is as follows:—

> An obstruction to the natural flow of a slough or surface water, by a beaver dam, may be rightfully removed by anyone interested, in order to restore the land to its original and natural conformation, unless another party, relying on the continuance of the obstruction, had dealt with his land in such way that he would be injured by the removal of the obstruction.

While without further consideration I would not be prepared to agree that a beaver dam, irrespective of the time it was erected, is a removable obstruction, the principle laid down in that case seems to me applicable to the facts of the present case.

I would dismiss the appeal with costs.

Elwood, J.A.

ELWOOD, J.A., concurred with NEWLANDS, J.A.

Appeal dismissed.

CASTALDI v. DENISON.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Ferguson, JJ.A. March 19, 1920.

1. NEGLIGENCE (§ I C—50)—ICE FIELD—COMMON LAW DUTY IMPOSED ON PERSON CUTTING ICE—BOYS ENTERING ENCLOSED ICE FIELD—WARNING GIVEN—DEATH OF BOYS—DAMAGES.

At common law the ice which forms upon a navigable river the bed of which is in the Crown belongs to the public but becomes the property of whoever gathers it and reduces it into possession as an article of personal property, but in doing so the rights of others to skate in safety upon the river must not be interfered with. The action of intelligent boys 11 and 13 years of age in entering an enclosed ice field, knowing that it was an ice field, and that it was dangerous to skate upon the ice within the enclosure, especially if they heard a warning shouted to them not to go in because it was dangerous, will disentitle their representative to recover damages for their death in an action under the Fatal Accidents Act.

[*Lake Simcoe Ice and Cold Storage Co.* v. *McDonald* (1901), 31 Can. S.C.R. 130, applied.]

2. NEGLIGENCE (§ I A—4a)—STATUTORY DUTY—FAILURE TO PERFORM—ACCIDENT—EFFECTIVE CAUSE—FATAL ACCIDENTS ACT—DAMAGES.

Mere failure to perform a statutory duty and the fact that an accident has happened is not enough to entitle one to damages in an action under the Fatal Accidents Act; it must be shewn that the failure was the effective cause of the accident.

[*Shilson* v. *Northern Ontario Light and Power Co.* (1919), 48 D.L.R. 627.]

Statement.

AN appeal by the defendant from the judgment of CLUTE, J., at the trial, in favour of the plaintiff, for the recovery of $500 damages, in an action under the Fatal Accidents Act, brought by the mother of two boys who, while skating upon the Napanee river, broke through thin ice formed over a hole, said to have been cut by the defendant and left unguarded or insufficiently guarded, and were drowned.

D. L. McCarthy, K.C., and *J. E. Madden*, for the appellant.
W. S. Herrington, K.C., for the plaintiff, respondent.

The judgment of the Court was read by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment dated the 18th September, 1919, which was directed to be entered by Clute, J., after the trial before him sitting without a jury at Napanee on that and the previous day.

The action is brought by the mother of Pappina Castaldi and Antonio Castaldi, under the Fatal Accidents Act, to recover damages for their death, which it is alleged was caused by the negligence of and the breach of his statutory duty by the appellant.

ONT.

S. C.

CASTALDI v. DENISON.

Meredith,C.J.O.

The appellant was engaged in cutting and removing ice from the river Napanee at a point where the river is navigable, and the deceased came to their death while skating on the river, owing to breaking through the thin ice which had formed where ice had been removed by the appellant.

The respondent bases her claim to recover on two grounds, viz., (1) at common law on the ground of negligence, (2) on the ground that the appellant failed to discharge the duty imposed upon him by sec. 287 (*a*) of the Criminal Code.

The facts are not seriously in dispute. The appellant for some time before the accident had been engaged in harvesting the ice, and had set off a part of the river, about 212 feet in width and 566 feet long, as the field for his operations. This he enclosed by a wire strung from posts, 75 to 80 feet apart, planted in the ice and resting upon the river-bottom. At the west end there were also placed bushes at intervals, and there were bushes also on the north side. The wires had sagged in some places and at some points had become partly imbedded in the ice. According to the testimony of William Barker, a witness called by the respondent, and who had been in the employment of the appellant in the work that he was doing, there was a slack in the wire in the centre of the west side of the field for about 2 feet, and the wire was 4 feet 6 inches or 4 feet 8 inches from the ice at the posts. He had suggested to the appellant that the posts and wire were not a sufficient protection, and the appellant had told him to put up what he thought was a sufficient protection. Acting upon these instructions, he put down bushes, starting at the north-west corner and extending across the whole west side: 6 to 9 bushes, he said, but what he thought were sufficient. This was done within the 7 days before the accident. According to his testimony, any one entering the field from the west side would have to go over or under the wire.

According to the testimony of Charles Markle, a witness called by the respondent, the cutting was begun about 2 feet from the west end of the field, and hard ice had formed over the northerly part of what had been cut, but at the distance of about 150 feet from the west end the ice that had formed was thin, and, as I understand the evidence, it was when the deceased were skating over that ice that it broke through.

It was conceded that the deceased entered upon the ice-field at the west end; before entering it they conversed with two boys, Frank Babcock and Harry Irwin, who were on the river sailing an ice-boat. The conversation occurred at the west end, and Irwin, seeing that they were on the ice-field, called to them saying, "I would not go in there," that it was dangerous. But they went on, paying no heed to the warning. My view of the evidence is that the proper conclusion to be drawn is that they heard but did not heed the warning, though it is possible that they may not have heard it. According to the testimony of Irwin, in addition to the posts, wire, and bushes, there was a bank of snow, and the field could not be entered without bending down—ducking down—under the wire.

The accident occurred between 4 and 5 o'clock in the afternoon and in daylight; and, according to the testimony of some of the respondent's witnesses, it was quite apparent that ice-cutting was going on in the ice-field. The ages of the deceased were 13 and 11 years respectively, and they were both bright and intelligent boys.

As I understand the reasons for judgment of my brother Clute, he found in favour of the respondent because, in his opinion, the appellant had not complied with the provisions of sec. 287 (*a*) of the Criminal Code, his view being that it was not sufficient to have fenced the ice-field—that the hole that had been made by removing the ice should have been fenced.

The section provides that every person who "cuts or makes, or causes to be cut or made, any hole, opening, aperture or place, of sufficient size or area to endanger human life, through the ice on any navigable or other water open to or frequented by the public, and leaves such hole, opening, aperture or place, while it is in a state dangerous to human life, whether the same is frozen over or not, unenclosed by bushes or trees or unguarded by a guard or fence, of sufficient height and strength to prevent any person from accidentally riding, driving, walking, skating or falling therein," is guilty of an offence and liable, on summary conviction, to a fine or imprisonment with or without hard labour, or both.

It will be convenient, before dealing with the question as to the claim based on the alleged non-compliance by the appellant

ONT.
S. C.
CASTALDI
v.
DENISON.
Meredith,C.J.O.

with the requirements of the statute, to deal with the question of his liability at common law.

At common law the ice which forms upon a navigable body of water, the bed of which is in the Crown, belongs to the public, but becomes the property of him who has gathered it and reduced it into possession as an article of personal property: *per* King, J., in *Lake Simcoe Ice and Cold Storage Co.* v. *McDonald* (1901), 31 Can. S.C.R. 130, 133, 134. It follows from this that in entering upon the river and cutting and removing the ice the appellant was doing a lawful act, and is only liable to the respondent if, in exercising that right, he unnecessarily and improperly interfered with the right of the deceased to skate in safety upon the river, and their death was the result of that interference.

In my opinion, the appellant discharged his common law duty by fencing the ice-field as it was fenced; and, even if he had failed to discharge it, the effective cause of the accident was not his breach of duty, but the action of the deceased in entering the ice-field knowing that it was an ice-field, and that it was dangerous to skate upon the ice within the enclosure, especially if they heard the warning that was given to them by Irwin. As I have said, the deceased were bright and intelligent boys, and the occurrence took place in broad daylight.

As was said in the recent case of *Shilson* v. *Northern Ontario Light and Power Co. Limited*, (1919) 48 D.L.R. 627, at p. 630, 45 O.L.R. 449, at p. 454:—

"What the respondents did was just the same as if they had a patrolman who said, 'Don't go over into that enclosure, it is dangerous to go there;' and it shocks my common sense to think that a boy or other person who has been warned in that way and chooses to go there, and is injured by something he did not expect to find, should be entitled to recover."

These observations were quoted by Anglin, J., in the Supreme Court of Canada: *Shilson* v. *Northern Ontario Light and Power Co.* (1919), 50 D.L.R. 696, 698.

I come now to the consideration of the case as affected by the provisions of the statute, and I assume that a person who sustains injury because the duty imposed by the statute is not performed may recover, though at common law he could not.

It is not open to question that the mere failure to perform the duty, and the fact that an accident has happened, is not enough; it must be shewn that the failure was the effective cause of the accident; and, for the reasons given in dealing with the common law aspect of the case, I am of opinion that that has not been proved.

It is unnecessary to decide whether the view of the learned trial Judge is the correct view of the meaning of the statute. As at present advised, I think that it is not: and, if necessary for our decision, would hold that where an ice-field is set apart, and the field is enclosed as the statute requires, it is not necessary to enclose the openings that are made within the limits of the field. The purpose of the statute was not to safeguard one who, disregarding the warning that the fencing of the field would convey to him, takes upon himself the risk of entering the field.

The liability of a person engaged in harvesting ice to answer in damages to one who suffers injury by falling into an opening made in the ice or breaking through thin ice that has formed over an opening where the fence is not of the character which the statute requires, necessarily depends upon the circumstances in which the accident happened. One seeing the fence that was there, and knowing that ice-cutting was going on within the enclosure, must know that the fence is there to warn him that he ought not to enter, and, if he chooses to disregard the warning, his recklessness is the effective cause of any accident which befalls him.

It may be that, if the fence is so near to the opening that a man driving at night might drive into it, the fence should be strong enough to prevent that happening, but that view of the meaning of the statute does not help the respondent.

I would, for these reasons, allow the appeal with costs and dismiss the action with costs. *Appeal allowed.*

BUFFET v. WALLER.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, Fullerton, and Dennistoun, JJ.A. May 11, 1920.

BROKERS (§IIB—12)—REAL ESTATE AGENT—RIGHT TO COMMISSION FOR SALE OF LAND.

If the relation of buyer and seller is really brought about by the act of a real estate agent with whom the lands were listed, he is entitled to commission although the actual sale has not been effected by him.

[See annotation, 4 D.L.R. 531.]

MAN.

C. A.

BUFFET v. WALLER.

APPEAL from a County Court judgment. The plaintiff sues to recover commission on the sale of defendant's farm. Another real estate agent, Lazarnick, claimed that he had brought about the sale and earned the commission. Defendant was willing to pay the commission to the party entitled. Lazarnick was added as a third party and the contest is between the plaintiff and him. The amount of commission was admitted to be $250. His Hon. Judge Prud'homme, before whom the case was heard, found in favour of the plaintiff.

H. M. Hannesson, for appellant; *L. P. Roy*, for respondent.

Perdue, C.J.M.

PERDUE, C.J.M.:—The evidence shews that Waller had instructed the plaintiff to sell the property, consisting of a farm and a considerable quantity of stock and implements, giving him full particulars of the same. The plaintiff advertised the property for sale and by means of this advertisement it came to the attention of one F. Chaput, living at Letellier, who saw the plaintiff and obtained particulars from him. The plaintiff told Chaput to see Waller and deal directly with him. Chaput examined other properties and not finding any to suit him he returned to Winnipeg with the intention of seeing the plaintiff. Before doing so, however, he visited Lazarnick's office in order to see him about some lands he was offering for sale and which adjoined Waller's farm. At the interview Waller's farm was mentioned and Lazarnick offered to take him to Ste. Anne where the lands were, intimating that he, Lazarnick, could arrange a sale of Waller's farm on terms suitable to Chaput. On the following day Lazarnick told him that the Waller farm was under option to the Soldiers' Settlement Board and that Chaput could not get that property. Lazarnick told Chaput to go to Ste. Anne and arrange a purchase of the other property from the owner, Desautels. On going to Ste. Anne, Desautels shewed him his land and also, at Chaput's request, took him to see Waller's farm. Desautels was anxious to sell his own property and made no effort to sell Waller's. Chaput went back alone the same day to Waller's farm and examined it and the stock. In the evening of the same day he saw Waller and the two came to an agreement. The terms of sale were reduced to writing and signed and were afterwards carried out.

Lazarnick claims that Desautels was his agent and that it was through his own and his agent's efforts that the sale was effected. I think the trial Judge took the right view that it was the plaintiff who first brought Waller's farm to the attention of the purchaser Chaput and got him interested in it. Lazarnick in fact told Chaput that the farm was under option to the Soldiers' Settlement Board, and discouraged him from attempting to buy it. It was Chaput's own idea to go to Waller, find that he was free to sell the farm and then himself arrange the terms of purchase. "If the relation of buyer and seller is really brought about by the act of the agent he is entitled to commission although the actual sale has not been effected by him": *per* Erle, C.J., in *Green* v. *Bartlett*, 14 C.B. (N.S.) 681 at 685, quoted with approval in *Burchell* v. *Gowrie and Blockhouse Collieries*, [1910] A.C. 614 at 624. I think it was the act of the plaintiff that was the *causa causans* of the sale.

The appeal should be dismissed with costs.

Cameron, J.A.

CAMERON, J.A.:—The land in question was listed by Waller, the owner, with the plaintiff, a real estate agent, for sale, about August 1, by letter, in which the cash to be paid on the purchase price was fixed at $2,000. It was accordingly advertised by the plaintiff in several papers in August and September, and in the advertisements the same amount of cash required on the purchase was stated. The first inquiry the plaintiff received was from A. Chaput in a letter dated August 24, in which reference is made to the plaintiff's advertisement in the "Tribune." Flavien Chaput, brother of A. Chaput, came in to see plaintiff some time in the first three weeks in September and told him his brother had written to him (plaintiff) and that he (Chaput) was looking for a farm. Plaintiff gave him all the particulars and shewed him Waller's letter and told him, as Waller was anxious to sell, he (F. Chaput) could go over to see him and make his own deal with him. F. Chaput told the plaintiff he could consider the matter and very likely go to Ste. Anne.

F. Chaput bought the property between the 15th and 20th of October. He had his information about it originally from his brother and came to Winnipeg to see plaintiff and got the particulars of the farm from him, as well as the name of the owner.

MAN.

C. A.

BUFFET v. WALLER.

Cameron, J.A.

F. Chaput did not go to Ste. Anne immediately, but inspected other properties at Rainy River and elsewhere. Returning, his wife urged him to take action, and he then went to Winnipeg to see the plaintiff. In the meantime his brother had been corresponding with Lazarnick about properties he had for sale, lots 68 and 69, Ste. Anne. Accordingly he went to see Lazarnick when he met him for the first time. F. Chaput does not remember whether it was Lazarnick or himself that first spoke of Waller's farm. He told him he had not cash enough, as he thought Waller wanted cash for his stock and farm. He told Lazarnick he had not more than $2,000 cash. Lazarnick said he would take him to Ste. Anne on the following day, and that "he could have Waller do business for $2,000." Lazarnick told him the next day that the Soldiers' Settlement Board had an option on the property and that he (Chaput) could not look for it for sale. Then Chaput was put in telephone communication with one Desautels of Ste. Anne, who proposed to sell Chaput his (Desautels') farm, and Chaput arranged to go down to see him the next day. Instead, having met another possible vendor, he went to Isle des Chenes, but finding the land there unsuitable, walked to Ste. Anne, found Desautels, who drove him to lots 68 and 69, and he says "at my request took me out to lot 67" (Waller's property). He just saw the buildings on the farm but did not see Waller, who was in Winnipeg. Desautels did not seem anxious to sell Waller's farm. After a period of indecision, Chaput went over Waller's property himself and made up his mind to wait and see Waller, which he did that evening. After some discussion with Waller and his wife, Chaput decided to buy, and made a bargain and paid $100. In a few days the transaction was formally completed. On cross-examination Chaput says he does not think Lazarnick told him the name of Waller, that Lazarnick did not give him all the particulars, and did not shew him a letter. The reason he went to Lazarnick's office was to see about lots 68 and 69.

Chaput did not know Desautels was Lazarnick's agent. It was the elder Desautels that advised him to buy Waller's place.

Now that is the evidence for the plaintiff and on it he is clearly entitled to succeed. There is, however, to be considered

the evidence of Lazarnick and of the witnesses called on his behalf. After perusing it and the evidence given in rebuttal by F. Chaput, I still retain the view that the plaintiff had made out his case. It seems to me clearly established that the plaintiff was the efficient cause, or *causa causans*, or procuring agent, of the sale to Chaput. I think the trial Judge was right in the conclusion at which he arrived. The intervention of Lazarnick in the matter complicates the circumstances, but throughout them there is the outstanding fact that the plaintiff brought the purchaser and vendor together and was the cause of the negotiations which ultimately resulted in the sale.

Cameron, J.A.

I think the appeal must be dismissed.

HAGGART, J.A.:—I would not disturb the finding of the trial Judge. I would dismiss the appeal.

Haggart, J. A.

I adopt the reasons given in detail by the Chief Justice and Cameron, J.

FULLERTON, J.A. (dissenting):—At the trial this action developed into an issue between the plaintiff and the defendant Lazarnick as to which of them was entitled to receive the commission payable by the defendant Waller.

Fullerton, J.A.

Both the plaintiff and Lazarnick are real estate agents doing business in the City of Winnipeg.

There is little, if any, material conflict of evidence—the difficulty, if any, is to apply the law to the facts of the case.

Prior to October 10, 1919, the defendant Waller was the owner of part of lot 67, Ste. Anne, containing about 114 acres.

In August, 1919, Waller listed the property for sale with the plaintiff. Plaintiff advertised it in the "Tribune," "Free Press" and in "La Liberté."

Arthur Chaput, a brother of Flavien Chaput, who subsequently became the purchaser of the property, on August 24, 1919, wrote to plaintiff asking for a description of the land advertised for sale at Ste. Anne. Some time during the first 3 weeks in September Flavien Chaput called at the office of the plaintiff. Plaintiff gave him all the particulars of the farm, also the name of the owner, told him that the owner was very anxious to sell, and suggested that he should see him and make his own deal with him. Chaput said he would consider it. Plaintiff did nothing further in the matter.

MAN.

C. A.

BUFFET v. WALLER.

Fullerton, J.A.

The defendant Lazarnick had a sub-agent named Desautels living at Ste. Anne. About July 5, 1919, Lazarnick was advised by Desautels that Waller's farm was for sale. He advertised it and got a party interested and together they went to Ste. Anne and saw Waller. Two or three days later Waller came to Lazarnick's office to close the deal, but as the party could not furnish sufficient cash the deal fell through. This was about the last of July. Lazarnick says that on that occasion he asked Waller whether he should keep on trying to get a buyer for him, and Waller replied to go ahead, as he was willing to sell the property, provided he could get a substantial cash payment on the price quoted.

On October 8, Flavien Chaput came to Lazarnick's office and a conversation took place respecting the 114 acres of lot 67 Ste. Anne belonging to Waller. Chaput said that his brother Arthur "had spoken to him about it (the 114 acres) but that the first cash payment was too much." Chaput said he could only put up $2,000 in cash. Lazarnick told him that if he would come back the next day he would get Waller on the phone in the meantime and see what could be done. After Chaput left his office Lazarnick got Waller on the phone and told him he had a man who was willing to buy his place. Waller explained to him that the Soldiers' Settlement Board had an option on the place, but that the option would expire on the 15th October, and that he did not think the Soldiers' Settlement Board meant business. Waller asked how much money the man had, what nationality he was, whether he was married or single, and what price he had quoted him. Lazarnick informed Waller that he had quoted his own price, $40 an acre, that the man was willing to pay $2,000 cash, that his name was Chaput, a Frenchman, and that he was married and had children. Waller replied: "Alright, send him down, as I am sure we can do business, and I am practically certain the Soldiers' Settlement Board will not take the farm."

Chaput came to Lazarnick's office the next day, and Lazarnick then told him that as long as he could pay $2,000 cash, and the Soldiers' Settlement Board gave up the place, he could buy the farm at $2,000 cash and the balance arranged. Lazarnick sug-

MAN.

C. A.

BUFFET v. WALLER.

Fullerton, J.A.

gested to Chaput that he should go down to Ste. Anne and see his man Desautels, who also had a place for sale, his own farm, and that he probably could buy Mr. Desautels' place if it was impossible to get Waller's. Chaput said he would go down. While they were talking Desautels called Lazarnick by phone. Lazarnick said to Desautels to watch out for Mr. Chaput that evening, meet him at the train and take him down to see Mr. Waller's place, his own place, and if no arrangement could be made for either of these places to try and get him a small farm in that district.

Chaput went to Ste. Anne the night of the 10th October, 1919, stayed with Desautels over night, and together they visited the Waller farm the next day. Waller was away, but returned that night, when the sale was closed.

Chaput, who was called as a witness on behalf of the plaintiff, corroborates Lazarnick's story in all material particulars. It is true he says that Lazarnick told him at their second interview that the Soldiers' Settlement Board had an option on the property, and that "he could not sell it any more; I could not look for the property any more." Now Waller completely corroborates Lazarnick as to their conversation on the telephone on October 8th above detailed. He says he told Lazarnick that his land was under option but he expected to know in a few days. It is very unlikely that Lazarnick under such circumstances would tell Chaput that "he could not look for the property any more." The fact is that Chaput learned on his arrival at Ste. Anne that the Soldiers' Settlement Board had abandoned the option.

Chaput also stated that Desautels did not appear anxious to shew him the Waller farm, but was eager to sell him his own. This, however, has no bearing on the question. We have the fact that Waller listed the land with Lazarnick for sale, that Chaput came to Lazarnick, who called this land to his attention, arranged with him to visit the land, and a sale resulted. Clearly Lazarnick would be entitled to recover his commission from Waller.

Now, as to Buffet's position. True he also had the land listed, advertised it for sale, and Chaput, seeing his advertise-

MAN.

C. A.

BUFFET v. WALLER.

Fullerton, J.A.

ment, visited him and got all the particulars, including the name of the owner, Waller. Buffet, however, never communicated the fact to Waller or took any steps whatever to bring about a sale. When Waller sold he only knew Lazarnick in the matter. Lazarnick did not know that Buffet had anything to do with the matter. How then could Buffet ever recover a commission from Waller? I am clearly of opinion that Lazarnick is entitled to recover the commission.

I would allow the appeal with costs.

Dennistoun, J.A.

DENNISTOUN, J.A., concurred with Perdue, C.J.M.

Appeal dismissed.

ONT.

S. C.

DELORY v. GUYETT.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. February 20, 1920.

PRINCIPAL AND AGENT (§ II C—20)—AGENT—AUTHORITY TO RECEIVE MONEY—CHEQUE—PAYMENT TO AGENT—FRAUD OF AGENT—LIABILITY OF PRINCIPAL.

An agent authorised to receive money for his principal may not receive anything but money, but if he receives a cheque on a bank and the cheque is paid to the agent before his authority is revoked that is good payment to his principal.

Statement.

APPEAL from the judgment of Lennox, J. on an action for a declaration that a mortgage made by the plaintiff to the defendant had been fully paid and satisfied and for an order upon the defendant to discharge the mortgage or reconvey the mortgaged land.

The judgment appealed from is as follows

This is a case of great hardship arising out of the dishonesty of a solicitor. It matters not which way the decision is, it results in a very serious loss to an innocent person. The dangerous agency of sympathy can play no part, for I have no reason to believe that either one of the parties can bear the loss better than the other; and, on the contrary, I have fair ground to infer that the loss, on whichever of the litigants it falls, will be a very severe blow indeed.

The plaintiff is a married woman, residing in Hamilton; she borrowed $2,500 from the defendant upon a mortgage of her property in Toronto. The defendant resides in Toronto and is an

ONT.

S. C.

DELORY v. GUYETT.

employee of Brown Brothers, stationers, carrying on business here. When the plaintiff wanted to effect the loan, she, upon the suggestion of an acquaintance, applied to Mr. Loftus, a solicitor, with whom she had no previous acquaintance. The relations between the defendant and Loftus, if any, previous to this mortgage transaction, were not disclosed. It is a question of fact whether the defendant was in the habit of employing Loftus as a solicitor or not, and the fact could have been deposed to if he desired to do so, and thought of it. The mortgage is dated, the execution sworn to, and the mortgage registered, on the 30th May, 1913. It was prepared in the office of Mr. Loftus, and it is perhaps a reasonable inference that the title was searched by a solicitor. There is no suggestion that any solicitor other than Mr. Loftus was engaged by either party. The consideration-money was paid to the plaintiff by Loftus, and the mortgage and title-deeds left with him. The plaintiff and defendant did not meet at all. I think it is fair to conclude that at this time Loftus was the solicitor of both parties. There is no ground for inferring that in this transaction Loftus continued to be the solicitor of either party after the loan was completed; and, as I said, there is no evidence either way as to other transactions between Loftus and the defendant. The plaintiff at the time obtained the defendant's house-address from Loftus, and the defendant then, or at all events before the 27th May, 1918, obtained the mortgage and other papers. During the currency of the mortgage the plaintiff regularly remitted the interest from time to time falling due upon the mortgage, by her cheque payable in Hamilton.

About a month before the principal money became due, the plaintiff wrote the defendant saying that she might not be able to have the money exactly at the date of maturity, and asking if, in that event, she could have a brief extension of time. She says she enclosed a stamped—and I think addressed—envelope for reply. She got no answer. The defendant says he got the letter, but no envelope, and that he instructed Loftus to answer it. The circumstance is not important except perhaps as a slight indication that the defendant was disposed to leave the closing up of the loan to Mr. Loftus. It may not have meant that. At best it is an equivocal action, and the most that can be argued is that it assists in interpreting what the defendant really intended

ONT.
S. C.
DELORY
v.
GUYETT.

the plaintiff to do when payment of the mortgage was subsequently discussed between the plaintiff and defendant by telephone. I think a stamped envelope was enclosed by the plaintiff in her letter to the defendant, as she says.

On the 27th May, 1918, the plaintiff called the defendant on the long distance telephone, and she says she talked to him at his house. The call was put in by her daughter, and she only took the receiver when he was announced to be on the line. The defendant says his wife answered, and that he was connected where he was working, at Brown Brothers' place of business. His wife did not give evidence, and it may be as the defendant says, but it is not a contradiction of the plaintiff, as, unless he told her, she would not know where he was speaking from. The plaintiff's account of the telephone conversation was in substance: "I 'phoned the defendant on Monday the 27th May, 1918, that I was prepared to pay off the mortgage and would go down on Wednesday morning by the 8.35 train, and asked him to meet me. He said he was very busy, but to come down and pay the money to Loftus. I repeated, 'Pay the money to Mr. Loftus,' and he said, 'Yes, for I'll send Mrs. Guyett over with the mortgage and deed.' I said, 'I will go direct from the train to the lawyer's office,' and I went accordingly."

The plaintiff's daughter was to go with her mother to Toronto, and listened to the Hamilton end of the telephone conversation. She corroborates her mother. The defendant in substance says: "She said she was coming to pay off the mortgage on Wednesday. Would I meet her? I said I could not. She said, 'Will I pay it or will it do to pay it to Mr. Loftus?' I said 'I guess so.' That's all. I called up Mr. Loftus and sent the papers to him by my wife." On cross-examination he said: "She wanted to make an appointment with me to pay off the mortgage. She asked if it would be all right to pay it to Mr. Loftus, and I said, 'I guess so.'"

The parties substantially agree as to all that is important. They differ a little as to how the name of Mr. Loftus was introduced. I think they were both honest in their statements; but, even aside from the corroboration of the plaintiff's evidence by her daughter, I have more confidence in the verbal accuracy of the plaintiff than of the defendant.

ONT.

S. C.

DELORY v. GUYETT.

The plaintiff at the time appointed went to Mr. Loftus's office, accompanied by her daughter, found the papers in his hands as arranged, and paid the principal money and interest owing on the mortgage, the costs of exchange and of the discharge, by her cheque, payable in Hamilton. The solicitor then gave her the deed, mortgage, and insurance policy—the latter endorsed by Mr. Loftus. She then said, "What about the discharge?" and was told that the discharge is not given until the cheque is paid, and it will be sent on. The cheque was made payable to Loftus, who filled it up. He put it into the bank that day, and it was entered in his account. It is spoken of as "a deposit" as distinguished from a collection, if that makes any difference, but the banker endorsed it "not cleared yet," and refused to allow it to be drawn upon until advised that the cheque was paid next day.

Mr. Ferguson very strenuously argued that, if the defendant directed that the money be paid to Loftus, yet Loftus was only the defendant's agent to receive money, and a cheque is not money, distinguishing between the effect of payment in cash and something as a substitute, and referred to a great many authorities; but the money was paid, and whether on Wednesday or Thursday is of no consequence.

With deference, I cannot see that the cases relied upon are in point. *Barker* v. *Greenwood* (1837), 2 Y. & C. Ex. 414, and *Bridges* v. *Garrett* (1869), L.R. 4 C.P. 580, are cases where the agent accepted the set-off of claims. *Blumberg* v. *Life Interests and Reversionary Securities Corporation*, [1897] 1 Ch. 171, is a case of tendering a cheque instead of money. In *Sykes* v. *Giles* (1839), 5 M. & W. 645, *Hine Brothers* v. *Steamship Insurance Syndicate Limited* (1895), 72 L.T.R. 79, and *Williams* v. *Evans* (1866), L.R.1 Q.B. 352, agents authorised to act on a cash basis took bills of exchange, and the attempt was to throw the incidental loss upon the principal.

These cases all turn upon principles not presented in this action. The plaintiff's cheque did not *per se* amount to payment, and, if dishonoured, a discharge, whether given by the defendant or an agent, would not relieve the land of its burden as between the mortgagor and mortgagee, whatever effect it might have as to innocent third parties, by way of estoppel.

ONT.
S. C.
DELORY
v.
GUYETT.

Neither do I think that the inclusion of the costs of exchange and the fee for the discharge of the mortgage alters the situation. All the cases recognise that the usual course of business may be followed. The payment was made as it had always been made before, and it was reasonable for the defendant to expect that it would be made in this instance as it had always been made. If he desired that the cheque be made payable to his own order, he had only to say so. He knew she was coming to pay off the mortgage, he told her to come, and said it would be all right to pay it to Mr. Loftus. He sent down the papers in consequence, as he said he would do, and knew that she would not get a discharge immediately, for he had not signed one. The money was paid on Thursday, and if paid on Wednesday the only effect would have been to enable Mr. Loftus to appropriate it a few hours earlier than he did. It is a hard case either way. Both parties were very slow to act afterwards, but by the time the plaintiff would reasonably have been put upon inquiry the money was irretrievably lost. It is possible that if the defendant had followed up his inquiries on the 29th, or even the next day, and insisted upon his money or the return of his papers, the excuses of Mr. Loftus, whatever they were, would have been exposed in time, and the money might not have been lost; but this does not decide anything. The question is, in what was done was Mr. Loftus, on the facts, the ostensible agent of the defendant, was he held out as the defendant's agent to receive the money? Halsbury's Laws of England, vol. 1, p. 158, para. 346. I think he was, and the defendant is estopped from disputing it.

I would feel better satisfied if I could find justification for leaving each party to pay his and her own costs. If the delay of the plaintiff in inquiring about the discharge—although the discharge is for the protection of the mortgagor only—had prejudiced the defendant, I would think this a justification, but it did not.

There will be judgment for the plaintiff in the terms of the prayer in the statement of claim, and with costs if demanded. They should not be insisted upon.

T. R. Ferguson, for the appellant.

Arthur J. Thomson, for the plaintiff, respondent.

ONT.
S. C.
DELORY
v.
GUYETT.
Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment dated the 17th March, 1919, which was directed to be entered by Lennox, J., after the trial before him, sitting without a jury, at Toronto, on the 12th and 13th of that month.

The case was ably argued on both sides, and we have to determine on which of two innocent persons, neither of whom is well able to bear it, the loss sustained by the dishonesty of a solicitor must fall.

The appellant held a mortgage made by the respondent on property in Hamilton which she owned, and she lived in that city. The mortgage had been prepared by the solicitor, Loftus by name; and, being desirous of paying it off, the respondent came to Toronto and went to the office of Loftus, where she expected to meet the appellant. Communication was had with him, but he was unable to come to the office, and, being asked what the respondent was to do with the money she desired to pay to him, he directed her to pay it to Loftus, which she did. Loftus had possession of the mortgage, and the respondent signed a cheque on her banker in Hamilton for the amount owing on the mortgage and the cost of the discharge. The cheque was drawn by Loftus, and was made payable to him, and was given to him. Loftus's bank-account at this time had a small sum at his credit, but not sufficient to pay a cheque for $1,060, which he drew on the day on which the deposit of the cheque was made. There is no doubt, I think, that Loftus intended to use the proceeds of the cheque or part of it for his own purposes. It was deposited with his banker on the 29th May, 1918, and placed to his credit. The banker, however, did not treat the amount as available to be drawn against until it was learned that there were funds in the bank on which it was drawn to meet it. This was learned on the day following the making of the deposit, and then the amount credited to Loftus's account became available to be drawn on by him, and the cheque that he drew, having been again presented, was paid. In this way part of the proceeds of the respondent's cheque was applied to pay this cheque, and the remainder of it was afterwards applied by Loftus to his own use.

ONT.
S. C.
DELORY
v.
GUYETT.
Meredith, C.J.O.

The result of the appeal depends entirely upon a question of fact. The law to be applied is clear, I think. There is no doubt that an agent authorised to receive money for his principal may not receive anything but money; but it is equally clear that, if he receives a cheque on a bank, and the cheque is paid to the agent before his authority is revoked, that is a good payment to his principal.

In *Williams* v. *Evans* (1866), L.R. 1 Q.B. 352, an auctioneer had taken a bill of exchange for the deposit, and it was held that he had no authority to receive payment in this way, but in delivering the judgment of the Court Blackburn, J., said:—

"If the bill had become due and been paid before the authority of the auctioneer had been revoked, it would have amounted to much the same thing as cash."

In *Bridges* v. *Garrett* (1869), L.R. 5 C.P. 451, at p. 454, Cockburn, C.J., after saying that where an agent is authorised to receive money for his principal he must receive it in money, added:—

"If, however, payment is made by cheque, and the cheque is duly honoured, that is a payment in cash."

There is nothing in *Pape* v. *Westacott*, [1894] 1 Q.B. 272, to cast doubt upon these statements of the law; on the contrary, Lindley, L.J., referring to *Bridges* v. *Garrett*, said (p. 279):—

"The whole question there turns upon the cheque being cashed; but if it is cashed it is a mere piece of machinery."

Walker v. *Barker* (1900), 16 T.L.R. 393, is to the same effect.

On the facts of this case, the proper conclusion is, I think, that the respondent's cheque was paid, and when it was paid her debt to the appellant was discharged.

I do not think that what Loftus did in depositing the cheque transferred it for value to the banker and so converted it to his own use. It appears to me that what he did was to deposit it as so much cash to the credit of his account, and what the bank did was so to credit it, subject to the cheque being honoured when it should be presented for payment. It was, as I view it, an ordinary, everyday transaction, and in the circumstances of this case the bank received the cheque as agent of Loftus to collect it. It might have been different if Loftus had drawn cheques on his banker, and the banker had honoured them on the faith of the

ONT.

S. C.

DELORY v. GUYETT.

Magee, J.A.

cheque being good; but it is unnecessary to decide what the result would have been if that had been the state of facts.

I would dismiss the appeal with costs.

MACLAREN and HODGINS, JJ.A., agreed with MEREDITH, C.J.O.

MAGEE, J.A.:—I agree with the reasons and conclusion of my Lord the Chief Justice.

The question seems to me to be entirely one of fact and agency. The defendant told the plaintiff to pay Loftus. It is conceded that at least Loftus had authority to receive cash. Had he received cash, it would have been the natural and proper course to have deposited that in the bank. He could have misapplied it. The defendant was not guarding himself against that in giving instructions to pay him. Having received, instead of cash, a cheque, he puts that in the bank, which would be the natural and proper course.

The so-called deposit of the cheque in the bank was not a discounting of it. The bank placed no money at his disposal by reason of its receipt of the cheque, and did not do so until it learned of the cheque being paid. The credit of the amount in his account, without the intention of paying it to him or his order, was only a matter of temporary bookkeeping, such as occurs hourly, and one might say necessarily with all cheques received by banks. Not being willing to pay him the money for it in advance of knowledge that it was honoured, the bank held it only for him. Whether it was entered by the bank among bills for collection—a very unlikely course—or not, makes no difference, the fact being that it really was only for collection. On the following day the cheque was honoured, and the money became unconditionally subject to his order in his bank-account, just as if he had received cash and deposited it. Being there subject to his order and by his own act, it was as much received by him as if still in his own hands. The outstanding cheque which he had given did not operate as an assignment *pro tanto* of the money at his credit, as has often been held. Up till the moment of payment of that cheque by his bankers, he could have stopped payment. The fact of it not being stopped and of his allowing it to be paid out of the proceeds of the respondent's cheque, may have been a misapplication of the fund, but it was a misapplication after the

ONT.
S. C.
DELORY
v.
GUYETT.
Magee, J.A.

respondent had done her part completely, and complied with the terms of his agency. In *Hine Brothers* v. *Steamship Insurance Syndicate Limited*, (1895) 72 L.T.R. 79, Lord Esher said (p. 82):—

"If within the proper time the broker was to receive a cheque upon a banker, payable on demand by his taking it to a banker, and if he takes it to a banker and gets paid in cash, according to the custom, not of brokers alone, but of all people of business, and even those who are not in business, it is accounted as cash." Bruce, J., said (p. 80) that there was a wide difference between the discount of a bill and the payment of a cheque.

It is, perhaps, possible that, having given an unmarked cheque to an agent of the appellant, who was not authorised to receive an unmarked one, the respondent might be entitled to demand it back from him, and that he could not properly refuse by saying he now held it for the appellant, who had not authorised him. But, even if we grant that the cheque was held for the respondent until it was honoured, and the money placed to Loftus's credit in the bank, the moment that took place the moneys were held by him for the appellant; and, as the misapplication of them by honouring his cheque necessarily took place afterwards, it was the appellant's loss.

I do not, however, consider that he had not authority to receive a cheque marked or unmarked in the sense of receiving it to have it cashed or to deliver it to the appellant. Until marked or cashed it might not operate in favour of the respondent as satisfaction of the mortgage-debt any more than if given to the appellant himself, but none the less it would be held by Loftus for the appellant with the like effect as if held by the appellant himself, and could be demanded by the appellant from him, and could not be demanded back by the respondent.

I would dismiss the appeal.

Ferguson, J.A.

FERGUSON, J.A. (dissenting):—This is an appeal by the defendant from a judgment of Lennox, J., dated the 17th March, 1919, whereby he declared that a mortgage given by the plaintiff to the defendant had been fully paid and satisfied and should be discharged.

The mortgage is dated the 30th May, 1913, and was given to secure repayment of a loan of $2,500 and interest, the principal to become due and be paid in lawful money of Canada on the 30th May, 1918.

The plaintiff resides in Hamilton and the defendant in Toronto.

On the 27th May, 1918, the plaintiff called the defendant on the long distance telephone, and her account of the conversation which resulted reads:—

"Q. I would like you to tell me the conversation between yourself and Mr. Guyett over the long distance telephone on the 27th of May? A. I long distanced 'phoned him. I said I had got the money and I was ready to come down and pay off the mortgage, and also the last six months' interest. I said, 'Will you meet me at the lawyer's office, or where will you meet me?' He said: 'Well, I am very busy now. We are shorthanded for men, which makes it hard for me to get off. I don't think it will be necessary for me to be there. You can come on down and pay Mr. Loftus.' I repeated it after him. I said, 'Pay Mr. Loftus?' He said: 'Yes, for I will send Mrs. Guyett over with the mortgage and the deed.' Then I told him I would leave on the Wednesday.

"His Lordship: He said he was very busy and could not get away. What else? A. He said to come on down to pay Mr. Loftus.

"Q. What else? Something about sending papers in? A. I said, 'Pay Mr. Loftus?' He said: 'Yes, I will send Mrs. Guyett over with the mortgage and the deed.'

"Mr. Thomson: Q. Go on. A. I told him what train I was coming on. I said I would come on Wednesday at 8.35 on the C.P.R. I said, 'I will go right from the station to the lawyer's office.'"

The plaintiff came to Toronto on the day agreed upon, gave Loftus an unmarked cheque drawn on the Bank of Montreal, Hamilton branch, and received from him the deed, mortgage, and insurance policy; she asked for a discharge of the mortgage, but did not receive it. She explains why at pages 19 and 20 of the stenographer's report of the evidence:—

"Q. When you came here the purpose was to pay your money and get a discharge of your mortgage? A. Yes, sir.

"Q. Mr. Loftus took this piece of paper which was blank, exhibit 2, from you? A. Yes.

"Q. And he wrote it out? A. Yes.

"Q. Then he asked you to sign it, and you signed it, and you said to him, 'What about the discharge?' A. Yes, sir.

ONT.
S. C.
DELORY
v.
GUYETT.
Ferguson, J.A.

"Q. He didn't hand you the discharge because he said—what is it? A. 'We never discharge a mortgage until we get the cheque cashed. The cheque has to be cashed first.' I thought that was the law.

"Q. The cheque had to be cashed? A. Yes.

"Q. You left this order on your bank at Hamilton with Mr. Loftus, payable to him, upon the understanding that you would get your discharge when your cheque was paid? A. Yes.

"Q. You understood Mr. Loftus when he received the amount of your cheque—this cheque was to him? A. Yes, sir.

"Q. When he received the amount of your cheque, which included his charges as well as the amount of the mortgage-moneys, he would give you your discharge? A. Yes. He said so.

"Q. He said he would? A. Yes.

"Q. Upon that understanding you left him this cheque? A. Yes."

On the day he received it, Loftus endorsed and deposited the cheque in his bank, and the bank gave him credit in his current account for the face-value thereof, less $3 charges (see exhibits 6, 7, and 8). The transaction between the bank and Loftus is told by the witness Tierney at pp. 41, 42, 46. He says:—

"Q. You are a clerk from the Bank of Ottawa, Toronto? A. Yes.

"Q. What is your position there? A. A. to L. ledger-keeper.

"Q. Did J. T. Loftus keep an account in your bank? A. Yes.

"Q. During 1917 and 1918? A. Yes.

"Q. I shew you exhibit 2, which purports to be a cheque for $2,588.52. Correct? A. Yes, sir.

"Q. Whose endorsement is on the back of that cheque? A. J. T. Loftus.

"Q. You know Mr. Loftus's signature as the ledger-keeper there? A. Yes, sir.

"Q. Is this Mr. Loftus's bank-book I produce to you (shewing)? A. Yes.

"Q. Does it shew the account during 1918, including the month of May? A. Yes, sir.

"Q. Will you look at the book and see if he deposited that cheque, exhibit 2, in his own bank-account in your bank? A. Yes, sir.

"Q. On what date? A. On the 29th of May, 1918.

"Q. That is the date of the cheque. He deposited that cheque to his own account? A. Yes, sir.

"Q. In connection with that, is this (shewing) the deposit-slip? A. Yes, sir."

(Exhibit 6, bank-book of Mr. Loftus—exhibit 7, deposit-slip.)

"Q. If this cheque had come to your office as a collection, would it have reached this bank-account of Loftus at all, or gone into this bank-account? A. No, sir.

"Mr. Thomson: I don't understand the question.

"His Lordship: Neither do I.

"Mr. Ferguson: He says it came in there not as a collection but as a deposit to this account.

"Q. The cheque, exhibit 2, if it had come as a collection to your bank, what course would it have taken instead of the one you have indicated here? A. It would have gone through the collection department, and would not have been put to Mr. Loftus's account until it was paid in Hamilton and the funds remitted back to us.

"Q. As a collection? A. Yes.

"Mr. Thomson: You hardly need expert evidence on that.

"Mr. Ferguson: Instead of that we have that deposited to his account there as his own money.

"His Lordship: Q. You gave him credit for that amount although you didn't know whether that cheque was worth anything or not? A. Yes, sir."

Page 46:—

"His Lordship: Q. Virtually you had it for collection, you did not give him any liberty to draw on it until you got the money? A. We never gave Loftus any liberty to draw until we knew his cheques were paid.

"Q. So it was not effective until you got word from Hamilton? A. Until we got word from Hamilton it was paid."

On the same day as he received the credit, Loftus issued cheques against it; one of these, calling for a payment of $1,060, was presented to the Bank of Ottawa on the 29th May, but was not paid until after the bank had, on the 30th May, telephoned to Hamilton and had been informed that the plaintiff's cheque had been presented to the Bank of Montreal in Hamilton and paid.

ONT.
S. C.
DELORY
v.
GUYETT.
Ferguson, J.A.

It is conceded that Loftus has not paid the defendant; counsel agreed that Loftus had taken advantage of the situation to get money for his own purposes. Neither party is willing to look to Loftus for his or her money.

The appellant contends: (1) that payment by cheque was not authorised; (2) that Loftus did not receive the cash for the cheque, in that, before it was presented to the Bank of Montreal for payment or paid, Loftus had transferred the cheque to the Bank of Ottawa in such circumstances as to make that bank holder of the cheque in its own right; and, consequently, payment by the Bank of Montreal was not payment to Loftus or to the appellant.

The respondent relies on *Bridges* v. *Garrett*, L.R. 5 C.P. 451, and *Walker* v. *Barker*, 16 Times L.R. 393, and contends: (1) that under the circumstances, Loftus was authorised to accept a cheque as payment of the mortgage-moneys; (2) the mortgage-moneys were in any event paid when the cheque was cashed either by Loftus or by the bank; (3) that, while the transaction between the bank and Loftus took the form of a debtor and creditor transaction, it was in truth and substance a principal and agent transaction, and the payment was in fact made to the Bank of Ottawa as agent for Loftus.

The appellant answers that in the *Bridges* case and in the *Walker* case it was found as a fact that the agent had authority to receive payment by cheque; that in both cases it was the proceeds of the cheque that the agent converted, whereas in the case at bar the agent had not authority to receive payment by cheque, and he misappropriated the cheque and not the proceeds thereof.

The authorities cited by counsel are collected and considered in Bowstead on Agency, 6th ed., p. 70. The same authorities, together with some additional Canadian and American authorities, are considered in 31 Cyc., p. 1378. I have read most, if not all, of the authorities cited, and think they establish: (1) that, when the circumstances adduced in evidence enable the Court to find as a fact that the authority given to the agent conferred upon him power to accept a cheque as payment, payment of the cheque, even if not made to the agent, is payment to the principal: *Bridges* v. *Garrett*, L.R. 5 C.P. 451, as explained in *Pape* v. *Westacott*, [1894] 1 Q.B. 272, and in *Hine Brothers* v. *Steamship Insurance*

ONT.
S. C.
DELORY
v.
GUYETT.
Ferguson, J.A.

Syndicate Limited, 72 L.T.R. 79; (2) that, where the circumstances are such that the Court cannot find as a fact that the authority given to the agent conferred upon him power to receive payment by cheque, payment of the original debt is not established unless it is proven that the cheque was paid, and that the proceeds of the cheque reached the agent in the form of money immediately available for the satisfaction of the original debt: *Pape* v. *Westacott*; *Hine Brothers* v. *Steamship Insurance Syndicate Limited*; *Pearson* v. *Scott* (1878), 9 Ch. D. 198. The principle seems to be that, where there is authority to receive a cheque, the receipt of the agent is the receipt of the principal, the cheque itself is payment, it is the principal's property, and the agent holds and deals with the cheque for his principal, and his principal assumes the risk of his improperly dealing with the cheque, while in the case where the agent has not authority to receive a cheque, the cheque is the property of the agent, and the person placing the cheque in the hands and power of the agent assumes the risk of his dealing with it improperly: *Williams* v. *Evans*, L.R. 1 Q.B. 352.

In the first case the debtor proves payment of the mortgage-moneys by proving the delivery of the cheque, and payment of the cheque by proving that it has been cashed; in the second case he must prove not only the cashing of the cheque, but the cashing of the cheque by the agent, so that he has in his hands lawful money of Canada available to satisfy his obligations to his principal.

The case of *Crane* v. *Boltenhouse* (1845), 4 N.B.R. 581, seems to me to be in conflict with *Hine Brothers* v. *Steamship Insurance Syndicate Limited* (*supra*), while the other Canadian case referred to in Cyc., *Ætna Life Insurance Co.* v. *Green* (1876), 38 U.C.R. 459, seems to fall within the class of cases where the agent was found to have authority to receive a cheque.

To my mind the result of the appeal turns on the answers to two questions:—

(1) Had Loftus authority to receive a cheque as payment?

(2) Was the payment of the plaintiff's cheque by the Bank of Montreal a payment of funds to the defendant's agent so as to leave them in his hands available to satisfy the defendant's claim?

The answer to the first question turns on the meaning of the words "pay Loftus." Do they mean "pay Loftus in lawful money

ONT.

S. C.

DELORY v. GUYETT.

Ferguson, J.A.

of Canada;" or should they, in the circumstances adduced in evidence, be held to mean "pay Loftus in money or by cheque?"

Bowstead, p. 69, says:—

"An agent who is authorised to receive payment of money has, *primâ facie*, no authority to receive payment otherwise than in cash, unless it is usual or customary in the particular business to receive payment in some other form, and the usage or custom in question either is a reasonable one, or is known to the principal at the time he confers the authority."

In Halsbury's Law of England, vol. 1, p. 187, para. 400, the law is stated thus:—

"When an agent is employed to carry out a transaction which involves a payment to him on his principal's behalf, he must not compromise his principal's rights or part with his property until he has received payment, unless authorised by his instructions or by usage to do so. Payment, in the absence of instructions or usage, must be received in cash, and not otherwise."

See also pp. 164, 165, and 210.

On the foregoing statements of the law the direction to "pay Loftus" would mean to pay in cash only, unless it is usual or customary to pay mortgage-moneys by cheque, or at least usual for solicitors to receive the payment of mortgage-moneys by cheque.

Bowstead states (pp. 100, 101) that "a solicitor has no implied authority, as such . . . to take a cheque in lieu of cash in payment of a mortgage-debt, of which he is authorised to receive payment."

The learned author justifies the foregoing statement of the law by referring to the opinion of Kekewich, J., in *Blumberg* v. *Life Interests and Reversionary Securities Corporation*, [1897] 1 Ch. 171. Counsel urged that the question for decision in that case was not, "Had the solicitor power and authority to receive payment by cheque?" but, "Could the solicitor be forced to receive payment by cheque?" And, consequently, the opinion expressed by Kekewich, J., on which the learned author relies, is *obiter*. Counsel's criticism seems justified, yet, as the learned Judge dealt with the practice of solicitors receiving each other's cheques, his statement of the law and his reasoning are worthy of consideration. He says:—

"Then arises a novel question, namely, whether assuming that a solicitor or any other person is authorised, either expressly or by implication, to receive a legal tender, he is authorised to accept a banker's cheque. Mr. Warrington has been careful to limit the extent of the authority, by saying that the solicitor can do what is ordinarily done in the way of business by ordinary persons in transactions of the kind in question—that is to say, he would not be at liberty to accept a diamond or other pledge, or a mortgage or other security; but that as mortgage-money is generally paid by cheques, he is at liberty to accept a cheque, though Mr. Warrington will not go so far as to say that he would be at liberty to accept a bill or promissory note. It seems to me that such an extension of authority by reference to the habits of mankind would be calculated to work mischief. The acceptance of a cheque involves passing a judgment on the solvency of the person who tenders the cheque. . . . A solicitor who has authority to accept a tender accepts anything short of a tender in cash at his own risk. No doubt it is usual for solicitors to trust each other and to accept each other's cheques, and the practice is desirable because it promotes good feeling and facilitates business. But I think it would be going too far to say that a solicitor has authority to accept a cheque because he has authority to accept a tender according to the law of the land."

The reasoning and opinion of Mr. Justice Kekewich may not support Mr. Bowstead's proposition just as stated by him, but they at least afford no ground for the respondent's contention that there exists a practice to the contrary. The plaintiff did not give any evidence of such a practice; and, in the absence of evidence, I would think that there is no basis for the contention that it is usual to accept cheques as payment of mortgage-moneys.

To find that Loftus had authority to receive a cheque as payment, we must, I think, conclude that he had the right to hand over the mortgage, title-deeds, the insurance policy, and, if he had it, the discharge, in exchange for the cheque. Would any Court say that a solicitor who had done these things had acted properly or that a custom or usage that permitted a solicitor so to act, was just and reasonable? I think not.

The answer to the second question turns on whether the Bank of Ottawa was the owner of the cheque or held it simply as

ONT.
S. C.
DELORY
v.
GUYETT.
Ferguson, J.A.

agent for Loftus, and whether the moneys represented by the credit in Loftus's account were moneys lent by the bank or were the plaintiff's moneys paid to the bank as agent for Loftus, and then credited to his account. There might have been no substantial difference between the course events took upon the deposit of the cheque and what would have happened had the cheque been received by the bank for collection. It is most unlikely that either Loftus or the bank officials gave a thought to the legal rights of the parties, or to what, if any, difference it made to such rights when the cheque was discounted instead of being accepted for collection. In such circumstances, I prefer to be guided by the form of the transaction, rather than to speculate as to what the parties intended, and by that process of reasoning to find a difference between the form and the substance.

Following the form of the transaction, there can be no doubt but that on the 29th May the Bank of Ottawa became and continued, till paid, to be the holder of the plaintiff's cheque, not as agent for Loftus, but in its own right, as transferee for value; that the bank did not purport to act as agent, but collected the plaintiff's moneys as owner of the cheque; that the moneys from the cheque were not credited to Loftus, but, on the payment of the moneys to the bank, other moneys already credited to Loftus's account were released from a sort of stop-order that had been maintained against them, pending the payment of the plaintiff's cheque.

For these reasons, I am of opinion that Loftus had not authority to receive the plaintiff's cheque as payment of the defendant's mortgage-moneys—that, when the cheque was cashed, it was not cashed and the moneys were not received by the defendant or by any one on his behalf; that, on the reasoning of the judgment in *Hine Brothers* v. *Steamship Insurance Syndicate Limited*, 72 L.T.R. 79, this appeal should be allowed.

Even if the proper conclusion is that the transaction between the Bank of Ottawa and Loftus was not a debtor and creditor transaction, but was in truth and substance a transaction between principal and agent, it does not seem to me to follow that the plaintiff has established payment to Loftus in lawful money of Canada by shewing that she caused his account in the Bank of Ottawa to be credited with the amount she was directed to pay

him personally and in cash. To my way of thinking, a bank credit and lawful money of Canada are different things. The defendant told the plaintiff to pay Loftus. That meant in lawful money of Canada; and, had it been shewn that Loftus received lawful money of Canada and converted it to his own use, the loss would have been the defendant's; but where, as here, it is neither shewn nor alleged that Loftus ever received lawful money of Canada, it should, I think, be held that he never received anything for the defendant.

I would allow the appeal and dismiss the action.

Appeal dismissed (FERGUSON, J.A., *dissenting.*)

LESSOR v. JONES.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., and White, and Grimmer, JJ. February 20, 1920.

AUTOMOBILES (§ V E—490)—ROOM IN GARAGE RENTED FOR KEEPING CAR—KEY DELIVERED—DAMAGES TO CAR—LIABILITY.

The owner of a garage who rents room in his garage in which to place a car, and gives the owner of the car a key which enables him at any time to take his car out and use it without the knowledge of such garage owner, is not a bailee for hire and is not liable for damages caused to the car while in such garage.

Statement.

APPEAL by defendant from verdict entered for the plaintiff in the Saint John County Court.

B. L. Gerow, supports appeal; *L. A. Conlon, contra.*

The judgment of the Court was delivered by

Hazen, C.J.

HAZEN, C.J.:—This action was tried before the Judge of the County Court of the City and County of Saint John, without a jury. It was brought for the recovery of damages to the plaintiff's motor car while stored in the defendant's garage, and judgment was given for the plaintiff for $99.54, with costs. It appeared by the evidence that the defendant was the owner of a small garage, which, I think, could be fittingly described as a private garage, on Charlotte St., in the City of Saint John, and that he rented to the plaintiff the right to store his motor car therein, at $5 a month, the plaintiff being given a key to the garage and being able to enter at any time he saw fit to do so and remove and return his car as he chose. This is substantially a statement of facts, as appears in the judgment of the Judge, and is based upon the evidence of the plaintiff, who stated that he

N. B.
S. C.
LESSOR
v.
JONES.
Hazen, C.J.

made arrangements with the defendant to pay him $5 a month to store his car in his (defendant's) garage. The plaintiff in his evidence further stated that he asked if the car would be safe there, and the defendant replied that it would be in good condition and that nothing would happen to it while it was in the garage.

The plaintiff claimed that the defendant was a bailee: that the facts that I have recited constitute the bailment, and this was held to be the case by the Judge, who in the course of his judgment said, after reciting the facts, which are substantially as I have stated them:

> I find that, as the car was left in the garage by the plaintiff, in running order, as above stated, that the damage was occasioned while the plaintiff was in the hospital, that the defendant was a bailee for hire, and the damage having been caused to the car while in his possession he is liable therefor, unless he shews that the injury was caused by *vis major* or otherwise, through no fault or want of care on his part. This he has failed to do.

The definition of "bailment" as given in Bouvier's Law Dictionary, vol. 1, p. 313, taken from the MS. Lect. Harvard Law School, 1851, is: "A delivery of something of a personal nature by one party to another, to be held according to the purpose or object of the delivery, and to be returned or delivered over when that purpose is accomplished." The definition given by Blackstone, Lewis Ed. U.S., vol. 2, ch. 30, p. 451, is: "The delivery of goods in trust, upon a contract, expressed or implied, that the trust shall be faithfully executed on the part of the bailee." The definition given by Kent, vol. 2, p. 559, is: "A delivery of goods in trust upon a contract express or implied that the trust shall be duly executed and the goods restored by the bailee as soon as the purposes of the bailment shall be answered." And in Jones on Bailment, p. 1, we have the definition: "A delivery of goods on a condition express or implied that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose for which they are bailed shall be answered." There are other definitions given by text-book writers and others, and definitions given in reports, all of which as far as I have been able to find, are along the lines of the definitions I have given. These definitions all imply that there shall be a delivery of the chattel, to be held according to

the purpose or object of the delivery, and another condition is that it is to be returned or re-delivered when the purpose for which it is delivered is accomplished.

In my opinion, the elements that constitute a bailment were absent from the present case, and with all respect I think the Judge of the Saint John County Court was in error in holding as he did. From the statement of what occurred, I am of opinion that the plaintiff did nothing more than hire from the defendant room in his garage in which to place his motor car. There was no delivery of it, as far as I can see, to the defendant. He hired this space in which to place his car, and placed it there, and he had in his possession a key which enabled him, at any hour of the day or night that plaintiff might see fit, to go and take his car out and use it in such way as he chose, without the knowledge of the defendant.

I cannot help coming to the conclusion that in this case there was no bailment. The case seems to be on all fours with that of a man who owns a coach-house; I have a carriage for which I haven't room on my own premises, and I go to him and say, "I want you to let me place my carriage in your coach-house, and I will pay you for doing so." He says, "All right." And if I say to him, "Will it be safe there?" and he says, "Yes." I don't think it carries it any further.

There were certain questions that arose on the trial of this case that were not dealt with. It was claimed that the injury to the plaintiff's car (and it was found injured in the garage) was caused by the negligence of the defendant, and there was some evidence to shew that the defendant himself got into the car for the purpose of moving it, when he found, according to his own evidence, that it would not move. But there was some conflicting evidence on the subject, and I think the question whether the injury to the car was caused by the defendant, or directly through his fault, is one that ought to be determined. I am of opinion, therefore, that there should be a new trial, and that the defendant should have his costs of this motion.

Appeal allowed with costs and cause remitted to Court below to grant a new trial. *Judgment accordingly.*

ONT.
S. C.

Re HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO AND CITY OF HAMILTON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. February 20, 1920.

TAXES (§ I F—90)—HYDRO-ELECTRIC POWER COMMISSION (ONT.)—PUBLIC COMMISSION—EXEMPTION FROM MUNICIPAL TAXATION.

The Hydro Electric Power Commission of Ontario is a public commission within the meaning of par. 7 of sec. 5 of the Assessment Act, R.S.O. 1914, ch. 195, and its property is therefore exempt from municipal taxation except as provided by sec. 45(a) of the Assessment Act enacted by sec. 39 of the Statute Law Amendment Act 1918, 8 Geo. V., ch. 20, which makes the land owned by or vested in "a municipal corporation or commission" liable to assessment and taxation for municipal and school purposes, in the municipality in which it is situated.

Statement.

SPECIAL case stated by the Senior Judge of the County Court of the County of Wentworth, under sec. 81 of the Assessment Act, R.S.O. 1914, ch. 195, as enacted by the Assessment Amendment Act, 1916, 6 Geo. V. ch. 41, sec. 6, as follows:—

1. From the 1st January, 1919, to the 31st October, 1919, the appellant (the Hydro-Electric Power Commission of Ontario) was the tenant of office premises in the Bank of Hamilton building, in the city of Hamilton.

2. The appellant has been assessed by the respondent (the Corporation of the City of Hamilton) for a business assessment purporting to be made under sec. 10, sub-sec. 1, para. (*k*), of the Assessment Act, and to be computed by reference to the said property as land and building occupied or used by the appellant as a person carrying on the business of the transmission of electricity for the purposes of light, heat, and power, for the purposes of such business, viz., land, $2,180; building, $1,700; total, $3,880; business assessment, 25 per cent. thereof—$970.

3. The business assessment so made was confirmed by me on appeal on the 7th November, 1919. The figures are not in dispute, but this special case on points of law or construction is stated by me, with the consent of the parties, under sec. 81 of the Assessment Act, as enacted by the Assessment Amendment Act, 1916. The appellant has agreed that there shall be no costs against the respondent in any event.

4. The following points of law or construction are submitted:—

(1) Was the appellant a person carrying on the business of the transmission of electricity for the purposes of light, heat, and power, within the meaning of sec. 10 of the Assessment Act, so as to be liable to a business assessment thereunder?

If the above question be answered in the affirmative,

(2) Was the appellant liable to a business assessment unless or except in so far as the property on which such business assessment was based was assessable against the appellant in respect of the value (*a*) of land and building, or (*b*) of land only?

(3) Having regard to sec. 5, para. 7, of the Assessment Act, as amended by sec. 37 of the Statute Law Amendment Act, 1918, 8 Geo. V. ch. 20, and to sec. 4 of the Power Commission Act, 1917, 7 Geo. V. ch. 20, and otherwise, was the said property assessable against the appellant in respect of the value (*a*) of land and building, or (*b*) of land only?

The matter of the assessment came before the Judge of the County Court upon an appeal by the Hydro-Electric Power Commission of Ontario from the decision of the Court of Revision for the City of Hamilton confirming an assessment of the Commission as stated above. The learned Judge dismissed the appeal, giving reasons as follows:—

The appeal is upon the ground that the Commission is not liable to assessment for "business assessment."

In the first place, it is urged on behalf of the appellant that the term of tenancy in the premises of the Bank of Hamilton ceased on the 31st October, 1919; it moved then to premises formerly belonging to the Canada Life Assurance Company in Hamilton. No assessment was made on account of the premises of the latter company. I think the objection that the term terminated on the 31st October, and that therefore it is not liable to the assessment for business tax which will be collected in 1920, is not tenable.

The chief reliance for the appellant is upon the construction of the Assessment Act, R.S.O. 1914, ch. 195, sec. 5, para. 7, whereby "property . . . vested in or controlled by any public commission" is not liable to taxation, unless "occupied by a tenant or lessee"—that is, by a tenant or lessee of the public commission, which is not the case here. This was amended, in so far as the Hydro-Electric Power Commission is concerned, by the Power Commission Act, 1917, 7 Geo. V. ch. 20, sec. 4, which adds to the Power Commission Act, R.S.O. 1914, ch. 39, a new section, 12*a*., whereby the land owned by and vested in the Commission is assessable for municipal and school purposes. Sub-section 2

ONT.

S. C.

RE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO AND CITY OF HAMILTON.

excludes from such assessment anything upon the land or any structures or other property being upon the land, and makes the land alone liable to assessment. In 1918, by sec. 39 of the Statute Law Amendment Act, 8 Geo. V. ch. 20, adding a new section, 45a., to the Assessment Act, this is further extended, so as to include land owned or vested in the municipality, and again all buildings are excepted.

It is argued by counsel for the appellant that, as the lands in possession of the Commission are alone assessable, not any personal property, and as the business tax is not a lien upon the land, no resort can be had to the land which they occupy for recovery of the tax; and that, as their personal property and structures upon the land are exempt from taxation, they cannot be seized for assessment for the "business tax;" and that, therefore, as there are no sources from which to recover the money, it is evident that the Commission cannot be assessed for it.

I am not struck with the force of this argument very much, because, if the Commission is assessable at all, the means of collecting it is another matter, and that there may be difficulty in that respect is no reason why the assessment should not be made.

The real question turns rather upon the business assessment section of the Assessment Act, being sec. 10, sub-sec. 1, para. (*k*), of R.S.O. 1914, ch. 195: "Every person carrying on the business of . . . the transmission of . . . electricity for the purposes of light, heat or power," shall be assessed for a sum to be called "Business Assessment," to be computed by reference to the assessed value of the land so occupied or used by him, "for a sum equal to 25 per cent. of the assessed value of the land."

It is conceded that, if the Hydro-Electric Power Commission of Ontario is assessable at all for business assessment, the sum for which it is here assessed is correct.

By the Power Commission Act, R.S.O. 1914, ch. 39, sec. 2, the Hydro-Electric Power Commission of Ontario is declared to be a "body corporate," and as such it comes within the word "person" as interpreted in sec. 29, para. (*x*), of the Interpretation Act, R.S.O. 1914, ch. 1.

I therefore cannot see how I can do otherwise than hold that the Hydro-Electric Power Commission of Ontario is liable to assessment for business taxation under sec. 10, sub-sec. 1, para. (*k*),

ONT.

S. C.

RE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO AND CITY OF HAMILTON.

of R.S.O. 1914, ch. 195, as being a body corporate, and thus within the word "person" as used in para. (*k*), and therefore liable to this assessment for business taxation.

As I said before, I cannot agree with the contention that because the land occupied cannot be made liable for business taxation, nor the chattels of the Power Commission seized, therefore the Hydro-Electric Power Commission cannot be assessed for "business assessment."

C. S. MacInnes, K.C. for the Commission.

F. R. Waddell, K.C., for the Corporation of the City of Hamilton.

The judgment of the Court was read by

MEREDITH, C.J.O.:—This is a special case stated by the Judge of the County Court of the County of Wentworth, under sec. 81 of the Assessment Act, as enacted by the Assessment Amendment Act, 1916. Meredith, C.J.O.

The question raised is as to the liability of the Commission to be assessed for the building occupied by it in the city of Hamilton, in addition to the land on which it stands, and for business assessment under sec. 10 of the Assessment Act.

The Commission is a public commission within the meaning of para. 7 of sec. 5 of the Assessment Act, and, except as provided by sec. 45*a*. of the Assessment Act, enacted by sec. 39 of the Statute Law Amendment Act, 1918, its property is therefore exempt from municipal taxation.

That exemption was partly taken away by sec. 45*a*., which makes the land owned by or vested in "a municipal corporation or commission" liable to "assessment and taxation for municipal and school purposes in the municipality in which it is situate at its actual value, according to the average value of land in the locality;" and sub-sec. 2 of sec. 45*a*. provides that buildings, machinery, and works on the land "shall continue to be exempt from assessment and taxation as heretofore."

No question was raised upon the argument as to the applicability of these provisions to a commission such as the Power Commission. It is, I think, open to question whether they apply to any commission but a municipal commission, but, as that question was not raised, I assume for the purposes of my judgment that they are applicable to the Power Commission.

ONT.

S. C.

RE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO AND CITY OF HAMILTON.

Meredith, C.J.O.

It is to be observed that sec. 5 makes "all real property in Ontario and all income derived either within or out of Ontario by any person resident therein or received in Ontario by or on behalf of any person resident out of the same," subject to certain exemptions, liable to taxation, and that the exemption paragraph (7) says nothing about income, but exempts the property vested in or controlled by any public commission.

The word "property" means, I think, real property, because personal property is not liable to taxation.

The business assessment is imposed by sec. 10, and is a personal tax, and not a tax on real or personal property. The assessment on land is used only for the purpose of determining the amount of business assessment, which is a percentage on the assessed value of the land occupied or used for the purpose of the business.

I am unable to agree with the argument of counsel for the Commission that the Commission is not a "person" within the meaning of sec. 10. None of the cases cited in support of this contention has, in my opinion, any application to the case with which we have to deal. I see no reason why the word "person" should not be given the extended meaning which the Interpretation Act gives to it. There is, I think, nothing in the context to exclude that meaning.

It was argued that, because the property of the Commission is, subject to the exception created by sec. 45*a*., as enacted by sec. 39 of the Act of 1918, exempt from taxation, it follows that it is not liable to the business assessment, inasmuch as this tax must be paid out of the property of the Commission, which is exempt from taxation. I am unable to follow this argument. Every tax which a man must pay has to be paid in a sense out of his property—unless he borrows the money with which to pay it. The business assessment, as I have said, is a personal tax, and by no process of reasoning can it be said to be a tax upon property.

In *Curtis* v. *Old Monkland Conservative Association*, [1906] A.C. 86, the question was whether the association, which was an unincorporated body of persons, was a person within the meaning of an exempting provision of the Income Tax Act, and it was held that it was not, the reason for the decision being that in the taxing Acts it was expressly provided that, among other bodies, "societies

of persons, whether corporate or not corporate, shall be chargeable with such and the like duties as any person will under and by virtue of this Act be chargeable with." This, in the opinion of the House of Lords, indicated that the word "person" in the exempting provision was not intended to include such bodies as were mentioned in the charging provision.

In *Pharmaceutical Society* v. *London and Provincial Supply Association*, (1880), 5 App. Cas. 857, the question was whether the society was a person within the meaning of a statutory provision which made it unlawful for any person to sell poisonous drugs, etc., unless such person should be a pharmaceutical chemist, etc., within the meaning of and registered under the Act. The ground of the decision was that, as a corporation could not become a registered pharmaceutical chemist under the Act, but only individual persons, the society was not a "person" within the meaning of the prohibitory provision to which I have referred.

These cases, as I have said, do not help the Commission's case. They are but illustrations of the application of the canon of construction which excludes the primary meaning of words where the nature and provisions of the enactment shew that it was not used in that sense.

It was contended by counsel for the Commission that, even if the Commission is a person within the meaning of sec. 10, it does not carry on its business in Hamilton, the premises in that city in respect of which the assessment was made being used only as office premises for the purposes of its business.

I do not understand that it is essential, in order that the Commission shall be liable to the business assessment, that it should carry on its business in Hamilton. If it carries on one of the businesses mentioned in sec. 10, and the Commission does carry on one of the businesses mentioned in para. (*k*) of sub-sec. 1, and occupies or uses land for the purpose of its business, it is, as I understand the provisions of the section, to be assessed "for a sum to be called 'Business Assessment' to be computed by reference to the assessed value of the land so occupied or used."

In this view of the meaning of sec. 10, a more fair mode of assessment is prescribed than was applicable in the case of income assessment, which is assessable practically where the head office of a corporation is situate.

ONT.
S. C.
Meredith, C.J.O.

I would, for these reasons, answer the questions submitted as follows:—

Question 1. Yes.

Question 2. The Commission is liable to be assessed for business assessment in respect of the value of the land only.

Question 3. In respect of the land only.

No costs to either party.

SASK.
C. A.

SWIFT CURRENT v. LESLIE.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, J.A., and Bigelow, J.A., ad hoc. January 26, 1920.

1. MUNICIPAL CORPORATIONS (§ IID—142)—ULTRA VIRES CONTRACT—FAILURE TO CARRY OUT—DAMAGES.

A town being a corporation created by statute has no authority to grade streets and build bridges outside of the town limits for the benefit of private individuals and not required in the public interest and for the public benefit, where such authority is not given by the statute, and an agreement to undertake the construction of such works is invalid and unenforceable as against the town, and no damages can be awarded for failure to perform its terms, but the fact that part of the agreement is unenforceable does not relieve the corporation from compensating the vendor for property purchased from him and taken by the corporation and appropriated to its own use.

2. ARBITRATION (§ III—16)—VALIDITY OF.

Where an award is valid as to part and void as to another part the valid portion if severable from the rest is enforceable.

[*Montmagny* v. *Letourneau* (1917), 39 D.L.R. 214, 55 Can. S.C.R. 543, referred to.]

Statement.

APPEAL by defendant from a decision declaring that a city corporation was not liable for damages for failure to perform the terms of a certain contract, and dismissing the defendant's counter claim for the enforcement of an award made on an arbitration in respect thereof.

D. Buckles, for appellants; *C. E. Gregory*, K.C., and *C. E. Bothwell*, for respondent.

The judgment of the Court was delivered by

Lamont, J.A.

LAMONT, J.A.:—The material facts are as follows: By a by-law passed April 4, 1911, the town of Swift Current authorized the raising of $25,000 for the construction of an electric light and power plant and the purchase of the lands necessary therefor. The town entered upon blocks 26 and 36, as shewn on a map or plan of the south-west quarter of 19-15-13-W.3rd, of which land the defendants Leslie and Fillmore were the owners. Negotiations took place between the town and the said defend-

ants as to the terms upon which they would give the town a transfer of the two blocks, and on December 8, 1911, an agreement was executed by the said defendants and by the Mayor and Secretary-Treasurer of the town. To this agreement the corporate seal of the town was affixed. By the terms of the agreement the defendants agreed to transfer the said blocks to the town, and the town agreed as consideration therefor to grade certain streets and erect certain bridges on lands of the defendants on said south-west quarter of 19, which said quarter was situate outside the limits of the corporation. The town did not carry out the terms of this agreement. On January 1, 1914, the town was erected into a city. The city municipality succeeded to all the rights and liabilities of the town. In the early part of 1914 the city and the defendants Leslie and Fillmore opened negotiations for the purpose of fixing compensation to be paid for the two blocks taken by the town, and settling the damages to be paid for the failure of the town to carry out the agreement of December 8; and on May 20, 1914, the parties entered into an agreement to have their differences decided by arbitration. That agreement recited that the defendants Leslie and Fillmore and the town of Swift Current had entered into a written agreement dated December 8, 1911; that the town had entered upon and appropriated to its own use said blocks 26 and 36, and that the owners had received no compensation therefor. The agreement also contains the following:—

And whereas the parties have been unable to agree as to the proper compensation to be paid the parties of the first part for the breach by the said municipality of the Town of Swift Current of the said agreement and for the taking of said blocks twenty-six (26) and thirty-six (36), and the compensation (if any) to be paid for lands injuriously affected by reason thereof. And it has been mutually agreed between the parties that the respective rights of the parties hereto under the said agreement of the eighth (8th) day of December, 1911, and the compensation (if any) to be paid to the parties of the first part for blocks twenty-six (26) and thirty-six (36) so taken as aforesaid and for lands injuriously affected thereby should be submitted to arbitration.

Now therefore the parties hereto have agreed and do hereby agree with each other for themselves, their successors and assigns as follows:—

Frederick A. C. Ouseley, of the City of Swift Current, in the Province of Saskatchewan, District Court Judge, is hereby appointed sole arbitrator under this agreement.

The questions for arbitration shall be the damages (if any) payable to the parties of the first part by the parties of the second part in conse-

SASK.

C. A.

SWIFT CURRENT v. LESLIE ET AL.

Lamont, J.A.

quence of the breach by the municipality of the Town of Swift Current and the parties of the second part or either of the said agreement of the 8th day of December, A.D. 1911, and the compensation (if any) payable to the parties of the first part for lands injuriously affected by the construction of said Power House and by the laying of said water pipes, and the said arbitrator shall determine the amount of said damages and compensation.

The arbitrator shall make a separate finding as to the value of the said Blocks twenty-six (26) and thirty-six (36) and the compensation (if any) to be paid therefor.

The arbitration was had. Both parties to the agreement were represented by counsel. Some three weeks were consumed in taking evidence, and the arbitrator on December 11, 1914, made his award. In it he says:—

Having considered all the evidence and after having had a view of the premises, I find and award that the amount payable to the claimants by the City of Swift Current as damages in consequence of the breach by the municipality of the Town of Swift Current and the City of Swift Current, or either of them, of the said agreement of the 8th December, 1911, is the sum of $27,793.95.

Secondly, I find and award that no compensation at all is payable to the City of Swift Current to the claimants for Blocks 26 and 36, in Parkview Subdivision, and that the value of Block 26 is the sum of $9,800, and the value of Block 36 is the sum of $4,900.

Thirdly, I find and award that no damages whatever are payable to the claimants for lands injuriously affected by the construction of the Power House and by laying the said water pipes, there being no evidence before me to shew that any damage was sustained under this head.

The arbitrator also directed that upon payment by the city of the damages awarded, the defendants Leslie and Fillmore would give a transfer of blocks 26 and 36 to the city. On January 20, 1915, the plaintiffs brought this action. The defendants then made a motion in Court to enforce the award. No formal judgment was given in their motion, but leave was given to them to counterclaim on this action for the enforcement of the award. This they did. The trial Judge held that the plaintiffs were entitled to the declaration asked for, and that the defendants were not entitled on their counterclaim* The defendants now appeal.

The city seeks to avoid the result of the arbitration on three grounds: (1) That there was no authority for the agreement to arbitrate; (2) That the agreement of December 8, 1911, although signed and sealed, had never been authorised or ratified by the

*See 10. S.L.R. 1.

town council; and (3), that even if it were found to have been authorized it was beyond the power of the council to make.

As to the first of the above grounds, it will be observed that the plaintiff is the corporate body of the city. By par. 13 of its statement of claim it alleges that it did enter into the agreement of May 20, 1914, that is, the agreement to arbitrate.

When the corporate body comes before the Court with an allegation that it did enter into the arbitration agreement, I do not see how it can now contend that any formality was wanting to the valid making of that agreement.

The second ground is in my opinion equally untenable. In the arbitration agreement the city alleges that the Town of Swift Current entered into the agreement of December 8, 1911. It was on the basis that this agreement was binding on both parties that the city obtained the consent of Leslie and Fillmore to the arbitration agreement, and, having gone to arbitration on that basis, the city cannot now come in and say that there never was any such agreement; that what purported to be an agreement was no agreement at all, because the council of the town never authorized it. In my opinion, however, it is immaterial whether it was authorized or not, for the third of the above grounds taken by the city, that the agreement was beyond the powers of the council to make—is, I think, sound. The town, being a corporation created by statute, had only such authority as was given by the statute. I cannot find in the statute any power given to grade streets and build bridges outside of the town limits for the benefit of private individuals and not required in the public interest and for the public benefit. To undertake the construction of such works was, under the circumstances, beyond the powers of the town. The contract was, therefore, invalid and unenforceable as against the town. Not being legally enforceable, no damages can be awarded for failure to perform its terms.

It was argued that the city by entering into the arbitration agreement had estopped itself from shewing that the town had no power to make the agreement. That contention cannot be supported.

In *Re Companies Act; Ex parte Watson* (1888), 21 Q.B.D. 301, Cave, J., says at 302: "But it is well established that a

SASK.
C. A.
SWIFT CURRENT v. LESLIE ET AL.
Lamont, J.A.

corporate body cannot be estopped by deed or otherwise from shewing that it had had no power to do that which it purports to have done."

If this were not so, a corporate body might enter into an agreement beyond its powers and then, by a submission to arbitration, as was done here, accomplish, in an indirect manner, that which it had no power to do directly.

The fact however that no damages can be awarded against the city for failure to carry out the agreement of December 8, does not relieve it from liability to compensate the defendants for the two blocks taken. That liability still exists, and, if the question of the amount of such compensation was properly submitted to arbitration, I cannot see any reason why the city should not be bound by the award.

The statutory method of determining the amount of compensation to be paid for lands taken by a city where the parties cannot agree, is by arbitration. City Act, R.S.S. 1909, ch. 84, sec. 245. (New sec. 356, Sask. 1915, ch. 16).

A perusal of the agreement of May 20 shews that three questions were submitted to the arbitrator:—

(1) The damages (if any) suffered by the failure of the town to perform the terms of the agreement of December 8; (2) The compensation (if any) to be paid for the two blocks taken; (3) The compensation (if any) payable for the injury done to the defendants' other lands by the erection of the power plant.

The award of $27,793.95 under the first of these is, in my opinion, void, for the reasons I have given. No compensation is payable under (3), as the arbitrator has found. He found the value of the two blocks taken to be $14,700. As the city council had on one occasion authorized an offer of $12,000, and on another $15,000, payable in city bonds, it cannot be said that the value found by the arbitrator was unreasonable.

It was argued that, as the award was void in one particular, it was unenforceable in all. I do not think so. The rule as I understand it is, that where an award is valid as to a part thereof and void as to another part, the valid portion, if severable from the rest, is enforceable.

See Duff, J., in *The Town of Montmagny* v. *Letourneau* (1917), 39 D.L.R. 214, at 216, 55 Can. S.C.R. 543 at 548.

The questions submitted to arbitration in this case are, in my opinion, all severable.

The arbitrator, however, did not award to the defendants the value of the two blocks as compensation therefor. What he did was to award the defendants $27,793.95, as damages for breach of the agreement of December 8, and direct that the defendants upon receipt of that sum should deliver a transfer of the blocks free of all encumbrance. In this I think the arbitrator was wrong. One clause of the submission reads as follows:

> And it is understood that the said compensation, if any, shall as so awarded, stand in lieu of performance of the said stipulations, covenants and agreements to be further performed by the said municipality under the said hereinbefore recited agreement, as if inserted therein, and upon payment of the said compensation (if any) or performance of the said award, the said blocks twenty-six (26) and thirty-six (36), shall be transferred and conveyed to the said municipality subject only as provided in said agreement.

This seems to me to contemplate that compensation shall be awarded for the blocks taken. Under the submission, $14,700 should have been awarded as compensation for the blocks taken, and any additional sum found to be payable for the city's failure to carry out the agreement of December 8 should have been awarded as damages.

If put in that form, the award as to the compensation would, in my opinion, be enforceable against the city. Sec. 258 of the City Act, then in force, provided that any award made under the expropriation proceedings of the Act should not be binding on the city unless adopted by the city within one month after the making of the award. This section, however, has no application where the city has entered upon and has taken possession of the property and appropriated it to its own use.

See *City of Toronto* v. *Grosvenor Presbyterian Church Trustees* (1917), 40 D.L.R. 574, 41 O.L.R. 352; (affirmed (1918), 45 D.L.R. 327).

In their statement of defence the defendants asked for judgment on the award and leave to enforce it in the same manner as a judgment of the Court, and in their counterclaim they asked payment of the damages and costs awarded, together with interest thereon. As the award, as it stands, is solely for damages, the order asked for by the defendants cannot be granted.

SASK.

C. A.

SWIFT CURRENT v. LESLIE ET AL.

Lamont, J.A.

The submission however provides that the Court may remit the award for the reconsideration of the arbitrator, and in my opinion it should be referred back to be put in the form I have indicated. It being unenforceable in its present form, the appeal must be dismissed.

I would, however, not allow the city any costs of the appeal, as the city or its predecessor took possession of the defendants' land and erected its power plant thereon and for 8 years it has kept possession, without compensating the defendants therefor.

Judgment accordingly.

ONT.

S. C.

SHEEHAN v. MERCANTILE TRUST CO.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford and Middleton, JJ. January 2, 1920.

CONTRACTS (§ III A—200)—PROMISE TO MARRY—MADE BEFORE WIFE'S DEATH—ILLEGAL—NO EFFECT.

A promise made by a testator during his and his wife's life time to marry another woman after his wife's death is an illegal promise and of no effect in law.

Statement.

AN appeal by the defendants from the judgment of CLUTE, J. (1919), 45 O.L.R. 422. Reversed.

A. J. Russell Snow, K.C., and *C. B. Nasmith*, for the appellants.

W. M. McClemont, for the plaintiff, respondent.

The judgment of the Court was read by

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—If this case had to be determined upon the plaintiff's testimony only, and if we were obliged to treat that testimony as if accurate and true in all respects, this action should, in my opinion, be dismissed.

Her story is: that the testator, in his, and in his wife's, lifetime, promised to marry her; and that after his wife's death he refused to do so, promising her $10,000 to be paid to her at his death.

That consideration, for that promise, was illegal; and the promise therefore of no effect in law.

But it was said, by her, also: that the promise was renewed after the death of the man's wife, and that there were other considerations, such as services rendered, or to be rendered: assuming that there was a new binding promise, made after the death of the testator's wife—that it was not merely the old promise adhered to; and assuming, too, that the payment to be made in respect of services rendered or to be rendered was not

a mere gratuity, a bounty to be bestowed in respect of services already paid for: the good and the bad together could not make a legal consideration; it was to be the one payment for all, without any possibility of separating the bad from the good, or in any possible way attributing so much of the one payment to the good considerations and the rest to the bad.

I have, however, no desire to base my judgment upon that narrow ground; I prefer to put it on the ground that there is no proof sufficient to support any judgment in her favour.

Her case begins with a stale claim: an action brought more than three years after the death of the man from whose estate the large sum of money involved in it is demanded; not sooner begun, though, if payable at all, the money was payable immediately after the man's death; and there is no kind of reason why the plaintiff, much in need of money, should not have demanded it, and sought to have recovered it, at once; none that I can suggest except that she had no lawful right to it.

The next step in it reveals an extremely degrading and disgraceful state of affairs: an amorous old creature, an octogenarian, first on such intimate terms with the plaintiff—young enough to be his granddaughter—for many years his servant as confidential clerk and as nurse, and occasionally as a menial; always on such intimate terms with him as to become engaged to marry him while his wife was yet living, and always having some sort of a promise from him to leave to her money at his death: second, superseded, after his wife's death, by another woman, professing to be a widow, and living with him as his housekeeper, to whom similar promises of marriage and money by will were made; until she in turn was discarded for another; third, apparently a girl, called "little Mary," in the like capacity with like promises: she in her turn being discarded for, fourth and last, the housekeeper living with him at his death, who evidently had like promises, and, being the last, enjoys the fulfilment of them to the extent of the income, for her life, from $10,000, under his last will. And, notwithstanding all these intimacies, and perhaps because of them, the man's end came, thus, according to a solicitor of long standing practising in Hamilton: "He was lying there, an awful hot day, and his condition was such that no human being wanted to stay near him."

ONT.

S. C.

SHEEHAN v. MERCANTILE TRUST CO.

Meredith, C.J.C.P.

That the man was engaged to marry the plaintiff, or at least said he would marry her, there can be no doubt, that is what would be expected when such a woman submits to such intimacy with such a man: and there can be no doubt of his promises to leave to her and to the other women money at his death: that is what would be expected. He was said to be worth about $50,000, and had no children of his own or any other persons having any strong claims upon his bounty. The old creature's money was the attraction, and there was no chance of getting much of that till he died, but apparently a good chance then for some one who could stoop low enough to take it upon his terms and at his will.

Upon the plaintiff's own account of herself in this matter, and another, it is impossible for me to give any credit to her unsupported testimony: and in such a case as this it should be impossible to give such credit to any plaintiff seeking to recover money on alleged promises, such as those in question, of those who have died. I do not speak of statute-imposed obligations; I speak of the corroboration common caution and common sense demand: see *Hill* v. *Wilson* (1873), L.R. 8 Ch. 888, 900, *per* James, L.J.

Let those who can believe the stories of the lost writing, under the carpet unmoved for years, the forgetfulness, and the reviving marbles: the rouge paper for pale lips and the cat: the writing of valuable papers on the verandah when hunting for early blue flowers in the climate of Hamilton on the 13th day of March: but there is nothing in these stories more than that which shews the character of the witness whose unsupported testimony alone can support the judgment in question.

There is no doubt, as I have said, that the man promised the woman money; but only at his death: that is by his will. A perusal of the whole of the plaintiff's depositions for discovery in this action, as well as her testimony at the trial, evidence of a most uncertain and unsatisfactory character, can lead to no other proper conclusion.

Here are some of her varying modes of expressing the man's promise:—

"When he handed me the note, he said: 'There, Mary, if I marry another woman that will protect you and you will get your $10,000.' He said, 'I will make my will and leave it to you

anyway.'" He did not marry another woman, and yet, as the case stands, she gets the $10,000.

"He always promised me that if I would stay and take care of Mrs. Brown as long as she lived he would give me $10,000 and he would marry me. If he died before her I would get $10,000, and that would bring me $3 a day, and if she died first he would marry me as soon as she was dead."

Her story now is that she was to get $10,000 for the loss of the marriage—not to get both marriage and money: "He promised if I would care for Mrs. Brown that I was to have $10,000 if he died before she did, in his will; then, if she lived after him, he was to give me that in consideration of that $10,000 or the interest of $10,000, whichever it was; I was to care for her as long as she lived, and I did, and cared for him too."

How the man was cared for in his dying hours the solicitor related: and he has also told that, shortly before, the plaintiff's care was devoted only to having a will in her favour made.

"He told me he was going to marry her: and I says: 'Are you?' and he says, 'What are you going to do about it?' Nothing. He says, 'It won't make any difference to you, May, and I will leave you the money, the $10,000 or the interest on the $10,000.'"

"Q. In 1913 he made a will? A. Yes.

"Q. And in that will he gave you the income on $10,000? A. Yes.

"Q. And you were satisfied with that will? A. Yes.

"Q. Now you were quite satisfied if he gave you the income on the $10,000? A. Yes."

For the plaintiff's services she was paid by the testator; and the testator was cautious enough to put upon his cheques a statement of the nature of the payment. The last of them produced contains the words, "In full of all demands of any nature or kind to this date"—the date being nearly two years after his wife's death.

The plaintiff's assertion that the words were added after she cashed the cheque go mainly to establish her unworthiness of credit when prosecuting such a claim as this.

Then the wills made, and the will which at the end the plaintiff tried to have established, all go strongly in support of the view which I have expressed of the character of the actual promise—that it was revocable.

ONT.

S. C.

SHEEHAN v. MERCANTILE TRUST CO.

Meredith, C.J.C.P.

The testator's will of the 2nd June, 1910, in his own handwriting, gave to the plaintiff the income of $10,000: but subsequently this was "cancelled" because the plaintiff was "unworthy of the same."

By his last will he gave to his then housekeeper the income of $10,000 for life.

Shortly before the testator's death, his adopted daughter and the plaintiff had a will prepared by the solicitor before mentioned, giving them both great credit "for long and faithful services;" and to the daughter also a large portion of his property: and to the plaintiff $10,000 absolutely.

The scheme failed. The will could not be proved.

There is really nothing in the evidence inconsistent with the view which I have expressed: Dr. Edwards testified that the testator at one time said he intended to marry the plaintiff and at another that he would not: also that, besides the wages which he was paying her, at his death she was to receive $10,000; that she had more right to it than anybody else; that his friends never came to see him; and that he felt himself justified in leaving her that amount.

Plainly an intended revocable gift.

Dr. Gillree's testimony was that the testator said he intended to marry the plaintiff, and also, on another occasion, that he would not; that he said he intended to leave her $10,000; that he would not see her want when he was gone. He was not sure whether the testator said he left the plaintiff $10,000 or the interest on $10,000.

This also, instead of supporting the plaintiff's claim, disproves it.

Whether the plaintiff was to get $10,000 or the interest on $10,000, it was to be a gift at death, a gift which was revocable and was revoked.

The writing sued upon as a promissory note is not inconsistent with this: there is nothing to indicate that it was an irrevocable promise, or to shew any kind of consideration for it: and it was considered of so little worth by the plaintiff as to have been so long forgotten and to pass through the vicissitudes to which I have adverted.

The later writing and the plaintiff's testimony regarding it tend only the further to discredit her. The plaintiff and the testator

were able to draw up legal and mercantile documents, and yet it is seriously said that this writing was drawn up for the one purpose of making it plain that the plaintiff was to get $10,000, to make it plainer than the earlier writing. In the absence of corroboration of the plaintiff, what other conclusion can be come to than that it was given to the plaintiff to collect moneys due to the plaintiff, and that the word which now is "her" was "me?"

And, if the gift or promise were not revocable, it must fail, because there is no corroboration of the plaintiff's testimony as to consideration given: that is, that the testator gave the promise for a valid consideration; the whole claim in such a case depending upon proof of good consideration: besides, as I have said, if consideration were proved, the whole promise would be vitiated by the inseparable taint of part of the consideration proved.

I am in favour of allowing the appeal and dismissing the action, *Appeal allowed.*

WILGRESS v. RITCHIE.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher and McPhillips, JJ.A. April 29, 1920.

1. ANIMALS (§ II—55)—UNLICENSED DOG—WANTON ABUSE AND DESTRUCTION OF—SHEEP PROTECTION DISTRICT—SHEEP PROTECTION ACT, 7 & 8 GEO. V., 1917 (B.C.), CH. 57.
Section 3 of the Sheep Protection Act, 7-8 Geo. V. 1917, (B.C.) ch. 57, cannot be invoked for the wanton abuse and destruction of unlicensed dogs where such Act is not *bonâ fide* and within the intention of the statute.

2. STATUTES (§ II A—100)—CONSTRUCTION—SHEEP PROTECTION ACT—KILLING UNLICENSED DOG IN SHEEP PROTECTION DISTRICT—GROSS CRUELTY.
Where there are two constructions of a statute open, one reasonable and the other unreasonable, it is the duty of the Court to give effect to the former, and pay attention to the intention of the Legislature in passing the Act.

Statement.

APPEAL from the judgment of the County Court in an action for damages for beating, abusing and injuring unlicensed bitch at Northfield, B.C., in Sheep Protection District. In consequence, the animal had to be destroyed. The defendant pleaded a denial, and at the trial amended his dispute note by pleading sec. 3 of the Sheep Protection Act, 7-8 Geo. V. 1917, ch. 57.*

* Section 3 of the Sheep Protection Act, 7-8 Geo. V. 1917 (B.C.), ch. 57, is as follows:
3. Any person may kill any dog which he finds within any portion of the Province to which this Act applies, unless:—

B. C.

C. A.

WILGRESS v. RITCHIE.

The judgment appealed from was as follows:—

I find as fact that the defendant was the cause of the injury to the dog on account of which it had to be killed. Value of the dog $250. I find that the defendant is protected by the Sheep Protection Act, B.C. Statute, 1917, ch. 57, sec. 3. Although he did not kill the dog outright or possibly did not intend to kill the dog, it seems to me that, that section which protects a man for killing a dog outright in a sheep district, will protect him for a less injury, which may not kill the dog outright. January 27, 1920. C. H. Barker, C.C.J.

V. B. Harrison, for appellant:—

The plaintiff's dog strayed across the road on to the defendant's lot. The defendant took hold of the dog by the collar and beat it with a big stick, breaking the bone of its hind leg and otherwise inflicting wounds. He let the animal go, and threw boulders at it, the dog crossed the road back to the premises where it was kept at Northfield, and received the attention of a veterinary surgeon for two weeks. At the end of that time, owing to the injuries received at the hands of the defendant, it had to be destroyed.

The evidence negatives the presence of sheep at Northfield, the defendant does not maintain there were any there. The defendant denies doing the act complained, denying that he was there, and raises as an alternative defence, sec. 3 of the Sheep Protection Act. We contend:—1. That the Act does not apply in the circumstance. It is for the better protection of sheep and does not give a right to kill dogs, without a licence regardless of the circumstance. 2. If I be wrong in this contention and the Act does give a right to kill dogs at pleasure in a sheep protection district, then the defendant did not kill or proceed toward the animal with the intention to take life. He wounded the dog only, by excessive beating and stoning, to an extent that its usefulness became permanently impaired and it was, in consequence, subsequently destroyed by the plaintiff. 3. I contend that the defendant should not be heard to say that his demeanour is shielded by the Act as he swears in evidence that he was away at the time and knows nothing of the dog. He quoted *Adcock* v. *Murrell* (1890), 54 J.P. 776.

(*a*) A licence issued under this Act in respect of that dog is in force at the time; and

(*b*) The dog has on a leather or metal collar to which is attached the licence-tag issued in connection with the licence.

F. S. Cunliffe, for respondent:—

Sec. 3 of the Act gives an absolute right to kill if there is no licence. If the defendant had continued the beating he would have killed the dog. There is no prescribed method of killing. The greater offence of killing would include the lesser offence of wounding. It is shewn that Northfield is in Sheep Protection District "A" by Order-in-Council of June 21, 1917, passed by virtue of this Act. Sec. 9 of the Act provides that a licenced dog may be killed on land other than the owner if actually pursuing sheep, although it be licenced under the Act. Sec. 4 of the Act allows of the Act to be pleaded in the alternative.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would allow the appeal. This is one of the most painful cases that has come before this court in a long time. It would, indeed, be a very great pity if a man could be allowed to wantonly abuse in a most brutal fashion any dog which does not carry a tag. Here the man who committed this brutality pledged his oath in the box that he was not there at all, did not do it at all, although other witnesses saw him do it. It would indeed be unfortunate if people were encouraged in the belief that they could do such things and escape penalty. Apart from the criminal law, fortunately, there is the civil law, which provides a remedy for persons suffering loss. The dog was found to be worth $250 by the Judge below, and there is no reason why the plaintiff who suffered that loss should not have that amount made good by the defendant. He is not entitled to any sympathy whatever, in my opinion, whether his prosecution be criminal or civil. No doubt a person is entitled, in some circumstances to kill a dog within a sheep district. If the dog were chasing sheep, for instance, no one would question his right, but this man did not do it from a sense of duty, or in good faith. He did it wantonly, contrary to the letter of the law, and contrary to the spirit of the law. He must, therefore, suffer the consequence by paying the judgment of $250 with costs here and below.

Martin, J.A.

MARTIN, J.A.:—I base my judgment upon the legal principle that where there are two constructions of a statute open, one reasonable and the other unreasonable, it is our duty to give effect to the former. This is an Act for one specific purpose, that is to say, for the better protection of sheep. In my opinion, it

B. C.
C. A.
WILGRESS v. RITCHIE.
Martin, J.A.

cannot be invoked for the destruction of dogs thereunder, unless the act complained of is done under a *bonâ fide* conviction within the intention of the statute. In other words, a statute for the protection of sheep cannot be converted into a statute for the perpetrating of brutality. I am not at all in sympathy, however, with people who allow dogs to run about, chasing and destroying sheep. In this case, I agree that the judgment below should be vacated and judgment entered for the plaintiff.

Galliher, J.A.

GALLIHER, J.A.:—I would allow the appeal and enter judgment for the plaintiff for the amount claimed. I quite agree with the remarks of the Chief Justice in regard to the wanton cruelty which the evidence discloses in this matter before us. I want it distinctly understood that I am fully in accord with what has been said.

McPhillips, J.A.

MCPHILLIPS, J.A.:—I am of opinion the appeal should be allowed. In allowing the appeal and reversing the judgment of His Honour Judge Barker, we are only reversing his opinion on a question of statute law, not upon the facts. In regard to the statute it is called the Sheep Protection Act. I am entirely in agreement with what my brother Martin has just said. We must pay attention to the intention of the Legislature. It is not to be forgotten, as Jessel, M.R., said in *Re Bethlem Hospital* (1875), L.R. 19 Eq. 457 at 459: "Such a thing as construing an Act according to its intent, though not according to its words."

This appeal brings to the attention of the Court a wanton and cruel beating and maiming of a dog, a despicable act against all proper instincts of humanity, and it is attempted to get shelter and immunity by pleading a statute designed to protect sheep; but here we have no evidence whatever that the plaintiff was in the act of protecting sheep or even had that in contemplation. It is idle to say that the plaintiff's cruelty can be excused in this or any other way.

In *The Duke of Buccleuch* (1889), 15 P.D. 86, Lindley, L.J., said at p. 96:—

> You are not to attribute to general language used by the Legislature, in this case any more than any other case, a meaning that would not only carry out its object, but produce consequences which to the ordinary intelligence are absurd.

You must give it such a meaning consistent with the objects Parliament intended.

I agree with what the Chief Justice has said, that this is one of the most painful cases that has come before this Court, and I trust the annals of the Court will never again contain such a painful case. *Appeal allowed.*

GEDDES BROS. v. AMERICAN RED CROSS.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. February 20, 1920.

SALE (§ III—45)—CONTRACT—NOTICE OF INTENTION NOT TO DELIVER—RIGHT TO PERFORM CONTRACT—RIGHTS OF PARTIES.

After notice of intention not to deliver goods in accordance with the terms of a contract of sale, if it is not accepted by the promisee the promisor can, down to the time of performance, change his mind and perform the contract, consequently, such a notice standing alone effects no legal change in the position of the parties. When therefore the time for performance arises if the goods are delivered in accordance with the terms of the contract the seller is entitled to recover the price of the goods according to the terms of the contract.

Statement.

Appeal from the judgment of Rose, J., in an action for the price of yarn sold by the plaintiffs to the defendants or for damages for refusal to accept yarn ordered by the defendants. Affirmed.

The judgment appealed from is as follows:—

ROSE, J.:—This is an unfortunate case in which the question is: who must bear a loss which would have been avoided if the defendants had answered a certain letter written by the plaintiffs, or if the plaintiffs had not construed the defendants' failure to answer that letter as a refusal of their request to be released from their contract?

The plaintiffs are dealers in yarn, carrying on business in Sarnia. During the war they had sold considerable quantities of yarn to the defendants, and in August, 1918, one of them, Mr. Gordon Geddes, went to Washington to solicit further orders. Negotiations which he there had with Mr. E. T. Reed, director of the defendants' bureau of purchases, resulted in his agreeing to sell to the defendants 35,000 pounds of worsted yarn and 20,000 pounds of certain other yarn; and, in confirmation of the bargain, purchase-orders, dated the 14th August, 1918, No. 1787 for the worsted and No. 1788 for the other yarn, were made out and mailed

ONT.

S. C.

GEDDES BROS. v. AMERICAN RED CROSS.

by Mr. Reed to the plaintiffs. Order 1787 has been filled. The difficulty that has arisen is in reference to order 1788.

When the orders were received, the plaintiffs wrote, on the 24th August, a letter (exhibit 2) saying that there was some doubt about their ability to fill order 1788, in that 4,000 pounds, which Mr. Geddes had said that he had on hand, and which, according to the contract, were to be shipped at once, had been sold and delivered to the defendants under another contract, before the receipt of the order; and that the mill from which the plaintiffs had bought the yarn (i.e., the remaining 16,000 pounds) asserted an inability to deliver the balance. It was added that every effort would be made to secure delivery and that any part of the wool received by the plaintiffs would be delivered to the defendants pursuant to the order.

This letter was not answered for a month, i.e., until the 26th September, when Mr. Reed wrote that he did not understand the plaintiffs' letter and would expect the yarn to be delivered as contracted for. He asked also for a telegram to say how much of the yarn could be shipped immediately and when the contract could be completed, explaining that the defendants were issuing shipping instructions covering all the yarn they had purchased, and wished to know when they could count on delivery. The shipping instructions came in a letter dated the 2nd October, and directed the plaintiffs to ship part of the yarn to New York, part to Cleveland, and part to Minneapolis.

On the day of the date of the shipping instructions, the 2nd October, the plaintiffs answered the defendants' letter of the 26th September, saying that they would be able to fill order 1787, but, as to order 1788, saying: "It will be impossible for us to deliver this, as the mills are not able to make it, they state on account of having Government orders which require their whole attention."

They went on to refer to their letter of the 24th August, and said: "As we received no reply, we presumed you understood the situation. We greatly regret, naturally, that we are not able to fill this order, but it is something over which we have no control, and we trust that under the circumstances you will consider this entirely satisfactory."

After receipt of this letter, Mr. Reed gave instructions to have order 1788 marked cancelled, and it was so marked in the defen-

dants' records; but no notice to that effect was sent to the plaintiffs. The plaintiffs waited for some time, and then, coming to the conclusion that the defendants' silence in reference to the letter of the 2nd October meant the same thing as similar silence had meant in connection with the letter of the 24th August, viz., that the defendants were going to hold them to their contract, they made efforts in various quarters to procure yarn with which to fill the order. They appointed Messrs. Bates & Bates, of Montreal, their agents in that behalf, with the result that before the 8th November, as Mr. Bates says, and as I see no reason to doubt, the whole 20,000 pounds had been contracted for at a price almost as great as the price at which the plaintiffs had agreed to sell to the defendants. At the end of November and the beginning of December, Bates & Bates shipped to New York 4,350 pounds, to Cleveland 2,418 pounds, and to Minneapolis 3,564 pounds. On the 10th December, Mr. Reed, for the defendants, wrote to Bates & Bates: "We cannot accept this yarn, as this order was cancelled by Geddes Bros., in their letter to us of October 2nd." He also wrote to the plaintiffs to the same effect, and to the position so taken he has adhered.

Under date of the 27th November, the defendants sent to the plaintiffs, as well as to others with whom they had contracts, a letter asking for an answer to a telegram, said to have been sent on the 20th November, by the war council of the defendants, saying that the signing of the armistice had reduced the defendants' need of merchandise, and asking the several persons to whom it was addressed to "cancel on an equitable basis" such parts of their contracts as had not been filled. On the 2nd December, the plaintiffs wrote, in answer to this letter, that they had not received the telegram, and that, if the defendants would say on what basis they desired to cancel the orders, they (the plaintiffs) would do anything possible to meet them. If, as may be assumed, the shipments from Montreal were made on the days of the dates of the shipping receipts produced, and if the defendants' letter of the 27th November was posted on the day of its date, the plaintiffs had that letter in Sarnia before the yarn sent to Cleveland and Minneapolis had left Montreal; and perhaps there is room for the suggestion that, considering that the purchasers were the Red Cross, the plaintiffs might reasonably have taken prompt

ONT.

S. C.

GEDDES BROS. v. AMERICAN RED CROSS.

steps to stop the yarn in Montreal. It is, however, to be noticed that the letter of the 27th November is headed in the matter of order 1787, and, unless the plaintiffs ought to have inferred, from the absence of reference to order 1788, that the defendants had acceded to the request, made on the 2nd October, for the cancellation of the last mentioned order, there was nothing in the letter to direct their attention specially to the fact that the defendants were anxious to stop the shipment of further quantities of yarn of the sort covered by order 1788. Moreover, speculation as to whether the plaintiffs' action was as generous as it might have been is beside the legal question which has to be determined, and there is nothing in the letters of the 27th November and the 3rd December which appears to me to affect that question: assuming that the contract represented by order 1788 was still subsisting, and that the letter of the 27th November was a request to cancel it, the plaintiffs had a legal right to refuse to accede to that request.

The plaintiffs' letter of the 2nd October may be construed either as a request for the cancellation of, or as a repudiation of their obligation under, the contract. If it was merely a request, it appears to me that, in the absence of any intimation from the defendants that the request was granted, it amounts to nothing. If it was a repudiation, the defendants had the option either to accept it as a breach of the contract or to disregard it and insist upon performance. If they did the latter, they kept the contract alive and left the plaintiffs free to perform it, if so advised, notwithstanding the previous repudiation: *Frost* v. *Knight* (1872), L.R. 7 Ex. 111; Leake on Contracts, 6th ed., p. 639. It is suggested that the option was exercised by the defendants when they marked the contract "cancelled" upon their own files, and that their silence—their omission to complain of delay in the making of deliveries—was a communication of their election, if any communication was requisite. I am unable to adopt this argument. It appears to me that, notwithstanding the fact that the defendants had decided not to insist upon delivery of the yarn, they remained free to change their decision until they notified the plaintiffs of it, and I do not think that any such time had elapsed, or any such change of circumstances had occurred, before the shipment of the yarn, as amounted to an announcement of their election or as would have precluded them from insisting upon delivery.

There was a letter from the defendants to the plaintiffs, dated the 5th December, headed in the matter of order 1782. It gave the defendants' reasons for asking the plaintiffs to "accept cancellation of the unshipped portion of" that order, one of such reasons being that the plaintiffs cancelled order 1788, and the defendants "without making any trouble in regard to it . . . accepted this cancellation . . ." Here we have, for the first time, a communication from the defendants to the plaintiffs of their acceptance of the proposal contained in the letter of the 2nd October, or of the exercise of their option to treat that letter as a breach and to terminate the contract—it does not seem to matter much in which way it is looked at. There is no evidence as to when the letter was posted in Washington, or as to when it was delivered in Sarnia; nor is there any evidence as to when the last of the yarn to be shipped—that addressed to Minneapolis—was delivered to the carrier in Montreal; but, the shipping receipt being dated the 6th December, it may be assumed that the shipment was made on that day, and there does not seem to be any reason for assuming that the letter reached the plaintiffs before they had handed the yarn to the carriers. This letter, then, seems to have come too late to be effective to deprive the plaintiffs of the right to be paid for any of the yarn shipped; but I think it was effective to defeat their claim in respect of any yarn on hand and not shipped. They had contracted for the whole 20,000 pounds, but they succeeded in cancelling their orders for so much as they had not shipped, except 1,500 pounds, which they had to accept, and which they still had on hand in Montreal at the time of the trial. By the day of the trial the price of yarn of the kind in question had fallen considerably; but it appears that for some little time after the signing of the armistice there was no very great change in the market-price; and it does not appear that, if the plaintiffs had made prompt efforts to minimise their loss, they could not have sold this yarn at as good a price as that realised for what was sent to New York, viz., 10 cents a pound less than the price which the defendants had contracted to pay. It seems, therefore, that if they are entitled to anything in respect of the 1,500 pounds, they are not entitled to more than $150; but, as I have said, I do not think they are entitled to anything.

ONT.

S. C.

GEDDES BROS. v. AMERICAN RED CROSS.

The letter of the 26th September stood as a request for a release from the obligations of the contract, or as a repudiation of such obligations, whichever it was, until the plaintiffs announced to the defendants that they withdrew the request, or, notwithstanding the repudiation, intended to do what they had contracted to do. Shipment of some of the yarn, plus notice to the defendants that it had been shipped, would, of course, be such an announcement, and any attempt by the defendants thereafter to agree to the cancellation, or to exercise one of the options given to them by the repudiation, would have been too late; but there is no evidence that, at the time of the writing of the letter of the 5th December, the defendants had any knowledge that goods had been shipped. Mr. Reed learned of the shipment on the 9th or 10th December, when he was shewn the invoice for the yarn shipped to New York, and there is no evidence that that invoice had reached any office of the defendants any length of time before Mr. Reed saw it. I think, therefore, that it is not proven that the defendants' letter of the 5th December was too late to be effective as regards the 1,500 pounds; and I think it follows that the plaintiffs' right to ship must be treated as having ceased when that letter was received, and that there was no breach by the defendants of any contract relating to such yarn as was still in the plaintiffs' possession when the letters of the 10th December were written, announcing the defendants' refusal to accept delivery under order 1788.

I had hoped that the parties would be able to adopt the course suggested at the close of the trial and make some reasonable compromise. In the discussion the plaintiffs appeared to recognise the right of the Red Cross to generous treatment at the hands of those with whom it has contractual relations; and it seemed not impossible that some means would be found of minimising the loss, and that some arrangement would be made for sharing, upon an equitable basis, any unavoidable loss. However, I have no been advised that any settlement has been reached, and I must, therefore, give judgment for the amount to which the plaintiffs appear to be entitled.

After the defendants had refused to accept the yarn, the plaintiffs managed to find a purchaser for the 4,350 pounds sent to New York, and realised all but $435 of the price which the

ONT.

S. C.

GEDDES BROS. v. AMERICAN RED CROSS.

defendants had agreed to pay. The defendants are entitled to credit for the amount so realised, and their liability in respect of that lot is $435. The contract-price of the yarn sent to Cleveland was $4,373.40, and of that sent to Minneapolis, $6,453.70. These amounts, in all $11,262.10, the defendants must pay; and they will of course be entitled, upon payment, to the possession of the yarn, which, as I understand it, is still in the Customs. The judgment will be for $11,262.10, with costs.

A. J. Thomson, for the appellants.

D. L. McCarthy, K.C., and *A. W. Langmuir*, for the plaintiffs, respondents.

The judgment of the Court was read by

HODGINS, J.A.:—The only two points raised in this case are: whether the non-performance of the contract in question by the respondents, at the time when it should have been performed according to its terms, preceded by an earlier refusal to perform it, put an end to the contract without any action on the part of the respondents; and, also, whether, under the circumstances detailed in the evidence, the property had passed to the appellants so as to make them liable for the price instead of for damages for non-acceptance.

Hodgins, J.A.

With regard to the first point, it appears that the order received by the respondents, No. 1788, dated the 14th August, 1918, was in the following words:—

"Geddes Brothers, Sarnia, Ont.

"Shipping instructions to be given later.

"Freight, Collect, F.O.B. Sarnia,

"Net 10 days.

"Purchased in bond,

"20,000 lbs. Oxford Woollen Yarn, Sweater, scoured. . . $1.80.

"Deliver 4,000 lbs. at once, and 2,000 lbs. a month.

"Edward T. Reed."

The shipping instructions were not given until the 2nd October, when the 20,000 lbs. were divided into three lots, each of which was directed to be sent to a different place. The shipping instructions dealt with the total, as if all was to be delivered at the same time.

On the same day, the 2nd October, 1918, the respondents wrote to the appellants in reference to this order, saying that

ONT.

S. C.

GEDDES BROS. v. AMERICAN RED CROSS.

Hodgins, J.A.

it would be impossible for them to deliver the yarn, as the mills were not able to make it, their whole attention being taken up with Government orders. At the time of writing that letter, the shipping instructions had not been received by the respondents, but they crossed the respondents' letter above mentioned. That being the case, and the appellants having previously pressed for the fulfilment of this contract, it might have been expected that a reply would have been received from them, making it clear whether or not they accepted or rejected the proffered cancellation. They did not, however, write at all; and the respondents, after waiting for a time, and becoming uneasy lest silence meant that they would be held to their contract, proceeded to buy yarn to fill the order, and succeeded in shipping it on the 27th November and early in December, 1918, to the appellants, who declined to receive it.

Upon the point of law argued, it is quite clear that the letter of the 2nd October enabled the appellants to treat the repudiation as a definite breach, and thereupon to treat the contract as rescinded, except for the purpose of bringing an action for the breach, or they might have treated the notice that the contract would not be performed as inoperative, and awaited the time when the contract was to have been executed, and then held the respondents responsible for all the consequence of non-performance. If, however, the notice is treated as inoperative, the contract is kept alive for the benefit of both parties. Each remains subject to all his own obligations and liabilities under it, and the party who gave the notice is at liberty, not only to complete the contract if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it: *per* Cockburn, C.J., in *Frost* v. *Knight*, L.R. 7 Ex. 111, at p. 112, *sub fin.*

As is stated by Collins, M.R., in *Michael* v. *Hart & Co.*, [1902] 1 K.B. 482, at p. 490: "An anticipatory breach of contract going to the whole consideration . . . has not of itself the effect of rescinding the contract, for there must be two parties to a rescission." If, therefore, the renunciation is not adopted by the other party, he must wait for the arrival of the time when in the ordinary course a cause of action on the contract would arise; but if he elects to assent to the notice as being a repudiation, he

must so notify the other party. This is clear from the cases already cited, as well as from the case of *Johnstone* v. *Milling* (1886), 16 Q.B.D. 460.

It was urged by Mr. Thomson that, even admitting that down to the time for performance it was incumbent upon his clients to have assented to rescission, yet, they not having done so, the actual non-performance by the respondents of the contract on the day named itself put an end to the contract or supplied in some way the want of acceptance of the prior renunciation. I am unable to accept that view.

The non-performance of the contract, presuming time not to have been of the essence of the contract, as I think is the case here, is merely an actual breach instead of an anticipatory breach of the contract, and puts the promisee in the position to sue for performance, or, treating the non-performance, if it went to the root of the contract, as a repudiation of the whole contract, to sue for damages. This would clearly be the case if the contract was one for a single delivery of goods. If the contract can be treated, notwithstanding the shipping instructions, and by reason of the original provision as to monthly delivery, as one for successive deliveries, then, *â fortiori*, the non-delivery of a part on the due date could only give the same right to the promisee, subject to the question as to whether non-delivery of a part could be treated as a repudiation of the whole contract. I do not see how non-performance of a contract at the appointed time adds to or detracts anything from the position created by what is called an anticipatory breach. After notice of intention not to perform the contract, if it is not accepted by the promisee, the promisor can, down to the time of performance, as already mentioned, change his mind and perform the contract. Consequently such a notice, standing alone, effects no legal change in the position of the parties. When, therefore, time for performance arises, and the contract is broken by non-performance, the situation created by the anticipatory breach, having always remained ineffective, is ended, and a right of action accrues, not by anything arising out of the earlier refusal, but by non-performance itself.

The case chiefly relied on by Mr. Thomson, *Ripley* v. *McClure*, (1849), 4 Ex. 345, does not seem to go far enough to support his point.

ONT.
S. C.
GEDDES BROS. v. AMERICAN RED CROSS.
Hodgins, J.A.

What it really decides is that a refusal to perform the contract, unretracted down to and inclusive of the time when the defendant was bound to receive goods, is evidence of a continuing refusal and a waiver of conditions precedent and actual delivery. In that case the time for performance arrived before action, and the legal value of the earlier refusal to perform was that, having continued down to the time for actual performance, it relieved the promisor from proving actual delivery or tender. This seems to have been the view taken of it in *Tufts* v. *Poness* (1900), 32 O.R. 51.

Upon the second point, that of damages—the original order contains the words "ship via freight, collect, f.o.b. Sarnia," and payment therefor is to be "net, 10 days," i.e., no doubt, after shipping instructions have been given and complied with by placing the goods on the cars at Sarnia, properly billed. The goods were afterwards delivered "f.o.b. Sarnia," and went forward. This, being done in pursuance of the contract, was a good delivery of the goods to the buyer: Benjamin on Sale, 7th ed., p. 701; Halsbury's Laws of England, vol. 25, p. 189. Inspection could not well be made at Sarnia, as both the contract and the shipping instructions provided for the collection of the freight on arrival at the foreign destination, but this would not seem to prevent recovery of the sale-price, pursuant to the terms of the contract. The goods might have been rejected on their arrival at the places designated as their destination, if not in conformity with the contract. It has not been set up or argued that these goods did not conform to the order, and it is affirmed by the chief witness for the respondents that the yarn he bought and shipped was in strict compliance with the provisions of the contract.

I do not think that damages for non-acceptance are the proper measure to be applied in this case.

The appeal should be dismissed.

Appeal dismissed.

BANK OF BRITISH NORTH AMERICA v. ST. JOHN & QUEBEC R. Co.

N. B.
S. C.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. April 23, 1920.

ASSIGNMENT (§ III—30)—NOTICE OF—SENT TO SOLICITOR OF COMPANY—SUFFICIENCY OF.

Notice of an assignment sent to the solicitor of a company is notice to the company.

MOTION by defendant railway company to set aside or vary an order and judgment of Chandler, J., and to enter a verdict for the appellant. Statement.

W. P. Jones, K.C., for appellant.

F. R. Taylor, K.C., *contra*.

The judgment of the Court was delivered by

HAZEN, C.J.:—The material facts in this case, which was tried before Chandler, J., without a jury, were as follows:—On May 8, 1912, the Hibbard Company, Limited, entered into a contract with the St. John & Quebec Railway Co. for the construction of a line of railway between Fredericton and Woodstock on the western side of the River St. John. In the latter part of August, 1914, the company was unable to pay the July estimates, and no funds were forthcoming to meet the contractors' obligations, so the then Premier of the Province, the Hon. George J. Clarke, went to Montreal and negotiated with members of the Hibbard Company to continue the work of construction. Mr. Clarke was acting on behalf of the Province of New Brunswick, and he represented that the difficulties created by the war made it impossible for the railway company to finance, and that the province was arranging for its being carried on, as under the provisions between it and the railway company it had the right to do. He pointed out the difficulty, if not the impossibility, there would be in arranging for cash payments, but represented that the province would hand over to the contractors bonds of the province or bonds of the railway company guaranteed by the province, bearing interest at the rate of 4½%, less a certain draw-back of 10% to be paid over when the work was completed, on the understanding that all estimates were to be approved by the provincial engineer. In the course of the negotiations, it was pointed out to Mr. Clarke that such arrangements would be impossible unless the company was able to finance upon the Hazen, C.J.

N. B.

S. C.

BANK OF BRITISH NORTH AMERICA v. ST. JOHN AND QUEBEC R. CO.

Hazen, C.J.

security of the bonds, and Mr. Clarke consequently gave a letter to the Bank of British North America setting forth what the province would undertake to do substantially as I have stated, and the Bank of British North America consented to supply the Hibbard Company with the necessary funds from month to month to carry on its work. Accordingly the Hibbard Company, Limited, on September 2, 1914, executed an assignment to the Bank of British North America whereby it transferred, set over and assigned to that bank all of the company's right, title and interest to all claims whatever for earned drawback arising out of the contract between the company and the St. John & Quebec Railway Co.: all claims whatsoever for work done, material supplied and any matter or thing whatsoever for which the company might be entitled to have and claim against the said railway company on account of reduced quantities, wrong classification, forced account or any other matter or thing—etc.; and all claims for estimate or payment yet to become due in connection with the prosecution and completion of the work undertaken under the said contract of every nature and kind whatsoever; all right whatsoever to have and receive from the Lieutenant-Governor-in-Council of the Province of New Brunswick all bonds of the said province already guaranteed by the said province which might thereafter be paid and delivered for and on account of work done and to be done in connection with the said contract and work to be done thereunder.

It appears from the evidence that a copy of this assignment was sent to the St. John & Quebec Railway Co. at Fredericton, and another copy was filed in the office of the Provincial Secretary-Treasurer at the same place on September 11, 1914, and that that official acknowledged receipt thereof upon the duplicate in the hands of the bank, but the company does not admit receiving its copy, and its president and manager (Messrs. Gould and Thompson) both deny ever having seen it. The work on the railway went on until it was completed in October, 1914, all payments that were made being made to the bank in bonds of the railway company guaranteed by the province. On October 27 of the year last mentioned, an agreement was entered into between the Hibbard Company and the railway company whereby

various claims and contentions were disposed of, and it was arranged that certain bonds should remain on deposit in the hands of the Provincial Secretary-Treasurer until such time as the Supreme Court of New Brunswick upon a special case being submitted should adjudicate as to the liability for a number of claims against the contractor and the railway company, then filed with the Government of the Province, and on October 22, 1915, the Supreme Court gave judgment holding that neither the railway company nor the contractor were liable for such claims. Thereupon the Hibbard Company, contractor, naturally began pressing for the payment of the balance due. These negotiations were continued for a long time, Premier Clarke and other members of the Government interesting themselves in respect to the settlement.

From what has been said, and from the facts submitted in the case, the railway company and the Government, from and after September, 1914, the date when the assignment was made to the Bank of British North America, appear to have acted as one, the Government taking part in all negotiations through Premier Clarke and the Honourable Mr. Baxter, Attorney-General. On January 16, 1916, the Hibbard Company gave an absolute power of attorney to a Mr. Gall to act for it in making a full and final settlement with the railway company, and a few days later Mr. Gall, acting under such power, came to a settlement with the company, conceding payment of liabilities that the company had previously repudiated and diverting a considerable amount of money, amounting to over $17,000 to the Imperial Bank upon his own account, leaving a balance of a little less than $5,000 payable to the Hibbard Company, and for which amount the railway's cheque was given. The amount that was paid to the Imperial Bank as aforesaid was it was claimed for services rendered by Mr. Gall and for goods supplied by him, including a locomotive.

The contention of the bank is that the Government and the railway company remain liable to the bank for the balance of the advances made to secure the work, amounting to a sum of $32,899.10, with interest from March 5, 1916; that of this amount there has only been paid the sum of $4,902.17, the balance arrived

N. B.

S. C.

BANK OF BRITISH NORTH AMERICA v. ST. JOHN AND QUEBEC R. CO.

Hazen, C.J.

at in the settlement made by Mr. Gall with the railway company in January, 1916.

The trial Judge held that the assignment from the Hibbard Company, Limited, to the Bank of British North America, dated September 22, 1914, of the amount due to that company under the contract between it and the St. John & Quebec Railway Co., dated May 8, 1912, was a good and valid assignment either under sec. 19 of the Judicature Act or as an equitable assignment. In this I fully concur, and I do not see how it is possible, having regard to the language of the section referred to, to come to any other conclusion so far as its being a good and valid assignment under that Act is concerned, and it was sufficient in my opinion to pass and transfer to the Bank of British North America the legal right of the chose in action, and would therefore be effectual in law to pass and transfer the legal right to such debt or chose in action from the date on which notice thereof was given to the railway company.

Chandler, J., having stated in his judgment as above that he considered that the assignment of the amount due to the Hibbard Company under their contract with the railway company to the Bank of British North America was a good and valid assignment, held that the St. John & Quebec Railway Co. had notice of the assignment of the claim of the Hibbard Company to the Bank of British North America, and that such notice was given by the resolution passed by the Hibbard Company, authorizing Andrew D. Gall to settle with the railway company and the Government of New Brunswick (this resolution having been passed on or about January 3, 1916).

It is contended, however, by the appellants that Chandler, J., was in error in finding that notice of the assignment had been given to the St. John & Quebec Railway Co. as required by the Act, but I entirely concur in his conclusion supported as it is by authorities to which it seems to be almost unnecessary to refer again, as they are set forth with admirable clearness in his judgment, that the fact that the assignment had been made was brought to the attention of Mr. Hanson, K.C., solicitor for the defendant company, and a notice thus given to him of the assignment of the Hibbard Company's claim to the bank, and that notice to the solicitor was notice to the defendant com-

pany, as Mr. Hanson was acting for the railway company in this particular transaction. The resolution which was brought to Mr. Hanson's attention was one which was passed by the directors of the Hibbard Company, on January 3, 1916, and was in the words following:—

It was resolved that Mr. Andrew D. Gall, a director and treasurer of the company be and he is hereby authorized to negotiate a settlement with the St. John & Quebec Railway Co. and the Government of the Province of New Brunswick in respect of all claims of this company against the said railway company and the said Government; to sign any regular and lawful agreement in respect to such claims and to give a full and final receipt and discharge for all payments made *provided the same be paid into the Bank of British North America according to its rights of transfer and subrogation.*

This resolution was forwarded to Mr. Hanson and it is quite clear that his attention was called to the words which I have italicized, for on receipt of the resolution Mr. Hanson objected to it and stated in his evidence that the provision for payment to the bank pursuant to its right of transfer and subrogation was his only objection to it.

I think it is clear from the authorities cited, *Le Neve* v. *Le Neve* (1748), 3 Atk. 646, 26 E.R. 1172, and *Bradley* v. *Riches* (1878), 9 Ch.D. 189, that notice to a solicitor is notice to the client. The head-note in the latter case states: "The presumption that a solicitor has communicated to his client facts which he ought to have made known cannot be rebutted by proof that it was to the solicitor's interest to conceal the facts." And it was held in *Espin* v. *Pemberton* (1859), 3 De G. & J. 547, that notice to a solicitor was actual notice to his client. In that case Lord Chelmsford, the Lord Chancellor, said at page 554:—

The notice, which a client is supposed to receive through his solicitor, is generally treated as constructive notice. I think it would tend very much to clearness in these cases, if it were classed under the head of actual notice . . . If a person employs a solicitor, who either knows or has imparted to him in the course of his employment some fact which affects the transaction, the principal is bound by the fact, whether it is communicated to or concealed from him. Constructive notice, properly so called, is the knowledge which the Courts impute to a person upon a presumption so strong of the existence of the knowledge, that it cannot be allowed to be rebutted, either from his knowing something which ought to have put him upon further inquiry, or from his wilfully abstaining from inquiry, to avoid notice.

In *Brandt's Sons* v. *Dunlop Rubber Co.*, [1905] A.C. 454, as pointed out by Chandler, J., the question of notice was discussed and it was held that notice of an assignment of certain

N. B.

S. C.

BANK OF BRITISH NORTH AMERICA v. ST. JOHN AND QUEBEC R. CO.

Hazen, C.J.

moneys to the clerk of the defendant, which notice was not communicated by him to his principals, was notice to the company. It seems to me that Chandler, J., very correctly came to the conclusion which he expressed in these words:—

> In my view the defendant company in this case received notice to pay the money coming to the Hibbard Company to the Bank of British North America. The defendant company disregarded that notice and paid the money over to the wrong people. They must, in my judgment, pay the money over again, and pay it to the right person.

The case of *Denney* v. *Conklin*, [1913] 3 K.B. 177, referred to by Chandler, J., is also very much in point, together with the quotation from the judgment of Atkin, J.

Chandler, J., also points out that there are other grounds on which it might be fairly concluded that sufficient notice had been given, though he does not directly find thereon. I think there is the strongest possible reason for his saying that it might be successfully contended that through the course of the dealing between the Provincial Government and the St. John & Quebec Railway Co. prior to the year 1915 the Provincial Government practically took out of the hands of the defendant railway company the construction of the railway, as the Provincial Government in the year 1914 kept under its control the guaranteed bonds of the company which were issued in that year; and it might also be contended that notice to the Provincial Secretary-Treasurer of the assignment from the Hibbard Company to the Bank of British North America was notice to the defendant company, under the circumstances existing in September, 1914; that notice was given to the Provincial Secretary-Treasurer was proved; it was also proved that notice was sent to the railway company, although as before mentioned its president and manager stated that such notice had not come under their observation. It is a most extraordinary thing it seems to me that it did not, and I think there is ground for the contention that if it did not pass under the eye of these gentlemen it was in consequence of the carelessness in the method of receiving papers and opening and filing letters that was pursued in the company's office. The trial Judge, however, while attaching weight to these considerations preferred to base his judgment on the ground of the notice to the company's solicitor, which notice he unquestionably received, according to his own admission. The

contention of the appellants that the Judge was in error in finding that Mr. Hanson was a person upon whom such a notice could properly be served, and that the railway company had paid the moneys to the wrong person and that all moneys paid after Mr. Hanson had received the resolution must be paid to the bank, must I think fail, as well as the other grounds of appeal.

In my opinion, therefore, the appeal should be dismissed with costs, and in compliance with the judgment of Chandler, J., the matter should be referred to a Master of the Supreme Court to take an account of the amount due by the Hibbard Company, to the Bank of British North America, for loans and advances in connection with the contract between the Hibbard Company and the St. John & Quebec Railway Co., dated May 8, 1912, and that an account should also be taken of the amount due from the St. John & Quebec Railway Co. to the Hibbard Company, under the contract above mentioned.

The appeal should be dismissed with costs.

Appeal dismissed.

MONTREUIL v. ONTARIO ASPHALT BLOCK CO.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. March 19, 1920.

IMPROVEMENTS (§ I—4)—LESSEE WITH OPTION TO PURCHASE—LESSOR HAVING LIFE INTEREST ONLY—ACTION FOR POSSESSION BY REMAINDERMAN—CONDITION OF DELIVERING UP POSSESSION.

Although a company lessee with an option to purchase is not entitled to invoke the provisions of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, sec. 37, because the improvements were not made under the belief that it was the owner of the land at the time such improvements were made; it is entitled as a condition to delivering up possession to the remainderman to be compensated for the lasting improvements made on the land before it was discovered that the lessor was tenant for life only to the extent to which the value of the land has been enhanced by such improvements.

[*Shepard* v. *Jones* (1882), 21 Ch. D. 469; *Henderson* v. *Astwood*, [1894] A.C. 150, applied; *Young* v. *Denike* (1901), 2 O.L.R. 723, distinguished.]

Statement

AN appeal by the plaintiffs from the judgment of FALCONBRIDGE, C.J.K.B., 46 O.L.R. 136. Reversed.

E. D. Armour, K.C., for the appellants.

J. H. Rodd, for the respondent.

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the plaintiffs from the judgment, dated the 6th September, 1919, which was directed to be entered by the late Chief Justice of the King's

ONT.

S. C.

MONTREUIL v. ONTARIO ASPHALT BLOCK CO.

Meredith, C.J.O.

Bench, after the trial before him, sitting without a jury, at Sandwich, on the previous 24th April.

The action is brought to recover possession of a parcel of land in the village of Ford City.

The respondent by its statement of defence alleges that Luc Montreuil the younger, now deceased, the father of the appellants, demised the lands in question, and the water-lot in front of it, to the respondent for a term of 10 years, at a rental of $1,000 a year, with the option to the respondent to purchase the demised premises for $22,000; that by the lease the respondent covenanted to expend, within one year from the date of the lease, $6,000 in the construction of a dock on the demised premises, which at the expiration of the term was to become the property of the lessor, unless the option to purchase should be exercised; that the respondent gave notice in accordance with the provisions of the lease of its intention to exercise the option; that the deceased refused to convey the demised premises to the respondent, alleging that he had only a life-interest in them; that the respondent, immediately after the execution of the lease, entered into possession of the demised premises and constructed the dock, and expended, in addition to the cost of it, upwards of $200,000 in the erection and "from time to time in the extension and betterment of an extensive plant for the manufacture of asphalt paving blocks, and has carried on its operations thereon during the whole of the said term;" that a considerable part of the plant is constructed on the lands in question, and "the severance of the said lands would entail large loss and damage to this defendant, which it is entitled to recover against the estate of the said deceased;" that the appellants, or some of them, took part in the negotiations leading up to the making of the lease, and all of them were well aware of it, and stood by, making no protest, while the construction and the betterment of the plant were going on, and are now estopped "from denying the title in fee assumed by the deceased, and are estopped from denying the right of this defendant to relief under the statute hereafter pleaded, or in the alternative are liable in damages to this defendant" (para. 12).

The respondent pleads the statute, the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, and other statutes, and says that "if the plaintiffs are otherwise entitled to the lands in question

then this defendant is entitled or should be allowed to retain the same by reason of the improvements made under mistake of title, making such compensation for the lands as may be directed, or in the alternative should be entitled to a lien upon the said lands to the amount by which the same have been enhanced by such improvements" (para. 13).

The respondent also, by way of counterclaim, claims:—

"(1) A declaration that the plaintiffs are estopped from denying the title of the deceased, their father, as against the defendant, or in the alternative damages for the loss occasioned to this defendant by their standing by under the circumstances set out in paragraph 12 hereof.

"(2) A declaration that this defendant, upon making proper compensation, is entitled to retain the lands in question, or in the alternative a lien thereon in respect of the improvements made under mistake of title, as claimed in paragraph 13 hereof."

By the judgment it is found and declared that the plaintiffs are entitled to an estate in fee simple in possession "in the lands and premises in question in this action, and that the defendant the Ontario Asphalt Block Company Limited has made lasting improvements thereon in the *bonâ fide* belief that the said lands were its own, and is entitled to retain the lands and premises in question in this action, upon making compensation to the plaintiffs for the same;" and it is adjudged accordingly, and a reference is directed to fix the amount of the compensation to be paid to the appellants for the land; and the action as against the defendant the Cadwell Sand and Gravel Company is dismissed with costs.

The facts are not seriously in dispute. When the lease was made, both the lessor and the respondent believed that the lessor was the owner in fee simple of the demised lands. It was afterwards discovered that, upon the true construction of the will under which he derived his title, he was entitled to an estate for life only. A very considerable sum was expended by the respondent in buildings and erections on the lands before the discovery was made; and the remainder of the expenditure by the respondent, which was also a very considerable sum, was made after the respondent became aware that its lessor was tenant for life only.

It should also be mentioned that, according to the terms of the lease, the respondent was entitled, at the expiration of the term,

ONT.

S. C.

MONTREUIL v. ONTARIO ASPHALT BLOCK CO.

Meredith, C.J.O.

which was 10 years, or any renewal of it, to remove all buildings, plant, and machinery, thereafter erected by it (except the dock). The option to purchase was to be exercised at the end of the term of 10 years, and only if the lessee should have given 6 months' previous notice in writing of its intention to exercise it; and it was also provided that, if the option should not be exercised, the lessee should be entitled, on giving 3 months' notice in writing before the expiration of the term of 10 years, to a renewal of the ease for a further term of 10 years, on the same terms as to rent and payment of taxes and water-rates.

Having given due notice of its intention to exercise the option, the respondent, on the 10th February, 1913, brought an action against Luc Montreuil for the specific performance of his covenant to convey if the option should be exercised.

In addition to other defences not necessary to be mentioned, the defendant in that action set up that he was tenant for life only of the demised premises, although when he executed the lease he believed that he owned them in fee simple, and he claimed that, as the lease was entered into by both parties under a mistaken belief that he was the owner, his agreement to convey was void.

The result of that action was that specific performance was adjudged in respect to the water-lot and the life-interest in the other lot, subject to an abatement in the price agreed to be paid, for the difference in value of an estate in fee simple and an estate for the life of the defendant, the difference in value to be paid on the assumption that the value of the fee simple was, on the 2nd February, 1913, the proportionate part of the purchase-price agreed to be paid attributable to that parcel, and a reference to ascertain the sum to be allowed by way of abatement was directed, and further directions and the question of subsequent costs were reserved until the report should be made.

The reference directed has not yet been proceeded with.

The learned Chief Justice founded his judgment on the case of *Young* v. *Denike*, (1901), 2 O.L.R. 723, in which he thought that it was decided that a person having a contract of purchase was the owner of the land within the meaning of the statute which the respondent invoked.

The statute, which is now sec. 37 of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, reads as follows:—

"37. Where a person makes lasting improvements on land, under the belief that the land is his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of the land is enhanced by such improvements; or shall be entitled or may be required to retain the land if the Court is of opinion or requires that this should be done, according as may under all circumstances of the case be most just, making compensation for the land if retained, as the Court may direct."

It will be observed that two conditions must exist to warrant the application of the section: (1) that the person claiming the benefit of the section shall have made lasting improvements on the land; and (2) that he made them under the belief that the land was his own.

It was argued by counsel for the appellants that the buildings and erections on the land in question do not constitute lasting improvements within the meaning of sec. 37, and in support of his contention reference was made to *Commissioners for the Queen Victoria Niagara Falls Park* v. *Colt*, (1895), 22 A.R. (Ont.) 1.

In my view, it is impossible to say that some at all events of the buildings and erections do not constitute lasting improvements, and an inquiry as to that aspect of the case should be directed if the respondent is entitled to be compensated for lasting improvements.

As to the expenditures made after it was discovered that Luc Montreuil was tenant for life only, which, as I have said, were of very considerable sums, it is clear that they were not made by the respondent under the belief that the land was its own. These expenditures were not made under any such belief, but, as put by the witness Fleming, the respondent "took the chance—it was obliged to do it."

It is clear, I think, that the respondent is not entitled to the benefit of sec. 37.

The improvements made before the discovery that Luc Montreuil was tenant for life only were not made and could not have been made by the respondent under the belief that the land was its own. Mr. Fleming makes this clear, as appears from the following extract from the shorthand notes of the evidence at pp. 35, 36:—

ONT.

S. C.

MONTREUIL v. ONTARIO ASPHALT BLOCK CO.

Meredith, C.J.O.

"Mr. Armour: Was there any time during the whole of the currency of the lease or afterwards that the Ontario Asphalt Block Company was really the owner of this piece of land that is now in dispute? A. How do you mean?

"Q. Did you or any of the officers of the company ever really believe that you owned the land now in dispute? A. We intended to own it.

"Q. Did you ever believe it? A. That is, we intended to carry out the terms of that option.

"Q. Did you ever really believe that you owned it? A. We treated it as so.

"Q. Did you ever really believe you owned it? A. I could not believe anything more than what our rights were under that lease.

"Q. You know what I mean—did you ever really believe, when you took that lease or at any time afterwards, that the Ontario Asphalt Company owned that land? A. When we tendered, when we gave that notice, I did, when we tendered the $22,000 and the conveyance.

"Q. You did then? A. Yes.

"Q. Because you had accepted the option? A. Yes.

"Q. Did you ever believe it before? A. I don't know just in what sense you mean that.

"Q. Did you believe it was your land? A. I believe we intended owning it; it was not our land.

"Q. When you spent——? A. Whatever I might have believed, we were simply subject to the terms of that lease and the option, just whatever that means, that is for the Court to determine, whether I believed I owned it or the company owned it.

"Q. I would like you to answer my question? A. I would rather not answer that question.

"Q. I would rather you would? A. I submit to the Court.

"His Lordship: He could not believe he owned it when they were only lessees.

"Mr. Armour: If your Lordship is satisfied with that—

"His Lordship: Owning it would imply the fee simple, would it not?

"Mr. Armour. That is all.

"Q. The first 12 months you had spent about $8,000—you did not believe you owned it then? A. We intended to carry out the option on it.

"Q. Did you believe you owned it then? A. No, we could not own it—the only rights we had were under that lease.

"Q. Nor in 1908, when you had spent $109,510? A. The same answer."

The respondent, until it exercised its option to purchase, had no estate in the land but that of a tenant for years. It had the right, if Luc Montreuil had been owner in fee simple, to become the owner, if it should choose to exercise the option. The respondent was in no sense the owner of the land, and never supposed that it had any rights in it except those which the lease conferred.

The case which the learned Chief Justice treated as authority for the judgment which he directed to be entered—*Young* v. *Denike*, 2 O.L.R. 723—is not, in my opinion, an authority for the application of sec. 37 in such circumstances as exist in the case at bar. What the Chancellor did was to apply the well-established rule that, where a vendor is unable to make title, the purchaser is entitled to be compensated for the improvements he had made on the faith of his contract. No question such as we have to deal with was raised, but, as the Chancellor said: "Both parties agree and ask that, failing title, the contract may be rescinded and that they be restored to their former position" (p. 726).

Although, in my opinion, the respondent is not entitled to invoke the provisions of the statute, it is entitled, as a condition to the granting of the relief which the appellants claim, to be compensated for the lasting improvements that were made on the land before it was discovered that Luc Montreuil was a tenant for life only, to the extent to which the value of the land has been enhanced by the improvements.

The case falls, I think, within the principle of the decision of Mr. Justice Story in *Bright* v. *Boyd* (1841), 1 Story R. 478; (1843), 2 Story R. 605; and of Spragge, C., in *Gummerson* v. *Banting* (1871), 18 Gr. 516.

Although both of these were cases of a purchaser who was in possession, holding under a defective title, the principle of the decisions is of wider application, and, in my opinion, extends to such a case as the one we are dealing with. The respondent was in possession under an agreement which entitled it, if the lessor had the title which it was assumed he had, to become the owner of the land, on the terms and subject to the conditions mentioned in the

ONT.

S. C.

MONTREUIL v. ONTARIO ASPHALT BLOCK CO.

Meredith, C.J.O.

lease, and the improvements which were made before the discovery that the lessor was tenant for life only, were undoubtedly made under the belief that he was owner in fee simple, and that, subject to those terms and conditions being complied with, the respondent would become the owner of the land.

It would be manifestly unjust that the remaindermen should be permitted to take possession of the improvements without making compensation to the extent to which they enhance the value of the land. If the land had been worth no more than $1,000, and a building appropriate for the locality had been erected at a cost of $100,000, the gross injustice of permitting the remaindermen to possess themselves of the land and the building would not be open to question. It was argued that the improvements made by the respondent did not add to the value of the land. If that is found to be the case, no injustice will be done; compensation will be allowed only to the extent to which the improvements have enhanced the value of the land, and, if they have not enhanced it, no compensation will be payable.

The allowance to a mortgagee who has expended money in making lasting improvements, which have added to the value of the mortgaged premises, is a familiar application of the principle enunciated by Mr. Justice Story and Chancellor Spragge in the cases decided by them to which I have referred.

That a mortgagee will be allowed for such expenditure is established by the cases of *Shepard* v. *Jones* (1882), 21 Ch.D. 469, a decision of the Court of Appeal, and *Henderson* v. *Astwood*, [1894] A.C. 150, a decision of the Judicial Committee of the Privy Council; and I see no reason why the same rule should not be applied in the circumstances of this case.

I would, for these reasons, reverse the judgment appealed from, and substitute for it a judgment referring it to the Master at Windsor to ascertain and report as to the lasting improvements made by the respondent on the lands in question, and as to the amount by which the value of the lands has been enhanced by such improvements, and reserving further directions and the question of costs, both of the action and of the appeal, until the Master shall have made his report.

The question was raised by Mr. Armour as to the propriety of the order made by the Chief Justice, adding three of the plaintiffs

ONT.

S. C.

MONTREUIL v. ONTARIO ASPHALT BLOCK CO.

as plaintiffs in their capacity of executrix and executors of the last will and testament of Luc Montreuil. They were added as plaintiffs without their consent, and the order cannot therefore stand, and their names as plaintiffs in their representative capacity must be stricken out; apart from this objection, I can see no reason for making them parties. The equity which the respondent seeks to enforce does not affect them except in their individual capacities, and no relief has been or could be granted against them in their representative capacity in this action.

Maclaren, J.A. Magee, J.A. Hodgins, J.A.

MACLAREN and MAGEE, JJ.A., agreed with MEREDITH, C.J.O.

HODGINS, J.A., was of opinion that the appeal should be allowed *in toto*.

Appeal allowed.

MAN.

K. B.

GRAHAM v. ST. BONIFACE.

Manitoba King's Bench, Mathers, C.J.K.B. February 20, 1920.

TAXES (§ III F—148a)—SALE OF LAND FOR ARREARS—UNAUTHORIZED PURCHASE BY OFFICER OF MUNICIPALITY—LEGALITY—ACTION BY PETITIONER—REDEMPTION—COSTS.

The purchase of lands at a tax sale by the mayor of a corporation who is not authorized to make such purchase either by resolution or by-law is void. The petitioner is entitled to have the lands redeemed from such sale and his costs.

[*Tetrault* v. *Vaughan* (1899), 12 Man. L.R. 457; *Bannatyne* v. *Pritchard* (1906), 16 Man. L.R. 407, referred to.]

Statement.

APPLICATION to dispose of costs on a proceeding to sell lands for taxes.

H. E. Swift, for petitioner; *H. P. Blackwood*, K.C., for respondents.

Mathers, C.J.K.B.

MATHERS, C.J.K.B.:—The City of St. Boniface sold the petitioner's lands for arrears of taxes for the years 1912 to 1915. The mayor attended the sale and bid the lands in on behalf of the city without having been authorised either by resolution or by by-law to do so. Subsequently, the city applied for title under the Real Property Act, R.S.M. 1913, ch. 171, amended 9 Geo. V. 1919, ch. 85, and the petitioner lodged a caveat and later filed this petition to enforce it. After the petition had been filed, the city redeemed the lands from the tax sale, thus restoring the petitioner's title and rendering the further prosecution of the petition unnecessary.

The matter came before me this morning in Chambers to dispose of the costs. It was urged on behalf of the petitioner that

MAN.

K. B.

GRAHAM v. ST. BONIFACE.

Mathers, C.J.K.B.

by redeeming the lands from sale the respondents had admitted that the sale was void upon some at least of the grounds alleged in the petition.

I do not find it necessary to express any opinion as to the effect of such redemption because the respondents' counsel admits that the mayor, who bid the lands in at the tax sale on behalf of the respondents, had not been authorised so to do by either a by-law or resolution of the council, as required by the charter. That the absence of such a resolution or by-law makes the sale void has been decided in *Tetrault* v. *Vaughan* (1899), 12 Man. L.R. 457, and in *Bannatyne* v. *Pritchard* (1906), 16 Man. L.R. 407.

This being one of the objections raised by the petitioner he would, had the petition gone to trial, have been entitled to judgment declaring the sale void. He is, therefore, entitled to the costs of the proceedings. *Judgment accordingly.*

ONT.

S. C.

ROXBOROUGH GARDENS OF HAMILTON v. DAVIS.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins, and Ferguson, JJ.A. January 19, 1920.

COMPANIES (§ IV G—125)—AGREEMENT TO SELL LANDS TO SYNDICATE—RESOLUTION AT MEETING AUTHORIZING—OFFICERS OF COMPANY MEMBERS OF SYNDICATE—CONFLICT OF INTEREST AND DUTY—ACTION TO SET ASIDE CONVEYANCE—REPLACING OF PARTIES IN ORIGINAL POSITIONS.

An officer of a company occupies the same position as a trustee, agent or other person occuping an office or place of trust and confidence, and he will not be allowed to place himself in a position where his interest and his duty conflict or where he may, without disclosure, make a profit out of his agency.

[*Cook* v. *Deeks*, 27 D.L.R. 1, [1916] 1 A.C. 554; *Transvaal Lands Co.* v. *New Belgium (Transvaal) Land & Development Co.*, [1914] 2 Ch. 488; Bowstead on Agency, 6th ed., paras. 48-53, Palmer on Companies, 10th ed., pages 192, 193, referred to.]

Statement.

APPEAL by plaintiffs from a judgment of Falconbridge, C.J.K.B., in an action to set aside a grant by the plaintiff company of all its lands to the defendant company, the Dufferin Land Corporation.

The judgment appealed from is as follows:

FALCONBRIDGE, C.J.K.B.:—The principal question of fact to be decided is, whether resolution No. 2, appearing on p. 40 of the minutes, etc., of the plaintiff company was in fact carried at the meeting held on October 16, 1917. It appears in the minutes signed by the defendant Petrie as secretary *pro tem.*

ONT.

S. C.

ROXBOROUGH GARDENS OF HAMILTON v. DAVIS.

If it was not carried, the defendant Petrie is guilty of both forgery and perjury, and it would require the cogent testimony which would have to be adduced to secure his conviction, if he were on his trial on those charges, to bring me to that conclusion. Several witnesses for the plaintiff, men of apparent respectability, vehemently deny that any such resolution was carried or even put to the meeting. But I place great reliance on the evidence of Fisher, manager of the Molsons Bank at Owen Sound, who appears as the seconder of the motion. I find as a fact that the resolution was passed. Giving the plaintiffs' witnesses credit for honesty in their testimony, I can only conclude that, in the confusion and excitement of a very heated meeting, they failed to realise that the motion was being put and carried.

In any event, it would be impossible to rescind this agreement. The parties cannot be restored to their original positions. Many of the lots have been sold, and purchasers have received deeds, and other changes have taken place.

I cannot find that any damages have been sustained. The purchase appears to be a liability and not an asset, and the defendants at the trial invited the shareholders who are supporting this action to come into the new company on the same footing as they (the defendants) are on, even offering to forego the commission, but that invitation has not been accepted.

The plaintiffs may have, at their own risk and expense, a reference to the Master at Hamilton as to the matters set up in the 10th and 11th paragraphs of the statement of claim. Save as to this, the action is dismissed. Some of the defendants' proceedings seemed to invite attack, and there will be no costs. If the plaintiffs go into the Master's office, further directions and subsequent costs will be reserved until after report.

C. S. Cameron, for appellants; *George Lynch-Staunton*, K.C., for respondents.

Meredith, C.J.O. Maclaren, J.A. Magee, J.A.

MEREDITH, C.J.O., MACLAREN and MAGEE, JJ.A., agree with FERGUSON, J.A.

Hodgins, J.A.

HODGINS, J.A.:—If the resolution which is said to justify the action taken by the defendants was passed "in the confusion and excitement of a very heated meeting," as put in the judgment of the trial Judge, it should be scrutinised with care. It would not be fair to give it any wider meaning than it can reasonably

ONT.

S. C.

ROXBOROUGH GARDENS OF HAMILTON v. DAVIS.

Hodgins, J.A.

bear, seeing that it is being used to bind a minority, actually present, who failed to realise that it was being put and carried. Looking at the notice for the meeting in question, it is to consider the sale of the assets of the company for $65,000, and "(2) the sale of a portion of the lands of the company at the rate of $6 per foot frontage and the payment of a commission of 10 per cent. of the sale-price thereof."

Having in view that notice, I think the resolution, as now construed, goes beyond it. The alternative was a sale of all assets at $65,000 or a sale of "a portion" at $6 per foot frontage. The defendants acted on the assumption that the authority "to sell any lots or group of lots" warranted a sale of all the lands. But the evident purpose of the notice and the resolution, even as phrased, is to confine the alternative sale to a portion only. This method of dealing had been recommended in 1916 as being a course much to be preferred to any other, so as to provide a fund for releasing lots sold from the mortgage.

To construe the resolution in the way desired by the respondents would be, under the circumstances disclosed here, to enable a majority to exercise a power or authority for their own benefit and not for that of the company as a whole. This cannot be done, nor can the authority be exceeded: *Allen* v. *Gold Reefs of West Africa Limited*, [1900] 1 Ch. 656, 671; *Brown* v. *British Abrasive Wheel Co.*, [1919] 1 Ch. 290.

The importance of full notice, where shareholders are to act upon it, and it is intended to bind absentees and those who have given proxies which are used at the meeting, is emphasised in *Baillie* v. *Oriental Telephone and Electric Co.*, [1915] 1 Ch. 503, and in *Pacific Coast Coal Mines Limited* v. *Arbuthnot*, 36 D.L.R. 564, [1917] A.C. 607.

To my mind the resolution, as entered in the minute-book, involved a radical change from a policy to sell all for $65,000 less a 10 per cent. commission and only a portion at $6, to one resulting in a sale *en bloc* at $6 a foot or $54,000, with a commission of 10% deducted from that sum. And I think this change cannot be supported by the wording of the resolution.

As to the position of the defendants, I cannot usefully add anything to the judgment of my brother Ferguson, with whose view I agree.

The situation of those who have paid moneys to sustain and help a failing venture is always a complicated one, where there are others interested. These last usually wait till something concrete is done to save it from complete extinction, and then come in and complain of those who acted and paid.

But that is the lot of majority shareholders who do not obey the strict law laid down in the cases cited by my brother, to which I may add *In re North Eastern Insurance Co.*, [1919] 1 Ch. 198.

They ought not to complain if the relief now given permits the minority shareholders to participate in the so-called plum, on payment of their share of the expenditure made by the defendants.

The appeal should be allowed.

FERGUSON, J.A.:—This is an appeal by the plaintiffs from a judgment of Falconbridge, C.J.K.B., dated September 19, 1919, whereby he dismissed the plaintiffs' claim to set aside a grant by the plaintiff company of all its lands to the defendant company. The conveyance is dated January 5, 1918, and was drawn by the defendant Petrie, then acting manager and solicitor for the plaintiff company, and was executed on behalf of the plaintiff company by the defendants Davis and Henry, acting as president and secretary-treasurer respectively. The consideration for the making of the deed is not stated in the document, but it is said to have been executed to complete an oral agreement of sale entered into by the plaintiff company, through the agency of Davis and Henry, acting by and under authority conferred upon them by one of two resolutions passed on October 16, 1917, at a special general meeting of the shareholders of the plaintiff company. Though there is a dispute as to who was the purchaser, it is abundantly clear that the same individuals, *i.e.*, Davis, Henry, and Petrie, represented the purchaser in the making of any contract that was made.

The appellants' contentions are: that resolution No. 2, under which Davis and Henry purported to act, was not submitted to or passed by the shareholders, or that, if any resolution of like purport was submitted or passed, the same is not accurately or truly recorded in the minutes; that any resolution passed, according to its true intent and meaning, authorised a sale of only a part of the lands and not of the whole of the lands; that it did not

ONT.

S. C.

ROXBOROUGH GARDENS OF HAMILTON v. DAVIS.

Ferguson, J.A.

authorise the payment or allowance of a 10% commission, and that such a commission is unreasonably large; that neither the resolution recorded in the minutes, nor the resolution submitted, authorised or was intended to authorise a sale to the directors, officers, or agents of the plaintiff company or to a corporation in which they or any of them were interested; that, under the notice calling the special general meeting, it was not open to the shareholders to pass a resolution authorising a sale of the whole of the lots at less than $65,000, nor a resolution authorising a sale to an agent or director or to a company in which they were interested; that, if any contract of sale was entered into, it was made by the plaintiffs' agents with themselves, without authority and without full disclosure and for their own profit, or was made with a company for which the plaintiffs' agents were agents, or in which they were directors, officers, and shareholders; that the defendant company took the conveyance with notice of these facts; and that, under such circumstances, the contract is voidable and should be set aside; or, in the alternative, that the individual defendants, being, at the time of the alleged transaction, their agents, should account to the plaintiffs for all profits, benefits, or advantages which they or any of them have received, and for any damage which the plaintiff company has suffered as a result of their breach of duty, and particularly should account for a commission of $5,438.40 allowed to the defendants and their associates for making the sale in question in this action, and for $1,000 of the capital stock of the defendant company which the defendant Petrie says was given to him, and for any other capital stock which the defendants or any of them had issued to them in the defendant corporation by way of gift or bonus or as consideration for the transfer of the plaintiffs' property to the defendant corporation.

The plaintiffs say further that the conveyance included parcels A, B, and C on the plan of the plaintiffs' lots, and that no sum was agreed to be paid for the frontage of these lots, as was required by the resolution; that the conveyance also included lots that were already under an agreement for sale, and on the purchase-price of which a considerable sum was still to be paid, which was not authorised.

ONT.

S. C.

ROXBOROUGH GARDENS OF HAMILTON v. DAVIS.

Ferguson, J.A.

Counsel for the respondents offered to reconvey the sold lands, but contended that parcels A, B, and C were properly thrown in to make up for a lack of frontage on lots shewn on the plan, in respect of which there existed a special agreement with the municipality, preventing, till certain work was done, the opening of parts of the streets shewn on the plan. The respondents contended also that the sale was not, as is now contended by the appellants, a sale by the plaintiffs to their agents, and a transfer by their agents to the defendant corporation, but was a sale direct from one corporation to the other, made by the plaintiffs' agents under the authority of the resolution entered in the minutes, and which the respondents say was duly passed; that the respondent corporation is an entity separate from the individuals who are shareholders in it, and is not affected by any irregularities in the proceedings of the plaintiff company, or with notice of any improper conduct on the part of the plaintiffs' agents; and that, consequently, the conveyance cannot be set aside; that the defendant corporation has so dealt with the property as to render it impossible to restore the parties to their original position.

The two resolutions referred to in the foregoing contention of the parties, read as follows:—

"The president, Mr. Davis, was in the chair.

"The notice calling the meeting was read and after some discussion it was

"Moved by Mr. Jonathan High,

"Seconded by J. S. Robertson,

"That the president and secretary-treasurer be and they are hereby authorised to sell the whole holdings of the company at the price of $65,000, and to pay a commission not exceeding 10 per cent. of the sale-price. The purchasers to assume all incumbrances as part of such price, and this company to pay all taxes and interest or permit purchasers to deduct the same from their purchase-money.

"Carried unanimously.

"Some of the shareholders expressing a doubt of the possibility of selling the property in accordance with the foregoing resolution,

"It was moved by Mr. Petrie,

"Seconded by Mr. Fidler,

"That the president and secretary-treasurer be and they are hereby authorised, in the event of the failure to sell on the terms

ONT.
S. C.
ROXBOROUGH GARDENS OF HAMILTON v. DAVIS.
Ferguson, J.A.

of the preceding resolution, to sell any lots or groups of lots at the price of $6 per foot, and to pay thereout a commission not exceeding 10 per cent. of the sale-price thereof, and that an effort be made to sell the north end lots first, if such a sale be found practicable.

"Carried unanimously."

The trial Judge found as follows (quoting the first three paragraphs of the reasons for judgment of FALCONBRIDGE, C.J.K.B., *supra*).

Of the 40 odd shareholders of the plaintiff company, the minutes shew that 11 attended the general meeting held at Hamilton on October 16, 1917; 9 of the 11 were called as witnesses. The trial Judge does not suggest that any of these 9 stated what he knew or believed to be untrue, yet 4 are positive that resolution No. 2 was not submitted or passed, while 4 say that some such resolution was submitted and passed; but, of these, only Petrie was able to pledge his oath to the wording of the resolution. The president, Davis, says that he did not read the resolution to the meeting. The ninth man favours the respondent's contention. It is in these circumstances that the Judge says that, if resolution No. 2 as entered was not carried, the defendant Petrie is guilty of both forgery and perjury. I am unable to concur in the finding of the trial Judge that a resolution in the very words recorded in the minutes was passed, or to agree in his view that to disagree with his finding requires us to conclude that Petrie has been guilty of either perjury or forgery. I prefer to believe that each of the witnesses was honest in his recollection and testimony, and that the dispute and difficulty arise from the informal nature of the discussion and proceedings and a misunderstanding of what was done or intended to be done, rather than to believe or find that any one witness or set of witnesses attempted to mislead the Court. I think each witness endeavoured to give accurately and truly his recollection of what he thought had been done.

Petrie's story is fortified by a record—not however made at the meeting or in his own handwriting, but made the day after the meeting by his stenographer, and then made by her on instructions given by Petrie from notes or memoranda made at the meeting. Unfortunately these original notes or memoranda are lost. That the resolution, as dictated by Petrie, records what he thought was the expressed intention of the meeting, I do not

doubt; but, under such circumstances, the record may, without lack of good faith on Petrie's part, record something differing materially in both wording and effect from that actually done or intended to be done by the shareholders.

The record says that the resolution as entered was carried unanimously; in the face of the denials and of the admitted controversy about the rate of the commission to be allowed to Robertson under resolution No. 1, and the reasons given for making him a special allowance, I cannot conclude that the shareholders at the same meeting knowingly assented, either unanimously or by a majority vote, to the payment of a 10% commission on the sale of the whole block of lots, at the sacrifice price of $6 per foot.

The books, documents and records of both the plaintiff and defendant corporations shew that it was not Petrie's habit to make and keep full and accurate records of the doings of either corporation; and, notwithstanding this record, I am satisfied that none of the shareholders at the meeting, not even Petrie there and then had a present intention to authorise a sale of the whole of the lands at $6 per foot, or to pay a commission on such a sale at the rate of 10%; and that, if the resolution recorded is expressed so as to permit of such a sale being made, and such a commission being paid, it does not truly record either what was done or intended to be done.

The idea of selling the whole lands at $6 per foot was not suggested either in the notice calling the shareholders' meeting or at the meeting. It was Henry's suggestion, made as part of his discussions of January 2 and 3, 1918, with Petrie, Davis, and Parks, and as a result of Petrie's opinion, then expressed, that the resolution recorded permitted such a sale being made, Henry and Davis then and there decided to acquire the plaintiffs' lands under the authority of that resolution. See Petrie's evidence, at p. 193 of the notes of evidence, where he says:—

"There was some question whether that resolution was sufficient to do it, and I expressed myself as being of the opinion that it was; that, even following that resolution, if we sold it out in three parcels, so long as the purchasers were willing to accept the situation among themselves, that would be good.

ONT.
S. C.
ROXBOROUGH GARDENS OF HAMILTON v. DAVIS.
Ferguson, J.A.

In no place does Petrie, nor do the other witnesses, suggest that the general meeting considered or intended, by the resolution there discussed and passed, to authorise a sale of the whole lands at $6 per foot frontage, or a sale to the selling agents named. All the circumstances shew that the company was in desperate circumstances; it needed money to pay arrears of both interest and taxes; the shareholders were being pressed to do something or authorise something being done to raise money to pay these pressing debts; and, in these circumstances, they authorised a sale of the whole lands at $65,000, and they may have authorised a sale of a part, at a greater sacrifice, represented by $6 per foot; but I cannot think that they considered or authorised a sale of the whole at $6 per foot, or a sale to their directors or agents.

A very careful perusal and consideration of the evidence and exhibits has led me to the following conclusions: that there was at the meeting of October 16, 1917, some discussion of a sale of a portion of the lots at $6 per foot frontage; that Petrie, as a result of such discussion, in good faith concluded that the majority, if not all, of those present approved of sales of parts of the lots at $6 per foot, and the payment of 10% commission on such sales, if made in the ordinary course of business, and that he endeavoured to express that authorisation in the resolution which he recorded; but that neither he nor those who took part in the discussion at the meeting intended at that time by the second resolution to authorise a sale *en bloc* with a 10% commission; that some of the shareholders present did not appreciate or understand that such a resolution was before the meeting or was passed; but, in view of the finding of the trial Judge, who had the witnesses before him, I am not prepared to say that a majority of that meeting did not consider and pass a resolution along the lines I have above set out; that, unless the defendant corporation can take and hold the position that it was an innocent purchaser, who dealt with the accredited officers of the company, and was not concerned in or fixed with notice of matters affecting the internal management of the company, the transaction attacked cannot be justified or supported, either on the resolution actually passed or on the resolution recorded. The transaction resulted in a transfer of all the plaintiffs' lands, including lands under agreement for sale; this, I think, was not intended or authorised, neither was it

intended or authorised that parcels A, B, and C should be sold at less than $6 per foot frontage; Petrie says they were thrown in to offset the effect of the agreement which prevented the present opening of a street. The resolution is silent as to terms of sale, yet it may be that it is wide enough to permit a sale for other than cash; but, where it provides that each foot frontage sold shall be paid for at $6 per foot, it cannot, I think, be contended that the agents were by that resolution authorised to sell or convey part of the lands for nothing.

However, the defendant company cannot plead innocence. The agents of the plaintiff company were and are the agents, officers, and shareholders of the defendant company. The same men negotiated for both the buyers and the sellers. Petrie was acting manager and secretary of the plaintiff company and director and secretary of the defendant company, and was solicitor for both. Davis and Henry were directors and agents of the plaintiff company and interested agents of the defendant company.

On January 3, 1918, when, the witnesses say, Henry announced the decision of himself and his associates to take over the plaintiffs' property under resolution No. 2, the defendant corporation, which had been incorporated under the Ontario Companies Act, R.S.O. 1914, ch. 178, for the purpose of being used to carry through the Robertson sale referred to in resolution No. 1, had as its shareholders only its 5 incorporators, and had on the same day as the charter is dated, *i.e.*, November 28, 1917, held its only meetings, at which the 5 incorporators were elected directors, and Crompton, Ogg, and Petrie were elected and appointed president, vice-president, and secretary-treasurer respectively. These directors passed a set of by-laws, and authorised the sale of stock to the extent of $20,000, and passed a resolution that the company would purchase the lands of the Roxborough Gardens at $65,000; yet no attempt had, on January 3, 1918, been made, and apparently no attempt has since been made, by the corporation, to comply with the requirements of Part VIII. of the Ontario Companies Act, or to obtain, under sec. 114 thereof, a certificate entitling it to commence business or to make concluded contracts.

The questions, "Who were the purchasers?" and "What was the contract?" were not put directly to any of the three witnesses

ONT.

S. C.

ROXBOROUGH GARDENS OF HAMILTON v. DAVIS.

Ferguson, J.A.

who could give this information, but the evidence is clear that any contract made was made by Davis, and Henry, for the plaintiffs, with Davis and Henry, either for themselves and their associates or for the defendant company, whose charter they intended to acquire.

Petrie, who was doing the solicitor work, and advising as such, in his letter of April 8, written to James Laird, of Owen Sound, who, with Davis and Henry, made up the board of directors of the plaintiff company, writes that the sale was made to A. Barons, who took up the Dufferin Land Corporation charter, and got his friends to join him.

At the trial, Mr. Petrie says:—

"The deal was put through—Mr. Barons and Mr. Henry arranged for me to turn over that property to them, and the deal was put through with the Dufferin Land Corporation.

"Q. Mr. Henry and Mr. Barons acquired the charter of the Dufferin Land Corporation. A. Yes. Q. The Dufferin Land Corporation got the property, did it? A. Yes. . . . Q. Mr. Barons was not present at the meeting which took place in your office in January of 1918? A. No. Q. At that very meeting Mr. Henry put up some money to take over this property. Q. Under this new deal? A. Yes. Mr. Parks was going to, but he did not, and Mr. Henry did put it up. Q. And then Mr. Henry decided to take up the property at that time? A. No, Mr. Henry communicated with Mr. Barons and reported that Mr. Barons had decided to go on and take it up."

Henry's account of what took place is found at page 261; and, after stating why he rejected the Robertson offer, and that he then considered with Petrie and Davis what was to be done, he says:—

"I communicated with Mr. Barons and Mr. Stewart—we had talked the matter over previously to coming down—providing Mr. Robertson's deal fell through we were going to drop out and let our money go. They said 'It is just this way, if you will stand in with your bond and stay in the company with us, and put more money in, we will go back in the company again—' this was Mr. Barons—he said, 'I would be willing to put more money in and all stand together and take the land over.' I said, 'I will go down and see.' So Mr. Barons purchased the property."

The defendant Davis was called by the defendants and in examination-in-chief, gives testimony as follows:—"Q. You are one of the stockholders in the Roxborough Gardens? A. Yes. Q. And you are one of the syndicate that bought the property, turned it over to this company? A. Yes, sir."

When such evidence is considered, along with the fact that no meeting of the defendant company was held until February 8, though the conveyance to the defendant company is dated January 5, and was registered on January 28; that the defendant company's directors and shareholders, other than Petrie, took no part in the negotiations; that there is no document shewing a contract between the plaintiff company and the defendant company; that the deed from one company to the other does not record the consideration or an agreement by the defendant company to assume and pay off the encumbrances; I think the proper conclusion is, that Henry and Davis and their associates, who were, all but two, shareholders in the plaintiff company, decided, without notice or communication to the plaintiff company or its body of shareholders, to take over the property under resolution No. 2, doing so on the advice of Petrie, also to acquire the charter of the defendant company, which was then nothing more than a shell, and to carry through their purchase by turning the property over to the defendant company in such a way as to secure repayment of the moneys they or some of them had already invested in the plaintiff company.

Between the meeting of October 16, 1917, and the making of the deed attacked, there was no meeting of the directors of the plaintiff company; Laird, the fellow director of Davis and Henry, was not consulted in reference to the sale alleged to have been made; and between November 28, when the defendant company was incorporated and organised, there was no meeting of that company's directors or shareholders till February 8, 1918, some weeks after the deed which is attacked had been executed and registered.

At the meeting of the defendant corporation's directors, held on February 8, stock was allotted to Davis, Miss Henry, Petrie, Barons, and other associates of Davis and Henry, and members of the old board were replaced by nominees of the new shareholders and Petrie was instructed to arrange for sales of these lands,

ONT.

S. C.

ROXBOROUGH GARDENS OF HAMILTON v. DAVIS.

Ferguson, J.A.

keeping in view the obtaining of an average price of $13 per foot. The difference between the sale-price of the plaintiff company and the proposed selling price of the new company is noticeable.

Another resolution passed at this meeting instructed that Henry be given a note for $8,000 to cover the indebtedness of the old company to him, which, it is recited, the new company had agreed to assume.

The statement of adjustments, found at page 45 of the minute-book of the plaintiff company, shews that the sale at the price of $6 per foot was not sufficient to take care of the incumbrances, taxes, and the commission, and to pay Henry's bond in full; it left a balance due on it of $1,889.01; yet at the first meeting of the new company it is recorded that the company in the purchase assumed Henry's claim, not for $6,630.43, as shewn in the adjustments, but for $8,000: the difference is not explained, but is, I think, made up of moneys Henry had advanced to the defendant corporation. See Exhibit 32.

Subsequently Henry received a note and bond charging against the lands of the defendant company all the moneys that were owing to him by the plaintiff company with interest, all the moneys he had advanced to the new company, the $1,000 he had paid in for stock standing in his daughter's name, and the commission on the sale, a total of $15,300 (Exhibit 63). The evidence and the report of the auditor (Exhibit 51) shew that at most only $8,000 has been paid for capital stock in the defendant company, though stock of the value of $15,000 has been issued, $1,000 of it to Petrie without any payment; no books were produced, and how the new shareholders received bonus stock or why they received it is not disclosed in the evidence, but there is only one way that such bonuses could be given, and that is by adding something to the price of the property which the syndicate turned over to the company; the way the auditor's report (Exhibit 51) is made up and the valuation he therein puts upon the lands indicate such a transaction.

All these circumstances strengthen me in the conclusion that a syndicate, which included among its members the plaintiff company's agents and officers, was the purchaser. Such a conclusion does not necessarily, mean that Davis, Henry, and Petrie thought they were doing or intended to do a wrong to the plaintiff

company or its shareholders. No doubt, when, early in January, they decided to take over the plaintiff company's property at $6 a foot, and to take into their syndicate or into the new company only those who were willing to contribute towards carrying the property, and to leave out those shareholders who were either unable or unwilling to risk new moneys in their land speculation, they reasoned that they should not be called upon to protect those who failed to protect themselves. Such a view is not without merit: it is a position which they might reasonably be expected to take. They desired to protect their own investments, but, in doing so, they did not think that it was fair, or that they were obliged to assume or to protect and carry the investment of the others. These men, however, were all in a fiduciary position which required them not only to protect themselves, but to protect as well their less fortunate associates, and in a position that required them not to allow their interest to conflict with their duty. I cannot help but think that, had Henry's personal interest, or what he thought was his personal interest, not conflicted with his duty to the plaintiff company and its shareholders, the Robertson sale would have been put through, but Henry's consideration of the Robertson transaction was directed to seeing what would be the result to him rather than to ascertaining what would be best for the plaintiff company and its shareholders; and, because he concluded that he was not sufficiently secured in the Robertson transaction, he rejected it, and proposed, promoted, and carried through the transaction now attacked, in which he and his associates were better secured, but by which the plaintiff company and its other shareholders lost all they had invested. Can it be that the agents or directors of the plaintiff company may, without consulting the company through its shareholders or directors, meet together and reject an offer of $65,000 because one of the agents or directors thinks his security will not be as good, and the same day or the day after agree with themselves to take over the property at a much lower price, and, by them or subsequently acquiring control of a charter of another company, take to themselves or to some of themselves security for at least what some of them had put into the old company, and to one, if not more, of themselves bonus stock in the new company, which, at its first meeting by its resolution, put a valuation on the property acquired

ONT.

S. C.

ROXBOROUGH GARDENS OF HAMILTON v. DAVIS.

Ferguson, J.A.

of not less than $13 per foot, when the price realised by the vending company was only $5.40 per foot, and then come into this Court and say that they did their duty by the plaintiff company; that the plaintiff company has suffered no damage, and that they received no benefits, or that the purchasing company for which they acted had not in law notice or knowledge of their acts, and that such a transaction cannot be rescinded. I think not—not at least in this case in which the sales agents were special agents acting under and pursuant to a special resolution, and under which, without notice or disclosure to their principals, they sold to themselves or to a syndicate or company in which they were interested; nor do I think that the defendant company, different entity though it be from its shareholders, is in any different or higher position than any other person who takes a conveyance from an agent or trustee, knowing that such agent or trustee is acting beyond his authority, or in breach of his duty.

There is no doubt that the defendant company, through its officers, agents, and solicitors, had full notice and knowledge of all the facts; and, in my opinion, such knowledge rendered the transaction and conveyance subject to the equities between the plaintiff company and the individual defendants.

I am not impressed with the view of the trial Judge that the parties cannot be restored to their original positions. The plaintiffs are ready and willing to pay to the defendants the moneys put up, said to be about $8000 and to take a reconveyance of the lands subject to such agreements of sale as the defendants have entered into, and I see no difficulty in directing this to be done. If the parties are unable to agree as to the amount to be paid, that can be ascertained by the Master.

The conclusions I have arrived at are, I think, fully justified by the facts and by the authorities dealing with, explaining, and illustrating the rule that the Court will not allow a trustee, agent, or other person holding an office or place of trust and confidence, to put himself in a position where his interest conflicts with his duty, or without disclosure to make a profit out of his agency. The books are full of authorities dealing with these propositions. They are well collected in Bowstead on Agency, 6th ed., under articles 48 to 53 inclusive, and in Palmer's Company Precedents, 11th ed., pages 192 and 193. Two of the latest decisions are *Cook*

v. *Deeks*, 27 D.L.R. 1, [1916] 1 A.C. 554; *Transvaal Lands Co.* v. *New Belgium (Transvaal) Land and Development Co.*, [1914] 2 Ch. 488. The opinions delivered in the *Transvaal* case deal not only with the rules and general principles governing the rights, duties, and obligations of agents and directors, but also with the effect of by-laws, regulations, or statutes limiting the general law, and the effect of notice to a purchasing company of breach of duty by such agents or directors and the right to rescind; and this case establishes that, unless and so far only as authorised by a company's articles or by-laws or by the statute governing the company, the board cannot make a binding contract in any other company in which a member of the quorum is interested; and that, if that company has notice of the irregularity, the first company may obtain rescission of the transaction, even after completion, provided that rescission is still possible; and also that, if the agents of the purchasing company are also agents of the selling company, the purchasing company is fixed with notice of anything of which its purchasing agents had notice.

There is nothing in the by-laws of the plaintiff company providing for dealings between the company and its directors, but sec. 93* of the Ontario Companies Act, R.S.O. 1914, ch. 178, makes provision for such dealings, and that section allows more latitude than most of the provisions found in the articles by which the English companies are governed. Section 93 declares that a director in one company shall not be deemed to be interested in

*93.—(1) No director shall at any directors' meeting vote in respect of any contract or arrangement made or proposed to be entered into with the company in which he is interested either as vendor, purchaser or otherwise.

(2) A director who may be in any way interested in any contract or arrangement proposed to be made with the company shall disclose the nature of his interest at the meeting of the directors at which such contract or arrangement is determined on, if his interest then exists, or in any other case at the first meeting of the directors after the acquisition of his interest, and if he discloses the nature of his interest, and refrains from voting, he shall not be accountable to the company by reason of the fiduciary relationship existing for any profit realised by such contract or arrangement; but no director shall be deemed to be in any way interested in any contract or arrangement, nor shall he be disqualified from voting or be held liable to account to the company by reason of his holding shares in any other company with which a contract or arrangement is made or contemplated.

(3) This section shall not apply to any contract by or on behalf of a company to give the directors or any of them security by way of indemnity.

ONT.

S. C.

ROXBOROUGH GARDENS OF HAMILTON v. DAVIS.

Ferguson, J.A.

a contract made with another company simply because he is a shareholder in such other company; and, had the transaction here attacked been a sale by the directors of the plaintiff company to the defendant company, that proviso in sec. 93 of the Ontario Companies Act might have protected the transaction by relieving these individual defendants from disclosing to the plaintiff company their interest. But this sale was not a sale by the directors. It was a sale by two specially authorised officers, Laird took no part in it and gave it no consideration; the exception in the general law provided for by the Ontario Companies Act does not cover that situation; and, if I be right in my view of the facts, this sale was not a sale by the plaintiff company to the defendant company, but was a sale to a syndicate of which the individual defendants were members, and the Ontario Companies Act does not protect that situation unless there has been a disclosure. The onus was on the defence to make out a case for the application of the exception to the general law: in this they have, in my opinion, failed.

A perusal of the *Transvaal* case, above referred to, establishes, I think, that, in the circumstances of this case, notice to Davis, Henry, or Petrie was notice to the defendant corporation, and that with such notice a decree for rescission may be made against the defendant company, unless some change in the ownership of the property involving the rights of innocent third parties has rendered rescission impossible. In this case there has been no subsequent conveyance of the properties: some agreements for sale have been made, and some payments have been made on account of these, but there is nothing to prevent the plaintiffs assuming the burden of and taking the benefit of these contracts of sale: they call for the payment of a much higher purchase-price than $6 a foot.

For these reasons, I would allow the appeal and direct that, on the plaintiffs undertaking to assume and carry out such agreements for the sale of lots as have been made by the defendant company and to pay to the defendant company all moneys which it has properly paid out or expended by way of payments on the registered incumbrances, on taxes, on putting the property in shape for sale, and in selling lots that have not been repaid by sales, and upon payment accordingly, the property and the

ONT.

S. C.

Ferguson, J.A.

agreements be vested in the plaintiff company: if the parties cannot agree upon this amount, that it be referred to the Master at Hamilton for inquiry and report.

The defendants should pay the costs of the action and of this appeal: further directions and costs should be reserved.

Appeal allowed.

ADAIR v. CANADIAN PACIFIC OCEAN SERVICES Ltd.

N. B.

S. C.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. February 20, 1920.

JUDGMENT (§ II A—60)—PETITION UNDER WORKMEN'S COMPENSATION ACT —FINALITY OF.

The decision of the Judge who hears the petition under the Workmen's Compensation for Injuries Act (N.B.) and amending Acts is final and conclusive provided the amount allowed to the claimant is not greater than is provided for by the Act. Partial and total dependence are, under the Act, on the same footing in regard to the compensation to be awarded where death results from the injury.

Statement.

MOTION by defendant to reduce an award to the plaintiff under the Workmen's Compensation Act, 4 Geo. V. 1914, ch. 34.

F. R. Taylor, K.C., supports appeal.

B. L. Gerow, contra.

The judgment of the Court was delivered by

Hazen, C.J.

HAZEN, C.J.:—The respondent brought a petition summarily under the Workmen's Compensation for Injuries Act, Con. Stats. N.B. 1903, ch. 146, and amending Acts, 4 Geo. V. 1914, ch. 34, and 8 Geo. V. 1917, ch. 34, to recover compensation to which she claimed to be entitled under the Act, for the death of her son, Stanley Reid, who was killed on February 4, 1918, while employed as a ship-labourer in loading grain into the hold of the steamer "River Araxes" at the port of St, John, by falling into the hold of the steamer. The petition was tried before the trial Judge, the right of the respondent to recover compensation being denied by the appellant for the following reasons:—1. The accident which caused the death of the deceased did not arise out of and in the course of employment. 2. The Canadian Pacific Ocean Services, Limited, were not at the time of his death the employers of the deceased. 3. The respondent was not a dependent within the meaning of the Act, so as to entitle her to compensation.

N. B.

S. C.

ADAIR v. CANADIAN PACIFIC OCEAN SERVICES LTD.

Hazen, C.J.

These questions of fact were all decided by Barry, J., who heard the petition, in favour of the respondent. He held *inter alia* that the respondent had succeeded in discharging the onus which the law cast upon her of establishing a partial dependency upon the earnings of the deceased, and he fixed the amount of compensation at the sum of $1,500, together with $100, costs of the application.

In the appellant's factum, part 3, under the head of "Argument," it is stated:—

> Under the provisions of the Workmen's Compensation Act respecting summary petitions to a Judge, the only question that can be a question of appeal is as to whether or not the Judge proceeded on a wrong basis as to the amount allowable. If the amount he awards is an amount authorized by the Act under the circumstances found by him, there is no appeal.

The question in this case, therefore, is confined to whether or not the Act authorized the trial Judge to award to a partial dependent an amount that had no relation to actual damage sustained, and might be greatly in excess thereof. The matter submitted to this Court, therefore, comes down to a determination of the question as to whether or not the trial Judge was authorized by the Act to award to a partial dependent the amount that he has, or that in making his award it was his duty to consider the actual damage sustained. 4 Geo. V. 1914, ch. 34, sec. 17, sub-sec. 1, says: "There shall be no appeal from the decision of such Judge" (meaning the Judge who hears the petition) "which shall be final and conclusive; provided the amount, if any, allowed to the claimant is not greater than is provided for by this Act." The Judge in awarding damages points out that in fixing the amount of compensation to be awarded in case of death, the Act makes no distinction between a partial and a total dependency, and I think no one can read the evidence without concurring in his view that a partial dependency has been established. The respondent in the course of her evidence said:—

> I feel safe to say that he (deceased) gave me about $400 a year, through work and cash and other help, that would be over and above board. In the July before he was killed he sent me $70. In September of the same year, he sent me over $60. Then he did work in the spring and fall which would be worth about what he would get away from home, say $65 or $75 a month. To employ a man to do the work Stanley did at home would cost about $75 a month and board.

The last year of his life she thinks he worked about 4 months at home. During the time he was working in town he always sent her money. The winter before his death, on two different occasions, he sent her about $75. That, with what he worked at home, she feels certain would bring the amount up to $400 a year. He always brought provisions or something with him that he paid something for, and that, she says, is one of the reasons Stanley did not leave any money when he died. He always gave all he could spare at the home, and during the 11 years since the respondent had married a second time, he had been assisting her steadily in the manner she indicated.

The Judge says that, while the respondent was subjected to cross-examination, the result of which seemed to cast a doubt on the accuracy of one of her statements, notwithstanding that he had no doubt that she was honestly endeavouring to present in its true colours the nature and extent of her partial dependency upon the generosity of her son, and that no one, in his opinion, who heard her testimony could doubt its truthfulness or hesitate to believe that, by her son's death, she had suffered a distinct pecuniary loss. The Judge, therefore, having found that the respondent was a partial dependent upon her son who had been killed in an accident which arose out of and in the course of his employment by the appellant, had nothing further to do but to deal with the question of damages. In order to do this it was necessary to consult sec. 1 (*a*), 8 Geo. V. 1917, ch. 34, being an Act to amend 4 Geo. V. 1914, ch. 34, being the Workmen's Compensation Act, Con. Stats. N.B. 1903, ch. 146, amended. The section reads as follows:—

(*a*) If the workman leaves any dependents who at the time of his death reside in Canada and are partially or wholly dependent upon his earnings, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, but not exceeding in any case $2,500; provided that the amount of any weekly payments made under this Act shall be deducted from such sum, and if the period of the workmen's employment for the said employer has been less than the said 3 years then the amount of his earnings during the said 3 years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer, but such compensation in no case to be less than $1,500.

In referring to this section, the Judge said that, although the deceased workman had worked but a couple of hours, having

N. B.

S. C.

ADAIR v. CANADIAN PACIFIC OCEAN SERVICES LTD.

Hazen, C.J.

worked a week he would have earned over $16, therefore, if he is entitled to compensation it is to the minimum sum fixed by the Act, viz., $1,500. He also points out that to put partial and total dependence on exactly the same footing in regard to compensation seems to be curious legislation. The Act certainly makes no distinction between dependents who are partially or wholly dependent upon the earnings of the deceased, and the respondent in this case, who has proved that she was a partial dependent, is entitled to quite as much compensation as if total dependency had been proved.

The respondent submits that the Judge was in error in holding that he had no discretion other than to award the sum of $1,500 to the respondent, and that this was an insufficient award, the evidence shewing that for a period of many years the deceased workman had been helping his mother, and that this being the case an award of $1,500, which is the minimum allowed by the law, is hardly sufficient, and that if it were open for counsel on behalf of the respondent, the latter would move the Court of Appeal to increase the amount.

In my opinion, however, the point is not open because of the provision which I have quoted before, that the decision of the Judge shall be final and conclusive, provided the amount allowed to the claimant is not greater than is provided by the Act.

It has been argued on behalf of the appellant that the amount awarded is excessive and that the trial Judge should have awarded compensation proportionate to the damage sustained by the respondent. I cannot agree with this view. A Judge in awarding damages is limited by the section of the statute which has been referred to and I do not think he has any discretion in the matter. In any event, in my view he cannot award an amount less than $1,500.

The appeal should be dismissed with costs.

Appeal dismissed.

WATCHINS MEDICAL Co. v. LEE.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. May 28, 1920.

PRINCIPAL AND SURETY (§ I B—10)—CONTRACT OF SURETYSHIP MISUNDERSTOOD BY SURETY—RELEASE.

The fact that a surety has misunderstood the contract he has signed does not release him from his contract of suretyship.

Statement.

APPEAL from the judgment of Walsh, J. Reversed.

F. C. Jamieson, K.C., for appellant.

H. A. Friedman, for respondent.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—This is an appeal from the judgment of Walsh, J., at trial without a jury. The action proceeded to trial only against the defendants Pawliuk and Au Coin. The defendant Lee did not defend. The trial Judge dismissed the action as against both the defending defendants. The plaintiff appeals only in respect of the defendant Au Coin. Lee was the principal debtor and it was sought to make Pawliuk and Au Coin liable as sureties. The claim is founded on a written contract consisting of two parts—first, a contract with the principal Lee and secondly an underwritten form of contract in the following words:—

In consideration of one dollar in hand paid by The J. R. Watkins Medical Co., the receipt whereof is hereby acknowledged, and the execution of the foregoing agreement by said company, and the sale and delivery by it to the party of the second part, as vendee, of its medicines, extracts and other articles and the extension of the time of payment of the indebtedness due from him to said company as therein provided, we, the undersigned sureties do hereby waive notice of the acceptance of this agreement and jointly, severally and unconditionally promise and guarantee the full and complete payment of said sum and indebtedness, and for said medicines, extracts and other articles, and of the prepaid freight, cartage and express charges thereon, at the time and place, and in the manner in said agreement provided.

(Witness sign here).	(Sureties sign here).
Witness as to signature of first	Sign in ink.
business men preferred surety:	His
George Harosym,	1st Surety. Ilia X Parliuk
Duvernay	mark.
	Occupation Farmer
Witness as to signature of second	P.O. Address, Kalcloud.
surety	2nd Surety. Stanislaus Au Coin.
A. J. Barnes, Duvernay	Occupation, Machinery agent
	P.O. address, Duvernay.

Do not sign as witness unless you see surety sign, or he informs you personally that the signature is his, and that he wrote it himself.

Note.—At the expiration of this agreement the company will be willing to make a new agreement with the party of the second part, provided the

ALTA.
S. C.
WATKINS MEDICAL CO. v. LEE.
Beck, J.

amount of his business and the conduct of the same under this agreement shall have been satisfactory to the company.
Form Canada, No. 2. (Over).
(Must be signed by references on other side.)
References sign here.
References must be well-known business men, one of whom must be a banker if possible. Where references do not know all the signers they will please give the names of those with whom they are acquainted.
..... and .....
his sureties, each to be over twenty-one years of age, and to be responsible and trustworthy in every respect.

(Signed as reference by)	(Occupation)	(P.O. Address)
Reference to second surety		S. Heryniss, Duvernay
Reference to first surety		S. Hernyiss "

Walsh, J., found that Pawliuk, who is a Ruthenian and does not understand English, and to whom an interpreter at Lee's instance undertook to explain the contract, did not appreciate its character and was not bound. As to the defendant Au Coin the trial Judge said:—

I think it quite clear from the evidence that the other defendant's signature to this contract was on the condition that there was to be at least another surety. Upon the evidence, I am satisfied that his idea as conveyed to him by Lee and by the wording of the contract itself was that his liability was to be secondary to that other guarantor, and that it was only after the plaintiff's remedies against the principal debtor and first surety were exhausted that he would be under any liability at all. But even if I am wrong as to that, and even if that is not sufficient to relieve Au Coin from his liability it is obvious that he entered into his contract of suretyship upon the understanding and upon the condition that there was to be another surety. Whether that other surety was to be prior so far as liability to him is concerned or not, there was to be another surety. As a result of my finding with respect to Pawliuk, there is not and never has been another surety. The condition therefore upon which this man executed his surety has never been fulfilled.

It is with regret that I find myself unable to agree with the view taken by the trial Judge.

I think there is not enough on the face of the form of contract —which in fact is a printed form prepared by the plaintiff company—to suggest as a reasonable construction of the contract of suretyship that the "second surety" should be liable only after the remedies against the "first surety" should be exhausted. If the form were ambiguous and such a construction were a reasonable one, then I think, had it been so construed by the surety, the creditor would have been bound by the surety's construction—this by the application of a well-recognized principle.

So far as the defendant Au Coin may have been misled by the representations of Lee, the principal, as to the meaning and effect of the document, the plaintiff company, the creditor, I think is not responsible for such misrepresentations, there being an absence, I think, of evidence which would entitle us to infer that Lee was the agent of the company in procuring the contract. One can well imagine a case in which the principal might be the agent for the creditor in procuring a bond, but the only circumstance we have here is that the plaintiff company sent its standing printed form of contract to Lee for the purpose of signature by himself and such two sureties as he might secure and of whom he might secure references calculated to lead to their acceptance by the company. That it seems to me is not sufficient.

The second ground put by the Judge could also it seems to me be given effect to only if the agency of Lee were established.

In 32 Cyc., title: "Principal & Surety," page 64, para. (b) it is said: "Fraud practised by the principal alone upon the surety will not affect the liability of the latter, as no duty is imposed on the obligee to seek out the sureties and ascertain whether they have been misled."

In 27 Am. & Eng. Ency. of Law, title: "Suretyship," page 444, para. (b) it is said: "Where fraud is practised by a principal without the knowledge of the creditor, the obligation is binding upon the surety."

Again in 32 Cyc., page 58, para. c., it is said:

> A contract is void as to a person whose signature as surety has been forged, but it is not a defence to a surety that he was induced to sign an instrument on the supposition that a prior signature thereon was genuine. . . . The forgery of the signature of a co-surety will not affect the liability of a surety, whether such forged signature was upon the instrument at the time he executed it or afterward was placed there, unless the creditor takes the instrument with notice of the facts.

And in 27 Am. & Eng. Ency., page 445, para. (2), it is said: "A surety may be held liable to the obligee of a bond or the holder of a promissory note although the name of a co-surety to the instrument is a forgery."

The present case—one in which the co-surety had actually signed and was apparently bound and was relieved only on the ground that he supposed he was signing an instrument of an entirely different character—is one in which it seems to me the

ALTA.

S. C.

WATKINS MEDICAL CO v. LEE.

Beck, J.

position of the creditor is not less favourable than in the case of fraud or forgery.

Of course, the case is quite distinguishable from the case of an instrument which is in truth incomplete and its incompleteness is indicated upon its face, or is brought to the knowlege of the creditor by extraneous circumstances for the reasons indicated, I am of opinion that the appeal should be allowed with costs and judgment be entered for the amount claimed with costs against the defendant Au Coin.

Appeal allowed.

ONT.

S. C.

REX v. KAPLAN.

Ontario Supreme Court, Meredith, C.J.C.P. February 17, 1920.

INTOXICATING LIQUORS (§ III I—91)—TRIAL OF OFFENDER—AMENDMENT OF INFORMATION—TIME IN WHICH PROSECUTION MUST BE COMMENCED—AMENDMENT NOT WITHIN TIME LIMIT.

Section 78 of the Ontario Temperance Act, 6 Geo. V. 1916, ch. 50, gives the magistrates power to amend an information under sec. 41 of the Act but does not repeal the provision limiting the time within which prosecutions must be begun, and a conviction on an amended information which is not within the limitation is bad and will be set aside.

Statement.

MOTION to quash a conviction of the defendant by two magistrates for an offence against the Ontario Temperance Act.

P. Kerwin, for the defendant.

Edward Bayly, K.C., for the magistrates.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The conviction is attacked on three grounds:—

1. That the Police Magistrate had no jurisdiction in the matter.

2. That the prosecution was not begun within three months after the commission of the offence.

3. That the accused was not convicted or punished upon the evidence adduced at his trial but was convicted or punished upon statements made to the Police Magistrate not under oath or at the trial.

The first objection has no force, because the Police Magistrate was *ex officio* a Justice of the Peace and acted in that capacity only, with another Justice of the Peace, the two together having jurisdiction.

The second objection appeared to me, upon the argument of this motion, to be plainly a fatal one, but time was taken for a more careful consideration of the case *Rex* v. *Ayer* (1908), 17 O.L.R. 509, referred to by Mr. Bayly, before determining the question.

The information was laid on the 18th November, 1919, and the charge made in it was that the accused, on or about the 15th September, 1919, did unlawfully give liquor to two persons named, and to others, in a place other than in the dwelling-house in which he resides, contrary to the provisions of sec. 41 of the Ontario Temperance Act.

At the trial, on the 30th December, 1919, the information was amended so as to charge that the accused did, on the 15th September, 1919, have or give liquor to two persons named, and to others, in a place other than in the private dwelling-house in which he resides, without having first obtained a license under the Ontario Temperance Act, contrary to sec. 41 of the said Act.

The grammatical inaccuracy of the amendment—"did unlawfully have . . . liquor to . . . and to others"—ought not to have occurred; but it does not obscure the intention, and it is corrected in the conviction.

And the conviction otherwise is in the words of the amended conviction.

Section 61 of the Act provides, in sub-sec. 2, as amended by the Act of 1919, 9 Geo. V. ch. 60, sec. 19, that "All informations or complaints for the prosecution of any offence against any of the provisions of this Act, shall be laid or made in writing, within three months after the commission of the offence . . ."

It is quite obvious that the charge of having liquor was not thus laid or made, though that of giving liquor was: but it is said that sec. 78 of the Act gave power to the magistrates to make the amendment: so it did, being wide enough to permit the substitution for the offence charged in the information of any other offence against the provisions of the Act: but that goes only half way towards supporting the conviction; the other half must be a contention that this power to make a new charge in effect repeals the provision of the Act limiting the time within which prosecutions shall be begun.

ONT.
S. C.
REX
v.
KAPLAN.
Meredith, C.J.C.P.

It is quite right to say, as was in effect said in the case of *Rex* v. *Ayer*, that full effect should be given to the provisions of the Act respecting the amendment of an information; but it may be said, with even greater force, that full effect should be given to the provisions of the Act respecting the time within which information or complaint must be laid or made: and there seems to me to be no difficulty in giving full effect to each; that there is no good reason for bringing them into conflict the one with the other. A new charge may be made, but it must be made within the three months: see *Rex* v. *O'Connor* (1912), 3 D.L.R. 23, 3 O.W.N. 840, 20 Can. Cr Cas. 75.

The conviction, therefore, for having liquor is bad; and, as there is no certain conviction for giving liquor, it is altogether bad. It is not for having *and* giving, but is for having *or* giving; so that if the one fall the other is without support.

So, too, I have no doubt, the conviction in the alternative form is bad. Convictions must be certain, for various obvious reasons.

The Act gives much latitude in the preliminary proceedings: under sec. 75 of the principal enactment, several charges of contravention of its provisions committed by the same person on the same day may be included in one information or complaint; and there may be one conviction for several offences accordingly: sec. 98. Under sec. 76 of the principal Act as amended by sec. 29 of the Act of 1917, 7 Geo. V. ch. 50: "Any offence may be charged in the alternative where such alternative is referred to in the same section:" but I have found nothing, and nothing has been referred to, authorising a conviction in the alternative: it would be extraordinary if there were any such power. So that, apart from the question of time, I cannot think that this conviction, being in the alternative, could be sustained. There is, however, nothing in effect startling or new in these provisions: it is all embraced in the common practice of trying the accused person at the one time on several counts in the one indictment. They afford no excuse for uncertainty in the conviction.

On the last objection to the conviction: it seems to me to be quite plain, from the words of the Police Magistrate in giving reasons for the conviction and punishment of the accused, that the penalty, if not the conviction, was based very much upon

statements made, or information obtained, to or by the Police Magistrate out of court. Shorthand notes of the trial were made, at the magistrates' instance, and they contain nothing which gives any kind of justification for these observations made by the Police Magistrate, at the close of the trial, which appear in the notes of the trial: "We could fine as high as $1,000 on this case, and I suppose if we fined the $1,000 Mr. Kaplan wouldn't be out a cent on the whisky business. That is my opinion. If Mr. Kaplan is willing to run chances of running a whisky business in a town where there is no license and to run chances of being caught by the inspector, or some detective or other person, he must not blame the parties that catch him or that fine him in the whisky business at all." "Now if Mr. Kaplan is willing to stand chances of the law and sell openly, as I understand he said he would not be afraid of anybody catching him, if he has a mind to stand chances, he will have to stand the chance and run the risk of the fine, and that fine up to $1,000." Affidavits filed in support of this application, and which are unanswered, add to these words, words to the effect that the Police Magistrate could act upon things which came under his own observation. I can come to no other conclusion, from all the circumstances of the case, than that the Police Magistrate went out of his own court into another rather to convict than to try the accused: and bias is most out of place in a judicial officer.

The whole story as disclosed at the trial was that at a farm "bee" there was a bottle of whisky from which all present drank at one time or another: and one witness only, a witness who admitted that he was on bad terms with the accused, said in effect that the bottle had been brought there by the accused, who was one of the workers at the "bee."

As every one admitted having drunk from the bottle, and as, under sec. 41, sub-sec. 1, of the principal Act, as amended by sec. 10 of the Act of 1917, 7 Geo. V. ch. 50, "Any person who drinks liquor in a place where such liquor cannot lawfully be kept shall be deemed to have liquor in contravention of this section," that is, sec. 41 of the principal enactment, it is extraordinary that the accused was not convicted of "having liquor," of having committed which offence, under this enactment, there

ONT.

S. C.

REX v. KAPLAN.

Meredith, C.J.C.P.

could be no doubt; and the penalty being the same as for "giving liquor" under sec. 41.

It ought not to be needful to say, though evidently it is: that no one should be convicted of an offence not proved because the magistrate may think that, if not guilty of that particular offence, he has been guilty of others, and should be punished anyway: nor that the penalty should not be increased because of other real or imaginary offences with which he is not charged.

The conviction may, and should be, in my opinion, quashed on this ground also: see secs. 101 and 102 of the principal enactment: the conviction cannot be amended, for this Court has no power to try the case and impose a proper fine or other punishment, the minimum of which fine is $200 and the maximum $1,000.

Conviction quashed.

ALTA.

S. C.

MARSHALL WELLS ALBERTA Co. Ltd. v. ALLIANCE TRUST Co.

Alberta Supreme Court, Appellate Division, Stuart, Beck and Ives, JJ. March 31, 1920.

MORTGAGE (§ II—30)—LAND TITLES ACT—REGISTRATION OF MORTGAGE—REGISTRATION OF EXECUTION—MORTGAGE MONEYS PAID WITHOUT NOTICE OF EXECUTION—LIABILITY.

Under the Land Titles Act (Alta. Stats. 1906, ch. 24) an execution and a mortgage are alike in that each is a statutory charge upon land. Each charge takes its priority according to registration and binds to the extent of its statutory authority, and a mortgagee of a mortgage registered prior to an execution is protected in regard to advances made after registration of the execution if he has no actual notice of such execution.

Statement.

APPEAL by plaintiff from the judgment of Harvey, C.J., in an action for a declaration that the plaintiff's execution has priority over a certain registered mortgage. Affirmed.

The judgment appealed from is as follows:—

On October 9, 1913, the defendant Gordon gave to his co-defendant, Alliance Trust Co., a mortgage on certain property in Fort McMurray for $30,000. The mortgage was registered on October 10, and on October 28, a cheque for $25,000, the full amount that was to be advanced, was sent by the trust company to one Bennett, who held a power of attorney from Gordon. On the following day he endorsed the cheque as attorney, and deposited it in the bank. There were numerous executions registered against the land prior to the mortgage, which apparently were paid out of this money. On October 29, the day on which

ALTA.

S. C.

MARSHALL WELLS ALBERTA CO. LTD. v. ALLIANCE TRUST CO.

Bennett deposited the cheque, plaintiffs' solicitors wrote a letter to him advising him that they had, on behalf of the plaintiffs, signed judgment against Gordon, and requesting payment out of the moneys being advanced if he were acting for the mortgage company, and if not the agent for the mortgage company requesting information as to who was. Mr. Bennett apparently referred them to Messrs. Hyndman, Milner & Matheson, for on November 3 they write them enclosing a statement of the amount required to satisfy the executions in their hands, which they say is at the request of Mr. Bennett. It appears from the records of the Land Titles Office that an execution for the last judgment had been registered on October 25. Messrs. Hyndman & Co., on November 4, write asking further particulars, and intimating that there may not be sufficient money to pay all the amounts chargeable against the defendant. It does not appear what happened after that until a letter from plaintiffs' solicitor to the trust company direct, on February 14, 1914, notifying them of the execution and claiming priority to the mortgage, though registered after it. This letter was acknowledged, and then there is silence, as far as the material before me shews, until June, 1918, when an action was begun for a declaration that the execution has priority over the mortgage though registered subsequently. The matter came before me more than a year ago, but owing to the absence of some of the persons concerned, by reason of the war and for other causes, it has been delayed to the present time.

Upon the first argument, it was contended on behalf of the plaintiffs that the mortgage company had express notice of their claim under their registered execution before the mortgage moneys were advanced, and that it would amount to a fraud to advance the moneys without giving effect to their claim. On the material then before me there seemed much to support the contention as far as it related to fact, and it seemed entitled to considerable weight as far as the law was concerned, though the contention on behalf of the defence was that the time of registration was all that could be considered. The material which has been supplied since then, however, puts a different appearance on the facts. Mr. Bennett and Mr. Hyndman both swear that

ALTA.

S. C.

MARSHALL WELLS ALBERTA CO. LTD. v. ALLIANCE TRUST CO.

they represented Gordon only and not the mortgage company, and if that is so there clearly is no express notice to the mortgagee of the plaintiff's execution shewn until after it had advanced the money. At first it seems most unlikely that a mortgage company would advance $25,000 upon a property against which there were a great many executions, and leave it to the good faith of the mortgagor to use the money first in discharging these encumbrances, but of course one can see that the relationship between the parties would be of great importance. Mr. Bennett says that he personally, on behalf of the mortgagor, negotiated with the manager and directors of the mortgage company for the loan, and that by reason of the speculative character of the property is was agreed that there should be a bonus of $5,000 in addition to the interest, and that he agreed to see that the executions were paid off. The cheque was sent to him, and when it is known that he was a brother of the president of the mortgage company it is quite easily understood that the mortgagees might feel quite satisfied in trusting him to carry out his engagements, though in no way their agent. I am unable to conclude therefore on the evidence before me that the mortgagees had any express notice of the registration or even the existence of this execution before they advanced the mortgage moneys. My great difficulty, however, has been to determine exactly what is the right of a mortgagee upon the registration of his mortgage, and before any moneys are advanced and what is the extent of his charge on the land.

Sec. 43 (*e*) of the Land Titles Act 1906 (Alta.), ch. 24, provides that the land mentioned in any certificate of the title is by implication subject to "any . . . executions against . . . the owner of the land which have been registered and maintained in force against the owner." It seems from this that from and after October 25 the land of the defendant Gordon was subject to the plaintiff's execution.

In *Jellett* v. *Wilkie* (1896), 26 Can. S. C. R. 282, the Chief Justice in delivering the judgment of the Court at p. 290 points out that the execution creditor has a charge upon whatever beneficial interest the execution debtor has. He also points out at p. 291 that the execution operates as a caveat or warning "to

persons who might subsequently purchase . . . from the execution debtor, that he could only sell or transfer an interest subject to the lien of the writ," and adds, "it follows therefore that the rights of prior parties remain as they were before the execution was registered."

This still does not determine what was the beneficial interest of the debtor which was charged by the execution on its registration before any moneys were advanced.

Sec. 23 provides that registered instruments "shall be entitled to priority the one over the other according to the time of registration and not according to the date of execution . . . and so soon as registered every instrument shall become operative according to the tenor and intent thereof, and shall thereupon create, transfer, surrender, charge or discharge, as the case may be, the land or the estate or interest therein mentioned in the instrument." And sec. 41 also provides that upon registration of any instrument "the estate or interest specified therein shall pass, or, as the case may be, the land shall become liable as security in manner and subject to the covenants, conditions, and contingencies set forth and specified," etc.

There seems no doubt from these sections that the mortgage became effective upon its registration, which was prior to the registration of the execution, but effective for what purpose and to what extent? The sections say it shall operate "according to its tenor" or to make the land "liable as a security," and the question at once arises, security for what?

A transfer on registration operates at once to put an end to the interest of the transferor, but a mortgage is entirely different, and it affects the beneficial interest of the mortgagor in the land to a smaller or greater extent according to the circumstances. It seems perfectly clear that if no money were ever advanced while the title would be clouded by the registration of the mortgage the beneficial interest of the mortgagor would not be affected. It is surely a security only for the amount of the indebtedness of the mortgagor. Whatever the inchoate right or contingent interest of the mortgagee may be before the moneys are advanced I cannot see how the mortgage can be held to charge the land with the payment of, or make it se-

ALTA.

S. C.

MARSHALL WELLS ALBERTA CO. LTD. v. ALLIANCE TRUST CO.

curity for, any moneys until such moneys are advanced, and if they are advanced the land remains charged with, and security for only so much as remains from time to time, unpaid. I am by no means satisfied therefore that though registered prior to an execution a mortgage will be entitled for all purposes and to the full extent to priority over the execution. This also seems to have been the view of Scott, J., in *Re Love and Bilodeau* (1912), 7 D.L.R. 175. In that case the execution was prior in time of registration to the mortgage but the land being a homestead the execution did not charge it, and the mortgage did, but the Judge expressed the opinion that if the land ceased to be a homestead and thereby lost its exemption from the execution before all the mortgage moneys were advanced, the execution might be postponed to the mortgage only to the extent of the moneys advanced.

In *Hopkinson* v. *Rolt* (1861), 9 H.L. Cas. 514, 11 E.R. 829, 5 L.T. 90, it was held that a mortgagee under a mortgage providing for further advances could not claim priority over a subsequent mortgage in respect of any further advances made after express notice of the second mortgage.

In *West* v. *Williams,* [1899] 1 Ch. 132, 79 L. T. 575, it was held that the same rule applied though there was a covenant by the first mortgagee to make the further advances.

In *Robinson* v. *Ford* (1914), 19 D.L.R. 572, 7 S.L.R. 443, the Supreme Court of Saskatchewan *en banc* held that the rule was applicable to our system of registration of titles upon the principle of fraud.

The converse position was presented in *Pierce* v. *Canada Permanent Loan & Savings Co.* (1894), 24 O.R. 426; 25 O.R. 671, and (1896), 23 A. R. (Ont.), 516, in which the further advances had been made by the mortgagee after the registration of a second mortgage but without express notice or any knowledge of it. It was held by the trial Judge that the second mortgage was prior as regards the advances made after its registration. This was reserved on appeal by a majority of two to one, and on a further appeal to the Court of Appeal the latter decision was affirmed with one dissenting Judge upon the reasons given in the judgment appealed from. An appeal to the Supreme Court

of Canada was launched, but not proceeded with, and I cannot find that the decision has been since questioned or adversely criticised.

Ferguson, J., the trial Judge, 24 O.R. at p. 431, in his reasons for holding the second mortgage to have priority as from its registration said: "Such registration [of it] must in this view be considered notice of it to the company at the time of their acquiring further interests in the property by making the further advances on their mortgage."

Boyd, C., in his reasons for reversing the trial Judge, on the other hand took a quite opposite view when in 25 O.R. at p. 679 he said:—

> Looking at the Ontario Registry Act, R.S.O. (1887), c. 114, the provision is "that the registration of any instrument under the Act shall constitute notice of the instrument to all persons claiming any interest in the lands subsequent to such registration." That does not hit the present case. The company claims interest in the lands under a prior mortgage carrying the legal estate, and the fact that advances were made on this first mortgage subsequent to the registration of a second mortgage is not contemplated or covered by the statute.

It seems to have been the opinion of the majority of the Court that the legal estate was vested in the mortgagee by the mortgage for the purpose of securing it for all moneys advanced under its terms and that while its interest varied with the subsequent advances no new interest within the meaning of the Registry Act was acquired by such advances. Now it is apparent that between the Ontario system and ours two important differences exist. In the first place, under our system the legal estate is not vested in the mortgagee, and in the second, registration is not merely notice but in itself creates interests. I think it may safely be taken without argument as plain that an execution creditor's rights are not superior to those of a mortgagee who makes an immediate advance upon the security of the mortgage, and that the right of a mortgagee in advancing the first principal moneys of a mortgage cannot be less than those of one making later and further advances under the terms of the mortgage. Boyd C., quotes Lord Blackburn as saying in *Bradford Banking Co.* v. *Briggs* (1886), 12 App. Cas. 29, at p. 36, that:—

> The first mortgagee is entitled to act on the supposition that the pledgor who was owner of the whole property when he executed the first

ALTA.

S. C.

MARSHALL WELLS ALBERTA CO. LTD. v. ALLIANCE TRUST CO.

mortgage continued so, and that there has been no such second mortgage or pledge until he has notice of something to shew him that there has been such a second mortgage, but as soon as he is aware that the property on which he is entitled to rely has ceased so far to belong to the debtor, he cannot make a new advance in priority to that of which he has notice.

And he adds for himself on p. 676 (25 O.R.):—

In the absence of notice (*i.e.*, notice which gives him real and actual knowledge, and so affects his conscience), the mortgagee is entitled to assume and act on the assumption that the state of the title has not changed. That protection is given to him by virtue of the Registry Act as well as by the doctrine enunciated in *Hopkinson* v. *Rolt*, 9 H.L. Cas. 514, 11 E.R. 829, until he is made aware of a change, not by the hypothetical operation of an instrument registered subsequent to his, but by a reasonable communication of the fact by the one who comes in under the subsequent instrument.

Otherwise consider the consequences. Before making any subsequent advance the first mortgagee would need to have telegraphic or other electrical advice as to the state of registration on the land each time he paid, for if, before the payment, some transfer from the mortgagor intervened his advance would be postponed to the claim of the new comer.

I think too much reliance ought not to be placed upon the argument of inconvenience because the Legislature can always obviate that, but it is entitled to some weight; and, in addition to what is pointed out by the Chancellor, reference may be made to the position of a purchaser of a mortgage on land upon which an execution is registered subsequent to the mortgage. He has no possible way of assuring himself that the mortgage moneys were all advanced prior to the registration of the execution. The execution creditor in most cases could have no personal knowledge, and consequently would not be in a position to make an admission which would bind him, though of course he could say whether he had given express notice of his execution. A mortgage under such conditions would be practically unsaleable.

Hogg, on the Australian Torrens System, says that the rule under the Torrens System is the same as that declared in *Pierce* v. *Canada Permanent Loan & Savings Co., supra.* He states, p. 963:—

Further advances made by a mortgagee to his mortgagor may frequently, under the general law, be tacked on to the original mortgage, so as to exclude an intermediate incumbrancer. Under the Torrens System this can only happen when by the terms of the original mortgage further advances may be made to the mortgagor. If the mortgage contains no such stipulation, a second mortgagee is entitled to rely on the register as

he finds it, and the only incumbrance prior to his own registered mortgage will be the amount properly due in terms of the first mortgage. If, however, the first mortgage does authorize further advances, the first mortgagee may, in the absence of notice and notwitstanding a caveat disclosing the existence of a second unregistered mortgage, make further advances to the mortgagor which will have priority over any subsequent mortgage; and the fact that such subsequent mortgage was actually registered would seem to be immaterial.

The case to which he refers as authority is not in the library, but the digest indicates that it is the judgment of a single Judge and probably the opinion of Hogg would be entitled to equal weight with it.

The terms of sec. 77 of the Land Titles Act are of some importance in regard to the claim under an execution though, of course, not material to a claim under a mortgage. That section provides that an execution shall not bind lands until registered with the registrar:

> But from and after the receipt by him of such copy no certificate of title shall be granted and no transfer, mortgage, encumbrance, lease or other instrument executed by the execution debtor of such land shall be effectual except subject to the rights of the execution creditor under the writ while the same is legally in force; and the registrar on granting a certificate of title and on registering any transfer, mortgage or other instrument executed by the debtor affecting such land shall by memoranda upon the certificate of title in the register and in the duplicate issued by him express that such certificate, transfer, mortgage, or other instrument is subject to such rights.

It is to be observed that this section, while declaring the rights of the parties, does so with reference to the registration of documents and the acts of the registrar. One can see that the "transfer, mortgage, etc., executed by the debtor" which are to be effectual only subject to the execution creditors' rights, which are not defined, may be (1) instruments executed after the registration of the execution, or (2) instruments registered after, no matter when executed, or (3) all instruments no matter when executed or registered even if before the execution is registered, but in the latter case, only affected after the registration of the execution. Unless they include the last the plaintiff can get no benefit from the section.

Having regard to the fact that the section is dealing largely, if not primarily, with acts of registration, and the registrar's

ALTA.

S. C.

MARSHALL WELLS ALBERTA CO. LTD. v. ALLIANCE TRUST CO.

duties which are to be performed upon registration I am of opinion that the construction which should be placed upon it is the one which limits it to registration, or in other words that the rights which are made subject to those of the execution creditor are such rights as arise under instruments registered after the registration of the execution, and that that should be deemed to be the extent to which the legislation intends to protect the execution creditor. This is almost the only view which is consistent with the provision that instruments are to have priority according to the times of registration and is in harmony with the principles declared in *Pierce* v. *Canada Permanent Loan & Savings Co., supra*, and the authorities upon which it relies.

If I had come to a different conclusion I should have had to consider whether I could dispose of the case without the presence of another party whose interest might also raise other considerations, for it appears that the beneficial interest in the mortgage has been assigned, but having come to the conclusion I have I need not concern myself with that.

The application of the plaintiff and therefore the action will be dismissed with costs.

C. C. McCaul, K.C., for appellant; *H. R. Milner*, for respondent.

Stuart, J.

STUART, J.:—I think this appeal should be dismissed with costs. After careful consideration of the points involved, I have arrived at reasons for my conclusion which are perfectly satisfactory to my own mind, however they may strike others.

The facts are sufficiently set forth in the judgment of the Chief Justice.

I think that undoubtedly the first enquiry to be made is as to what was the effect of the registration in the Land Titles Office on October 27 (or 25) 1913 of the writ of *fi fa* lands and upon what that process attached. I have no doubt that it affected only legal interests of the debtor in land with, of course, such equitable interests as were covered by his legal interest. I use the term "legal" here as meaning any interest which a Court of law as distinguished from a Court of equity will recognize, and as including both estates at common law and interests which have a statutory origin. And I have also no doubt that

ALTA.

S. C.

MARSHALL WELLS ALBERTA CO. LTD. v. ALLIANCE TRUST CO.

Stuart, J.

the writ did not and could not reach any merely equitable interest where the legal interest, against the holder of which the owner of the equity could proceed only in equity to enforce his rights, was outstanding in a third party. It is true that under sec. 84 of the Land Titles Act, 1906 (Alta.) ch. 24, the execution credit or can file a caveat, but that only constitutes notice to persons subsequently dealing with the registered owner. The mere *fi fa* lands itself certainly would not attach upon the mere equitable interest of the debtor. After filing the caveat the creditor could proceed by equitable execution, that is, by the appointment of a receiver. That, however, is a proceeding in equity, and rests upon the very assumption that the interest cannot be reached by the strictly legal process. It was only in 1917 that the statute was amended so as to make purely equitable interests in land exigible under *fi fa*. How this procedure is to be worked out under our Land Titles system where mere equitable interests do not appear on the register and are not registerable at all, I feel some difficulty in understanding.

I think, therefore, that the writ filed on October 27 attached only upon such interests in land of the debtor as were covered by a legal estate or interest, but of course that it caught all equitable interests up to the extent of the legal interest, though no further. *Samis* v. *Ireland* (1878), 4 A.R. (Ont.) 119. *Kerr* v. *Styles* (1879), 26 Gr. 309.

Now the debtor Gordon was the registered owner of an estate in fee simple in the land in question. Disregarding the mortgage, the writ no doubt caught that estate but only to the extent of his equitable interest. *Jellett* v. *Wilkie* (1896), 26 Can. S.C.R. 282.

But prior to the registration of the writ of *fi fa* the debtor had executed a mortgage in the statutory form for $30,000 in favor of the Alliance Trust Co., Ltd., and that mortgage had been registered in the Land Titles office against the title.

My next question, therefore, is, what then and thereafter was the extent of the legal interest of the debtor in the land?

I do not think he thereafter continued to be the owner of the whole legal interest in the land. It is true that our mortgages do not convey a common law "estate," and that the Act declares

ALTA.

S. C.

MARSHALL WELLS ALBERTA CO. LTD. v. ALLIANCE TRUST CO.

Stuart, J.

that they shall constitute only a charge upon the land. But I think that clearly the effect is more than to make them mere "equitable" charges, *i.e.*, charges which resort to a Court of equity would be required to enforce. Both the mortgage and the charge are creations of statute law. The charge is a "legal" interest in the sense in which I am using the word "legal," *i.e.*, as including both common law and statutory interests. Even if our Court had no equitable jurisdiction at all and were still merely a Court of law in the old sense it would be bound to and competent to recognize a right or interest which a statute of Parliament had created. Therefore at law the legal interest of the debtor in the land in question had been cut down. Out of it there had been cut or carved the strictly legal interest right or estate, whatever word one may care to use, of the mortgagee. With the legal registered title in that state, I think the sheriff could not possibly have sold under the *fi fa*, the full fee simple. He could have sold only subject to the mortgage. No Judge under the statute would have confirmed a sale of the whole legal estate in fee simple regardless of the mortgage. Even if upon an inquiry into the facts it had appeared that not a cent had been advanced, nevertheless it would have been by the exercise of equitable jurisdiction that the mortgage would have been wiped off and disregarded. On the face of it, it acknowledges receipt of the money. This is binding in law but not in equity.

Sec. 23 of the Land Titles Act (1906), (Alta.) ch. 24, says: "So soon as registered every instrument shall become operative according to the tenor and intent thereof, and shall thereupon create, transfer, surrender, charge or discharge as the case may be, the land or the estate or interest therein mentioned in the instrument." This, taken with sec. 61, operates, I think, to make the registered mortgage for $30,000 a statutory charge upon the land exactly for what appears on its face. Any modification of this must, I think, be the work of a Court of equity.

It is no doubt now after the so-called fusion of law and equity, unattractive to hark back to pure law and to refrain from jumping at once into the discussion of the principles of equity. But when we are enquiring as to what a strictly legal process of the Court actually does attach upon, as distinguished

from any question of equitable priorities, what else can there be to do but to consider first the question of pure law? It is not a question in the first place of what the creditor ought in equity to be able to get at. It is a question of what his legal process does in law really get at and attach. And it needed undoubtedly, and as the Legislature apparently considered, a statute to make a *fi fa* lands reach purely equitable interests however impossible it may be to work out such a statute in practice.

I think, therefore, that as the execution creditor's *fi fa* lands reached only what legal interest the debtor had it therefore reached only his legal fee simple less a legal statutory charge for the sum of $30,000.

Now it is true that the whole $30,000 was not advanced to the debtor prior to the filing of the writ. But what is the position as to that? The mortgagee had at law a statutory charge to the extent of $30,000. In a Court of equity they would not be allowed to enforce it except to the extent of the money they had really advanced. That is, the mortgagee's legal interest or charge did not cover a full and parallel equitable interest. The debtor had no doubt an equity against the mortgagee's legal interest or estate to the extent of the deficiency in the advance. But that equitable right was something outside and beyond the extent of his own legal interest or estate. It was not covered by his own legal fee simple, which at law had been cut in upon and diminished to the extent of the $30,000 legal statutory charge. His equitable right to cut down the full $30,000 charge was not in my opinion an equitable interest covered by his legal interest and inasmuch as it was only his legal interest that could be attached by the writ, together with such equitable interest as that legal interest, in and by itself covered, my opinion therefore is that the writ never reached at all the equitable right to have the mortgage treated as only a mortgage for the amount already advanced.

I think the position should be considered as exactly the same as in the case of a lease. If A, the owner of the fee simple, has, before the *fi fa* is filed, executed a lease for life to B, I think the *fi fa* would catch only the reversion of A. And if at the time of the agreement for the life lease it was also agreed in a form

ALTA.

S. C.

MARSHALL WELLS ALBERTA CO. LTD. v. ALLIANCE TRUST CO.

Stuart, J.

which only a Court of equity would recognize that B should grant a sub-lease back to A for 20 years, then still I think the *fi fa* would catch only the reversion and not also the purely equitable right to the sub-lease, which is an equitable estate covered by the legal life estate.

Of course one can quite easily see that the equitable right to the amount not advanced might appear to be as much annexed to the legal fee simple estate as to be a mere right against the mortgagee's estate. If that were strictly so, then I think the writ of *fi fa* caught the deficiency. But I shall return to this presently.

What I venture to insist upon is that it cannot possibly be a matter of the law of equity to decide what a writ of *fi fa* catches or attaches upon. Whatever in law it catches, why, it just catches and what it does not catch it does not catch, that is all.

Why any question of notice should have to be considered I am unable to understand. Whatever a writ of execution catches with a certain notice being given it also catches, as I conceive the matter, without any notice at all. It is a fallacy to treat the legal process, the *fi fa* as a mere projection towards the property of the Court's equitable mind.

The execution creditor is not an assignee of a debt who can accomplish something more by notice than he can without it. He is not a garnishing creditor who by service of notice by a summons can stop something. He is not a purchaser for value of the property in any sense. This is where the analogy of first and second mortgages quite disappears. I have never yet heard of an execution creditor reaching more property by his writ simply by giving notice to someone, except, of course, under rule 609, the very terms of which and of the exception therein contained confirms, I think, what I have said where there is no such specific provision.

There is no place for exercising an equitable jurisdiction in deciding the question before us in this case, although we may recognize the distinction between legal and equitable estates.

The Court is, therefore, forced to decide as a matter of law what extent of property the *fi fa* lands caught. I have suggested

ALTA.

S. C.

MARSHALL WELLS ALBERTA CO. LTD. v. ALLIANCE TRUST CO.

Stuart, J.

that the equitable right of the mortgagor to have more money advanced to him was not part of the estate or interest which was caught by the execution. I cannot at present, at any rate, find reason for varying that opinion.

To my suggestion that it is merely a matter of equity that the mortgage would only be treated as a mortgage for the sum actually advanced, it has been answered that it is a fact that it is only a mortgage for the sum advanced. But under writs of *fi fa* the sheriff does not seize "facts," although we may seize facts in our mental processes. The sheriff seizes property, objective and material, and certain interests which the law creates in that property. The facts are interesting, but solely for the purpose of enabling the Court to decide what is the real nature of the different interests which exist in the land which may or may not be subject to a writ of *fi fa*.

My view, therefore, is just this: That the equitable interest of the mortgagor in the moneys not yet advanced at the date of the filing of the writ is an interest not covered by his remaining legal estate simply because his remaining legal estate is only what remains after a legal charge of $30,000 is cut out of it. I know very well that in equity it is not a charge for $30,000, but in strict law, nevertheless, it is a charge for that amount and, therefore, the legal estate left is simply lessened to that extent.

I see no other way of deciding this case without entering upon a consideration of what it is "equitable" that a writ of *fi fa* should catch, a process which I consider illegitimate. Of course if this were an application by the execution creditor for equitable execution, which it is not, these questions of equities and priorities would be more relevant.

And yet the result is, I think, not unjust and is probably the most convenient, though I think neither consideration has anything to do with the case.

Beck, J.

BECK J.:—I would dismiss the appeal with costs. I agree substantially with the reasons given in the first instance by the Chief Justice.

I think, however, the conclusion he reaches is by implication determined by the decision of this Court in *Grace* v. *Kuebler*

ALTA.

S. C.

MARSHALL WELLS ALBERTA CO. LTD. v. ALLIANCE TRUST CO.

Beck, J.

(1917), 33 D.L.R. 1, 11 Alta. L. R. 295 at 303, dismissing an appeal from the decision of the C.J. (1916), 28 D.L.R. 753, 11 Alta. L. R. 295, affirmed by the Supreme Court of Canada (1917), 39 D.L.R. 39, 56 Can S.C.R. 1. That was a case of a purchaser under an agreement continuing to pay his vendor, the registered owner at the time of purchase without notice that his vendor had subsequently transferred mortgaged land to another who had become the registered owner. It was held that the original purchaser was protected as to his payments made to his vendor.

The doctrine that in such and similar cases the party liable to pay may safely continue payments to the other unless he has actual notice that the other has no longer a right to the money and that subsequent registration merely is not equivalent to actual notice was laid down not as a new but as a well recognized doctrine.

That broad and predominating principle is the one upon which I would rest my opinion in the present case.

Ives, J.

IVES, J.:—I think this appeal should be dismissed with costs for the reasons given for his judgment by the Chief Justice.

The issue turns upon whether or not the mortgagee paid over the mortgage money after express notice of a registered execution.

Under our Land Titles Act an execution and a mortgage are alike in this, that each is a statutory charge upon land. Each charge takes its priority according to registration, and binds to the extent of its statutory authority.

The state of the law as to priority of a second mortgage over a subsequent advance under an antecedent mortgage seems to be settled by the authority of *Hopkinson and Hunter* v. *Rolt* (1861), 9 H.L. Cas. 514, 11 E.R. 829, and cases following, and to rest upon whether the mortgagee at the time of the advance had or had not such notice of the subsequent charge as would bind his conscience.

In the present case the subsequent charge is not a mortgage but an execution which gives rise to no reason for extending the rule. In this Province, where the area is large and but two

registry offices provided, the result may be one of great inconvenience, but that is a matter for the consideration of the Legislature and not the Courts. ALTA. S. C. Ives, J.

In the present case it cannot be held that express notice was given the mortgage company before payment over.

Appeal dismissed.

Re SHIELDS, SHIELDS v. LONDON and WESTERN TRUST Co. ONT. S. C.

Ontario Supreme Court, Appellate Division, Mulock, C.J. Ex., Riddell, and Sutherland, JJ., and Ferguson, J.A. April 20, 1920.

COSTS (§ II—29)—ADMINISTRATION PROCEEDINGS—SEVERAL DEFENDANTS—SEVERING—RULE 669—PRACTICE.

In proceedings for the administration of the estate of a deceased intestate where there are several defendants, each having a separate interest, each defendant is justified in severing if he sees fit, and unless the Court at the hearing in awarding costs sees fit, in the exercise of its discretion to provide that there shall be but one set of costs, each is entitled to his separate bill, but those who in truth represent the same interest and estate are not entitled to sever. The award of costs by various orders and judgments pronounced in such a cause is binding on the Taxing Officer, but he should enter into an enquiry as directed by the provisions of rule 669 with a view of ascertaining whether the defendants are entitled to be allowed only one set of costs on the taxation.

Statement.

APPEAL by plaintiff from the judgment of Middleton, J., on an appeal from the taxation by the Taxing Officer of the costs of the defendants under several orders made in a matter originated by an application for an order for administration of the estate of James Shields, deceased. Affirmed.

The judgment appealed from is as follows:—

MIDDLETON, J.:—James Shields died in 1895, leaving him surviving his wife and a number of children. Letters of administration of his estate were not taken out until the 23rd March, 1916.

An application was originally made before me in Chambers for an administration order: this application was made by Andrew J. and George Shields, two of the children, the sole defendant being the administrator. The order was unopposed, and it was not disclosed that certain of the children of the deceased claimed to have acquired possessory title to certain lands that were of the intestate in his lifetime. When those children were added as parties defendant in the Master's office this contention became apparent, and the Master ruled that the administration could not proceed until the question of title had been determined. An appeal

ONT.

S. C.

RE SHIELDS, SHIELDS v. LONDON AND WESTERN TRUST CO.

was had from the Master's ruling, resulting in an order of the Appellate Division, on the 2nd February, 1917, referring it to the Master to determine the question of the ownership of the property, on notice to all parties interested. This reference took place, and the Master found in favour of those who claimed to have acquired the possessory title. Appeal was had from this decision, the case being carried before a Judge in Court, the Divisional Court, and the Supreme Court of Canada, all tribunals upholding the findings of the Master, and in the end the plaintiff Andrew J. Shields has been ordered to pay all the costs of this litigation, and George Shields the costs up to a date when he discontinued his attack upon his mother and brothers and sisters.

Before the Master and throughout, the brothers and sisters did not unite in a common defence, but they were represented by a formidable body of solicitors; and, two of the brothers being in financial difficulties, execution creditors who had recovered judgments and obtained receivership orders were separately represented.

Before the Taxing Officer, the following bills have been carried in and allowed:—

The administrator, the London and Western Trust Company	$231.70
The London and Western Trust Company as administrator of the estate of William B. Shields, one of the sons.	631.07
The Union Trust Company and Bury, receivers of John J. Shields' share and W. B. Shields' share	156.00
Annie Shields, Jessie Shields, James Shields, and Catharine Leach	353.00
John J. Shields	686.97
Molsons Bank, receivers of John J. Shields	362.00

The contention of the plaintiff Andrew J. Shields upon appeal is, that these parties, all substantially representing the one interest and the one claim, ought to have been represented by one set of solicitors only, and that under the practice the taxation against him of this multitude of bills was oppressive and improper.

No steps were taken at any time to secure the representation by one solicitor of those opposed to the plaintiff. I do not know that under the practice this could have been done, but it does not appear to me to be proper to enter upon any such inquiry at this stage of the action. The award of costs by the various orders and

judgments pronounced in the cause was binding upon the Taxing Officer, and is binding upon me, but the Taxing Officer should, I think, have entered into an inquiry, as directed by the provisions of Rule 669*, with the view of ascertaining whether the defendants were entitled to be allowed only one set of costs upon the taxation. The provisions of this Rule differ somewhat from those of the earlier Rule, but in essence the question is still the same, and the only obligation which is cast upon the defendants to appear by the same solicitor, instead of each choosing his own representative, is that resting upon the old practice of the Court of Chancery. Little remains to be added to what was said by Chief Justice Armour in *Melbourne* v. *City of Toronto* (1899), 13 P.R. (Ont.) 346, save to point out that the embarrassing expression "the law of the Court," found in the earlier Rule, 1202, no longer appears.

In cases of this kind, each defendant having a separate interest is justified in severing, if he sees fit; and, unless the Court at the hearing, in awarding costs, sees fit, in the exercise of its discretion, to provide that there shall be but one set of costs, each is entitled to his separate bill. The only exception to this general statement, at all relevant to this case, is that those who in truth represent the same estate and interest are not entitled to sever: mortgagors and mortgagees, execution creditors and their debtors, are not entitled to separate. This has been recognised as an established principle of equity for many years: for example, see the cases collected in Morgan on Costs, 2nd ed., p. 125.

The question has frequently arisen in administration and partition proceedings, and the practice is now satisfactorily established. In *Belcher* v. *Williams* (1890), 45 Ch. D. 510, the general rule is stated, but an exception was thought to exist in the case of partition, and in that case incumbrancers were treated as though they were not owners of a subdivided interest. This was in conflict with many of the earlier cases, and in *Cattor* v. *Banks*, [1893] 2 Ch. 221, the earlier practice was restored, and it is now clear that each share is to be allowed only one set of costs out

*669. Where two or more defendants defend by different solicitors under circumstances entitling them to but one set of costs, the Taxing Officer shall allow but one set of costs; and if two or more defendants deceivingly by the same solicitor separate unnecessarily in their defences, or otherwise, the Taxing Officer shall allow but one defence and set of costs.

ONT.

S. C.

RE SHIELDS,

SHIELDS v. LONDON AND WESTERN TRUST CO.

of the estate; and, if the share is subject to any incumbrance, the costs properly incurred by any incumbrancer should be allowed as against that share only. The rule is that the amount payable by way of costs out of the share should be paid to the first mortgagee; but, if that rule should be arbitrarily applied here, injustice would be done; and I think the proper disposition to make is that, as against the plaintiff Andrew J. Shields, the amount to be allowed should be that of the largest bill incurred in respect of the particular share. The receiver would then be entitled to a first lien upon the share, including costs, for the amount of the costs payable to the solicitor for such receiver. If there is any difficulty in working this out, I may be spoken to. The administrator of the estate of James Shields was entitled to be represented, as the plaintiff attacked it, and refused to withdraw the charges made.

The appeal should be dismissed save in this respect.

As to the shares concerning which this modification is made, there should be no costs of this appeal, as there has in that case been partial success only. When there is no change, the appellant should pay costs.

W. E. Fitzgerald, for the appellant.

J. C. Elliott, for the estate of W. B. Shields and the Molsons Bank.

W. Lawr, for Jessie, Anne, and John J. Shields.

W. J. Elliott, for the Union Trust Company, receiver of the share of John J. Shields.

THE COURT affirmed the decision of MIDDLETON, J., agreeing with the reasons given by him for his order.

Appeal dismissed with costs.

B. C.

C. A.

RADVOSKY v. CREEDON.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. April 15, 1920.

SALE (§ II B—30)—CONTRACT FOR SALE BY DESCRIPTION—SAMPLE AFTERWARDS DELIVERED—RIGHT OF PURCHASER TO INSIST ON ORIGINAL CONDITIONS.

Where there has been a contract for the sale of goods by description, and the purchaser has insisted on goods of a certain origin, the fact that after the contract was entered into a sample was furnished by the seller does not make a new contract of sale by sample, and the purchaser is entitled to insist on the original conditions and to repudiate the contract and the goods if the seller cannot deliver goods of the origin demanded.

B. C.

C. A.

RADVOSKY v. CREEDON.

Macdonald, C.J.A.

APPEAL by defendant from the judgment of Murphy, J., in an action for damages for breach of contract for sale. Affirmed.

E. C. Mayers, for appellant; *W. Martin Griffin*, for respondent.

MACDONALD, C.J.A.:—I agree with the trial Judge.

Had the origin of the beans, a sample of which was sent to the plaintiffs been shewn to be Manchurian, I think I should have come to a different conclusion on the question of damages. There would, in such case, have been no damages, as the evidence shews that in February and March beans answering to sample, but not originating in Manchuria, could be bought for less than the contract price.

By arrangement between counsel prior to the trial, the origin of the beans in dispute was not gone into. Now, while I think that the sale was one by description and not by sample, yet a sample was sent to the plaintiffs, and as I understand the correspondence, the plaintiffs were willing to accept beans answering this sample provided they were shewn to be of Manchurian origin. In other words, while the sale was by description, and while the beans might not answer the description, the plaintiffs had assented to their being taken as answering the description, subject only to proof of Manchurian origin, and had that been an issue at the trial, and had it been proven by defendants, I think on the evidence of plaintiffs' witnesses, Griffiths and Disher, no damages could be recovered.

The defence is that on the evidence and in the circumstances there had been no breach of contract and that defendants were not bound to tender any beans. In this I think, they failed.

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

Martin, J.A.

GALLIHER, J.A.:—Upon the hearing I was prepared to dismiss this appeal and further consideration has not altered my views.

Galliher, J.A.

McPHILLIPS, J.A.:—This appeal presents some features of complexity but, upon a close analysis, I think upon the facts, emerges, as found by the trial Judge—as a sale by description—the sample subsequently furnished was not the making of a new contract and a sale by sample, but merely indicating the general appearance and size of the beans contracted to be supplied. The fundamental matter, in my opinion, was that the beans were to

McPhillips, J.A.

B. C.

C. A.

RADVOSKY v. CREEDON.

McPhillips, J.A.

be Manchurian white beans, and when it was insisted upon by the respondents that what was meant was beans of Manchurian growth and origin, the appellants agreed to this and promised to establish this fact to the satisfaction of the respondents, which was never done, and in the end the appellants plainly committed a breach of the contract—by repudiating it and failing to supply the beans contracted to be supplied. Mr. Mayers very ably, and very persuasively presented the appeal in the light of first a contract by description, later by sample with the further term that the respondents were called upon and had agreed to put up a bank guarantee in Vancouver covering the whole amount of the purchase, and that the failure to establish the credit admitted of the appellants repudiating the contract; with deference, I do not consider that position made out. Mr. Griffin, in a very careful argument for the respondents, has made it clear to me that the trial Judge arrived at the right conclusion. It was shewn, on behalf of the appellants, that the description was capable of being covered by no less than seven varieties of beans, and the respondents, feeling in embarrassment, wished a sample, and a sample was furnished, and the contention is that from that time on it was a sale by sample, capable of being completed by the delivery of beans in accordance with sample, and that the breach of contract was on the part of the respondents in refusing to accept beans up to sample. It cannot be gainsaid that what the parties really split upon was the establishment of the origin of the beans, *i.e.*, that the beans were what, in the contemplation of the parties they were contracted to be, "Manchurian White Beans," and, in my opinion, the appellants failed utterly in shewing upon the facts of the present case that they were ready and willing at all times to deliver the beans contracted to be supplied. Then, as to the requirement contended for by the appellants, of a bank credit for the whole purchase price, this is untenable. It never was the contract, it was never the agreement between the parties. It was a demand made by the appellants which the respondents were not called upon to accede to. The correspondence between the parties makes it abundantly clear that although a sample was, after the contract was entered into, furnished by the appel-

lants to the respondents, there never was any receding from the position the respondents always insisted upon, that was, that the beans were to be of Manchurian origin. The appellants did not, when the point was pressed by the respondents that origin should be established, contend that origin was not a matter of contractural obligation, but explained that, if shewn, it would render them liable to pay duty thereon to Japan, which had not been done. This circumstance, in itself, does not demonstrate a high plane of business morality, and cannot be viewed with other than disapproval by this Court. It does not conform with that comity which should not only exist between nations, but that observance of the law of nations which should always actuate people in business life, engaged in foreign trade transactions. There should be probity in this as in all other matters. The discussion of this matter of origin culminated in the appellants writing the respondents the letter of January 2, 1917, which reads as follows:—

Messrs. Universal Importing Co., January 2, 1917.
Montreal, Que.

We are to-day in receipt of your favor of the 26th ultimo, and note with pleasure that you are quite willing to accept beans like sample which we sent you, which are Manchurian hand picked small white beans.

We wrote you some days ago in connection with this matter, and at that time we explained to you why we did not want to acquaint the Customs with the fact that these beans came from Manchuria, however, we have gone into this matter rather fully, and we find that the duty on beans coming into Japan from Manchuria is very small, and we will only have to pay duty on the amount of the Japanese duty, which amounts to about $1.50 per ton, and we have decided that we will absorb this ourselves, and on all shipments coming in we will prove that the country of origin is Manchuria. We cannot only prove it in this manner, but also through correspondence, and we think that everything will be to your entire satisfaction.

Apparently, from your letter you are afraid of getting some beans that will not cook, no doubt having in mind the old Rangoon beans, which caused so much trouble throughout the Dominion a few years ago. Now we assure you that we know all about the old Rangoon beans, and that we would not handle them under any circumstances. We have sold thousands of tons of these Manchurian small white beans, and they have given every satisfaction.

The trouble is that the bean originally was a Rangoon bean that has been grown in Manchuria by the Japanese. They are called under several names, some people call them Burma, some Chenson and some call them Indian. We much prefer to call them Manchurian small white beans, as we think it gets away from any thoughts of the old Rangoon bean.

B. C.
C. A.
RADVOSKY
v.
CREEDON.
McPhillips, J.A

We expect that we will be shipping you the first part of your order within the next couple of weeks; we, therefore, ask you to instruct Messrs. Martin & Robertson to be on hand to make the examination.

CREEDON & AVERY, Limited.
Per V. C.

Later, we have the letter of January 10th, 1917, of the appellants to the respondents, which reads as follows:—

January 10, 1917.

Messrs. Universal Importing Co.,
Montreal, Que.

We are to-day in receipt of your night lettergram of the 9th instant, and are very much surprised at your action in trying to cancel part of your contracts, and as stated in our previous letters our contracts are very clear, and if it really came to a "show down" we are not compelled to adhere to your wishes and prove the origin of these beans. However, to facilitate matters, we are prepared to lose a little money and pay the extra duty which we are compelled to, and prove to you beyond a doubt that these beans are the product of Manchuria. We fully expect you to take the full delivery and to arrange with Messrs. Martin & Robertson to give the necessary documents so as our drafts can be paid here.

We regret any trouble or inconvenience that has been caused, but cannot see that the fault lies with us, and all we want to do is to carry out our part of the contract and to adhere to your wishes as far as it is possible to do.

We expect to receive a wire from you stating that everything will be satisfactory. We do not wish to have any hard feelings or to take any drastic steps to protect our interests.

CREEDON & AVERY, Limited.
Per V. C.

Then, there was a telegram also on this date from the appellants to the respondents, which reads as follows:—

Canadian Pacific Railway Company's Telegraph Night Lettergram.

Universal Importing Co., January 10, 1917.
Montreal, Que.

Can accept no cancellation of any part of your contracts. We are prepared to prove beyond a doubt the origin of the beans. Expect to be making shipment your first hundred and fifteen tons latter part of this month.

CREEDON & AVERY, Ltd.

Finally, the appellants wired to the respondents the two following wires, which constituted the repudiation upon the appellants' part of the contract. They read as follows:—

NIGHT LETTER.

Universal Importing Co., February 5, 1917.
Montreal, Que.

You have not replied our letter tenth January, nor have you put up bank guarantee covering your full purchases. We will not ship any part of

your orders until you advise you are going to accept your full purchases and put up bank guarantee covering them fully. This is final.

CREEDON & AVERY, Ltd.

Messrs. Universal Importing Co., Montreal, Que. February 7, 1917.

Herewith we enclose you confirmation of our night lettergram of the 5th inst., and as we have not heard anything further from you in connection with this matter, we take it for granted that you are not going to comply with our request, and we are therefore reselling the beans, and as far as we are concerned the matter is closed.

CREEDON & AVERY, Limited.
Per V. C.

It might rightly be said that the appellants were wrong in two particulars. There was failure in proving the origin of the beans, and an unwarranted demand for a too extensive bank guarantee. Certainly if there should be any doubt about the appellants being required to prove origin of the beans, there is no shadow of a doubt that the bank guarantee covering the whole purchase price was not a matter of contract. The term of contract with respect to payment was "Payment cash in Vancouver." This is clear from the terms of contract as confirmed and accepted, which reads as follows:—

CONFIRMATION No. 516.

Vancouver, B.C., Nov. 17, 1916.

Creedon & Avery, Ltd., Foreign Import and Export Merchants, Vancouver, B.C.

Messrs. The Universal Importing Co., Montreal, Que.

We confirm having sold you the following goods: 115 tons Manchurian white beans hand picked, packing in 100 lb. bags gross for net $7.90 per 100 lbs f.o.b. cars duty and war tax paid Vancouver.

Confirming our acceptance of to-day of your firm order of to-day.

Shipment from Vancouver in January, 1917.

Delivery on arrival.

Payment cash in Vancouver.

Terms net.

Accepted.
UNIVERSAL IMPORTING CO.
A. S. RADOVSKY.

TERMS OF SALE.

1. Any alteration in the import duty or other taxes that may be made subsequent to the date of this acceptance to be for buyer's account.

2. Subject to any changes in insurance or freight rates effective at time of shipment.

3. In the event of shipment or delivery of the goods or any portion thereof being delayed by causes beyond seller's control, known as "*force majeure*," no liability to attach to sellers, and the time for the shipment or delivery to be extended accordingly.

B. C.
C. A.
RADVOSKY
v.
CREEDON.
McPhillips, J.A.

4. Any claim for alleged damages, difference in quantity, quality, specification, etc., to be notified to the sellers within 48 hours after tendering delivery.

5. In the event of goods or any part of them being lost at sea, or destroyed before delivery, the sale to be void to the extent of such portion as may be lost or destroyed.

6. If requested by purchaser, the seller shall provide a certificate, attested before competent authority, to cover the conditions appearing in clauses 2 and 3.

CREEDON & AVERY, Ltd.
Per M. AVERY.

It is a matter for remark also that it would seem that even apart from the failure to prove the origin of the beans, the appellants failed to deliver beans in accordance with the sample. It is idle to contend that the sample agreed to be furnished was in any way linked up with or formed the consideration for the giving of a bank guarantee for the full purchase price. It is only necessary to refer to the two following telegrams as indicating what the extent of the bank guarantee was to be:—

NIGHT LETTER.

The Great North Western Telegram Company of Canada.

Montreal, Que., November 29, 1916.

Creedon & Avery, Limited,
Vancouver, B.C.

Bank would guarantee for payment of individual shipments at Vancouver Providence certificate of inspection would be attached to documents your offer Blue peas Daifucu Beans too high for this market, quote Kumamoto White Beans Earliest shipment.

UNIVERSAL IMPORTING CO.

GREAT NORTH WESTERN DAY LETTER.

November 30, 1916.

Universal Importing Company,
Montreal, Que.

We will attach Government inspection certificates to all drafts. Have your bank wire bank guarantee to Imperial Bank, Vancouver, at once. We offer subject to being unsold further hundred tons May, June, from Japan seven seventy-five f.o.b. cars Vancouver, wire promptly as these are under offer elsewhere.

CREEDON & AVERY, Ltd.

In this connection also it is to be noticed that when the bank guarantee for the full purchase-price was called for, the respondents immediately disagreed with the contention made, and wrote a letter in the following terms:—

B. C.

C. A.

RADVOSKY v. CREEDON.

McPhillips, J.A.

Montreal, December 16, 1916.

Messrs. Creedon & Avery, Ltd.,
Vancouver, B.C.

We beg to acknowledge receipt of your letter of the 9th inst., and contents noted.

Referring to your last paragraph, where you state that we make arrangements for credit to cover the balance of our order, as these were the terms, you state the goods were sold at. If we remember right your terms were payment cash against documents in Vancouver, which we will abide by.

It appears to us that there is no necessity in tying up $50,000 now, when payments are to be made only when the goods arrive in Vancouver. We will pay for each shipment as it arrives, after same has been inspected, according to previous arrangements, by the firm of Martin & Robertson.

We are, however, not very well satisfied in noting that you are shipping only seven hundred and fifty bags at present, as it will then leave too many bags for one shipment in January. You will please let us know more definitely, how many shipments we are to expect, and the quantity of each. We would prefer if the entire lot could be divided into three shipments of equal quantities, at intervals of three weeks.

UNIVERSAL IMPORTING CO.,
Per A. S. RADOVSKY.

Then, there was an interval of time of some 40 days, then followed the telegram of January 26, 1917, demanding credit for entire purchase price. This telegram reads as follows:—

NIGHT LETTER

January 26, 1917.

Universal Importing Company,
Montreal, Que.

We will give you the desired information immediately we have your assurance that you will take your full order and that a confirmed bankers' credit is established covering your entire purchase, otherwise we refuse to ship you any part of your order. Up to the present we have received no reply to our letter tenth.

CREEDON & AVERY, Ltd.

In passing, it may be said in the interval of time, the 40 days, the bank guarantee limited to each shipment had been supplied, and the appellants had billed through to the respondents a car of beans (see bill of lading).

Unquestionably, there was failure upon the part of the appellants to comply with the terms of the contract in the supply of the beans contracted for, and it is clear that the beans loaded at Vancouver and passed upon by Messrs. Martin & Robertson for the respondents were rightly rejected by the respondents as not being in compliance with the contract. (See *Peters & Co.* v.

B. C.
C. A.
RADVOSKY v. CREEDON.
McPhillips, J.A.

Planner (1895), 11 T.L.R. 169 at 170.) There was clear and apparent failure upon the part of the appellants to carry out the contract, to be followed later by the quite unjustifiable repudiation of contract. The result in law, of course, must follow that is the respondents are entitled to damages for the breach of the contract. (R.S.B.C. 1911, ch. 203, sec. 65 (3)). Now, the question is, were the damages rightly assessed? I cannot see any error in the method of assessment adopted by the trial Judge. In *Brown* v. *Muller* (1872), L.R. 7 Exch. 319, 27 L.T. 272, the principle is stated by Kelly, C.B., at 321: "Now the proper measure of damages is that sum which the purchaser requires to put himself in the same condition as if the contract had been performed."

The manner in which damages have to be assessed, and the assessment of them generally, received consideration by Lord Moulton in *McHugh* v. *Union Bank*, 10 D.L.R. 562 at 568, [1913] A.C. 299 at 309.

It follows that, in my opinion, the judgment of Murphy, J., should be affirmed, that is that the appeal should be dismissed.

Appeal dismissed.

SASK.
C. A.

AUGER v. LANGAS.

Saskatchewan Court of Appeal, Newlands, Lamont and Elwood, JJ.A. June 16, 1920.

EVIDENCE (§ XIII A—1,000)—APPLICATION FOR ADMISSION OF NEW—AFTER TRIAL—WHEN GRANTED.

In an application under Rule 654 for the admission of new evidence after trial, the applicants must not only shew that they did not know of this evidence at the trial, and could not have found it out by due diligence, but they must also shew that the evidence would be conclusive so that a verdict would have been found otherwise than it was.

[*Young* v. *Kershaw* (1899), 81 L.T. 531, 16 T.L.R. 52, followed.]

Statement.

APPLICATION by defendants appellants for the admission of new evidence before this Court on an issue that was tried and decided against them at the trial.

F. W. Turnbull, for appellant; *A. McWilliam*, for respondent.

The judgment of the Court was delivered by

Newlands J.A.

NEWLANDS, J.A.:—The defendants were in business at Maple Creek as the Victoria Café. The defendant Langas was also in business at Forres under the name of the Victoria Café No. 2.

This business he sold out to one James Carlos, who had been manager of the business, and Carlos bought goods from plaintiff and also from one Hale. Hale assigned his account to plaintiff.

It was contended by defendants that they notified plaintiff and Hale of the sale to Carlos before the goods sued on were sold by them to the Victoria Café No. 2. This issue was found against them by the trial Judge. Since the trial, they discovered that one William F. McNichol will give evidence that both plaintiff and Hale told him that they had accounts against Carlos and were going to try to make defendants pay them; further, that they had no account against defendants, but that they intended to try to bluff them into paying Carlos' account. These facts are set out in an affidavit by McNichol, and are specifically denied in affidavits by the defendants.

This application is made under rule 654, under which such evidence can be admitted upon special grounds.

The special grounds are, that they did not know of this evidence at the trial, and could not have found it out by due diligence. I think they must go further than this, and shew that the evidence would be conclusive, because there is no object in admitting fresh evidence in this Court unless it would have a conclusive effect upon the appeal.

In applications for a new trial on the ground of the discovery of new evidence, it has been held that such evidence must be conclusive so that a verdict would have been found otherwise than it was.

Smith, L.J., in *Young* v. *Kershaw* (1899), 81 L. T. 531, 16 T. L. R. 52, followed *Anderson* v. *Titmas* (1877), 36 L. T. 711; there Huddleston, B., said:—

> In the cases in which new trials have been granted on this ground the proposed fresh evidence will be seen to have been of a material and conclusive character, as in *Broadhead* v. *Marshall* (1773), 2 Wm. Bl. 955, where an action was brought against an executor for a debt of his testator. The defendant was abroad at the time of the trial, and afterwards a receipt was discovered which clearly shewed that the debt had been paid. But in the present case there is nothing conclusive. There would be two witnesses on each side, and therefore no preponderance of testimony.

The applications under this rule are to avoid the necessity of a new trial, and, therefore, the same principles must apply. The evidence to be admitted must be conclusive, not oath against

SASK.
C. A.
Newlands J.A.

oath, as in this case, and if we could not grant a new trial because of the discovery of this evidence, neither can we admit it when we are of opinion that it is not conclusive.

The application should therefore be refused.

Application refused.

ONT.
S. C.

MORROW v. MORROW.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. March 19, 1920.

INCOMPETENT PERSONS (§ II—12)—LUNATIC—NECESSARIES FURNISHED TO —DEATH OF—LIABILITY OF ESTATE.

The estate of a lunatic is liable for necessaries supplied to the lunatic and the rule applies in the case of a lunatic not so found.

[*Wentworth* v. *Tubb* (1842), 12 L.J.N.S. Ch. 61, 62; *Re Gibson* (1871), L.R. 7 Ch. 52, 54, followed. See also *Mercantile Trust Co.* v. *Campbell* (1918), 43 D.L.R. 388, 43 O.L.R. 57.

Statement.

AN appeal by the plaintiff from the judgment of LENNOX, J., at the trial, on the 19th November, 1919, dismissing an action brought by one brother against another—the defendant being executor of the will of a deceased sister—to recover $2,967.25 for board, lodging, medical expenses, etc., of the sister while living with the plaintiff during the last three years of her life.

H. S. White, for the appellant.

E. G. Porter, K.C., for the defendant, respondent.

The judgment of the Court was read by

Maclaren, J.A.

MACLAREN, J.A.:—This is an appeal by the plaintiff from a judgment of non-suit rendered by Lennox, J., at the non-jury sittings, Napanee, on the 19th November, 1919.

The parties are brothers, and the action was brought against the defendant as executor of their deceased sister, Mary Jane Morrow, for $2,967.25, chiefly for her board and lodging during the last three years of her life. She was unmarried, and had been living with an unmarried brother, Edward, a considerable time before his death, which occurred on the 12th July, 1915. She had some means of her own, and left an estate of $7,000. After the death of Edward, she appears to have lived in a small house of her own on Amherst Island, and later with her brother Herbert. On the 3rd March, 1916, Herbert took her to the plaintiff's

house and left her there. The plaintiff was absent at the time, and on his return she told him that the others had put her out, and asked him if she could stop with him. He answered, "You can, if you will try and conduct yourself or behave yourself and pay your board." She said that she would pay him when she saw their brother Robert (the defendant), who, it appears, was in the asylum at the time. She remained at the plaintiff's until the 30th May, 1916, when she went back to her brother Herbert's, where she remained until the 3rd October, 1916. She then returned to the plaintiff's, and remained with him until her death on the 25th April, 1919.

At the trial the plaintiff sought to prove the insanity of the deceased at times, and also relied upon the promises made by her at the time she came to live with him and on subsequent occasions. He had also taken legal steps, while she was living with her brother Edward, to have her declared a lunatic, and retained a solicitor and had her examined by two physicians; but these proceedings he subsequently abandoned. Her pastor was called as a witness by the plaintiff, and, in answer to a question as to her condition mentally and physically, he replied: "I think she was mentally unsound. I regarded her as being so." When asked if he saw her at meal-hours, he answered: "Yes, I did. Q. And what was her behaviour on those occasions? A. She behaved very well as far as I could see. Q. She behaved very well? A. Yes." Counsel for the defence asked several suggestive questions to strengthen the evidence as to her insanity; but it was not advanced beyond the above, and no specific facts were proved or illustrations given.

At the close of the plaintiff's case, counsel for the defendant moved for a nonsuit, on three grounds, in these words:—

"First, there is no evidence of a contract, specific contract, at all, having been made; secondly, that, even if there was, taking the whole evidence together, it shewed that this woman was incapable of making a contract, and any pretended contract made by her could not be enforced; the third, that the services rendered were gratuitous on account of the relationship between the parties."

At the close of the argument on the motion for a nonsuit, the hour of adjournment having arrived, the Judge said that he

ONT.
S. C.
MORROW
v.
MORROW.
Maclaren, J.A.

would look into the authorities, and advised a settlement, adding:—

"If there is no settlement, it may be that I will find that the law is against the plaintiff, and that I cannot give him anything. I may say quite distinctly that if I can give him something I will." He concluded by saying: "In any event, if the parties do not come to a settlement, I will hear the evidence on the other side. Then I will reserve judgment and consider whether I can give something to the plaintiff in that event."

In the morning the parties announced that they were unable to agree upon a settlement. The Judge asked the defendant's counsel if he renewed his application for a nonsuit. On being answered that he did, the Judge dismissed the action.

The law has long been well-settled that the estate of a lunatic is liable for necessaries supplied him. The earliest case that I have found is *Manby* v. *Scott* (1665), 1 Sid. 112, 82, E.R. 1000, where a lunatic is put on the same footing as an infant.

In *Wentworth* v. *Tubb* (1842), 12 L.J.N.S. Ch. 61, 62, Lyndhurst, L.C., said: "When necessaries are provided for a lunatic, and there is no fraud or imposition practised, he is bound to pay for them, because it is a debt, and is therefore a charge upon his estate."

In *Howard* v. *Digby*, (1834), 2 Cl. & F. 634, at p. 663, 6 E.R., 293, Brougham, L.C., said: "Nothing is more common than for the Chancellor to confirm a Master's report, making allowances to A.B. for moneys paid for the use of the lunatic,—to C. D. for having mantiained the lunatic; to E. F. for having clothed the lunatic. Upon what ground are all these allowances made? Not from kindness, not from charity, not for the convenience of the parties; but because they are debts; because in the eye of that Court, be it a Court of Law, or a Court of Equity, or the Chancellor sitting in lunacy, they are valid debts incurred by the insane person, and are discharged by the justice of the Court."

See also *Williams* v. *Wentworth*, (1842), 5 Beav. 325, at p. 329 (49 E.R. 603). The same rule applies to the case of a lunatic not so found: *In re Gibson* (1871), L.R. 7 Ch. 52, at p. 54.

If the question to be decided by us was, whether the deceased was insane at the time she went to live with the plaintiff, I might have great difficulty in coming to that conclusion. I do not find sufficient evidence to justify such a finding; but the plaintiff

saw fit to bring witnesses to testify as to her insanity, not however as to her condition at the exact time of the contract upon which he bases his claim.

The defendant by his counsel sought to bring out from the plaintiff's witnesses testimony as to her insanity generally, and argued strongly that she was incompetent to enter into any contract at the time that she went to live with the plaintiff or subsequently.

The witnesses were, no doubt, influenced by the fact that there was insanity in the family, and that the defendant was at that very time in the asylum, and the eccentricities and ebullitions of the deceased were attributed to insanity more readily than they might otherwise have been, by the pastor and the witness Sills, who both thought her unaccountable at any time.

Assuming that it is not satisfactorily proved that Mary Jane Morrow was insane during the time that she lived with the plaintiff, there is, in my opinion, ample evidence to establish the fact that she was there under circumstances which would render her and her estate liable to the plaintiff for the fair value of her board and lodging during the 145 weeks she remained with him. I have already mentioned the conversation that took place between the plaintiff and her on the 3rd March, 1916, when he came home and found her there. This is amply corroborated by the plaintiff's wife and son, and more than sufficient to meet the requirements of sec. 12 of the Evidence Act, R.S.O. 1914, ch. 76. The plaintiff's wife, in addition, swears that, on different occasions when her husband was not present, the deceased told her that she was going to pay for her board when she saw her brother Robert (the defendant). Another special occasion was when they were taking pigs to town—that she then said she would pay her board is deposed to by the plaintiff's wife and son.

The whole tenor of the evidence is that she had seldom been at the plaintiff's house before the occasion in question, and then only for very short visits. The fact that he had not long before taken legal steps to have her declared a lunatic would sufficiently account for this, and for her piteous appeal to him when she said: "The rest put me out. Can I stop with you?" Except the bare relationship, there are in this case none of the other circumstances that usually go to assist in coming to the conclusion that such

ONT.

S. C.

MORROW v. MORROW.

Maclaren, J.A.

services and board were not to be paid for. Every other item that one finds in any of the reported cases where the beneficiary or his estate was held not liable is entirely wanting in this case.

The trial Judge made no special findings, but it is clear from his observations that he credited the testimony of the plaintiff and his witnesses; he accepted, however, the argument of the defendant's counsel that the deceased was not competent to make a contract, and that without this the plaintiff could not recover. The law as stated above as to the liability of a lunatic for necessaries was not presented to him.

At the close of the argument on the motion for a nonsuit, just before the evening adjournment he strongly advised a settlement, and at the opening of the Court in the morning, when counsel announced that rhey had been unable to agree, he said: "Although I would be very anxious to find something for the plaintiff, I do not see that there is any possibility of doing so. I think there is noth ng for it but to dismiss the action."

In my opinion, the plaintiff is entitled to a reasonable allowance for the board and lodging of the deceased for the 145 weeks she was at his house. I would allow him $5 a week. I do not think he is entitled to the costs of the proceedings to have the deceased declared a lunatic, which he abandoned, or to his charges for the two trips to the island, as the wood for which he made the second one would compensate him for these two trips.

The defendant made a counterclaim, but did not offer any evidence in support of it. This should be dismissed.

Costs throughout on the Supreme Court scale.

Appeal allowed.

ALTA.

S. C.

DONLEY v. E.D. & B.C.R. Co.

Alberta Supreme Court, Beck, J. June, 1920.

1. TRIAL (§ II C—55)—POWER OF JUDGE—ALLOWING CASE TO GO TO JURY—ALLOWING VERDICT OF JURY—JUDGMENT FOR PLAINTIFF ON GROUND OF NO CASE.

Where a Judge at the conclusion of the plaintiffs' case is asked to rule whether there is a case to go to the jury or not, he may decline to rule that there is no evidence, may allow the defendants' evidence to be taken, may allow the verdict to go, and none the less may give judgment for the defendants on the ground that there is no case.

ALTA.

S. C.

DONLEY v. E.D. & B.C. R. Co.

2. EVIDENCE (§ XIII A—1002)—EXCLUSION OF—SEVERAL DEFENDANTS—DEFENCES BY SAME SOLICITOR—MOTION FOR DISMISSAL OF ONE DEFENDANT—ADMISSIBILITY OF EVIDENCE—EFFECT ON OBJECTING DEFENDANT.

In a case where several defendants are sued jointly, put in defences by the same solicitor and are represented at the trial by the same counsel, and the evidence which it is sought to exclude as against one of the defendants who seeks to rest upon a motion for dismissal is that of a witness who is so high an officer in the employment of all the defendants that he was put forward by all of them as their officer on an examination for discovery whose admissions would bind the several defendants, subsequent evidence may be taken as binding the objecting defendant as well as the others.

ACTION for damages before Beck, J., with a jury.

Frank Ford, K.C., and *F. D. Byers*, for plaintiff.

N. D. Maclean, for defendants.

Beck, J.

BECK, J.:—This action was tried by me with a jury. Throughout the case I was in grave doubt as to the question whether the liability to damages in this action rested upon any of the defendants and if it did, whether it rested upon all or some or one of them. The ordinary difficulties were increased by the question whether or not the remedy of the plaintiff so far as the construction company is concerned was solely by way of an application to the Board constituted by the Workmen's Compensation Act, 8 Geo. V. 1918, ch. 5. I consequently refused the application of Mr. Maclean, counsel for all the defendants, at the conclusion of the plaintiff's case, for a dismissal of the action as against the construction company and asked the jury to give a special verdict by way of answering certain questions rather than give a general verdict and again after the jury had returned their answers to the questions which I had submitted to them. I declined to accede to the motion of Mr. Ford, K.C. counsel for the plaintiff, for judgment for the plaintiff against all three defendants, appointing a time for the discussion of the legal difficulties with which it was necessary for me to deal, and expressing the opinion (see rule 200) that it was within my power and that it was my duty to enter such judgment for or against the several parties as the law applied to the facts, whether those facts were established by admissions, by the findings of the jury or by unquestioned evidence, called for.

There are some English authorities which throw some light upon the powers of a Judge trying a case with a jury. As they seem to be unfamiliar, I refer to them perhaps at quite unnecessary length.

ALTA.

S. C.

DONLEY v. E.D. & B.C. R. Co.

Beck, J.

In *Peters* v. *Perry* (1894), 10 T.L.R. 366, Bruce, J., had tried a case with a jury. It was a negligence case. The jury disagreed. At the conclusion of the plaintiff's case, he had been asked to dismiss the action but had declined. He eventually did so (see our rule 202). He said at page 366:—

> It was argued . . . that as the case had gone to the jury, it was no longer competent to me to give judgment without a finding of the jury. I do not agree with this contention. It is often convenient, having regard to the possibility of an appeal, to hear the whole of the evidence and to take the opinion of the jury upon the facts, but the Judge, I consider, is at liberty at the end of the case, even if there should be no finding by the jury or notwithstanding a finding by the jury for the plaintiff, to enter judgment for the defendant, if he is satisfied there is an absence of evidence upon which a jury could reasonably have found for the plaintiff.

It is noted in the report of this case that Day, J., had taken the same view in an earlier case of *Davis* v. *Slee*, and that his view had been sustained on appeal (see 10 T.L.R. at 366).

In *Skeate* v. *Slaters, Ltd.*, [1914] 2 K.B. 429, Lord Reading, C.J., said at page 434:

> It was argued for the plaintiff that the learned Judge, having left the case to the jury, could not subsequently alter his decision and enter judgment for the defendants. I do not agree with this contention. It is always open to a Judge, if he thinks fit, to reconsider his decision that there was no case to go to the jury and to enter the judgment for the defendants, if he is then of opinion that the plaintiff has failed to make a case against the defendants. Frequently at trials with a jury, the Judge, although he thinks the plaintiff has not made a case, submits it to the jury in order that their views may be ascertained. This practice very often has the advantage of making an end of the contest as to the facts and in the event of a successful appeal against the Judge's ruling enables this Court to dispose of the action without sending it for retrial. If a Judge thinks a case, however weak, has been made by the plaintiff which, unanswered, would justify a verdict for the plaintiff, and, therefore, submits the case to a jury, the Judge ought not thereafter to enter judgment for the defendants, however strong may be his opinion that, upon all the evidence, including that of the defendants, they should succeed, unless he would have been justified in directing the jury to find a verdict for the defendants. If he could not have so directed the jury he should leave the facts to their decision and should not usurp their province.

Peters v. Perry, 10 T.L.R. 366, was referred to and approved as understood to come within the propositions laid down by the Lord Chief Justice.

Buckley, L.J., said, [1914] 2 K.B. at 438:

> Where the Judge at the conclusion of the plaintiff's case is asked to rule whether there is a case to go to the jury or not, he may certainly, I think, decline to rule that there is no evidence, may allow the defendants' evidence to be taken, may allow the verdict to go, and none the less may give judgment for the defendants upon the footing that there is no case. . . .

ALTA.

S. C.

DONLEY v. E.D. & B.C. R. Co.

Beck, J.

Further, if the Judge at the conclusion of the plaintiff's case rules, as he did here, there is nothing, I think, to prevent him at the termination of the hearing from reviewing his first opinion. This he may do in my judgment (if he has not disposed of the case) by finding upon further consideration that upon the plaintiff's evidence there was after all no case. But further, I think, he may and ought upon all the evidence in the case (including the defendant's evidence) so to rule if, upon the case as a whole, he finds that the evidence fails to disclose a case upon which the jury could reasonably find a verdict for the plaintiff. Under O. 36, r. 39 (see rules 200, 202, 203), he is to direct judgment to be entered as he shall think right, that means of course as he judicially thinks right and if he is judicially of opinion that upon the case as a whole—that upon the evidence both of the plaintiff and of the defendant—there is no case, it is his duty, I think, to enter that which he thinks is the right judgment, namely, a judgment for the defendant.

Phillimore, L.J., at page 444, approves of *Peters* v. *Perry* (*supra*) but explains that:

> When a Judge takes this course and rules at the end of the whole case that the plaintiff has made out no case, he has to consider the defendant's evidence, not with a view of seeing whether it weakens the plaintiff's case, but with a view of seeing whether it strengthens it.

The powers of a Judge trying a case with a jury are also discussed and Ontario cases referred to in Holmested's Ontario Judicature Act, 4th ed., 1915, pages 725-6. Individual Judges of this Court and Appeal Division have on more than one occasion entered judgment for a defendant notwithstanding a verdict of a jury for the plaintiff.

Mr. Maclean says that at the conclusion of the plaintiff s case he having asked that the action be dismissed as against the McArthur Construction Co. and I having refused the motion, he stated that he "rested" and proposed to put in no evidence on behalf of the construction company. My recollection is that he correctly states what occurred. He contends consequently that the evidence put in subsequently must be taken to have been put in solely against or on behalf of the two railway companies, defendants, and cannot be looked at for the purpose of affecting the right or liability of the construction company.

The question presents itself to my mind in this way. If there is but one defendant and if at the conclusion of the plaintiff's case a motion for dismissal is made and the Judge, whether rightly or wrongly, refuses the motion, the defendant's counsel is driven to choose whether he will rely upon his contention that the action should be dismissed or whether he will introduce evidence on the defendant's behalf. If he chooses the latter course

ALTA.

S. C.

DONLEY v. E.D. & B.C. R. Co.

Beck, J.

undoubtedly the plaintiff's case must be considered in the light of the subsequent evidence and if the subsequent evidence shews the plaintiff to be entitled to relief though the evidence given originally does not the plaintiff is entitled to succeed. If counsel for the defendant chooses the former course the case is not necessarily terminated inasmuch as the trial Judge may be in grave doubt with regard to the law applicable to the case and may desire time for consideration and may have refused the motion on that ground, while being inclined to the opinion that the motion should be granted proposing, however, to hear the evidence on the defendant's behalf so as to avoid a new trial in the event of his coming to the conclusion that his impression of the moment was wrong. As to the risk which counsel for a defendant runs in making a motion to dismiss at the conclusion of the plaintiff's case and in either having his motion granted or electing to give no evidence and there being a successful appeal, see *Tarrabain* v. *Ferring* (1917), 35 D.L.R. 632 at pages 636-637, 12 Alta. L.R. 47 (affirmed 52 D.L.R. —, 59 Can. S.C.R. 670). If counsel for a sole defendant electing to give no evidence declines to accede to the trial Judge's proposal to hear the evidence for the defence the trial is at an end, subject to this, that it is certainly within the discretion of the presiding Judge then and there to permit counsel for the plaintiff to supplement his evidence. If, instead of there being a sole defendant, there are several defendants, counsel for one of them might rest upon his motion for dismissal and leave the court, and I suppose both he and his client being no longer before the presiding Judge the subsequent evidence given in their absence would not be considered by the Judge with reference to the liability of that particular defendant, though if such evidence seemed to make a clear case against that defendant while the Judge upon consideration was of opinion that otherwise the action should have to be dismissed I think the Judge might well continue the trial after notice to that defendant's solicitor so as to make the subsequent evidence available for the plaintiff (see *Stevenson* v. *Dandy* (1918), 43 D.L.R. 238, 14 Alta. L.R. 99.

But, at least, in such a case as the present, where three defendants are sued jointly, put in defences by the same solicitor, and are represented at the trial by the same counsel, and the evidence which it is sought to exclude as against the defendant who seeks

to rest upon the motion for dismissal is that of a witness who is so high an officer in the employment of all three defendants that he was put forward as the representative of all three companies as their officer on an examination for discovery whose admissions would bind the several companies whom he represented, I think the subsequent evidence must be taken as binding the objecting defendant as well as the others. It seems to me to be in effect nothing more than the Judge permitting in the presence of the objecting defendant the plaintiff to supplement the evidence which he has previously given, supplementing it by means of cross-examination of the witnesses produced nominally on behalf of the other defendants.

Furthermore, on the adjourned argument before me, Mr. Ford made formal application to put in on the plaintiff's behalf as against the construction company what he looks upon as the most important parts of the evidence affecting the construction company, namely, the agreement between the A. & G. W. Railway Co. and the construction company, and the schedules of rates and wages and timetables, to which application I acceded.

I propose, therefore, to consider the whole of the evidence dealing with the question of the liability of the construction company, though I doubt if the evidence of the defence will affect my decision with respect to that company.

The questions submitted to the jury and the jury's answers thereto are as follows:

1. Was there negligence, independently of the question whose negligence? A. Yes. 2. In what did the negligence consist? A. Lack of proper track inspection. 3. Was the deceased guilty of contributory negligence? A. No. 4. If so, in what did the contributory negligence consist? . . . 5. Did the deceased voluntarily assume the risk? A. Only the usual risks. 6. (a) Was the deceased aware that the remuneration for his work north of Lac La Biche was, in fact, paid by the J. D. McArthur Co.? (b) Was it a fact that the J. D. McArthur Co. did pay this remuneration? A. (a) No. (b) It was allocated, but no evidence of payment. 7. Was the deceased as engineer of the train which suffered the accident under the control of the J. D. McArthur Co. or of one or other of the railway companies at the time of the accident, and if so, which of them? A. He was under the joint control of E.D. & B.C. and A.G.W. Railway Cos. and J. D. McArthur Co. 8. Assuming the plaintiff is entitled to damages against all or some or one of the defendants at what figure do you assess the damages? A. Damages $11,500.

The occasion of the accident was that a portion of the line of railway north of Lac La Biche had been constructed on a cutting

ALTA.

S. C.

DONLEY v. E.D. & B.C. R. Co.

Beck, J.

on the side of a hill; that it was virtually not ballasted at all; that the rails were kept in place mostly by snow and ice; that, though the train had passed over the portion of the line in question safely going north early in the morning, the snow and ice had thawed during the day and upon the train coming upon that portion on its return journey in the evening the rails and the train slipped over the bank. Obviously the cause of the accident was the unsafe condition of the track. The obligation to keep it in reasonably good condition having regard to the circumstances was primarily upon the construction company. Apart from the Workmen's Compensation Act, 8 Geo. V. 1918, ch. 5, the construction company would undoubtedly be liable in this action. That Act is applicable to such employers as the construction company. I, therefore, am of the opinion that the remedy of the plaintiff as against the construction company is by proceeding under the Workmen's Compensation Act. These words occur in sec. 2, sub-sec. (f) of the Act:

> Where the services of a workman are temporarily let or hired to another person by the person with whom the workman has entered into such a contract (of hiring), the latter (*i.e.*, the original employer—one of the railway companies)—shall be deemed to continue to be the employer of the workman while he is working for that other person (the construction company).

It is urged that by reason of this provision the plaintiff must be deemed to be "the workman" (clause "o") not of the construction company but of one of the railway companies and that, the railway companies being excluded from the operation of the Act, he is not a workman entitled to the benefit of the Act as against the construction company and that, therefore, the Compensation Board has no jurisdiction; and that consequently the plaintiff's remedy by way of an action for damages for negligence against the construction company is not interferred with by the Act.

The evidence shews that the E.D. & B.C. Railway Co., the A. & G. W. Railway Co., and the Central Canada Railway Co. were operated as one system, and, as I think, that during construction of any part of any of the three lines, the construction company was also another unit of the same system; and it seems to me that the effect of this arrangement was that it was contemplated both by the companies and by the men that so far as the men were doing work for a particular company they should be deemed to be the employees of that particular company. In other words,

ALTA.

S. C.

DONLEY v. E.D. & B.C. R.Co.

Beck, J.

my view is that Donley when working on the part of the system under construction by the construction company was not "a workman temporarily let or hired" by one of the railway companies to the construction company.

As to the E.D. & B.C. Railway Co. there is absolutely no evidence on which it can be found that it was in any way responsible for the faulty construction of the roadbed which was the occasion of the accident.

As to the A. & G.W. Railway Co., the conclusion I have come to is that the company is liable.

I think its liability depends upon the control it had over the work being done for it by the construction company.

The contract between the two companies provides for the naming of an engineer by the railway company. He was actually named and he or his delegate—whose appointment was also authorized—were constantly in superintendence of the work. The contract gives to the engineer or his delegate the following powers:

2. The contractor agrees to employ only competent men to do the work and that whenever the engineer shall inform him in writing that any man on the work is, in his opinion, incompetent, unfaithful or disorderly, such man shall be discharged from the work and shall not be employed again on it.

3. The engineer reserves the right . . . to give such orders as in his opinion will facilitate the progress of the work and the contractor must conform to such order.

10. Defective work and material may be condemned by the engineer at any time before the final acceptance of the work and such work shall be rebuilt in accordance with his directions at the contractor's expense.

11. At all times when the work is in progress, there shall be a foreman or head workman, and any instructions given to him shall be considered as having been given to the contractor.

16. The engineer shall at any time . . . be at liberty to make any alteration, substitution or change that he may deem advisable, etc.

The contractor shall carry on the work at such places and in such manner as he shall be directed from time to time by the engineer. . . . All works are to be done to the entire satisfaction of the engineer, etc.

It is because of the direct control retained and purporting to actually exercised by the railway company, through its engineer, over the construction company, that I think the railway company liable. In many cases where one proposes to do a work but engages another to do it under contract, the latter becomes an "independent contractor" and not a "servant" of the former, and the employer

ALTA.

S. C.

DONLEY v. E.D. & B.C. R. Co.

Beck, J.

is not liable. Nevertheless, the contractor may have so large and direct a control retained over him by the employer that the latter is liable for his negligent acts or omissions.

A leading case upon this distinction is *Stephen* v. *Thurso Police Commissioners* (1876), 3 Ct. of Sess. Cas., 4th series, 535.

It is there said (see Lord Gifford's judgment, page 542):

> On carefully considering the very numerous cases which have occurred chiefly in England, on this branch of the law, and of which we had in argument a very full citation, I think the principle which governs the decision in such cases is that the person or superior, be he called either master or employer, who has reserved or who has assumed the direct and personal control over the subordinate, be he called servant or workman, who committed the fault or negligence, is liable for the damage thereby caused.

In the result therefore I dismiss the action as against the E.D. & B.C. Railway Co. and the J. D. McArthur Construction Co. and direct judgment for the plaintiff against the A. & G.W.R. Co. for $11,500 damages and costs except such as may have been occasioned by joining the other two companies.

Judgment accordingly.

MAN.

C. A.

CARROLL v. GRAND TRUNK PACIFIC R. C.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, Fullerton and Dennistoun, JJ.A. April 6, 1920.

RAILWAYS (§ II D—71)—CATTLE KILLED BY TRAIN—NOT "AT LARGE"—BREACH OF STATUTORY DUTY TO FENCE—RAILWAY ACT, R.S.C. 1906, CH. 37, SECS. 254 AND 427.

In an action against a railway company to recover the value of cattle killed by a train, where the facts shew that the plaintiff's cattle were not "at large" and only strayed upon the railway, owing to the defendants' breach of their statutory duty to fence, the latter are liable under the Railway Act, secs. 254 and 427.

[*McLeod* v. *Canadian Northern R. Co.* (1908), 18 O.L.R. 616, 9 Can. Ry. Cas. 39; *Ferris* v. *C.P.R. Co.* (1894), 9 Man. L.R. 501; *Palo* v. *Canadian Northern R. Co.* (1913), 14 D.L.R. 902, 16 Can. Ry. Cas. 1, 29 O.L.R. 413, referred to.]

Statement.

APPEAL by defendant from the trial judgment in an action to recover the value of three cattle killed by a train on defendant's railway. Affirmed.

H. J. Symington, K.C., for appellant.

J. P. Foley, K.C., for respondent.

Perdue, C.J.M.

PERDUE, C.J.M.:—This is an action to recover the value of three cattle killed by a train on defendants' railway in the municipality of Portage la Prairie. His Honour Judge Barrett, before whom the case was tried, states the facts as follows:—

MAN.

C. A.

CARROLL v. GRAND TRUNK PACIFIC R. CO.

Perdue, C.J.M.

On December 20, 1918, the plaintiff, who is a farmer and the owner of parish lots 49 and 50, turned the cattle in question into these lots for the purpose of feeding at a straw pile on lot 50. The gate opening from the highway into these lots was not closed but the leaving open of such gate had nothing to do with the manner in which the cattle got upon the defendant's property.

There are no line fences between parish lots 49, 50, 51, 52 and 53 but all are enclosed by a boundary fence with the exception of the defendants 'right of way and yards. All of these lots are cultivated and have been for years, and the land in the immediate vicinity is and has been for years thickly settled and cultivated. In fact, it is one of the oldest and most improved parts of this Province.

The cattle were killed upon defendants' property by defendants' train, and were of the value of $300.

The cattle got upon defendants' property owing to there being no fence along its property.

The trial Judge made the following among other findings:—

The evidence shews conclusively that the plaintiff with full knowledge of there being no fence along defendants' right of way turned his cattle into the field and exercised no control or supervision over them other than to prevent them going upon the highway through the gate by which they entered.

The animals in question herein were lawfully pasturing where they were placed by the plaintiff. It was an understood thing that the animals of the owners of parish lots 49 to 53 inclusive should be pastured upon all of those lots, and that custom, according to the evidence, had been followed for years.

He also found that the animals were not at large within the meaning of the Railway Act, R.S.C. 1906, ch. 37, and that they got upon the defendants' railway owing to there being no fence along the right of way.

The defendants claim that an order was made in 1913 by the Board of Railway Commissioners for Canada relieving the defendants from erecting fences along the portion of their railway where the cattle got upon it, and a certified copy of the order and documents attached was tendered in evidence. Objection was taken by the plaintiff that notice to him had not been given of defendants' intention to produce such evidence as required by the Manitoba Evidence Act, R.S.M. 1913, ch. 65, sec. 22, and that the order had not been set up in the dispute note. The Judge was of opinion that the documents were not admissible but he allowed them to be filed subject to the objection. He found the defendants liable and entered judgment against them for $300.

This case, in my opinion, turns upon the question of the defendants' liability to fence their right of way at the point in question.

MAN.

C. A.

CARROLL v. GRAND TRUNK PACIFIC R. CO.

Perdue, C.J.M.

Without deciding the question whether or not the plaintiff's objections to the reception of the documents were well taken, I think that, as they are before us, it would be well to consider the effect of the documents and dispose of the case accordingly.

The certificate purports to be signed by the Secretary of the Board and it is under the seal of the Board. It states simply that the documents attached to it and marked "A" and "B" are true and correct copies of the originals on file with the Board. Document "A" purports to be a printed copy of an order of the Board dated May 26, 1913. It is intituled: "In the matter of the application of the Grand Trunk Pacific Railway Company, hereinafter called the 'Applicant Company,' under sec. 254 (4), of the Railway Act, R.S.C. 1906, ch. 37, for an order authorizing permanent exemption from erecting and maintaining fences along certain portions of its right of way west of Winnipeg as shewn in red on record fence plans and in yellow on station ground plans, on file with the Board under file No. 9994.83." It orders that the applicant company "be, and it is hereby relieved, from erecting and maintaining fences along the following portions of its right of way, namely:" Then follows a list of about 175 places at intervals along the line from Winnipeg to Edmonton. Amongst these we find "Portage la Prairie." This plainly refers to the city of that name. It could not be taken to refer to the Rural Municipality of Portage la Prairie, which is quite an extensive district of thickly settled farming country. The intention was, no doubt, to dispense with fences along the railway where it passed through the City of Portage la Prairie.

Document "B" is a plan shewing the location of the railway through the City of Portage la Prairie and through a portion of the territory lying to the east and the west of that city. The order "A" does not refer to this plan, nor does the plan refer to the order. In the corner of the plan there is an unsigned note in these words: "That portion of Right of Way Boundary for which application for exemption from Fencing is made is shewn in Yellow." The name of the maker of the plan is not shewn. There are yellow lines bordering the right of way where it passes through the city and for a considerable distance west of the city. The plan put in by the plaintiff shews the west boundary of the city to be a considerable distance east of parish lots 49-53. The

plan "B" is not, and does not contain, a station ground plan. It cannot, therefore, be one of the plans referred to in "A." The order does not refer to the plan or the plan to the order so as to connect them. Further, the order "A" contains a clause that the operation of the order and any relief given thereunder, in so far as any portions of the right of way are concerned, shall cease and determine when and as soon as any land on either side or in the vicinity of any such portion or portions "becomes settled or improved." The lands in question in this suit, being parish lots 49-53, lie in the Rural Municipality of Portage la Prairie and are, as found by the trial Judge, cultivated and improved and have been so for a number of years. I think the documents put in by the defence, namely, "A" and "B," completely fail to shew that the duty of the defendants under sec. 254 of the Railway Act to fence its railway through the above lots was dispensed with.

The lots 49-53 were fenced upon all sides except along the defendants' railway through lots 52 and 53. The plaintiff owns and lives on S.E. 1/4, 4/12, 7, W. which is separated by a highway from lots 49 and 50 which also belong to him. There is a gate on each side of the highway to give him access to the last mentioned lots. On the morning in question he drove his cattle to a straw pile on lot 50. By an arrangement with the owners of lots 51, 52 and 53, his cattle were permitted to roam and pasture upon these lots when not under crop. He gave similar privileges to them in respect of his lots. When the cattle left lot 50 and went upon lots 51 and 52 they were not trespassing. They were not at large. They were upon lands where their owner was licensed to put them. They got upon the property of the defendants by reason of the breach of statutory duty of the defendants to fence their railway as prescribed by sec. 254 of the Railway Act.

In *McLeod* v. *Canadian Northern R. Co.* (1908), 9 Can. Ry. Cas. 39, 18 O.L.R. 616, the plaintiffs were the lessees of a field in which they pastured their horses. The field adjoined defendants' railway. A fence along the railway was erected by the defendants, but they had left a gap in it. The horses passed through the gap, got upon the railway track and were killed by a train. It was held that the horses were not "at large" within the meaning of sec. 294 of the Railway Act, but the defendants

MAN.

C. A.

CARROLL v. GRAND TRUNK PACIFIC R. CO.

Perdue, C.J.M.

by their failure to erect and maintain fences, pursuant to the duty imposed on them by sec. 254, were liable for damages at the suit of any person injured by reason of the statutory right of action conferred by sec. 427 of the Act.

In *Ferris* v. *C.P.R. Co.* (1894), 9 Man. L.R. 501, it was held that where horses had strayed upon the land of an adjoining owner and escaped thence on to the railway track through a defective gate and were killed by a train, the railway company was not liable. In that case the evidence failed to shew any special permission given to the owner of the horses to allow them to be on the land in question. The decision is only of importance in the present case in that it shews, as I read it, that if there had been evidence to prove that the horses were by permission of the owner in the field from which they got upon the railway, the defendants would have been liable. The *Ferris* case, *supra*, was commented upon in *Carruthers* v. *C.P.R. Co.* (1906), 16 Man. L.R. 323, affirmed in (1907), 39 Can. S.C.R. 251.

In *McLeod* v. *Canadian Northern Ry. Co.*, *supra*, it was held that the knowledge by the plaintiff that the railway fence was defective when he turned the horses into the field did not relieve the defendants of liability, that the question of contributory negligence did not arise where the proximate cause of the damage was the omission of the railway company to make and maintain fences as required by the statute.

The *McLeod* case was followed in *Palo* v. *Canadian Northern R. Co.* (1913), 14 D.L.R. 902, 16 Can. Ry. Cas 1, 29 O.L.R. 413. In this latter case the animal that was afterwards injured had been turned out to pasture on land beside the railway track which the company had not fenced as required by the Railway Act. It was held that the company's omission to fence did not deprive the adjoining owner of the right to turn his animals out to pasture on his own land.

I think, following the above cases, that the plaintiff's cattle were not "at large" when they left the plaintiff's own land and went upon lots 51 and 52. They were upon these lots by the permission and license of the owner. It was owing to the defendants' breach of their statutory duty to fence that the cattle got upon the railway. The defendants are liable under secs. 254 and 427 of the Railway Act.

The appeal should be dismissed with costs.

CAMERON and HAGGART, JJ.A., concur in dismissing the appeal.

FULLERTON, J.A.:—Sec. 254 of the Railway Act, R.S.C. (1906), ch. 37, requires the railway company to erect and maintain upon the railway,—"(a) fences of a minimum height of four feet six inches on each side of the railway."

Sub-sec. 4 of the same section, as amended by sec. 9, 1-2 Geo. V. 1911, ch. 22, enacts that:—

> The Board may, upon application made to it by the company, relieve the company, temporarily or otherwise, from erecting and maintaining such fences . . . , where the railway passes through any locality in which, in the opinion of the Board, such works and structures are unnecessary.

At the trial the defendant, with a view to shewing the defendants were relieved from erecting fences, tendered in evidence a copy of an order made by the Board of Railway Commissioners for Canada, dated May 26, also a plan, both of which are certified by the Secretary of the Board to be "true and correct copies of the originals on file with the Board."

Objection was taken by the plaintiff to the receipt of the order and plan on the ground that no notice of the intention of the defendant to use such copies was given as required by sec. 22 of the Manitoba Evidence Act. I do not think it necessary to consider this objection because, if properly receivable in evidence, they prove nothing.

The order recites:—

> In the matter of the application of the Grand Trunk Pacific Railway Company, hereinafter called the "Applicant Company," under sec. 254 (4), of the Railway Act, for an order authorizing permanent exemption from erecting and maintaining fences along certain portions of its right of way west of Winnipeg, as shewn in red on record fence plans, and in yellow on station ground plans, on file with the Board under file No. 9994.83.

The Order then directs as follows: "It is ordered that the applicant company be, and it is hereby, relieved from erecting and maintaining fences along the following portions of its right of way, namely:" Here follows a long list of names including Portage la Prairie.

The certificate relied on simply says "that the documents hereto attached and marked 'A' and 'B' are true and correct copies of the originals on file with the Board." No connection whatever is established between the order and the plan. From

MAN.

C. A.

CARROLL v. GRAND TRUNK PACIFIC R. CO.

Fullerton, J.A.

the order it would appear that the portions of the right of way exempted are shewn in red on record fence plans, and in yellow on station ground plans on file with the Board under file No. 9994.83. It is not shewn that the plan marked "B" is either a copy of the record fence plans or of the station ground plans.

The defendant has failed, therefore, to establish any exemption from fencing, and so far as the decision of this case is concerned, must be held to come under the provisions of sec. 254.

The facts as found by the trial Judge are as follows:

On December 20, 1918, the plaintiff, who is a farmer and the owner of parish lots 49 and 50, turned the cattle in question into these lots for the purpose of feeding at a straw pile on lot 50. There are no line fences between parish lots 49, 50, 51, 52 and 53, but all are enclosed by a boundary fence with the exception of the defendants' right of way and yards. . . . The animals in question herein were lawfully pasturing where they were placed by the plaintiff. It was an understood thing that the animals of the owners of parish lots 49 to 53 inclusive should be pastured upon all these lots and that custom, according to the evidence, had been followed for years.

The cattle crossed parish lot 51 and on to 52, where they were killed on the defendants' right of way.

The position is then, that the plaintiff was a licensee of lot 52 and his cattle were lawfully on that lot when they were killed.

If the plaintiff had been the lessee of lot 52 the defendant would undoubtedly have been liable. *McLeod* v. *C.N.R. Co.*, 9 Can. Ry. Cas. 39, 18 O.L.R. 616.

In view of the case of *Ferris* v. *C.P.R. Co.*, 9 Man. L.R. 501, I think the plaintiff was in the same position as a lessee.

I would dismiss the appeal with costs.

Dennistoun, J.A. DENNISTOUN, J.A., concurs in dismissing the appeal.

Appeal dismissed.

ONT.

S. C.

DIME SAVINGS BANK v. MILLS.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. December 19, 1919.

GUARANTY (§ I—6)—INDEBTEDNESS OF COMPANY AS CUSTOMER OF BANK—CONSTRUCTION OF INSTRUMENT—LIMITATION OF LIABILITY OF GUARANTORS.

The defendants executed a bond by which they guaranteed "the payment of any and all sums of money which may at any time hereafter be owing and payable by" a corporation or company, "when organised, to said bank" (the plaintiffs), "not exceeding $6,000 at any one time, upon notes, acceptances, endorsements, overdrafts, to be made by said corporation when organised, or upon any account whatsoever. Acceptances of this guarantee, notice of default, renewal, or extension of time of payment of any part of

said indebtedness, any releases thereof, *addition thereto* or change or other form of security, are hereby waived and agreed to. This . . . is a continuing guarantee, covering all indebtedness of said" company, "when organised, to said bank, not exceeding $6,000 at any one time, upon any account whatsoever, until revoked by notice . . ." It was also recited in the bond that the company wished to borrow and the bank agreed to lend sums of money, from time to time, "not exceeding $6,000 at any one time," upon notes, etc. The Court held that upon the true construction of the bond, the defendants were, notwithstanding renewals, extensions, additions, or charges, to be liable "on any account whatsoever" only to the extent of $6,000 at any time, and when they chose to revoke by notice they could do so, their liability being then fixed by the limited amount. The limitation of $6,000 was intended as a protection to the bank, not a prohibition against advancing more than that amount.

ONT.
S. C.
DIME SAVINGS BANK v. MILLS.

Statement.

APPEALS by the two defendants, Mills and Howell, from the judgment of FALCONBRIDGE, C.J.K.B., at the trial, on the 23rd April, 1919, in favour of the plaintiffs for the recovery of $3,520.25 and costs, and dismissing the defendants' counterclaims. The action was upon a bond, signed by the two defendants, guaranteeing the payment to the plaintiffs of moneys (not exceeding $6,000) which might, after the date of the bond, be owing and payable to the plaintiffs by a certain company, at any one time, upon notes, acceptances, endorsements, overdrafts, or upon any account whatsoever.

R. McKay, K.C., for the appellant Mills.

M. A. Secord, K.C., for the appellant Howell.

E. S. Wigle, K.C., for the plaintiffs, respondents.

Hodgins, J.A.

HODGINS, J.A.:—Appeals by both defendants from the judgment of the Chief Justice of the King's Bench, dated the 23rd April, 1919, whereby he directed payment to the plaintiffs of the sum of $3,520.25.

Action on a bond conditioned as follows:—

"Now, therefore, for value received, we, the undersigned, Lawrence C. Howell, of Galt, Ontario, and Thomas Mills, of Kingston, Ontario, hereby jointly and severally guarantee the payment of any and all sums of money which may at any time hereafter be owing and payable by Stearns-Knight Detroit Co., when organised, to said bank, not exceeding six thousand dollars ($6,000) at any one time, upon notes, acceptances, endorsements, overdrafts, to be made by said corporation when organised, or upon any account whatsoever.

"Acceptances of this guarantee, notice of default, renewal, or extension of time of payment of any part of said indebtedness,

ONT.

S. C.

DIME SAVINGS BANK v. MILLS.

Hodgins, J.A.

any releases thereof, addition thereto, or change or other form of security, are hereby waived and agreed to.

"This guarantee is a continuing guarantee, covering all indebtedness of said Stearns-Knight Detroit Co., when organised, to said bank, not exceeding six thousand dollars ($6,000) at any one time, upon any account whatsoever, until revoked by notice given to said bank."

The first recital set out that the corporation "wishes and expects to borrow . . . divers sums of money from time to time, *not to exceed $6,000 at any one time*, upon notes, endorsements, acceptances, and any account whatever."

The second recital reads that the respondents agreed "to loan to the said corporation, sums of money, from time to time as above stated, *not exceeding $6,000 at any one time*, upon notes, acceptances, endorsements, overdrafts, etc., made or endorsed or upon any account whatsoever, provided that the payment of the said loans be guaranteed by the undersigned."

Two points are raised: first, that the recitals govern the operative parts of the bond, so that the appellants are not liable if at any time the respondents had advanced more than $6,000; and, second, that the agreement between the respondents and the company contained in the guarantee, being the basis of the appellants' liability, could not be departed from, and if in fact more than $6,000 was, at any one time, due to the respondents, the bond was void.

Both these objections amount really to the same thing, as each suggests that the bond, when properly construed, prevented the respondents from exceeding the limit of $6,000 at any one time.

It appears that there was at odd times, from a Saturday to a Monday, an unauthorised overdraft of something like $20, which was promptly covered on Monday. These trivial overdrafts were not authorised, and the creditors cannot be chargeable with having increased the amount of the company's liability by these amounts. They were involuntary, so far as the respondents were concerned, and were promptly disavowed, being immediately covered by the debtor. See, upon this point, *Davey* v. *Phelps* (1841), 2 M. & G. 300, 133 E.R. 760.

ONT.

S. C.

DIME SAVINGS v. MILLS.

Hodgins, J.A.

The evidence further shews that, when the company sold motors, it brought in its customers' notes, endorsed by itself, and either discounted or sold them to the respondents, the company remaining liable as endorser. These transactions, if treated as loans to the company, caused the amount of the indebtedness to exceed $6,000 by about $2,500 at one time.

I am inclined to think that these last transactions are strictly within the terms of the bond, which allow borrowings to be "upon notes, acceptances, endorsements . . . or upon any account whatsoever." The contract of guarantee is *strictissimi juris*, and the appellants are entitled to insist on a rigid adherence to the terms of their obligation.

But the bond contains a provision which must have its ordinary meaning given to it: renewal or "extension of time of payment of any part of said indebtedness, any releases thereof, *addition thereto*, or change or other form of security, are hereby waived and agreed to."

The liability of the company, in connection with these discounts or sales of customers' notes, was upon notes and endorsements, and so, in form, within the stipulated course of dealing. They represented sums of money owing and payable exceeding $6,000 at any one time. Consequently, they were "an addition to" the indebtedness, and so were agreed to. They were all afterwards paid by the customers, and no practical harm has been done to the appellants.

I have discussed this matter as if the appellants were correct in construing the bond in the way they argue.

In my opinion, the bond primarily contemplates direct advances to the company up to $6,000 to enable it to begin operations and finance them. It was, I think, contemplated that in the course of business customers' notes for purchased motors might be discounted by the company, and thus an addition to the $6,000 would be created. This would be natural, while a limitation of the advances upon the company's own notes or endorsements for plant or operating expenses, etc., might well be insisted on from motives of prudence. The real meaning of the guarantee seems to be expressed in the last paragraph of the bond, where it is said that the guarantee is to be a "continuing guarantee, *covering*

ONT.
S. C.
DIME SAVINGS BANK v. MILLS.
Hodgins, J.A.

all indebtedness" (of the company) "*to said bank, not exceeding $6,000, at any one time, upon any account whatsoever.*"

I read this as meaning that the sureties were, notwithstanding renewals, extensions, additions, or charges, to be liable "on any account whatsoever" only to the extent of $6,000 at any time, and that when they chose to revoke by notice they could do so, their liability being then fixed by the limited amount. The limitation of $6,000 is intended as a protection to the bank, not a prohibition against advancing more than that amount.

If this is not so, the possible meanings are that at any one time the bank could not make an advance exceeding $6,000, a most unlikely construction, but one fairly well expressed in the recitals, and the meaning asserted by the appellants. That, too, seems to me not to be one intended by the parties, although the bond may undoubtedly be construed in that way. But it is useless trying to stretch words to fit unanticipated circumstances. The parties must be left to what they said at the time. If the limit from day to day is $6,000, then it is equally clear that an "addition thereto" was contemplated and was agreed to.

The liability of the sureties is measured by the liability of the company, and interest should run from the time when its indebtedness became due to the respondents. If the amount for which judgment has been entered is incorrect, the Registrar can compute it, and the judgment may be amended accordingly. Both appeals should be dismissed.

Meredith, C.J.O.
Magee, J.A.

MEREDITH, C.J.O., and MAGEE, J.A., agreed with HODGINS, J.A.

Maclaren, J.A.

MACLAREN, J.A., agreed in the result.

Ferguson, J.A.

FERGUSON, J.A.:—If what is written in the recitals in the document sued upon is to be read as a statement that the plaintiffs had agreed that the indebtedness of the debtor to the bank would not at any one time exceed $6,000, the appellants would, in my opinion, be entitled to succeed, for I do not think that the subsequent provision in the agreement, for renewals, extensions, discharges, and additions, is necessarily inconsistent with such an agreement, or that the provision contains in itself a stipulation permitting the plaintiffs to make any advances contrary to the terms of the agreement stated in the recitals. It is not shewn that it was in the contemplation of the parties that the

ONT.

S. C.

DIME SAVINGS BANK v. MILLS.

Ferguson, J.A.

plaintiffs should make one direct advance of $6,000. On the contrary, the circumstances and the wording of the document indicate that the parties contemplated that the moneys should be advanced from time to time, on notes, acceptances, endorsements, and overdrafts; it might well be that it was intended by the proviso to permit the plaintiffs to release notes or acceptances, such as trade-paper, and to take new trade-paper or to make new loans, so long as the total advances did not exceed $6,000; but, with the trial Judge, I do not see anything within the four corners of the document which prohibits the plaintiffs from lending more than $6,000.

In my opinion, the words used in the recital, when given their full effect and meaning, amount to no more than a statement that the plaintiffs have agreed to advance some moneys to the debtors, but they are not bound to advance more than $6,000 at any one time. The contention of the appellants that the plaintiffs bound themselves not to advance more than the $6,000 is not, I think, supported by any words to be found in the document; nor, in my view, is it in accordance with the real meaning of the words of the document, or the real intention of the parties.

On my reading of the whole document, the plaintiffs were not bound to advance more than $6,000; but, if they did do so, they could look to the guarantors for repayment only to the extent of $6,000.

I would dismiss the appeals.

Appeals dismissed with costs.

YUKON.

T. C.

Re APPLICATION OF ANNA THERESA BOYLE.

Territorial Court of the Yukon Territory, Macaulay, J. May 11, 1920.

MINES AND MINERALS (§ I A 7a)—PLACER MINE CLAIM—HYDRAULIC LEASE —ORDER-IN-COUNCIL — ABANDONMENT OF CLAIM — RELOCATION— RIGHTS OF PARTIES.

A placer mining claim which had been granted and was in good standing at the time hydraulic lease No. 18 was granted, and which was granted and which was kept in good standing for some time after the granting of the said lease, and which is in the immediate vicinity of other placer mining claims which are being profitably operated, is expressly excluded from the ground covered by the said hydraulic lease, by the Order-in-Council of August 25, 1900. The subsequent reversion of the claim to the Crown does not change its location, and it becomes vacant Dominion land open for location under the Placer Mining Act.

[*Smith* v. *Canadian Klondyke Mining Co.* (1911), 19 W.L.R. 1, followed.]

YUKON.

T. C.

RE APPLICATION OF ANNA THERESA BOYLE.

HEARING on the return of an order issued on the application of Anna T. Boyle calling upon A. J. Seguin, Mining Recorder for the Dawson Mining District, Yukon Territory, at the sittings of this Court to be held at the Court House, Dawson, on April 21, 1920, to shew cause why a writ of mandamus should not issue directed to and commanding him, the said Mining Recorder, to accept the application of the above named A. T. Boyle for a grant of Creek Placer Mining Claim Number 3 on Crofton Gulch, in the said Dawson Mining District, Yukon Territory, and on payment of the proper fees in that behalf, to issue to the said A. T. Boyle a grant of said Creek Placer Mining Claim Number 3, Crofton Gulch, in accordance with the provisions of the Yukon Placer Mining Act. Application granted.

C. B. Black for applicant; *J. P. Smith*, K.C., and *C. E. McLeod*, for mining recorder.

Macaulay, J.

MACAULAY, J.:—The evidence submitted shews that on March 9, 1920, the applicant did stake, locate and mark out on the ground, in accordance in every particular with the provisions of the Yukon Placer Mining Act, Creek Placer Mining Claim No. 3 on Crofton Gulch, in the Dawson Mining District, Yukon Territory; that on the same day she applied to the said Mining Recorder, in accordance with the provisions of the said Placer Mining Act, for a grant of the said claim and tendered to him the sum of $10, being the fee required to be paid for such grant under the provisions of the said Act.

The evidence also shews that the applicant was a person over the age of 18 years, and entitled to locate a claim under the provisions of sec. 17 of the said Placer Mining Act. It also shews that Creek Claim No. 3 Crofton Gulch is a 500-foot claim, and comprises the ground formerly covered by Creek Claims Nos. 3 and 4 Crofton Gulch, which were originally staked and granted as 250-foot claims under the then provisions of the Placer Mining Regulations of the Yukon Territory.

There is no dispute in the evidence that the claim was not properly located, staked and applied for or that it did not cover the ground formerly known as Claims Nos. 3 and 4 Crofton Gulch aforesaid, but the Mining Recorder in his evidence says that he refused to issue the said grant for the reason that said

Crofton Gulch is within the limits of Hydraulic Lease No. 18, and was for that reason on land lawfully occupied for placer mining purposes, as described in sec. 17 of the Yukon Placer Mining Act. He further states that an application for a grant of said claim was made by one W. Shaw on March 10, 1902, and was refused, and that an application for a grant of the said claim was made by Charles Wilfred McPherson on May 3, 1913, and refused, for the reason that the said Crofton Gulch was within the limits of the said Hydraulic Lease, as shewn by the records of the Mining Recorder's office at Dawson. But there is nothing in the material before me to shew that either the said Shaw or the said MacPherson took any other steps after the said refusal of the Mining Recorder in each instance, to obtain a grant of the said claim; and their own laches in that respect would prevent them now, if no attempt had been made to enforce their rights in the meantime, from opposing the application of this applicant.

The evidence of the Gold Commissioner, G. P. MacKenzie, shews that the holders of Hydraulic Lease No. 18 and their predecessors in title have been in occupation, for placer mining purposes, of the tract of land described in the said lease since the granting of the said lease, and have complied with all the provisions of the said lease as to carrying on of operations as required by its terms, payment of rentals and in all other respects.

There is also in evidence a copy of said Hydraulic Lease No. 18, dated November 5, 1900, and the evidence further shews that on November 16, 1900, the said lease was assigned by Joseph Whiteside Boyle, the lessee, to Harold Buchanan McGiverin.

There is also in evidence a copy of a letter dated, Ottawa, Canada, November 22, 1900, as follows:—

To the Honourable
The Minister of the Interior,
Ottawa, Ont.

Sir: Regarding any placer mining claims existing within the limits of the area leased for hydraulic mining purposes, on record in the Timber and Mines Branch of the Interior Department as Lease No. 18, File No. 55,466, I beg to state that while the intention is clearly apparent when abandoned, these claims are to revert to and become a part of the leasehold, it appears to be necessary that the lessee should have a letter from

YUKON.

T. C.

RE APPLICATION OF ANNA THERESA BOYLE.

Macaulay, J.

your Department to this effect. Will you kindly look into this matter at your earliest convenience and have a letter issued to me covering this point.

I have the honour to be sir,

Your obedient servant,

H. B. McGIVERIN.

And an answer thereto, as follows:—

File 55,466, T. & M.

Department of the Interior,

Ottawa, 12 December, 1900.

Sir: I beg to acknowledge the receipt of your letter of the 22nd ultimo, addressed to the Minister of the Interior, with respect to Hydraulic Mining Lease No. 18, issued in favour of Joseph W. Boyle, of Dawson, of a tract of land situated on the Klondyke River, in the Yukon Territory, and in reply to inform you that all placer mining claims within the boundaries of the above leasehold for which entry was in force at the date of the lease, but which may be abandoned or forfeited for any cause, will at any time during the currency of the lease, revert to the lessee.

Your obedient servant,

P. G. KEYES, Secretary.

H. B. McGIVERIN, ESQ.,
Barrister, etc.,
Ottawa, Ont.

A copy of said letter from Keyes to McGiverin is on file in the office of the Gold Commissioner at Dawson, on the files of the said Hydraulic Lease No. 18.

The Gold Commissioner further says that in recognition of the title of the holders of the said lease to the premises described therein as given by the said lease and the letter of the said Keyes to the said McGiverin, the Gold Commissioner of the Yukon Territory and the Mining Recorder of the said District have at all times during the period in which he filled either of the said offices refused to issue grants for placer mining to any persons locating ground for placer mining purposes within the limits of the premises described in the said Hydraulic Lease.

This, undoubtedly, was the reason why the grant was refused to the applicant, and the facts in this case are in no way in dispute.

The evidence submitted on behalf of the applicant further shews that a grant of Creek Placer Mining Claim No. 3 Crofton Gulch was issued to one Omar Patten on February 17, 1899, under the then provisions of the regulations governing placer mining in the Yukon Territory, and that the said claim remained

in good standing until February 17, 1902, when it lapsed and reverted to the Crown, and that it was a claim 250 ft. long. It also shews that a grant to Creek Placer Mining Claim No. 4 on said Crofton Gulch was issued to one Victor Putzy on February 20, 1899, under the said provisions and regulations then governing placer mining in said Territory, and that the said claim remained in good standing until February 20, 1901, when it lapsed and reverted to the Crown, and that it was also a claim 250 ft. long and that the application of the applicant herein covers the ground mentioned in both the said claims.

The evidence further shews that a group of many placer mining claims in a tract in the vicinity of and surrounding said claims Nos. 3 and 4 Grofton Gulch, had been granted to the persons whose names are mentioned in the evidence, prior to the issue of Hydraulic Lease No. 18, and during the years 1898 and 1899, and that the said claims have been renewed from time to time and are still in good standing and are shewn on the different plans put in as exhibits, and particularly shewn on plan (ex. E.), referred to in the affidavit of John Wesley Park.

The evidence further shews that the said placer mining claims adjoining said creek placer mining claim No. 3 Crofton Gulch, for which the applicant seeks a grant, and surrounding said claim on three sides thereof, as shewn on said plan (ex. E.), are and have been since the granting thereof by the Crown profitably operated and mined by ordinary placer mining methods and are still being profitably operated and mined by said methods.

Counsel for the Mining Recorder, in a very able and exhaustive argument, contended that the Canadian Klondyke Mining Co., the successor of the lessee Boyle, mentioned in said Hydraulic Lease No. 18, is in possession of the tract of land known as No. 3 Crofton Gulch, and for which the applicant prays a grant, under and by virtue of the said Hydraulic Lease No. 18 and under and by virtue of the said letter of Keyes to McGiverin, in which it is stated that all placer mining claims within the boundaries of the above leasehold for which entry was in force at the date of the lease but which may be abandoned

YUKON.

T. C.

RE APPLICATION OF ANNA THERESA BOYLE.

Macaulay, J.

or forfeited for any cause, will at any time during the currency of the lease revert to the lessee. He argued that under said letter the said company was in any event in possession of the said tract, and that a possessory title was stronger than no title, and that a third person or stranger has no status to attack the title or possession of the said company; that the said tract is occupied ground and not open to location under the provisions of sec. 17 of the Placer Mining Act. He quoted, among other authorities, in support of his contentions: *Nelson, etc., Co.* v. *Jerry* (1897), 5 B.C.R., 403; *Victor* v. *Butler* (1901), 8 B.C.R. 100, 1 Martin's Mining Cases, 438; *Robertson* v. *Daly* (1885), 1 Martin's Mining Cases, 165-166; In *Re Weir,* cited in McPherson & Clark, Law of Mines, p. 469; *Osborne* v. *Morgan* (1888), 13 App. Cas. 227; *Smith* v. *Canadian Klondyke Mining Co.* (1911), 16 W.L.R. 196; *National Phonograph* v. *Edison Bell Co.*, [1908] 1 Ch. 335; *Smith* v. *Canadian Klondyke Mining Co.* (1911), 19 W.L.R.1; *City of Vancouver* v. *Vancouver Lumber Co.*, [1911] A.C. 711; *Hartley* v. *Matson* (1902), 32 Can. S.C.R. 644.

Counsel also contended that under clause 3 of the said Lease No. 18, which provides that "the said lease or demise shall be subject to the rights or claims, but to such rights or claims only, of all persons who may have acquired the same under the regulations of any order of the Governor-General-in-Council up to the date of these presents," the applicant could not succeed in obtaining a grant of said placer claim No. 3 Crofton Gulch, as she had acquired no right or claim to the said placer claim prior to the date of the said lease, and that said clause 3 clearly provided that all such claims not so acquired became the property of the lessee and his assigns or successors in title.

I agree with the contention of counsel that the applicant has no status to attack the said Hydraulic Lease, and I also agree that if the Canadian Klondyke Mining Company is in possession of the tract covered by said creek claim No. 3 Crofton Gulch, with the consent of the Crown, or that if such ground is lawfully occupied for placer mining purposes the applicant must fail. In such case she would clearly have to invoke and obtain the aid of the Attorney-General before attempting to contest the claim of the said company.

The said Hydraulic Lease No. 18 contains many provisos, exceptions, conditions and prohibitions, and among them is the following:—

> Provided also, that this demise is subject to all other regulations contained and set forth in the said Order-in-Council of the Third day of December, 1898, as amended by subsequent Orders-in-Council, as full and effectually to all intents and purposes as if they were set forth in these presents.

And when we turn to the amendments made in the said regulations by an Order-in-Council of August 25, 1900, we find the following prohibition:—

> No application for a lease for hydraulic mining purposes, however, *shall be entertained for any tract* which includes within its boundaries any placer, quartz or other mining claim acquired under the regulations in that behalf, or in the immediate vicinity of which placer, quartz or other mining claims have been discovered and are being profitably operated, and also that the Gold Commissioner shall, in addition to furnishing the reports above referred to, be required to furnish a certificate that the location applied for does not contain any such placer, quartz or other mining claim, nor have any such claims been granted in the immediate vicinity of such location.

Counsel for the applicant contended that under the above regulations, which formed a part of said lease, the tract in which said placer claim No. 3 Crofton Gulch was situate was excluded from the ground covered by the said lease by the very terms of the lease itself, and was, therefore, vacant Dominion lands open for location under the provisions of the said Yukon Placer Mining Act, and that the applicant was entitled to the order asked for. He relied mainly on the authority of *Smith* v. *Canadian Klondyke Mining Co.*, 19 W.L.R. 1, in support of his contention. He also cited unreported judgments of Craig, J., and Dugas, J., in this Court, delivered in 1903, in *Re Envoldsen* v. *Govollin*, to shew that mining claims could only be disposed of in the manner provided by the mining regulations in force from time to time which had the force and effect of statutes, and that nowhere in such regulations is the power given to the Minister of the Interior or the Deputy Minister to interfere with, or to alter or change such regulations.

Smith v. *Canadian Klondyke Mining Co.* was a stated case submitted to this Court for hearing in the year 1911, and was tried before Craig, J., and reported in 16 W.L.R. 196.

YUKON.

T. C.

RE APPLICATION OF ANNA THERESA BOYLE.

Macaulay, J.

The "Golden Age" quartz mineral claim, the subject of the litigation in *Smith* v. *Canadian Klondyke Mining Co.*, was located on November 2, 1899, and duly recorded. It was physically situated within the boundaries of the Hydraulic Location of the defendants, as described in Hydraulic Lease No. 18, the lease referred to in this application. The said mineral claim had been continuously renewed and kept in good standing, and was prior in date to the said Hydraulic Lease No. 18, which had been given to the said Boyle. The facts upon which the case was submitted are fully set out in the judgment of the Court *en banc*, in appeal in that case, reported in 19 W.L.R. 1. The question submitted for the opinion of the Court was:—

> Do the rights and privileges granted to the lessee under Hydraulic Lease No. 18 extend to and include the tract of ground lying within the boundaries of the plaintiff's mineral claim, the "Golden Age"?

The Judge who tried the case found in favour of the plaintiff, and on appeal to the Court *en banc*, the decision of the trial Judge was affirmed, the Court *en banc* holding that under the regulations of December 3, 1898, as amended by subsequent Orders-in-Council, and particularly by the amendment of August 25, 1900, the tract covered by the said mineral claim, the "Golden Age," was excluded from the said lease notwithstanding that the original application of Boyle may have included within its physical boundaries the tract covered by the said quartz claim.

On appeal to the Supreme Court of Canada, the judgment of the Court *en banc* was upheld by the unanimous decision of that Court. Idington, Anglin and Duff, JJ., delivered written judgments. The other members of the Court concurred, but the case, I believe, has never been reported, although I have copies of the written judgments of the said Judges before me.

There is no provision in either the Quartz Mining Regulations or in the Placer Mining Regulations or Placer Mining Act of the Yukon Territory which prohibits the staking of placer claims on tracts of land covered by quartz claims, or vice versa. But the Court was of opinion in that case that the whole tract covered by the said mineral claim was excluded from the said lease and that the defendant was prohibited from claiming any rights or privileges therein.

In the case before me the tract which was covered by said placer mining claim No. 3 Crofton Gulch, which was then known as claims Nos. 3 and 4 Crofton Gulch, had been granted as placer mining claims and were all in good standing on the 5th day of November, 1900, when said Hydraulic Lease No. 18 was executed, and were kept in good standing for some time after the granting of the said lease.

Under the said provisions of the regulations contained and set forth in the said Order-in-Council of the 3rd day of December, 1898, as amended by subsequent Orders-in-Council, and particularly by the Order-in-Council of August 25th, 1900, above referred to, this tract was clearly excluded from the said lease at the time of the granting thereof by the terms of the said lease. All of the claims in the said tract in the immediate vicinity of said claim No. 3 Crofton Gulch, then known as Nos. 3 and 4 Crofton Gulch, are still in good standing and are being profitably operated. The said claim No. 3 Crofton Gulch is surrounded on the north, east and west sides by claims that are being so profitably operated. The fact that No. 3 Crofton Gulch became vacant land and reverted to the Crown did not alter its location. It is still in the tract that was excluded from the said lease, and even if it had been vacant Dominion land at the date of the said lease it would still, in my opinion, have been excluded therefrom, as it is a tract in the immediate vicinity of which placer mining claims have been discovered and are being profitably operated.

If the defendant in the case of *Smith* v. *Canadian Klondyke Mining Company* did not acquire any rights or privileges to placer mining claims which were situated within the boundaries of the "Golden Age" mineral claim, and which as such were vacant placer mining claims at all times, much more, therefore, is the said company prohibited from asserting claim to the tract in question in this application.

The letter from the Secretary of the Minister of the Interior to Mr. H. B. McGiverin could not have the effect of altering the regulations which were embodied in the said lease, which had the force and effect of statutes, as pointed out in the case of *Re Envoldsen*.. Nowhere in the Regulations is any power given to the Minister of the Interior to alter or interfere with the

YUKON.

T. C.

RE APPLICATION OF ANNA THERESA BOYLE.

Macaulay, J.

Regulations. Neither could the said letter have the effect of bringing within the provisions of the lease any tract which by the terms of the said lease was excluded therefrom.

For the reasons given above I am of the opinion the Creek Placer Mining Claim No. 3 on Crofton Gulch was vacant Dominion lands, open for location under the provisions of the Yukon Placer Mining Act, when it was located and staked by the applicant; that the applicant was a person entitled by law to stake and acquire such a mining claim; that the said claim was properly staked and located in accordance with the provisions of the said Placer Mining Act, and that the order should go for the issue of a writ of mandamus, as asked, together with the costs of the application.

D'ARCY v. LAND.

N. B.

S. C.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. February 20, 1920.

BROKERS (§ II B—12)—REAL ESTATE AGENT—SALE OF LANDS SUBJECT TO LEASEHOLD INTEREST—NECESSITY OF PURCHASING LEASEHOLD—INTEREST OF AGENT—RIGHT TO COMMISSION ON SALE OF LEASEHOLD.

A real estate agent who is employed to sell land which is subject to a leasehold interest, and who, in order to sell the freehold, is compelled to negotiate a sale of the leasehold interest, acts as his own principal in such negotiations, and it being to his interest to buy the leasehold interest at as low a figure as possible he is not entitled to any commission from the owner of such leasehold interest on the sale.

[*Boston Deep Sea Fishing Co.* v. *Ansell* (1888), 39 Ch. D. 339; *Lydney & Wigpool Iron Co.* v. *Bird* (1886), 33 Ch. D. 85, applied.]

Statement.

APPEAL by defendant from judgment of Armstrong, J., Judge of the St. John County Court. Reversed.

J. K. Kelly, K.C., for defendant, supports appeal; *J. S. Tait, contra.*

Hazen, C.J.

HAZEN, C.J.:—The respondent in this cause sought to recover $100.72, $87.50 being for commission for negotiating a sale of leasehold property owned by the appellant, and $13.22 commission of 5% on $264.45, collected on a bond on which the respondent himself was a joint obligator to the appellant.

The Judge of the County Court refused to allow the claim for $13.22, as the respondent was himself liable to the appellant on the bond given to her, and it was to his interest that he should see that the amount due thereon was paid, and in doing so he was acting as much in his own interests as in the appellant's. He

directed, however, that judgment be for the respondent for $87.50 and costs to be taxed by the clerk. The appellant had filed a counterclaim for $270 and interest, being the balance due on the bond given to her by one Alexander Thorne, in which bond the respondent had joined as security for payment by Thorne. This amount was admitted by the respondent, and the trial Judge directed that the appellant was entitled to recover on her counterclaim the sum of $292 with costs.

The respondent is a real estate agent. In the year 1915, one Andrew Dewar, being the owner in fee of a lot of land in Duke St., West St. John, placed the same in the hands of the respondent for sale. He told the respondent he wanted $300 for himself, and the respondent could have as commission anything over and above that at which the property was sold. It was, therefore, in the respondent's interests to sell the fee in this lot of land for as large a sum as possible. This lot was under lease to the appellant for $16 a year, and she erected upon it a house which belonged to her. The respondent, after Dewar listed the house with him, went to the appellant and told her that Dewar had placed the lot in his hands for sale, and asked her if she wanted to buy it. She said no. He then asked if she would sell her leasehold. She said yes, and after consulting with her son, stated she would take $1,800 for it. The respondent approached one Alexander Thorne, took him through the house, and Thorne finally said he would pay $1,750 for it. The respondent so advised the appellant, who said that she would accept that price, and the property was sold to Thorne, he paying Dewar $650 for the freehold, and the appellant $1,750 for her leasehold interest. These statements of fact, word for word, are taken from the respondent's factum filed herein, and it seems to me that they fail to constitute any agency between the respondent and the appellant for the sale of the leasehold interest. The respondent having been informed by Dewar that he could have as commission anything over and above the $300 that he would get for the fee was acting clearly in his own interests and in no one else's, when he went to the appellant and asked her if she would sell her leasehold interest in the property, and when she agreed to accept $1,750 for it she did so

N. B.
S. C.
D'ARCY v. LAND.
Hazen, C.J.

at the request of the respondent, who was anxious to make the sale in order that he might realize a commission on the sale of the freehold. He subsequently sold the whole property for $2,400, so that after paying the appellant $1,750 and some incidental expenses in connection with the raising of a sum of money on mortgage, he realized for himself a commission of $300 on the whole transaction.

If these alone were the circumstances in connection with the case, and there were no other questions arising, I would have no hesitation in deciding that the relationship of principal and agent did not exist between the respondent and the appellant, and that the respondent in arranging with Mrs. Land for the sale of her leasehold interest was doing so not as her agent but simply in his own interests in order that he might make a commission which was offered him by the owner of the fee. It was clearly in his interests to get as large a price as possible for the fee, and if $2,400 was the total amount that he got for the whole property to have the appellant's interest in the leasehold fixed at as low a sum as possible, because the difference between her price and the $2,400 would constitute the price paid for freehold, and he would receive every dollar of that amount over and above the $300 above referred to.

The Courts of law have been most particular in guarding against what are called secret commissions, and in refusing to allow such when they have been claimed. It may be laid down as a general principle, that it is the duty of an agent to disclose to his principal all facts that can have any bearing whatever upon the transaction in question, and that are within his knowledge. It was clearly the duty of the respondent to inform the appellant of his interest in the transaction, and while it has been contended on behalf of the respondent that the evidence is sufficient to justify a conclusion that he did so, I cannot find that such is the case, and it appears to me that the appellant was kept in ignorance of facts that the respondent should certainly have communicated to her in order that she might fairly consider her own action in regard to the amount for which she was to sell.

In the case of *Salomons* v. *Pender* (1865), 3 H. & C. 639, 159 E.R. 682, an agent employed to sell land sold it to a company

in which he was interested as a shareholder and a director, and it was held that he was entitled to no commission from his employer in respect to the sale. As Martin, B., said: "A man cannot be an agent for another and a principal in the same contract." And it certainly seems to me that this language is most applicable to the present case, for the respondent was claiming to act as agent for the appellant, while at the same time he was a principal in the transaction, being interested in the sale from her in order that a sale might be effected of the fee at a sum that would give him the most substantial commission.

In the case of *Andrew* v. *Ramsay & Co.*, [1903] 2 K.B. 635, it was held that where property has been sold by an agent for a principal, and the agent has been paid a commission on the sale by the principal, the latter on discovering that the agent has received a secret commission from the purchaser may recover back the commission paid by him to the agent. This was an appeal from the decision of the Judge of the County Court of Clerkenwell. The action was brought by the plaintiff, a builder, to recover from the defendants, a firm of auctioneers, a sum of fifty pounds paid by the plaintiff to the defendants for commission on a sale of certain property belonging to the plaintiff. The defendants were employed by the plaintiff to effect a sale of the plaintiff's property, and were promised a fee of fifty pounds as commission. They procured a purchaser who paid a deposit of one hundred pounds upon the purchase price, of which the defendants retained fifty pounds in their possession as their commission, and handed the balance to the plaintiff. Subsequently, the latter discovered that the defendants had received a secret commission of £20 from the purchaser, and brought an action to recover this amount. He recovered the £20 in his action in the County Court, but sought to recover the sum of £50 paid to the defendants as commission, on the ground that they had committed a breach of their duty as agents towards him in accepting a secret commission and thus disabling themselves from using their best efforts to obtain for him the best price for his property. The County Court Judge held that the plaintiff was entitled to succeed, and gave judgment for him for £50 and costs, and it was from this decision that the defend-

N. B.
S. C.
D'ARCY v. LAND.
Hazen, C.J.

ants appealed. The Lord Chief Justice in giving judgment dismissing the appeal, said that he thought that the case was covered by the decision in *Salomons* v. *Pender, supra,* which I have already cited. The case turned on the broad principle that where a person was not entitled to say—I have been acting as your agent and doing the work you have employed me to do—he could not recover the commission promised to him. He considered that a principal was entitled to have an honest agent, and that only an honest agent was entitled to receive his commission. If it turned out that a man was not acting entirely as agent for his principal, but was directly or indirectly working for the other party to the contract in such a way as possibly to sacrifice in whole or in part the interests of his principal, he was not entitled to his commission. He thought that the principle of *Salomons* v. *Pender,* applied to the case, and if there was no direct authority on the point the sooner there was one the better.

Taking the Lord Chief Justice's remarks above quoted, if it turned out that a man was not acting entirely as agent for his principal, but was directly or indirectly working for the other party to the contract, how much stronger is the case where the party, as in this case, was not acting entirely as agent for his principal, but was directly or indirectly working for his own interests. Had he been working solely with an eye to the interests of the defendant, he might and no doubt could have obtained a larger price for her property than that which she consented to accept.

In *Manitoba and North-West Land Co.* v. *Davidson* (1903), 34 Can. S.C.R. 255, the facts were that Davidson represented to the manager of a land corporation that he could obtain a purchaser for a block of its land, and was given the right to do so up to a fixed date. He negotiated with a purchaser who was anxious to buy, but wanted time to arrange for funds. Davidson gave him time, for which the purchaser agreed to pay $500. A sale was carried out, and Davidson sued for his commission, not having then received the $500. It was held that the consent of Davidson to accept the $500 was a breach of his duty as agent for the corporation, which disentitled him from recovering the commission. Nesbitt, J., in the course of his judgment said, at p. 259:—

Does such a transaction as this disentitle him to the payment of his commission, assuming that he is otherwise entitled to such a commission? I think the test is: Has the plaintiff by making such an undisclosed bargain in relation to his contract of service put himself in such a position that he has a temptation not faithfully to perform his duty to his employer? If he has, then the very consideration for the payment for his services is swept away. I think that the making of such a bargain necessarily put Davidson in a position where it was to his interest that Grant should become the purchaser, in which case he would receive not only the commission but $500 commission as a secret profit.

So, in this case, the making of the arrangement between the respondent and Dewar whereby the respondent was to receive everything that he got for the fee over $300 put him in a position where it was to his interest that the appellant should sell her leasehold interest for the lowest sum that he could induce her to.

Nesbitt, J., referred to several cases in the course of his argument, one the case of *Andrew* v. *Ramsay & Co.*, [1903], 2 K.B. 635, to which I have already referred. The other the case of *Boston Deep Sea Fishing & Ice Co.* v. *Ansell* (1888), 39 Ch. D. 339, from which I cannot do better than to quote the language of Cotton, L.J., at p. 357, referred to by Nesbitt, J., in 34 Can. S.C.R. 255, at p. 259:—

It is suggested that we should be laying down new rules of morality and equity if we were to so hold. In my opinion if people have got an idea that such transactions can be properly entered into by an agent, the sooner they are disabused of that idea the better. If a servant, or a managing director, or any person who is authorized to act, and is acting, for another in the matter of any contract, receives, as regards the contract, any sum, whether by way of percentage or otherwise, from the person with whom he is dealing on behalf of his principal, he is committing a breach of duty. It is not an honest act, and, in my opinion, it is a sufficient act to shew that he cannot be trusted to perform the duties which he has undertaken as servant or agent. He puts himself in such a position that he has the temptation not faithfully to perform his duty to his employer.

It seems to me that this is exactly the case of the respondent. By agreeing with Dewar to accept, as commission, everything that he could obtain for the property over and above a certain amount, and then agreeing, as he alleges, to act as agent for the appellant, he has put himself in such a position that he has a temptation not faithfully to perform his duty to her.

In the same case Bowen, L.J., says, 39 Ch. D. at 363 (and is quoted, 34 Can. S.C.R., at 260):—

Now, there can be no question that an agent employed by a principal or master to do business with another, who, unknown to that principal or

N. B.

S. C.

D'ARCY v. LAND.

Hazen, C.J.

master, takes from that other person a profit arising out of the business which he is employed to transact, is doing a wrongful act inconsistent with his duty towards his master, and the continuance of confidence between them. He does the wrongful act whether such profit be given to him in return for services which he actually performs for the third party, or whether it be given to him for his supposed influence, or whether it be given to him on any other ground at all; if it is a profit which arises out of the transaction it belongs to his master, and the agent or servant has no right to take it, or keep it, or bargain for it, or to receive it without bargain, unless his master knows it.

I agree with Nesbitt, J., that a person acting in a position of trust and confidence cannot too well understand that the rules as laid down in these judgments will be rigidly enforced by the Courts. See also *Lydney & Wigpool Iron Ore Co.* v. *Bird* (1886), 33 Ch. D. 85, 55 L. J. (Ch.) 875.

I am therefore of opinion that the appeal should be allowed with costs, the judgment directed by the Judge of the County Court for $87.50 for the respondent should be set aside, and that a verdict should be entered for the appellant for $292 with costs.

White, J.

WHITE, J.:—The Judge of the County Court in the written judgment he delivered in this case has found as a matter of fact "that the plaintiff did not disclose to the defendant his contemplated profit," but he expressed himself as of opinion that while such profit was so made, it was not made at the expense of the owner of the leasehold.

I agree with the Chief Justice in thinking that it was the duty of the respondent to have informed the appellant of the agreement he had made with Dewar that he should receive as a commission or profit for the sale of Dewar's interest in the land all that he could get for such interest over and above $300, and that having failed to disclose such agreement he is not in a position to recover a commission from the appellant for the sale made of her interest in the land.

I agree that the judgment directed by the Judge of the County Court for $87.50 in favor of the respondent should be set aside, and that judgement should be entered for the appellant for $292 with costs.

Grimmer, J.

GRIMMER, J., concurs.

Appeal allowed.

MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases.

GALLAGHER v. DECKER.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. May, 31, 1920.

ALTA.

S. C.

VENDOR AND PURCHASER (§ III—37)—*Transfer of land in blank—Subsequent purchasers—Sale to satisfy mortgagees—Rights of parties.*]—Appeal from the trial judgment, 51 D.L.R. 289, in an action to recover damages against the defendant who having given a blank transfer of certain land subsequently resold it to satisfy certain mortgages.

H. R. Milner, for appellant.

F. C. Jamieson, for respondent.

The judgment of the Court was delivered by

HARVEY, C.J.:—In December, 1914, the defendant sold to one Wenzel by way of exchange a certain house and lot upon which there were two mortgages and gave a transfer duly executed but without the name of the transferee or any consideration being stated, although the defendant states that he has no recollection that it was not fully complete. He supposed the transfer had been registered until more than 3½ years later, when he received a demand for payment of one of the mortgages. The first mortgagees had, in the meantime, been paying the taxes and receiving the rents which however apparently were not sufficient to keep their mortgage in good standing. The defendant then finding himself confronted with the liability for two mortgages which should have been assumed by his transferee got into communication with Wenzel, who had left Edmonton. The latter stated that he did not know what had happened to the transfer, but he had the impression that he had traded the property to someone who would probably never register the transfer. He expressed his willingness to give the defendant a quit-claim deed so that he could deal with the property, and this he did. The defendant endeavoured to sell the property for sufficient to pay off the mortgages, but without success,

ALTA.
S. C.

but finally after several months' delay he made a sale at a sum which with $115 paid by him satisfied the mortgages, the second mortgagee having consented to accept almost $200 less than the amount due under the mortgage. Some time after this had been accomplished the plaintiff came forward and said that he was the holder of the transfer given by the defendant, and he now sues for damages for being deprived of the land. It appears that he received the transfer under an exchange with Wenzel a very short time after Wenzel received it and that he put it in his safe where it remained, that something more than a year later he enlisted and later went overseas, and did not return until after the sale made to pay off the mortgages.

Hyndman, J., who tried the action, gave judgment for $328.80 damages as the difference between what he considered the fair value of the land and the amount required to discharge the encumbrances—(1920), 51 D.L.R. 289.

On the argument we allowed the appeal with costs and dismissed the action with costs.

It is a little difficult to appreciate exactly the ground upon which any claim by the plaintiff may be based. The plaintiff certainly has no estate in the land and could acquire one only by inserting his name in the transfer and having it registered, and immediately upon his doing that he would become liable to the defendant to indemnify him against the mortgages. He has not even put his name in the transfer to make himself a transferee and so subject to an implied covenant to pay the mortgages, but he nevertheless sets up a claim to be beneficially entitled to the land of which he has been deprived. His counsel states that the action is not one for breach of trust but one of tort which he classes as trespass. The trial Judge has found that the defendant acted in good faith and that he made an "honest, reasonable and business-like effort" to dispose of the land for $2,000 and failed and he apparently only succeeded in selling it for the price he obtained because the purchaser was the tenant and was being bothered by prospective purchasers looking through the house.

In my opinion, that finding disposes of any question of breach of trust and also of a sale under value. The trial Judge does say that the price obtained may "possibly have been somewhat below its actual value," but that $2,300 was as much as it was

ALTA.
S. C.

reasonably worth. With all respect, it appears to me that, having found that the defendant did all a reasonable person could do to sell for more than he obtained, and having used all businesslike efforts to make such sale he established a basis for fixing the value of the property much more reliable than that of the opinion of any experts, especially when we see that the defendant did, in addition, pay out of his own pocket a sum of money to discharge liabilities properly those of someone else. I think, therefore, that no sale at an undervalue has been established and therefore no damage to the plaintiff even if he has any rights to claim damage. *Judgment accordingly.*

B. C.
C. A.

E. & N.R. Co. v. WILSON.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher and McPhillips, JJ.A. April 15, 1920.

DISCOVERY AND INSPECTION (§ IV—20)—*Interrogatories—Discovery—Examination of officer,*]—Appeal from an interlocutory order. Reversed.

E. C. Mayers, for appellant.

H. B. Robertson, for respondent.

MACDONALD, C.J.A.:—I would allow the appeal. The questions were irrelevant.

GALLIHER, J.A.:—I would allow the appeal.

As to interrogatories 2 and 3: An officer of a company answering interrogatories is presumed to have acquainted himself with all the facts.

The matter has been dealt with in the English cases and also in our Court in *Brydone-Jack* v. *Vancouver Printing & Publishing Co.* (1911), 16 B.C.R. 55.

No. 10 and Nos. 20 to 24 inclusive, are, in my opinion, irrelevant to the issues raised on the pleadings.

No. 32 and No. 36 (in so far as it is not already answered), do not call for answers at the present stage. It would entail considerable labour and expense and may never be required.

If the Granby company succeed there will be no necessity, while on the other hand if the plaintiffs succeed, a reference

B. C.
C. A.

will have to be ordered and the matters called for now determined.

MCPHILLIPS, J.A.:—The appeal was one from an interlocutory order and pending the appeal the action has been tried. The decision of the appeal, no matter how decided, would be wholly abortive and without effect—there, in fact, remains nothing but a question of costs. When the parties elect to go down to trial with an interlocutory appeal standing for judgment—it would seem to me that no duty rests upon this Court to determine the appeal. The appeal should be struck out of the list, and no costs should be allowed. (See *Fawcett* v. *C.P.R. Co.* (1901), 8 B.C.R. 219.) *Appeal allowed.*

LYALL SHIPBUILDING Co. v. VAN HEMELRYCK.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips, and Eberts, JJ.A. April 6, 1920.

WRIT AND PROCESS (§II A—16)—*Service ex juris—Marginal rule—Contract under seal—Construction of ships—Delivery.*]—Appeal from an order of Murphy, J., refusing to set aside an order made giving leave to the plaintiff to issue a writ of summons against the defendant for services *ex juris*. Affirmed.

E. P. Davis, K.C., and *Ghent Davis*, for appellant.

Sir Chas. H. Tupper, K.C., for respondent.

MACDONALD, C.J.A.:—I agree with my brother GALLIHER in dismissing the appeal.

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

GALLIHER, J.A.:—The order granting leave to serve the writ *ex juris* was made under Marginal Rule 64 (e) of our Supreme Court Rules which is in these words:—

> Service out of the jurisdiction of a writ of summons or notice of a writ of summons or other document by which a matter or proceeding is commenced may be allowed by the Court or a Judge whenever (e) the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction.

The breaches complained of as endorsed on the writ are: (a) Failure to take delivery in Vancouver in the Province of British Columbia of six auxiliary sailing ships, and (b) Failure to accept and pay for the said six auxiliary sailing ships.

B. C.
C. A.

The claim is based on a contract under seal between the plaintiff and defendant, or in the alternative, upon cablegrams and correspondence between the plaintiff and the defendant and between the plaintiff's agents and defendant's agents all of which are set out in the appeal book.

On this motion there is no contest that whether we take the written contract under seal or the correspondence and cablegrams, there was an agreement that the plaintiff should construct at his yards in North Vancouver in the Province of British Columbia the six ships in question for the defendant.

Sir Charles Tupper for the respondents objected that by reason of the defendant having applied to examine Cook on his affidavit filed on the application of service of the writ *ex juris* he had submitted to the jurisdiction of the Court that this was a step in the cause and waived any objection to the service. I cannot regard this as a step in the cause.

Upon the motion to set aside the writ, the defendant would have been entitled to file an affidavit in answer within certain limits, that is, it must not be an affidavit which sets up his own case and which would really result in an argument on the merits which was what occurred in *Boyle* v. *Sacker* (1888), 39 Ch.D. 249, cited by Sir Charles.

The Court will not receive fresh facts from the defendant and so enter into the merits of the case. (Piggott's Service out of the Jurisdiction, 51.)

What was proposed to be done by defendant here was not a step in the sense that it would constitute a bar, but something a proposed part of and to be used in connection with the application to set aside.

None of the authorities cited by Sir Charles seem to me to support his contention. The point to be decided here is: Do the facts here as disclosed in the affidavit of Cook and the different exhibits bring the case within rule 64 (e)?

Before discussing this, I have thought it better to quote from the language of Judges in the English Courts in cases laying down certain principles for guidance in applying their Rule XI. (1-e) which is similar to ours.

B. C.

C. A.

In *Comber* v. *Leyland*, [1898] A.C. 524, their Lordships thus express themselves:

Lord Shand, at page 534:—There is no right to serve out of the jurisdiction where the performance of the contract may be given either within the jurisdiction or abroad in the option of the party who has undertaken the obligation.

The Lord Chancellor, Lord Halsbury, at page 528:—In order to justify the exercise of this limited and exceptional power of issuing process to be served in a foreign country, you must shew that the performances of the contract *must* (although the word "ought" is used in the rule, that is what I understand it to mean) under the obligation of the contract itself be in this country.

Lord Herschell, at page 529:—In order to justify the allowing service of a writ on a person outside the jurisdiction it is necessary to prove that, according to the terms of the contract between the parties, some part of it at least ought to be performed within the jurisdiction in this sense, that the place for its performance, stipulated for either *expressly* or *impliedly* in the contract, is this country.

In *"The Eider,"* [1893] P. 119, 62 L.J. (Pro.) 65, Lord Esher, M.R., at 68, says:—

Where you have a case in which a payment may be made in either one of two places, namely, either abroad or in England, then the decision of *Bell & Co.* v. *The Antwerp London & Brazil Line*, [1891] 1 Q.B. 103, 60 L.J. (Q.B.) 270, comes in and shews that the contract for payment, the breach of which is complained of, is not one which according to its terms ought to be performed within the jurisdiction within Order XI., rule I-(e), for it is one which may be performed either within or out of the jurisdiction.

It has been decided that the performance within the jurisdiction need not necessarily be a performance for which there is an express condition in the contract between the parties.

It is sufficient to bring it within the rule if upon a right construction of the contract and the circumstances it can be seen that the intention of the parties would warrant the conclusion that there was an implied term.

Bearing in mind these principles we have now to consider the position here.

Sir Charles abandoned the point as to place of payment and the only remaining point under the endorsement on the writ is failure to accept delivery.

As to delivery itself, I think it is clear that should be at Vancouver, but the tender of delivery is of course one that the plaintiff would have to make.

There is a clause in the written contract under seal at 62 as follows:—"The builders' obligation to insure shall cease as

B. C.
C. A.

to each vessel upon delivery of said vessel to owner at builders' yard."

That, I think, would make the intention clear as to where delivery of possession would be made under that contract, but even if that contract could not be relied upon, I would have no hesitation in concluding that under all the circumstances of this case, delivery of possession should be made at Vancouver and not elsewhere.

Then with delivery at Vancouver, I think it follows in the absence of any stipulation to the contrary, that acceptance of delivery must be at the same place and as that would be something to be performed by the defendant within the jurisdiction, and as I am of opinion that such a condition can under all the circumstances be implied under the contract between the parties, the case in my view falls within the rule.

It follows that the appeal should be dismissed.

MCPHILLIPS, J.A.:—This is an appeal from the order of Murphy, J., dismissing the application of the appellant for an order setting aside the order of Hunter, C.J. B.C., granting leave for the issue of a writ of summons for service *ex juris* and liberty to serve notice thereof at the City of Paris, France.

The action is one for damages for breach of contract in refusing and failing to take delivery of six auxiliary sailing ships, built at the North Vancouver, B.C., shipyards of the respondent.

It would appear that a formal contract was entered into between the appellant and the respondent—being entered into in New York. The appellant however repudiates this contract. It was signed for him by one Ernest J. Honore, whilst the appellant has stated that the contract is not his he would not appear though to deny that there was a contract for the construction and delivery of the ships and it remains of course to be determined—if the action is allowed to proceed—what in fact constitutes the contract.

The appellant is a Belgian subject resident in France, the respondent being a company duly authorized to carry on business in Canada with its head office for its business in British Columbia, at North Vancouver.

In regard to the formal contract, the total contract price was $2,700,000, $1,350,000—50%—to be paid at the time of

B. C.
C. A.

the entering into same (this was not paid and the contract as a matter of fact was never delivered out to the respective parties but was held in a named depository awaiting said payment), the balance of 50% to be paid in instalments of $225,000 per vessel upon delivery of each vessel to the appellant at the respondent's yard at North Vancouver, B.C., the trials of machinery and speed of each vessel to be in the waters of the Straits of Georgia, B.C., *i.e.*, in Canadian waters. Payments were to be made at the Merchants and Metals Bank in New York, in the United States of America.

Now, apart from the formal contract it is alleged that there was a contract by correspondence—contained in cables and letters—and the appellant throughout this correspondence does not deny the existence of a contract.

In *Love & Stewart* v. *S. Instone* (1917), 33 T.L.R. 475, Lord Loreburn said:—

> It was strongly in favour of the appellants that in the correspondence both parties spoke of a contract between them . . . It was quite lawful to make a bargain containing certain terms which one was content with, dealing with what one regarded as essentials, and at the same time to say that one would have a formal document drawn up with the full expectation that one would by consent insert in it a number of further terms. If that were the intention of the parties, then a bargain had been made, none the less that both parties felt quite sure that the formal document could comprise more than was contained in the preliminary bargain . . . It would be irrelevant to discuss the question how far other evidence, as for example, of conversations could be admitted, and involve writing something like a treatise.

I would think that in this case—so elaborately and ably argued upon both sides—that there is no necessity for entering into much detail. This is clear to my mind that there was a contract to be performed in British Columbia, and that the breach took place in British Columbia, and within M.R. 64 (e) Order XI. r. 1. There is no question that the parties to the contract were *ad idem* as to the terms of the contract, and it was arranged with the Government of Canada by the respondent at the request of the appellant that each vessel should be capable of transfer to Belgian registry upon completion. With regard to payment, the appellant agreed to pay the total contract price for each vessel to the respondent "at Vancouver as each boat is delivered and other evidence to this effect could be referred to.

B. C.

C. A.

The counsel for the appellant in his very able argument submitted that the breach, if any, of the contract as attempted to be proved by the respondent established at best non-payment and that payment was to be in New York. With deference, I do not think this is shewn upon the evidence, in fact, in my opinion, the evidence discloses that payment was expressly to be at North Vancouver, B.C. If I should be in error as to this, then payment was impliedly to be at North Vancouver, B.C., as the delivery of each vessel was to be there and the transfer of flag to Belgian registry was to be there. This would import payment at North Vancouver, B.C. Assuredly it could not be expected that delivery would be made without payment. A great many authorities were referred to by the respective counsel in their very elaborate arguments, all being of great assistance but a great deal of the labour that would otherwise have fallen upon one in giving a considered judgment upon this appeal is brushed away by the very recent decision of the House of Lords upon the very point to be considered—namely, in the case of *Johnson* v. *Taylor Brothers & Co.*, [1920] A.C. 144 at 151, Lord Birkenhead, the Lord Chancellor, said:—

> The Legislature intended to prohibit the service of writs out of the jurisdiction in actions for breach of contract unless, according to the terms of the particular contract, it ought to be performed within the jurisdiction. Ought, then, the contract of which I have already set out the material terms, according to those terms to have been performed within the jurisdiction?

Now, in the case before us the vessels were to be built and were in fact built at North Vancouver, In British Columbia, the inspection thereof and trials thereof to be in the Straits of Georgia in British Columbia, and the delivery of the vessels by the respondent to the appellant was to take place at North Vancouver, B.C., and the action is for breach of contract on the part of the appellant in refusing or failing to take delivery of the vessels and make payment therefor, all matters called for by way of performance in British Columbia, not elsewhere.

Such is the case as alleged by the respondent, and sufficiently enough alleged to entitle in my opinion the order being made. The Court is in no way called upon to pass upon the merits of the action—that remains for further determination in the Court below.

B. C.

C. A.

Manifestly, the present case is not one which could be said to be without the trite definition of the rule as stated by Lord Haldane in the case last referred to at page 163 (Or. XI. r. 1):—

> What it does is, while leaving intact the old principle that by the law of England jurisdiction depended, broadly speaking, on presence within the jurisdiction, to enable the Court to give special leave for service out of the jurisdiction in certain circumstances. The Court may do so; that is to say, that the Court has a new power which it is enabled to exercise in particular cases which seem to it to fall within the spirit as well as the letter of the various classes of case provided for. This appears to me to entitle the Court to refuse to give such leave in an instance in which the proceeding, though for a breach within the jurisdiction and in the letter within the terms of the rule, is in the substance not so.

Here we have, it may be said, everything of "substance" to be performed within the jurisdiction.

I am not unmindful of the terms of the formal contract as to payments being made in New York, that contract, though the appellant claims is not his, he nevertheless does not deny but admits the entry into a contract for the purchase of six vessels and there is ample evidence establishing that such a contract, was entered into apart from the formal contract. Lord Dunedin, in the same case, at page 154, is reported to have said:—

> The spirit of the rule I take to be that, when what the plaintiff wishes really to complain of is the non-performance of something which the defendant ought to have performed within the jurisdiction according to the proper interpretation of the contract, he should be allowed to try that question here, notwithstanding that there might be some other acts which the defendant ought to have performed abroad. It seems to me to follow that there must be substance in the breach.

Here, certainly, there was substance in the breach, six vessels are built and delivery is not taken thereof but they are left with the respondent with all the attendant responsibilities and expenses attachable thereto, and the answer is apparently: "Your only forum for trial is the Court of the State of New York." It does not occur to me that that can be a sufficient answer in the present case. I would also refer to what Lord Atkinson said in the case last referred to at page 157:

> I do not understand that it is the whole of the contract that has to be performed within the jurisdiction. It is sufficient if some part of it is to be performed within the jurisdiction, and if there is a breach of that part of it within the jurisdiction; and that was the view taken by the Divisional Court in *Robey* v. *Snaefell Mining Co.* (1887), 20 Q.B.D. 152, where the action was brought by a firm of engineers in Lincoln for the price of machinery erected in the Isle of Man.

B. C.

C. A.

And we have Lord Buckmaster at page 160, saying:—

It is not necessary to consider again the wording of the rule. Its effect is stated in the case of *Rein* v. *Stein*, [1892] 1 Q.B. 753, and the Courts have consistently followed that decision, as meaning that if any part of the contract is to be performed within the jurisdiction, the breach of that part brings into play the operation of the rule. Accepting this principle, there still remains the duty of examining whether this breach is the real matter of dispute.

In the present case "the real matter of dispute" consists in the refusal to accept delivery of the vessels—it is not the same action as one for the purchase price of the vessels. The appellant by his refusal to accept delivery of the vessels entitled the respondent to sue for such breach and that breach of contract unquestionably was a breach of contract within British Columbia—it was a term of the contract obligatory upon the appellant, *i.e.*, to be performed within the jurisdiction.

It might well be that in this action brought for the breach of contract and other consequential relief in British Columbia, that other and different damages are recoverable than would be recoverable in the State of New York, and that this action is a distinct right of action capable of complete enforcement in this jurisdiction only. Be that as it may, I have come to the firm conclusion that the order originally made by the Chief Justice of British Columbia was rightly made and that Murphy, J., arrived at the right conclusion in refusing to set the same aside.

I express no opinion as to whether the application for leave to cross-examination upon the affidavit filed made by the appellant constituted a step in the action, and amounted to an attornment to the jurisdiction. As at present advised, I am not of that opinion.

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

Appeal dismissed.

CITY OF MONTREAL-NORD v. GUILMETTE.

Supreme Court of Canada, Davies, C.J., and Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 2, 1919.

CAN.

S. C.

PLEADING (§ III A—301)—*Municipal corporation—Promissory note—Evidence.*]—Appeal from a decision of the Court of Review, at Montreal (1918), 55 Que. S.C. 53, affirming the judgment of the trial Court and maintaining the respondent's, plaintiff's, action.

CAN.
S. C.

The action is brought for the payment of a promissory note signed: "Ville Montreal-Nord, Joseph Boyer, maire, J. A. Cadieux, sec.-tres." The municipality appellant filed a general denial to the statement of claim; and the appellant having made default to answer to interrogatories on *faits et articles*, these were declared by the Court *pro confessis*. No other evidence was adduced by either party.

The trial Court gave judgment against the appellant for the amount of the note; and the Court of Review held the evidence, the interrogatories declared *pro confessis*, sufficient to enable the respondent to obtain judgment on his action.

The defendant appealed to the Supreme Court of Canada, which, after hearing counsel for both parties, reserved judgment, and at a subsequent date, dismissed the appeal with costs.

Appeal dismissed.

L. E. Beaulieu, K.C., for appellant.

Perron, K.C., and *Gustave Monette*, for respondent.

KEYSTONE LOGGING & MERCANTILE Co. v. WILSON.

Supreme Court of Canada, Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. February 7, 1919.

TRESPASS (§ I C—15)—*Damages—Cutting of timber—License.*—Appeal from the judgment of the Court of Appeal for British Columbia (1918), 25 B.C.R. 569, at page 573, allowing the appeal from the judgment of the trial Court, (1917), 25 B.C.R. 569, and maintaining the respondent's, plaintiff's, action.

The respondent is the owner of certain lands on which are merchantable timber and brought action against the appellant for trespass to lands and the taking of timber and other trees, injury to the soil and destruction of boundary posts. The respondent pleaded leave and license and did not dispute liability to make due compensation for trees taken and damage done; and he paid into Court $600 to cover this compensation.

CAN.
S. C.

The trial Court held that the offer was sufficient to cover the damages suffered by the respondent; but the Court of Appeal awarded to the respondent the sum of $1,860.

On the Appeal to the Supreme Court of Canada, the Court heard counsel for the appellant and, without calling upon counsel for the respondent, dismissed the appeal with costs.

Appeal dismissed.

R. Cassidy, K.C., for appellant.
Eug. Lafleur, K.C., for respondent.

CANADIAN GENERAL SECURITIES Co. v. GEORGE.

Supreme Court of Canada, Idington, Anglin, Brodeur and Mignault, JJ., and Cassels, J. ad hoc. May 6, 1919.

CONTRACTS (§ II D—170)—*Sale of land—Re-sale by vendors—Collateral agreement—Evidence.*]—Appeal from a decision of the Appellate Division of the Supreme Court of Ontario, (1918), 43 D.L.R. 20, 42 O.L.R. 560, reversing the judgment for the appellant at the trial.

One George, a cousin of respondent, was employed by the appellant company to sell lots in a proposed town. He wrote to the respondent urging him to buy and stating that he could re-sell within a short time at double the price he would pay. He afterwards telephoned repeating his solicitations and told respondent that the company would re-sell at the advance, and within the time, mentioned in his letter. The manager of the company heard the telephone message and reproved his agent but did not repudiate the representation made. Respondent bought two lots, paid the initial sum demanded, and made other payments from time to time but made no claim on the company for re-sale. In an action by the company for an unpaid balance on the purchase, respondent set up the alleged agreement for re-sale.

The trial Judge held that no such agreement binding on the company was proved. The Appellate Division reversed his judgment and dismissed the action.

CAN.
S. C.

The Supreme Court of Canada, after argument and judgment reserved, allowed the appeal and restored the judgment at the trial.

Appeal allowed.

Lindsay, K.C., for appellant.
G. F. Henderson, K.C., and *McLarty*, for respondents.

CANADIAN S.S. LINES v. GRAIN GROWERS EXPORT Co.

Supreme Court of Canada, Davies, C.J., and Idington, Anglin and Mignault, JJ., and Masten, J. ad hoc. May 6, 1919.

SHIPPING (§ I A—3)—*Carriage of goods—Injury to cargo—Seaworthiness of ship—Canada Shipping Act, R.S.C. (1906), ch. 113, sec. 964.*]—Appeal from a decision of the Appellate Division of the Supreme Court of Ontario (1918), 43 O.L.R. 330, reversing the judgment at the trial by which the respondent's action was dismissed.

The plaintiffs claimed damages for injury to grain shipped in a barge belonging to defendants. The defence was that defendants were not in fault and were relieved by the provisions of sec. 964 of the Shipping Act. They claimed that the barge struck a corner of the dock in going out of port, but the evidence given was not very clear.

The trial Judge exonerated the defendants and dismissed the action. The Appellate Division held that the evidence established that the barge was not seaworthy at the outset and sec. 964 did not apply.

The Supreme Court of Canada affirmed the latter decision and dismissed the appeal.

Appeal dismissed.

Tilley, K.C., and *S.C. Wood*, for appellant.
J. H. Moss, K.C., and *C. C. Robinson*, for respondent.

CAN.

S. C.

KRAUSS v. MICHAUD.

Supreme Court of Canada, Fitzpatrick, C.J., Davies, Idington, Duff and Anglin, JJ. November 2, 1917.

APPEAL (§ I A—1)—*Jurisdiction—Abandonment of property—Fraudulent bilan—Imprisonment.*]—Appeal from the judgment of the Court of King's Bench, appeal side (1917), 26 Que. K.B. 504, affirming the judgment of the Superior Court, District of Montreal, and maintaining the respondent's contestation.

The appellant, an insolvent trader, made a judicial abandonment of his property. The respondent, a curator to the estate duly authorized, fyled a contestation of the statement or "bilan" produced by the appellant.

The trial Court maintained the contestation and condemned the appellant to be imprisoned for a term of six months.

The appellant appealed to the Court of King's Bench on two grounds: first, that the evidence did not justify the condemnation and, secondly, that this evidence had not been taken within the delays fixed by the Code of Civil Procedure.

On appeal to the Supreme Court of Canada, the case was called and, on the date of the hearing of the case, after hearing counsel on behalf of both parties, the Court quashed the appeal for want of jurisdiction, no costs to either party as the question had not been raised by the respondent.

Appeal quashed.

Henry Weinfield, K.C., and *M. Sperber*, for appellant.

Peter Bercovitch, K.C., for respondent.

DAVIE v. NOVA SCOTIA TRAMWAYS AND POWER Co.

Supreme Court of Canada, Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. November 18, 1918.

NEGLIGENCE (§II—70)—*Tramway—Driving team across track—Contributory negligence.*]—Appeal from a decision of the Supreme Court of Nova Scotia (1918), 41 D.L.R. 350, 52 N.S.R. 316, reversing the judgment at the trial in favour of the plaintiff.

The plaintiff's teamster was driving a load up a hill at the top of which was a street railway track. On reaching this track he attempted to cross when a car was approaching and one of his horses was struck and had to be shot. In an action for the

CAN.
S. C.

value of the horse the evidence was that the teamster had an assistant and material for blocking the waggon on the hill; that the motorman had thrown on the reverse power but the car skidded, which could have been prevented by sand but it could not have been applied without losing control for a time of the driving apparatus.

The trial Judge held the electric company liable. His judgment was reversed by the full Court and the action dismissed.

The Supreme Court of Canada, after hearing counsel, reserved judgment and, on a subsequent day, dismissed the appeal, Anglin, J., dissenting.

Appeal dismissed.

G. F. Macdonnell, for appellant.

Jenks, K.C., for respondent.

ALBION MOTOR EXPRESS Co. v. CITY OF NEW WESTMINSTER.

Supreme Court of Canada, Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. October 12, 1918.

HIGHWAYS (§ IV C—218)—*Repairs—Oiling—Negligence.*]—Appeal from the judgment of the Court of Appeal for British Columbia, (1918), 25 B.C.R. 379 at 382, affirming the judgment of the trial Judge, Murphy, J., and dismissing the appellant's (plaintiff's) action.

The appellant's motor truck, heavily laden with goods, skidded on a steep street in the city respondent and was overturned and damage sustained, owing to the roadway having been oiled but not sanded.

The trial Judge held that the driver of the truck might, had he exercised ordinary care and driven in a certain way, have avoided the danger; and this judgment was affirmed by the Court of Appeal.

On appeal to the Supreme Court of Canada, the judgment of the Court of Appeal was affirmed.

Appeal dismissed.

Parmenter, for appellant; *G. E. Martin*, for respondent.

ASHWELL v. CANADIAN FINANCIERS TRUST Co.

Supreme Court of Canada, Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. May 13, 1918.

TRIAL (§ III E—230)—*Charge—Misdirection—Practice and procedure.*]—Appeal from the judgment of the Court of Appeal of British Columbia (1917), 25 B.C.R. 97, maintaining the verdict at the trial in favour of the plaintiff (respondent).

To an action brought to recover money payable on allotments of shares and for calls, the respondent, executors of a deceased shareholder, pleaded the invalidity of his subscriptions because of his mental incompetence when they were procured and because of alleged misrepresentations then made to him. On the trial both issues were submitted to a jury. In charging the jury the trial Judge said: "One or both of these defences may be true, but they cannot both be true. If he were mentally incompetent, then the question of misrepresentation would not arise at all." The jury returned a general verdict for the plaintiff. The defendant moved to set aside the verdict and for judgment dismissing the action, and alternatively for a new trial on grounds of misdirection. The trial Judge gave judgment in accordance with the verdict and the Court of Appeal affirmed this judgment.

On appeal to the Supreme Court of Canada, the judgment of the Court of Appeal was reversed and a new trial was ordered, with costs of this Court and of the Court of Appeal, the costs of the trial to abide by the result.

Appeal allowed.

C. W. Craig, for appellant.

G. H. Dorrell, and *J. A. Ritchie*, for respondent.

MERCHANTS BANK OF CANADA v. HAGMAN.

Supreme Court of Canada, Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. October 21, 1918.

TAXES (§ III B—119)—*Co-owners—Notice of assessment to one only—Sufficiency—Town Act, Alta. S. 1911-12, ch. 2, secs. 301, 302, 317.*]—Appeal from the judgment of the Supreme Court of Alberta, Appellate Division (1918), 13 Alta. L.R. 293, reversing the judgment of Hyndman, J., at the trial, and maintaining the respondent's (plaintiff's) claim on an interpleader issue.

CAN.
S. C.

The respondent claimed to be the owner of certain goods in the Queen's Hotel, Vegreville, as purchaser from the town at a sale on a distress for taxes, and the appellant, as chattel mortgagee and as execution creditor of the owners of the goods, contested the respondent's claim on grounds of irregularity in the assessment and tax proceedings. The Queen's Hotel was the property of three persons, only one of them, one Cyre, the manager, living in Vegreville. The assessment and tax notices were addressed to the Queen's Hotel only and were received by Cyre only. The taxes being unpaid, the town under a distress seized and sold the contents of the hotel to the respondent.

The trial Judge was of opinion that the notice given was not in accordance with the Town Act, 2-3 Geo. V. 1911-1912 (Alta.), ch. 2, but his judgment was reversed by the Appellate Division.

On the appeal by the defendant to the Supreme Court of Canada, the Court, after hearing counsel for both parties, reversed judgment, and, at a subsequent date, dismissed the appeal with costs. *Appeal dismissed.*

N. D. Maclean, for appellant; *W. L. Scott*, for respondent.

OCEAN ACCIDENT AND GUARANTEE CORPORATION v. LAROSE.

Supreme Court of Canada, Davies, C.J., and Idington, Duff, Anglin and Brodeur, JJ. November 18, 1918.

DEBTOR AND CREDITOR (§I—1)—*Judgment—Release—Bond.*]—Appeal from the judgment of the Supreme Court of Alberta, Appellate Division (1918), 13 Alta. L.R. 187, reversing the judgment of Ives, J., at the trial and maintaining the respondents' (plaintiffs') action.

The respondents, three in number, obtained a judgment against two defendants; and two of the joint judgment creditors entered into an agreement with one of the judgment debtors in settlement of the amount of the judgment. The third judgment creditor obtained, on the face of the document, no interest in such agreement, following which an appeal by the judgment debtors was discontinued. The present action was subsequently brought by the judgment creditors, the present respondents, against the appellant upon a bond given as security for the judg-

CAN.

S. C.

ment in the first action and the appellant relied upon the above agreement as a release.

The trial Judge held that the execution of this agreement by two of the three joint judgment creditors or partners constituted a release at law and he dismissed the action with costs. The Appellate Division held that, although there was no allegation or evidence of intent to defraud, it would be unjust and inequitable to hold the third joint creditor bound by such agreement.

On the appeal by the defendant to the Supreme Court of Canada, the Court, after hearing counsel for both parties, reserved judgment, and, at a subsequent date, dismissed the appeal with costs.

Appeal dismissed.

Chrysler, K.C., for appellant.

Woods, K.C., for respondent.

JONES & LYTTLE v. MACKIE.

Supreme Court of Canada, Fitzpatrick, C.J., and Idington, Anglin and Brodeur, JJ. March 11, 1918.

CONTRACTS (§ IV A—315)—*Stoppage of work—Owner's lack of funds—Contractor's claim for damages—Guarantee as to cost not exceeding estimate—Fraud—Practice and procedure—Pleading—Amendment of defence on appeal—Allowance of.*]—Appeal from the judgment of the Supreme Court of Alberta, Appellate Division, [1917] 3 W.W.R. 1021, reversing the judgment of Stuart, J., at the trial and dismissing the appellant's (plaintiff's) action with costs.

The respondent, desiring to erect a large business building, made an agreement in writing with the appellant that the cost would be $189,000, with the condition that if the estimate was exceeded the appellant would pay to the respondent 20% of the excess and if the cost fell below the estimate, the appellant should be paid 20% of the sum thus saved, it being agreed that $15,000 would be paid at all events. After the appellant had done about $50,000 worth of work, the construction was suspended owing to the respondent's lack of funds, and $5,000 had then been paid to the appellant by the respondent. Later on the respondent

CAN.
S. C.

advertised for tenders for the continuation of the works according to new plans and specifications; and the new contract was not given to the appellant.

The appellant claimed damages for breach of contract; and the respondent contended that the contract had been rescinded. The trial Judge awarded the appellant $10,000 subject to a reference to the Master to ascertain whether the costs of completing the contract would have exceeded or been less than $189,000. The Appellate Division reversed this judgment and found there had been fraud on appellant's part which vitiated the contract, although there had never been any such defence pleaded or alleged during the trial or in the notice of appeal.

On the appeal by the plaintiff to the Supreme Court of Canada, the Court, after hearing counsel for both parties, reserved judgment, and, at a subsequent date, allowed the appeal with costs.

Appeal allowed.

G. F. Henderson, K.C., and *J. A. Wright*, for appellan .

A. H. Clarke, K.C., for respondent.

SHARP CONSTRUCTION Co. v. BEGIN.

Supreme Court of Canada, Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. March 11, 1918.

MASTER AND SERVANT (§ II B—185)—*Cog-wheels of engine uncovered—Skilled engineer in charge—Accident—Damages—Negligence.*]—Appeal from the judgment of the Court of King's Bench (Que.) (1917), 26 Que. K.B. 345, reversing the trial judgment and maintaining plaintiff's action. Reversed.

The appellant was in the employ of the company appellant as engineer. The engine was operating a certain number of cog-wheels. These cog-wheels were not covered. It was proved that the appellant was a skilled engineer who was looked to to have the machine in proper order. The accident occurred when the appellant tried to clean a friction pulley near the cog-wheels, while in motion, by holding a rag against it.

The trial Court dismissed the action with costs. The Court of King's Bench reversed this judgment, Cross, J., dissenting.

CAN.

S. C.

holding that there was contributory negligence and condemning the appellant to pay $2,400 to the respondent.

On appeal to the Supreme Court of Canada, after hearing counsel on behalf of both parties, the Court reserved judgment, and, on a subsequent day, allowed the appeal with costs, Idington, J., dissenting. *Appeal allowed.*

F. Roy, K.C., and *G. H. Montgomery*, K.C., for appellant.
Belleau, K.C., and *Alleyn Taschereau*, K.C., for respondent.

FERRING v. TARRABAIN.

Supreme Court of Canada, Fitzpatrick, C.J., and Idington, Anglin and Brodeur, JJ. March 25, 1918.

LANDLORD AND TENANT (§ II B—10)—*Agreement to build suitable house—Damages—Cancellation of lease.*]—Appeal by defendant from the Supreme Court of Alberta, 35 D.L.R. 632, in an action for breach of contract.

The respondent prayed by his action for a declaration that a certain building occupied by them was not the building called for by the agreement and lease entered into by him and the appe lant; and he claimed damages.

The trial Judge found in favour of the defendant appellant; but the Appellate Division maintained the respondent's claims, with the right to the appellant to elect for a new trial.

On appeal by the defendant to the Supreme Court of Canada, the Court, after hearing counsel for both parties, reserved judgment, and, at a subsequent date, dismissed the appeal with costs. *Appeal dismissed.*

C. H. Grant, for appellant; *J. R. Lavell*, for respondent.

ETTINGER v. ATLANTIC LUMBER Co.

Supreme Court of Canada, Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. April 9, 1919.

DEEDS (§ II C—31)—*Trespass—Title to land—Onus—Proof of title.*]—Appeal from a decision of the Supreme Court of Nova Scotia (1917), 36 D.L.R. 788, 51 N.S.R. 523, reversing the judgment at the trial in favour of the plaintiff.

CAN.

S. C.

The appellant brought action for trespass on his land and cutting and hauling away of timber. The lots of the two parties are adjoining and both claim title through different grantees under grants made in 1817. In the grants the lands are described by reference to marks on the ground which have disappeared.

The plaintiff failed to establish the northern line of his lot, but the trial Judge found that the southern line was proved and with that he was able to identify the whole lot. His judgment for the plaintiff was, however, reversed by the full Court which held that he was in error as to the starting point of the southern line and dismissed the action.

The Supreme Court of Canada after hearing counsel and reserving judgment dismissed the appeal.

Appeal dismissed.

Henry, K.C., and *Sangster*, for appellant.

Paton, K.C., and *Hanway*, for respondents.

HALIFAX ELECTRIC RAILWAY Co. v. THE KING.

Supreme Court of Canada, Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. May 6, 1919.

EXPROPRIATION (§ III C—140)—*Award—Special value.*]—Appeal from the judgment of the Exchequer Court of Canada (1918), 40 D.L.R. 184, 17 Can. Ex. 47, awarding compensation for expropriation of the appellants' land.

The land expropriated was used as a plant for generating gas and electricity. The appellants appealed from the award of the Exchequer Court claiming that it had a special value greatly exceeding the amount allowed.

The Supreme Court of Canada held that the award was liberal if not generous and affirmed the judgment appealed against.

Appeal dismissed.

Jenks, K.C., for appellants; *Rogers*, K.C., for respondent.

CAN.

S. C.

THE KING v. BRITISH AMERICAN FISH CORPORATION.

Supreme Court of Canada, Davies, C.J., and Idington, Anglin and Mignault, JJ., and Masten, J. ad hoc. May 6, 1919.

CROWN LANDS (§ I B—11)—*Lease—Fishing rights—Void option for renewal—Severance.*]—Appeal from the judgment of the Exchequer Court of Canada (1918), 44 D.L.R. 750, 18 Can. Ex. 230, in favour of the plaintiff (respondent).

The respondent was given a lease for twenty-one years of fishing rights in the Nelson River and other waters with an option of renewal at the expiration of the term on fulfilment of certain conditions. After the rights under the lease were exercised for nine years respondent was notified by the Department of Marine and Fisheries that it was *ultra vires* and void *ab initio* and the fishing rights were withdrawn. In an action against the Crown for loss of the balance of the term it was conceded that the option for renewal was void and contended by the Crown that it vitiated the whole lease. The judgment of the Exchequer Court was that the option was severable and the lease good.

The Supreme Court of Canada heard counsel and reserved judgment. Later the judgment of the Exchequer Court was affirmed. *Appeal dismissed.*

C. C. Robinson, for appellant.
Anglin, K.C., for respondent.

THE KING v. LEE.

Supreme Court of Canada, Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. June 2, 1919.

EXPROPRIATION (§ II A—84)—*Identity of land—Metes and bounds—Plan.*]—Appeal from the judgment of the Exchequer Court of Canada (1917), 38 D.L.R. 695, 16 Can. Ex. 424, in favour of the defendant (respondent).

The Crown filed an information in the Exchequer Court claiming title to land near Windsor Junction as part of the Intercolonial Railway. The County of Halifax, represented by the respondent, claimed the land as a public way.

CAN.
S. C.

By a statute of Nova Scotia the Commissioners appointed to expropriate land for the railway were required "to lay off the same by metes and bounds and record a description and plan thereof." The dedication filed did not contain such description, and the Exchequer Court Judge held that the plan attached thereto did not so describe it. He also held that if it did a written description was still necessary.

The Supreme Court of Canada, while deciding that identification of the land by metes and bounds by reference to the plan would be sufficient, agreed with the Judge of the Exchequer Court, the Chief Justice dissenting, that it could not be so identified. *Appeal dismissed.*

Henry, K.C., and *Sangster*, for appellant.
Jenks, K.C., and *McIlreith*, K.C., for respondent.

THE KING v. THE "HARLEM."

Supreme Court of Canada, Davies, C.J., and Idington, Duff, Anglin and Mignault, JJ. June 2, 1919.

COLLISION (§ I A—3)—*Crossing ships—Keeping course—Evidence.*]—Appeal from the judgment of the Local Judge of the Nova Scotia Admiralty District of the Exchequer Court (1918), 47 D.L.R. 471, 19 Can. Ex. 41, in favour of the defendant (respondent).

The Government of Canada brought action against the ship "Harlem," claiming damages for the loss of its ship the "Durley Chine" in a collision between the two vessels.

The ships were "crossing ships," and the local Judge held that the "Durley Chine" having the "Harlem" on her starboard side was obliged to keep out of her way, and that not having done so she was wholly to blame for the collision.

The Supreme Court of Canada, having heard counsel and reserved judgment, dismissed the appeal.

Appeal dismissed.

Henry, K.C., for appellant.
Jenks, K.C., for respondent.

ACKLES v. BEATTY.

CAN.
S. C.

Supreme Court of Canada, Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. March 17, 1919.

BROKERS (§II B—10)—*Sale of land—Lapsed option—Commission—Quantum meruit.*]—Appeal from a decision of the Supreme Court of Nova Scotia (1918), 40 D.L.R. 130, 52 N.S.R. 134, reversing the judgment at the trial in favour of the plaintiff.

A. held an option for the sale of land, his remuneration to be the excess of the price obtained over $29,000. After the option had lapsed he introduced to the owner a purchaser of the land at $35,000, on terms different from those set out in the option and claimed the excess over $29,000 as his commission. He brought action for this amount which he recovered at the trial, but the full Court held that he could only recover *quantum meruit.*

The Supreme Court of Canada after hearing counsel reserved judgment and afterwards dismissed the appeal.

Appeal dismissed.

Paton, K.C., and *Burchell*, K.C., for appellant.

Milner, K.C., for respondent.

LOVE v. LYNCH.

SASK.
C. A.

Saskatchewan Court of Appeal, Newlands and Lamont, JJ.A., and Embury, J. May 3, 1920.

SPECIFIC PERFORMANCE (§I A—14a)—*Agreement for sale of land—False representation that agent for another—New agreement —Materiality.*]—Appeal from the trial judgment in an action for specific performance of an agreement for sale of land.

P. H. Gordon, for appellant.

F. H. McLorg, for respondent.

The judgment of the Court was delivered by

NEWLANDS, J.A.:—This is an action for specific performance of an agreement of sale.

The plaintiff sold certain lands to defendant, describing himself as agent for one Campbell. A new agreement was subsequently entered into between these parties in which plaintiff was not so described, but the Chief Justice has held, and the evidence supports that finding, that the representation that he was the agent for Campbell in the first agreement was false, and that

SASK.

C. A.

he did not think that the later agreement entered into between the parties cured the original fault. "The defendant was still in ignorance of the original misrepresentation, and the further representations made by the plaintiff with regard to his reasons for obtaining the new agreement were based on his original false representation and were not true."

A misrepresentation by a person that he is contracting for a principal, when in fact he is acting for himself, is material where the personality of the contracting party is a material element in inducing the contract, but where the party would be equally willing to buy from any person, such a misrepresentation will not affect the validity of the contract. Leake on Contracts, 6th ed., 328; *Fellowes* v. *Gwydyr* (1829), 1 Russ. & M. 83; *Rayner* v. *Grote* (1846), 15 M. & W. 359; *Smith* v. *Wheatcroft* (1878), 9 Ch.D. 223.

I can see many instances where the personality of the vendor of speculative real estate, sold on deferred payments, may be important; and particularly in a case where the party representing himself as agent sells within three weeks after purchase for an advance of $11,250, being 50% more than his purchase price, to a purchaser who was relying upon his judgment of the value of the property. The defendant swears in his examination for discovery, put in by plaintiff at the trial, that he was so relying on plaintiff. It is altogether different to rely upon the valuation of an agent whose only interest is his commission, than on that of the owner who is making a profit of 50% by the sale, and I, therefore, think that the personality of the owner in this case was most material. There is no evidence that the contract was ever confirmed by defendant after the fact came to his knowledge that plaintiff was the owner and not the agent for Campbell.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed.

SORBY v. PARKER.

Saskatchewan Court of King's Bench, Taylor, J. January 22, 1920.

WILLS (§ IV—200)—*Construction—Passing of accounts by executrix—Conveyance of certain lands.*]—Application by way of originating summons to have a will construed, accounts passed and for conveyance of certain lands.

SASK.

C. A.

A. L. Gordon, for plaintiff.

W. M. Blain, for defendant C. E. M. Parker.

E. S. Williams, for defendant J. S. Ridgeway.

TAYLOR, J.:—This is an application under originating summons to have the will of Martha Frances Sorby, the plaintiff's deceased wife, construed, to require the defendant Mrs. Parker as an executrix of the will to pass her accounts, ascertain what claims she may have against the estate, for directions respecting legacies, and, on the application of the plaintiff, for a direction that the defendant Mrs. Parker convey a certain quarter section of land to him.

Martha Frances Sorby died on August 7, 1908. Her estate consisted of: (a) The alleged indebtedness of her husband to her; (b) an interest as purchaser under agreement in the northeast of 27-21-23, west 2nd; (c) some other lands and personal property specifically devised and bequeathed in the will. The plaintiff and Mrs. Parker were appointed executor and executrix. The will was probated on January 7, 1911, on the application of the plaintiff and Mrs. Parker.

The most serious trouble between the parties is that arising out of the disposition made in the will of the quarter-section. There is a legacy to the two defendants of $750 charged on the quarter section. "The remainder of the said property to be my husband's for his life-time, after all expenses incurred for me and by me has been paid out of said property; at my husband's death said property to be divided equally between the Church Missionary Society of the Church of England, and the Church of England's Missionary Work in the Northwest Territories." There is no residuary devise.

At the time of her death considerable sums were owing by Mrs. Sorby to her vendors on the agreement of purchase. Mrs. Parker advanced these moneys; some of them have been returned to her by the plaintiff. To secure the payments made by Mrs. Parker the title to the quarter section issued in her name. Now the plaintiff (life tenant), claiming that he has purchased the reversionary interest, and that the legacy of $750 has abated by reason of deficiency of assets, that the interest of the testatrix in the quarter section at the time of her death was of no value, has made an agreement to sell the quarter section and has demanded

SASK.
C. A.

of the defendant Mrs. Parker, his co-trustee, that she join in conveying the land to the purchaser. Counsel for Mrs. Parker has objected that whilst there is a body to take the gift to the Church Missionary Society of the Church of England there is none to take it for the Church of England Missionary Work in the Northwest Territories, and, therefore, the plaintiff cannot, without more, release Mrs. Parker as trustee. The affidavit of the plaintiff sets out that he has arranged for the purchase of the interest of the said society represented and controlled by the Synod of the Diocese of Qu'Appelle. I find that the "Missionary Society of the Church of England in Canada" is incorporated by special Act of the Dominion Parliament, 3 Edw. VII. 1903, ch. 155 (Dom., vol. 2), as "A Society . . . consisting of all the members of the said church for the general missionary work of the said church." It would appear very clear that this body corporate is entitled to the gift to the Church Missionary Society of the Church of England.

The Act in question purports to be passed on the prayer of the body representing all the members of the Church of England in Canada, and as it consists of all the members of the said church, for the general missionary work of the said church, it would appear to logically follow that the same corporation has charge and control of the Church of England missionary work in the Northwest Territories, and would be entitled, by virtue of the Act and the canon which is incorporated as a part thereof governing the Society, as the proper representative of the Church of England in Canada, to the gift for the Church of England Missionary Work in the Northwest Territories, clothed, of course, with the trust to use it for the purpose directed. It may be that the Synod of the Diocese of Qu'Appelle acts for and on behalf of the Missionary Society of the Church of England in Canada. This is not shewn in the material. Mrs. Parker, as trustee under the will, would not be justified in joining in a conveyance until it is shewn that there is a release from the Missionary Society of the Church of England in Canada.

As to the abatement of the $750 legacy, there is nothing in the material whatever which would justify such a conclusion, and it seems to me late in the day for the life-tenant to so contend. The legacy is the first charge on the land in question

SASK.

C. A.

and it is only subject to this charge, and "after all expenses incurred for the testatrix and by her have been paid out of said property" that the plaintiff takes his life interest. He has been in actual possession of the land and in receipt of the rents and profits thereof without accounting to anyone, since the death of the testatrix, for over 11 years. It must be borne in mind that as executor it was his duty to provide for the payment of the $750 legacy. If the legacy abated for insufficiency of assets, as it is a charge prior to his own claim as life tenant, it necessarily followed that the devise to him also abated. It was stated by counsel that by way of compromise he was acquiring the interest in the reversion from the missionary society for $300. It would seem to me to follow that for him to claim an interest as life-tenant, or as purchaser of the reversion for valuable consideration, admits that the legacy could not abate; and the conclusion I arrive at is that the fact that he as trustee has permitted himself as life-tenant to remain in possession for so many years, set up a claim as life-tenant, and now as purchaser of the reversion for valuable consideration, estops him from contending that the bequest of $750 abated for deficiency in assets. His acceptance of the life tenancy is consistent only with an understanding that he would protect a prior charge which as trustee he was bound to protect. In the contention, therefore, that the legacy has abated the plaintiff must fail on the admissions of fact made by him.

There is a further bequest in the will of "the one thousand dollars I have lent my husband to be paid to my sister and brother on the death of my husband." The husband denies by affidavit filed that there ever was such an indebtedness. Mrs. Parker claims that not only was there such an indebtedness but that it has been paid; that the sum of $1,000 paid to her by the plaintiff, and for which receipt was given, was paid in settlement of this indebtedness. I do not think that I should hold that the receipt, even if it bears that construction—as to that I express no opinion—would necessarily estop the accepter of the receipt. This is not a matter to be determined in originating summons. In view of the repudiation of liability by the husband, even if the legacy be not payable until his death, the parties would be justified in commencing action for a declaratory judgment. I do not think

SASK.

C. A.

it is a matter which should be determined on affidavit evidence on the return of an originating summons.

The accounts of the estate have never been passed. In the endeavour between Mrs. Parker and the plaintiff to adjust matters between them Mrs. Parker has furnished an account in which she claims for disbursements $2,873.58. Of this statement, as shewn by the plaintiff's affidavit, he disputes the two items therein in reference to the legacy of $750 with which I have already dealt and found against him, and four items of $10, $119.58, $50, and $100 for legal expenses paid by Mrs. Parker. Unless there has been some litigation or unusual proceeding the amount would seem much more than should have been paid for any legal services rendered in connection with the estate. She should pass her accounts, but she is met with this difficulty, that the solicitor to whom these moneys were paid is now dead. Apparently, she has not his itemized bills and is somewhat at a loss to know for what the money was paid; those in charge of the solicitor's estate are unable to assist her, according to her counsel's statement. But, unfortunate as that may be, these circumstances will not justify her in charging the amount so paid to the estate. Ordinarily, on passing accounts, the Surrogate Judge simply refers such legal bills to the proper officer to be taxed, and the amount as taxed is allowed. If Mrs. Parker is unable to bring in any solicitor's bill to be taxed these amounts should be cut down to the fees and disbursements provided in the Surrogate Court tariff for the services which would appear necessary to have been performed in taking out probate.

As the plaintiff is desirous of having the estate wound up without further delay, Mrs. Parker should forthwith bring in and pass her accounts in the Surrogate Court and have the amount to which she may be entitled definitely fixed, as well for moneys advanced by her and expenses incurred by her as for her compensation, so that the plaintiff should not be unreasonably delayed in his desire to have the estate wound up. As Mrs. Parker's counsel intimated that it was only by reason of the circumstances mentioned that she had refrained from passing her accounts, and that she was quite willing to do so, I will not now make an order requiring her to account but will enlarge the application for two months, when the parties may speak to the matter again,

and any party may at any time have leave to apply for further directions.

As to costs, in his contention as against the defendant John Samuel Ridgeway I think the plaintiff has completely failed, and he should pay the costs of the said John Samuel Ridgeway forthwith after taxation thereof. As between the plaintiff and the defendant Mrs. Parker, as at present shewn, both are somewhat at fault. In his main contention the plaintiff has failed. I make no order as to costs of the plaintiff or the defendant Mrs. Parker at the present time. *Judgment accordingly.*

McMILLAN v. CANADIAN NORTHERN R. Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, J.A., and Bigelow, J. May 3, 1920.

DISCOVERY AND INSPECTION (§ IV—20)—*Contract of hiring —Further and better particulars of—Object of—Rule 148—Surprise.*]—Appeal from a Judge in Chambers ordering plaintiff to furnish further and better particulars of a contract of employment. Reversed.

D. Campbell, for appellant.

C. A. Ferguson, for respondents.

The judgment of the Court was delivered by

LAMONT, J.A.:—This is an appeal from a Chambers order directing the plaintiff to furnish further and better particulars of the contract of hiring under which he alleged he was in the employ of the defendants.

The plaintiff was a locomotive fireman on one ofthe defendants' engines, and was injured while on duty as a result of a collision between the locomotive and certain railway cars. For this injury he has brought this action, and claims damages on the ground that the collision was due to the negligence of the defendants.

In his statement of claim (para. 3) the plaintiff alleged that on or about November 12, 1918—the day of the accident—he was employed as locomotive fireman on one of the defendants' engines operating at Rainy River, in the Province of Ontario. The defendants filed their defence, and then served a demand

SASK.

C. A.

for particulars of the contract by which the plaintiff was employed as alleged in paragraph 3 of the statement of claim. In answer to this demand the plaintiff said:

1. Some time during the month of October, 1911, the plaintiff made application for employment to the defendant in its engine service upon the usual form of application supplied by the defendant and entered the service immediately thereafter.

2. The plaintiff further says that he has not a copy of the said application for employment.

3. The plaintiff further says that his rates of pay, hours of duty and general conditions of his employment are contained in a small book entitled "Canadian Northern Railway Company Rates and Rules of Pay for Engineers and Firemen" and that the said book is set forth in the plaintiff's affidavit of documents and marked as an exhibit thereto.

The defendants moved for further and better particulars. The Master in Chambers dismissed their application, but, on appeal to a Judge in Chambers, the Master's order was reversed and the plaintiff ordered to furnish particulars of

where the contract was entered into, whether the application referred to in the particulars already furnished was accepted by the defendants, whether it was in pursuance of such application and its acceptance that the plaintiff entered the defendant's service, also the pages of the book referred to in the particulars already furnished, which contain the particulars relied on.

"The object of particulars is to enable the party asking for them to know what case he has to meet at the trial, and so to save unnecessary expense and avoid allowing parties to be taken by surprise." Odgers on Pleading and Practice, 8th ed., page 184.

The Court will order particulars where necessary. Rule 148.

In *Rat Portage Lumber Co.* v. *Equity Fire Ins. Co.* (1907), 17 Man. L.R. 33, Mathers, J., at page 34, said:—

The practice is well settled that, to justify an order for particulars after the close of the pleadings, it must be shewn by affidavit, or otherwise, that they are necessary for the purpose of saving expense or preventing surprise at the trial. Such an order should not be made as of course.

Here the defendants filed their defence before applying for particulars. We have therefore to consider whether the particulars demanded are necessary for the purpose of saving expense or preventing surprise at the trial. It was not contended that they would effect any saving of expense, but it was strenuously argued that, unless the order appealed from stood, the defendants might be taken by surprise at the trial by the plaintiff setting

up some contract of employment other than the one indicated in the particulars given, and this would appear to be the view taken by the learned Judge in Chambers.

With deference I am of opinion that the contention cannot be maintained. In answer to the defendants' demand for particulars as to the contract of employment relied on, the plaintiff says that in October, 1911, he made application to the defendants in its engine service upon the usual form of application supplied by the defendants, and entered the services immediately thereafter. Taking the demand and the answer of the plaintiff, that answer to my mind can have one meaning only, and that is, that the contract of employment relied upon was that created by the plaintiff's application and the immediate entry into the defendants' service, which implies that the entry was made as the result of the application and its acceptance. In the face of his answer the plaintiff would not at the trial be allowed to rely upon any other contract of employment. That application was made to the defendants on their usual form. The defendants do not say that it is not now in their possession. It was in their possession originally, and they do not claim that it has been lost or destroyed.

The particulars delivered in my opinion cover all that was directed in the order appealed from, except the place where the contract was made and the pages of the book of rules setting out the rates of pay, hours of duty, etc., for engineers and firemen; as to this last, the furnishing of the book containing the company's own rates and rules of pay was, in my opinion, sufficient. This leaves only the place where the application was signed.

A perusal of rule 148, and the authorities, shews that the particulars contemplated are particulars of something material to the case of the party of whose pleadings particulars are demanded and on which such party relies. Particulars will not be ordered of matters immaterial to the action, although pleaded.

In *Gibbons* v. *Norman* (1886), 2 T.L.R. 676, an action was brought against the Governor of Jamaica for wrongful dismissal from office of a District Judge. The defendant pleaded that the plaintiff was liable to be suspended by him in his "abso-

SASK.
C. A.

lute discretion upon sufficient cause to him appearing." The plaintiff demanded particulars of the sufficient cause. The Court held he was not entitled to them. The Chief Justice pointed out that it was sufficient for the defendant's case that the act was done in the exercise of his absolute discretion, and that the words "upon sufficient cause to him appearing" might have been omitted from the pleading. They were subsequently struck out.

In the present case, the place where the contract of employment was entered into is, in my opinion, immaterial to the plaintiff's case. All he relies upon is the fact that he was at the time of the accident in the employment of the defendants. How, in a case of this kind, the defendants could be taken by surprise at the trial by not knowing the place where the application was signed, I cannot conceive. If that application restricts or limits any rights which the plaintiff would otherwise have, it is a matter of defence.

The appeal should therefore be allowed, the order made by the Chamber Judge set aside, and the order of the Master restored. The plaintiff is entitled to his costs, both before us and in Chambers.

Appeal allowed.

GUY v. REGAN.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. May 3, 1920.

SET-OFF AND COUNTERCLAIM (§ I C—15)—*Action for damages for illegal seizure of crop—Counterclaim for specific performance of an agreement or cancellation—Application under rule 185 to exclude counterclaim—King's Bench Act (Sask.)*]—Appeal by plaintiff from the order of a Judge in Chambers reversing the Master's order excluding a counterclaim. Reversed and order of Master restored.

A. Allan Fisher, for appellant; *J. W. Hill*, for respondent.

The judgment of the Court was delivered by

LAMONT, J.A.:—The plaintiff brought an action against the defendant for damages for illegal seizure of his crop.

The defendant in his statement of defence set up that the seizure was justifiable under the terms of an agreement of sale of

SASK.

C. A.

the land on which the crop was grown, and he counterclaimed against the plaintiff and one J. D. Abbott, who, he says he is informed, claims an interest in the land as purchaser from Guy, for specific performance of the agreement, and, in the alternative, for the cancellation thereof and immediate possession of the land mentioned therein. The plaintiff applied to the Master in Chambers, under rule 185, for an order excluding the counterclaim, on the ground that the relief claimed therein was not a proper subject of counterclaim in an action of this kind. The defendant appealed to a Judge in Chambers, with the result that the Master's order was reversed. The plaintiff now appeals to this Court.

The counterclaim is based on sec. 24 (3) of the King's Bench Act, which provides that the Court and every Judge thereof shall have power to grant to any defendant in respect of any matter of equity, and also in respect of any legal right claimed by him, all such relief against any plaintiff as such defendant shall have properly claimed by his pleading, and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any Rule of Court or any order of the Court as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the said defendant for the like purpose.

This section is taken from the English Judicature Act, 36-37 Vict. 1873, ch. 66. In the Annual Practice, 1920, under O. 21, rule 11, page 370 (note), I find the following:—

> The defendant may set up a counterclaim against a third person along with the plaintiff, provided the relief thus sought relates to, or is connected with, the subject-matter of the plaintiff's claim. See *Barber* v. *Blaiberg* (1882), 19 Ch. D. 473; *Edge* v. *Weigel* (1907), 97 L.T. 447; *Macdonald* v. *Logan* (1905), 7 Terr. L.R. 423.

In this case, the original subject of the cause is damages for illegal seizure of the plaintiff's crop. The relief claimed in the counterclaim against the plaintiff and Abbott is specific performance of an agreement of sale of land, and, in the alternative, for cancellation of the agreement and immediate possession of the property. It will be observed that under the section it is the

SASK.

C. A.

relief that must be related to or connected with the original subject of the cause or matter.

In *Edge* v. *Weigel*, 97 L.T. 447, Kennedy, L.J., at page 450, said:—

> What the defendant must do to bring himself within the sub-section is to shew that he is entitled to "relief relating to or connected with the original subject of the cause or matter." It is not because he wants relief—which relates to the same kind of question—but it must be relief which relates to, or is connected with, the original subject of the cause.

In what way can it be said that the relief sought by way of specific performance or cancellation of the agreement is related to or connected with the claim for damages for the illegal seizure? The only connection which, on the argument before us, counsel for the defendant could suggest was that the agreement of sale had been referred to in the statement of claim. It was there referred to, it is true, but it was totally unnecessary for the plaintiff to make any reference to it; the only allegations upon which his cause of action depended were, that the defendant illegally seized his crop and that he had been injured thereby.

In my opinion it cannot be said that the relief asked for in the counterclaim is related to or connected with the original subject of the plaintiff's cause of action.

It will also be observed that there is no allegation in the counterclaim which if substantiated would establish a relationship between the plaintiff and Abbott, it is merely suggested that he is a purchaser from the plaintiff. The allegation is that the defendant "is informed" that such is the case. For the defendant to say that he "is informed" as to a certain fact, is to refer to evidence of the fact which he may adduce, not to allege the matter as a fact. *Schweiger* v. *Vineberg* (1905), 15 Man. L.R. 536.

In *Treleaven* v. *Bray*, 45 L.J. (Ch.) 113, 1 Ch. D. 176, Blackburn, J., said, at page 115: "There cannot be a counterclaim against a third party between whom and the plaintiff no relation exists." And in *Hopkins* v. *Brown* (1914), 17 D.L.R. 38, 6 Alta. L.R. 262, Stuart, J., in giving the judgment of the Appellate Division of the Alberta Court, said, at page 41:—

> Now, I think anything in the counterclaim which does not necessarily involve any relationship or connection between the added defendants and Hopkins (the plaintiff) should not be allowed. . . .

SASK.

C. A.

And at page 42:—

It is for the defendant to make his allegations, and it is only from these as they are made and stand before us, that we can decide whether the Court should exercise the power given to it by the statute.

On both these grounds, therefore, the order appealed from should, in my opinion, be set aside, and the order of the Master restored. The plaintiff should have his costs both here and in Chambers. *Judgment accordingly.*

WALLACE v. VIERGUTZ.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, J.A., and Brown, C.J.K.B. May 3, 1920.

AUTOMOBILES (§ III B—221)—*Collision between two cars—Evidence—Negligence—Liability.*]—Appeal by plaintiff from the trial judgment in an action for damages resulting from a collision between two automobiles. Affirmed.

Avery Casey, K.C., for appellants; *E. W. Garner*, for respondent.

The judgment of the Court was delivered by

LAMONT, J.A.:—This is an action for damages resulting from a collision of two automobiles, one driven by the plaintiff Alexander Wallace, and the other by the defendant. The said plaintiff was driving east on 4th St. in the town of Estevan, and the defendant was driving south on 11th Avenue. They came together a few feet south-west of the man-hole in the centre of the intersection. The trial Judge accepted the evidence of one David Reider as to the position of the two cars just prior to the accident. Reider testified that when the defendant's car was at the crossing, the plaintiff's car was about opposite Leader's store, which, according to the plan filed, is some 250 or 260 feet west of the man-hole. The distance from the crossing on 11th Avenue to the man-hole is 45½ feet, so that, while the defendant drove his car about 50 feet, the plaintiff covered 250 feet. There was also evidence that the defendant was going not over 6 miles an hour, while the plaintiff was driving very fast.

The defendant testified that when he got within one and a half or two rods of the crossing he looked west up 4th St., that he saw up the street to Milnes' store, which is situated fully 100 feet

SASK.
C. A.

further west than Leader's store, and that there was no car on the street within that distance. The defendant then drove on south, without again looking up 4th Street.

The trial Judge held that the accident was the result of the plaintiff's own negligence in driving his car at an excessive rate of speed, without keeping a watch for other cars at the crossing. He also held that, after the collision became imminent, the defendant could not have done anything to avoid it. He, therefore, gave judgment dismissing the action. From that judgment, the plaintiff appeals.

In my opinion, the evidence given at the trial amply supports the findings of the trial Judge. It was, however, strongly urged upon us that, even if the plaintiff was driving at an excessive rate of speed, he was still entitled to recover because he had the right of way.

Sec. 38, sub-sec. (2) of the Vehicles' Act, 8 Geo. V. 1917 (Sask. 2nd sess.), ch. 42, is as follows:—

(2) Where a person operating a motor or other vehicle meets another vehicle at an intersection of highways, the vehicle to the right hand shall have the right of way.

Under this subsection, when two vehicles approach one another at an intersection, a duty is cast upon the driver of the vehicle on the left to permit the other vehicle to pass over the intersection first. The object of this provision is to lessen the chances of a collision. If a person is injured by reason of the failure of the driver on the left to observe the provision, such failure is evidence of negligence on the part of such driver, and the burden is on him to shew that he was not negligent under the circumstances. Counsel for the defendant, admitting that this burden rested on the defendant, contended however that it has been discharged. He argued that it had been discharged by shewing that the defendant's automobile was travelling at only six miles an hour; that the defendant as he approached the crossing, and within one and a half and two rods therefrom, did look to the right up 4th Street, to see if any vehicle was approaching from that street from which danger of a collision might be apprehended; that, at that point, he had a view of 4th Street for some 350 feet, and that in that distance there was no vehicle on the streets; that, under these circumstances, it was not negligence on the part

SASK.

C. A.

of the defendant to proceed to cross the intersection without again looking up 4th Street, because he knew that no vehicle driven at a reasonable rate of speed could reach the intersection before he could cross it.

In my opinion, this contention is well founded. When the defendant looked up 4th Street he was within 70 feet of the centre of the intersection. He was travelling at the rate of six miles an hour. There was at that time no automobile approaching on 4th Street within a distance of about 350 feet. A car covering that distance so as to make a collision possible must necessarily travel at a rate of from 25 to 30 miles per hour. The municipal by-law provided that no motor vehicle should be driven within the town at more than 15 miles per hour. The defendant had a right to assume that the plaintiff would observe the provisions of the by-law and not exceed 15 miles an hour.

In *Ramsay* v. *Toronto R. Co.* (1913), 17 D.L.R. 220 at 232, 30 O.L.R. 127 at 139, Mulock, C.J., in giving the judgment of the Appellate Division, said:—

> Persons crossing street railway tracks are entitled to assume that cars using those streets will be driven moderately and prudently. If a person crosses in front of an approaching car, which is so far off that, if driven moderately, it cannot overtake such person, even though he do not look again and is injured, he is not guilty of contributory negligence: *Toronto R.W. Co.* v. *Gosnell* (1895), 24 Can. S.C.R. 582.

See also *Toronto R. Co.* v. *King*, [1908] A.C. 260 at 269; *Doyle* v. *C.N.R. Co.* (1919), 46 D.L.R. 135.

Had the plaintiff observed the requirements of the by-law the accident could not have happened. The defendant having looked to his right, and having found that no danger was to be apprehended from any vehicle approaching at a reasonable rate of speed, was justified in going ahead without again looking.

I agree with the trial Judge that the collision was due solely to the plaintiff's reckless rate of speed and his failure to exercise due care. The appeal should be dismissed with costs.

Appeal dismissed.

SASK.

C. A.

LOCKERIDGE v. REEDER.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. May 3, 1920.

PLEADING (§ I N—111)—*Action for goods sold and delivered—Evidence not supporting sale—Amendment to cover conversion—Appeal—Return of goods.*]—Appeal by defendant against an amendment to cover conversion in an action for goods sold and delivered. Affirmed.

A. G. MacKinnon, for appellant.

W. A. Goetz, for respondent.

The judgment of the Court was delivered by

NEWLANDS, J.A.:—This is an action for goods sold and delivered. After hearing the evidence, the trial Judge held that the evidence did not support a sale of the goods, but that it did support a conversion of the plaintiff's goods by defendant, and he allowed an amendment accordingly. Against this amendment the defendant appeals.

If the action had originally been for conversion the evidence would have been the same. The general rule is that any amendment will be made that is necessary for the purpose of determining the real question in controversy between the parties. I think the amendment was properly made.

The defendant also appeals because the Judge ordered a return of the goods or their value. This is the proper form of judgment in an action for conversion.

The defendant further appeals because he says the learned Judge erred in allowing the plaintiff the costs of action, or that he should have ordered that plaintiff be allowed costs on the small scale, with a set off.

The value of the goods was fixed at $98.50. As plaintiff sued for over $100, he would only have been allowed costs on the small scale with a set off. In an action for conversion the costs would have been on the higher scale, no matter what amount plaintiff recovered.

The Judge ordered that plaintiff have the costs of action and the defendant all costs of and occasioned by the plaintiff's amendment. I think this order means what defendant contends for: that plaintiff be given the costs of the action as originally constituted, which would be costs on the small scale as he only

SASK.

C. A.

recovered $98.50, and, as the action was raised to the higher scale by the amendment, that the defendant have his costs on that scale with a set off.

That being the case, the defendant has already got what he contends for and the appeal should be dismissed with costs.

Appeal dismissed.

DALRYMPLE v. CANADIAN PACIFIC R. Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. May 3, 1920.

JURY (§ I A—7)—*Right to—Rule 239—Notice required—King's Bench Act, sec. 51.*]—Appeal from a Judge in Chambers reversing a Local Master granting leave to file a reply after the time had expired, for the purpose of giving a notice demanding a jury. Reversed.

W. F. A. Turgeon, K.C., for appellant.

P. H. Gordon, for respondent.

The judgment of the Court was delivered by

NEWLANDS, J.A.:—The Local Master made the order asked for, but on appeal to a Judge in Chambers he was reversed. Since the rule 239 requiring the demand for a jury to be served by defendant with his defence and by plaintiff with his reply, the King's Bench Act, 6 Geo. V. 1915, ch. 10, has been passed. This Act re-enacts sec. 50 of the Judicature Act, R.S.S. 1909, ch. 52, and therefore repeals the provisions of rule 239 which modified that section, in so far as they are inconsistent with sec. 46 of the King's Bench Act. By that section a party is entitled to a jury who gives notice to that effect to the other party fifteen days before the day fixed for the trial.

Plaintiff, therefore, did not need to get leave to file a reply in order to give jury notice. He could do so any time within fifteen days of the time fixed for the trial without any leave.

Sec. 51 of the King's Bench Act, which declares valid and effectual all rules of Court, especially excepts all those inconsistent with that Act, and as rule 239 is inconsistent with sec. 46 of that Act it is not saved by sec. 51.

As the order of Bigelow, J., struck out the jury notice, this appeal must be allowed with costs.

Appeal allowed.

SASK.

C. A.

NATYSZAK v. PANCHYSHYN.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. May 3, 1920.

SPECIFIC PERFORMANCE (§ I E—30)—*Action for possession of land—Promise to convey to son—Contemplation of marriage—Death of son—Statute of Frauds.*]—Appeal by defendant from the trial judgment granting possession of certain lands, agreed to be conveyed in contemplation of the marriage of the promissor's son. Affirmed.

A. E. Bence, for appellant; *D. A. Finn*, for respondent.

The judgment of the Court was delivered by

NEWLANDS, J.A.:—This is an action by the plaintiff as administrator of Nick Panchyshyn, deceased, for the possession of the north ½-11-46-17-w 2nd meridian.

The defendant denies the plaintiff's right to this land, and in his reply the plaintiff sets up the circumstances under which the deceased acquired the land.

Upon these pleadings the trial Judge found:—

I am satisfied on the evidence that at the time of the arrangement of the marriage between Nick Panchyshyn and Lena Natyszak, as she then was, there was a promise by the defendant to buy a farm for Nick. The witnesses so testify, and it is further in evidence that the defendant was anxious that his son should get married so that he should stay at home. The promise to buy a farm would of itself be too uncertain to admit of specific performance, but what was then uncertain has been rendered certain by the subsequent actions of the defendant. That is to say, he purchased the halfsection of land, and had the document prepared and executed by himself assigning the said land to the deceased. So that while the oral promise to buy a farm for Nick was an indefinite promise, it has been rendered sufficiently definite to admit of specific performance by the action of the defendant by ear-marking the halfsection in question as the land intended for Nick Panchyshyn. It is true that this document was not according to the evidence delivered, but in my opinion that is not material, because as I have said before the real contract to buy this land for Nick Panchyshyn in consideration of the contemplated marriage which was before uncertain has been rendered certain by the purchase of the farm and the execution of the document and the Statute of Frauds is not pleaded.

I do not think it would have made any difference if the Statute of Frauds had been pleaded, the assignment of this land to the deceased having been put in writing.

In 25 Hals., page 535, par. 967, it is stated:—"An offer to make a settlement in the event of a marriage taking place may, by a

marriage following such offer, become a contract binding on all parties concerned."

He further states that no formal document is necessary, but, to enable such a contract to be enforced, it must:—1, comply with the Statute of Frauds; 2, be a definite offer which is turned into a contract by the celebration of the marriage; 3, be reasonably certain as to the amount and nature of the property to which the contract applies—parol evidence being admissible to explain ambiguities, and 4, be proved that the marriage took place on the faith of the offer.

The finding of the trial Judge is to the effect that these conditions have been complied with and that anything that was uncertain in the original contract was made certain by the execution by defendant of the assignment of the above described land to his son.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed.

ROWLEY v. COOK.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. May 3, 1920.

CONTRACTS (§III B—209)—*Unlicensed architect—Agreement with, for plans for a building—Notice of cancellation to assistant—Communication to architect before reinstatement—Right to recover for services rendered.*]—Appeal from the trial judgment in an action by an architect to recover the amount of fees due for preparing a sketch of a building to be erected. Reversed.

L. L. Dawson, for appellant.

G. A. Ferguson, for respondent.

The judgment of the Court was delivered by

LAMONT, J.A.:—The plaintiff claims the sum of $210 for preparing sketch plans for a building to be erected by the defendant. The estimated cost of the building was $21,000, and the fee charged one per cent. The District Court Judge found that the defendant in January, 1919, employed the plaintiff to prepare plans. The plaintiff at the time was not a registered architect, and did not become one until February 17 of that year, he having been struck off the roll for non-payment of fees. The Judge also found

SASK.
C. A.

that the plans were prepared by the middle of February, and that after they were completed, but before the plaintiff became duly registered, the defendant saw one Flack, the plaintiff's assistant, on the street, and told him to stop work on the plans as he had something else in view. These findings, with which I agree, are supported by the evidence.

The Judge expressed the opinion that if what took place between the defendant and Flack amounted to a cancellation of the defendant's instructions the plaintiff could not collect, because he was not in good standing as an architect prior to such cancellation; but he held that the conversation with Flack, being a casual conversation in the street, was not sufficient to bind the plaintiff as a cancellation of the instructions to prepare plans, and that as the plaintiff subsequently delivered the plans when he was in good standing, he was entitled to recover. From this decision, the defendant appeals.

With deference, I think the Judge erred in holding that the conversation with Flack, in view of what subsequently took place, did not amount to a cancellation of the plaintiff's employment. I quite agree that a casual conversation between the defendant and the plaintiff's assistant in the street might not, under certain circumstances, bind the plaintiff, but in this case Flack not only reported the conversation to the plaintiff the morning after it took place, but made an entry in the plaintiff's book that the plans "were finished when Cook said stop, he had something else in view." From this entry I think it is clear that the plaintiff considered the defendant's statement to Flack as a cancellation of any instructions he had given; further, that he wished the record to shew that the plans had been finished at that date.

We have, therefore, the plaintiff employed in the capacity of an architect to prepare sketch plans; the plans in question prepared and the plaintiff's employment discontinued before he became registered as an architect. We have also the fact that the plans prepared were not accepted by the defendant. Under these circumstances, can the plaintiff recover for the work he did? In my opinion he cannot.

Sec. 29, sub-sec. (3) of the Saskatchewan Architects' Act, 1 Geo. V. 1910-11, ch. 30, as amended by 6 Geo. V. 1915, ch. 43, sec. 29, reads as follows:—

SASK.

C. A.

(3) Any person who, not being an architect and registered under this Act, supplies, for hire, gain, or hope of reward, plans, blueprints or specifications for use in the erection, enlargement or alteration of any building not being built for himself or by himself as contractor for another person, shall be liable on summary conviction to a fine not exceeding $25 for a first offence and not exceeding $100 for every subsequent offence, and he shall be incapable of recovering any fees, reward or disbursements on account thereof.

Had the defendant gone to the plaintiff on the day he cancelled his instructions to prepare plans, and asked for and received the plans in question, assuming them to have been completed, The plaintiff would not have been entitled to recover, because he was not then an "architect registered under the Act." If he were incapable of recovering his fees when his employment was terminated, and that was his position under the statute, I do not see how he could better his position by subsequent registration. It is, in my opinion, idle to contend that he supplied the plans after he became registered, for the reason that he was not then in the defendant's employment as an architect.

In my opinion, the appeal should be allowed with costs, the judgment below set aside, and judgment entered for the defendant with costs. *Appeal allowed.*

LILLDAL v. RUR. MUN. OF MEOTA.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. May 3, 1920.

SALE (§ II C—36)—*Seed oats—Municipality authorized to sell to resident farmers—Sale to non-resident—Expression of opinion as to quality—Warranty—Consideration.*]—Appeal by defendant from the trial judgment in an action for damages for breach of warranty. Reversed.

P. H. Gordon, for appellant.

T. D. Brown, K.C., for respondent.

The judgment of the Court was delivered by

NEWLANDS, J.A.:—The above named municipality passed a by-law under the authority of the Municipalities Seed Grain Act, 1917, 8 Geo. V. (Sask., 2nd Sess.), ch. 47, authorising the municipality to advance seed grain on credit to resident farmers within the municipality who, owing to bad crops or other adverse

SASK.

C. A.

conditions, were unable to procure the same, to borrow money for such purpose and to secure the price of all seed grain sold by promissory notes and registered seed grain liens. The plaintiff, who was not a resident of the municipality, saw the secretary-treasurer, Mr. Thompson, and told him he wanted to buy seed oats, and he says he purchased seed oats from the defendant in February, 1919. He got the oats and paid for them on March 24. At the time he bought the oats, he says Thompson told him they were good oats, but as the municipality had not yet received the oats this could not have been any more than an expression of opinion. At the time he received the oats, he says Thompson told him the oats germinated 97 per cent. This being after the time he says he bought these oats, it could not be a warranty, as there was no new consideration for it.

Plaintiff sowed these oats and found they were not good seed oats, the greater part of them not germinating. He brought this action for damages.

The trial Judge found that the contract to sell the oats to plaintiff was *ultra vires* of the municipality and he could not, therefore, recover damages, but he held he was entitled to get his money back. He apparently bases this judgment on the following finding:—

> I find the secretary-treasurer of the defendant municipality represented that the oats sold to the plaintiff had a germinating capacity of 97% and was aware of the purpose for which the plaintiff intended to use them, namely, to seed his land.
>
> The oats had a very low germination and were totally unfit and useless for seed purposes.
>
> The plaintiff paid the defendant $100 for these oats.
>
> Under these circumstances I am of the opinion that the plaintiff is entitled to recover back the money so paid to the defendant and I so hold.

It is difficult to say from this finding whether the Judge held that defendants had actually warranted the oats to be good seed oats that would germinate 97%, or that there was an implied warranty of fitness because the defendants were aware of the purpose for which plaintiff intended to use them.

The plaintiff, in my opinion, can recover on neither ground. As to the statement of Thompson being a warranty, I have already said that plaintiff swore he bought the oats in February and it was in March Thompson told him the oats would germinate 97%, and as to the implied warranty, the defendant was not

a dealer in oats, but was only authorized to supply oats to residents of their own municipality, and therefore sub-sec. 1 of sec. 16 of the Sale of Goods Act, R.S.S. 1909, ch. 147, would not apply.

I am of the opinion that there was never any warranty in this case. "It depends upon the construction of the contract whether any statement made with reference to the goods is a stipulation in the contract, being a condition, or a warranty only, or whether it is an expression of opinion, or other mere representation not forming part of the contract." 25 Hals. page 149, para. 276.

The defendants were not selling oats to parties outside their municipality. Plaintiff went to them to buy, and anything said by Thompson at that time could only be an expression of opinion, as he certainly was not authorised to warrant the oats to a non-resident of the municipality. It was simply a sale of oats without a warranty, and, as plaintiff got the oats and paid for them, he cannot recover from defendant either damages or the price paid, because the oats were not of the quality he expected.

It is unnecessary to consider the question of *ultra vires* which was argued by Mr. Brown, because, even if the transaction was within their powers, they would not be liable under the facts in this case.

I would allow the appeal with costs.

Appeal allowed.

INDEX.

CARRIERS—

CASES—